

The Fight For Substantive Equality: Women's Activism and Section 15 of the *Canadian Charter of Rights and Freedoms*

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Abstract

This article discusses the role of women's groups in the development of section 15 of the *Canadian Charter of Rights and Freedoms*, the Charter's principal equality rights guarantee, entrenched in the Constitution in 1981. Thanks to the leadership of Doris Anderson, submissions to the Special Joint Committee on the Constitution from the Canadian Advisory Council on the Status of Women (CACSW), the National Action Committee on the Status of Women (NAC), and the National Association of Women and the Law (NAWL) were instrumental in securing changes to section 15. However, the version in the entrenched Charter still fell short of women's aspirations.

Résumé

Cet article aborde le rôle des groupes féministes dans l'élaboration de l'article 15 de la *Charte canadienne des droits et libertés*, principale garantie de l'égalité des droits dans la Charte, incorporée à la Constitution en 1981. Grâce au leadership de Doris Anderson, les soumissions au Comité mixte spécial sur la Constitution du Canada faites par le Conseil consultatif canadien sur la situation de la femme (CCCSF), le Comité canadien d'action sur le statut de la femme (CCASF) et l'Association nationale Femme et Droit (ANFD) ont joué un rôle déterminant dans l'obtention des modifications à l'article 15. Toutefois, la version incorporée à la Charte ne répondait toujours pas pleinement aux aspirations des femmes.

Setting the Stage: Rights Discourse in the 1970s

In the 1970s, Canadian women had been legal "persons" for just forty years.¹ The report of the Royal Commission on the Status of Women (RCSW) (1970) identified many measures that would be necessary for women to achieve full equality. Organizations formed in the 1970s to press for equality included the umbrella National Action Committee on the Status of Women (NAC), which emerged from the coalition established to lobby for the establishment of the Royal Commission (Molgat n.d.), and the National Association of Women and the Law (NAWL). Following a recommendation of the Royal Commission, the federal government established the Canadian Advisory Council on the Status of Women (CACSW) in 1973 to provide advice to government on women's issues from an arms-length perspective (RCSW 1970, 389-393, 418).

Canada's international commitments were important milestones in rights protection in the 1970s. With the consent of the provinces, Canada ratified both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1976.² It ratified the First Optional Protocol to the *International Convention on Civil and Political Rights* in May 1976,³ providing for complaints directly to the Human Rights Committee of the UN. In 1980, Canada signed the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), ratifying it in December 1981.⁴ These instruments focused on equality in the broadest sense, including social and economic rights.

From small beginnings in the 1940s, provincial and territorial human rights legislation had, by the 1970s, expanded to prohibit discrimination in such areas of activity as signs and symbols, contracts, facilities and services, employment, and accommodation. In addition to prohibiting discrimination, the legislation often provided for creation of special programs to promote the equality of those characterized by one or another of the prohibited grounds, which then could

not be invalidated by complaints from more privileged individuals.

Originally, the prohibited grounds were race, colour, national or ethnic origin, creed, and religion. However, by the 1970s, protection against discrimination on the ground of sex⁵ had been included in most statutes and protection was also available in some jurisdictions against discrimination on the grounds of marital status, family status, disability, political belief, and record of convictions. The federal government was the last jurisdiction to enact a human rights statute, passing the *Canadian Human Rights Act* in 1977.⁶ Specifically exempt from this legislation was the *Indian Act*, a source of so much inequality for women.⁷ Efforts to include sexual orientation in this law were unsuccessful; at this time, the Québec *Charte des Droits* had the only protection in the country against discrimination on the basis of sexual orientation, which was included in the *Charte* in 1977.⁸

The *Canadian Bill of Rights* was enacted by the federal government in 1960. It declared that there have existed and shall continue to exist a number of fundamental rights and freedoms, “without discrimination by reason of race, national origin, colour, religion, or sex.” One such right is “the right of the individual to equality before the law, and the protection of the law;”⁹ said to have been modelled on the Fourteenth Amendment to the US Constitution.¹⁰ The *Bill of Rights* provided that every Canadian law was to be construed and applied so as not to abridge, or authorize the abridgement of, any of the protected rights.¹¹ Apart from the earlier *Saskatchewan Bill of Rights*¹² this was the first human rights law in Canada that was expressly made to apply to government action. The right of Parliament to override the Bill was, however, absolute.¹³

Activists litigating under the *Canadian Bill of Rights* admired the approach used for race-based distinctions under the Fifth and Fourteenth Amendments to the US Constitution. The US Supreme Court considers race a “suspect” classification and gives “strict scrutiny” to distinctions based on race. To survive, such classifications have to serve a compelling state interest and be necessary to the accomplishment of that goal (Williams 1983). Classifications not seen as “suspect” would be upheld if rationally related to a permissible government goal, the so-called reasonable or rational basis test. By 1980, American feminists had not succeeded in getting

sex distinctions into the upper tier of this “two-tier” test. They were subject only to a mid-level of scrutiny, in which the Court required that classifications based on sex must serve important governmental objectives and be substantially related to the achievement of those objectives (Williams 1983, 6.5-6.9). First proposed in 1923, the women’s Equal Rights Amendment to the US Constitution was passed by Congress in 1972 and sent to the states for ratification, a process which, by 1982, had fallen short of its goal.¹⁴

Doris Anderson (1996) called the *Canadian Bill of Rights* “useless as a legal tool to help women” (235). Jeannette Lavell and Yvonne Bédard unsuccessfully used section 1(b) to challenge section 12(1)(b) of the *Indian Act* providing that women, but not men, would lose Indian status upon marriage to a non-Indian man.¹⁵ Indian men, by contrast, would confer status on their non-Indian wives. The majority of the Supreme Court stated that “equality before the law” did not import the egalitarian guarantees of the Fourteenth Amendment. Rather, it guaranteed equality only in the administration of the law. Justice Laskin, for the dissent, characterized s. 12(1)(b) as a statutory “banishment” of Indian women and doubted that discrimination on account of sex, where it had no biological or physiological rationale, “could be sustained as a reasonable classification even if the direction against it was not as explicit as it is in the Canadian Bill of Rights.”¹⁶ His statement was akin to the US “strict scrutiny” test.

