Citizenship and Citizen Participation

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Thank you for that kind introduction and for inviting me to participate on this panel.

The topic I have been asked to address is "Setting the Agenda of Courts and Tribunals through Funding." This is somewhat of a problematic title—as it implies that the Department of Justice is involved in setting the courts' agendas—a proposition that does not sit well with the constitutional principle of judicial independence.

I have thus decided to rephrase the topic as "whether and to what extent the funding of interest group litigation has had an impact on access to the courts." In examining this question, I will be taking a rather philosophical approach. I would like to first address the rationale for funding interest group litigation. Then I will describe the existing federal funding programs. Finally, I will examine the impact of funding on the range of perspectives heard by the courts. In so doing, I would also like to address the critique, in some academic circles, that funding of interest group litigation is undemocratic.

In my view, funding of interest group litigation is vital to giving a voice to groups that would otherwise not likely be heard before the courts. In this respect, such funding enhances public access and participation before the courts, and is thus consistent with democratic values.

I. A FEW DEFINITIONS—WHAT DO WE MEAN BY AN "INTEREST GROUP?"

The term "interest group" is often used in a narrow manner as applying for example, to lesbian and gay activists, civil libertarians and feminists,[1] to the exclusion of corporate interests and the interests of social conservatives. When used in such a manner, it is suggested that only the former groups pursue interests before the courts; whereas the latter groups are not so involved.

For the purposes of this discussion, when I refer to "interest group," I mean a collectivity of individuals who have come together out of a common interest or purpose. Such groups may include: Aboriginal people, civil libertarians, corporate interest groups, labour groups, equality-seeking groups, victims groups, social conservatives, environmentalists and economic nationalists.

I will focus much of my discussion on interest group litigation in the context of Charter challenges. I will not be addressing legal aid, but I remain open to answering any questions you may have on the subject.

II. SHOULD GOVERNMENT FUND INTEREST GROUP LITIGATION: WHY OR WHY NOT?

Certain academics assert that funding of interest group litigation is undemocratic in that it positions particular interest groups to control the courts' agendas to the exclusion of other members of the public who may reflect majoritarian views.[2] They are also concerned that government support for interest group litigation intensifies existing rights-based rhetoric thereby quelling full discussion, including dissenting views, in Parliament.[3]

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1 See, for example, the types of interest groups included in Morton and Knopff's "Court Party", *infra* note 2.

2 See F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 149-166.

3 *Id.,* at 166.

The concern behind this assertion is the view that courts themselves are undemocratic and not the place for the resolution of often complex questions posed by the Charter. For these authors, Parliament is the preferable venue for debate around social policy issues.

This is one perspective, with which one may agree or disagree. I however view the relationship between Parliament, the courts and interest groups fundamentally in a different way.

In his book, *Democracy and Distrust,* John Hart Ely posits that even in representative democracies, many elected politicians represent majoritarian interests to the disadvantage or exclusion of minority views.[4] Given the natural propensity of politicians to seek re-election, this furthers the tendency to respond to majoritarian interests. While political theorists have argued that majorities are constantly shifting and that minority interests may seek protection through alliances with such shifting majorities, the fact is that, in the political arena, there is a significant imbalance in power, which leaves minority interests vulnerable to exclusion.[5] The courts play an important role in mitigating against such power imbalances by ensuring that minority interests are heard in cases argued before them.

It is unquestionable that litigation and particularly Charter litigation is expensive and would not be a viable option for groups with limited financial resources. Without such funding, it is likely that only those from financially advantaged sectors of Canadian society would be able to seek protection of their interests before the courts. As my co-panelist Arne Peltz has stated elsewhere, "rights are meaningless without real and accessible remedies."[6]

III. WHAT FEDERAL PROGRAMS PROVIDE FUNDING FOR INTEREST GROUP LITIGATION?

There are three main federal programs which provide funds to individuals or groups for litigation before Canadian courts: the Court Challenges Program and two Aboriginal test case funding programs. I will describe these in turn.

