



Department
of Justice

Ministère
de la Justice

MEMORANDUM/NOTE DE SERVICE

BY HAND

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CONFIDENTIAL
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Date
March 19, 1981

TO/A: MINISTER (VIA B.L. STRAYER)

FROM/DE: SENIOR COUNSEL
(PUBLIC LAW)

SUBJECT/OBJET: CHARTER RIGHTS EQUALITY FOR MEN AND WOMEN

Comments/Remarques

Further to the meeting which the Deputy Minister and I had on February 18 with lawyers representing the National Association of Women and the Law, Miss Edythe MacDonald and I met today with four lawyers representing the Ad Hoc Committee of Canadian Women and the National Action Committee of Women to discuss the various concerns that these groups have with the present wording of the Charter of Rights.

While the women's groups have identified a number of changes that they would like to see included in the Charter, there are basically three for which they are continuing to press. Of these, the third (guaranteeing rights equally to both sexes) is undoubtedly the most crucial, and if it were accepted, I believe much of the pressure would be defused, since they appear to accept the fact that the opportunities for amendments are extremely limited.

The three principal amendments being pressed for are:

- (1) Changing "everyone" to "every person" throughout the Charter.
 - (2) Creating a "two-tiered" test for non-discrimination grounds in section 15.
 - (3) Ensuring that the Charter rights are guaranteed equally to both sexes.
- (1) "Everyone" versus "Every Person"

The main concern here is that because the rights refer variously to "everyone" or "every individual" or "any person", the courts might interpret "everyone" in section 7 ("everyone has the right to life") as including the unborn.

As I pointed out to them, the courts have not been so much concerned with what terminology is used to characterize a living being as they have

Comments/Remarques:

with the fact that the common law does not recognize the unborn as the possessor of any legal rights. Consequently, whether "everyone", "every individual" or "every person" is used is immaterial to the issue of the "rights of the unborn". What is important is that the law does not recognize rights of the unborn until after birth.

I believe that the lawyers representing the women's groups now appreciate this point, although they would prefer the use of "every person" throughout the Charter.

(2) "Two-tiered" Test for Section 15

The principal concern here is that, absent some indication to the courts that certain grounds of non-discrimination are more invidious than others, the courts will apply the same test of "reasonableness" to all grounds.

Specifically, the women's groups would wish to see a test spelled out in section 15 which would state that a "compelling reason" must be shown for any distinction based on sex, race, religion, colour, national or ethnic origin, sexual orientation or political belief, while simple reasonableness would be the test for other grounds.

As I pointed out to the legal representatives, there is serious danger in specifying in advance any a priori test for determining if a particular ground of distinction constitutes discrimination. If certain grounds warrant a more stringent test, it could only be on the basis of immutable characteristics, i.e. conditions which a person could not change.

This being the case, one could not argue that religion and political belief must be included while handicap and age were excluded. It is far better if the courts are left to decide this issue on a case-by-case basis, rather than generating additional argument on a "preferred" group of grounds from the outset. To take the latter approach would generate endless debate on what grounds should be subject to the "compelling reason" test as apposed to a single "reasonableness" test.

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Comments/Remarques:

(3) Rights Guaranteed Equally Between Sexes

A provision that would ensure that all Charter rights and freedoms pertain equally to both sexes is the critical issue, and on this matter the legal representatives of the women's groups have a valid point.

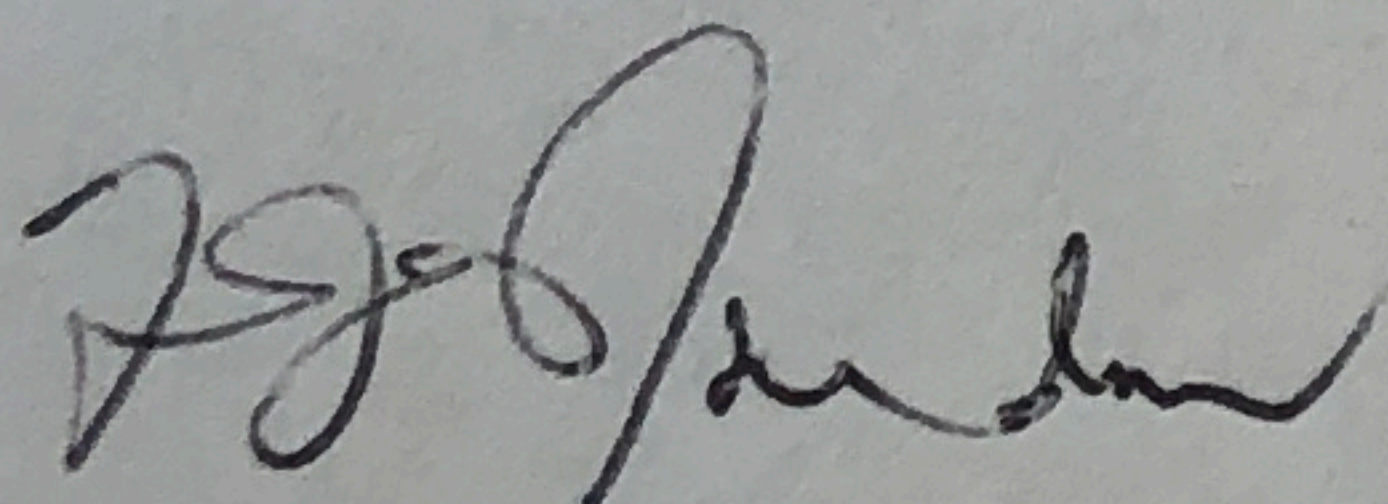
Despite the fact that section 15 assures equality without discrimination on the basis of sex, concerns remain that sections 25 (native rights) and 27 (cultural rights) could be construed as enabling the Charter to permit discrimination based on sex.

While such an interpretation is rather unlikely, it is possible to argue that these provisions could permit discrimination as between sexes based on cultural values. Consequently, it would be desirable to introduce an amendment to remove this doubt.

To ensure this result, it is recommended that an amendment along the following lines be considered as a new section 28:

"Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

While such an amendment will not necessarily assure the support of all women's groups for an entrenched Charter in the present resolution, it is our assessment that it will go a considerable distance to meeting the basic concern of most groups.



F.J.E. Jordan

cc. Deputy Minister
Michael Kirby
Fred Gibson
Barry Strayer
Gérard Bertrand
Edythe MacDonald