Stella Bliss relied upon the equality before the law guarantee to challenge Canada’s denial to her of ordinary unemployment insurance benefits when she could not find employment after having a baby. She had fulfilled the qualifying period for ordinary benefits and was physically able to work. The qualifying period for maternity leave benefits was longer and she had not satisfied it. Canada insisted she take maternity benefits, or nothing, and the Supreme Court ruled that she should receive nothing. It held that she was entitled only to the equality in the administration of the law; as long as all pregnant women were treated alike, there was no violation.¹⁷

After the decision in *Lavell and Bédard*, women held a National Day of Mourning for the *Bill of Rights*. They distributed an announcement declaring the Bill’s “short valuable life was dedicated to the freedom of MAN; its sudden, untimely death occurred when wom-

en expected to be included” (*Status of Women News* 1974, 2-3; Eberts 1979, 247). Vancouver Status of Women described the Supreme Court decision in *Bliss* as “a kick in the stomach for working women” (Pal and Morton 1986, 148). Along with the Supreme Court’s rejection of hardworking ranch wife Irene Murdoch’s claim to a share of the couple’s ranch on divorce,¹⁸ these cases left Canadian women convinced that the male-dominated courts had no understanding or sympathy for women’s lives and aspirations for equality.

Women also had reason to distrust governments’ view of equality. Justice Minister E. Davie Fulton, who shepherded the *Bill of Rights* through Parliament, told a legislative committee that the equality before the law guarantee “would not be interpreted by the courts so as to say that we are making men and women equal, because men and women are not equal; they are different.”¹⁹ The federal government’s widely-despised “White Paper” on Indian policy, introduced in 1969 and withdrawn the next year, also regarded equality as sameness; it advocated equal (identical) treatment in law of non-Aboriginals and Aboriginals although Aboriginal peoples had a history of profound disadvantage.²⁰

Not only had women been stung by the courts’ response to their equality claims under the *Bill of Rights*. By the end of the 1970s, they came to see that the constitutional renewal percolating in government backrooms (Romanow, Whyte, and Leeson 1984) could have a significant negative impact on their lives (Anderson 1996, 234-35).

At a First Ministers’ meeting in November 1978, only ten years after Canada’s 1968 *Divorce Act*²¹ established uniform availability of divorce across the country, Prime Minister Pierre Elliot Trudeau offered to give the provinces jurisdiction over marriage and divorce, which was a federal responsibility under the *Constitution Act, 1867*. This proposal quickly gained momentum (Eberts 1981, 5-6; Bowman 1981). Deeply immersed in the struggle for reform of family law, many Canadian women feared that returning to the provinces the power to enforce support and custody orders made at divorce would make enforcement even more difficult than under the single federal law (Eberts 1981, 17-18). This worry was not shared by Québec women (Sawyer and Vickers 2001, 17; Fédération des Femmes du Québec 1981), but opposition in the rest of the country had stalled the proposals by mid-1980 (Eberts 1981, 18).

This skirmish had sensitized women to the dangers lurking in the constitutional renewal process and, in 1980, the National Action Committee had identified the Constitution as a priority issue (Eberts 1981, 6).

Meddling with divorce caught women’s attention in a way that two previous attempts at formulating a charter of rights had not. The *Canadian Constitutional Charter, 1971* (“Victoria Charter”) did not include a section on equality or non-discrimination rights. However, it guaranteed basic civil liberties and article 5 provided that “no citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote” for members of Parliament or a provincial legislature. The Victoria Charter provided in article 3 that governments could curtail these rights by “such limitations...as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, of the rights and freedoms of others...” (Romanow, Whyte, and Leeson 1984, 17).

In 1978, the federal government unilaterally put forward the *Constitutional Amendment Bill*. The bill’s proposed *Charter of Rights* guaranteed fundamental civil liberties, legal rights, language rights, and mobility rights. Section 6 included “the right of the individual to equality before the law and to the equal protection of the law.” Justice Minister Otto Lang suggested that this language would encourage courts to adopt the US “reasonable basis” analysis.²² Section 9 stated that this equality right was to be “enjoyed without discrimination because of race, national or ethnic origin, language, colour, religion, age or sex.” All of the individual rights in the proposed Charter were subject to “such limitations...as are justifiable in a free and democratic society in the interests of public safety or health, the interests of the peace and security of the public, or the interests of the rights and freedoms of others, whether such limitations are imposed by law or by virtue of the construction or application of any law.”²³

1980 Versions of the Charter

The federal government released a draft of the Charter in August 1980 for discussion with the provinces. When no agreement was reached at the First Ministers’ meeting of September 12, 1980, Canada announced its decision to proceed unilaterally with patriation. The second version of the Charter was tabled in the House of Commons and Senate on October 5, 1980, along with

other elements of a proposed resolution respecting patriation of the Constitution (Elliott 1982, 13-14). A Special Joint Committee of the Senate and House of Commons was established to hear submissions on the draft.