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4 J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) at 103.

5 *Id.,* at 135.

6 A. Peltz, "Deep Discount Justice: The Challenge of Going to Court with a *Charter* Claim and No Money" (1997) [unpublished] at 23.

A. The Court Challenges Program

The **Court Challenges Program** is currently administered at arm's length from Government by the Court Challenges Program of Canada, a non-governmental organization located in Winnipeg, which receives funding from the Department of Canadian Heritage. The corporation receives $2.75 million annually. The program remains unique in the world.

The Program was initiated in 1978 to provide funding to individuals seeking to clarify the language provisions contained in the *Constitution Act, 1867.* With the passage of the Charter in 1982, the program's mandate was broadened to include the official language rights contained therein. The program's mandate was further extended in 1985 to cover challenges to federal legislation, policies and programs under section 15 of the Charter, which came into force in April of that year.

In February 1992, the Government abolished the program as part of a large cost-cutting exercise. After strong protest from equality-seeking groups, official language minority groups and individuals from Canada's academic and legal community, the Government announced that it would re-instate the program in 1993. This announcement was made by a conservative Government (Prime Minister Campbell), a fact often overlooked by critics of the program. The program was re-established in 1994.

The program provides financial assistance for test cases of national significance in the areas of official language minority rights and equality rights. The maximum amount of case funding available is $50,000 for the trial level, $35,000 for each appeal and $35,000 for each intervenor. The Equality and Language Panels of the program review funding applications and make decisions on the amounts to be granted. In the 1999-2000 year, the Panels received 174 applications for funding, 131 of which were granted funding.

Some of the more well-known cases that received funding from the program last year include: *Corbiere* (successful s.15 challenge to *Indian Act* provisions that limit voting in band elections to those band members living on-reserve); *Mills* (Charter challenge to *Criminal Code* provisions governing the production of private records of sexual assault victims); *Liebmann* v. *Canada* (successful s. 15 challenge to the Department of National Defence's policy allowing for consideration of cultural, religious or other sensitivities in determining assignments); *Baker* (administrative law challenge to an immigration officer's denial of Ms. Baker's application for landing based on humanitarian and compassionate grounds); *Montfort* (challenge to Ontario

government's decision to close the Montfort hospital); and *Arsenault-Cameron* (minority language rights challenge by French parents in PEI for French language school to be established in their community).

B. Aboriginal Test Case Funding Programs

Apart from the Court Challenges Program, Indian and Northern Affairs Canada (INAC) administers two test case funding programs. Under the "regular" Aboriginal Test Case Funding Program, individuals or entities, private or public, can receive contributions to cover the legal costs of litigating aboriginal issues of any kind, except those relating to the 1985 amendments to the *Indian Act*, which fall under the second program, the C-31 Test Case Funding Program. Under both programs, funding is discretionary.

The "**regular" Aboriginal Test Case Funding Program** has two stated objectives: first, to clarify long-standing legal issues surrounding the interpretation of the *Indian Act* and other legislation, treaties and constitutional instruments; second, to assist INAC in meeting its objectives of fulfilling its legal, statutory and constitutional responsibilities to Aboriginal people. In essence, if the litigation involves important, unresolved Aboriginal-related legal issues of general application to a large number of Aboriginal people, which cannot be resolved outside the courts, funding can be granted. It must be in the interest of both Aboriginal people and the federal government to have the matter resolved judicially.

Under this program and pursuant to a written contribution agreement, a recipient can receive up to $1 million. Funding is available for all stages of the litigation (except for applications for leave to appeal at the Supreme Court of Canada).

