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Should the Dispute Remain Between the Accused and the Crown? Third-Party Intervention in Criminal Proceedings

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Case Commented On: *R v Vallentgoed*, 2016 ABCA 19 (CanLII) and *R v Barton*, 2016 ABCA 68 (CanLII)

Should courts shun third party intervention in criminal proceedings? Two recent Alberta Court of Appeal cases address this issue: *R v Vallentgoed*, 2016 ABCA 19 (CanLII) (January 2016) and *R v Barton*, 2016 ABCA 68 (CanLII) (March 2016).

In *Vallentgoed*, the Edmonton and Calgary Police Services (EPS / CPS) were denied leave to intervene in a criminal appeal by Justice Veldhuis. The appeal concerned the scope of the Crown's obligation to disclose approved instrument (AI) maintenance logs. Approved instruments are instruments used to measure blood alcohol levels. The accused, Vallentgoed and Gubbins, were charged with impaired driving offenses and had requested additional disclosure of AI maintenance records.

In *Barton*, Justice Berger granted leave to intervene to the Women's Legal Education and Action Fund (LEAF) and the Institute for the Advancement of Aboriginal Women (IAAW) in the Crown's appeal of Barton's acquittal for the murder of Cindy Gladue. Ms. Gladue, a Cree woman engaged in sex work, died as a result of an injury caused by Mr. Barton. According to LEAF's press release, "At the trial, the jury accepted the defence argument that Ms. Gladue, an Indigenous woman, had consented to 'rough sex' and acquitted the man accused of her murder, Bradley Barton." (Women's Legal Education and Action Fund (LEAF) and the Institute for the Advancement of Aboriginal Women (IAAW) Seek Leave to Intervene in R. v Barton).

Vallentgoed and *Barton* initially present starkly different visions of the intervener's role in criminal proceedings. In *Vallentgoed*, Justice Veldhuis claims that intervener status should be rarely granted in criminal proceedings. She writes:

> The discretion to grant intervener status should be exercised sparingly, particularly in criminal proceedings where the dispute must remain between the accused and the Crown: *R v Neve*, [1996] 8 WWR 294 at para 16, 184 AR 359 (CA). Interventions in criminal appeals are "generally shunned by the courts for a variety of policy and prudential reasons", especially the risk "that the hearing of other voices can distort an appeal": *R v JLA*, *2009 ABCA 324* at para 2, 464 AR 310. (para 6, emphasis added)

Two months later, Justice Berger acknowledges this perspective in *Barton*:

> Some judges have opined that it is very unusual for the court to consider interventions in criminal appeals. By way of illustration, Watson J.A. in *R. v. J.L.A.*, 2009 ABCA 324 (an

> important precedent-setting criminal law pronouncement heard by a designated five person panel reported as *R. v. Arcand*, 2010 ABCA 363) explained that "the issue in such cases is between an individual and the state." (para 5)

But Justice Berger then rejects this approach:

> 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. See, for example, *R. v. J.L.A.*, *supra*. (para 10, emphasis added)

I disagree with Justice Veldhuis's claim that criminal disputes should remain between the accused and the Crown. Criminal law concerns the entire community—it is a conversation about how to interpret and apply our criminal law and related procedural protections, and in some cases, about how to sanction and rehabilitate a community member who has committed a grave wrong. While the Crown is mandated to represent the public interest in criminal disputes, it often fails to do so because the public interest and the state's interest frequently diverge. Moreover, different members of our community have incompatible interests, so it is impossible for the Crown to do justice to all of these perspectives. Interveners thus have a critical role to play in criminal proceedings by explaining to the court how the case will affect the people they represent. In *Barton*, LEAF and IAAW wanted to explain how the precedent set by this case would impact women, particularly Aboriginal women. As they write in their leave application:

> This appeal raises legal issues regarding the law on sexual assault that transcend this particular case and the Court's decision on those issues will significantly affect the law on sexual assault. In particular, the Proposed Interveners are interested in this appeal because of the precedent that it will set and the impact it will have on sexual assault complainants, particularly Aboriginal women engaged in sex work. (LEAF and IAAW Application, para 6)

By granting leave to intervene to LEAF and IAAW in *Barton*, Justice Berger ensured that the perspectives of women could inform and enrich a decision that directly affects them.

