LITIGATING EQUALITY: SOME FORMATIVE ISSUES

Marc Gold

Osgoode Hall Law School

York University

November 1984

INTRODUCTION

Let me begin by citing one of the many comments that have been offered on the subject of equality. "The demand for Equality obsesses all our political thought. We are not sure what it is...but we are sure that whatever it is, we want it."[1] This remark illustrates what many of us already know. Of all the provisions of the Charter, those concerned with equality rights are the most controversial and intrusive: controversial, because we are just not sure what equality entails as a constitutional ideal, and intrusive, because virtually every issue that can arise under the Charter can be analyzed in terms of equality rights.[2] The plain fact is that we cannot know the extent to which there exist any outer limits to the reach of equality rights in our law. As Archibold Cox has written, "[o]nce loosed, the idea of Equality is not easily cabined".[3]

The object of my remarks tonight is to raise some of the central issues that confront us in the litigation of equality rights under the Charter. What standard or standards of judicial scrutiny will be imposed upon laws that classify on the basis of one of the grounds enumerated in section 15(1)? How will the courts treat allegations of inequality based upon laws that classify on some ground other than those enumerated? What is the meaning and function of the concept of discrimination? Is discrimination established whenever a law has a differential impact on one group as compared with another, or must one also establish some discriminatory intent? What kind of evidence should one introduce to impugn or defend a law under section 15, and how does one make maximum use of such evidence in argument?

Finally, what are the remedies that are available for breaches of equality rights?

Before turning to these issues, a number of preliminary remarks are in order. First, although I have put these issues in the form of discrete questions, they are clearly interrelated as I hope to illustrate. Second, in the brief time that we have together this evening, I can only hope to raise the issues with you in a preliminary and tentative way. Our only comfort is the fact that jurists and philosophers have, as yet, failed to resolve these issues in the centuries, if not indeed the millenia, during which they have grappled with them. Finally, we must confront the fact that, at this early stage in the life of the Charter, any predictions about how the courts will react to the myriad of concrete cases put before them must remain a matter of speculation. As one of my former teachers has observed, "he who lives by the crystal ball must be prepared to eat glass."[4] Trusting that we, as lawyers, have strong stomachs, to our topic we now turn.

STANDARD(S) OF REVIEW AND THE QUESTION OF JUSTIFICATION

To illustrate some of the issues that I identified as central to the litigation of equality rights under the Charter, let us begin with a hypothetical case. Assume that the Worker's Compensation scheme provides benefits to the dependent spouses (including common-law spouses) of workers killed in the course of employment, such compensation to cease if the dependent widow or widower remarries. Assume further that the legislation provides

that benefits may be terminated if the widow or common-law wife openly lives with a man in the relation of man and wife without being married to him.[5]

Your client, who has been receiving compensation under this statute, shacks up with her boyfriend. The Workmen's Compensation Board finds out about this, and terminates your client's benefits. You bring an action claiming that this violates section 15(1) of the Charter.

As the person claiming that a law is unconstitutional, you bear the initial burden of demonstrating the violation of the Charter.[6] You argue that this law violates section 15 by virtue of its discrimination on the basis of sex. Only widows lose their benefits if they cohabit with a man; widowers appear free to shack up with impunity.

In the face of such arguments, it is likely that the onus would shift to the government to justify the law.[7] (It goes without saying, of course, that, regardless of who bears the burden of justification, the person bringing the challenge would be well advised to address the question of justification in written and oral argument.) What would be the gist of such arguments offered in justification, and how would one respond to them?

Government would argue that the purpose or object of the "dependent spouse" provisions in the Act is to provide benefits to those who, having demonstrated economic dependency on their now deceased spouse, remain in an unmarried situation such that the entitlement should be maintained. The rationale thus combines some notion of pre-existing entitlement with some

assumption about how long the need persists, and when that assumption is no longer warranted. In terms of the distinction drawn between widows and widowers, government is likely to argue that, in the great majority of cases, wives are dependent economically on their husbands and not vice-versa. Thus, in most cases where a women takes up with a man in circumstances where they are living as if they were married, the need for a continuation of benefits ceases. The government might well concede that not all cases will fall into this category. Nonetheless, it would have to maintain that the great run of cases will, and that such provisions are required for the scheme to be administered efficiently. Given that both political and economic considerations impose some upper limit on the amount of money that a Worker's Compensation scheme can tap, the government would defend such legislation in terms of allowing the scheme to provide for those who really need the benefits.

Who wins in such a hypothetical case? It seems clear that this will depend upon how closely the court scrutinizes these reasons argued in justification. If the court imposes a low standard of review on such legislation, the impugned provisions are likely to stand. The purpose of the legislation clearly is legitimate, and the means chosen could not be said to be irrational. To be sure, there is an imperfect fit between the class defined as eligible and the class that might truly be in need, but a perfect fit is rarely possible in legislation and would not be required under this relaxed standard of review. In legislating on the basis of its assumption that women, living as

if they were married, tend to be economically dependent on their male partners and not vice-versa, the legislature could not be said to have acted irrationally.