As for the second, "companion" program, it stems from the 1985 amendments to the *Indian Act* (Bill C-31), enacted to remove sexual discrimination from the legislation, restore rights lost in the past as a result of such discrimination and provide for Indian bands to assume control of their own membership. The **C-31 Test Case Funding Program** thus targets cases dealing with issues concerning Bill C-31. The rationale underlying this program is quite simple: allow those individuals, mainly women with limited financial resources, affected by band action in the design and administration of band membership rules, to have recourse to the courts in cases of alleged discrimination. The formal terms and conditions of the C-31 Program were approved in 1988.

As with the regular program, any individual or entity, private or public, can apply to the **C-31 Test Case Funding Program**. To be eligible, however, they must satisfy somewhat stricter criteria. The litigation must involve a Bill C-31 issue that is unresolved and that involves the determination of individual rights. Cases where parties are bringing actions solely against the Crown or where the Government made a decision on the record not to opt for the position taken by the Applicant are ineligible to be funded. Similarly, intervenors are eligible only where they are arguing in support of the thrust of the Crown's position.

The contribution payable to any one recipient for a case up to and including the Supreme Court of Canada cannot exceed $500,000.[7] Where a band applies for funding, INAC will consider its financial position and funding may be denied if the Band is deemed to have adequate resources. Finally, all or a portion of the contribution may be repayable, should the recipient obtain any judgment or award of costs or settlement monies.

During the eighteen year period from 1983 until 2001, contributions totaling almost $18 million (*i.e.* $1 million per year average) have been granted to various groups through the **Aboriginal** and **C-31 Test Case Funding Programs**.[8] Most of the major aboriginal law cases have received funding from the programs, including: *Guerin* v. *The Queen*[9] (on the nature of the aboriginal title) and *Delgamuukw* v. *British Columbia*[10] (which dealt with the content of the aboriginal title, how it is protected by s. 35(1) of the *Constitution Act, 1982*, and its evidentiary requirements); *Simon* v. *The Queen,*[11] *R.* v. *Sioui,*[12] *R.* v. *Horseman*[13] and *R.* v. *Badger*[14] (dealing with treaty rights, establishing their *sui generis* nature, as well as guidelines for interpretation and extinguishment); *R.* v. *Sparrow,*[15] *R.* v. *Gladstone*[16] and *R.*

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7 Note however that this figure has been exceeded for specific interveners in the *L'Hirondelle* constitutional challenge to the amendments.

8 All numbers compiled by Indian and Northern Affairs Canada in *Test Case Funding Contributions (November 1983 to August 2001)*.

9 [1984] 2 S.C.R. 335.

10 [1997] 3 S.C.R. 1010.

11 [1985] 2 S.C.R. 387.

12 [1990] 1 S.C.R. 1025.

13 [1990] 1 S.C.R. 901.

14 [1996] 1 S.C.R. 771.

15 [1990] 1 S.C.R. 1075.

v. V*an der Peet*[17] (dealing with "existing aboriginal rights", their *sui generis* nature and purposive interpretation, establishing principles of extinguishment, and a justificatory standard under s. 35(1) of the *Constitution Act, 1982* for infringement of aboriginal rights). More recent cases to have received funding include: *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*[18] (s. 15 challenge to *Indian Act* provisions that limit voting in band elections to those band members living on-reserve); *R.* v. *Marshall*[19] (where the Court found a Mi'kmaq treaty right to carry on a small scale commercial eel fishery); *Lovelace* v. *Ontario*[20] (unsuccessful s. 15 challenge to program distributing proceeds from reserve-based casino to band Indians to the exclusion of non-band aboriginal communities) and the *Reference re Secession of Quebec*[21] (where two aboriginal groups received funding to intervene in the case.[22])

The federal government also provides what is known as "core" or "project" funding to a variety of interest groups. These funds are granted either to assist such groups with "core" functions such as running their organizations or for specific projects (not including litigation). Given that some organizations applying for core funding are advocacy groups, it is possible that a portion of these funds is used for litigation purposes. However, this is speculative and in any event, the amounts would not likely be significant.[23]

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16 [1996] 2 S.C.R. 723.

