The National Association of Women and the Law
L'Association Nationale de la Femme et le Droit

WOMEN'S HUMAN RIGHT TO EQUALITY:
A PROMISE UNFULFILLED

- SUBMITTED TO THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION

NOVEMBER, 1980

P.O. BOX 197, STATION B, OTTAWA, ONTARIO. K1P 6C4

7. To ensure that the rights of native women are protected, section 24 must be amended to provide that any special rights and freedoms of native peoples apply equally to native men and women.

8. Section 26 sanctions laws of evidence which contravene all sections of the Charter including the right to equality. It must be removed.

9. Canadian governments do not need three years to amend discriminatory laws. The three-year delay in the implementation of the equality clause must be removed.

10. The only legitimate way in which a new Constitution can be developed for all Canadians is through their own participation through a Constituent Assembly. The system must guarantee that a representative number of women are elected to this body.

TABLE OF CONTENTS

I INTRODUCTION 1

II AN ENTRENCHED CHARTER 1

III THE SUPREME COURT OF CANADA 2

IV CHARTER OF RIGHTS: CONTENT 5

1. Section 1: the "Mack Truck" Clause 5
2. Purpose Clause 7
3. Personhood: The Object of Rights 8
4. Title of Section 15: "Equal Rights", not "Non-Discrimination Rights" 8
5. Section 15(1): Equal Rights 9
   (a) The Problem 9
   (b) "Equality Before the Law" 9
   (c) "Equal Protection and Benefit of the Law" . . 10
   (d) The Legal Standard 10
   (e) Other Prohibited Grounds 11
   (f) "Any Distinction", not"Discrimination" 12
   (g) Recommended Wording 13
6. Affirmative Action 14
   (a) "Nothing in this Charter..." 14
   (b) "...any law, program or activity..." 15
   (c) "Disadvantaged Groups", not"Disadvantaged Persons" 15
   (d) Relationship of Disadvantaged Groups to Prohibited Grounds 16
7. Section 24: Rights for Native Women 16
8. Section 26: Laws Respecting Evidence 17
9. Section 29(2): Three Year Delay 17

V THE PROCESS OF CONSTITUTIONAL REFORM 18

I. INTRODUCTION

This brief is presented on behalf of the National Association of Women and the Law, an organization of lawyers, law students and lay people who are concerned with legal issues as they relate to women.

The implementation of an effective Charter of Human Rights and Freedoms seems to us a priority in achieving equality for all people within our social framework. Such a Charter is a declaration by a people of its aspiration towards a particular mode of living. But we caution the Committee that the operative phrase here is "an effective" Charter. A simple declaration of intent is not enough. Indeed, poorly articulated rights accompanied by excessively broad exception clauses may leave Canadians -- particularly Canadian women -- worse off than we are now. We are committed to seeing that any Charter of Human Rights and Freedoms which will be entrenched into our Constitution deals with existing and potential problems in an effective way.

II. AN ENTRENCHED CHARTER

We recognize a number of advantages which flow from entrenchment of a Charter of Rights and Freedoms into our Constitution. First, it is symbolic and educational as a statement of the value placed upon human dignity and integrity in our society. Secondly, an entrenched Charter would bind both the provincial and federal governments to a uniform standard. Thirdly, by requiring adjudication by the Courts, it would provide Canadians with an alternative forum to the elected legislatures for enforcement of their basic rights and freedoms.

However, we cannot endorse the entrenchment of a Charter as poorly articulated and subtantively inadequate as this one. In our view the proposed Charter will offer little protection to Canadians and may cement inequities within our society.

Although the expanded role of the Courts opens another forum for the adjudication of human rights issues, there are dangers to be avoided in granting the Courts greater power. Canadian jurisprudence illustrates the Supreme Court's reluctance and indifference when considering women's assertion of their

right to equality. The "Persons" case[1] of 1928 is a well-known example of this attitude. In that case, the Supreme Court of Canada held unanimously that women were not persons within s. 24 of the British North America Act. Fortunately, in 1929, these women were able to appeal to the wisdom of the Judicial Committee of the Privy Council in Britain. Otherwise, we might still be waiting for a constitutional amendment to allow women to sit in the Senate.

