Getting In, Getting Heard, Getting Practical: Intervening in Appellate Courts Across Canada

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I. Importance of Interventions

Courts are called upon to resolve disputes between particular parties. A court's decision, however, may have a broader impact beyond the interests of the parties before it. To ensure these effects do not go overlooked, courts may permit a third party to intervene in a proceeding to share its expertise and experience.

Interventions have become an integral part of the judicial review and appellate litigation process.[2] At the Supreme Court of Canada, there has been a significant increase in the number of interveners.[3] Scholars have exhaustively reviewed the purpose and function of interventions and their impact on the decision-making process.[4] Some provide an empirical analysis of the effects of interveners, while others offer a more targeted case study.[5]

In recent years, there have been a number of high-profile cases which have attracted interventions at both the Supreme Court of Canada and lower appellate or reviewing courts.[6] There is much that lawyers need to know when advising clients about intervening.

Proposed interveners can face a difficult task. We review below where courts have their own rules for determining if it will grant a party intervener status. While the test for intervener status varies by jurisdiction, common factors can be distilled.

The aim of this article is to review the most common iterations of the various tests and present a comprehensive list of the most important factors lawyers ought to address regardless of the appellate court in question. By clarifying what courts expect and examining why one lawyer is successful over another, a lawyer applying to intervene can reduce uncertainty in the process.

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[2] By way of four recent examples, our firm was involved in the following cases in which interveners played a significant role:

- 17 interveners – *Ktunaxa Nation et al. v. British Columbia*, SCC File No. 36664, appeal heard Dec. 1, 2016;
- 7 interveners – *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471;
- 11 interveners – *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12;
- 14 interveners – *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

[3] For consistency, we adopt the Supreme Court of Canada's spelling of "intervener", although some jurisdictions use "intervenor".

[4] Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010), 50 S.C.L.R. (2d) 1-40; Nathalie Des Rosiers & Christian Pearce, "Interventions" (March 14, 2009) (unpublished); Carissima Mathen, "The Expanding Role of Interveners: Giving Voice to Non-Parties" in The 2000 Isaac Pitblado Lectures: "Competence & Capacity: New Directions" (Manitoba: Law Society of Manitoba, 2000) 85; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U.T. Fac. L. Rev. 151.

[5] For a Canadian empirical study on interventions, see Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall Law Journal 381. For a study of the Women's Legal Education and Action Fund (LEAF) intervention in *R. v. J.A.*, see Richard Jochelson & Kirsten Kramar, "Essentialism Makes for Strange Bedmates: The Supreme Court Case of J.A. and the Intervention Of L.E.A.F." (2012) 30 Windsor Y.B. Access Just. 77.

[6] See for example *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (12 interveners); *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 (9 interveners); *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (21 interveners).

After exploring recent case law and what it takes for a proposed intervener to be successful, this article also examines special considerations operating in the context of criminal law matters. At the end of the article, we provide practical tips for applying to intervene and how lawyers can make the most of their intervention.

II. Getting Leave to Intervene

Culture Shift: Judicial Efficiency, Tailoring Interventions

The Supreme Court of Canada in *Hryniak v. Mauldin* recognizes a culture shift is required to promote timely and affordable access to the civil justice system.[7] One may expect that this shift would be adverse to interveners since interventions necessarily add to the number of parties involved in a proceeding and prolong submissions, but this has not been the case.[8]

Courts have responded to the need to carefully manage judicial resources by tailoring the scope of an intervener's participation in the appellate process. This played out in the Alberta Court of Appeal case of *R. v. Barton*,[9] where, in the context of a criminal appeal, an intervener was invited to participate subject to specific conditions.[10] The proposed interveners requested the right to file one joint factum of 20 pages or less and to make oral submissions not exceeding 20 minutes. Ultimately, leave to intervene was granted, but the interveners were confined to the proposed joint factum with no right to make oral submissions.[11]

Courts also frequently refuse to grant intervener status to select applicants where there is a large number of proposed interveners and there is overlap in the interests they represent. Justice Nordheimer addressed the issue of the commonality of the perspectives of the proposed interveners in *Trinity Western University v. Law Society of Upper Canada*.[12] On the basis that an intervener ought to have a perspective distinct not only from the main parties but also other proposed interveners, he granted intervener status to three religious organizations and denied status to four.[13]

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[7] *Hryniak v. Mauldin*, 2014 SCC 7 at para. 2.

[8] In July 2017, Chief Justice McLachlin took the unusual step of varying an order of Justice Wagner made days earlier with respect to motions to intervene in two matters involving Trinity Western University and the law societies of B.C. and Ontario. Justice Wagner had initially allowed the motions to intervene of nine of the 26 applicants for what was scheduled as a one-day hearing. The 17 applicants that were not granted the right to intervene included mostly religious-affiliated groups, but also a number of LBGTQ groups, Egale Canada Human Rights Trust, and West Coast Women's Legal Education and Action Fund.
In an interview with *The Globe and Mail*, Justice Wagner indicated that after being made aware of concerns on social media, he sought out the Chief Justice to see what could be done. The concerns related primarily to the fact that four LGBTQ groups had not been granted intervener status. After speaking with the Chief Justice, Justice Wagner said they "decided that it would be best to add another day, and have all the applications granted".

[9] *R. v. Barton*, 2016 ABCA 68.

[10] *R. v. Barton*, 2016 ABCA 68 at para. 13.

[11] *R. v. Barton*, 2016 ABCA 68 at para. 13.

[12] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, affd. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 6220 at paras. 41-47.

[13] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 at paras. 41-47.

Courts are generally open to new perspectives from interested individuals, associations and organizations. The benefits in considering the larger effect of a change in the law include having a more comprehensive decision and reducing litigation in the long run.

Accordingly, proposed interveners must think strategically about the precise scope of their intervention and be mindful of the principle of proportionality.[14] This approach, coupled with an application to intervene that is responsive to the factors explored below, will greatly increase the chances of obtaining intervener status and the opportunity to make a meaningful contribution to the court.

