

**From NAACP to LEAF:
American Legal Exports to Canada¹**

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Abstract:

The early American writers on the amicus curiae not only described and ventured to explain the transformation of this procedural mechanism into an avenue for interest group pressure, they also tried to legitimate it. When the Supreme Court of Canada challenged the legitimacy of transforming the equivalent Canadian mechanism in the same way, scholars and interest group leaders used later American writings on the amicus to persuade it to relent. These Canadian actors were attracted to the American experience with public interest litigation because of the political story embedded in it. The article concludes by speculating that the political dimension of the American experience with public interest litigation has created a powerful mythology that is attractive in many nations.

Introduction

Courts and similar legal institutions are getting more powerful around the world, and the literature on the “global expansion of judicial power” is beginning to draw comparative lessons about how this happens. Some studies emphasize how the growth of judicial power in other countries parallels the growth of judicial power in the U.S. (Holland 1991; Epp 1998; Tate and Vallinder 1995). Others see different models at work (Stone 1992). There is no doubt that the global expansion of judicial power has influenced Canada. Over the last thirty years, the Canadian courts have taken on an increasingly important political and policy-making role (Morton and Knopff 2000, Epp 1998, Russell 1995, Bogart 1995). This trend accelerated when Canada adopted a comprehensive, constitutional Charter of Rights in 1982.

As in the American case, judicial power has expanded in Canada partly because Canadian judges have increasingly welcomed public interest litigation (Epp 1998). Judges and interest groups in both countries have widened the opportunities for organized interests to gain access to judicial proceedings, in part by transforming their mechanisms for “third party” participation. In the US, the amicus curiae was transformed from a procedural rarity into a common avenue for interest representation before the courts. Canada saw a similar transformation of the equivalent procedural mechanism, the intervener.² These transformations helped establish public interest litigation in both countries’ appellate courts and in turn bolstered the expansion of judicial power on both sides of the 49th parallel. The transformation of the Canadian intervener came decades after the transformation of the amicus, so it is not surprising that Canadian interest groups, judges and lawyers cited the earlier American developments to explain their plans for the intervener. American developments probably even inspired many of the Canadian efforts to change the intervener mechanism.

² Interveners at the Supreme Court of Canada are equivalent to the US Supreme Court’s amici. The American “intervenor” is altogether different and should not be confused with the Canadian “intervener”.

This article goes beyond charting how American developments informed and inspired similar developments in Canada. Instead, it shows how various actors pointed to the transformation of the amicus to legitimate the transformation of the intervener in Canada. When the Supreme Court of Canada challenged the legitimacy of interest group intervention in the late 1980s, Canadian public interest groups and legal commentators both offered arguments to refute this challenge. These arguments drew heavily on the American experience with the amicus curiae and the American academic literature about amici. American scholarly writings on interest group litigation, which exalt the role of interest groups like the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), have not only helped to inspire the growth of public interest litigation in Canada, they have helped establish its “normalcy”.

This article unfolds in four sections. First, the American experience with amici curiae is outlined, with particular emphasis on the rich academic literature that described and helped to legitimate the transformation of the amicus. The second section discusses how Supreme Court of Canada took up the Trudeau government's invitation to expand judicial power in Canada. Part of the Court's response involved transforming its approach to public interest litigation generally and interest group intervention in particular. The scholarly community reacted enthusiastically to these changes and drew on the earlier American developments to argue for their legitimacy. The third section examines how the drafting of Canada's constitutional Charter of Rights in 1980-82 accelerated the process of legal mobilization in Canada, and led many interest groups to believe that they would be welcome as interveners before the Canadian Supreme Court. The final section begins with the Supreme Court halting the transformation of the intervener mechanism. Both interest group leaders and legal scholars respond with a furious effort to legitimate interest group intervention, drawing almost exclusively upon the American literature about amici to justify their demands for expanded interest group access to the Court. The importance of the American literature on amici in legitimating interest group intervention in Canada is interesting for its own sake, but it also leads to

important lessons about the global expansion of judicial power generally. These lessons are canvassed in the conclusion.