Nor have women found that application of the guarantee of equality in the Canadian Bill of Rights to actual situations alleviated discrimination against them. The Lavell/Bedard[2] and Bliss[3] decisions demonstrate the need for the clearest possible articulation of the scope of the rights and freedoms set out in a Charter of Rights.

In our view the Charter, as proposed, will do little to cure the problems of the past. We cannot, therefore, support entrenchment of the proposed Charter unless several critical changes are made to it.

III. THE SUPREME COURT OF CANADA: COMPOSITION

The present Supreme Court of Canada is composed of nine members, three of whom must be trained in the Civil law. Proposals for reform of the Court have included alteration to increase the representation on the Civilian side: to four members in a court of nine; or to five members in a court of eleven judges. Although the Supreme Court of Canada Act does not require it, practice has ensured that a balance of members from all regions of the country are appointed to the Court as well.

Yet, although women make up one-half of the population, no such rule, either legislative or procedural, has been developed to ensure that women are represented on our highest Court.

---

[1] Henrietta Muir Edwards et al v. Attorney-General for Canada, /1928/ S.C.R. 276 (S.C.C.); /1930/ A.C. 124 (P.C.)

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

[3] Bliss v. Attorney-General of Canada /1979/ S.C.R. 183

The Royal Commission on the Status of Women recommended in 1970 that women should be appointed to all levels of the Judiciary, particularly the Supreme Court. Since that time, eight justices have been appointed to the Court. Despite the presence of outstanding women lawyers and judges in every region, no women have yet been named to the Supreme Court.

This is a significant omission. Professor Beverley Baines, in a paper prepared for the Canadian Advisory Council on the Status of Women, described the problem as follows:

> A study of American cases carried out in 1971 by two middle-aged, white, male law professors (their own self-characterization) is a case in point. They analyzed a representative selection of American judicial opinions in which the judges were responding to allegations of sex discrimination. Their conclusions were that the performance of American judges in sex discrimination decisions ranged "from poor to abominable". The judges "failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues". The authors found particularly noteworthy the contrast between judicial attitudes in the sex discrimination cases and those in race discrimination cases. They reported that:
>
> > Judges have largely freed themselves from patterns of thought that can be stigmatized as 'racist' -- at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on colour. With respect to sex discrimination, however, the story is different. 'Sexism' -- the making of unjustified (or at least unsupported) assumptions about individual capabilities, interest, goals and social roles solely on the basis of sex differences -- is as easily discernible in contemporary judicial opinions as racism ever was.[4]

---

[4] see Baines, Beverley, "Women, Human Rights and the Constitution", prepared for the Canadian Advisory Council on the Status of Women, October, 1980, at p. 23

Canadian studies of male and female decision-makers have confirmed this difference in perspective.[5]

The Canadian Bar Association in its publication on the Constitution: "Towards a New Canada" justified diversity of membership on the Supreme Court in the following terms:

> There is no doubt value in having members chosen from the various parts of the country, so that they can bring with them an understanding of the situations in which the law is to apply throughout the land. . . . Defined representation for Quebec is justified because of the different legal system in that province. It also ensures that the Court is sensitive to the particular values of one of Canada's major cultural communities. In this vein, while we insist that the members of the Court should not be selected on a representative basis, we do agree that an effort must always be made to ensure that the Court as a whole has a deep understanding of all the regions of Canada. Law does not exist in a vacuum. It must be interpreted and applied with a full understanding of the country and its people.[6]

We doubt that a "full understanding" of the Canadian people is possible when only one sex is represented on the Court. The need for such "full understanding" will become even more critically important when the Court is charged with the duty of interpreting the guarantee of equality for women and men set out in the Charter.

WE THEREFORE RECOMMEND THAT THE CONSTITUTION GUARANTEE A REPRESENTATIVE NUMBER OF WOMEN ON THE SUPREME COURT OF CANADA. Women must be represented on the lower courts as well, but the Supreme Court, as our final court of appeal, is of particular importance.

The appointment of women will in no way limit representation on other bases since women can be found in all regions of the country and make up one-half of all ethnic and religious groups.