Guidance from the Supreme Court of Canada

In *Reference re Workers' Compensation Act*,[15] Sopinka J. set out the rules applicable to motions for leave to intervene at the Supreme Court of Canada. This case represented "one of the few reported cases on a motion for intervention"[16] and continues to guide the practice on interventions. Sopinka J. stated that the Court has "a wide discretion in deciding whether or not to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention".[17] He stated that a proposed intervener must establish the following criteria: (1) an interest; (2) submissions which will be useful and different from those of the other parties.[18] Sopinka J. held that being involved in a similar case could satisfy the interest criteria. Having a history of involvement in the issues giving the applicant an expertise which can shed fresh light or provide new information on the matter could satisfy the useful and different submissions criteria.[19]

Sopinka J. addressed interventions again in *R. v. Morgentaler*.[20] He granted an order prohibiting the intervener Canadian Abortion Rights Action League from presenting argument on the federal peace, order and good government power. After citing *Reference Re Workers' Compensation*

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[14] *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21 at para. 78 citing *Hryniak*, at paras. 32 and 5.

[15] *Reference re Workers' Compensation Act, 1983* (Nfld.) (Application to intervene), [1989] 2 SCR 335.

[16] *R. v. Finta*, [1993] 1 SCR 1138 at p. 1142 (McLachlin J.).

[17] *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 SCR 335 at p. 339. See also *Norcan Limited v. Lebrock*, [1969] SCR 665 in which Pigeon J. stated that the rule for interventions should "not be narrowly construed. It seems clear that any interest is sufficient to support an application under that rule subject always to the exercise of discretion."

[18] *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 SCR 335 at p. 339.

[19] In Supreme Court of Canada practice, these requirements are formalized at Rule 57 of the *Rules of the Supreme Court of Canada*, SOR/2002-156:

> (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.
>
> (2) A motion for intervention shall
>
> (a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
>
> (b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

[20] *R. v. Morgentaler*, [1993] 1 SCR 462.

Act, he stated: "An intervener is not entitled, however, to widen or add to the points in issue."[21] The constitutional issues as framed were restricted to the federal criminal law power.

Less than two months later, McLachlin J. (as she then was) further expanded on what an applicant is required to demonstrate in *R. v. Finta*[22]. She excluded the participation of one proposed interveners on the basis he was not engaged in any litigation "implicated by the outcome in this case" and did not represent an interest directly affected by the appeal.[23] In so doing, McLachlin J. clarified that an intervener is not someone simply with "a serious preoccupation with the subject matter". Rather, the Supreme Court is looking for potential interveners whose interest in the matter was based on their having a stake in the result.[24]

Courts across Canada often cite the principles from *Reference re Workers' Compensation Act*, *Morgentaler*, and *Finta*.[25] However, since the decision is discretionary, and each court is subject to its own rules of procedure, courts are adopting their own modified approaches. This usually manifests itself in a court developing a list of factors to consider. Examining these factors makes it plain what a given court expects to see from a proposed intervener and fleshes out Sopinka J.'s two criteria. Below we will examine these regional variations with a view to compiling a comprehensive list of factors to address when seeking leave to intervene.

Guidance from Courts of Appeal

Federal

Rouleau J. in *Rothmans Benson and Hedges Inc. v. Canada*[26] set out the relevant factors to consider on a motion for leave to intervene:

> In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:
>
> (1) Is the proposed intervenor directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

It is not necessary that all of the factors be met by a proposed intervener.

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[21] *R. v. Morgentaler*, [1993] 1 SCR 462 at p. 463.
[22] *R. v. Finta*, [1993] 1 SCR 1138, 1993 CanLII 132 (SCC).
[23] *R. v. Finta*, [1993] 1 SCR 1138 at p. 1143.
[24] *R. v. Finta*, [1993] 1 SCR 1138, 1993 CanLII 132 (SCC).
[25] *Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*, [1989] 2 SCR 335.
[26] *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (T.D.) at para. 12, affirmed [1990] 1 F.C. 90 (C.A.).

While the *Federal Courts Rules* have been amended since the *Rothmans* decision to include Rule 109 which is a general provision governing interventions, the above factors continue to apply.[27] Courts though must now have regard to Rule 109(2) which requires a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.[28]

The Federal Court of Appeal has also been clear that where the Federal Court has granted a party intervener status, it would require proof of a fundamental error, material change in the issues on appeal, or important new facts bearing on the intervention to not grant leave.[29]

British Columbia

In *PHS v. Ontario*,[30] Saunders J.A. outlined two routes to obtaining leave:

> An application for leave to intervene in an appeal engages the court's discretion. An applicant is usually required to show some direct interest in the appeal or show the applicant can make a useful contribution to the public law issue different from that of the parties. In the recent case *Faculty Association of the University of British Columbia v. University of British Columbia*, … Mr. Justice Lowry … said:
>
> > [4] An applicant for intervenor status is generally required to show some direct interest in the outcome of the appeal, although the absence of a direct interest may in some cases be overcome if the applicant represents a public interest in a public law issue and can bring a different and useful perspective to the resolution of the issue.
>
> In the second route to intervenor status, a different and useful contribution to make, Madam Justice Newbury said in *R. v. Watson and Spratt* … in a passage approved in *Gehring*:
>
> > From these it is clear that where the applicant does not have a "direct" interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a "public" law issue); whether the case has a dimension that legitimately engages the interests of the would-be intervenor; the representativeness of the applicant of a particular point of view or "perspective" that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, the proposed intervenor is likely to "take the litigation away from those directly affected by it".[31]

These two routes (direct interest vs. no direct interest) were reiterated more recently in *Carter v. Canada (Attorney General)*[32] and *Friedmann v. MacGarvie*.[33] The Court elaborated on the first

