

**WOMEN, HUMAN RIGHTS & THE CONSTITUTION**

Submission of  
the Canadian Advisory Council  
on the Status of Women  
to the  
Special Joint Committee on the Constitution  
November 18, 1980



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on the Status of Women**

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We welcome this opportunity to place before you these submissions on the Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada. Patriation of the Canadian Constitution is a significant landmark in the history of our nation. We hope that this expression of our concerns and interests will aid in your deliberations.

The Canadian Advisory Council on the Status of Women was created in 1973, pursuant to a recommendation made by the Royal Commission on the Status of Women. It has four full-time members and 27 part-time members chosen from all parts of Canada, with a varied background of professional and volunteer concerns. Its mandate is to bring before the government and the public matters of interest and concern to women and to advise the Minister on such matters relating to the status of women as the Minister may refer to the Council or as the Council may deem appropriate. In furtherance of its responsibilities, the Council has published over sixty studies, including briefs and comments on the federal legislative program in areas of human rights, criminal law, federal appointments, and Indian women<sup>1</sup> -- all areas which will be affected by the proposed Charter of Human Rights and Freedoms.

In recent months, we have been devoting considerable attention to the process of constitutional

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1 See attached list of current Council publications.

renewal in Canada. This summer, we commissioned thirteen studies on Women and the Constitution,<sup>2</sup> both to inform our own members and also to encourage the women of Canada to become involved in this issue which has a far-reaching impact on our lives and those of generations to come. Some of these papers in their original or summary form have been widely distributed. We have received over eight thousand letters from all parts of the nation in response, a clear sign that Canadian women feel themselves vitally affected by the present constitutional developments. Although we do not claim to be speaking as the direct agent of those women who have made their views known to us, by letter, phone, and in person, we are satisfied that our remarks here today reflect the concerns which have been expressed to us.

Our submissions are directed solely toward the proposed Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1980.

We wish to begin by emphasizing that we are in favour of the principle of entrenching in our constitution protection for our basic rights and freedoms. In the first instance, the Charter will be a signal and guide to legislatures. It is highly desirable to guarantee that certain fundamental rights and liberties will not suffer legislative curtailment or interference. As women, we are only too familiar with legislated inequality. We know only too well that

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2 See attached list of Council studies.

our present Bill of Rights is unable to stop discrimination when it is embodied in legislation.

We welcome as well the fact that the Charter of Rights will apply to the provinces and territories and to the federal government. The incumbent provincial governments have publicly affirmed their commitment to fundamental values during recent debate on constitutional renewal. We are aware, however, that governments do not have a guarantee of perpetual power. Past experience has shown that the elected governments of provinces are certainly not immune from committing breaches of our liberties.

At present, the courts have a considerable role in determining the meaning and the constitutionality of legislation, by reason of their power of interpretation and of their role as arbiters of the Constitution. There has been concern expressed about the amount of power which would be given to the courts by an entrenched charter: it has been said that they would be called upon to play a greater political role since they would be interpreting the general principles of any constitutional charter.<sup>3</sup> There is also some

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<sup>3</sup> A helpful exposition of the problem is found in Paul Weiler, In the Last Resort (Toronto, Carswell/Methuen, 1974), at page 213. He states that in the administration of a Bill of Rights "... the judges are faced with essentially open-ended moral categories into which they must pour precise meaning and content. In this task they cannot rely extensively on legislative or administrative definitions because these are precisely the bodies from which originate a definition that are under examination".

concern that the courts have not demonstrated an ability to give satisfactory meaning and content to the freedoms and rights stated in the Canadian Bill of Rights and equivalent provincial legislation.

In our view, it is of paramount importance to ensure that the wording used in the Charter will provide such clear directions to judges that they cannot possibly misinterpret the intended content and meaning.

We wish to stress, however, that our support for the principle of entrenchment does not mean that we approve of every aspect of the proposed Charter of Rights and Freedoms. There has been a question in the past about the Courts' capacity to strike down legislation it might find contrary to the standards in the Canadian Bill of Rights. We think that entrenchment, in particular Section 25 of the proposed Charter, makes it clear that the Courts may render such legislation inoperative. Whether they will depends on their view of the standards to be applied. We doubt whether anyone can be satisfied that a complete qualitative change in our Courts' approach will come about unless we put in the Charter new and strong standards of equality against which the Courts will test legislation.

#### Section 15

This section is intended to be the main guarantee of what the title refers to as "Non-discrimination Rights". We do not think that the guarantee is strong enough, for a number of reasons.