17 [1996] 2 S.C.R. 507.

18 [1999] 2 S.C.R. 203.

19 [1999] 3 S.C.R. 456.

20 [2000] 1 S.C.R. 950.

21 [1998] 2 S.C.R. 217.

22 $80,000 for Kitigan Zibi Anishinabeg and $250,000 for the Grand Council of the Crees.

23 For example, Canadian Heritage provided $6,287,560 last year to Aboriginal representative organizations as core organizational funding. Some of these groups have been involved in litigation however, unless a detailed audit is conduct on their spending, it is not known whether any federal funds were used for litigation purposes.

It is undeniable that public interest litigation is very expensive. To illustrate, consider the fact that, in just one case and only for the trial level, it costs the federal government $500,000 in legal fees and disbursements to defend the challenge to section 43 of the *Criminal Code* ("the spanking provision"). Federal funding of litigation is modest when one considers the cost of public interest litigation. It is evident that a large amount of legal work for such cases is done on a *pro bono* basis. The relatively small amount of federal funding going towards such purposes serves to dispel the view that Government is significantly involved in funding interest group litigation to the detriment of other citizen participation before the courts. However the funding that does exist, undoubtedly assists groups that would otherwise have considerable difficulty bringing their claims to court.

IV. THE IMPACT OF FUNDING ON PERSPECTIVES HEARD BY THE COURTS

How does funding of interest group litigation impact on the perspectives on issues heard by the courts? This question requires an understanding of what groups are bringing their issues before the courts, the nature of those issues and the extent to which funding plays a role in enabling such issues to be heard by the courts.

Critics of Government funding of interest group litigation suggest that such funding allows particular interest groups to advance their "leftist causes" before the courts to the exclusion of other individuals and groups thereby hindering public access to the judicial system.[24] Others, such as Ian Brodie, have argued that Government funding of interest group litigation "encourages systemic appellate litigation by groups organized to wage long-term battles, rather than sporadic efforts by loosely organized communities."[25]

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[24] L. Sossin, "Courting the Right" (2000) 38 *Osgoode Hall L.J.* 531-541 a book review of F.L. Morton & R. Kropff, *supra* note 2, characterizes Morton and Knopff's thesis as the "Court Party" hijacking the Supreme Court and transforming it into a venue for advancing unpopular left causes to the exclusion of public participation and scrutiny.

[25] I. Brodie, "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program" (2001) *Can. J. Pol. Sci.* 357 at 358.

Gregory Hein in his article "Interest Group Litigation and Canadian Democracy,"[26] discusses the results of his examination of all Federal Court and Supreme Court of Canada published decisions from 1988 to 1998. His findings reveal that while corporations litigate for different reasons than other interest groups, they are very much present in Canadian courtrooms. He offers a different perspective on interest group litigation:

> "The account advanced by conservative critics is incomplete and misleading. While warning us about 'zealous" activists who invite judicial activism, they never tell us that courts are filled with a broad range of interests that express a wide array of values. […]We will see that critics on the right are correct when they argue that social activists are eager to pursue legal strategies. However their interpretation ignores the economic interests that also appreciate the benefits of litigation. Corporations exert a surprising degree of pressure by asking judges to scrutinize the work of elected officials."[27]

Hein emphasizes that there was interest group litigation well before the coming into force of the Charter. For example, in the 1930s, corporations came before the courts to hinder the growth of a welfare state and to advance pecuniary and proprietary claims.[28] This trend of corporate-sponsored litigation continued after the Charter as well. During the ten year period of Hein's study, he found that corporations brought 468 actions, significantly more than any other interest group.[29] He also found that 38 % of the claims challenging government legislation and ministerial decisions emanated from corporations.[30] Corporate actions included challenges to legislation governing banking, federal elections, international trade, advertising, and environmental protection.[31]

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[26] (2000) 6 *I.R.P.P.* 2-31.

