

NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN

presentation to the

SENATE

HOUSE OF COMMONS

SPECIAL JOINT COMMITTEE ON THE CONSTITUTION OF CANADA

November 20, 1980

Ottawa, Ontario.

Women could be worse off if the proposed Charter of Rights and Freedoms is entrenched in Canada's Constitution. Certainly, the present wording will do nothing to protect women from discriminatory legislation, nor relieve inequities that have accumulated in judicial decisions.

Differences between the life patterns of women and men have not been considered by the drafters of the proposed Charter. We ask you to look at the new Charter in a different way, from the perspective of over half the people of Canada, to see its deficiencies and consider amendments to affirm and protect the fundamental rights to equality of women with men.

The National Action Committee on the Status of Women is a voluntary organization working to improve the status of women in Canada. NAC is an umbrella for more than 150 non-governmental organizations across the country - some regional, others Canada-wide. It promotes reform in laws and public policies, informs the public about women's concerns, and fosters cooperation among women's organizations.

NAC held a public forum on the Constitution in Toronto on October 18, 1980, the recommendations from which were considered by the Executive and form the basis of this brief. Notably, it was agreed that we support entrenchment of a Charter of Rights and Freedoms in principle. However, Part 1 of the Constitution Act, 1980, would be acceptable only if amendments are made to Sections 1, 15(1) & (2), 24 and 29(2), and a new section on the Supreme Court

We remind you that NAC has already informed the Minister of Justice of its opposition to moving divorce from federal to provincial jurisdiction. Nor do we address the division of powers which has wide application especially in the area of social services. Women have encountered difficulty by interminable referrals back and forth because of federal-provincial sharing of responsibility for financing and administration.

Part 1. Section 1:

SCHEDULE B
CONSTITUTION ACT, 1980

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government. 5

Rights and Freedoms in Canada

The opening section under Guarantee of Rights and Freedoms falls short of the principle we would expect. Imprecise wording in the limitations clause (underlining ours) could open the way to a variety of interpretations of permitted exceptions. Indeed, the potential for driving a truck through led

participants at our conference to dub it "the Mack truck clause". Failure to clarify the guaranteed rights and freedoms by removing the limiting clause would render useless subsequent sections.

A. NAC PROPOSES THAT THE GENERAL LIMITING CLAUSE BE DELETED.

If there have to be restrictions on rights and freedoms in time of war, these should be specified, as well as those rights and freedoms not to be abridged under any circumstances.

B. NAC RECOMMENDS THAT RIGHTS AND FREEDOMS NOT TO BE ABRIDGED UNDER ANY CIRCUMSTANCES, SHOULD INCLUDE, AT LEAST, THE RIGHT NOT TO BE SUBJECTED TO ANY CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT AND THE HUMAN RIGHT TO EQUALITY IN THE LAW.

Part 1, Section 15 (1)

Non-discrimination Rights

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.

Equality before the law and equal protection of the law

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(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.

Affirmative action programs

'Equality before the law' (underlining ours) - the wording proposed in the government's Charter of Rights, and used in the present Canadian Bill of Rights, has been interpreted to mean only that laws, once passed, will be equally applied to all individuals in the

category concerned. The law as written could discriminate against women, which is neither just nor acceptable. The courts have been concerned with maintaining the just administration of the law, but not with discrimination built into the law itself. Thus the Supreme Court of Canada decided against Lavell and Bedard, two Indian women who lost their status on marriage to non-status men. If the present wording prevails, there is no guarantee that Indian women will not continue to be denied equal rights with Indian men.

C. NAC RECOMMENDS AMENDMENT TO PROVIDE FOR EQUALITY IN THE LAWS THEMSELVES, AS WELL AS IN ADMINISTRATION OF THE LAWS.

Better still would be a statement that equality is a positive objective, and requiring an 'evening-out' process towards its achievement. This would be consistent with the view that freedom from discrimination is a positive human right women are entitled to enjoy. It would discourage a narrow interpretation of equality and prevent objections to affirmative action programmes which could lead to costly, time-consuming litigation.

- D. NAC RECOMMENDS A NEW CLAUSE TO SPECIFY THE HUMAN RIGHT TO EQUALITY AS A POSITIVE OBJECTIVE.

- E. NAC RECOMMENDS THAT THE SPECIFIED CATEGORIES IN SECTION 15 (1) BE AMENDED TO INCLUDE MARITAL STATUS, SEXUAL ORIENTATION AND POLITICAL BELIEF.

In view of the Stella Bliss case especially, it is clear that more specific directions need to be given to the courts for the interpretation of equality. Notably it is necessary to specify that discrimination on the basis of sex is proscribed whether the law discriminates against all women or only some of them.

- F. NAC RECOMMENDS THE ADDITION OF A NEW CLAUSE TO SECTION 15 SPECIFYING THAT DISCRIMINATION ON THE BASIS OF A SPECIFIED CATEGORY IS PROSCRIBED WHETHER ALL MEMBERS OF THAT CATEGORY ARE AFFECTED OR ONLY SOME.

Part 1, Section 15 (2) (above)

We believe this clause on affirmative action programs is intended to include women, but nowhere is this expressly stated. Given the sorry records of the courts on women's rights cases, this is not a matter to be left to judicial discretion. Should affirmative action programs be established we do not want to have to spend years in court proving their legality.