---

[6] Canadian Bar Association, Committee on the Constitution, "Towards a New Canada" 1978, pp. 60-1.

IV. CHARTER OF RIGHTS: CONTENT

1. Section 1: The "Mack Truck" Clause

Section 1 is titled "Guarantee of Rights and Freedoms". In fact, it is a limitation clause which defines the circumstances in which the provisions of the Charter can be abridged or denied. While we recognize that the government must have the authority to act decisively at certain critical times, we feel that the wording of Section 1 is dangerously broad.

The Special Joint Committee on the Constitution which considered Bill C-60 had this to say about the limitation clause in that the Bill, which, although different in wording, was similar in intent to Section 1:

> Clause 25 of the Charter serves two purposes. First, it instructs the Courts on how to interpret the Charter by making explicit that the protected rights and freedoms are not absolutes but may be limited in their exercise or enjoyment in the interest of several aims justifiable in a free and democratic society. In our view the Charter would in any event be read this way by the Courts, and the explicit direction to the courts is unnecessary. Coupled with the second purpose of the clause, it is also harmful through overextension. This first purpose should be therefore abandoned.
>
> The second purpose of the clause is to replace Section 6 of the Canadian Bill of Rights, which preserves the limitation of liberty by the War Measures Act, allowing for its invocation "upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists". In the Charter the War Measures Act is preserved by implication rather than explicitly.
>
> The case for justifiable limitations on rights by the War Measures Act applies principally to the political rights and freedoms rather than to the legal rights and freedoms. Many of the more precise legal protections should not require limitation even in wartime crises. For example, we do not see how the state could ever be justified in imposing cruel and unusual punishment. In our view, any limitations on the protected rights should be exactly spelled out in the Charter. Moreover, the accountability of the

> Government to Parliament for the invocation and administration of trenching legislation should be established by the Charter. [7] [emphasis added]

The Committee then recommended that Section 25 be replaced by "a clause which exactly specifies permissible limitations on protected rights and freedoms by the War Measures Act or similar legislation and that the Government should be required to justify to Parliament the invocation of such legislation".

Our objections to Section 1 can be summarized in two main points: First, Section 1 applies at all times - it is not limited to emergency situations. Secondly, the standard of "reasonable limits" that are "generally accepted in a democratic society" appears to us to allow virtually any legislation passed by a majority in Parliament or a legislature. Apart from concerns regarding the basic rights and freedoms which we share with other groups, we are concerned that this clause may have the effect of completely negating the protection provided by Section 15. Certainly the regulations which the Federal Government imposed after the Second World War forcing married women out of the Public Service were "generally accepted" at the time. With the expectation that unemployment will only increase in the next few years, a repeat of such discriminatory treatment of women is quite possible. Already, the Economic Council of Canada has recommended an income-tested Unemployment Insurance scheme which would disentitle 90% of married women.

The limitation clause in the International Covenant on Civil and Political Rights, to which Canada and all of the provinces are signatories, is much more strictly worded, and it clarifies that some rights may never be abridged -- not even in wartime:

> Article 4
> (1) In time of public emergency which threatens the life of a nation and the existence of which is officially proclaimed, the States Parties to the present covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

---

[7] Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, October 10, 1978, p. 20:14.

> (2) No derogation from Articles 6 (right to life), 7 (torture, cruel, inhuman or degrading treatment), 8 (slavery), 11 (imprisonment for civil wrongs), 15 (equal application of criminal law), 16 (personhood), and 18 (freedom of thought, conscience and religion), may be made under this provision. [emphasis added]

There are several essential components here which we believe should apply:

1. rights can be limited only in an emergency;
2. the government must have articulated that an emergency exists to exempt itself from the Charter;
3. the existence of an emergency is an objective situation which the court must assess and the onus would be on the government to establish that such a situation exists;
4. the standard is "to the extent strictly required by the exigencies of the situation".
5. some rights are protected in all situations (including the right to equality).

In fact, the difference between Section 1 of the proposed Charter and Article 4 of the International Covenant on Civil and Political Rights is so significant that we believe THAT THE PROPOSED SECTION 1 WOULD PLACE CANADA IN A BREACH OF HER OBLIGATIONS UNDER THIS COVENANT.