There was not a lot of difference between the August and October drafts. Neither had a preamble. Neither had a “hard” notwithstanding clause (Leeson 2000, 7-9) like that in the *Canadian Bill of Rights* or what emerged as section 33 of the Charter. Section 1 of both versions was a limitations clause to tell the courts what kinds of restrictions on rights governments could impose. Neither version had what later emerged as sections 27 and 28 of the Charter. However, the October version included what eventually became section 32, providing that section 15 would not come into effect until three years after the coming into force of the Charter. Section 24 of that version also stipulated that the Charter’s guarantees should not be construed so as to deny the existence of other rights or freedoms that existed in Canada, including any rights or freedoms pertaining to the Aboriginal peoples.

Section 1 of the Charter tabled in October 1980 provided that:

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.

This provision was considerably cut back from the very broad clause that had been in both the Victoria Charter and the *Constitutional Amendment Bill*. Nonetheless, feminist lawyers called section 1 the “Mack truck clause” because “a person could drive one right through it.”²⁴

What became section 15 of the Charter appeared under the heading “Non-Discrimination Rights”:

- (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.
- (2) This section does not preclude any programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

Marginal notes state that this formulation was derived from the *Canadian Bill of Rights*, except for the addition of “ethnic origin” and “age” as grounds in subsection (1) and the addition of subsection (2) (Elliott 1982, 38). Both of the “new” grounds had been in the 1978 proposed Charter (Dawson 2006, 30). So, too, had been the change from “protection of the law” (the *Bill of Rights* phrase) to “the equal protection of the law,” wording meant to bring the phrase more in line with the Fourteenth Amendment.²⁵ Barry Strayer (2006), a senior federal official at the time of patriation, has stated that officials added subsection 15(2) in the summer of 1980 to overcome the California Supreme Court’s 1976 decision in *Bakke v. Regents of the University of California*,²⁶ striking down affirmative action in university admissions.

Strayer (2006) has acknowledged that “[t]he equality rights provision which emerged in 1980 survived essentially unchanged throughout the many iterations of the federal Charter proposals from 1968 to 1980” (19). He notes that “[a]t the time, we were content to tinker with the anti-discrimination provisions of the Bill of Rights” (18). As to why more attention was not paid, throughout the years of constitutional negotiations, to the precise content of equality rights, he has stated: “Frankly, we felt that the heart of our struggle was to achieve an entrenched Charter...equally applicable at the federal and provincial level” (19). Significantly, however, he also has acknowledged that one of the problems the drafters had with respect to the equality rights provisions was that “not everyone believed in perfect equality, and some had reservations about its expression in the Charter” (21).

Advised in the spring of 1980 about federal plans for the Special Joint Committee (Reid 2007, 59),²⁷ CACSW worked intensively on the Constitution in the summer of 1980. It commissioned thirteen papers, which were circulated widely and generated over 8,000 letters in response (Doerr and Carrier 1981). CACSW sent copies of these papers to the Minister Responsible for the Status of Women Lloyd Axworthy and to the Prime Minister’s Office (Anderson 2006, 40). Doris Anderson (1996) later wrote: “we were obviously going to end up with a Charter, and I believed our job was to make sure it was a good one and of some use to women” (236). The resources generated by CACSW that summer were made available to women’s organizations pre-

paring for the fall hearings of the Special Joint Committee on the Constitution (Kome 2007, 63). Penney Kome (1983) considered that the CACSW papers written by CACSW experts Mary Eberts and Beverley Baines “informed virtually all the feminist activities around the Constitution and presentations before the Special Joint Committee” (31).

With the release of the Charter on October 5, 1980, CACSW expressed anger that section 15 was virtually identical to the ineffectual equality-before-the-law guarantee of the *Bill of Rights*. Doris Anderson (1996) wrote in her memoir: “It was clear, although we had sent Axworthy a full set of the papers, that neither he nor any of his staff had read them” (235). CACSW issued a press release, made a public statement, and wrote to Lloyd Axworthy and the Prime Minister detailing the council’s objections to the proposed wording (Anderson 1996, 235; Kome 1983, 29). The council distributed flyers with detachable coupons for women to return to the government expressing disapproval of the weak draft. By the time Anderson resigned from CACSW in January 1981, over 17,000 coupons had been sent in (Kome 1983, 29).

Prime Minister Trudeau hoped that he could vault over the objections of the provinces to entrenchment by capturing public approval for the *Charter of Rights and Freedoms*. It seemed, though, that the federal government thought it could commandeer women’s approval, rather than win it with a draft that satisfied their criteria. Doris Anderson (1996) recounted that Lloyd Axworthy told CACSW’s executive that it should support the government’s wording of the Charter “as it stood and without question” (235). He threatened to cut the CACSW budget and go directly to women themselves if CACSW did not cooperate (235). Minister Axworthy was the featured dinner speaker at a combined meeting of NAC and Women for Political Action, held in Toronto on October 18, 1980 (“Persons Day”). After working all day on the draft Charter, developing the position that NAC would take at the Special Joint Committee,²⁸ diners were exhorted by the Minister to simply trust the government, a message which was deservedly booed (Anderson 1996, 236; Kome 1983, 33-34).