While I believe interveners play an important role in criminal proceedings, I think Justice Veldhuis is right that particular caution is warranted in determining who should be granted leave to intervene in criminal cases. When assessing a leave application for criminal proceedings, courts must be especially careful to ensure that the applicant will provide a fresh perspective, and will not merely reinforce the Crown's position. Of course, in civil proceedings, courts must also verify that the proposed intervener will bring a new perspective to the case. If an intervener merely bolsters the position of one of the parties, the trial may become unfair. Granting leave to intervene to an applicant that just repeats the views of one party essentially gives that party more air time before the judge. While courts should ensure that all trials are fair, they have a particular obligation to guarantee the fairness of criminal trials since the accused's freedom is at stake. In fact, the right of an accused to a fair trial is constitutionally protected in section 11(d) of the *Charter*, which states:

11. Any person charged with an offence has the right

> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal…

Significantly, Justice Veldhuis and Justice Berger both focus on whether the applicants would bring a fresh perspective to the case in determining whether to grant them leave to intervene.

In *Barton*, Justice Berger writes:

> At the end of the day, the relevant inquiry is whether the proposed intervener will advance different and valuable insights and perspectives that will actually further the court's determination of the matter (see: *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2015 FCA 34 at para. 15, citing with approval *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21 at para. 11). Put another way, can the applicant add to the effective adjudication by ensuring that all the issues are presented in a full adversarial context? See: *Reference re Workers' Compensation Act*, 1993 (Nfld.), 1989 2 SCR 335, at para. 13. (para 8, emphasis added)

Justice Berger notes "judges of the Court of Appeal who will sit in judgment on the appeal will benefit from the unique perspectives of the interveners" (para 13, emphasis added). LEAF and IAAW intend to discuss "the definition of "sexual activity" in s. 273.1(1) of the *Criminal Code*" and to "provide a substantive equality analysis of the meaning of consent and also observations on the procedure required by s. 276 of the *Criminal Code"* (para 12).

In his response to LEAF and IAAW's application for intervention, Barton cited Justice Watson's statement in *R v J.L.A.* that: "[w]here 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" (para 2, emphasis added) (Respondent's Memorandum of Argument in *Barton*, para 7). Justice Berger rightly rejected this view. The protection of the defendant's liberty interest should not come at the cost of stifling the voices of parties who are affected by the outcome of a case and have a fresh perspective to provide. Inviting interveners into the courtroom may at times place an additional burden on the accused, but as long as they are not merely bolstering the Crown's position, their voices should be heard.

Justice Veldhuis's analysis in *Vallentgoed* also focuses on whether the applicants would provide a new perspective on the case. She writes:

> Intervener status will be granted where the applicant: (1) is directly and significantly affected by the outcome of the appeal, and (2) has expertise and a fresh perspective on the subject matter of the appeal that is useful for the appeal's resolution: *R v Morgentaler*, *[1993] 1 SCR 462* at para 1, [1993] SCJ No 48 (QL); *City of Edmonton v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 at para 8, 584 AR 255. (para 5, emphasis added)

Justice Veldhuis notes that CPS and EPS would be directly and significantly affected by the outcome of the appeal, as the case could oblige them to disclose AI maintenance records. "However," she explains, "it is doubtful that the EPS and CPS will provide a fresh perspective on the issues or present different submissions from the Crown on appeal" (para 8, emphasis added). This was doubtful because EPS and CPS, like the Crown, were arguing for limited disclosure. CPS wanted to claim "that the common and similar disclosure requests made by defence counsel are really a 'strategy' to 'stall the prosecution of impaired driving cases'" (para 10). Justice Veldhuis notes that "[i]t is unclear how these arguments differ from or provide a unique perspective relative to that of the Crown" (para 10). As for EPS: "During oral submissions, counsel for EPS argued the Crown factum did not sufficiently cover the issue of the scope of disclosure and if permitted to intervene, the EPS would seek to expand on the Crown's position" (para 15).

I wonder if Justice Veldhuis and Justice Berger would have reached the same outcomes had their cases been switched. Both judges focused their analysis on whether the intervener would provide a fresh perspective. Whereas LEAF and IAAW were bringing a unique perspective to the case, by discussing its impact on women, EPS and CPS sought to merely reinforce the Crown's position. Moreover, the interests of the Crown and of the police coincide substantially—both actors are part of the state.

Justice Veldhuis writes in *Vallentgoed*:

> Permitting the CPS to advance arguments that substantially overlap with and bolster the Crown's position is prejudicial as it simply serves to amplify the voice of the state at the potential cost of the Respondents. (para 10, emphasis added)

This quote suggests that for all of Justice Veldhuis's talk about a criminal law dispute being limited to the Crown and the accused, her real concern is ensuring that the accused's trial is fair.

I wish she had framed her concern in those terms. By suggesting that third party intervention in criminal cases is rarely appropriate, Justice Veldhuis may have made it more difficult for parties affected by the outcome of a criminal case to intervene. Criminal disputes do not merely affect the accused and the state. These disputes can affect Aboriginal women, doctors, people living with AIDS, and people of faith. While the Crown speaks with one voice, the community speaks with many. These voices should not be silenced in the courtroom.