The American Experience with Amici

Since the 1930s, American groups like the NAACP and the American Civil Liberties Union have become renowned for their amicus activities at the US Supreme Court. The growth of amicus activity during these years has been impressive. Only a handful of groups appeared as amici in the first thirty years of the twentieth century, but over the course of the next five decades the amicus changed from being a rare way to ameliorate the shortcomings of the private litigation model into an accepted technique of interest advocacy. According to one study, amici participated in 10.5% of the Taft Court's cases, 20.2% of the New Deal Court's cases and 31.4% of the Warren Court's cases (Puro 1971: 56). A follow-up study found amici in 53.4% of the Burger Court's cases between 1970 and 1980 (O'Connor and Epstein 1981-82: 316).³ By the end of the 1970s, amicus curiae participation had become "the norm rather than the exception" in cases before the American Supreme Court (318). Similar trends are reported for amicus participation before the American federal district courts and federal courts of appeals (McIntosh 1984, McIntosh and Barker 1988).

These numbers are impressive on their own, but they do not do justice to the long-term impact of this change in the American academic literature. In the 1950s and 1960s, American scholars devoted even greater attention to amici than their numbers warranted. Interest group amici helped deliver all the great moral victories won in, and by, the American Supreme Court during the Warren Court years. The NAACP challenged restrictive property covenants and school desegregation. The ACLU fought for expanded due process rights and against the death penalty. Others mobilized around the issues of religious freedom, women's rights, abortion and reapportionment. Interest

³ O'Connor and Epstein's figures for the years before 1970 do not match Puro's. It is impossible from their article to determine how their methodology differs from his. Nonetheless, the figures are similar, if not exactly comparable.

group amici figured prominently in four decades of “social justice” activism and created such potent symbols as Shelley (1948), Brown (1954), Miranda (1966), Baker (1962) and Roe (1973).

This tumult produced a rich academic literature on the “heroic” amicus. During the 1950s and 1960s, this literature not only noted and described the transformation of the amicus, it also offered arguments to legitimate the transformation. David Truman set the stage for this literature when he declared, in 1951, that “The activities of the judicial officers of the United States are not exempt from the processes of group politics” (1960 [1951]: 479). Clement Vose expanded on Truman’s ideas in his chronicle of the NAACP’s legal challenge to racially restrictive covenants. He noted the importance of strategic litigation, using tactics like carefully selected test cases and amicus participation in important cases (Vose 1955, 1959). In his 1958 article, “Litigation as a Form of Pressure Group Activity,” he set out arguments for the legitimacy of public interest litigation by groups like the NAACP: this kind of litigation was used earlier by conservative groups; the NAACP only turned to litigation after it failed to make gains through Congress and state legislatures; and since courts make important decisions, litigation was a legitimate interest group tactic. Jack Peltason’s volume on the federal courts echoed Truman and Vose’s arguments. He highlighted the twin NAACP tactics of sponsoring test cases and appearing as an amicus in other cases. He, too, argued that these tactics were legitimate because they were similar to the tactics *laissez-faire* interests had used in an earlier era (1955). The NAACP and others, he wrote, only turn to litigation when political activity in Congress and at the state level proves futile. Lucius Barker (1967) touched on similar themes in his analysis of the NAACP’s desegregation campaigns. Richard Cortner (1968) argued interest group litigation and the transformation of the amicus were legitimate because some interests are so poorly treated in the political process that they must turn to the courts.

Legal scholars also offered legitimacy to the new role for the amicus. Frank Covey’s brief law review article outlined the history of the amicus, arguing that the courts often called upon American government officials to represent their views as amici

in politically controversial cases (1959). Samuel Krislov (1963) produced a more extensive history that welcomed the change in the amicus from a disinterested friend of the court into an advocate for social and political interests. Ernest Angell (1967) provided an analytical extensive account of the amicus. He attributed the growth of amicus activity in the US courts to the complexity of American public law, the law of federalism, and the mobilization of interest groups around the courts. He argued that the ACLU, appearing as an amicus, had given the Court the critical arguments it endorsed in leading criminal and privacy rights cases of the 1960s like Mapp (1961) and Griswold (1965). By taking the amicus seriously as an object of legal study, these scholars not only drew attention to the achievements of interest group litigation and the role of the amicus, they also helped legitimate its use as a mechanism for interest advocacy.

