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CHARTER LITIGATION AND THE POLICY PROCESSES OF GOVERNMENT: A PUBLIC INTEREST PERSPECTIVE[©]

BY ELIZABETH J. SHILTON*

As a member of the private bar, I am not involved in government. However, as a long-time member of the Women's Legal Education and Action Fund's¹ National Legal Committee and as a litigator in *Charter*² matters on behalf of LEAF and other equality-seeking groups, I am directly involved in calling on government to respond to a variety of *Charter* challenges. From that perspective, I have frequently had occasion to reflect critically on the role of the *Charter* in the policy processes of government.

LEAF was born officially on 17 April 1985, the day section 15 of the *Charter* came into effect. Its role is to develop and implement a coordinated national strategy for litigation designed to realize the *Charter's* promise of equality rights for women. It carries out that mandate through its National Legal Committee, which selects test cases for sponsorship and provides strategic direction for them. Test cases are chosen for their precedent-setting value in developing an equality jurisprudence of benefit to all Canadian women, including those whose lives are shaped by multiple disadvantages. I have chaired the National Legal Committee for a number of years and have observed very closely the role of government in addressing the *Charter* issues and concerns of

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¹ Hereinafter LEAF.

² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

equality-seeking groups, including LEAF. This paper does not represent the "official" views of LEAF on these issues. The following is my own set of considered reflections on government in its role as litigator of *Charter* issues.

First, let me venture some observations on the role of *Charter* litigation in the overall process of social change. The early debates about whether or not Canada should have an entrenched *Charter of Rights and Freedoms* focused to a significant extent on the legitimacy of any species of judicial supremacy within our political tradition. Voices from all points on the political spectrum made themselves heard in that debate. Groups that advocated fundamental social change were perhaps less concerned about the *legitimacy* question *per se*, than about the more instrumental version of the same question, the *efficacy* question. In other words, such groups were concerned about whether an entrenched *Charter* would hasten social change or whether it would prove to be an undesirable fetter on such change.

The *Charter* is obviously with us. No significant voice in the current constitutional debate suggests that the *Charter* should be repealed or that the fundamental relationships it establishes between legislature and courts should be altered. The question for equality-seeking groups, however, remains whether or not using the *Charter* is an effective tool for social change. From this very practical perspective, there persists a strong anti-*Charter* bloc, arguing: (1) that litigation itself is a man's game, played by men's rules in which women's voices cannot be heard; (2) that litigation is inefficient as a tool for social change because it drains money, energies, and resources that could be better deployed on other strategies; and (3) that litigation is reactionary because it fosters the illusion that real change is possible within existing social power relations and political structures.

All these arguments are worth listening to, and they must be deeply pondered and carefully weighed by feminists who believe that fundamental social change is a necessary precondition to the achievement of a sex-equal society. For feminists to adopt litigation as the only strategy for social change, or even as the main strategy, would be, self-evidently, a strategic error. The fact that LEAF is an organization dedicated to litigation should not mislead anyone into thinking that the Canadian women's movement has opted for litigation over other strategies for social change, or even that the particular feminists who founded and have been involved in LEAF value litigation over other

strategies. Litigation is simply one strategy among many. LEAF is often referred to as "the litigation arm of the women's movement," but it is not the sum total of the women's movement by any means. The continually evolving, consultative, cooperative processes for case development and case management, which LEAF pioneered, are an important component of LEAF's recognition of the limitations of litigation as a tool for equality-driven social change.

But even those who are not prepared to grant proactive litigation an important role in social change recognize that the women's movement cannot abjure the *Charter*. The *Charter* will not abjure us. Many of the reforms and social programmes equality seekers have achieved by using other strategies available in the political process have been and are currently being challenged under the *Charter*. In many recent Supreme Court of Canada *Charter* cases, we have witnessed an historic clash between liberal individual rights models for *Charter* interpretation, and more purposive, substantive models, which take account of distinctive Canadian traditions of collective and communitarian values. The women's movement cannot afford to let these cases, many of them involving governmental initiatives crucial to the status of disadvantaged groups, be decided without attempting to ensure that the equality values at stake are fully recognized, and that the impact of the developing jurisprudence on the interests of disadvantaged groups is fully understood and taken into account in the decision-making process. Thus LEAF, often in coalition with other groups, has intervened in a number of cases in the Supreme Court of Canada. In some of these cases sex equality was not directly in issue, but law of unparalleled significance to women's equality rights was made.³

The development of *Charter* litigation has thus compelled participation. In many *Charter* cases, as was anticipated in the early days of the *Charter*, equality-seeking groups are the challengers of governmental action. In such cases, these groups litigate to force government to address directly the issues raised by the litigation, to examine government policies, and to bring them into line with *Charter* standards. In other cases, however, as was *not* so clearly anticipated, equality-seeking groups are intervening on the side of government to support equality-promoting legislative initiatives, which are under attack

³ Two important examples are *Andrews v. The Law Society of British Columbia*, [1989] 1 S.C.R. 143 and *R. v. Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

from other individuals or constituencies in the community. In these latter cases, what equality seekers ask of government is that it mount a proper defence, frame and put forward with conviction the right section 1 evidence and the right equality-based arguments in order to influence the jurisprudence in a direction that will allow equality values to flourish.