2. Purpose Clause

WE RECOMMEND THE INCLUSION OF A "PURPOSE CLAUSE" IN THIS CHARTER, SIMILAR IN WORDING TO ARTICLE 3 OF THE UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS. Such a clause would undertake to guarantee the equal right of men and women to the enjoyment of all civil, political and economic rights set forth in the Charter. The adoption of such a section at the beginning would reflect the intent and spirit of the Charter and provide an overriding statement of principle to be used in its interpretation. Any ambiguity, for example, in Section 15(1) could be clarified by reference to the overall purpose set out in Section 1. Any limitations on the rights and freedoms should be severed from this basic guarantee and placed in a separate section.

3. Personhood: The Object of Rights

We are concerned about possible problems of interpretation arising from use of the word "everyone" throughout the proposed Charter. While the terms "persons" and "individual" have been defined in successive decisions, the meaning of the word "everyone" has not been settled, adding an unnecessary element of uncertainty in future litigation.

Again we find ourselves in agreement with the comments of the 1978 Joint Committee on the Constitution who said:

> While the words "individual" and "person" refer to the natural entity, we believe that it is the human person that is the proper subject of rights and freedoms. The word "individual" connotes the individuation or distinctness of the human being, but not his or her dignity.
>
> We are also troubled by the limitation to natural persons or individuals of the right to the use and employment of property, and the right not to be deprived thereof except in accordance with the law. We can see no prima facie reason why corporations and groupings of persons should be denied this protection. [emphasis added][8]

The British North America Act used the word "person" in relation to qualifications for the public office of Senator and that in 1929 the Judicial Committee of the Privy Council overruled the Supreme Court to hold that this concept includes adult women.

In view of the difficulties which would be caused by the introduction of the such vague terms as "everyone and "chacun", IT IS RECOMMENDED THAT THE PHRASE "EVERY PERSON"/"TOUTE PERSONNE" BE INSERTED IN ITS PLACE WHEREVER IT OCCURS IN THE CHARTER.

4. Title of Section 15: "Equal Rights", not "Non-Discrimination Rights"

Although the title of a section is not of great significance to legal interpretation, we believe that it would be helpful if the words "Equal Rights" were used instead of the negative "Non-Discrimination Rights". "Non-Discrimination", as a negative term, conveys only what should be avoided, rather than the standard to

---

[8] Report of the Special Joint Committee on the Constitution (1978) p. 20:11

which we aspire in Section 15, namely "equality". Therefore, WE RECOMMEND THAT THE TITLE OF SECTION 15 BE CHANGED TO "EQUAL RIGHTS".

5. Section 15(1) - Equal Rights

(a) The Problem

The section of the proposed Charter of Rights and Freedoms which is intended to prohibit discrimination is found in Section 15. The Federal Government's proposed wording is as follows:

> 15(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

There are two grave problems with the formulation of Section 15, as it now stands. The first is the narrow, restrictive manner in which the PRINCIPLE of equality is articulated, beginning with title of the section: "Non-Discrimination Rights" and the second problem is the lack of guidelines given to the Court as to the appropriate standard(s) to be used by them in interpreting the guarantee of equality.

(b) "Equality before the Law"

The first right granted in this section is the right to "equality before the law", a clause which has already been interpreted by the Supreme Court of Canada in the cases of Bedard and Lavell to mean equality in the administration of the law and not in the content of the law itself. Such a restrictive meaning of equality allows blatantly discriminatory laws to stand so long as their application in the ordinary courts is "equal".

Some have suggested that interpretation of the phrase "equality before the law" in the context of the Canadian Bill of Rights has been so narrow because it was a mere statute and that a more generous interpretation will be given to this clause once it is entrenched in the Constitution. An examination of the two leading sex inequality cases: Lavell and Bliss, however, reveal that the decisions did not turn on a difference between a statutory and a constitutional standard for equality. We are therefore not at all confident that the Supreme Court will begin to interpret this clause in a broader way simply because it is entrenched. Quite the contrary: in our view, these words are likely to receive exactly the same interpretation after

entrenchment as before. This, after all, is the message being given to the Court by entrenchment of the same words. Any progress in "discrimination" cases will therefore rest upon the second "guarantee of equality" in subsection 15(1): "equal protection of the law".