When Nathan Hakman questioned how often interest groups appeared as amici (1966, 1969), scholarly interest waned and American scholars did not return to the comprehensive study of interest group litigation and the amicus for a decade.⁴ Nevertheless, in the 1980s saw a new interest in the amicus. Karen O'Connor and Lee Epstein sparked this new interest by showing how normal amicus participation had become in the US Courts. Their first study (1981-82) tracked a steady growth in amicus activity during the 1970s. Amici appeared in over half of the Court's noncommercial, full opinion cases, including almost 64% of its non-criminal cases. Their follow up study showed that US Supreme Court judges heard from amici because they found amici arguments useful in formulating their opinions (1983). These studies sparked further research. Caldeira and Wright (1990) showed how widely accessible the US Supreme Court had made itself to a variety of groups and organizations. Amici appearances at the cert stage, they also showed, influenced which the US Supreme Court's agenda (Caldeira and Wright 1988). Robert Bradley and Paul Gardner (1985) showed that both "underdog" and "upperdog" interests had increased their efforts to appear as amici

⁴ Several studies of interest group litigation in particular areas of law reform were published during the 1970s (Meltsner 1973, Sorauf 1976, Kluger 1977, Cowan 1976).

before the US Supreme Court since the 1950s, and that the appearances by underdog interests were growing more quickly. Epstein (1985) and Ivers and O'Connor (1987) showed that conservative interests were using litigation tactics. Karen O'Connor (1980) produced a comprehensive study of feminist public interest litigation strategies and tactics.

Several overall conclusions can be drawn about the American scholarly literature on the amicus curiae. In its early years, this literature noted that interest groups were active in the courts and offered explanations as to why this was so. The literature went beyond simply documenting and analyzing the phenomenon, though. It also offered normative arguments why groups like the NAACP could appear as amici in American courts. Hakman's work diverted attention from interest group litigation for a decade, but by the 1980s interest groups were appearing as amici so commonly in the American courts that scholarly interest resurged. By this time, the transformation of the amicus curiae was widely accepted and no further arguments about its legitimacy were needed. Interest group litigation was common and many kinds of groups were appearing as amici.

Canada and Trudeau's Judicial Reforms

When Pierre Trudeau entered federal politics in the mid-1960s, he intended to expand the policy-making power of the Canadian courts, including the Supreme Court of Canada. He hoped that an expansion of judicial power would aid the cause of liberal law reform and his campaign for a "Just Society". He also hoped it would combat the disintegrative pressures in Canadian politics by strengthening a national institution and expanding rights to French-language services outside Quebec (Knopff and Morton 1985). The Canadian Supreme Court was a quiet court at this point, focused on "textual analysis rather than on policy consequences" (McCormick 2000: 80). It had not been especially important legally or politically before 1949, when the Judicial Committee of the Privy Council (JCPC) served as Canada's final court of appeal. After 1949, the Court showed flickers of interest in a more prominent role but "little in the way of substantial

change” (McCormick 2000: 3). To fulfill Trudeau's hopes, the Supreme Court would have to be reformed.

Trudeau's program of judicial reform had four components. First, Trudeau began appointing judges like Bora Laskin who had experience in law reform and the academic world and who wanted the Court to use its powers more actively. Secondly, the Trudeau government gave the Court control over its own docket, freeing it to focus on law reform. Thirdly, the Trudeau government began financing rights-oriented litigation by individuals, Indian bands and interest groups (Epp 1998, Brodie 2001). Finally, Trudeau pushed for a constitutional bill of rights. The Supreme Court's new judges readily accepted the challenge of Trudeau's reforms. They soon focused the Court's attention on higher-profile public law cases (Russell 1987). They also abandoned the Court's strict adherence to stare decisis, sat more often as a nine-judge bench, wrote fewer seriatim decisions, and considered non-traditional types of evidence. Taken together, these changes turned the Court into an important political institution with a significant role in developing Canada's public law. They also prepared the Court to play a nation-building role when the Charter of Rights was finally adopted in 1982 (Knopff and Morton 1985).