Presentations by NAC, CACSW, and NAWL to the Special Joint Committee²⁹

All three groups—NAC, CACSW, and NAWL—

expressed support for patriation and the entrenchment of a Charter of Rights, while stressing that the difficulty of amending an entrenched Charter made it necessary that the document be as good as possible right from the outset.³⁰ All three condemned section 1; its reference to “a parliamentary system of government” would protect any limitation on rights included in any statute that had been passed by a legislature. This capitulation to the will of the majority meant that women were worse off with section 1 than they would be with no Charter at all.³¹ The three urged that section 1 be removed altogether and replaced by a strong declaration of the equality of men and women.³² As NAWL put it, this “overriding statement of principle”³³ would be used in interpreting the Charter. The submissions leave no doubt that full substantive equality, not just equality in the administration of the law, was the groups’ goal.³⁴ Governments’ ability to restrict Charter rights in time of war or national emergency could be ensured by a tightly restricted clause modeled after that found in the *International Covenant on Civil and Political Rights* (ICCPR); however, as in the ICCPR, some rights, including equality, could not be restricted even then.³⁵

All three groups called for the removal of the three-year moratorium on the coming into force of the equality guarantees, which delayed access to the courts for redress of inequality.³⁶ Governments did not need more time to determine which legislation needed reform; the Royal Commission and follow ups to it by federal and provincial advisory councils had done that.³⁷ It was pointed out that Canada and the provinces should already have been amending legislation to comply with the international covenants ratified in 1976.³⁸ NAC argued that the problem was not lack of knowledge of what needed to be done, but whether there was the political will to do it.³⁹

All three groups stated that the guarantee of existing rights for Aboriginal peoples should contain a stipulation that such rights be available equally to men and women.⁴⁰ They further argued that the term “everyone” should be replaced by “person” wherever it appeared in the Charter because “person” had a known history of interpretation that definitely included women.⁴¹ NAC and NAWL also called for constitutional entrenchment of the Supreme Court with a guarantee that the court would be “representative” of women,⁴² agreeing with parliamentarians’ suggestions that this would

mean that at least 50 percent of its members should be female.⁴³

CACSW and NAWL had developed the most detailed proposals for changing section 15. However, all three groups agreed that simply repeating the ineffectual language of “equality before the law” was inadequate.⁴⁴ NAWL expressed doubt that mere entrenchment would persuade any court to give the equality guarantees more vigour than the *Bill of Rights*.⁴⁵ Both NAWL and CACSW were skeptical that adding “equal” before the term “protection” would invoke the egalitarian jurisprudence of the US Supreme Court.⁴⁶ Moreover, as strongly put by CACSW, they regarded as inadequate both the reasonable basis test and the mid-level of protection for sex equality under the Fifth and Fourteenth Amendments. Why, they argued, should women accept language that would bring only that protection when there was a chance to insert stronger language right from the outset?⁴⁷

The goal of all three groups was to ensure that distinctions based on sex would be treated as “suspect” and subject to strict scrutiny.⁴⁸ A key element of the strategy for achieving this aim was to remove from section 15 all reference to “discrimination.” This term was too often interpreted to mean only something negative or harsh; a distinction that purported to confer something positive, however odious or harmful it actually was, would not be caught by the term “discrimination.”⁴⁹ CACSW and NAWL asked that the heading before section 15 be changed to “Equality Rights”⁵⁰ and sought to eliminate the term discrimination from the text of section 15 as well.

CACSW proposed that the first two sections of section 15 provide:

- (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.
- (2) Such equal rights may be abridged or denied only on the basis of a reasonable distinction.
- (3) Sex, race, colour, national or ethnic origin, and religion will never constitute a reasonable distinction except as provided in subsection (3) [dealing with affirmative action].⁵¹

NAWL’s preferred version of section 15 was:

- (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;
- (2) and a compelling reason must be shown for any distinction on the basis of sex, race, national or ethnic origin, colour or religion.⁵²

While NAWL preferred not listing grounds in its subsection (1), it told the parliamentary committee that it was prepared to accept the following alternative version of section 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 without unreasonable distinction on any ground including sex, race, national or ethnic origin, colour, religion, marital status, age, physical or mental handicap, sexual orientation, political belief and previous conviction.
- (2) a compelling reason must be shown for any distinction on the basis of sex, race, national or ethnic origin, colour or religion.⁵³

The CACSW and NAWL versions of section 15 both added “equal benefit” of the law to equality before the law and equal protection of the law in order to ensure that improper distinctions were not made in statutes which conferred benefits.⁵⁴ Both used “distinction” instead of discrimination. Both would, by specific language, make sex, race, national or ethnic origin, and religion suspect classifications. It was believed that specific language was required to make sex a suspect classification for two main reasons. One was that the federal draft put sex in the list after age, a characteristic which seemed to permit many reasonable distinctions. This juxtaposition was seen as playing into the courts’ demonstrated tendency to regard as reasonable almost any distinction based on sex.⁵⁵ To guard against this risk, strong statutory guidance to the courts was desirable.

Both the CACSW and NAWL drafts contemplated the existence of a two-tier system of constitutional protection against inequality. CACSW’s draft and NAWL’s preferred draft were silent about what classifications, other than the named suspect classifications, would receive protection. CACSW explained to the Special Committee that it would be open to the courts to determine whether a particular non-listed ground

merited constitutional protection and at what level. Just because a ground was not in the statutory list of suspect classifications did not mean that a court could not consider it suspect and require a compelling justification for distinctions based on it.⁵⁶ Of course, a court could also apply to that ground the weaker reasonable or rational basis test. While, in theory, strong protection could be available to the grounds not listed in section 15, it was far more likely that these drafts created a caste system of grounds, protecting the named grounds more strongly than the others.

