# Women and the Charter of Rights and Freedoms

Submission of

the Ontario Committee on the Status of Women

to the

Special Joint Committee on the Constitution

November, 1980

**********

The Ontario Committee on the Status of Women was founded in 1972 to press for implementation of the recommendations of the Royal Commission on the Status of Women on the provincial level. We are a totally voluntary organization numbering some 500 women and women's groups in various parts of Ontario and are funded by our membership dues.

We wish to contribute to review and revision of the Canadian Charter of Rights and Freedoms as contained in Schedule B of the Constitution Act, 1980. We shall address ourselves to issues of specific concern to women.

The principle of entrenching basic rights and freedoms in our constitution merits our support. The actual content of those rights and freedoms, however, must be worthy of entrenchment. We believe that, in part, the proposed charter falls short of such a goal.

The starting point for our discussion is section 15. While we applaud recognition of the equality of rights between men and women, we submit that the section as drafted will provide insufficient protection for women.

We must be clear, at this point, about why we support such a provision. We do not see it only as a statement of principle; we see it also as another tool to be used to strike down specific pieces of legislation or administrative acts based on such legislation which perpetuate a status for Canadian women inferior to that of Canadian men.

You have already heard about Jeanette Lavell, Yvonne Bedard and Stella Bliss. Each argued before the Supreme Court of Canada[1]; each relied on subsection 1(b) of the Canadian Bill of Rights[2] as follows:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely... the right of the individual to equality before the law and the protection of the law. (Emphasis added).

The Supreme Court of Canada found in each case that inequality did not exist using the standard "equality before the law." Its interpretation was that "equality before the law" only guaranteed equality in procedural rights, not equality in the substance of the law. These cases gave us clear examples of what women lose when there is no guarantee of substantive equality.

The lesson to be drawn is straightforward: the wording of the Canadian Bill of Rights offers inadequate protection for women. Yet the Charter replicates the words of the Canadian Bill of Rights as follows in subsection 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.

By virtue of the doctrine of stare decisis, courts would probably continue to be bound by the existing interpretation of the underlined words even though they are included in an entrenched Charter.

---

1. The Attorney of Canada v. Lavell; Issac v. Bedard, 1974 S.C.R. 1349 and Bliss v. The Attorney General of Canada, 1979 S.C.R. 183.

2. R.S.C. 1970, Appendix III.

Women are on strong ground on this point: the statutory precedent has proven to provide insufficient guidance to the courts on what they are to consider in determining whether inequality exists.

Further, we have reviewed the submission of the Canadian Advisory Council on the Status of Women to the Committee on the addition to subsection 15(1) of the words "equal protection of the law."[3] We are persuaded, as we hope the Committee is persuaded, that the words "equal protection of the law" do not answer our concern that the courts be given a clear mandate to determine whether equality exists in the substance of a law.

> RECOMMENDATION: We recommend that subsection 15(1) be amended in accordance with the following proposal of the Canadian Advisory Council on the Status of Women:
>
> 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.
>
> 15-(2) Such equal rights may be abridged or denied only on the basis of a reasonable distinction. Sex, race, colour, national or ethnic origin, and religion will never constitute a reasonable distinction except as provided in subsection (3).

We support the inclusion in the Charter of a provision allowing affirmative action programs directed at ameliorating the conditions of disadvantaged groups or persons. The Canadian Advisory Council on the Status of Women has canvassed the deficiencies of subsection 15(2) in its submission the the Committee.[4] We agree that the

---

3. Canadian Advisory Council on the Status of Women, "Women, Human Rights and the Constitutuion". Submission to the Special Joint Committee on the Constitution, November 18, 1980, pp. 6-12.

4. Op.cit., note 3, pp. 15-17

approach taken by the Canadian Avisory Council is preferable to that of a simple amendment specifically mentioning women as a disadvantaged group.

> RECOMMENDATION: We recommend that subsection 15(2) be replaced by the following proposal of the Canadian Advisory Council on the Status of Women:
>
> 15-(3) 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).

We strongly oppose the three-year moratorium on the operation of section 15 contained in section 29. It would leave many women without adequate recourse because most jurisdictions in Canada, including Ontario, do not have legislation of this type in place. Both volunteer and government-appointed women's groups have, for a period of years, collected information on necessary changes to existing statutes. The moratorium simply removes the urgency for change.

> RECOMMENDATION: We recommend that subsection 29(2) be deleted.

We appreciate that the intent of section 24 is to preserve existing but unspecified rights and freedoms and thus to broaden the positive scope of the Charter. It is possible that an undeclared right or freedom, whether pertaining to the native peoples of Canada or to other persons in Canada, may in fact be contradictory to a declared right or freedom. For instance, such a right or freedom may not pertain equally to men and to women.

RECOMMENDATION: We recommend that section 24 be amended by adding at the end a phrase providing that such rights or freedoms exist only to the extent that they do not abridge or abrogate a right or freedom specifically declared in the Charter.

Finally, we add our voice to that of the Canadian Advisory Council on the Status of Women in its comments on other sections of the Charter, particularly section 1. The Canadian Advisory Council's submissions reflect our concerns and offer informed proposals for change.

Canada was founded not only by two nations but also by two sexes. Women now are 52% of the population. The Charter, just as it strives to provide equality for both founding nations, must strive to provide equality for men and women. Where the Charter of Rights and Freedoms falters, the Joint Committee must strengthen it. We are aware that the Committee is mindful of this responsibility and this challenge; we trust that our submissions assist in the completion of its task.