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[27] See for example *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd*., 2000 F.C.J. No. 220 at para. 8.
[28] *Ibid*.; *Canadian Pacific Railway Company v. Boutique Jacob Inc*., 2006 FCA 426 at para. 20.
[29] *Globalive Wireless Management Corp. v. Public Mobile Inc*., 2011 FCA 119 at para. 5.
[30] *PHS Community Services Society v. Attorney General of Canada*, 2008 BCCA 441.
[31] *PHS Community Services Society v. Attorney General of Canada*, 2008 BCCA 441 at paras. 13-14 [Citations omitted]. See also *Court of Appeal Rules*, BC Reg 297/2001, Rule 36.
[32] *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at paras. 11-12.
[33] *Friedmann v. MacGarvie*, 2012 BCCA 109, 318 B.C.A.C. 119 (Chambers).

route and stated that an applicant has direct interest in the litigation "where the result of the appeal will directly affect its legal rights or impose on it some additional legal obligation with a direct prejudicial effect." [34] Furthermore, potential adverse impact is not sufficient to constitute a direct interest.[35]

The Court in *Carter* also touched on what may weigh against granting intervener status. These included the possibility that an intervener will:

- expand the scope of the proceeding by raising new or immaterial issues, or
- create an undue burden or injustice for the parties to the appeal by, for example, forcing them to respond to repetitive arguments.

It is worth keeping in mind at both the application stage and in giving submissions that an intervener is not to argue for a particular result or support the position of one party or the other, but instead to make principled submissions on points pertinent to the appeal.[36]

Alberta

In *Suncor Energy Inc v. Unifor Local 707A*,[37] the Alberta Court of Appeal confirmed permission to intervene is based on a consideration of the subject matter of the appeal and determination as to whether the proposed intervener's interest warrants intervener status.[38] Further, a proposed intervener must demonstrate an ability to provide "special expertise or fresh perspective" which brings some benefit to the proceedings. This is especially true where the number of potential interveners is significant.[39]

The Court of Appeal in *Pedersen v. Alberta*[40] refers to *R. v. Morgentaler*[41] and summarizes a list of relevant factors from case authorities on granting intervener status:

1. will the intervener be directly affected by the appeal;
2. is the presence of the intervener necessary for the court to properly decide the matter;
3. might the intervener's interest in the proceedings not be fully protected by the parties;
4. will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. will the intervention unduly delay the proceedings;
6. will there possibly be prejudice to the parties if intervention is granted;

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[34] *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para. 12 [Citations omitted]
[35] *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para. 12.
[36] *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para. 15.
[37] *Suncor Energy Inc v. Unifor Local 707A*, 2016 ABCA 265.
[38] *Suncor Energy Inc v. Unifor Local 707A*, 2016 ABCA 265 at para. 10 citing *Papaschase Indian Band (Descendants of) v. Canada (Attorney General)*, 2005 ABCA 320 at para. 5. For the applicable rules in Alberta see *Alberta Rules of Court*, AR 124/2010, 14.37(2)(e) & 14.58.
[39] *Suncor Energy Inc v. Unifor Local 707A*, 2016 ABCA 265 (CanLII) at para. 11; see also *Pedersen v. Alberta*, 2008 ABCA 192 (CanLII), 432 AR 219, at paras 10-11.
[40] *Pedersen v. Alberta*, 2008 ABCA 192, 432 AR 219.
[41] *R. v. Morgentaler*, 1993 CanLII 158 (SCC), [1993] 1 SCR 462 at para. 1.

7. will intervention widen the *lis* (i.e. *lis pedens*, "suit pending") between the parties; and
8. will the intervention transform the court into a political arena?[42]

Inspired by the approach adopted by the Federal Court of Appeal,[43] the Alberta Court of Appeal in *Suncor* expanded the list of *Pedersen* factors to include consideration as to whether an applicant has been granted intervener status in the court below.[44] It described the addition as follows:

> I would add to the list of factors set out in *Pedersen* the following considerations where the applicants were granted intervenor status below:
>
> (a) the role taken by the intervenors in the court below;
> (b) whether the submissions of the intervenors were necessary or helpful in informing the decision being reviewed;
> (c) whether the issues on appeal are the same as in the court below, or whether the issues as framed on appeal could continue to impact the applicants' interests;
> (d) whether the particular perspective of the applicants can continue to inform the discussion as now framed on appeal.[45]

The Court of Appeal, however, did not go so far as to say an appellate court would be required to grant permission to intervene where status was granted in the court below. The Court of Appeal retains jurisdiction to control its own procedure.[46]

Saskatchewan

Whatcott v. Saskatchewan (Human Rights Tribunal)[47] provides a useful summary of the applicable rules[48] and case law from Saskatchewan. Hunter J.A. restated principles as previously outlined by the Saskatchewan Court of Appeal in *R. v. Latimer*.[49] In considering an application to intervene, the Court will consider the following list of factors:

1. whether the intervention will unduly delay proceedings;
2. whether, if granted, the intervention will possibly prejudice the parties;
3. whether the intervention widens the *lis* (i.e. action, controversy, or dispute) between the parties;
4. the extent to which the intervener position is already represented and protected by one of the parties; and

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[42] *Pedersen v. Alberta*, 2008 ABCA 192, 432 AR 219 at para. 3.
[43] *Canada (Attorney General) v. Canadian Wheat Board*, 2012 FCA 114 (CanLII), 432 NR 383.
[44] *Suncor Energy Inc v. Unifor Local 707A*, 2016 ABCA 265 at paras. 18-20.
[45] *Suncor Energy Inc v. Unifor Local 707A*, 2016 ABCA 265 at para. 20.
[46] *Pedersen v. Alberta*, 2008 ABCA 192 at para. 4. In contrast, see Rule 22(2)(c)(i) of the *Rules of the Supreme Court* in which any intervener who was given full party status in the court below is to be named in the style of cause and is treated as an intervener without having to seek leave to intervene.
[47] *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2008 SKCA 95.
[48] *The Court of Appeal Rules*, Sask Gaz April 18, 1997, s. 17.
[49] *R. v. Latimer*, 1995 CanLII 3921 (SK CA).