[27] *Id.,* at 4

[28] *Id.,* at 8.

[29] *Id.,* at 9. The number of actions brought by other interest groups includes: Aboriginal peoples (77), Charter Canadians (equality-seeking groups) (80), civil libertarians (40), labour interests (58), new left activists (37), professionals (32), social conservatives (18), and victims (9).

[30] *Id.,* at 15.

[31] *Id.*

Hein emphasizes that the major current change is that "courts now hear from interests that struggled for decades to win access."[32] Traditional rules respecting standing and evidentiary requirements acted as solid barriers to groups wanting to advance issues of broad public interest. Judicial recognition of public interest standing and liberalization of the rules respecting intervenor status, have allowed for a much greater range of perspectives to be heard before the courts. Government funding of interest group litigation is another factor assisting interest groups in gaining access to the courts.

Hein's study also revealed that there is a difference in why interest groups use the courts. For example, corporations tend to pursue private interests before the courts, while other groups, such as civil libertarians and equality-seeking groups, seek social policy changes that will affect a broader audience.

Compare for example, the nature of the issues put forward by corporations before the courts under the Charter with that of equality-seeking groups. Some of the more renowned Supreme Court of Canada Charter cases involving corporations include: *R.* v. *Big M Drug Mart,*[33] (successful challenge to Sunday closing legislation by a retail business); *Hunter* v. *Southam Inc.,*[34] (successful challenge by Southam Inc. of search and seizure provisions in the *Combines Investigation Act*); *RWDSU* v. *Dolphin Delivery Ltd.*[35] (dealing with an injunction against secondary picketing and the application of the Charter); *R.* v. *Edward Book*s *and Art Ltd.*,[36] (unsuccessful challenge by retail businesses of partial prohibition on Sunday openings); *Irwin Toy Ltd.* v. *Quebec (Attorney General),*[37] (unsuccessful challenge to consumer protection legislation prohibiting commercial advertising directed at children); *R.* v. *Wholesale Travel Group Inc.*,[38] (partially successful challenge by travel agency of provisions of the *Competition Act* respecting false or misleading advertising); *RJR-*

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[32] *Id.*

[33] [1985] 1 S.C.R. 295.

[34] [1984] 2 S.C.R. 145.

[35] [1986] 2 S.C.R. 573.

[36] [1986] 2 S.C.R. 713.

[37] [1989] 1 S.C.R. 927.

[38] [1991] 3 S.C.R. 154.

MacDonald Inc. v. *Canada (Attorney General)*,[39] (successful freedom of expression challenge of legislation prohibiting tobacco advertising and promotion); *Canadian Egg Marketing Agency* v. *Richardson*,[40] (unsuccessful challenge by NWT egg producer of federal-provincial scheme regulating Canadian egg marketing); and *Thompson Newspapers Co.* v. *Canada (Attorney General),*[41] (successful challenge to federal elections legislation prohibiting publication of opinion survey results during last few days of election campaign).

These cases reveal that corporations pursue litigation to challenge government regulation of their business interests, whether it be through competition legislation, consumer protection legislation, health legislation or legislation governing elections. While corporations generally invoke the Charter in defence of charges laid against them as opposed to offensive challenges,[42] this does not mean that they do not vigorously pursue their interests before the courts and they have often been successful. These interests appear to be private or proprietary ones, although the cases do have important precedential value for the interpretation of Charter rights. Such interests are significantly different from those of other interest groups, such as equality-seeking bodies.

A sampling of Supreme Court of Canada cases involving Charter challenges that received equality rights funding for interventions or as parties from the Court Challenges Program reveals types of issues brought forward by these groups. Some of these cases include: *Schachter* v. *Canada,*[43] (successful equality rights challenge to the provisions of the *Unemployment Insurance Act* that provided parental benefits to natural parents but not to parents who adopted); *Symes* v. *Canada,*[44] (unsuccessful challenge to *Income Tax Act* provisions limiting the amount that may be claimed for child care expenses); *R.* v. *Williams,*[45] (in which the Court held

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39 [1995] 3 S.C.R. 199.