(c) "Equal Protection AND BENEFIT of the Law"

Section 15(1) also promises "the equal protection of the law". Again, this wording is substantially similar to that of the Canadian Bill of Rights with the addition of the word "equal". Since the words "protection of the law" have not been interpreted to add to the right of "equality before the law", any new right encompassed by this phrase must be found in the addition of the word "equal".

We do not believe that such a subtle change in the wording of the equality clause will be sufficient to overcome the past restrictive interpretation given to the words "equality before the law and the protection of the law". The principle should be generously and broadly stated so that there is no doubt whatsoever that the purpose of the section is to guarantee to every person their human right to equality in the fullest sense.

We are concerned that the word "protection" is too restrictive because its ordinary meaning would not include "benefits" or "privileges". When the phrase "equal protection" was included in the 14th Amendment to the American Constitution in 1868, the role of government did not encompass the scope of social benefit programs familiar today. Although the American Supreme Court has expanded the scope of the "equal protection" clause to include scrutiny of such programs (albeit somewhat reluctantly), there is no guarantee that the Canadian court would do the same. Our Court has tended to take a strict, more literal approach to interpretation of human rights legislation.

To ensure that the guarantee of equality set out in Section 15 includes equal right to the benefits which government provides, WE RECOMMEND THAT THE WORDS "AND EQUAL BENEFIT" BE ADDED AFTER "EQUAL PROTECTION" IN SECTION 15(1).

(d) The Legal Standard

No guarantee of equality is ever absolute. The court has an inherent power to define the boundaries of any rights in the Charter. For example, the right to "freedom of speech" does not grant a license to defame others or spread sedition. Similarly, the Court will have the duty when interpreting Section 15 to determine which "distinctions" amount to discrimination and which are "reasonable" and therefore allowed.

The American courts have developed a "suspect classification" test in relation to discrimination on certain "invidious" grounds. For example, race can rarely form a proper basis for differential treatment in law. In such cases, the onus is on the government to prove a compelling state interest for the distinction in order for the law to be upheld. The court must not only evaluate the purpose of the legislation, but must also determine if the purpose could be achieved in another non-discriminatory way.

However, a majority of the American Court has not yet applied this "suspect classification" or "strict scrutiny" test to distinctions on the basis of sex. Rather, it has developed a "middle" test somewhere between "strict scrutiny" and "reasonable distinctions" to apply to sex inequality cases.

Professor Beverley Baines has identified five different tests which the Canadian courts have developed to aid interpretation of the "equality" clause in the Bill of Rights.[9] The best of these appear to resemble the "reasonable classification" test which the American Court applies to cases of discrimination on grounds other than race or sex. The Canadian court has never applied the "strict scrutiny" test in any discrimination case.

Because immutable characteristics, such as sex and race, are unrelated to the ability or capacity of the person, we believe that a strict standard must apply to them. In the words of the paper presented by the Canadian Human Rights Commission, distinctions should "almost never" be made on these grounds. To ensure that the Court will take this approach, we believe that it will be necessary to clearly state this standard in Section 15. WE THEREFORE RECOMMEND THAT SECTION 15 SPECIFICALLY PROVIDE THAT A COMPELLING REASON MUST BE GIVEN FOR ANY DISTINCTION ON THE BASIS OF SEX, RACE, NATIONAL OR ETHNIC ORIGIN, COLOUR OR RELIGION.

(e) Other Prohibited Grounds: Age, Physical or Mental Handicap, Marital Status, Political Belief, Sexual Orientation and Previous Conviction

We would emphasize, however, that not all "inherent" classifications are necessarily invidious. The example of "age" comes immediately to mind. While some legal distinctions on the basis of age are improper and therefore ought to be prohibited by Section 15, many distinctions based on age are perfectly appropriate because they fairly relate to different levels of capacity. It is appropriate, for example, for children who have committed criminal offences to be treated less harshly than adults. Another example is setting an age of majority for various purposes. This is not to say that unfair or unreasonable distinctions on the basis of age should be

---

[9] Baines, "Women, Human Rights and the Constitution".

tolerated. Certainly Section 15 should forbid discrimination on this ground.