5. whether the intervention will transform the court into a political arena.[50]

The Court of Appeal in *Whatcott* was careful to note that, despite this list, since the question of whether or not to grant leave to intervene is ultimately discretionary, courts are *not* bound by these factors. Instead, the task is to balance them against the "convenience, efficiency and social purpose of moving the case forward with only the persons directly involved in the *lis*."[51]

Citing *R. v. Morgentaler*[52] and *Attorney General of Canada v. Saskatchewan Water Corporation*,[53] the Court of Appeal found it was proper for the Canadian Constitution Foundation to intervene, but restricted its submissions to the constitutional issues as framed by the parties.[54]

Manitoba

In *Hutlet v. 4093887 Canada Ltd. et al*.,[55] the Manitoba Court of Appeal stated that, under circumstances where a proposed intervener does not have a direct connection with the litigation, reasoning from the decision in *Sawatzky v. Riverview Health Centre Inc*.[56] applies to guide the Court in making its determination as to whether they should be given status. The *Court of Queen's Bench Rules* respecting intervention[57] should not be interpreted narrowly and the following factors should be considered:

(i) the nature of the case;

(ii) the issues which arise; and

(iii) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.[58]

With respect to the likelihood of an applicant being able to make a useful contribution, the following additional factors are applicable:

(a) does the intervener have a real, substantial and identifiable interest in the subject-matter of the proceedings;

(b) does the intervener have an important perspective distinct from the immediate parties; or

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[50] *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2008 SKCA 95 at para. 3; *R. v. Latimer*, 1995 CanLII 3921 (SK CA) at pp. 196-197.
[51] *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2008 SKCA 95 at para. 3; *R. v. Latimer*, 1995 CanLII 3921 (SK CA) at pp. 196-197.
[52] *R. v. Morgentaler*, [1993] 1 SCR 462.
[53] *Attorney General of Canada v. Saskatchewan Water Corporation*, 1991 CanLII 7955 (SK CA), [1991] 2 W.W.R. 614.
[54] *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2008 SKCA 95 at para. 7.
[55] *Hutlet v. 4093887 Canada Ltd. et al*., 2015 MBCA 25 at para. 8.
[56] *Sawatzky v. Riverview Health Centre Inc.* (1998), 133 Man.R. (2d) 41 (Q.B.)
[57] *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 13.01(1) & 13.01(2).
[58] *Hutlet v. 4093887 Canada Ltd. et al*., 2015 MBCA 25 at para. 8; *Sawatzky v. Riverview Health Centre Inc.*, [1998] M.J. No. 574 at para. 34.

(c) is the intervener a well-recognized group with a special expertise and with a broad and identifiable membership base?[59]

Ontario

The test for intervention under Ontario law is well established from *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd*.:[60]

> in determining whether an application for intervention should be granted…the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.[61]

In *P.S. v. Ontario*,[62] Laskin J.A. noted the following specific considerations for *Charter* cases:

> In a *Charter* case, the proposed intervener usually has to establish at least one of three criteria: it has a real, substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with a special expertise and a broadly identifiable membership base: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792, at para. 2.[63]

Applying these principles to the recent case of *Trinity Western University v. Law Society of Upper Canada*,[64] Nordheimer J. stated the *Bedford* criteria should not be understood as overriding the fundamental requirements set out in *Peel* – satisfying one of the *Bedford* criteria is not enough to warrant intervention.

In *Trinity Western University*, Nordheimer J. set out three guiding principles governing the granting of intervener status:[65]

1. the threshold for granting intervener status in a public interest or public policy case, is *lower* than it is for a private interest case;[66]
2. in *Charter* cases it is *important* for the court "to receive a diversity of representations reflecting the wide-ranging impact of its decision";[67]
3. the fact that the proposed intervener is not indifferent to the outcome of the appeal is not a reason to deny it the right to intervene.[68]

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[59] *Hutlet v. 4093887 Canada Ltd. et al*., 2015 MBCA 25 at para. 8 citing *Sawatzky v. Riverview Health Centre Inc.*, [1998] M.J. No. 574 at para. 35. See also *R. v. Mabior (C.L.)*, 2009 MBCA 93.
[60] *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd*. (1990), 74 O.R. (2d) 164, at p. 167. See also *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 13.01-13.03.
[61] Quoted in *P.S. v. Ontario*, 2014 ONCA 160 at para. 5
[62] *P.S. v. Ontario*, 2014 ONCA 160.
[63] *P.S. v. Ontario*, 2014 ONCA 160 at para. 6 [Emphasis added].
[64] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 para. 6.
[65] *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 paras. 8-9.
[66] *Jones v. Tsige* (2011), 2011 CanLII 99894 (ON CA), 106 O.R. (3d) 721 (C.A.) paras. 20-31.
[67] See also *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Gen. Div.).
[68] See also *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (C.A.) at para. 9.

Nordheimer J. added the following observation regarding the application of these principles:

- when there are multiple applicants for leave to intervene, and
- some favour the position of the applicant/appellant while others favour the position of the respondent,
- the court should seek a balance between the positions to be advocated when granting intervener status.

The Court acknowledged this final observation was not one of the *Peel* factors. Nonetheless, Nordheimer J. described it as a factor that should be considered in the overall mix.

Quebec

The Quebec Court of Appeal in *Munyaneza c. R.*[69] follows *Reference re Worker's Compensation Act*, *Morgentaler*, and *Finta*.[70] The Court explained that in the past it has granted intervener status to parties "not intending to take a position on an appeal but instead offering assistance to the Court, and refused leave to appeal a judgment of a trial court that granted a party intervener status in similar circumstances."[71] It noted that "tardiness in the presentation of a motion to intervene" will usually result in its dismissal, regardless of its merits or the consent of the parties.[72]

In *Munyaneza*, the Court also stated that these principles apply in criminal matters, subject to an important caveat: an accused person must, in principle, face only one prosecutor, who represents the public interest.[73] It added, "The preservation of the fairness of the appellate process is critical to the exercise of the Court's discretion in deciding whether or not to grant intervener status to an applicant."[74]

New Brunswick

In *R. v. Wood*, the New Brunswick Court of Appeal stated that a proposed intervention must:

