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Leave to Intervene Denied to Insurance Co. in Appeal of Cap on Minor Injuries

By Jennifer Koshan

Cases Considered:

Pedersen v. Alberta, 2008 ABCA 192

As noted in a previous post, on February 8, 2008, Associate Chief Justice Neil Wittmann of the Alberta Court of Queen's Bench struck down the $4000 cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents under s. 15 of the *Charter*. The defendants, the Alberta government and the Insurance Bureau of Canada, have filed an appeal of this ruling, and one of the plaintiffs (Morrow) has filed a cross-appeal of the dismissal of arguments made under s. 7 of the *Charter*. The Alberta courts' most recent ruling in the case concerns the application of the Dominion of Canada General Insurance Company (Dominion) for leave to intervene in the appeal. On May 21, 2008, the Court of Appeal denied Dominion's application.

Justices Marina Paperny, Peter Martin, and Patricia Rowbotham set out the test for intervener status from *R. v. Morgentaler*, [1993] 1 S.C.R. 462:

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;
7. Will intervention widen the lis between the parties; and
8. Will the intervention transform the court into a political arena?

Applying these factors, the Court found that while Dominion would be directly affected by the outcome, this was "no different from other companies in Alberta providing motor vehicle insurance policies", and the insurance industry perspective was already being presented in the appeal (at para. 7). Further, if Dominion were to be granted an intervention, other insurance companies would seek the same, resulting in undue delay without a corresponding benefit to the

hearing (at para. 10). The fact that Dominion would be directly affected was not, in the end, seen as sufficient for it to obtain intervener status.

Significantly, the Court dismissed Dominion's argument that leave to intervene should be granted more leniently in constitutional cases. According to the Court of Appeal, "that may have been the response when judicial consideration of the *Charter* was in its infancy. However, there is now a considerable body of authorities on the *Charter* and less need for assistance from an intervener" (at para. 4). Quoting from *Telus Communications Inc. v. Telecommunications Workers Union*, 2006 ABCA 297 (at para. 4), the Court held that "Granting intervener status is discretionary and ought to be exercised sparingly."

Dominion was seeking to assert its private interests rather than the public interest, and I do not disagree with the denial of its specific claim in this case. However, the Court's comments on interventions in *Charter* cases could be read more broadly as applicable to public interest interveners as well. The Supreme Court has also been more reluctant to grant intervener status in *Charter* cases over the last few years, and for the same reason – a perceived lack of need for assistance. I have criticized this tendency in previous work, noting that *Charter* cases have increased in their complexity and could often benefit from public interest interventions (see Jennifer Koshan, "Dialogue or Conversation? The Impact of Public Interest Interveners on Judicial Decision Making", Patricia Hughes and Patrick Molnari, eds., *Participatory Justice in a Global Economy: The New Rule of Law* (Montreal: Les Editions Themis, 2004) 233-274). With the demise of the Court Challenges Program in September 2006 and courts feeling more confident about the *Charter*, perhaps overly so, *Charter* litigation has become inaccessible to many public interest interveners.