Our point is that the judiciary should apply a different, more stringent, test to laws which distinguish on the basis on the invidious or suspect categories (such as sex or race) than to laws which distinguish on other bases, such as age.

To achieve this, Section 15 of the Charter must make it clear that a "suspect classification" test will apply to certain types of discrimination. To fail to do so will result in the standard for all differential treatment being reduced to the lowest common denominator, the "reasonable classification" test.

A number of grounds which should receive judicial scrutiny have been left out of the Charter. The more obvious ones are: marital status, physical or mental handicaps, political belief, sexual orientation and previous conviction. It is important to include "marital status" because often discrimination against women is "disguised" in this form. The language of Section 15 should permit the Court to scrutinize legislation on these grounds. The present wording of Section 15(1), because it provides a finite list of prohibited grounds, will not permit expansion to include them.

In addition, new grounds may be recognized in the future which we cannot now anticipate. To achieve this, either no list should be included in Section 15(1), or words such as "on any ground including" should be added before the list to clarify that it is not all-inclusive.

Our first preference would be to include no list at all to provide for the more expansive possible application of the section. However, we recognize the concerns of groups such as the mentally handicapped who may prefer the protection of a list of grounds which specifically includes them.

(f) "Any Distinction" not "Discrimination"

The value-cha ged word "discrimination" should be avoided if at all possible. Problems have arisen in interpretation of the word "discrimination" in that the courts generally feel that they must find that the complaining party has been subjected to "harsher treatment" than others. In the Burnshine[10] case, the Supreme Court of Canada upheld a provision under the Juvenile Delinquents Act which imposed a much longer term of incarceration on a young person than an adult could have received for the same offence, on the ground that he was "benefitting" from a longer

---

10 R. v. Burnshine, (1974) 44 D.L.R. (3d) 584.

period of "rehabilitation". The word "distinction" would squarely focus the Court on the primary issue: differential treatment of persons in like circumstances.

(g) Recommended Wording

Taking into account all of the points raised above, WE THEREFORE RECOMMEND THAT SECTION 15(1) BE REDRAFTED INTO TWO SUBSECTIONS USING THE FOLLOWING APPROACH:

Our First Preference would be:

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; and [11]

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

Another Acceptable Formulation would be:

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 WITHOUT UNREASONABLE DISTINCTION ON ANY GROUND INCLUDING SEX, RACE, NATIONAL OR ETHNIC ORIGIN, COLOUR, RELIGION, MARITAL STATUS, AGE, PHYSICAL OR MENTAL HANDICAP, SEXUAL ORIENTATION, POLITICAL BELIEF AND PREVIOUS CONVICTION; and

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

This approach includes several important improvements over the proposed draft:

1. the emphasis is placed on equal rights in law;
2. equality of benefits is guaranteed as well as protection;
3. new grounds can be added since there is no "list" (or an open-ended one);
4. a "strict scrutiny" test will apply to distinctions on the traditional grounds of "sex, race, national or ethnic origin, colour or religion".

---

[11] This is the wording proposed by the Canadian Advisory Council on the Status of Women.

5. The Court may apply a "strict scrutiny" test to the other grounds or a "reasonableness" test as circumstances warrant.

6. Affirmative Action

Any meaningful guarantee of equal rights for women must not preclude the methods necessary to overcome the cumulative effects of past discrimination. Freedom from discrimination is only one part of the right to equality. Affirmative action programs are consistent with a guarantee of equality in its broadest sense, in that they "even up" the position of disadvantaged groups.

Nevertheless, such programs necessarily operate as an exception to the specific prohibition against distinction. Care must be taken to ensure that the affirmative action clause is not so broadly or carelessly worded that it can be used to subvert the first function of the equality clause; ie, the prevention of discrimination.

The proposed Charter would allow affirmative action programs in Section 15(2): "This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups."