Tate and Vallinder note that higher levels of interest group litigation form part of the global expansion of judicial power (1995). Canada certainly confirms this observation. In response of its response to Trudeau's judicial reforms, the Court began to expand the role of interest groups in its work. It began transforming the role of the intervener to parallel the new role the amicus was playing at the US Supreme Court. Bora Laskin led the Court on this particular issue. In 1973, before he became Chief Justice, the Court allowed women's and Indian groups to intervene in Lavell (1974). This case arose under Canada's legislative Bill of Rights. It challenged the Canadian policy of stripping Indian status from Indian women who married non-status Indian men. Two years later, as Chief Justice of the Court, Laskin solidified the Lavell precedent by allowing several groups to intervene in the first Morgentaler case (1976), a challenge to Canada's abortion laws. These two cases are now recognized as the

beginning of a new approach to intervention at the Supreme Court of Canada (Canadian Bar Association 1991)

These earlier steps in the transformation of intervention were noted and enthusiastically welcome by one leading Canadian legal scholar. Bernard Dickens, a former colleague of Laskin's at the University of Toronto Law School and a strong supporter of Morgentaler's cause, praised Laskin for having

confirmed in Canadian trial practice the feature familiar in the United States' courts of admitting the arguments of non-parties [amici curiae]. He may thereby have pointed the way to the emergence of an authentic North American procedural jurisprudence (Dickens 1977: 666).

American amici, he argued, had a "distinguished twentieth-century history in the promotion of minority interests" (672). Even though most of the interveners in Lavell and Morgentaler ended up on the losing side of those cases, Dickens speculated that the Canadian courts could become "instruments of social justice" if they moved away from the English model of adjudication towards the American model of public interest litigation (666). Drawing heavily on Angell's 1967 article, Dickens sketched out the variety of interests that had appeared as amici before the US courts. He lauded the American Court's handling of Roe (1973), and pointed to the amicus work of the ACLU, the NAACP, the American Jewish Congress and the Catholic Council on Civil Liberties in bringing social justice issues to the courts. He hypothesized that the number of interveners would grow in Canada for the same reason the number of amici had grown in the US. While he concluded that it was "premature" to think that Canadians would adopt American trial techniques, he also argued that the American legal developments would continue to influence Canadian ones. "Canadian law schools refer to materials from the United States ..., their students and staff often obtain their further qualifications from the better law schools of the United States, and the natural force of cultural osmosis, reinforced by the mounting similarities observed between social conditioning factors affecting litigation, may cause Canadian legal perceptions to follow the Canadian economy in falling under an American influence" (Dickens 1977: 676).

After the Lavell and Morgentaler cases, the Supreme Court of Canada continued to experiment with interest group intervention (Brodie 2002). It faced no objections from legal observers. No voices objected to the Court importing American procedural reforms. According to Dickens, the Court had given “the seal of judicial approval” to interest group intervention (Dickens 1977: 674), and he seconded their approval. As the Canadian Court took up Trudeau’s invitation to expand judicial power, it would rely on interest group interveners just as the US Court had relied on interest group amici since the 1950s.

Mobilizing for Charter Litigation

In 1980, the Quebec provincial government’s proposal for a form of independence for the province was defeated in a referendum. Trudeau seized the moment to push forward with a comprehensive program of constitutional reform including a constitutional Charter of Rights. Several interest groups saw the proposed Charter as a way to expand public interest litigation in Canada. The idea of a Charter quickly took hold of the imagination of several social reform groups led by civil libertarians and feminists (Knopff and Morton 1985). These groups became heavily involved in drafting the Charter in 1981, and after the Charter came into effect in 1982 they expected to play a major role as the courts began interpreting the document.