NAWL's second alternative included a long list of specific grounds which would attract at least some level of protection under section 15. NAC, too, called for the addition to section 15 of marital status, sexual orientation, and political belief and supported the addition of mental and physical disability.⁵⁷ This approach eliminated the necessity of asking a court to determine whether the ground would be protected at least to some level. CACSW had explained before the Special Joint Committee that it did not include a long list of protected grounds in its draft in order to allow for expansion of the list of protected grounds through jurisprudence as levels of understanding changed and improved.⁵⁸ NAWL's alternative draft allowed for this growth over time by making its list of grounds non-exhaustive. NAWL thus preserved flexibility, while avoiding the appearance of creating a caste system of rights protection.

Both CACSW and NAWL recommended tightening up the protection for affirmative action programs included in section 15(2) of the federal draft. CACSW, for example, proposed:

- (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).⁵⁹

The language of NAWL's suggested affirmative action protection is almost identical.⁶⁰ NAC wanted to change section 15(2) of the draft specifically to ensure that these programs could benefit women.⁶¹

CACSW and NAWL insisted on government authorization of ameliorative programs⁶² as a protection against bizarre or unfair initiatives undertaken by the private sector. Women were leery of measures supposedly intended for their benefit, which had the effect of limiting their options or imposing unfavourable conditions on them. Interestingly, women's suspicion of the motives and judgment of both government and the courts was strong enough that none of the three groups advocated that the Charter require that ameliorative programs be put in place.

Result of the Presentations

After NAC presented its brief before the Special Joint Committee, Co-chair Senator Harry Hays remarked: "I was just wondering why we do not have a section in here for babies and children. All you girls are going to be working and we are not going to have anybody to look after them."⁶³ When he appeared before the committee on January 12, 1981 with the government's amendments to the draft Charter, Justice Minister Jean Chrétien was much more respectful. He complimented CACSW for "a particularly fine brief as well as for an impressive presentation" and said that the work of the council "has greatly influenced the government."⁶⁴ In this section, I consider just how deeply CACSW, NAWL and NAC's presentations influenced the government. The record is not a happy one.

The groups' recommendations with respect to section 1 were not accepted. Rather, Justice Minister Chrétien stated that the government amended section 1 as recommended by Gordon Fairweather of the Canadian Human Rights Commission and Walter Tarnopolsky of the Canadian Civil Liberties Association.⁶⁵ The new section reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Senator Duff Roblin pointed out to Chrétien that this language did not accept Fairweather's recommendation that abridgment of the equality of men and women, or of non-discrimination rights, should not be permitted pursuant to section 1.⁶⁶ Chrétien advised that Fairweather and Tarnopolsky had been consulted about the

compromise and accepted it.⁶⁷ The 1981 women's lobby would be required to secure section 28, providing that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

The government's amendments did not accept the women's recommendations about extension of full Aboriginal rights to women in section 24 (what later became section 25) of the Charter. Strayer (2006) has identified status Indian leadership (largely male) as one of the groups that did not want "perfect equality," especially where controlling band membership was concerned (21).⁶⁸ It was not until women themselves fought for and won section 35(4) of the *Constitution Act, 1982* that this protection was attained. Nor did the government remove the three-year moratorium on the equality rights of the Charter. Chrétien did not even mention to the Special Committee the women's submissions that recommended that a gender-balanced Supreme Court be entrenched in the Constitution.

The government did agree to change the title before section 15 to "Equality Rights" "so as to stress the positive nature of this important part of the Charter of Rights."⁶⁹ It acknowledged CACSW and NAWL for their efforts in this regard. The section, however, still turned on the limiting concept of "discrimination" and did not contain the two-tier test recommended by the women's groups.⁷⁰ Initially, it did not contain any additional grounds despite the recommendations made by NAWL, NAC, and many others seeking a longer list. Only at the eleventh hour did the government consent to a committee amendment adding mental and physical disability to the list of grounds.⁷¹ At the same time, the order of age and sex was reversed in the January 1981 list, supposedly to suggest that limitations on the basis of sex should not be considered as reasonable as those based on age (Dawson 2006, 30). In keeping with the specific language used by NAWL and the intent of CACSW's amendments, the list of grounds in section 15 was made open-ended to permit the section to grow with judicial interpretation.⁷² Since 1985, the additional grounds of citizenship, marital status, sexual orientation, Aboriginality-residence, and being a registered status Indian, called "analogous" grounds in the jurisprudence, have been recognized by the Supreme Court.⁷³

The most significant adoption of the women's groups' recommendations came in the opening words

of section 15(1). "Everyone" was replaced with "every individual" to signify that protection was available to natural persons only, as requested by NAWL,⁷⁴ although the section did not employ "person" as urged in the women's presentations. The government accepted the recommendation to include "the equal benefit of the law" as well as "equal protection." It recognized women's desire that the section guarantee equality in the substance as well as the administration of the law through the phrase "equal... under the law," which was apparently drawn from the ERA in the United States.⁷⁵ The significance of this language was acknowledged in the first Supreme Court of Canada decision on section 15, in which the section's guarantee of substantive equality and the intent to undo the harm of the *Lavell* and *Bédard* and *Bliss* cases were confirmed.⁷⁶ Subsection (2) of section 15 was tightened to some extent, although it did not require that a "program or activity" be authorized by law.

Conclusion

The February 1981 version of section 15, tabled in the House of Commons, provided as follows:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This was the final version of section 15, which appeared in the Charter patriated from Great Britain.