WE RECOMMEND THE FOLLOWING WORDING, BASED ON THE EQUIVALENT SECTION OF THE CANADIAN HUMAN RIGHTS ACT:

15(3) NOTHING IN THIS CHARTER LIMITS THE AUTHORITY OF PARLIAMENT OR THE LEGISLATURE TO AUTHORIZE ANY PROGRAM OR ACTIVITY DESIGNED TO PREVENT DISADVANTAGES THAT ARE LIKELY TO BE SUFFERED BY, OR TO ELIMINATE OR REDUCE DISADVANTAGES THAT ARE SUFFERED BY ANY GROUP OR INDIVIDUALS WHEN THOSE DISADVANTAGED ARE OR WOULD BE BASED ON OR RELATED TO SEX, RACE, OR OTHER GROUND PROTECTED UNDER SECTION 15(1).

We believe this wording is necessary for the reasons set out in the following sections.

(a) "Nothing in this Charter . . . "

The opening words of the proposed affirmative action clause should be expanded to read "Nothing in this Charter . . . ". This will rule out the possibility of a successful legal challenge to an affirmative action program aimed at alleviating sex discrimination on the basis that it contravenes another

freedom protected by the Charter, for example, freedom of speech. Such a revised wording parallels the opening of Section 15(2), which enables Parliament or the legislature to extend the use of either official language notwithstanding any other section of the Charter.

(b) ". . . any law, program or activity . . ."

Section 15(2) does not limit the scope of permissible affirmative action to that sanctioned by Parliament or a legislature, but extends to any law, program or activity. Private programs are invited without any requirement that they first be scrutinized by the appropriate level of government. This places the onus on the individual citizen to challenge private programs which abuse this section. Instead, authorizing legislation should be a necessary precondition for all affirmative programs involving a difference in treatment on the basis of sex, race or other prohibited ground.

This is not to say that it will be necessary for governments to pass as Act approving each proposed affirmative action program. It is envisaged that authorizing legislation, such as the Canadian Human Rights Act, will permit application for approval of a program to an appropriate administrative tribunal.

(c) "Disadvantaged groups" not "Disadvantaged persons"

The object of affirmative action is to even up the status of a disadvantaged group relative to the corresponding advantaged one. Any individual should not be considered a proper subject for such a program other than by virtue of his or her membership in a disadvantaged group. Focusing on the individual and not the group invites introduction of the Bakke[12] decision into Canadian jurisprudence. In that case, a white, middle-class male successfully argued that a program to increase black enrollment in university discriminated against him in that he was not admitted because of it. A comparison of Bakke's group to that of the successful black entrant would have validated the program immediately. Such confusion must not be imported into the Canadian context.

WE THEREFORE RECOMMEND THAT THE SCOPE OF PERMISSABLE AFFIRMATIVE ACTION PROGRAMS BE LIMITED TO DISADVANTAGED GROUPS AND NOT EXTEND TO DISADVANTAGED PERSONS.

---

[12] Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34.

(d) Relationship of Disadvantaged Groups to Prohibited Grounds

Nothing in Section 15(2) relates the "disadvantaged groups" to the prohibited grounds of discrimination listed in Section 15(1). This serious omission could permit, for example, a program to overcome regional disparities which could discriminate on the basis of sex or race.

The section must be worded so that the only permissable difference in treatment between groups of persons is that related to the basis for the disadvantage: the inequality created by the discrimination on a particular ground. For example, a program designed to overcome the disadvantages of native Indians because of race discrimination must apply equally to native men and women. Section 15(3) would permit preferential treatment in such an affirmative action program on the basis of race but not on the basis of sex.

On the other hand, a program could be designed to "even up" the disadvantages suffered by native Indian women on the basis of race and sex discrimination. Preferential treatment would be allowed since Indian women are disadvantaged on both grounds.

By referring the "affirmative action" subsection back to the prohibited grounds of discrimination, we will also ensure that all of the groups listed are entitled to benefit from such programs. This will answer a concern that it may be very difficult to convince a court that women are "disadvantaged" as a group.