40 [1998] 3 S.C.R. 157.

41 [1998] 1 S.C.R. 877.

42 The courts have generally held that corporations do not have standing to invoke the Charter as a "sword" but may do so as a "shield" in response to Government charges.

43 [1992] 2 S.C.R. 679 [hereinafter *Schachter*].

44 [1993] 4 S.C.R. 695.

45 [1998] 1 S.C.R. 1128 [hereinafter *William*].

that jurors may be challenged for racial bias); *R*. v. *Mills,*[46] (Court upheld the scheme governing admissibility of complainants' therapeutic records in sexual offence proceedings); *Corbiere* v. *Canada (Minister of Indian and Northern Affairs),*[47] (successful equality rights challenge to provisions of the *Indian Act* which required that band members be ordinarily resident on reserve to vote in band elections); *Granovsky* v. *Canada (Minister of Employment and Immigration)*,[48] (unsuccessful equality right challenge to provisions of the *Canada Pension Plan* respecting a benefit available to persons with severe and permanent disabilities to the exclusion of those with temporary disabilities); *R.* v. *Darrach*,[49] (Court upholds the provisions governing the admissibility of complainants past sexual history); and *R*. v. *Latimer*,[50] (whether a mandatory minimum sentence of life imprisonment for the second degree murder of a severely disabled child constitutes cruel and unusual punishment—funds were granted to support the views of persons with disabilities).

It is noteworthy that in many of these cases, funding was granted for the purposes of intervening in the case rather than for supporting a party. This is particularly evident in the criminal law cases, where funding was granted to support an intervention conveying the perspective of racialized minorities (*Williams),* women (*Mills; Darrach)*, and persons with disabilities (*Latimer*). These perspectives have likely had an influence on the Court's decisions and one can legitimately question whether the Court would have arrived at the same conclusions in the absence of hearing from these interest groups. At a minimum, support for such interventions assists in ensuring that the Court is able to hear from a wider range of perspectives on an issue prior to arriving at a decision. A review of these cases also reveals that the interests pursued by those challenging government actions concerned the advancement of equality rights for those less advantaged or historically subject to stereotyping (e.g. the disabled—*Granovsky;* parents of adopted children—*Schachter*). This stands in contrast to the economic interests pursued by corporations.

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[46] [1999] 3 S.C.R. 668 [hereinafter *Mills*].

[47] *Supra* note 18.

[48] [2000] 1 S.C.R. 703 [hereinafter *Granovsky*].

[49] [2000] 2 S.C.R. 443 [hereinafter *Darrach*].

[50] [2001] 1 S.C.R. 3 [hereinafter *Latimer*].

At the same time, we must recognize that funding of interest group litigation is not a panacea for ensuring that all needed perspectives are brought before the courts, nor is litigation often the best way the deal with complex social policy issues. Funding of interest group litigation also raises difficult issues for Government such as determining which groups should receive funds, for what types of cases and what amounts are appropriate.

I would suspect that some perspectives are still not being heard by the courts. I note for example that in the recent challenge to provisions of the Ontario *Safe Streets Act* concerning aggressive panhandling[51] only the Canadian Civil Liberties Association intervened. One might wonder whether the reasoning in the decision would have been different had the Court also heard from an anti-poverty group or an organization representing the interests of the mentally disabled.

V. THE IMPACT OF FUNDING OF INTEREST GROUP LITIGATION ON DEMOCRACY

As I stated at the outset, critics of judicial review argue that funding of particular interest groups is undemocratic in that it positions such groups to dominate courts' agendas at the expense of other groups and members of the public. As I hope I have demonstrated, Canadian courts and tribunals hear from a diverse range of perspectives including not only those that are recipients of state funding but also corporate interests as well as groups that receive funding from private sources.

