

'Judicial Review and Test Case Strategies' – Seminar 3 Minutes
(Minutes taken under Chatham House Rule)

The Public Law Project
*(in association with the Department of Law,
Queen Mary, University of London)*

Date: 19 October 2006

Location: IALS, Room L101

In Attendance:

1. Andrea Loux	Senior Law Lecturer, University of Roehampton
2. Andrew Le Sueur	Queen Mary, University of London
3. Caroline Stone	PLP – Minutes
4. Sir Henry Brooke	Former Vice-President of the Court of Appeal
5. James Welch	Liberty
6. Varda Bondy	PLP
7. Louise Whitfield	PLP

Introduction

Chair:

- Seminar Three addresses the infrastructure of bringing test cases; in particular, our speaker is going to examine the lessons to be drawn from the international scene.
- The last seminar will look at third party interventions. Seminars 3 and 4 focus on the key issues being grappled with in this area and there may be some overlap of content.

Speaker 1

Relevance of Canadian Courts Challenge Programme to discussion about 'test cases'

The Canadian Courts Challenge Programme ('CCCP')¹ is currently being shut down by the Canadian Government, having survived for all but two years since 1978. This has resulted in outcry from programme users and the Supreme Court judiciary alike. The Government has pulled funding before, so we wait to see what happens.

The Speaker's thoughts were drawn to the CCCP during the first Test Cases Seminar when there was discussion as to how test cases arise. In the UK, the organisation of test cases is largely informal – it is a matter of knowledgeable parties representing unconnected individuals. This notion is backed up by PLP's *Third Party Intervention Study* which found that people know about test cases only if they hear about them informally. In the United States, there are fifty-two jurisdictions and therefore litigants need a structure/network for bringing test cases and sharing information. It is the same in Canada too, particularly given that federal law exists alongside state legal systems.

There are dangers to this informal system, namely:

- If you are in the centre, it's easy to know what's going on. By contrast, the further away one gets from London, the more parties have no idea. Having taught in Manchester and Edinburgh, this is my experience even in other metropolitan towns.
- If information-sharing is going on informally, it is important that people attend quasi-professional/social meetings, such as QC parties or PLP seminars. The reality is that people drop off this radar temporarily, for example, going on maternity leave. The 'inside-outside' situation which applies in the academic sphere exists in the professional world too and there is a real issue about the extent to which we have allowed the organisation around public interest cases to be done informally by a few, central, key organisations. This reality is borne out by the fact that solicitors get potential test cases but they are not sure where to find the best repository of information.
- This informal co-ordination can lead to the problem of the 'rogue plaintiff/complainer', i.e. a bad case being brought which upsets a carefully-constructed test case strategy. Whilst cases are obviously driven by client's needs, to the extent that public interest litigation is more owned by the solicitors, it would be better if organisations were aware of what's going on, even if they are far from the centre. The lack of such a network leads to the inevitable third party intervention in 'bad' cases. This is precisely how the *amicus curae* process grew up in the US, with the National

¹ <http://www.ccpcj.ca/>

Association for the Advancement of Colored People (NAACP²) intervening before the Supreme Court in cases which upset their strict test case strategy. However, allowing more parties to participate may prevent these poor cases from being litigated.

- There is little drawing on 'best expertise', of which there is a lot within public interest groups. Liberty, for example, publish the content of their ECHR interventions on their website. There needs to be more publication of successes etc.

Part of the challenge is **coalition** building. For example, in Canada, this exists between the equality groups. Thus, the Speaker thought of CCCP as offering a possible answer to some of the problems identified with test case litigation.

CCCP – history

Established in 1978, the CCCP originally only funded cases concerning language rights. These cases were an attempt to challenge the Government's policy regarding publication of certain literature only in French. It is important to understand the political context of the Programme's establishment: it operated alongside the Government's push towards building the notion of citizenship. This policy was not just altruistic - it was partly about vote-winning. The CCCP was seen as a cheap, progressive programme and to the extent that it was supported by Conservatives, this was because it was politically advantageous to so do.

In 1984, with the new Canadian Charter of Rights and Freedoms coming into force, the Report "*Woman in Legal Action: Precedents for the Future*" encouraged women's organisations (who had been involved in drafting the Charter) to use the law to ensure equality. The Report drew on the NAACP's Legal Defence Fund³. In 1985, the CCCP expanded to cover equality rights under the Charter, including race and sex.

CCCP's current mandate:

- Covers equality and language rights (they operate in parallel, with separate directors)
- Federal cases only
- One of its explicit aims is to fund test cases
- Test case defined broadly as a case: 'of national significance which involves important legal issues not yet decided by the Court'.

Case Development Funding

It is striking the way in which the Programme sets out to create (i) a structure for equality challenges and (ii) a method of bringing in citizens to participate; in part it is hoped that bringing test cases will draw in other participants.