The role of Canada’s feminists in this history deserves special attention. Although the American battles over the Equal Rights Amendment were well known in Canada, the Canadian feminist movement became interested in legal rights and litigation tactics several years after American feminism did (Hosek 1983). Canadian feminists had been unsuccessful in a few litigation battles in the decades leading up to 1980, so they were aware that the courts could harm their interests (Pal and Morton 1986). When the Trudeau government appeared committed to adopting a constitutional Charter of Rights in 1980, leading Canadian feminist groups became involved in the battle over the drafting of the Charter (Hosek 1983). They mobilized a vigorous campaign to influence the wording of the Charter’s equality clauses and were

remarkably successful in having some critical sections amended (Kome 1983, Manfredi N.d., 2000, Brodie 1996).

As Christopher P. Manfredi points out, it "soon became apparent that this success represented only the first stage in the effort of Canadian feminists to re-design Canadian institutions through constitutional modification" (Manfredi 2000: 28). Canadian feminists were well placed to pioneer the use of American public interest litigation strategies in Canada. Only a few weeks after the Charter came into effect, a women's agency funded by the Canadian government sponsored a conference to consider how feminists could follow up on their Charter victories. At that conference, a number of feminist activists and academics explicitly referred to the NAACP as a model for a feminist law fund in Canada (Atcheson, Eberts and Symes 1984: 2). Following this meeting, the agency asked three leading feminist lawyers to study the possibility of establishing a feminist law fund in Canada. Their 1984 report, Women and Legal Action (Atcheson, Eberts and Symes 1984), recommended creating a feminist legal action fund modeled on the NAACP. The longest and most-comprehensive chapter in the report investigated the experience of almost every active "progressive" legal defense group in the United States.⁵ Brown v. Board of Education (1954) inspired many of their recommendations. The Report's chapter on American public interest litigation opens with these words:

Legal activity described as public interest law is best illustrated by describing an actual case. The story of Linda Carol Brown, a young black schoolgirl from Topeka, Kansas, offers a good example (Atcheson, Eberts and Symes 1984: 103).

⁵ The NAACP, the NAACP Legal Defense and Education Fund, the A.C.L.U., the A.C.L.U. Women's Rights Project, the National Organization of Women's Legal Defense and Education Fund, the Women's Equity Action League, the Women's Legal Defense Fund, the Women's Law Fund, the Women's Law Project in Philadelphia, Equal Rights Advocates in San Francisco, the National Women's Law Centre, the Centre for Constitutional Rights, the League of Women's Voters Education Fund, the National Center for Women and Family Law and the National Employment Law Project are all surveyed in the report (Atcheson, Eberts and Symes 1984: 114-144).

After relating Brown's story in some detail, the authors concluded, "The Brown case is a perfect example of how crucial and how effective public interest law can be" (Atcheson, Eberts and Symes 1984: 104). They went on to quote extensively from the U.S. literature on public interest litigation, telling the history of public interest law through the history of the NAACP and the ACLU.⁶ The report relies extensively on Karen O'Connor's book, Women's Organizations' Use of the Courts (1980). It carefully drew on its conclusions about the organization and strategies of successful public interest litigation groups. In the end, the report's authors recommended establishing a women's legal action fund in Canada, and that the fund "should take, as the basis of its method of operation, the systematic approach to litigation developed in the United States" (Atcheson, Eberts and Symes 1984: 166), including interest group intervention. A few months later, a group of feminist lawyers founded the Women's Legal Education and Action Fund (LEAF). The major history of LEAF's early years underlines how the American experience inspired its supporters. LEAF's founders

intended its structure to replicate the best features of American litigation funds and to avoid their worst shortcomings. Impressed by the record of the American organization the National Association for the Advancement of Colored People . . . LEAF's founders concluded that Canadian women could best secure their legal rights in a similar way (Razack 1991: 52).

