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THE IMPACT OF THE CHARTER OF RIGHTS AND FREEDOMS ON POLICY DEVELOPMENT IN THE NORTHWEST TERRITORIES[©]

BY BERNARD W. FUNSTON*

I. THE POLICY ENVIRONMENT

It is common knowledge that the Northwest Territories is geographically vast and that it is populated by only fifty-eight thousand people.¹ The seventy-five or so communities are small in population and relatively isolated due to the absence of any extensive road or rail network. The population is still largely rural. Most communities have populations of less than four thousand people, and Yellowknife, with a population of roughly fifteen thousand, has almost one quarter of the entire population of the territory.² Population profiles indicate that at least 35 per cent of residents are below the age of eighteen.³

In addition, the Northwest Territories is the only Canadian jurisdiction in which people of Aboriginal descent form a majority of the

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¹ Bureau of Statistics, Government of the Northwest Territories, (1992) 14:2 Statistics Quarterly 4 at 4.

² *Ibid.*

³ Outcrop, *Northwest Territories Data Book 1990/91: A Complete Information Guide to the Northwest Territories and its Communities* (Yellowknife: Outcrop, May 1990) at 39. This publication states that “[i]n June [1989] ... there were 20,676 children under the age of 17, or some 38 percent of the total population.”

population. Most of the smaller communities and unorganized areas have a high majority of Aboriginal peoples, while non-aboriginal residents reside mainly in the larger centres such as Yellowknife, Hay River, Inuvik, Fort Smith, and Iqaluit. The *Official Languages Act* of the Northwest Territories recognizes English and French, along with six Aboriginal languages, as the official languages of the territories.⁴

These facts alone make policy development in the Northwest Territories challenging in virtually all sectors. The circumstances of this small population spread over a vast territory are anything but homogenous. The services available to residents in an urban centre, in general, far surpass those available in the settlements. The picture is even further complicated by other significant factors. For example, the entire geographical area of the Northwest Territories is or has been subject to comprehensive Aboriginal land claims. The large parts of the western region of the territory are subject to Treaties No. 8 and No. 11 with the Dene.⁵ Parts of the western region are also subject to other, modern Aboriginal claims agreements with the Inuvialuit in 1984 and the Gwich'in in 1992.⁶ The eastern region of the territory is under claim by the Tungavik Federation of Nunavut, which represents the Inuit and has as one of its principal objectives the division of the Northwest Territories into two separate territories.⁷ Final agreement has been reached on this claim, and it now awaits ratification. When division occurs, the eastern territory, to be called Nunavut, would have a population which is more than 90 per cent Inuit.

How does this concern the *Canadian Charter of Rights and*

⁴ S.N.W.T. 1984 (2d Sess.), c. 2, s. 5, as am. by S.N.W.T. 1990, c. 7, s. 4.

⁵ Treaty No. 8 covers a geographic area encompassing northern Alberta and south portions of the Mackenzie River Basin in the Northwest Territories. The Crown and the Aboriginal peoples entered into the treaty in 1899. Treaty No. 11, signed in 1921, covers northern portions of the Mackenzie River Basin.

⁶ Canada, Department of Indian Affairs and Northern Development, *The Western Arctic Claim: The Inuvialuit Final Agreement* (Ottawa: Minister of Indian Affairs and Northern Development, 1984) and Canada, *Comprehensive Land Claim Agreement Between Her Majesty the Queen in Right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council* (Ottawa: Indian and Inuit Affairs Program, 1992).

⁷ Canada, Department of Indian Affairs and Northern Development and Tungavik Federation of Nunavut, *Agreement-in-Principle Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada* (Ottawa: Tungavik Federation of Nunavut and Minister of Indian Affairs and Northern Development, 1990) at 24, art. 4.

*Freedoms*⁸ and policy development? There is a significant interplay in the Northwest Territories between *Charter* values and the collective values reflected in section 35 of the *Constitution Act, 1982*,⁹ which recognizes and affirms Aboriginal and treaty rights. Section 25 of the *Charter* guarantees that *Charter* rights “shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including ... any rights or freedoms that now exist by way of land claims agreements or may be so acquired.” For a majority of the residents of the Northwest Territories, therefore, the Aboriginal rights sections of the *Constitution* are at least as important as the *Charter* guarantees of individual rights and freedoms. This translates into political realities for any government in the Northwest Territories and, consequently, has had a major impact on policy development.

II. REALIZING RIGHTS

A paradox exists in the Northwest Territories. Residents generally seem to be very *rights-oriented*; however, there has been relatively little Aboriginal rights litigation or *Charter* litigation outside of criminal law matters. This can be explained in two ways. First, the majority of the population, which is Aboriginal, tends to look at the Aboriginal claims process as the proper forum for realizing their rights, which are generally founded on the basis of Aboriginal comprehensive claims and self-government aspirations—not on *Charter* values. Second, the non-partisan, *consensus* style of government practised in the Legislative Assembly of the Northwest Territories, where Members of Legislative Assembly all sit as independents, tends to make the legislative and policy processes more accessible and responsive to the concerns of territorial residents. In other words, the political process generally responds relatively quickly to correct legislative or policy initiatives that may be seen as infringing on Aboriginal or *Charter* rights. In the majority of cases, it may be more cost effective for individuals to pursue political rather than litigious solutions to perceived rights

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁹ Being Schedule B to the *Canada Act 1982* (U.K.), c. 11 [hereinafter *Constitution*].

violations. More recently, there appears to have been an increase in the commencement of *Charter* actions to speed up the political process, but there are still relatively few civil actions that culminate in a court determination.