If we measure women's accomplishments with respect to the section by how well the final version matched women's aspirations, we must be disappointed with the result. If we look at how much women accomplished in the face of indifference, resistance, or even hostility on the part of the government, the accomplishment is substantial.

Yet another accomplishment of the women's work on section 15 of the Charter is not visible in the

language of the section, but is nonetheless considerable. Through reviewing the papers commissioned by the Advisory Council, attending study and strategy sessions on the draft Charter, and preparing briefs to the Special Joint Committee, Canadian women added a great deal to their constitutional and rights literacy. This enhancement would serve them well during the campaign to embed section 28 in the Charter and remove the section 33 override from rights guarantees in the Charter. It would inform significant post-entrenchment activities, like the conduct of statute audits to identify legislation that needed reform, educational activities to increase Charter literacy, the establishment of organizations to conduct Charter litigation, like the Women's Legal Education and Action Fund (LEAF), and a range of litigation and law reform activities undertaken by the women's movement after 1985. Women began the Charter era in 1980-1981 with a strong campaign for substantive equality guarantees and continue their quest for substantive equality using the skills and tools they put in place during that formative time.

Endnotes

¹ The Judicial Committee of the Privy Council advised in *Edwards v. AG Canada* [1930] AC 124 that women are "persons" under the *Constitution Act, 1867* and thus able to be appointed as senators; this overruled a decision of the Supreme Court of Canada [1928] SCR 276 that women, like criminals, lunatics, and imbeciles, were not "qualified Persons" and so unable to sit as senators. Many women did not become "persons" in 1930, however, because they were still denied the right to vote and had other restrictions on their civil rights. Among them were "registered Indians" and racialized women (Eberts 2009).

² Both covenants were adopted and opened for signature by GA Res. 2200A (XXI) of December 16, 1966. The ICESCR entered into force on January 3, 1976 in accordance with Article 27 and the IC-CPR entered into force on March 23, 1976 in accordance with Article 49. Canada acceded to both on May 19, 1976.

³ The First Optional Protocol opened for signature by UN GA on December 19, 1966 and entered into force on March 23, 1976. Canada ratified OP1 on May 19, 1976.

⁴ Adopted and opened for signature, ratification, and accession by GA Res. 34/180 of December 18, 1979; entry into force September 1981 in accordance with Article 27(1). Canada signed on July 17, 1980 and ratified on December 10, 1981. An Optional Protocol to

this Convention was adopted by UN GA Res. A/RES/54/4 of October 6, 1999; it came into force on December 22, 2000 and Canada acceded to it on October 18, 2002.

⁵ For an account of protection against discrimination on the basis of gender in human rights laws in 1976, see Cook and Eberts 1976.

⁶ SC 1976-77, c. 33, now RSC 1985, c. H-6. This step, too, had been recommended by the RCSW Report and Recommendation 165. See RCSW 1970, 388-89, 418.

⁷ This exemption was done by s. 67 of the CHRA, finally repealed by S.C. 2008, c. 30.

⁸ Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, First Session of the Thirty-Third Parliament, 1984-85, Report: *Equality for All*, October 1985, 26-27.

⁹ S.C. 1960, c. 44, s.1 and s. 1(b).

¹⁰ U.S. Const. amend. XIV, par. 1 provides, in part, that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." Constitutional expert Walter S. Tarnopolsky (1975) has argued that there is no doubt that s.1 of the *Canadian Bill of Rights* was adopted from the Fourteenth Amendment (291).

¹¹ S.C. 1960, c. 44, s. 2.

¹² Enacted by the *Saskatchewan Bill of Rights Act, 1947*, S.S. 1947, c. 35.

¹³ S.C. 1960, c. 44, s. 2.

¹⁴ The ERA provides, in section 1, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The time limit for ratification by the required 38 of 50 states expired in 1982 with only 35 states ratifying, but efforts to secure the ERA persist. For the history and present status of the ERA, see www.equalrightsamendment.org.

¹⁵ The word Indian is derived from the *Indian Act* itself and is a term of art, which is still used, for those who are eligible for Indian status under the Act. This outdated legislation continues to use the term Indian to distinguish those with status under the Act from those without. Status under the Act confers the right to take part in the governance of "Bands" (now more commonly referred to as First Nations) and to share in the commonly held lands. Women advocates and activists like Mary Two-Axe Early and Jenny Margetts established an organization called Indian Rights for Indian Women to fight for equality under the *Indian Act*. Once that had been achieved, they believed that they would be able to take part in self-government negotiations on the same footing as Indian men.

¹⁶ *Attorney General of Canada v. Lavell; Isaac et al. v. Bédard* [1974] SCR 1349, at 1365-1366, 1386-1387.

¹⁷ *Bliss v. Attorney General of Canada* [1979] 1 SCR 183 at 192.

¹⁸ *Murdoch v. Murdoch* [1975] 1 SCR 423. Anderson (2006) identifies these three cases as particularly troubling to women (39) and Marian Sawyer and Jill Vickers (2001) state that the "three major

cases” of *Lavell* and *Bédard*, *Bliss*, and *Murdoch* “put equality issues on the agenda in the 1970s” (16).

¹⁹ Special Committee on Human Rights and Fundamental Freedoms. *Minutes of Proceedings and Evidence*. Numbers 1 to 12 (July 12-29, 1960), 643; Eberts 1979, 237.