Lorne Sossin[52] aptly questions: "Why should the involvement of these [Court Party] groups in Charter litigation pose any more of a threat to democracy than the involvement of corporate groups, or of large corporations themselves, in Charter litigation to pursue neoliberal policy agendas?"[53] Sossin also points out that conservative groups vigorously pursue their interests before the courts. In the recent case of *Harper* v. *Canada*,[54] the President of the National Citizens Coalition is challenging provisions of the *Canada Elections Act* that limit the amount third parties

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[51] *R.* v. *Banks* (2001), 55 O.R. (3d) 374 (Ont. Ct. J.).

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[53] L. Sossin, *supra* note 24 at para. 8.

[54] [2001] A.B.Q.B. 558.

may use for election expenditures. Such limits were imposed to promote equality of opportunity in the electoral process. As Sossin points out, one may question how the interests pursued by such groups, such as removing limits on electoral spending, are seen to be enhancing democracy, particularly given that such interests would not have appeared on any legislative agenda.[55]

It is also important to keep in mind that even amongst those so called "leftist groups," there are diverse and often opposing interests. For example, equality-seeking groups and civil libertarians often taken opposing views with respect to limits on freedom of expression to prohibit obscenity or hate speech. Thus, these interest groups should not be lumped together as necessarily sharing common interests. The situation before the courts is much more complex than critics of judicial review portray. As Sossin aptly puts it:

> "The Court Party, if it includes groups which seek to use the courtroom to further a policy agenda, constitutes a big tent indeed, with gay and lesbian activists alongside tobacco executives, and LEAF shoulder to shoulder with the NCC."[56]

Conservative critics would argue that Government should cease providing funding to interest groups. They would like to "resurrect traditional judicial review" where the old standing and intervention rules applied and no funding was provided to groups for litigation purposes. According to Gregory Hein, "the measures that conservative critics propose have a distinct bias that Canadians should know about."[57]

> "Resurrecting traditional judicial review would filter out certain interests and values. Returning to the old rules governing standing and intervenor status would hurt public interests unable to demonstrate a direct stake in a dispute […]. Freezing the meaning and scope of constitutional guarantees would leave judges unable to address new social problems that create discrimination […]. Taken together, these obstacles would hinder interests concerned about racism, homophobia, gender inequality, environmental degradation, poverty, lives of the disabled and the plight of Aboriginal peoples.

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[55] *Supra* note 53 at para. 9.

[56] *Id.,* at para. 21.

[57] G. Hein, *supra* note 26 at page 25.

> Traditional judicial review would not, however, frustrate litigants advancing conventional pecuniary claims and legal action would still be an effective strategy for interests that want to resist state intervention."[58]

Funding of interest group litigation also ensures that constitutional rights and freedoms are interpreted and applied in an inclusive manner, one that ensures that such rights will be accessible by all Canadians. "Seen from this perspective, the current relationship between citizens, legislators and judges is attractive because it meets a basic requirement of democracy that many Canadians embrace. Nations comprised of diverse interests should not have institutions that respond to some and ignore others."[59]

CONCLUSION

Some academics, such as Ian Brodie, argue that government funding of interest group litigation results in an "embedded state being at war with itself in Court."[60] While it is true that at times Justice litigators find themselves defending government action that is challenged by an interest group with financial support from another federal department, this is not always the case. For example, in cases such as *Mills, Darrach* and *Latimer* which I mentioned earlier, funding was granted by the Court Challenges Program to put forward views that supported the Government legislation under attack. Rather than funding resulting in Government being at war with itself in Court, I see it rather as an instrument for facilitating diverse perspectives before the Court, better-informed judgments and ultimately a more inclusive policy development process. That, to me is quintessentially democratic.

Thank you.

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[58] *Id.,* at page 26.

[59] *Id*.

[60] I. Brodie, *supra* note 25 at 376.