

## RESOLVED: TO LITIGATE OR NOT TO LITIGATE, THAT IS THE QUESTION

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### POINT : DON BOURGEOIS

Litigation. It is not a word to be feared. It is not a dirty or four-letter word.

We lawyers like the word. Now, some might suggest that this is because we profit from litigation. But those individuals would no doubt also point to the suggestion by Dick the Butcher in *Henry VI, Part 2* (“First thing we do, let’s kill all the lawyers”) – which nobody in the 21st century and certainly none of our readers would agree is appropriate for such an honoured profession.

But I digress. It is time that the sector seriously considered litigation to achieve its objectives. Litigation is a legitimate tool used by many to obtain the results they want. It is used by governments, by private businesses (both large and small), and by private citizens. Litigation is not the first tool to reach for, but it is time we started to use it more often. It is a tool that is necessary as part of a mature, sophisticated public policy discussion.

Litigation allows somebody who is independent – usually a judge or tribunal member – to assess the facts in context of the law and make a decision. That decision may go against one of the litigants in whole or in part. But it gets the matter settled, usually with a right of appeal to an appellate level or of judicial review to a court (if the decision-maker was a tribunal or statutory decision-maker).

Litigation has a number of positive attributes:

1. It is public. The facts and evidence surrounding a decision become public. For example, if Canada Revenue Agency makes a decision with respect to a registered charity and the matter is litigated, the evidence becomes part of the public record. Some organizations may not want that evidence to be public – but a number do because of a sense of unfairness or lack of transparency in the decision-making process.
2. It can demonstrate that the dispute is legitimate. Too often politicians make vague allegations that are not substantiated or intended to monopolize the “sound bite” and the affected organizations cannot get heard. Litigation starts to balance the scales of access to the public.

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3. It can right wrongs. While it is not for me to tell KAIROS how to deal with the government, I think many in the sector feel that it was ill-served by a number of Ministers. It had its grant application “approved” up to the Ministerial level and then, for reasons that remain obscure, was “NOT” approved. It had its reputation sullied by another Minister who made repeated allegations of impropriety without being able to substantiate those allegations. Indeed, KAIROS vigorously (and, one could say, correctly) denied the allegations. Litigation would require those Ministers to account for their comments and decisions in a public forum.

4. It can cause changes to public policy. For example, environmental organizations have been particularly adept (but not consistently so) in bringing matters to court, such as the *Old Man River* case. Sometimes litigation is the only way to improve both the decision-making process and the decisions that flow from the process.

5. It can force governments to reassess. There is nothing like a court order directing a Minister to do or stop doing something to cause a reassessment of the importance of the issue, the mode of implementing a decision, and so forth.

6. It can result in compensation for damages. A number of organizations have suffered damages for which they have not been compensated. In recent months, organizations have had their grants cancelled unilaterally and without notice – at times part way through a fiscal period – after years of funding. These decisions cry out for cases to test what is detrimental reliance, breach of implied contract, and so forth in the 21st century for charitable and not-for-profit organizations. There are a number of private sector cases that can be used as precedents to move forward.

7. It can clarify what the law is. Recently Canada Revenue Agency issued new guidelines for fundraising. The Minister of Finance, in his 2010 Budget Speech indicating the elimination of the “disbursement quota” for most charities, noted that the government had sufficient tools, including the CRA guideline. There are a few items in the guideline that beg for clarification – including the constitutionality of the guidelines both from a federal/provincial jurisdictional perspective and from a free-speech perspective. More importantly, the CRA approach to “public policy” poses a serious problem. A charity may be de-registered for acting contrary to “public policy.” Whose public policy? Under what circumstances can this public policy be articulated?

Will litigation be cheap? No. But if a strategic approach is taken by the sector with a view to getting important decisions made in its favour, then the costs could be viewed as an investment in advancing education, advancing religion, relieving poverty, and such other purposes that are beneficial to the community. And there is a relatively recent precedent in the Amateur Youth Soccer Association (AYSA) case in which lawyers within the sector acted on a pro bono basis to advance the interests of the sector and did so with a high level of success.

What are the guidelines to move forward? A very good question. There is a saying in law – bad facts make bad law. One of the guidelines is to use bad-fact situations caused

by others to the advantage of the sector. While some would consider the end result to be “bad law,” from the sector’s perspective, it may be quite “good law” if it enhances governmental accountability and responsiveness.

But a key guideline must be to have one’s proverbial ducks in order. I have too often seen poorly prepared cases that not only lose but that also damage the prospects for future cases. A few of those cases have turned good facts into bad law.

Preparation is crucial. It means having the research done with the experts available – and not simply with experts who call themselves experts. They must be considered by others to be experts and to be capable. The research must address the issues and, crucially, challenge and address the “other side.” Successful litigation means knowing the other side as well as you know your own.

Preparation does not start when the litigation is initiated. Far from it. The planning for the litigation starts before you even decide litigation is appropriate. This means ensuring that the factual background is favourable. It takes planning and, very often, a series of steps. And there may be times where a loss is part of the overall longer-term strategy for success.

Litigation is a legitimate tool, both to protect charities and not-for-profit organizations and to advance their objects and purposes. But the success of litigation depends on having a plan that keeps the “eye on the prize” – which means having a clear understanding of what the “prize” is.

So, Bob, I call on the sector to embrace strategic, well-prepared litigation as one of the tools to protect the sector and to advance the public good.

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COUNTERPOINT : **BOB WYATT**

I can certainly see the advantages of what you’re proposing. I only wish I thought it was a realistic possibility.