How has government performed in *Charter* litigation affecting equality rights? In June 1991 I attended a national symposium on Women, Law and the Administration of Justice, hosted by The Honourable Kim Campbell. The symposium was designed to grapple in very practical ways with the problems facing women in the law and in the legal system. While there was considerable criticism of the "by invitation only" approach to community representation, the symposium was attended by women representing a significant cross-section of Canadian organizations dedicated to women's equality.

At that symposium, it was the consensus of equality-seeking groups involved in litigation against the federal government that government's record in dealing with *Charter* issues, which had entered the court system, was disgraceful. There is little evidence that litigation of this sort is ever seen as a trigger for policy review. There is no sense of special governmental responsibility for fostering and promoting *Charter* rights invoked through litigation. There is no discernible attempt to spare the purses of public interest groups by making voluntary disclosures, limiting discoveries, or consolidating issues. To speak directly from LEAF's experience, the federal government's litigation style is comparable to that of any long-pursed, cut-throat corporation hoping to bankrupt the opposition before the case ever gets to trial.

It has always been mysterious to those of us on the outside how government sees the "instructions" process. Who "instructs" counsel? Whence comes the policy direction that guides case management? From an outsider's perspective, it often seems that the only *policy* decision that is ever made about some of these cases is whether to defend or not. Once that decision is made, the file simply becomes part of a government litigator's case-load, and the government litigation juggernaut rolls into motion. Sometimes even the decision to defend seems to be made at an administrative level rather than at a policy level. There is little evidence that anybody ever pauses to reflect on the merits of either the case or the political judgment involved in the decision to defend.

To a group like LEAF, which operates on the recognition that even the smallest case management decision can have policy implications, this seems like irresponsible "lawyering." It also seems very much like a deliberate strategy to disempower equality-seeking groups and maintain control of *Charter* policy review solely in the hands of government.

There is great irony in all this. LEAF, like many other equality-seeking groups, gets much of its funding for litigation from public sources. Governments attracted favourable publicity in the early days of the *Charter* by giving money to equality-seeking groups to sue the government. Unfortunately, governments are slowly draining that money away through litigation strategies designed to make sure it doesn't go very far.⁴

The Ontario government, for example, established a million-dollar litigation fund for the use of LEAF in *Charter* litigation. Estimating conservatively, *one* major systematic case could cost that much, including working with plaintiffs on both fact issues and legal theory, legal research, commissioned fact and social science research, case development, consultations with affected constituencies, discoveries, motions, expert witness fees, and many long days of trial. LEAF has several cases now on its roster that could reach that magnitude.

At the Justice Minister's conference, equality-seeking groups put forward to Kim Campbell a specific challenge to review personally all cases in which her department was involved in defending governmental action against equality challenges, and to personally assure herself that the litigation was being conducted in accordance with the government's stated commitment to promoting the equality of disadvantaged groups. She accepted that challenge, and undertook to make the review. The resolution that was put forward at the symposium on this issue also called upon the Minister of Justice to seek similar commitments from her provincial colleagues. We await results.

Equality-seeking groups involved in litigation have generally found governments unresponsive when their legislation, policies, and practices are challenged in court. Predictably, governments are

⁴ The federal government programme for funding equality rights litigation, the Court Challenges Program, has now been cancelled. This programme had been heavily relied upon for litigation by equality-seeking groups raising challenges involving federal programmes. Ironically, one of the stated justifications for the cancellation of the programme was that it promoted adversarial rather than co-operative approaches to addressing equality issues.

somewhat more responsive when such groups are on the same side of a case. This is happening with more and more frequency as the shape of *Charter* litigation develops and changes in this country.

Equality rights occupy a different historical and jurisprudential place in the Canadian legal picture than do many other types of *Charter* rights, particularly those rights thought of as political rights. Early *Charter* decisions discussed at some length the nature and source of rights like freedom of expression and freedom of association. Generally, courts accepted the view that these rights pre-existed the *Charter* in Canadian law, being fundamental to a free and democratic society. Whether these are seen as "rights" or as "freedoms," courts, at the level of conceptualization, preferred to deal with them as "freedoms," and saw their role as ensuring that governmental action infringed on these freedoms only within those reasonable limits justifiable pursuant to section 1.