At this juncture, let us introduce the issue of the use of evidence in equality cases. Assume that you possess a brief prepared by a well-respected sociologist. The brief documents a radical change in the economic patterns within families. A majority of women are now in the paid work force, and the assumption of a wife's economic dependence on her husband increasingly is inaccurate. A significant number of households "depend" on two incomes.[8] The brief demonstrates that the assumption underlying the legislation constitutes an outdated stereotype of the economic relations between the sexes.

Notwithstanding this brief, the legislation would likely withstand attack if the court were to apply a relaxed standard of review. So long as the legislature can show that it had a reasonable belief in the accuracy of its assumptions, the law is likely to be upheld.[9]

As the standard of review gets tougher, the legislation becomes more vulnerable. If the courts impose a stringent standard of review, the misfit between the legislative classification and the purpose of the law might not be tolerated, especially in light of the underlying stereotype that informs the classification. In light of the factual situation that could be established on the evidence, the classification would not be "substantially related" to the government purpose, much less "necessary", and the efficiency argument might not be deemed sufficiently important to justify the use of an unjustified

stereotype.

Indeed it is this unjustified stereotyping that can be seen to be the real discrimination in the Act. But it only emerges if a stringent standard of review is imposed such that the factual assumptions of the legislature need to be defended as more than simply "not irrational". You can lead empirical evidence until you are blue in the face, but it will only assist you if the standard of review is sufficiently tough to forcc the government to defend its factual assumptions on their substantive merits. Thus we see the connection between the standard of review and the question of extrinsic evidence.

How does one go about determining the appropriate standard of review in a given case? Is one single standard to be applied to all laws that classify on the basis of a ground enumerated in section 15, or will different standards apply to, say, race, gender and age based distinctions? The fact that certain grounds are explicitly listed argues for the former approach, while American jurisprudence suggests the latter.[10] Notwithstanding that I have taken a variety of not altogether consistent positions on this issue in the past,[11] I am now of the view that it is possible to see one standard as appropriate for all cases where laws classify on the basis of an enumerated ground. In some areas, notably physical or mental disability in the context of employment, there may well be a greater range of circumstances when a legislative distinction could be upheld as sufficiently related to the purpose of the scheme, than there will be in the case of race or gender based distinctions. But this will be a

function of the relevance of the distinction, not of a different standard of review.[12]

If one standard is appropriate, how stringent should that standard be? It is plausible to argue that something akin to the American concept of strict scrutiny is appropriate; the legislative distinctions must be justified as necessary for the achievement of a compelling governmental purpose. The difficulty is, as you well know, that strict scrutiny virtually always results in the lw being struck down. In my view, a stringent standard is appropriate, but something a trifle more relaxed than strict scrutiny.[13]

There are a variety of ways in which one can defend such a stringent standard of review. First, section 15 lists certain grounds explicitly. Moreover, the groups defined by the factors listed in section 15 have suffered historically at the hands of intolerant majorities, have been victimized by unjustified stereotyping, and have been inadequately represented in the political process. These reasons may justify an enhanced judicial concern for laws that classify on the basis of an enumerated ground.[14]

This leads to the following issue. It is reasonable to expect litigation alleging discrimination on the basis of political beliefs, marital status and sexual orientation. What standard or standards of review will be applied when legislation classifies on the basis of some ground not enumerated in section 15?

It is tempting to argue that a more relaxed standard ought to be applied, if for no other reason than to give some

functional meaning to the fact that certain grounds <u>were</u> explicitly listed.[15] A number of arguments could be marshalled against this view. First, it is clear that the list in section 15 was a product, in part, of the fact that certain groups were well organized politically and were successful in their lobbying. To see the enumerated grounds as conforming to some pure theoretical system is to ignore the political reality of the process. Second, to the extent that a group can demonstrate that they have been victims of intolerance and stereotyping, without the political muscle to effect changes to legislation, why should they enjoy any less protection than those groups contemplated explicitly in section 15? The answer is not self evident.

<u>DISCRIMINATION: INTENTIONAL AND INADVERTANT</u>

In the preceding example I suggested that one hallmark of discrimination consists in the use of unjustified sterotypes to allocate burdens and benefits unequally. The question to which we now turn is what else we might mean by "discrimination" for the purposes of section 15. Consider the following hypothetical.