LEAF is now the most successful interest group in Canada's appellate courts and the most frequent interest group intervener before the Supreme Court of Canada (Morton and Allen 2001; Brodie 2002). It has absorbed and adopted the lessons of the American literature on public interest litigation.

Canada's feminist groups were not the only groups involved in drafting the Charter and mobilizing for Charter litigation. The Canadian Civil Liberties Association (CCLA) also lobbied over the drafting of the Charter, winning stronger versions of

⁶ They referred to Kluger 1977; Council of Public Interest Law 1976; Pinzler et al. 1982; Cowan 1976; Berger 1980; and Vose 1955 to name only a few sources.

several key sections and developing similar expectations about its role in Charter litigation (Knopff and Morton 1985). Once the Charter was in place, the CCLA intended to follow the example of the American Civil Liberties Union and litigate strategically.

As Epp warns (1998) it would be a mistake to overestimate the Charter's independent influence on Canadian judicial politics. Certainly Canadian groups were mobilizing legal activity before the Charter came into effect. Nonetheless, the process of drafting the Charter heightened interest in public interest litigation and raised expectations that the Supreme Court of Canada would accommodate the interest groups who were preparing to be involved in its work.

Legitimizing Interest Group Intervention

The Canadian Supreme Court embraced the potential for judicial power under the Charter. In its early Charter cases, the Court not only set a blistering pace of activism (Morton, Russell and Riddell 1994), it also adopted a "very broad conception of its review powers ... with relatively little opposition" (Manfredi 1989: 319). The adoption of the Charter and the Court's early Charter cases raised hopes among the groups mobilizing for litigation that the Court would open its doors to interest group interveners. However, these hopes were dashed. Non-government groups made more and more applications for leave to intervene at the Supreme Court (from 12 in 1981 to 29 in 1984), but the Court regularly turned them down. While the Court accepted 100% of non-government intervention applications in 1981, it accepted only 52% in 1984 (Brodie 2002). In effect, the Court halted and then reversed its earlier efforts to transform the intervention mechanism. Whether this was because of its new workload problems (Russell 1987) or because it was following a strictly legalistic approach to judicial review (Brodie 2002), by 1985 interest groups were discouraged about the prospects for public interest intervention at the Court.

Interest group activists and legal academics joined to condemn the Court's apparent reluctance to hear from interveners. The very legitimacy of intervention itself was at issue, and the Court obviously did not simply accept the proposal that the Charter

required it to hear from more interest groups. The challenge, then, was to legitimate interest group intervention. Both the activists and the academics took the same rhetorical strategy: pressuring the Court to alter its course by using the American literature on amici to legitimate their demands.

The first volley came from the CCLA. In 1984, disheartened by the Court's repeated refusals to hear its interventions, the CCLA sent the Supreme Court an unsolicited brief that urged the Court to draft new rules for interventions and expand the scope of interest group participation (1984). In so doing it recommended the Court "consult the experience of the common law democracy which has developed the most sophisticated adjudication in the area of constitutional rights, the United States" (1984: 3). The CCLA painted a highly complimentary portrait of amici curiae. The brief cited the American O'Connor and Epstein's 1981-82 study extensively to show how readily the US Supreme Court had accepted interest groups as amici. It referred to Angell's 1967 article to show that the ACLU had used the amicus procedure to influence the Court's decisions in Miranda (1966), Mapp (1961), Poe (1961) and Griswold (1965). The CCLA's message was that the Canadian Supreme Court could expect as much help from interest group interveners as the US Supreme Court had received from amici.

Jillian Welch, then of the University of Toronto, followed up the CCLA's brief with a much-cited 1985 law journal article. The "pluralistic participation of interest groups in Charter litigation is essential to the meaningful delineation of our rights," she wrote (Welch 1985: 204). She cited extensively from Krislov 1963, Angell 1967 and Jones 1979 and 1980 to show that interest group amici had helped the American Supreme Court perform its duties by improving the breadth of information and evidence available to the judges (1985: 230). The promise of a simple, direct and inexpensive route for interest groups to influence the Court that Dickens had detected in Lavell and Morgentaler had been lost. She urged the Canadian Court to return to the approach it had adopted in the mid-1970s.

