



Canadian
Advisory Council
on the Status of Women

Chré
Conseil consultatif canadien
de la situation de la femme

February 5th 1981

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The Honourable Jean Chrétien,
Minister of Justice,
House of Commons,
Ottawa K1A 0A6

Dear Sir:

Re: Proposed Amendments to the
Charter of Rights and Freedoms

This letter is our formal response to the amendments proposed by yourself, on behalf of the Government, on Monday January 12th, 1981 to the Joint Committee on the Constitution. It is also further to the attendance of our legal advisor at the "de-briefing" session held on January 13th, 1981 with members of your staff including Deputy Minister Tassé where a number of the points raised in this letter were discussed.

At that time the Council conveyed its strong approval of the changes proposed by Mr. Chrétien to clause 15, clause 1 and the "old" clause 26 (dealing with the laws of evidence). However, we also voiced our concern that certain key recommendations of the CACSW have not yet been accepted. These concerns can be summarized as follows:

- (1) Section 15(1) continues to include "age" (and now "handicap") in the same list of grounds with "race, colour, religion, national or ethnic origin and sex" with no apparent distinction between the two types of grounds. Laws which treat people differently on the basis of their age or handicap may well be based on a real difference in capacity, a

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"bona fide occupational requirement", while laws which distinguish between persons on the basis of their sex, race, colour, religion, national or ethnic origin will, in the words of Gordon Fairweather, "almost never" relate to a real difference in capacity.

As Mr. Tarnopolsky forcefully argued in the debriefing session, if a different test is not proposed for discrimination based on sex, race, colour, religion, national and ethnic origin, the court will be likely to use a vague standard of "fairness" to evaluate all allegedly discriminatory laws. Such a watered down test may prove ineffective against many discriminatory laws.

- (2) The scope of section 15(2) still has not been restricted to only those affirmative action programs that are designed to overcome the effects of discrimination based on one of the prohibited grounds. While it may simply be a drafting problem, a literal reading of the subsection as it now stands would permit an affirmative action program designed to overcome poverty (for example) to discriminate on any of the prohibited grounds, such as sex or race.
- (3) Clause 25 still fails to specify that the rights and freedoms guaranteed to aboriginal peoples must pertain equally to native men and women. This omission leaves the Court free to uphold the right of Indian men under section 12(1)(b) of the Indian Act to define band membership as they see fit in spite of its blatantly discriminatory effect on Indian women.
- (4) The three-year delay before clause 15 of the Charter takes effect will leave women without legal redress in situations where a government refuses to acknowledge that a particular law is discriminatory or

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simply chooses not to act to amend its laws within the three-year period.

All these matters were raised at the de-briefing session and remain of considerable concern to the Council.

The proposed section on multiculturalism, clause 26, raises a new issue of major concern for women.

The fundamental protection for multiculturalism in Canada is found in clause 15: the guarantee of equality to every individual regardless of race, colour, religion, national or ethnic origin. Each cultural group is free to pursue its own cultural values without fear of discrimination so long as these values do not impinge on the rights and freedoms of all other groups and individuals.

What then is the purpose of clause 26? What additional protection does it offer that clause 15 cannot properly provide? Since clause 26 is called an interpretation clause, the Court must find a meaning for it and then must interpret all other sections of the Charter in light of this meaning.

However unintentional, the wording of clause 26 clearly leaves the door open to the argument that certain cultural practices or values are necessary for the preservation of a particular cultural group and are therefore constitutionally valid even though they have a discriminatory effect on certain members of the cultural group. Such an interpretation would undermine the very purpose of a Charter of Rights and Freedoms - to guarantee a minimum standard of rights and freedoms to all Canadians regardless of their cultural group.

Women are particularly affected since it is with respect to discrimination on the basis of sex that the potential conflict between a group's cultural values and the individual's right to equality arises most clearly. For example, the widespread African practice of female genital mutilation has often been defended as a "cultural tradition". Likewise, in Canada,

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discrimination against Indian women under section 12(1)(b) of the Indian Act continues to be justified on the basis that it is necessary to protect the Indian culture.

If the Charter of Rights and Freedoms is to have any substance at all, it must guarantee certain fundamental rights and freedoms equally to all Canadians. It is on this foundation of equality that multiculturalism in Canada must be encouraged to grow.

Since it does not seem politically feasible to include a preamble in the Charter reciting the importance of the multicultural heritage of Canadians, we suggest that two other solutions are available:

- (1) As recommended by Gordon Fairweather, a "purpose clause" could be included at the beginning of the Charter guaranteeing to men and women equally all the rights and freedoms contained in the Charter. In this way, any cultural practices which discriminate against either sex would be struck down.
- (2) An alternative solution would be to clearly specify in clause 26 that it is not intended to limit the scope of the guarantee of equality contained in section 15:

"26. Without limiting the scope of the equality rights contained in clause 15, this Charter shall be interpreted"

The advantage of the first alternative is that a purpose clause could be added to the Charter without altering clause 26 which, I understand, was approved by the Joint Committee on January 31st, 1981.

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While we appreciate the stage which the present proceedings have reached, the addition of a further week may allow time for further consideration of the matters raised above. We have an opportunity in our history to create a truly meaningful Charter of Rights and Freedoms with broad public support, and we feel that time spent on improving this Charter is a worthwhile investment in a just and equal Canadian society.

Yours very truly,

Lucie Pépin,
Acting President.

c.c. The Honourable Lloyd Axworthy,
Minister responsible for the
Status of Women.