To this end, 50% of the Programme's budget is spent on outreach. This case development funding includes funding meetings between solicitors, barristers and interest groups wanting to form test case strategies. Further, one can apply for seed money to fund strategic research, for example, investigating the impact of pre-emptive cost orders. Approximately \$5000 CAD is available to fund

² <http://www.naacp.org/>

³ <http://www.naacpldf.org/>

this research into a possible test case area, with another tranche of \$5000 CAD available if the parties wish to conduct consultation. Case development funding also funds 'evidence building' – if people believe they are suffering, they can apply for money to help collect sufficient evidence to enable them to take the case to court.

As previously mentioned, coalition building is important. When the Speaker went to Canada to interview parties on third party interventions, everyone mentioned the CCCP without prompting, even if their cases were not being directly funded by the Programme. *Little Sisters Bookstore v Canada Customs* is an instructive example of this coalition building. The previous *Butler* case, a feminist challenge on pornography, had created a real divide between the gay/lesbian and feminist communities. One way to resolve this divide was to have meetings to thrash out the issues which the parties wanted to challenge in the *Little Sisters* case. These meetings allowed an attempt to negotiate which arguments would be made before the Supreme Court in a case which was ultimately a big win for the Canadian Women's Legal Education and Action Fund (LEAF).

There is a large intervening culture in Canada with up to 10-12 interveners in a big case. The Court does not like repetition of argument or arguing amongst the interveners and judges have previously complained about such lack of agreement. The CCCP provides a forum for the required organisation, by allowing formal meetings and communication within community entities. A side-effect of this process is better interventions and arguments.

Case funding

Thereafter, parties can apply for case funding, either to bring test cases or third party interventions. This funding covers lawyers' fees, any witness fees, travel fees, long-distance faxing for organisations trying to act Canada-wide (although now email is probably used). Case funding also funds negotiations in the event it may be possible to negotiate a settlement with a Governmental body.

Impact funding

Impact funding provides for reports/papers to be written on the impact of those test cases which have been brought. This helps spread the word and allows small occasional players to keep up with what's going on and dip in if they feel they can provide evidence. The same process probably occurs here at meetings between the various NGOs etc., however such conversations are not formally recorded and published.

Programme promotion and access funding are also budgeted for.

In conclusion, the CCCP's focus is on **infrastructure** and the importance thereof, in addition to the importance of **funding interventions on a regular basis**.

Equality Commission

The aforementioned raises questions about the role of the new Commission, which will be able to bring and support test cases without the same standing restrictions as other public organisations. It is anticipated that the Commission will undertake some litigation and/or act as a vehicle to disperse cases to other groups.

With the focus in the UK on citizenship, the question is whether the CCCP is a good model?

In this context, the Speaker expressed a final warning: the CCCP had a definite view in mind of the role that third party groups should play in supporting the Charter. This partly arose because the US example indicated that the best way to take advantage of the Charter was to litigate (- linking in with a wider political agenda). Thus, the existence of government funding for a test-cases programme commits the Government and community it represents to a vision of how best to achieve equality. When considering any similar programme in the UK, one must consider that there is now a move towards reports and positive duties, as compared with litigation. It is necessary to consider the implications of such a move on people's views of human rights and the role of litigation in society.

DISCUSSION

Budget

<u>Total spent 2004 – 5</u>	<u>\$1,610,515 CAD</u>
Incl.	
Case funding	\$1,249,602
Case development	\$81,000
Programme Access	\$265,000

Speaker 2: Are any difficulties raised by the involvement of government funding?

Speaker 1:

- The CCCP is an independent body and is funded at arms-length by the Government.
- That is not to say this situation does not create problems in terms of vulnerability - after all, it was the Government who pulled funding on 24/25 September. A controversial election case was recently brought against the Prime Minister by a group funded by the CCCP. They say revenge is a dish best served cold...

Speaker 3: Is the costs regime different in Canada?

Speaker 1: There is no costs protection or insurance through the Programme, so parties need to apply to the Court for costs protection early on in the case.

Speaker 4: How difficult is it to get funding?

Speaker 1:

- The Programme manages to fund about 50% of its applications.
- The application form itself is in very plain language as it is used by lawyers and non-lawyers alike. CCCP is successful in linking up unsophisticated groups with those that intervene professionally. To this end, test cases usually involve trusted lawyers, e.g. LEAF appears in almost every challenge on equality, not just feminist issues. This means that parties are able to make a good case for funding, which is particularly important given how uneven access to justice is in Canada. There is an acknowledged imbalance of experience at the Canadian Bar.

- In terms of choosing which cases to fund, there is an emphasis on newness. The feeling is that if an issue has been litigated before, it will cost less to get to the Court of Appeal and therefore is less in need of funding by the Programme.

Canadian culture of intervention?

Speaker 5: There seems to be a culture of third party interventions in Canada and therefore the CCCP makes sense. Can the same be said of the UK? The question is therefore is whether the Programme *impacted upon* or *arose from* this culture?