1. relate to a point of law of general importance (as opposed to a case-specific issue); and
2. seek to bring something additional to the appeal that the parties may not be able to supply.[75]

The New Brunswick *Rules of Court* refer to an intervener having an interest, being adversely affected and having a relevant question of law or fact in common with a party.[76] They also

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[69] *Munyaneza c. R.*, 2012 QCCA 1829.
[70] *Munyaneza c. R.*, 2012 QCCA 1829 at paras. 9-10. See also *Code of Civil Procedure*, CQLR c C-25, art. 211 & 509.
[71] *Munyaneza c. R.*, 2012 QCCA 1829 at para. 7.
[72] *Bouarfa v. Canada (Ministre de la Justice)*, 2012 QCCA 1097.
[73] *Caron v. R.*, 1988 CanLII 941 (QC CA), [1988] R.J.Q. 2333, at p. 2335 (C.A.).
[74] *Munyaneza c. R.*, 2012 QCCA 1829 at para. 8.
[75] *R. v. Wood*, 2006 CanLII 2750 (NB CA) at para. 5.
[76] *Rules of Court*, NB Reg 82-73, Rule 15.02.

separately provide for an intervention as a friend of the court (without becoming a party) solely for the purpose of rendering assistance to the court by way of argument.[77]

In *New Brunswick (Social Development) v. Savoie*,[78] the College of Psychologists of New Brunswick was added as an intervener but authorized to make submissions only with regard to some of the grounds of appeal.[79] *Savoie* provides an example of a scenario in which the proposed intervener had a direct interest in the subject matter of the appeal. In the court below, the trial judge concluded that only psychiatrists were permitted to offer expert opinion in regard to mental health issues and that a psychologist could not offer their opinion on the subject.[80]

Following the decision to add the College of Psychologists, and notwithstanding the limited scope of the intervention, they were able to adduce evidence which "establishes without question that psychologists are competent to provide opinions on the issue of mental health".[81]

Nova Scotia

In *Nova Scotia Barristers' Society v. Trinity Western University*, the Nova Scotia Court of Appeal considered an extension to apply for intervention and leave to intervene by the Canadian Constitution Foundation ("CCF").[82] Scanlan J.A. distilled the main issue on an application to intervene as follows: "…The issue is whether the intervention '…brings something additional to the Appeal that the parties (or other interveners) may not be able to supply'".[83]

The Court of Appeal went on to explain what may influence its exercise of discretion to afford a non-party the "privilege of intervening": "There is nothing automatic about allowing non-parties to have a voice in an appeal. Each intervention is a drain on the resources of the parties and the Court. A party seeking to gain a seat at the table must be able to convince the court that it brings with it a relevant perspective, the existing parties or other interveners will not supply."[84]

Ultimately, CCF was unsuccessful in obtaining leave to intervene. The primary reason was that CCF was late and there were already 10 interveners. The Court found CCF did not act in a timely manner to seek an extension and therefore denied the extension of time. The Court stated that in any event it would have denied the application for intervention.[85] Although the CCF had a history of intervening in constitutional rights cases,[86] in this particular case the CCF would not bring a new perspective to the appeal.

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[77] *Rules of Court*, NB Reg 82-73, Rule 15.03.
[78] *New Brunswick (Social Development) v. Savoie*, 2012 CanLII 80649 (NB CA)
[79] *New Brunswick (Social Development) v. Savoie*, 2012 CanLII 80649 (NB CA) at para. 1.
[80] *Minister of Social Development v. N.S.*, 2013 NBCA 8 at para. 2.
[81] *Minister of Social Development v. N.S.*, 2013 NBCA 8 at para. 9.
[82] *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113 at para. 6. For the applicable rule, see *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov. 19, 2008, Rule 90.19.
[83] *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113 at para. 23; see also *Global Maxfin Investments Inc. v. Crowell*, 2015 NSCA 9 at para. 24.
[84] *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113 at para. 17-18 [Emphasis Added].
[85] *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113 at para. 24.
[86] *Nova Scotia Barristers' Society v. Trinity Western University*, 2015 NSCA 113 at para. 3-5.

P.E.I.

Prince Edward Island follows the general outline of the test as articulated in *Reference re Workers' Compensation Act*. As stated by the Court of Appeal in *Vail & McIver v. WCB(PEI) & AG(PEI)*,[87] jurisprudence in Prince Edward Island requires that a proposed intervener has an interest in the proceeding and that they will make useful or different submissions on the appeal.[88]

In *Vail*, the Court of Appeal advises a "fairly relaxed approach" towards granting intervention.[89] Exercising discretion in deciding whether to grant leave requires consideration of "all the circumstances".[90] The discretion will not ordinarily be exercised in favor of granting leave to an applicant just because the applicant has a similar case.[91]

Interestingly, the Court of Appeal considered the timing of the motion for leave to intervene and the fact the same proposed intervener had previously applied for leave and was denied as relevant considerations.

> This raises the specter of it appearing as a collateral attack on a judgment that was not appealed, and also of it being *res judicata* and subject to issue estoppel. In my opinion, both of those arguments raise pertinent considerations, however neither of those arguments should prevail to disqualify consideration of Mr. Richard's motion on its merits.[92]

In *Vail*, the Court of Appeal also referred to Ontario jurisprudence,[93] including *Peel* for the proposition that a liberal construction of the test is appropriate in constitutional cases because of the greater potential impact on non-immediate parties to the proceeding.[94]

Newfoundland and Labrador

The Court of Appeal in *Warford v. Weir's Construction Limited*[95] referred to the following criteria to be applied in Newfoundland and Labrador:

1. a sufficient interest in the proceedings;
2. that the intervener can make a useful contribution; and
3. that its participation will not unduly lengthen, delay, or impose an unjust excessive burden on the parties.[96]

