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

TABLE OF CONTENTS

I INTRODUCTION---------- 1

II SECTION 1 - LIMITATION ON CHARTER OF RIGHTS --------- 1

III " EVERYONE" versus "EVERY PERSON" ---------- 3

IV Section 15(1) NON-DISCRIMINATION RIGHTS
(a) Equality before the Law ---------- 3
(b) Equal Right and Benefit ---------- 3
(c) "Two-Tier" Test - Categories of Discrimination -- 4
(d) Section 15(2) Affirmative Action ---------- 6

V Section 24 - UNDECLARED RIGHTS AND FREEDOMS --------- 7

VI Section 26 - LAWS RESPECTING EVIDENCE ---------- 7

VII Section 2a(2) - APPLICATION OF THE CHARTER --------- 7

VIII ENTRENCHMENT ---------- 8

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 <u>must</u> assess objectively whether or not the emergency exists;
4. the limitations imposed must be to the extent <u>strictly</u> 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. <u>Covenant on Civil and Political Rights</u>. 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.

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 Valliéres 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.