Speaker 1:

- There are definitely more interveners as a result of the Programme, so it has fed the intervention culture. Interveners in Canada do not pay costs bar their own, so this is another aspect of things.
- Intervening in the UK is a hidden process with much uncertainty about the rules. This is probably the cause of so little intervention, as the ordinary solicitor does not know how to. Litigation is a way to change society, however, I am certain that many groups here shy away from lawyers.
- Third party interventions are a cheap way to run a 'test case strategy'. It is often perceived that the strategy of joint intervention is most forceful and I know that Liberty and Justice consult about the cases they bring. One main advantage of joint interventions is that they spare costs. Comparing the Canadian culture with the UK, I have been to an intervention in the Coroner's Court. Whilst the guidance on this process is not so tight, the interveners ended up inappropriately commenting on/picking apart the facts of the case - so much so, that I am sure the Court won't allow an intervener anytime soon. Some of the points being made were not bad, but the interveners needed advice from lawyers.
- Another difference is that academics become involved in interventions in Canada/US on a regular basis. Here, academics do not have the same connections with the profession.

Speaker 6: The Supreme Court's opening in 2009 is the next major opportunity for change. The question is whether it will elicit interventions by, for example, having a fabulous website giving details of impending cases (like the US Supreme Court) or will it take a more passive role?

Speaker 4: What effect does having lots of interveners make in terms of improving the law? Here the impact of interventions is very much dependent on the particular facts of the case. Further, the English experience of intervention is more one of strong impact from small input.

Speaker 1: There are a variety of views, but generally the Justices welcome any well organised intervention, providing no redundant points are made. The reality is that it is the expert interveners who have the most impact.

Procedure for intervening/bringing test cases

Speaker 2: Are proceedings in Canada different in order to accommodate multiple interveners? (compare *Al-Skeini v SSHD* and *Burke v GMC*, cases involving numerous interveners)

Speaker 1:

- There are very strict time limits, more so than those in the House of Lords. The main points are first raised on paper (judicial clerks assist judges in digesting such material), with interveners only being allotted 5 – 10 minutes of oral submissions.
- There is a real (and well-admitted) unevenness at the Canadian Bar. Thus, legal arguments are often filled in by the interveners. Intervenors file their case last, so that they can see the other parties' arguments and avoid making redundant points. This causes problems if the other parties are not timely with submitting their documents.
- A big difference is that the Court specifically asks for interventions. This is possible because in Canada there is a very clear idea of what a test case strategy is. For example, the Bar has a third party intervention policy (detailing subject area, formation of coalitions etc.). There has been detailed thought on this question.

Speaker 3:

- PLP have been given a grant to write a short guide on intervention.
- On the one hand, the informality of procedure meant PLP could put in a last minute intervention in *Corner House*. *Corner House* was being run by people who had connections with PLP, which is how we knew about it – this links in with the point about being in the know.
- Contrast another case in which PLP really wanted to get the Dept of Health to intervene when bringing a case against the Local Health Board. We were sure the DoH would be on the claimant's side, however we did not get a response from them until two weeks before the case was listed in the Court of Appeal, despite having tried for over a year. In this instance, it would have been helpful if the Court could have asked the DoH to intervene.

Speaker 1:

When the HRA came into force, Scotland needed to bring in rules regarding interventions as the courts did not view themselves as having inherent jurisdiction. A 5000 word limit was set for a written document, effectively a baby intervention. There are more difficult rules of standing in Scotland, meaning public interest groups have been burnt and intervene less often. Nevertheless, people do not seem to be aware of this basic procedural rule.

Speaker 7:

- The Court of Appeal had its first discussion about intervention 8-9 years ago in the *Conjoined Twins* case. The feeling was that the Court should let it flow, and I believe there is more intervention now.
- Usually the Court receives a letter requesting permission to intervene via written submissions and simply says 'yes' or 'no'. Sometimes, the party wishes to make oral submissions, in which case the Court will check with the other side. I have only refused one request - a one-woman, misguided intervention. If there was a formal rule regarding intervention, we may well not have seen the organic growth which has occurred. My experience of JR is that often good things come from informality.
- In the CFA/ATE cases, the Court of Appeal did actively find interveners.

Co-ordination of challenges

Speaker 1: Involving people does change the nature of test cases. However, it takes a lot of effort from the leaders.

Speaker 4: We do a good job here through a few well-focussed groups who draw in smaller organisations. E.g. CPAG addresses social security issues comprehensively.

Speaker 5: This is only partially true. For example, the lack of a representative organisation is the only reason why women's issues are not litigated. Organisations like the Fawcett Society and the CRE lack resources to bring such challenges; similarly, MIND and Age Concern only have one part-time lawyer. The CCCP is fantastic because it ensures that no interest groups are left out in the cold. How can the UK translate this into its interventions?

Speaker 1: Is there any looking at things on a grander, more strategic level? Whilst there is infighting amongst the lead Canadian interveners, they see that they fulfil a larger role. Accordingly, they focus on spreading the word and crossing boundaries.

Speaker 4: There will be an informal looking at the bigger picture, through discussions between the respective directors of Liberty and JUSTICE.

Speaker 3: PLINGO (an informal meeting of NGO lawyers, established by PLP) has enabled lone lawyers in NGOs, e.g. the Prisoners' Advice Service, to discuss common issues, such as costs orders and other practical/tactical concerns. However, this is not really operating at a strategic level. We are starting to have some discussion about issues, such as how to litigate Art 14 ECHR claims, but we are not really examining the bigger picture.

2 November 2006