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[87] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17.
[88] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at paras. 15 and 16. See also *Prince Edward Island Rules of Civil Procedure*, Rules 13, 13.01, 13.03 21, 21.01, 21.01(b), 61.15.
[89] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 14 citing *Simmonds v. Law Society of Prince Edward Island*, 1995 CanLII 3418 (PE SCAD), [1995] 125 Nfld. & P.E.I.R. 220 (PEICA).
[90] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 14.
[91] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 14.
[92] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 19.
[93] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 14; see also *Trempe v. Reybroek*, 2002 CanLII 49410 (ON SC), [2002] 57 O.R. (3d) 786 (Ont.Sup.Ct.); *M. v. H*. 1994 CanLII 7324 (ON SC), [1994] 20 O.R. (3d) 70 (Ont.Ct.Gen.Div.).
[94] *Vail & McIver v. WCB(PEI) & AG(PEI)*, 2011 PECA 17 at para. 14; see *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CanLII 6886 (ON CA), [1990] 74 O.R. (2nd) 164.
[95] *Warford v. Weir's Construction Limited*, 2012 NLCA 37 at para. 9.

This formulation of the test closely follows the detailed *Rules* in that province which provide for specific criteria to be met by an applicant:[97]

> [B]y virtue of rule 7.05(1), a person may be added as a party intervenor if (1) that party has an interest in the subject matter of the proceeding, (2) there is a common question of law or fact, or (3) the person has a right to intervene under a statute or rule. Sub-paragraphs (a), (b) and (c) are disjunctive and the plain reading of the rule makes it clear that the person applying to be added as an intervenor has only to satisfy one of them. The court, in deciding whether or not to grant the application, must also consider, pursuant to rule 7.05(3), the undue delay or prejudice which may result, but in the final analysis the court "may grant such order as it thinks just".[98]

Ultimately, the question tends to be whether the proposed intervener has a useful contribution to make, an interest in the appeal, and a perceived positive impact on the proceedings.[99] In *Elton Estate*, for example, the Court was satisfied the proposed intervener did, in fact, have an interest. As such, there was no reason to give a "restrictive interpretation" to the *Rules*. There was no evidence intervention would "unduly delay" the process, nor was it apparent the intervention would "prejudice the adjudication of the rights of the parties to the proceeding".[100]

Yukon Territory

From *The First Nation of Nacho Nyak Dun v. Yukon*,[101] it can be seen that the Court of Appeal of Yukon largely follows an approach derived from British Columbia Court of Appeal decisions.[102]

Northwest Territories

In *Procureur Général des Territoires du Nord-Ouest c. Association des Parents ayant droit de Yellowknife*,[103] the Court of Appeal emphasized the discretionary nature of the decision on a motion to intervene and followed the test as outlined in *Yellowknife Public Denomination District Education Authority v. Euchner*.[104]

Citing *Morgentaler*, the Court of Appeal in *Euchner* endorsed the following view: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject

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[96] *Warford v. Weir's Construction Limited*, 2012 NLCA 37 at para. 9 citing *Forsey v. Eastern Regional Health Authority*, 2007 NLTD 101.
[97] *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D, Rule 7.05.
[98] *Elton Estate v. Elton*, 2009 NLCA 34 at para. 11.
[99] See, for example, *Forsey v. Eastern Regional Health Authority*, 2007 NLTD 101.
[100] *Elton Estate v. Elton*, 2009 NLCA 34 at para. 15.
[101] *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 12 at paras. 11-15.
[102] See *Friedmann v. MacGarvie*, 2012 BCCA 109; *FortisBC Inc. v. Shaw Cablesystems Limited*, 2010 BCCA 606; *Ward v. Clark*, 2001 BCCA 264. See also Yukon *Court of Appeal Rules*, 2005, Rule 36.
[103] *Procureur Général des Territoires du Nord-Ouest c Association des Parents ayant droit de Yellowknife*, 2013 CanLII 53218 (NWTCA) at para. 3.
[104] *Yellowknife Public Denomination District Education Authority v. Euchner*, 2008 NWTCA 1, 2008 NWTCA 01. The authorities in the Northwest Territories do not refer to any rules regarding interveners. The *Rules of the Court of Appeal Respecting Civil Appeals*, NWT Reg 142-91 are silent as to interveners and the *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96 only reference *amicus curiae* at Rule 92.

matter of the appeal."[105] The Court then went on to list the same factors seen in the Alberta Court Appeal decision *Pedersen v. Alberta.*[106]

Nunavut

There is little case law with respect to interventions in Nunavut and there is no explicit provision in the *Rules of the Court of Appeal Respecting Civil Appeals*.[107] However, some guidance can be found in lower court decisions. In *Savik Enterprises, et al v. GN*,[108] the Court considered and granted an opposed application for intervener status, but did not clearly set out the test it was following. From its analysis, however, it was clear that the Court was compelled by the fact the proposed intervener represented interests that were not adequately represented by the existing parties to the proceeding.[109] The Court also emphasized that the disruption from granting intervener status was minimal and there would be greater potential for disruption if the proposed intervener was forced to commence a separate action to assert and defend its interests.[110]

Summarizing the Tests for Interventions

One constant, in all jurisdictions, is that the test for leave to intervene is discretionary. However, it is possible to identify recurring factors considered by most courts in coming to a decision on a particular intervener. From this, it can be clear that there are certain issues, regardless of jurisdiction, that a lawyer ought to address in seeking leave.

