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# THE IMPACT OF THE CHARTER ON THE PUBLIC POLICY PROCESS AND THE DEPARTMENT OF JUSTICE<sup>©</sup>

BY MARY DAWSON\*

## I. INTRODUCTION

In the ten years since the proclamation of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> governments at all levels have faced a period of rapid change. Not only has the *Charter* resulted in changes to many laws, it has also changed the way governments operate and introduced a substantial element of uncertainty in the operation of government programmes. This paper will discuss the impact of the *Charter* on the public policy process from the perspective of the federal Department of Justice. In particular, it will look at the changing role of the Department of Justice in the policy-development process. It will also touch briefly on some of the substantive legal issues at the forefront of public policy decision making with which we continue to grapple.

## II. POLICY DEVELOPMENT AND THE CHARTER

It has taken considerable effort for policy planners in the federal government to come to grips with the *Charter*. Equally, there has been a “working-in” period for the Department of Justice.

In the beginning, the *Charter* presented a host of value-laden policy issues. The lack of certainty about how provisions of the *Charter*

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<sup>1</sup> Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter *Charter*].

applied in particular cases made those who had to rely on the Department's advice somewhat uncomfortable. Not surprisingly, policy planners, who initially lacked familiarity and comfort with the *Charter*, resisted seeking legal advice; there was even a bureaucratic tendency to wish the *Charter* away.

Lack of certainty regarding the *Charter's* application presented the Department of Justice with serious challenges. Providing legal advice to guide policy development in such an environment was frequently difficult. Initially, the Department found itself in a reactive mode as *Charter* challenges were filed and court decisions released. The government's policy agenda was often driven by specific cases. A series of significant *Charter* cases, such as *Singh v. Minister of Employment and Immigration*<sup>2</sup> and *R. v. Schachter*,<sup>3</sup> emphasized the serious burden on the government.<sup>4</sup>

The Department's initial experiences served as a catalyst for some serious thinking about the handling of *Charter* issues. It had to re-examine its role as legal adviser to the government and had to reassess when and how to provide legal advice. Similarly, other government departments and agencies had to reflect upon how legal issues, particularly *Charter* issues, should be addressed in the policy-development process.

The result was a growing recognition that the Department of Justice would operate more like a central agency of government, such as the Privy Council Office or Treasury Board. At the same time, the Department was moving toward what it calls "management of the law." "Management of the law" represents the Department's efforts, in all areas of law, including the *Charter*, to be proactive, to stay on top of legal trends, and to provide legal services that enable the government to deal with legal issues in an orderly and organized way.

Outside the Department of Justice, other departments have recognized the need to ensure that *Charter* considerations are integrated into the policy-development process. The Deputy Minister of Justice has urged government departments to consult their legal advisers during the early stages of policy development so that legal issues, especially

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<sup>2</sup> [1985] 1 S.C.R. 177 [hereinafter *Singh*].

<sup>3</sup> (1992), 93 D.L.R. (4th) 1 (S.C.C.) [hereinafter *Schachter*].

<sup>4</sup> See Part IV below for a discussion of this issue.

*Charter* issues, are identified and analyzed before policy options are fixed. The Department has devoted considerable effort to deciding on the most appropriate and consistent means by which to provide advice to policy makers most in need of it.

In 1991, the Clerk of the Privy Council, at the request of the Department of Justice, wrote to all deputy ministers outlining steps to ensure that *Charter* issues were identified and assessed before new policy proposals were considered by Cabinet. He specifically asked them to involve their legal advisers early in the policy-development process so that a *Charter* analysis could be reflected in the Cabinet document. The analysis had to include an assessment of the risk of successful challenge in the courts, the impact of an adverse decision, and possible litigation costs.

Justice lawyers in the departmental legal service units are the first to be involved in the identification of *Charter* issues during the policy-development process. However, the Department has devoted considerable attention to educating policy managers in the various departments on the kinds of issues that raise *Charter* concerns. Policy planners are often aware that they must seek legal advice from Justice's departmental legal officers, their point of first contact.

The Department of Justice has made efforts to assist the frontline Justice lawyers to develop *Charter* issues and define them to their clients. As one of its initial responses to the *Charter*, the Department established the Human Rights Law Section in the Public Law Sector. There are more than twenty lawyers in this section whose duties include research, policy work, and offering advice and litigation support in matters relating to the *Charter* and other human rights statutory instruments. The Human Rights Law section, which serves as a centre of *Charter* expertise for Justice lawyers and their clients, provides legal support to the Department's frontline lawyers.

In addition to the general duty of the Minister of Justice Attorney General to provide legal advice to government departments, the Minister has certain obligations under the *Department of Justice Act*<sup>5</sup> and the *Statutory Instruments Act*.<sup>6</sup> Amended in 1985 by the *Statute Law*

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<sup>5</sup> R.S.C. 1985, c. J-2.

<sup>6</sup> R.S.C. 1985, c. S-22.

