The Canadian Federation of Business and Professional Women's Clubs
La Fédération Canadienne des Clubs de Femmes de Carrières Libérales et Commerciales
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November 25, 1980

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Mr. Richard Pregent
Clerk
Special Joint Committee
on the Constitution
House of Commons
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Dear Sir:

Enclosed please find our brief, for submission to the Special Joint Committee. We still hope to present it before the Committee and if there is an opportunity to do so, please advise me.

Yours very truly,

Margaret A. McPherson

MAM:sm
Encl.

WOMEN AND THE CHARTER OF RIGHTS

Submission of the
Canadian Federation of
Business and Professional Women
to the
Special Joint Committee on the Constitution

November 25, 1980

I INTRODUCTION

This brief is submitted on behalf of the Canadian Federation of Business and Professional Women. Our organization represents 107 clubs across Canada, and has more than 4,000 members. The Federation is responsible for representing its members on crucial social and political issues at the national level.

With regard to the proposed Constitutional Amendments, this brief will focus on the Charter of Rights and its impact on women. We note with regret the lack of consultation with women's groups, and indeed, with all Canadians, in the Federal government's hasty development of its proposals. We feel that the many serious flaws in the Charter would have been avoided, if there had been greater public participation in its formulation.

II Section 1- LIMITATION ON CHARTER OF RIGHTS

Section 1 ostensibly is a guarantee of the rights and freedoms that are contained in the body of the Charter. However, the broadly worded limitation on the enjoyment of these rights and freedoms effectively destroys the guarantee. The phrase "subject to the reasonable limits generally accepted in a free and democratic society" has been interpreted by the Court very broadly. Basically, whatever the government designates as being within "reasonable limits" will be deemed acceptable by the Courts. This certainly has been the analysis in the past. The judicial review of the implementation of the War Measures Act[1] is an excellent example of this approach.

We recognize that there are times when the government must move quickly and decisively to meet a threat to the life of the

nation. However, the present limitation clause could be tightened substantially without unduly impeding government action in periods of genuine crisis.

We recommend that the following features be incorporated in a revised Section 1:

1. the rights and freedoms guaranteed in the Charter can be limited only in an emergency;
2. the government must declare the emergency;
3. the Supreme Court of Canada must assess objectively whether or not the emergency exists;
4. the limitations imposed must be to the extent strictly required by the exigencies of the situation;
5. certain types of rights can never be limited and are protected in all situations.

All of these features presently are included in Article 4 of the U.N. Covenant on Civil and Political Rights. We note that the Federal Government and all the Provincial Governments are signatories to the Covenant, as of 1976. Article 5(2) of the Covenant states that it sets the minimumstandard for any future human rights legislation which the signatories may introduce to their own jurisdictions. As Section 1 of the proposed Charter of Rights falls far below this minimum standard, we submit that Canada will be in breach of its obligation under the Covenant if it adopts the proposed wording.

III "EVERYONE" versus "EVERY PERSON"

Throughout the Charter, the word "everyone" is used to identify those who are eligible to assert and enjoy the fundamental and "non-discrimination" rights. This word creates immediate interpretation problems, due to the absence of a judicial or statutory definition of the term.

In view of the unnecessary ambiguity and uncertainty associated with the legal meaning of the word "everyone", we recommend that the phrase "every Person" be inserted in its place, wherever it is used in the Charter.

IV Section 15(1) - NON-DISCRIMINATION RIGHTS [2]

(a) "Equality before the Law"

Section 15(1) of the Charter is designed to prohibit discrimination on the grounds of race, national or ethnic origin, colour, religion, age, or sex. The wording used is basically that used in s. 1(b) of the Canadian Bill of Rights. The Supreme Court of Canada has interpreted this provision eleven times, and in all but one of those decisions, has given the section an extremely narrow and literal interpretation. It has been held in the Lavell-Bedard [3] judgments that the phrase "equality before the law" refers to equality in the administration of the law, and not in the content of law itself. To address this problem, we recommend that Section 15(1) be amended to provide "equality in and before the law".

(b) "Equal Right and Benefit"

Section 15(1) also provides for the "equal protection of the

law" without discrimination on any of the grounds listed. This phrase has not been interpreted to add to the scope of women's right to "equality before the law". In addition, the word "protection" in its legal meaning does not include privileges and benefits. With social benefit programmes being of such importance, we recommend that the guarantee of protection be extended to include benefits.

(c) "Two-Tier" Test - Categories of Discrimination

The proposed wording of s. 15(1) sets out a list of groups of people who have been targets of discrimination in the past. The groups which are specified are basically those named in the Canadian Bill of Rights, with the addition of the new category of age.

It is our contention that it is not necessary to include a finite list of the groups which may experience discriminatory treatment. We therefore recommend that the list in s. 15(1) be deleted. This will allow other threatened groups to avail themselves of the section's protection in the future, as the need arises.

We further submit that a new section 15(2) be inserted in the Charter to establish a specified list of groups which by their historical and social position have earned the highest level of protection that society can offer. This second tier would cover discrimination on the basis of sex, race, national or ethnic origin, colour or religion. Legislation which treats these groups differently would be subject to a higher test: in no circumstances, would discrimination on the basis of one of these attributes be acceptable. The onus would be on the government to justify any law or program which differentiated on one

of these bases. In short, these groups in s. 15(2) would be subject to the "strict scrutiny" test: i.e. a compelling reason must be shown for any distinction made on one of these grounds. The groups which would be covered by s. 15(1) would be subject to the "reasonableness" test: i.e. is there a reasonable basis for treating that group differently from other groups?