The starting point is the test stated by the Supreme Court of Canada: a proposed intervener must establish (1) an interest and (2) submissions which will be useful and different from those of the other parties.[111] In order to satisfy these two criteria, lawyers will want to consider addressing the following:

1. the nature of the case;
2. the issues which arise;
3. the likelihood of the intervener being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties;
4. whether the intervener has a fresh and useful perspective distinct from the immediate parties;
5. whether the intervener's proposed submission is repetitive of those of the appellant or the respondent;
6. whether the intervener's proposed submission relates to an issue raised by the parties (new issues not argued in the courts below will be seen as improperly widening the matter);
7. whether the intervener's proposed submission relates a point of law of general importance or an issue of public interest as opposed to a case-specific issue;

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[105] *Yellowknife Public Denominational District Education Authority v. Euchner*, 2008 NWTCA 1 at para. 4 citing *R. v. Morgentaler*, [1993] 1 SCR 462.
[106] *Pedersen v. Alberta*, 2008 ABCA 192, 432 AR 219. The fact Alberta Court of Appeal judges serve on the Northwest Territories Court of Appeal helps explain the reliance on the same list.
[107] *Rules of the Court of Appeal Respecting Civil Appeals*, NWT Reg (Nu) 142-91.
[108] *Savik Enterprises, et al v. GN*, 2004 NUCJ 4.
[109] *Savik Enterprises, et al v. GN*, 2004 NUCJ 4 at paras. 5-15.
[110] *Savik Enterprises, et al v. GN*, 2004 NUCJ 4.
[111] *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 SCR 335 at p. 339.

8. whether the presence of the intervener is necessary for the court to properly decide the matter;
9. whether the intervention will prejudice the parties (includes delay);
10. whether the intervention will transform the court into a political arena;
11. whether the intervener has a particular expertise on the subject matter of the appeal;
12. whether the intervener is a well-recognized group with a special expertise and with a broad and identifiable membership base;
13. whether the intervener has been involved in past cases; and
14. whether the intervener has a real, substantial and identifiable interest in the subject-matter of the proceedings.

Where the applicants were granted intervener status below, additional factors can be addressed:

1. the role taken by the interveners in the court below;
2. whether the submissions of the interveners were necessary or helpful in informing the decision being reviewed;
3. whether the issues on appeal are the same as in the court below, or whether the issues as framed on appeal could continue to impact the applicants' interests; and
4. whether the particular perspective of the applicants can continue to inform the discussion as now framed on appeal.

While the above test and factors will be widely applicable, proposed interveners should also consult the rules of court applicable to their jurisdiction to ensure they satisfy any legislated requirements.[112]

Intervening in Criminal Appeals

Traditionally, intervention in respect of non-constitutional issues in criminal cases is rarely allowed.[113] One rationale is that allowing interveners in criminal matters may result in unfairness to the accused or create the appearance of unfairness.[114] The negative judicial attitude towards criminal interventions is illustrated by *R. v. J.L.A.*:

> Intervention by a third party in a criminal case is generally shunned by the courts for a variety of policy and prudential reasons. Without discussing all those reasons, it can be said that all necessary voices with proper standing will

[112] *Court of Appeal Rules*, BC Reg 297/2001, Rule 36; *Alberta Rules of Court*, AR 124/2010, 14.37(2)(e) & 14.58; *The Court of Appeal Rules*, Sask Gaz April 18, 1997, s. 17; *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 13.01(1) & 13.01(2); *Rules of Civil Procedure*, RRO 1990, Reg 194; *Code of Civil Procedure*, CQLR c C-25, art. 211 & 509; *Rules of Court*, NB Reg 82-73, Rule 15.02, 15.03; *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov. 19, 2008, Rule 90.19; *Prince Edward Island Rules of Civil Procedure*, Rules 13, 13.01, 13.03 21, 21.01, 21.01(b), 61.15; *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D, Rule 7.05; *Court of Appeal Rules*, 2005 (Yukon), Rule 36.

[113] *R. v. Osolin*, 1993 CanLII 87 (SCC), [1993] 2 S.C.R. 313. Rule 60 of the Rules of the Supreme Court of Canada provides that attorneys general have the right to intervene when served with a notice of constitutional question.

[114] *R. v. Duncan* (1995), 1995 CanLII 1077 (BC CA), 130 D.L.R. (4th) 99 (B.C.C.A.) at para. 30 citing *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.) and *R. v. Finta* (1990), 1 O.R. 183, 44 O.A.C. 349, 11 W.C.B. (2d) 395 (C.A.).

> necessarily be heard through the traditional binary process. There is a risk that the hearing of other voices can distort an appeal. That risk of distortion is of acute concern where the intervention might be directly or indirectly adverse to the defendant in the case. Where the defendant already faces the voice of the state, the courts must necessarily be concerned about introduction of any other voice that could hurt the defendant.
>
> As such, it is very unusual for the Court to consider interventions in sentence appeals in criminal cases. The issue in such cases is between an individual and the state. Here, both the individual and the state are very ably represented. The specific interests and circumstances of the individual are unique to him, and they are of great importance to him. He alone faces jeopardy to his liberty. The public interests involved are large and general. It is the function of Crown counsel to speak to those interests from the broad public perspective – although obviously the defendant is entitled to speak to them from his perspective. Only the individual and the Crown can properly speak to the outcome of the case.[115]

Despite a history of only granting leave to intervene in criminal cases in exceptional circumstances, a recent Alberta Court of Appeal decisions stands in stark contrast to the above decision and suggests there may be a softening of this position. In *R. v. Barton*,[116] the Women's Legal Education and Action Fund Inc. ("LEAF") and the Institute for the Advancement of Aboriginal Women ("IAAW") sought leave to intervene in a criminal appeal before the Alberta Court of Appeal.

The proposed interveners intended to file one joint factum of 20 pages or less and make oral submissions not exceeding 20 minutes. The anticipated focus was:

- the definition of "sexual activity" at s. 273.1(1) of the *Criminal Code*;
- a substantive equality analysis on the meaning of consent; and
- observations on the procedure required by s. 276 of the *Criminal Code*.[117]

Berger J.A. concluded the Court would benefit from the unique perspective of the applicant interveners. He granted leave to intervene but confined it to the proposed joint factum.[118]

In doing so, Berger J.A. takes issue with the approach towards appeals in criminal cases, specifically addressing his Court's previous comments in *R. v. J.L.A.*:

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[115] *R. v. J.L.A.*, 2009 ABCA 324 at paras. 2-3. See also *R. v. Association In Defence of the Wrongfully Convicted*, 2009 CanLII 65815 (ON SC) (the Association in Defence of the Wrongfully Convicted, the Innocence Project and the Criminal Lawyers' Association of Ontario were refused leave to intervene in the new trial ordered in the wrongful conviction case of Roméo Phillion); *R. v. Atkinson*, 2005 MBQB 293 (CanLII), [2005] M.J. No. 492 at para. 10; *R. v. Finta*, 1990 CanLII 6824 (ON CA), [1990] O.J. No. 2282; *R. v. Zundel* (1986), 16 O.A.C. 244 (Ont. C.A.); *R. v. Seaboyer and Gayme* (1986), 50 C.R. (3d) 395, at p. 398; *R. v. Wood*, 2006 CanLII 2750 (NB CA) at para. 6. But see *R. v. Latimer*, 1995 CanLII 3921 (SK CA) (the Court granted intervener status to two public interest groups but imposed restrictions on them "to supplement, not to repeat, the submissions of the Crown in its factums").