²⁰ Statement of the Government of Canada on Indian Policy (The White Paper). Ottawa, ON: Department of Indian and Northern Affairs, 1969. It proposed abolition of the *Indian Act* and the ending of treaties so that Indigenous peoples would have the “same” citizenship as non-Indigenous people. The proposal ignored the decades of oppression of First Nations peoples, which had caused huge cultural, economic, and social damage. Indian peoples on reserves, for example, received the federal vote only in 1960.

²¹ *Divorce Act*, R.S.C. 1985, c. 3 (2nd supp.).

²² Canada. Department of Justice, Canadian Charter of Rights and Freedoms. Opening Statement by the Honourable Otto Lang, Minister of Justice and Attorney General of Canada, Presented at Federal-Provincial Conference of First Ministers on the Constitution of Canada, Ottawa, October 30-November 1, 1978. Quoted in CACSW, *Women, Human Rights, and the Constitution*. Submission to the Special Joint Committee on the Constitution, November 18, 1980 (CACSW Brief), 7.

²³ Bill C-60, section 25.

²⁴ First Session of the 32^d Parliament, 1980, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (SJC Minutes), Issue No. 9, November 20, 1980 at 9:58 (NAC Presentation) and Issue No. 22, December 9, 1980 at 22:53 (NAWL Presentation).

²⁵ Mary Dawson (2006) was the federal official in charge of all English language drafting. She indicated that the addition of “the equal” had the more modest goal of removing any doubt that equal also modified protection of the law (30).

²⁶ 553 P. 2d 1152 (1976).

²⁷ Reid was the Director of Research for CACSW from 1978-1981 and the information came from Maureen O’Neil, then head of the internal government department Status of Women Canada.

²⁸ NAC Presentation at 9:58.

²⁹ NAC and CACSW presented on November 20, 1980, reported in SJC Minutes Issue No. 9, and NAWL on December 9, 1980, SJC Minutes Issue No. 22.

³⁰ CACSW Presentation at 9:124, 9:148; NAC Presentation at 9:58.

³¹ CACSW Presentation at 9:132; CACSW Brief at 24-28; NAWL Presentation at 22:53.

³² NAC Presentation at 9:64; NAWL Presentation at 22:54; CACSW Brief at 30.

³³ NAWL Presentation at 22:54

³⁴ NAC Presentation at 9:58-59; NAWL Presentation at 22:56;

CACSW Brief at 29-30; CACSW Presentation at 9:124, 9:138

³⁵ NAC Presentation at 9:58; NAWL Presentation at 22:53; CACSW Brief at 28-29, 31.

³⁶ NAC Presentation at 9:75; NAWL Presentation at 22:62; CACSW Brief at 18-20.

³⁷ NAC Presentation at 9:60; CACSW Brief at 19.

³⁸ By MP Svend Robinson during the NAWL Presentation at 22:66.

³⁹ NAC Presentation at 9:75.

⁴⁰ NAC Presentation at 9:60, 9:67; NAWL Presentation at 22:61; CACSW Brief at 20-21.

⁴¹ NAC Presentation at 9:61; NAWL Presentation at 22:54; CACSW Brief at 24.

⁴² NAC Presentation at 9:61; NAWL Presentation at 22:51-53.

⁴³ NAC Presentation at 9:70; NAWL Presentation at 22:66.

⁴⁴ NAC Presentation at 9:65, 9:69; NAWL Presentation at 22:55; CACSW Brief at 4-5.

⁴⁵ NAWL Presentation at 22:55-56.

⁴⁶ NAWL Presentation at 22:56; CACSW Brief at 6-7, 10.

⁴⁷ CACSW Brief at 10-11; CACSW Presentation at 9:127.⁴⁸ FoN-AC’s position on this, see NAC Presentation at 9:69.

⁴⁹ NAWL Presentation at 22:59; CACSW Brief at 14; CACSW Presentation at 9:135.

⁵⁰ NAWL Presentation at 22:55; CACSW Brief at 15.

⁵¹ CACSW Brief at 13.

⁵² NAWL Presentation at 22:59.

⁵³ NAWL Presentation at 22:59.

⁵⁴ NAWL Presentation at 22:56-57; CACSW Brief at 13.

⁵⁵ CACSW Presentation at 9:126.

⁵⁶ CACSW Presentation at 9:51 and see NAWL Presentation at 22:60, 22:64.

⁵⁷ NAC Presentation at 9:59, 9:65.

⁵⁸ CACSW Presentation at 9:151.

⁵⁹ CACSW Brief at 15-17.

⁶⁰ NAWL Presentation at 22:60.

⁶¹ NAC Presentation at 9:60.

⁶² NAWL Presentation at 22:62, 22:70; CACSW Brief at 16.

⁶³ NAC Presentation at 9:75.

⁶⁴ SJC Minutes, No. 36, January 12, 1981 at 36:13.

⁶⁵ SJC Minutes, No. 36 at 36:11.

⁶⁶ SJC Minutes, No. 38, January 15, 1981 at 38:42-43.

⁶⁷ SJC Minutes, No. 38 at 38:42-43.

⁶⁸ The other group of “perfect equality” resisters named by Strayer (2006) was “some minorities” who did not want equality guarantees “to limit their practice of ethnic or traditional customs” (21). The February 1981 version of the Charter included section 26 (later 27), which provided that the Charter “shall be interpreted in a manner consistent with the preservation and enhancement of the

multicultural heritage of Canadians.”

⁶⁹ SJC Minutes, No. 36 at 36:13.