The application of two different standards in judging legislation which creates differences in status or treatment raises an obvious question. Is it fair to have a two-tier system? We believe that such a solution is the only valid one. As an example, compare two grounds of discrimination which are listed in the proposed Charter's text: race and age. It is our position that discrimination on the basis of race can never be justified and that this category requires the greatest degree of protection which our society can afford. Age, however, can be a reasonable basis for differences in status or treatment. We do not want ten year olds voting or drinking or driving cars. Society must set age standards for marriage and for eligibility for pensions and other social benefits for the elderly. Therefore, we strongly urge that a two-tier system be adopted and suggest the following wording:

15(1) EVERY PERSON SHALL HAVE EQUAL RIGHTS IN LAW INCLUDING THE RIGHT TO EQUALITY BEFORE THE LAW AND TO THE EQUAL PROTECTION AND BENEFIT OF THE LAW.

(2) A COMPELLING REASON MUST BE SHOWN FOR ANY DISTINCTION ON THE BASIS OF SEX, RACE, NATIONAL OR ETHNIC ORIGIN, COLOUR OR RELIGION.

(d) Section 15(2) - AFFIRMATIVE ACTION

Affirmative action programmes frequently have been an effective tool in the attempt to reduce inequities suffered by disadvantaged groups. Section 15(2) is aimed at preserving the right of governments to implement such plans without breaching the non-discrimination provisions in s. 15(1). Unfortunately, the proposed wording creates an number of problems:

1. this section applies to disadvantaged groups. We submit that sex should be specified as one of the grounds upon which a group may be deemed disadvantaged. It has been argued, in the past, that women are not a disadvantaged group. In view of the disproportionately low representation of women in political, social and economic decision-making, we believe that women are a disadvantaged class and as such, should be eligible for affirmative action programmes.

2. the section applies to "disadvantaged persons or groups". We feel that this opens the door for a Bakke[4] type situation, in which a member of the advantaged class can challenge an entire affirmative action programme on the basis that it adversely affects him. We recommend that individuals be denied the status to attack such programmes and that the word "persons" be deleted from s. 15(2).[5]

V Section 24 - UNDECLARED RIGHTS AND FREEDOMS

Section 24 is designed to preserve and maintain existing rights enjoyed by all Canadians, with particular emphasis on those rights presently exercised by native peoples. We are concerned that the wording of s. 24 undermines the intent of s. 15(1), with regard to the position of native women. With this possible conflict in mind, we recommend that s. 24 be amended in such a way that only those undeclared rights and freedoms, which enure to the equal benefit of both sexes, will be preserved.

VI Section 26 - LAWS RESPECTING EVIDENCE

The explanatory notes to Section 26 of the Charter state that it is designed to preserve our present policy giving protection from self-discrimination.[6] Due to the broad wording of the section, the laws of evidence would not be affected by the other provisions in the Charter. Therefore, a rule of evidence which discriminated on the basis of a person's sex, colour, national or ethnic origin, race or religion would not be struck down by the Charter. We submit that s. 26 must be amended to exempt s. 15(1) of the Charter from its operation.

VII Section 29(2) - APPLICATION OF THE CHARTER

The only rights in the Charter which will not have immediate application are the non-discrimination rights contained in s, 15(1). The apparent purpose for this delay is to allow Parliament and the Legislatures the opportunity "to make consequential amendments to other legislation".[7] We reject this explanation and protest the planned delay on the following grounds:

1. there is nothing in s. 29(2) to compel these governments to make the requisite amendments

to offending legislation;

2. governments have existing inventories of the legislation about which women are displeased and they require no further time to determine wherein dissatisfaction lies;

3. during the three year "limbo period, the groups which most require protection against discrimination will have neither judicial recourse nor statutory protection under the Charter;

4. the issues which will arise out of the wording in s. 15(1), will require sophisticated judicial examination. Our Courts must begin to develop a set of coherent principles on which to base their decisions under the new Charter, as soon as possible.

Therefore, we recommend that s. 29(2) be deleted from the Charter.

VIII ENTRENCHMENT

Throughout the Constitutional conferences and in the discussion generated by them, the focus frequently was on the question of entrenchment of a Charter of Rights. While the pros and cons of entrenchment have been set forth at lengh, the merits of the substance of the Charter generally have been ignored, until recently.

Entrenchment of a Charter per se is not the only issue. If we entrench a flawed Charter, we will have to live with its deficiences for a very long time. While the symbolic and educational roles of an entrenched Charter of Rights are important, they pale when examined in light of the distressing long-term implications of the provisions in this particular Charter. In short, we can not support entrenchment of the proposed Charter of Rights, in its present form.

Footnotes

1. Gagnon and Vallieres v. The Queen (1971) 14 C.R.N.S 321 (Que. C.A.) Leave to appeal to the Supreme Court of Canada was refused on April 25, 1972.

2. We support the recommendation of the Canadian Advisory Council on the Status of Women that the title of Section 15 be changed to "Equal Rights". We feel that "non-discrimination rights" has a negative connotation and gives the impression that some ill-intent must be involved for the section to operate.

3. Attorney-General of Canada v. Lavell, Isaac v. Bedard (1973) 38 D.L.R. (3d) 481.

4. Regents of the University of California v. Bakke 98 S. Ct. 2733 (1978)

5. We support C.A.C.S.W.'s recommended wording as set out in its brief to the Committee on November 18, 1980, (page 17):

> Nothing in this Charter limits the authority of Parliament or a legislature to authorize any program or activity designed to prevent, eliminate or reduce disadvantages likely to be suffered by or suffered by any group of individuals when those disadvantages are related to the race or sex of those individuals, or to the other unreasonable bases of distinction pursuant to subsection (2).

6. The Canadian Constitution, 1980 - Proposed Resolution, p. 24, Note 26.

7. Ibid, p. 24, Note 29.