(*Canadian Charter of Rights and Freedoms*) Amendment Act,<sup>7</sup> these statutes require the Minister to examine all government bills introduced in the House of Commons, as well as most regulations, for consistency with the *Charter*, and to report any inconsistency to the House. The Minister has not had to make such a report to the House of Commons but the very existence of these obligations has created a very powerful check on the policy process. The Minister's obligation cannot be ignored either by Justice lawyers or by their clients when they are assessing proposed legislation and regulations for consistency with the *Charter*.

In assisting the Minister with her obligations, Justice lawyers must carefully consider the existing case law under the *Charter*, the policy rationale for the proposed law, and whatever evidence there is to support the need for the law. They are not expected to give their approval to some aspect of proposed legislation or regulations because it might stand up on the narrowest reading of the *Charter*. Nor can they let what they perceive to be important social and economic goals overcome their sense of what is acceptable under the *Charter*. They have a responsibility to consider the overall public interest in the legislation or regulations, and must not raise unnecessary obstacles to the achievement of important policy goals. In this vein, they must also be careful not to pander to a particular group's interests at the cost of the overall public interest.

The decision by Justice counsel whether to take the position that a proposed law is inconsistent with the *Charter* is not an easy one. Characterizing the issues and thus determining which side of the prism to look through is often the most difficult part of the process. The Justice lawyer will consider whether there are good arguments that may be advanced for the *Charter* validity of the proposed law and then must predict the probable outcome of a *Charter* challenge. The degree of risk that will compel the advice that a proposed law is inconsistent with the *Charter* is difficult to quantify. Nevertheless, Justice lawyers have to be prepared to give a frank and realistic assessment and to state when a proposed law is not likely to be acceptable.

There are no set procedures to determine how *Charter* issues are resolved. Part of the role of the legal adviser in the policy-development process is to ensure that they *are* resolved. There are a number of ways

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<sup>7</sup> R.S.C. 1985, c. 31 (1st Supp.).

in which this can be accomplished. For the most part, serious *Charter* issues are resolved by officials before policy proposals are submitted to Cabinet. Usually this occurs either informally in meetings between officials, or after the department developing the policy receives a legal opinion. If a *Charter* issue is not resolved earlier, the Minister of Justice may be invited to express her views to the appropriate Cabinet committee.

The *Charter* has involved the Department of Justice in the policy-development process of its client departments to an extent that would previously have been considered unnecessary and inappropriate. This has been difficult both for the Department's lawyers and clients. Lawyers are more used to providing legal advice than creating new policy options. Clients quite naturally fear that lawyers, under the guise of offering legal advice, will either divert them from their objectives or take over some of their responsibilities for policy development.

Justice lawyers' involvement in policy formation has given rise to new responsibilities for them. They must determine how best to give effective legal advice at the early stages of policy development, when policy proposals, with a number of options under consideration, are likely to be very vague. Clients look to the Department of Justice for a broad-based approach to *Charter* problems. Working in the policy-formation process can be time consuming and very frustrating for lawyers used to working within well developed policy schemes.

As outlined above, the *Charter* has affected the development of policy options. Legal considerations have become as important as fiscal considerations for policy development. It is becoming clear now that the legal adviser is an important member of the policy-development team and that *Charter* implications of policy options need to be considered at an early stage. Clearly the *Charter* does foreclose certain options to governments. In many instances, though, the law may not be clear enough to require an automatic rejection of policy options. Or, the facts and evidence that support a justification under section 1 of the *Charter* may not be sufficiently well developed or identified to permit policy options to be decided. The legal adviser has a role in helping the client understand the requirements of the *Charter* as it applies to a particular case.

The *Charter* has been a very significant consideration in policy development in the areas dealing with social benefits, criminal law, and refugee determination. The difficulty for lawyers is that in all of these

areas, social and economic policy considerations play a very important role in legal analysis. Lawyers, therefore, have had to work closely with experts in these fields to develop with them an understanding of the effects of and justifications for various policy options.

### III. CHARTER LITIGATION

Despite its efforts to scrutinize legal issues at the policy-development stage, the Department of Justice has found and will continue to find itself in court, as individuals and groups take different views of the *Charter's* consistency with the policies and practices of the government. Here, too, the Department is working diligently to ensure that it articulates a coherent understanding of the *Charter*, one that takes into account broad public policy considerations.

The Department of Justice has a well developed internal process for the consideration of legal issues. It is not a rigid system, but a fairly flexible and diversified one, with mechanisms for resolving difficult and important legal questions. These mechanisms include the Department's litigation and *Charter* committees. These committees are composed of senior lawyers who review *Charter* litigation and the arguments to be made on behalf of the Attorney General of Canada.

To enhance its capacity to manage *Charter* litigation, the Department has also taken steps to ensure that its members are better informed about *Charter* cases. It now consults much more widely within government before making decisions. Frequently, departments other than the one responsible for the challenged legislation are interested in the litigation and the position that will be advanced before the courts.