⁷⁰ Although Deputy Attorney General Roger Tassé told the Special Joint Committee that the grounds listed in section 15 were more invidious than non-listed grounds, this was not really acceptance of a two-tier system. See SJC Minutes, No. 41 at 41:23.

⁷¹ SJC Minutes, No. 47, January 28, 1981 at 47:90-91.

⁷² SJC Minutes, No. 37 at 37:22.

⁷³ *Andrews v. LSBC* [1989] 1 SCR 143; *Miron v. Trudel* [1995] 2 SCR 513; *Egan v. Canada* [1995] 2 SCR 513; *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203; and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* [2011] 2 SCR 670.

⁷⁴ NAWL Presentation at 22:54.

⁷⁵ Senator Florence Bird queried CACSW on this subject. See CACSW Presentation at 9:141.

⁷⁶ *Andrews v. LSBC*, per McIntyre J., at 31-32 (Lexum electronic version).

References

Anderson, Doris. 1996. *Rebel Daughter: An Autobiography*. Toronto, ON: Key Porter Books.

_____. 2006. “The Adoption of Section 15: Origins and Aspirations.” *Journal of Law & Equality* 5 (1): 39-45.

Baines, Beverley. 1981. “Women, Human Rights and the Constitution.” In *Women and the Constitution in Canada*, edited by Audrey Doerr and Micheline Carrier, 31-63. Ottawa, ON: Canadian Advisory Council on the Status of Women.

Bowman, Myrna. 1981. “From Bad to Worse in One Easy Step: Proposed Transfer of Divorce Jurisdiction, an Assessment.” In *Women and the Constitution in Canada*, edited by Audrey Doerr and Micheline Carrier, 77-93. Ottawa, ON: Canadian Advisory Council on the Status of Women.

Cook, Gail, and Mary Eberts. 1976. “Policies Affecting Work.” In *Opportunity for Choice: A Goal for Women in Canada*, edited by Gail Cook, 174-180. Ottawa, ON: Statistics Canada in association with C. D. Howe.

Dawson, Mary. 2006. “The Making of Section 15 of the

Charter.” *Journal of Law & Equality* 5 (1): 25-37.

Doerr, Audrey, and Micheline Carrier, eds. 1981. *Women and the Constitution in Canada*. Ottawa, ON: Canadian Advisory Council on the Status of Women.

Eberts, Mary. 1979. “The Rights of Women.” In *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms*, edited by R. St. J. MacDonald and John P. Humphrey, 225-248. Toronto, ON: Butterworths.

_____. 1981. “Women and Constitutional Renewal.” In *Women and the Constitution in Canada*, edited by Audrey Doerr and Micheline Carrier, 3-27. Ottawa, ON: Canadian Advisory Council on the Status of Women.

_____. 2009. “Women as Full Citizens: Addressing the Barriers of Gender and Race in Canadian Constitutional Development.” In *Suffrage, Gender and Citizenship: International Perspectives on Parliamentary Reform*, edited by Irma Sulkunen, Seija-Leena Nevala-Nurmi, and Pirjo Markkola, 376-414. Newcastle-upon-Tyne, UK: Cambridge Scholars Publishing.

Elliott, Robin. 1982. “Interpreting the Charter – Use of the Earlier Versions as an Aid.” *UBC Law Review Charter Edition*, 11-57.

Fédération des Femmes du Québec. 1981. “Statement on Jurisdiction in Family Law.” In *Women and the Constitution in Canada*, edited by Audrey Doerr and Micheline Carrier, 119-120. Ottawa, ON: Canadian Advisory Council on the Status of Women.

Kome, Penney. 1983. *The Taking of Twenty-Eight: Women Challenge the Constitution*. Toronto, ON: The Women’s Press.

_____. 2007. “Face-off: Doris Anderson at the Canadian Advisory Council on the Status of Women.” *Canadian Woman Studies* 26 (2): 61-69.

Leeson, Howard. 2000. *Section 33, The Notwithstanding Clause: A Paper Tiger?* Montreal, QC: Institute for Research on Public Policy.

Molgat, Anne, with Joan Grant-Cummings. n.d. *NAC Herstory*. www.nac-cca.ca.

Pal, Leslie A., and F.L. Morton. 1986. "Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory." *Osgoode Hall Law Journal* 24 (1): 141-160.

Reid, Julyan, with Linda Markowsky. 2007. "A National Presence." *Canadian Woman Studies* 26 (2): 56-60.

Romanow, Roy, John Whyte, and Howard Leeson. 1984. *Canada Notwithstanding: The Making of the Constitution 1976-1982*. Toronto, ON: Carswell/Methuen.

Royal Commission on the Status of Women in Canada (RCSW). 1970. *Report*. Ottawa, ON: Information Canada.

Sawer, Marian, and Jill Vickers. 2001. "Women's Constitutional Activism in Australia and Canada." *Canadian Journal of Women and the Law* 13: 1-36.

Status of Women News. 1974. 1 (1): cover and 2-3.

Strayer, Barry. 2006. "In the Beginning...: The Origins of Section 15 of the Charter." *Journal of Law & Equality* 5 (1): 13-24.

Tarnopolsky, Walter. 1975. *The Canadian Bill of Rights*. 2nd Rev. Ed. Toronto, ON: McClelland and Stewart.

Williams, Wendy. 1983. "Sex Discrimination under the Charter: Some problems of theory." Paper Presented at the Charter of Rights Educational Fund Conference on Sex Discrimination: An Overview of Canadian & American Law, 19 February: 6.3-6.5. Charter of Rights Educational Fund, Study Day Papers.