Assume that provincial legislation provided that the names of all potential jurors should be drawn from the valuation rolls of the municipalities within a given judicial district. Within the judicial district is an Indian Reservation. The Reservation is not considered a municipality and has no valuation roll because the resident Indians do not pay taxes. As a result, no Indian resident on the Reservation can serve on a jury. Your

client, a native resident of the Reservation, has been charged with an offence entitling him to trial by jury. He objects to the constitution of the jury on grounds that no native people are on that jury, arguing that this violates section 15.[16] How would one argue this case, and how would a court likely respond?

The threshold question will be whether the legislation need to have been animated by a discriminatory purpose to be struck down under section 15. This is the position that some courts have taken with respect to issues arising under Human Rights legislation, contrary to the dominant trend in the jurisprudence of Human Rights tribunals, and as you know, that issue will soon be decided by the Supreme Court of Canada. Is there any way to predict whether courts will require a discriminatory purpose before finding a violation of section 15?

As in so many of these issues, the language and history of the section is of no real assistance.[17] In truth, the answer will depend upon the vision that the court has of the purpose of the Charter generally, and equality rights in particular. To the extent that the Charter is seen primarily as a protection against improper behaviour on the part of government, we will tend to see courts requiring some showing of an improper purpose lying behind an otherwise neutral law. On the other hand, to the extent that the Charter is seen as vesting rights in individuals and groups - rights not only to a certain measure of respect at the hands of government, but rights to a certain kind of result in a given situation - then we might find courts focussing more on the unequal operation of laws, disregarding the fact that no such unequal operation was desired or intended. In a sense, this

issue is related, if not logically than at least stylistically, to the more general question of the scope of the Charter and its potential application to so-called private activity.[18]

Assuming, for the moment, that the courts require such an element, how would one argue on the basis of the facts before us? One approach would be to argue that the use of the valuation rolls of a municipality was simply a device to keep Reservation natives out of the jury box. In other words, the legislative criteria are to be viewed as a proxy for a distinction drawn on racial grounds. But what does one need to establish such a case, and how could government respond?

Once again we confront the interrelation between the issues I identified at the outset. Let us assume that the argument in justification offered by the government ran along the following lines. "We did not intend to exclude native people from jury duty. We needed a relatively simple way to identify potential jurors, and given that the valuation rolls provided a ready set of data, we used such rolls in the interest of efficiency and ease of administration."

If the courts impose a relaxed standard of review in such a case, these arguments might well suffice. If government need only show that the means were rationally related to a legitimate objective, any hidden discriminatory purpose is unlikely to emerge. If a more stringent standard of review is imposed, the government will likely be unable to satisfy the test that the means were sufficiently related to the objective to justify the exlusion of an entire class of people. In other words,

efficiency arguments would be met with the argument that the government could have adopted other means to accomplish the same end, such as providing for the use of valuation rolls as well as lists of the membership of any Reservation within a judicial district. This fact might provide circumstantial evidence of a discriminatory purpose underlying the choice of the valuation roll. Alternatively, if government satisfies the court that they simply did not put their minds to the question of Reservation representation on juries, one might be able to argue that this neglect of the interests of a group enumerated in section 15 itself constitutes a violation of section 15.[19]

All of this is premised on the assumption that courts will require some discriminatory purpose before laws will be struck down under section 15. What would the situation be if no such discriminatory purpose was required?

At first blush, it would seem as if the law would clearly be struck down, but two factors might give us pause. First, not all native people may live on the Reservation, and not all residents of that Reservation may be native people. Thus, the law might function to keep some non-natives off juries, while allowing those non-resident natives to serve as jurors.[20] Second, if American jurisprudence is any guide, absent a demonstration of discriminatory intent, the fact that a jury may contain no members of the accused's racial group has been held to be constitutionally irrelevant. There is no constitutional right to have a jury contain any members of the accused's race.[21]

Counsel representing the native accused in our hypothetical case might argue some version of the following. First, the fact

that some residents of the Reservation may not be native people, or that some native people may live off the Reserve, does not change the fact that the great majority of the residents of the Reserve will be native people.[22] Second, this is not a case where one specific jury was challenged as containing no members of the accused's racial group. This is a case where virtually every jury constituted under the legislation will be unrepresentative in the same way. One may not have the right to be tried by a jury of one's race, or even by one containing some members of one's race. One does have a right to be tried by a jury who might have contained some members of one's own racial group. Or so the argument would go.

To summarize to this point, I have raised the issue of which standard or standards of review are likely to be applied in cases arising under section 15, and I have suggested that the choice on this question will influence not only the results in the cases, but the way in which they are both argued and influenced by the evidence. Respecting the question of discriminatory purpose, I have suggested how such a purpose might be established circumstantially, noting again that the possibility of doing so will tend to be a function of the standard of review imposed. In the event that a discriminatory purpose need not be established, I have suggested that success will likely be a function either of the court creating a substantive right to the benefit denied (or an immunity from the burden imposed), or of the court interpreting section 15 as directing the government to actively consider the interests of those groups contemplated in section 15

when legislation is being drafted. This leads us to our final topic for this evening, the question of remedies.