There are at least five things wrong with your idea. In no order of priority, I can identify these as:

- lack of money,
- a charity bar that is too small and contains too few litigators,
- lack of money,
- courts that are reluctant to intrude on what they see as parliamentary supremacy, and
- lack of money.

The Muttart Foundation was one of two foundations that provided funding when the Canadian Centre for Philanthropy (now Imagine Canada) intervened before the Supreme Court of Canada in the Vancouver Society case. Muttart<sup>1</sup> was also one of five foundations that funded Imagine Canada’s intervention in the AYSA case.<sup>2</sup>

In both cases, the interventions were possible only because the lawyers acting for Imagine Canada agreed to waive their fees. As courts are fond of saying, this represented the best traditions of the bar. But it is not something that can happen on a regular basis.

There were four lawyers from private practice directly involved in the AYSA intervention.<sup>3</sup> At one point – well before the hearing – they added up what they would have billed for the time they had already devoted to the case. They stopped counting at about \$250,000. And that was just for the intervention!

For years, whenever we have talked about the problems associated with appealing a decision of the Charities Directorate to the Federal Court of Appeal, we have talked about it costing at least \$50,000. (I suspect that number would probably be higher now.) We have discussed how unrealistic it is to expect that an organization turned down for registration, or a charity just revoked, is going to have that sum just sitting around waiting to launch a lawsuit.

And those costs are to become or remain a charity. It is a lot less discretionary than starting some so-called public-interest litigation.

But let us assume that we did find a way to fund such a case – whether through donations, grants, or lawyers agreeing to charge only for their disbursements. Do we turn to the charity bar? Or do we turn to litigators who may know little, if anything, about charities?

Some of the cases that you suggest turned “good facts into bad law” may have ended up that way because at least some of the lawyers involved were not au courant with the rules related to charities. Traditionally, those involved in charity and trust law have tended to be solicitors rather than barristers. It’s not often that charity lawyers are called upon, in the words of Rumpole, “to rise up on their hind legs” and face the robed arbiters on the bench. It’s one thing to argue with the Charities Directorate or some other branch of government; it’s another thing entirely to argue the case in front of a court.

Back to the money thing. It could be that one of the more interesting cases would be whether engaging in litigation is, in fact, a charitable activity. Even assuming we could find a charity that had the fortitude to sue a government and could find the money to do so, will their next adventure be a debate about whether they can continue to be a charity? Or will there be an argument from regulators that the charity has crossed the line and engaged in impermissible political activity?

Then there’s the question of assessing the likelihood of success of litigation. Lawyers are very fond of talking about the uncertainties of litigation. In other words, it’s a crap shoot. Canadian courts have traditionally not been at the forefront of spectacular decisions in public-interest litigation. In both of the most recent charity cases to end up in front of the Supreme Court of Canada, the court deferred to Parliament, saying that it is not the role of the courts to engage in social policy development.<sup>4</sup>

Even where we have had public-interest litigation – most often in the area of environmental law – the case has usually revolved around whether procedural niceties have been handled correctly. This is not to belittle the strong policy work that environmental charities have done by employing the courts (or at least the threat of them) in appropriate cases. But the results tend to underscore the tendency of Canadian courts, in policy cases, to ensure that the proper procedures were followed but to leave to government the responsibility for making decisions.

Even the tests that have been developed by the Canadian courts tend to operate against those challenging government decisions. In many of the cases that might be brought by charities, the question will be whether the government decision being challenged was within a range of reasonable possibilities. That's a pretty low threshold.

The U.S. courts have tended not to engage in the same type of self-censorship. They appear to be far more willing to enter into the fray, as witnessed by their role in everything from civil rights to environmental law, from prison law to poverty law. Canadians are wont to make light of the litigious nature of Americans, but their courts certainly seem less reluctant to deal with some of the multitude of policy issues that could be addressed by charities.

Finally, back to the money again. If charities become more litigious, how will their donors react? Is litigation something that donors will consider to be a good investment – especially given the length of time it can take and the amount of money it can cost? Or will they conclude that charities should get back to dealing with the front-line issues and not worry about policy issues? If a particular charity has a spectacular loss in the courts, will that translate into a broader drop in trust levels impacting other charities?

And will we face the spectacle of charities battling each other in the courts? It's not unusual to find two (or more) charities with widely differing views of how the world should be and what issues should get the most attention (by which we usually mean "money"). How will this impact us as a sector? How will donors react?

Way back when we were arguing a lot more loudly about advocacy, and there were calls for much greater latitude for charities to engage in advocacy activities, one of the national newspapers printed an editorial supporting the suggested changes. But, it pointed out, those rights would go to charities along the whole of the ideological spectrum. Do we really wish to spend our time, energy, and money on spectacles where two think-tanks ask a court to rule on which one has the better idea of how the country should be run?

There are days when I really do wish that charities would try to find the right cases and then go forward with them. But we do not have the charities, the donors, or the courts to make that a likely effective course of action.

And more is the pity.

**NOTES**

1. Vancouver Society of Immigrant and Visible Minority Women v. Minister of National Revenue [1999] 1 S.C.R. 10.
2. A.Y.S.A Amateur Youth Soccer Association v. Canada Revenue Agency [2007] S.C.J. 42
3. Peter Broder, then corporate counsel to Imagine Canada, was also involved in the preparation for the case. Mr. Broder is now general counsel and policy analyst at The Muttart Foundation. Other lawyers in private practice were also generous with their time in reviewing and commenting on the intervention.
4. There may be less reluctance when a constitutional issue is engaged, but Charter cases also tend to cost more money to litigate.