The first clause of subsection 15(1) states "Everyone has the right to equality before the law..." In cases involving section 1(b) of the present Canadian Bill of Rights this phrase has been interpreted by our Supreme Court of Canada to mean "equality in the administration of the law".<sup>4</sup> It does not prevent inequality that is built into legislation, as was only too clearly shown in the Bedard and Lavell cases.<sup>5</sup> By itself, then, this phrase is not an adequate guarantee. Because the reference to "equality before the law" in section 15 of the Charter is accompanied by a phrase different from that which accompanies it in section 1(b) of the Canadian Bill of Rights,<sup>5a</sup> we must

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4 Mr. Justice Ritchie, in Attorney General of Canada v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349, at page 1367. Professor Baines refers to this as the "rule of law" principle of interpreting the equality before the law guarantee; see B. Baines, "Women, Human Rights and the Constitution", prepared for the CACSW, October, 1980, at p. 30. She has identified four other principles employed by the Court to interpret the guarantee; see pp. 30 to 45 of her paper for a discussion of them. They are the "worse consequences" principle first enunciated by Mr. Justice Ritchie in R. v. Drybones, [1970] S.C.R. 282 at p. 297; the "valid federal objective principle" developed by Mr. Justice Martland in R. v. Burnshine, [1975] S.C.R. 693, at pp. 706 to 708; the "relevant distinction principle" developed by Mr. Justice Pratte and referred to by Mr. Justice Ritchie in Bliss v. A.G. Canada, [1979] S.C.R. 183, at p. 192; and the "prohibited classification principle" employed by Mr. Justice Laskin, as he then was, in his dissenting reasons in Lavell, [1974] S.C.R. 1386 to 1387.

5 Attorney-General of Canada v. Lavell; Isaac v. Bedard, [1974] S.C.R. 1349.

5a "Equal protection of the law" instead of simply "protection of the law".



carefully examine this new formulation see whether it can avoid the unacceptable interpretation which section 1(b) gave rise to. The goal of the section, according to the Minister of Justice, is to "wipe out" discrimination on the basis, for example of sex, race, colour or ethnic origin.<sup>6</sup> That, then, is the standard against which its terms must be measured.

The second part of subsection (1) guarantees "the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex". This language is a change from our present Canadian Bill of Rights, which provides only that persons are entitled to "the protection of the law".<sup>7</sup> There was a particular reason for adding the word 'equal' to the guarantee. The purpose is not elaborated upon by the government in connection with the present Charter, but we can see what it is if we go back to remarks made by the Minister of Justice in 1978.

In 1978, the federal government introduced Bill C-60, the Constitutional Amendment Bill, 1978.

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6 Notes for a speech by the Honourable Jean Chrétien, Minister of Justice, House of Commons, October 6, 1980, (Ottawa, 1980), "Constitutional Reform", p. 15.

7 Canadian Bill of Rights, s. 1(b). See R.S.C. 1970, Appendix III.

Like the present proposal, this earlier bill provided for "equal protection of the law".<sup>8</sup>

The Honourable Otto Lang, then Minister of Justice, stated that "equal protection of the law" could mean that "every individual is entitled to the same protection under the law without unreasonable discrimination on any basis". He further stated that the guarantee would mean "that a law cannot apply in a discriminatory manner unless such discrimination is found to be justifiable in the community's interest on the basis of a reasonable classification test".<sup>9</sup>

The significance of this approach has been pointed out by Professor Baines. By using language similar to that of the 14th Amendment of the United States Constitution, the drafters of the proposed Charter are hoping to encourage the use in Canada of American jurisprudence on "equal protection".<sup>10</sup>

We have no confidence that the simple addition of one word, "equal", will signal our Courts that they should adopt American jurisprudence. So far, the Supreme Court of Canada has refused to adopt American principles when interpreting our Canadian Bill

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8 Constitutional Amendment Bill, 1978, House of Commons, June 1978, section 6.

9 O. Lang, Constitutional Reform: Canadian Charter of Rights and Freedoms, Canada, 1978, p. 8.

10 Op.cit., note 4, p. 37.



of Rights.<sup>11</sup> The Justice Minister's opinion of the effect of the change cannot, under our rules of argument and evidence, be cited to the Court in an attempt to persuade it.

Furthermore, we do not think that simply resorting to American jurisprudence will necessarily ensure a vigorous and effective section 15.

We can appreciate why the American approach might be seen as desirable. Its basic features have a great deal of merit. To begin with, the American approach to equal protection ensures equality not just in procedural rights but also in the substance of the law.<sup>12</sup> Under the present interpretation of the Canadian Bill of Rights only equal procedural rights --

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11 In Curr v. The Queen, [1972] S.C.R. 889, Mr. Justice Laskin, as he then was, had to consider arguments that section 1(a) of the present Bill of Rights dealing with "due process" should be read in the light of American jurisprudence on the 5th and 14th amendments. In a well reasoned argument at [1972] S.C.R. 898-902 he rejects the argument, in part, because the Bill of Rights provides a different context for s. 1(a) than that surrounding the 14th amendment. In the Lavell case, he rejected 14th amendment jurisprudence on equality before the law on the ground that the Canadian Bill of Rights offered more explicit guidance on the point: [1974] S.C.R. 1349, at p. 1386. M. Justice Ritchie in Lavell simply denies, without elaboration, that s. 1(b) is "effective to invoke the egalitarian concept exemplified by the 14th amendment of the U.S. Constitution as interpreted by the Courts of that country": [1974] S.C.R. 1349, at p. 1365.

12 Op. cit., note 8, page 5.