There is a tendency on the part of officials to want to defend legislation that is attacked under the *Charter*. However, proper "management of the law" requires officials to scrutinize carefully the legislation and the government's position in the litigation, taking into account recent developments in the fast-paced world of *Charter* law. The government is prepared to recognize that legislation may not pass *Charter* muster. For example, before the last federal elections, the

government conceded that denying judges<sup>8</sup> or persons with disabilities<sup>9</sup> the right to vote was a violation of the *Charter*.

#### IV. INTERPRETING THE CHARTER

The *Charter* is still in the early stages of interpretation. Part of the difficulty for legal advisers in the policy-development process is that they must frequently give advice within the narrow context of a single legal decision. Broad approaches to *Charter* rights for use in policy development are difficult to develop because of a lack of jurisprudence interpreting many of the *Charter* provisions.

Within the government there is growing appreciation that one cannot wait for a court decision in order to resolve *Charter* problems. An area of particular concern pertains to benefit programmes, which have been challenged in a wide range of cases in the courts throughout Canada. After *Schachter*, the difficulties in attempting to develop a policy immediately after the child-care provisions of the *Unemployment Insurance Act*<sup>10</sup> had been found to be inconsistent with the *Charter* became apparent. The pressure on the federal government not to take anything away from any of the parties who had benefitted from the decision of the trial division of the Federal Court in *Schachter*<sup>11</sup> tended to constrain the government's policy options.

One of the criticisms most frequently made within government pertains to the cost of ensuring that laws and government programmes are consistent with the *Charter*. An example frequently cited to illustrate the cost of ensuring *Charter* consistency is the hundreds of millions of dollars spent to revamp Canada's refugee determination system after *Singh*.<sup>12</sup> Costs are a factor in determining how the government should

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<sup>8</sup> *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.).

<sup>9</sup> *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.).

<sup>10</sup> S.C. 1970-71-72, c. 48.

<sup>11</sup> It was held at trial that the distinction between natural and adoptive parents under the *Unemployment Insurance Act*, *ibid.*, was discriminatory, contrary to section 15(1) of the *Charter*. Strayer J. considered that the appropriate remedy was not to strike down the adoptive parents' benefits but to extend them to the natural parents ([1988] 3 F.C. 515 (T.D.)).

<sup>12</sup> In *Singh*, *supra* note 2, it was held that a refugee claimant was entitled to an oral hearing for the determination of refugee status.



comply with *Charter* rights. The Supreme Court of Canada has recognized in such cases as *Irwin Toy Ltd. v. A.G. Quebec*<sup>13</sup> that governments must often allocate scarce resources among important social goals, a factor to be considered when the court measures social legislation against *Charter* standards and considers the issue of justification under section 1.

A number of recent cases have raised questions about the government's capacity to target social benefits to certain groups. In *Schachter*,<sup>14</sup> the government did not appeal the trial judge's finding that the denial of unemployment insurance benefits to natural fathers was a violation of the *Charter*. The question that the government raised in the Supreme Court of Canada involved the interrelationship between the courts and Parliament in solving equality problems. In the same case, the Federal Court attempted to resolve the problem by extending the adoptive parents' benefits to biological parents. This was not the only way to solve the problem. In fact, Parliament had adopted a less costly way in the meantime.<sup>15</sup> This case squarely raised the question of the government's capacity to allocate scarce resources among various groups.

Given the limited resources available, the federal government is naturally concerned about its capacity to solve social problems in a manner that is compatible with *Charter* requirements. It is particularly wary of providing social benefits in circumstances where, because of subsequent *Charter* decisions, its liabilities may turn out to be greater than anticipated.

These are some of the issues with which the Department of Justice is wrestling and on which we provide some assistance to the courts in developing our understanding of the *Charter*. At their core are fundamental questions about Parliament's responsibility for developing and giving expression to public policy, the role of the courts under the *Charter*, and the scope of the *Charter* itself.

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<sup>13</sup> [1989] 1 S.C.R. 927 at 990. See also *McKinney v. University of Geulph*, [1990] 3 S.C.R. 229 at 286 and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 527.

<sup>14</sup> *Supra* note 3.

<sup>15</sup> See the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, s. 20; S.C. 1990, c. 40, s. 14.

## V. CONCLUSION

The *Charter* has pulled the Department of Justice into the mainstream of decision making in government and has posed major challenges for the Department.

These challenges include the reorganization of the Department's legal services so that *Charter* issues are adequately considered at all stages of the policy-development process. Justice lawyers must be prepared to provide sufficient information on the requirements of the *Charter*. However, the impact of the *Charter* has meant that the responsibilities of Justice lawyers cannot end there. Often, Justice lawyers have to go further to deal with complex and difficult policy issues; they have to assist other departments in identifying their options for resolving *Charter* issues.

The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.

As time goes on, *Charter* assessment is expected to become even more thoroughly integrated into the policy-development process. As the *Charter* evolves, it is anticipated that the government will get better at finding its way through *Charter* issues on the road to achieving important public policy goals.