- G. NAC RECOMMENDS ADDING TO SECTION 15 (2) THE WORDS "INCLUDING WOMEN".

Part 1, Section 29 (2)

Application of Charter

29. (1) This Charter applies
 (a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 (b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

25 Application of Charter

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(2) Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.

35 Exception

No delay should be necessary in the application of (1) and (2) (underlining ours) of Section 15 (above). Advisory Councils on the Status of Women have the necessary inventories of relevant legislation requiring up-dating which could be proceeded with immediately.

H. NAC RECOMMENDS THAT SECTION 29 (2) BE DELETED.

Part 1, Sections 24 and 25

Undeclared Rights and Freedoms

24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

Undeclared rights and freedoms

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General

25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

Primacy of Charter

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Sections 24 and 25 of the proposed Charter actually threatens to entrench unequal rights for native women. Under the present Indian Act men are given special rights to pass on Indian status to a non-Indian spouse and their children, while native women are denied the same ability. Indian women

indeed lose their status on marriage to a non-status spouse, and cannot regain it, even on divorce or widowhood. The spouse of a status man, by contrast, retains Indian status even if the marriage is dissolved. Entrenchment

of the rights and freedoms now existing for the native people could be interpreted to mean entrenchment of special rights to native men and their denial to native women.

- I. NAC RECOMMENDS AMENDMENT TO SECTION 24 BY ADDING "PROVIDING THAT ANY SUCH RIGHTS OR FREEDOMS APPLY EQUALLY TO NATIVE MEN AND TO NATIVE WOMEN".

SUPREME COURT OF CANADA

Decisions as to what rights and freedoms Canadian women will enjoy will continue to be made by the courts, and ultimately by the Supreme Court of Canada. Yet, the Supreme Court of Canada decided:

- that women were not persons -- the famous 1928 Persons' Case;
- that discrimination against Indian women in the Indian Act does not violate 'equality before the law';
- that Stella Bliss was not discriminated against because she was a woman, but a pregnant person;
- that, again in the Bliss case, there was no discrimination because not all pregnant women were denied benefits under the Unemployment Insurance Act;
- and that Irene Murdoch had no claim to a share in the ranch on which she had, for 20 years, done the haying, raking, swathng, mowing, driven the horses and tractors, and dehorned, vaccinated and branded the cattle, as well as kept house and raised four children, because she had done "no more than what a normal farm wife would do".

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A representative number of women on the bench is not just a demand for symbolism - that women and men are equal - nor for career opportunities - although women deserve the same chance at judicial appointments and promotions as men. Very practically, numbers count. The decision on Lavell and Bedard was by a 5-4 majority in the Supreme Court of Canada. Altogether, 14 judges ruled on these cases - 8 in favour of the women's argument, 5 against, and 1 did not decide on the equality aspects. Clearly, the appointment of even 1 or 2 women to the Supreme Court of Canada could have made a difference in these crucial women's rights cases.

At present, 3 out of 9 places on the Supreme Court of Canada are allocated to Quebec because it is accepted that judges without experience in civil law should not be deciding civil law appeals. Should the same argument not hold for women's appeals, if not on grounds of socialization, gender identity and roles, then on the actual record of male judges in women's rights cases?

J. NAC RECOMMENDS ADDITION OF A NEW SECTION TO GUARANTEE THE APPOINTMENT OF A REPRESENTATIVE NUMBER OF WOMEN TO THE COURTS, INCLUDING THE SUPREME COURT OF CANADA.

The consistent use of the word "everyone" throughout the Charter, concerns us. "Every person" would be more specific, since "person" as used in the B.N.A. Act, has been clearly defined by the Courts in the Persons Case.

K. NAC RECOMMENDS REPLACEMENT OF THE WORD "EVERYONE" WITH "EVERY PERSON" THROUGHOUT THE CHARTER.

To sum up, in order for the Charter to provide unmistakably for the human right to equality for every person in Canada, including women, key changes are required in Section 1, Section 15 (1) and (2). Amendments proposed in Sections 24 and 29 (2) contribute to the same end. These changes are required to protect the fundamental rights and freedoms of all people in Canada, of women and men, in their encounters with government and each other.

LIST OF RECOMMENDATIONS CONTAINED IN THIS BRIEF

Part 1, Section 1.

- A. NAC PROPOSES THAT THE GENERAL LIMITING CLAUSE BE DELETED.
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Part 1, Section 15 (1)

- C. NAC RECOMMENDS AMENDMENT TO PROVIDE FOR EQUALITY IN THE LAWS THEMSELVES, AS WELL AS IN ADMINISTRATION OF THE LAWS.
- D. NAC RECOMMENDS A NEW CLAUSE TO SPECIFY THE HUMAN RIGHT TO EQUALITY AS A POSITIVE OBJECTIVE.
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Part 1, Section 15 (2)

- G. NAC RECOMMENDS ADDING TO SECTION 15 (2) THE WORDS "INCLUDING WOMEN".

Part 1, Section 29 (2)

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Part 1, Sections 24 & 25 1.

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- J. NAC RECOMMENDS ADDITION OF A NEW SECTION TO GUARANTEE THE APPOINTMENT OF A REPRESENTATIVE NUMBER OF WOMEN TO THE COURTS, INCLUDING THE SUPREME COURT OF CANADA.
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