As a consideration in policy making, the *Charter* is important, although perhaps not paramount in a political sense. Government policy makers are continually called upon to balance the individual-oriented values inherent in *Charter* rights with collective Aboriginal rights in a way that can advance the constitutional, political, and economic development in the territories cooperatively.

III. POLICY DEVELOPMENT GENERALLY

Against this background, we can ask more detailed questions about the *Charter* and policy development. Outside of the development of legislation, there is no standard procedure for consideration of *Charter* issues in normal policy development. In key policy areas, such as affirmative action planning, *Charter* analysis is obviously involved throughout the policy-development process.

Structurally, the Department of Justice in the Northwest Territories operates as a centralized service to the other departments. The Department of Justice does not place lawyers in other departments as is the case in some other provincial governments. In the absence of a standard procedure for policy development apart from legislation, the Department of Justice may not be called upon to review all policy instruments for *Charter* issues. At the same time, however, it is well known throughout the government that the Department of Justice operates as the *Charter conscience* of the government, and referrals to the department are not uncommon even in situations where Justice is not otherwise a central actor in a policy-development process.

Like any government, the Northwest Territories has a wide array of policy instruments of which legislation is simply the most formal expression. In the development of most policy instruments, *Charter* considerations are not specifically highlighted in the standard checklist, although they are certainly one of the most obvious elements of the legal review required for virtually all decision papers placed before the Cabinet.

Similarly, when individual departments develop policies to govern their internal operations, they generally seek advice from legal counsel who would then be in a position to raise *Charter* issues if any exist. *Charter* review at this level of policy development is characterized by informal arrangements.

IV. THE CHARTER AND LEGISLATION

The situation is quite different where legislation is concerned. The *Charter* has obviously had a significant impact on the development of legislation in the Northwest Territories. Scrutiny of legislation for *Charter* compliance begins at the very earliest stages of the legislative process. Departments that are planning to bring forward new legislation or amendments to existing legislation must prepare a legislative proposal, which is a standard form document outlining the objectives of the legislation and the policy backdrop. All such legislative proposals pass through the Department of Justice in draft form and are reviewed by an internal committee within the department. At this stage, the policy objectives themselves undergo some degree of *Charter proofing*. The Department of Justice may open a dialogue with the sponsoring department on *Charter* or other legal issues that appear to be within the scope of the legislative proposal.

Legislative proposals are redrafted by the sponsoring department to address any legal concerns raised by Justice and are then transmitted to a committee of the Cabinet called the Legislation and House Planning Committee. Legal advisers to this committee include members of the internal Department of Justice review committee. Therefore, they are in a position to raise any legal concerns that are outstanding, including providing comments as to how the bill should be drafted.

Legislative proposals are then forwarded to the Executive Council, and if accepted, bills are scheduled for a future legislative session. The Legislative Division of the Department of Justice begins drafting the bill in consultation with the sponsoring department. During the drafting process, there is close consultation between the Legislation Division, the Client Department, and the Constitutional Law Division of Justice when any perceived *Charter* issue arises.

The nationalizing impact of the *Charter* can be perceived in the process of developing legislation in the Northwest Territories. It is

natural that, in the preparation of new legislation or amendments to existing legislation, legal counsel will look to other provincial and federal precedents for some guidance. In situations where a provincial or federal government act has successfully addressed a *Charter* issue, territorial legislators tend to adopt, at least in part, the same or a similar strategy.

It is perhaps not surprising that the *Charter* has had a greater impact in certain policy fields in the Northwest Territories. Those policy fields in which *Charter* and Aboriginal issues tend to come together have produced the most challenges. For example, policy making in the fields of education, renewable resource exploitation, language, affirmative action and employment equity, municipal government organization, and territorial electoral boundary issues have raised some of the more difficult policy considerations and choices.

V. CHARTER POLICY AND CHARTER LITIGATION

While the government of the Northwest Territories is very attentive to judicial decisions on *Charter* matters arising elsewhere in Canada, it must at all times be sensitive to the unique policy environment in the Northwest Territories. Generally, the government has been prepared to consider such judicial decisions in a broad fashion while still creating compromises which respect *Charter* rights and which allow the parties to avoid the expensive and time consuming process of testing legislation in the courts. The unique system of consensus government in the Northwest Territories has probably contributed to limiting the number of *Charter* cases that have gone to a final court determination in civil matters.¹⁰

Finally, it should be mentioned that when a territorial statute is challenged there are circumstances where the government is prepared to concede the invalidity of the statute. Such a situation occurred in the case of *Norris v. Demerais*¹¹ where a provision of the *Child Welfare Act*¹² was at issue.

¹⁰ There have been approximately ten since 1982.

¹¹ *Norris v. Demerais* (28 September 1989), (N.W.T. Terr. Ct.) [unreported].

¹² R.S.N.W.T. 1974, c. C-3.

VI. CONCLUSION

The Government of the Northwest Territories has not faced a ground swell of *Charter* litigation since 1982. There have been signs very recently, however, that the threat of *Charter* challenges or the commencement of *Charter* proceedings will become a more popular means of encouraging political action to amend existing legislation. In general, policy makers have been very receptive to *Charter* concerns and have sought to develop compromises, which are appropriate to the unique policy environment that exists in the Northwest Territories. Some of the more formal procedures that are presently in place for *Charter* review of legislation have been outlined above. For policy instruments other than legislation, however, the *Charter* review mechanisms could be characterized as informal. Given the relatively centralized and small bureaucracy in the Northwest Territories, informal mechanisms for *Charter* review at this level of policy development appear to have been adequate if the paucity of *Charter* litigation can be taken as a valid measure of success.