REMEDIES FOR VIOLATIONS OF EQUALITY RIGHTS

The question of remedies under the Charter is a vast one, and in the time that we have together, we cannot even begin to scratch the surface of the issues that are raised by the equality rights provisions. Professor Sharpe will be addressing his remarks to the question of injunctive relief under the Charter. I wish to raise two fairly discrete questions that flow from the two hypothetical examples we have been pursuing.

In the case of the Workmen's Compensation scheme, let us assume that the court finds the impugned provision inconsistent with section 15 and not justified as a reasonable limit on equality rights. The remedy of a declaratory order aside, it would appear as if there are at least three ways in which the legislation could be remedied so as to make it consistent with the Charter.

One way would be for the potential termination of benefits to be extended to widowers as it currently is applied to widows. One may object that this is bad policy, but it would remove the gender-based stereotyping that we identified as being the real objection to the law. Your client would not be too happy with this remedy, but it does "remedy" the unconstitutional nature of the law.

Alternatively, the legislation could be redrafted - either by the court or by the legislature responding to a direction or cue from the court - to provide that, where a widow or widower

cohabits with a person as if they were husband and wife, an individualized assessment of who is the breadwinner in the household would be undertaken, with the (currently) dependent widower or widow losing their benefits. This may not be an attractive remedy for the person who has brought the action, depending on whether she currently is in a position of dependency, but once again, this remedy would appear to correct that aspect of the law deemed unconstitutional.

Finally, the remedy might be to say that, unless and until a widow or widower remarries, benefits shall not be terminated even if there is cohabitation. This, of course, would be the remedy preferred by your client, but it is not at all clear that a court will find it to be the appropriate remedy. It is not merely the case that it would expand the benefits currently disbursed. This is likely to be the result of many successful challenges under section 15, although it would be prudent to appreciate that courts may balk at the role of "pulling the public purse". The fact is that such a remedy, by encouraging people to live together without formalizing their relationship by marriage, undermines the government policy of terminating benefits when a new marriage has been entered into.

The point of all of this is to underline the importance of seeking a remedy that the court will feel comfortable in granting. At least in the case of equality rights, such remedies may not always be the preferred remedy of your client. Cutting back on benefits may be as much a remedy for unconstitutional legislation as would be the expansion of benefits. To avoid such a possibility, one might be well advised to request a remedy that

steers between extremes. In our hypothetical case, such a remedy would be that which required a case by case assessment of economic dependency. One risks getting no remedy whatsoever by asking for more than a court will be willing to grant.

The second point I wish to raise is suggested by a variation of our jury example. Assume that the legislation was not drafted so as to use valuation rolls, but used some other device deemed neutral. Nonetheless, the evidence disclosed a pattern of non-representative juries, and on this basis the court held that the operation of the legislation offended section 15. The appropriate remedy might well be to force government to devise a scheme whereby the unequal operation of this law would be tempered, but what remedy should the court grant to the specific accused who brought the action?

By definition, the impugned legislation was not animated by a discriminatory purpose. Now that government is seised with a constitutional obligation to redress the situation, we could expect future applicants to have the chance at a remedy tailored to their specific interests, whether that is requiring that a differently-constituted jury be struck, or ordering a new trial with such a jury where the efforts by government to redress the situation were deemed insufficient under section 15. But unless the court creates a substantive right to a racially-balanced jury, thereby allowing them to order the accused to be tried by such a jury, how should the court approach granting a remedy to the specific accused who brought the initial action? The court might well be unwilling to grant a remedy under circumstances

where the government itself had not acted unjustly. It might be tempted to issue a prospective ruling; "from this day on, or after such and such a period has elapsed, one has the right to be tried under a jury selection system of the following kind, and if the legislation does not conform to the constitutional imperatives set out in this judgment, all convictions will be quashed". Once again, the nature of the case may suggest that the remedies deemed "just and appropriate" might not actually help the person who brought the action!

CONCLUSION

Rather than summarizing the points I have offered here tonight, let me conclude with a few observations about the issues we have not canvassed. We have not considered the roles of section 27 or 28 in our analysis, the former already getting some play in the Ontario Court of Appeal,[23] and the latter the subject of some debate in the literature.[24] Nor have we considered the question of affirmative action under section 15(2), and the various conceptual and evidentiary issues that it poses for those involved in litigation.[25]

I suppose one need not apologize for being unable to treat all of these issues in the brief time we have together. After all, the Constitution itself provided governments with a three year grace period to figure it all out; twenty minutes cannot do justice to a subject so complex and controversial. Nonetheless, I hope that we will have other occasions to consider these issues further.