According to equality-seeking groups, equality rights fall into a different conceptual category. Equality rights as well as political rights are recognized in the *Charter*. It is clear on almost any definition of equality, however, that equality does not exist in Canadian society. It is a goal to strive for, and not an existing state to be preserved. While some rights may legitimately be seen as best protected by an absence of government regulation, the promotion of equality requires governments to take positive action to bring about social change. If disadvantaged groups are to achieve substantive equality in our society, they will require aggressive assistance from governmental action, by way of both positive law and social programmes.

If we look at equality rights from this perspective, it ceases to be surprising that *Charter* challenge to legislation so frequently comes from the socially advantaged, or that equality-seeking litigation groups like LEAF are so often on the side of governments in defending legislation designed to benefit disadvantaged groups. As an instrument to promote equality for the disadvantaged, section 15 is getting a far more vigorous workout as a shield than as a sword.

If disadvantaged groups must look to government both to implement programmes to promote and realize *Charter* equality values, and then to defend those programmes in the courts from challenges based on notions of formal equality, amongst other attacks, there is a very high premium on proper legislative drafting, on proper *creation* of legislative history leaving no room for doubt about legislative intent to

promote equality, and ultimately, on proper litigation strategies to defend legislation against attack. Part of the responsibility of government in responding to the needs and interests of the disadvantaged will be to legislate to promote equality in ways that will withstand *Charter* attack.

Much of the government's work in this area will revolve around a sensitive, policy-oriented approach to section 1 of the *Charter*. The Supreme Court has now developed two interpretative themes in its approach to the role played by section 1 that are important to this discussion. First, the Court has said that it will take a different and more flexible approach to the balancing of rights and interests under section 1 where interests other than solely those of the state are being protected and promoted by the legislation under attack. In particular, it will allow the legislature more scope to balance the claims of competing groups where the rights of vulnerable groups are at stake.⁵

Second, the Court has said that legislation designed to promote and enhance equality rights is entitled to special protection under section 1. Specifically, the Court has said that "in light of the *Charter* commitment to equality, and the reflection of this commitment in the framework of section 1, the objective of the impugned legislation is enhanced insofar as it seeks to ensure the equality of all individuals in Canadian society."⁶

Both these jurisprudential trends, if they can be called that, show some promise that the Court will foster, perhaps even mandate, a positive role for legislatures in the promotion of equality rights. Certainly this approach to section 1 resonates with a judicial deference that is entirely absent from discussions of the role of positive law in areas where the proper role of government is more often seen as one of non-intervention. But if that promise is to be realized in ways meaningful to disadvantaged groups in Canada, government must take up the challenge to legislate energetically to promote equality rights, at the same time as it lays careful constitutional foundations for the defence of this legislation.

In the area of equality rights, governments that claim a commitment to promoting the equality of disadvantaged groups should

⁵ *Attorney-General of Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927 at 990 [hereinafter *Irwin Toy*].

⁶ *Keegstra*, *supra* note 2 at 756.

be reflecting not on the constraints of the *Charter* for public policy, but on the positive mandate provided by the *Charter* for governmental initiatives to reduce inequalities in Canadian society, and to *use* law to provide *equal* benefit and protection of all law, including all *Charter* protected rights and freedoms. Governments should also reflect on the fact that equality-seeking groups will be looking to government not just to deliver equality, but to deliver equality in constitutionally defensible ways, drawing on the wisdom of cases like *Keegstra* and *Irwin Toy* to buttress equality legislation with purpose and intent evidence that can claim constitutionally enhanced section 1 protection.

It is my view that to date governmental response to *Charter* litigation brought on behalf of equality-seeking groups reflects a very deeply entrenched resistance to important *Charter* values. We are told that governments, both in their political and in their bureaucratic manifestations, have accepted that the *Charter* is here to stay as a constraint on governmental action. This may be the case. But this acceptance appears to be premised on a vision of the *Charter* as simply an instrument governing relations between governments and courts. Governments see the *Charter* as compelling them to share power with the courts, but not to share power with the people. In particular, they do not see equality-seeking groups who use litigation as a tool as part of a *Charter*-inspired democratic process. *Charter* litigators are treated as aliens to the democratic process, using illegitimate tactics to wrest more than their fair share from the body politic for the interest groups that they represent.

This attitude must change if the *Charter* is to become real to the people to whom it was given. Just as the *Charter* is fundamentally different from other laws, *Charter* litigation is fundamentally different from other kinds of litigation. It requires a different, more humane, more thoughtful, and altogether less adversarial kind of response from government. I am hopeful that opportunities of the sort provided by this conference for representatives of government and public interest groups to discuss these issues will be more plentiful than they have been, and that through these kinds of discussions more fruitful and positive approaches to *Charter* litigation may be found.