In early 1986, Kenneth Swan, a CCLA vice-president, again raised these criticisms of the Court's approach. Why had the Court shut off such a bountiful source of

information by refusing to hear interveners, he asked? "Perhaps the best example of the real value of public interest intervention is found in the most sophisticated system of constitutional adjudication in the world, that of the United States" (1987: 39). O'Connor and Epstein's study showed how common amici were in the U.S. Supreme Court. "But," he went on to note, "it is not merely the quantity of interventions which is important in the United States; the quality of those interventions, and the far-reaching impact which they have had is just as significant" (1987: 40). Citing Angell 1967, he argued that Miranda 1966 (a case that was "essentially won," he wrote, by the ACLU as amicus), Mapp 1961, Furman 1972, Griswold 1965, and Bakke 1978 illustrated the utility of interveners to a "mature constitutional adjudication system" (1987: 41).

Philip L. Bryden, an activist of the British Columbia Civil Liberties Association added his own gloss on the argument for the legitimacy of interest group intervention (1987). The Supreme Court ought to accept more interveners, he wrote, because doing so would produce "more informed and, one hopes, better judicial decision-making" (507). The US Supreme Court commonly accepted amici curiae, he noted, citing O'Connor and Epstein 1981-82. He quoted Justice Hugo Black saying that since most US Supreme Court cases involved more than the interests of the immediate parties, "I think the public interest and judicial administration would be better served by relaxing rather than tightening " the rules on amicus curiae participation before that court (507). Amici, Bryden claimed, bring diverse kinds of evidence to the American Court, evidence that allowed the NAACP to challenge racially restrictive covenants and the ACLU to influence the development of the right to privacy citing Vose 1955, Griswold 1965, and Angell 1967. If the Canadian Supreme Court heard from more interest group interveners, it could expect a similar effect.

The campaign to legitimate interest group intervention involved more than a simple argument for Americanization, but it is interesting that the Court's critics repeatedly drew upon American writings about amici curiae to legitimate their demands on intervention. Eventually the Supreme Court's judges reacted to these concerns. They asked the Canadian Bar Association's (CBA) Supreme Court Liaison Committee to

investigate the issue and recommend a new policy on interveners. During the first half of 1986, the CBA Committee received submissions from the CCLA, LEAF, and other groups. All these groups advocated a more permissive policy on interveners, and all of them pointed to the American literature on amici to justify and legitimate their demands. The CCLA filed the same brief it had earlier sent to the Court (1984). LEAF's brief (1986) argued that the Canadian Court could safely expand the participation of interveners because amici had had such a beneficial impact on the U.S. Supreme Court, citing O'Connor and Epstein 1981-82. For its part, the BC Civil Liberties Association also cited O'Connor and Epstein 1981-82 to document how common amici were in the American practice, and cited both Vose 1955 and Angell 1967 to show how useful these submissions were. This flurry of criticism and lobbying did have an impact on the Court. In October 1986, the CBA Committee recommended that the Court accept more interveners (Crane 1986). The Court responded with a new set of rules governing interventions. While some group leaders were concerned initially that the new rules would not improve their lot, these fears eventually proved groundless. The new rules marked the beginning of a new approach from the Court. It now grants a variety of interest groups permission to intervene in almost all instances (see Table 1). Since 1987, it has allowed LEAF and the CCLA to intervene in whatever cases they find interesting. The Court is now as open to interveners in its Charter cases as the American Supreme Court was to amici in the 1970s.