7. Section 24: Rights for Native Women

The principal concern raised by Section 24 is that it will provide another basis for upholding the Lavell decision. Proponents of the Charter argue that the entrenchment of Section 15(1), with its slight modification from Section 1(b) of the Canadian Bill of Rights, provides adequate protection to Indian women. However, it is not clear that this inequity will be cured by Section 15(1) because of the existence of Section 24. Even if Section 12(1)(b) of the Indian Act can be struck down under Section 15(1) of the Charter, Section 24 may save it. On its face, this section appears to maintain the status quo of the Indian Act and the attendant discrimination of its Section 12(1)(b). To ensure that the rights of Native Women are protected, WE RECOMMEND THAT THE WORDS "PROVIDED THAT SUCH RIGHTS PERTAIN EQUALLY TO NATIVE WOMEN AND MEN" BE ADDED TO SECTION 24.

8. Section 26: Laws respecting Evidence

Section 26 denies the application of the Charter to the laws of evidence. In effect, this will allow discrimination in our rules of evidence on the basis of sex, race, national or ethnic origin, colour, or religion. THEREFORE, WE RECOMMEND THAT SECTION 15 OF THE CHARTER BE EXEMPTED FROM SECTION 26.

We note that this section apparently was included in the Charter to avoid introduction of the "poison fruit doctrine", as embodied in the Miranda decision in the United States. According to this doctrine, evidence obtained by illegal means is not admissable. Canadian courts, on the other hand, have allowed the introduction of such evidence. In view of the potential for abuse of their powers by the police under this rule, we urge the adoption of new admissibility laws, banning the use of tainted evidence. WE RECOMMEND THAT SECTION 26 BE DELETED FROM THE CHARTER.

9. Section 29(2): Three Year Delay

Section 29(2) suspends the application of Section 15 (non-discrimination rights) for a period of three years after the Charter comes in force. This is done ostensibly to permit Parliament and the provincial legislatures to make those amendments which would be necessary to eliminate any discriminatory provisions in existing legislation. However, there is nothing in this section or in the Charter compelling Parliament or the legislatures to act on this matter, nor is there any reason to believe that those bodies will amend offending legislation unless they are under a compulsion to do so. It is noteworthy that Section 15 is the only exempted clause, leaving the vital issue of equality of rights in limbo for three years. WE RECOMMEND THAT SECTION 29(2) BE DELETED.

The Courts must have the opportunity to develop a clear set of principles regarding the interpretation of Section 15. For the Courts to develop positive principles which will benefit Canadians, they must first consider the legislation discriminatory. A three year delay to remove the more obvious examples of discrimination from legislation is therefore not only unnecessary, but may actually impede the development of case law which expands the meaning of Section 15.

V. THE PROCESS OF CONSTITUTIONAL REFORM

We object, most strenously, to the course of unilateral action embarked upon by the Federal Government in this action. It seems to us that the proposed timetable is far too short to allow input and discussion of matters of such critical importance as an entrenched Charter of Rights and a formula for amending our constitution.

Consultation on this package has been wholly inadequate. Our concern is not only that the views of the Premiers are being ignored, although this is part of it. The views of Opposition Members in all eleven governments are likewise considered irrelevant, as are the thoughts of the people of Canada.

It does not surprise us in the slightest that the eleven "First Ministers" have been unable to agree upon the terms of a new Constitution. Their vested interests in this matter are quite self-evident.

In our view, the only legitimate way in which a new Constitution can be developed for all Canadians is through their own participation by way of a Constituent Assembly. At its convention this year, members of the constitutional section of the Canadian Bar Association recommended that such an Assembly should be composed of one-half of elected Members of Parliament and Members of Provincial Parliaments (with representative numbers from all parties) and one-half of members elected at large specifically for the purpose. We agree with this approach, with one modification: The system must guarantee that 50% of those elected at large are women. One way to achieve this would be to adapt the French "party list" system for this purpose, with each "party" required to alternate women and men on their lists. An effort should be made to ensure that the Constituent Assembly is representative of Canadians in other respects as well - ethnic minorities, religions, handicaps, etc. Provision should be made for groups other than the traditional political parties to offer Candidates for election.

The task of developing a new Constitution - including division of powers, an amending formula and a Charter of Rights - would be assumed by the Assembly, over a fixed period of years.