[116] *R. v. Barton*, 2016 ABCA 68.

[117] *R. v. Barton*, 2016 ABCA 68 at para. 11-13.

[118] *R. v. Barton*, 2016 ABCA 68 at para. 13.

> I say, with great respect, that judges are too quick to shun intervention by a third party in a criminal case. Watson J.A. has observed "all necessary voices with proper standing will necessarily be heard through the traditional binary process" – but not always. In fact, I have a real concern that the focus on the risk that "the hearing of other voices can distort an appeal," cited theoretically as a basis to reject the intervention of a party who is perceived to lend support to the Crown's position, is then invoked far too frequently to deny the appropriate intervention of a party who might assist the court but whose submissions may also be helpful to the defendant in the case. …[119]

For Berger J.A., the question for the court is whether the " intervener will advance different and valuable insights and perspectives that will actually further the court's determination of the matter".[120] He added that it is possible that only some issues in an appeal may warrant intervention and it is not an "all or nothing proposition" as judges can impose conditions to limit the intervention.[121]

Along with *R. v. Vallentgoed*,[122] another recent Alberta decision, *Barton* represents a shift in the otherwise negative attitude towards intervention in criminal appeals. This is a positive opportunity for appellate counsel and interest groups alike to explore intervening in criminal matters generally and before they reach the Supreme Court of Canada.

III. Practical Tips

As we (*Supreme Advocacy*) regularly assist parties (through their lawyers or directly) with intervening at the Supreme Court of Canada, we offer the follow 10 practical tips to keep in mind when seeking leave to intervene:

1. Be on time: With often short timelines on appeal, an intervener may not have much time to seek leave to intervene. It is imperative though to be on time and to not require an extension of time which carries with it a high risk of being refused. And from a strategic perspective, if you are pitching to the court how important your assistance will be, you do not need them querying, "If this is so important, why are you so late?"

2. Know your status: courts of appeal often have rules as to determine party status. Your status in relation to the matter may affect whether you have to apply for standing as a full party or an intervener and the extent of your participation rights.

3. Follow the rules: check the specific rules applicable to the court you are seeking leave in to intervene and make sure you include everything requested (i.e. notice of motion, affidavit in support, memorandum, etc.) and do so within the required page limits.

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[119] *R. v. Barton*, 2016 ABCA 68 at para. 10.
[120] *R. v. Barton*, 2016 ABCA 68 at para. 8.
[121] *R. v. Barton*, 2016 ABCA 68 at para. 9.
[122] *R. v. Vallentgoed*, 2016 ABCA 19.

4. Appearance counts: In addition to having strong leave materials substantively, care should be taken to make sure they are technically compliant and easy to read. A judge will be thinking whether they want to have to review more (and lengthier) materials from this intervener.

5. Ask for the parties consent: While not determinative, having one or both parties consent to your intervention will have an impact on the decision to grant intervener status. Best to do it early and to give the parties an idea of your position so they can make a meaningful decision. If presented properly, a party may welcome an intervener. A strategically helpful option – if the other side is not prepared to consent – is to ask they send you what's called taking a 'no-position position' letter (which you can then attach to an affidavit to file).

6. Positioning: whether you are the only proposed intervener or one of many, it is important to position yourself in relation to the parties and other proposed interveners. The court will try to compartmentalize everyone and you have to strive to find the balance between being sufficiently connected to the issues without being repetitive of others.

7. Lay it all out: many of the factors considered by the court on an application for leave to intervene deal with what your submissions will be on the appeal itself. Accordingly, begin preparing your appeal submissions early and give the court a true sense of what you intend to argue.

8. Don't raise new arguments: Make sure you are aware of what was argued below and addressed by the court. Your submissions should be relevant to the existing record.

9. Demonstrate your expertise: In crafting your submissions, especially if you are an intervener that is new to the court, take care to not only talk about your expertise but to show it. Raise something that will make the judge reviewing the application say, "I never thought of it that way and I want to hear more."

10. Don't take a position on the outcome: Avoid telling the court how they should decide the appeal.[123] You are there to assist and supplement.

IV. Conclusion

It is clear the Supreme Court of Canada welcomes interveners. The same is generally true of courts of appeal when dealing with a case that is of public importance. Even in criminal cases, we are seeing courts becoming more open to the idea of interveners.

At the same time though courts are continually facing problems associated with limited resources. These issues have been highlighted in *Hryniak* and more recently *R. v. Jordan* dealing with delays in the criminal justice system.[124] The response to these concerns has not been fewer

[123] The *Rules of the Supreme Court of Canada* specifically forbid this. Rule 42(3) provides: "Part V of the intervener's factum shall not consist of any statement with respect to the outcome of the appeal unless otherwise ordered by a judge."
[124] *R. v. Jordan*, 2016 SCC 27.

interventions, but instead courts carefully considering intervener applications and imposing restrictions.

For these reasons, there remains significant opportunity for interested individuals, associations, and organizations to become involved and influence the judicial process. To fully take advantage of these opportunities, interveners and their counsel must be mindful of the factors courts are considering when granting leave. A well-crafted application for leave to intervene which explains an intervener's interest in the matter and how they can provide useful and different submissions will go long way in convincing the court to exercise its discretion favourably.