It is impossible to say how much the American literature influenced the Court. Nevertheless, no single judge had a bigger impact on the Supreme Court's approach than the late Justice John Sopinka, and Sopinka was sympathetic to the arguments about the need for more interest group interveners. He spoke publicly about the issue just before he was appointed to the Supreme Court in 1988. "There can be no doubt," he wrote, "that the Charter has swept Canada into a new era of judicial activism" (Sopinka 1988: 884). He argued that this new activism required much broader participation from interest group interveners. Sopinka echoed the arguments of the Canadian academic and advocacy communities by drawing on the American literature about amici to justify

his views. He reiterated Krislov's argument (1963) that as the complexity of the caseload at the U.S. Supreme Court increased so did its need for amici. Citing O'Connor and Epstein's 1981-82 article, he noted that interest group amici are common at the U.S. Supreme Court. He specifically cited the concerns of the BC Civil Liberties Association, the CCLA, and other groups. Therefore, when he took his seat at the Court, he was well placed to establish new legal doctrines in the area. He was familiar with the American literature on amici curiae, and had firm ideas about how the Canadian Supreme Court ought to move in the area. As a member of the Supreme Court bench, he wrote a series of rulings that have recast the Court's rules on intervention. In each ruling, he broadened the ground for interest group intervention time and furthered the transformation of the intervention mechanism (Brodie 2002).

Conclusions

The early American literature on the amicus curiae, exemplified by writers like Vose, Peltason and Barker, tried to legitimate as well as describe and venture explanations for the transformation of this procedural mechanism into an avenue for interest group pressure. Canadian scholars and interest group leaders in turn used this literature, and the later American writings on the amicus, to legitimate their plans to change the intervention mechanism. The American literature on the transformation of the amicus not only inspired but also helped justify a parallel transformation in Canada.

The American literature on public interest litigation, at least the literature from the 1950s and 1960s, seems to have created a powerful mythology. This mythology, of the "heroic" amicus battling for disadvantaged groups in society against oppression and injustice, resonates in other countries as well as it resonates in the US. Tate and Vallinder (1995) may understate the influence of American constitutional expertise when they note how American scholarship on the courts and judicial review has "made an impression" in other countries.

This mythology is, of course, embedded in a deeply political story. The early American writers surveyed here were interested in amicus activity of a particular

political flavor: that of the NAACP, ACLU and other groups of a distinctly liberal and reformist bent. The “heroic” amicus was the friend of social justice and a helper to the Warren Court. The mythology that arises is a story of progress and triumph. The later American research of the 1980s partly corrected the political balance of the scholarship. Conservatives, law-and-order types and a range of other political interests were active in the courts and used public interest litigation techniques to help other kinds of causes.

Those who brought the American experience to bear to change the Supreme Court of Canada’s approach to intervention were attracted to the American experience because of, not in spite of, the story’s political flavor. Dickens, Welch, and the others involved in the Canadian debate repeatedly pointed to the work of politically liberal and progressive amici as the sort of work the Canadian Court should encourage. They never once referred to the other causes that appeared as amici. They wanted to follow in the steps of the NAACP and the ACLU, not Americans for Effective Law Enforcement or conservative public interest litigation groups. Their objective was not simply to legitimate interest group intervention per se, or even simple judicial activism, but judicial activism in the pursuit of the kinds of ends the Warren Court is often credited with having advanced (Rosenberg 1991).

It is possible, then, that the American literature on public interest litigation and judicial review is so influential abroad because of the political story embedded in it. As one Canadian lawyer put it, *Brown v. Board of Education* was “such a moral supernova in civil liberties adjudication that it almost single-handedly justifies the exercise” of judicial review (Gold 1982). Constitutional ethnography faces the challenge of being aware of this political dimension to the attractiveness of American-style public interest litigation and constitutionalism. The uniqueness of the American experience does not hurt its exportability. It helps.

Table 1: Non-Government Applications for Leave to Intervene, 1975-1990

Year	Applications	Success Rate
1976	0	-
1977	0	-
1978	0	-
1979	10	60%
1980	9	78%
1981	12	100%
1982	16	63%
1983	26	69%
1984	29	52%
1985	11	18%
1986	10	50%
1987	21	95%
1988	41	90%
1989	51	92%
1990	28	82%
1991	104	93%
1992	27	81%
1993	56	96%
1994	58	90%
1995	56	93%
1996	113	95%
Total	264	77%

Source: Supreme Court Bulletins, 1976-1984, Supreme Court News, 1985-1990.

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