WOMEN

Canadian Council on the Status of Women

Conseil consultatif canadien sur la situation de la femme

Women - Equality

BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON THE 1987 CONSTITUTIONAL ACCORD

Thursday, August 20, 1987

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SUMMARY OF RECOMMENDATIONS

by the

CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN

1. Therefore, as a matter of first priority, the Canadian Advisory Council on the Status of Women recommends that the public hearings conducted by the Special Joint Committee on the 1987 Constitutional Accord be extended to ensure the widest possible public advice and consultation on the implications of the Meech Lake Accord. We further recommend that the Special Joint Committee invite the federal government to encourage all provincial governments to organize public hearings on the implications of the Meech Lake Accord. (Paragraph 11)

2. The Council recommends, therefore, that the 1987 Constitution Amendment be amended as follows:

A. Section 1 of the Constitution Amendment, 1987 is amended as follows:

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:

2.(1) The Constitution of Canada shall be interpreted in a manner consistent with . . .

(c) The Canadian Charter of Rights and Freedoms and section 35 of the Constitution Act, 1982 and class 24 of section 91 of the Constitution Act, 1867.

B. Section 3 of the Constitution Amendment, 1987 is amended by deleting subclause 95b.(3).

C. Section 16 of the Constitution Amendment, 1987 is deleted.

(Paragraph 32)

3. Therefore, the Council recommends that section 7 of the 1987 Constitutional Accord be amended to ensure that it contains wording which clearly permits the federal government to attach conditions which will entitle Canadians to comparable access to and quality of services established by national shared-cost programs and which will enable the specific needs of women to be taken into account. (Paragraph 64)

4. Therefore, the Council recommends that section 7 of the 1987 Constitutional Accord be amended to include a clear statement applying section 36 and other relevant provisions of the Constitution Act 1982 to national shared-cost programs established under the 1987 Amendments. (Paragraph 66)

5. Canada's Constitution is more than a simple legal document. It sets out the framework for decision-making and power in Canada through institutions such as the Supreme Court of Canada, the Senate, the House of Commons, the provinces and territories, and now through a process of First Ministers' Conferences. But there is a reality gap with regard to our Constitution; that is, historically, women have not been and are not yet participants in these fundamental processes. Nor are women's experiences taken into account in our decision-making and power structures. It is the Council's firm conviction and recommendation that the federal government, indeed all those charged with safeguarding the democractic process in Canada, take every step to ensure that, in the exercise of political responsibility and prerogative, the women of Canada are provided with a meaningful opportunity to contribute at all stages of the political and legal constitutional decision-making process. (Paragraph 72)

INTRODUCTION

1. The Canadian Advisory Council on the Status of Women (the Council) is honoured to join with other Canadians in welcoming Quebec as a full partner in the Canadian Constitution, and in formally recognizing that Quebec is a distinct society within Canada.

THE CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN

2. The Council was established in 1973 on the recommendation of the Royal Commission on the Status of Women. The Council is composed of 27 part-time volunteer and 3 full-time paid members appointed by the federal government. Collectively, the Council represents the regional, cultural, ethnic, and linguistic diversity of Canada.

3. The objective of the Council is to bring before the government and the public matters of interest and concern to women. Thus, the Council provides the federal government with advice on both the impact on women of existing policies and programs and the development of new measures to improve the status of women in Canada; undertakes and publishes research on issues of interest and concern to women with the view to achieving needed reform; informs the general public on key issues; promotes an awareness of these issues through public and media relations; and contributes to the development of a substantive body of Canadian resource material on women's issues.

4. The Constitution is a matter of vital concern to women in Canada. As one Canadian historian has reminded us,

> . . . a constitution is more than a simple legal document. A constitution is a political institution which mirrors an entire society; it is an outgrowth of that society at a given moment in its historical evolution. At a certain moment which normally marks a turning point in its history . . . this constitution contains, in a sense, the country's destiny by setting out a well-defined framework of norms to be respected — it is the product of a confrontation of different forces.[1]

5. The response of women in Canada to constitutional decision-making grows out of their experiences. Women have learned that their voice in this country's fundamental political structures, as well as their right to equality in Canadian society, is intimately connected with the quality of our constitutional documents. In 1867, it was the "fathers" of Confederation who framed Canada's economic and political future in the *British North America Act*. At that time, women were disqualified at common law from holding public office, and the British courts relied on that doctrine to refuse to allow women to vote, to hold elected or appointed public office, and to enter many professional occupations. Later, the courts persistently refused or were unable to understand women's claims to equality, either in the Constitution or the Canadian Bill of Rights.[2] Canadian women were determined to eliminate the possibility that Canadian courts could ever again rule that they were not "persons" qualified to be summoned to the Senate, or that discrimination against women was acceptable when it met "valid federal objectives". As a result, women lobbied strenuously in 1981 and again in 1982 to ensure that effectively worded guarantees of equality were contained in sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* and, in 1983, to ensure the entrenchment of equality rights for aboriginal women in section 35(4) of the *Constitution Act, 1982*.[3]

6. All constitutional amendments have the potential of profoundly affecting the lives of women in Canada. For example, in March 1983, an amendment to include property rights in Article 7 of the *Canadian Charter of Rights and Freedoms* was proposed in the House of Commons. This amendment was intended to protect property in the traditional sense of the term, meaning real property. (There have been periods in our history when women were considered to be chattels, also a form of property.) Canadian women were concerned about the proposed amendment because, in general, they are not owners of real property. Moreover, the proposed amendment may have affected acquired property rights, such as the right to division of the matrimonial home, as well as new types of property, which are often social rights and benefits such as rent control, pensions, and labour standards. The women of Canada had many questions and needed answers. At that time, the Canadian Advisory Council on the Status of Women recommended that no new amendment be introduced in the House of Commons before an in-depth study could be made to establish the consequences of such a measure on the lives of women, and that any such measure be submitted to the general public, so that women could voice their opinion on the matter.[4]

PUBLIC PARTICIPATION IN THE 1987 CONSTITUTIONAL AMENDMENTS

7. Once again, Canadian women are concerned.

8. There has been little, if any, opportunity for meaningful public consultation on the proposed 1987 constitutional amendments. The federal government recently engaged in an unprecedented degree of consultation in preparing its proposals for tax reform; individuals and groups had several meetings with the Minister of Finance and departmental staff, and extraordinary efforts were made to ensure that experts and commentators were familiar with the materials prior to their release to Parliament and the general public. Different degrees of consultation, but consultation nonetheless, are sought in connection with virtually all other business of Parliament, in addition to the opportunities for comment, reflection, and debate provided in

the procedures for ordinary legislation. The Council believes that constitutional amendments — changes to the very documents which structure our society — require more, not less, democratic input.

9. The Council welcomes the opportunity provided by this Committee to discuss and debate the various features of the Meech Lake Accord. However, we must protest the timetable selected for these hearings. Issues of national significance cannot, and should not, be rushed through in a few short summer weeks. Many individuals and groups will be unable to participate; many of those who participate will do so without the degree of consultation or quality of analysis appropriate for issues of this importance. Canadians are entitled to assess these constitutional amendments with the benefit of the considered opinions and reasons of politicians, policy-makers, and the more "distanced" views of individuals and organizations, and to do so before being asked to lend their support to the amendments. In our view, the Committee's timetable is simply inadequate to achieve these goals.

10. Finally, we have been assured by the Prime Minister's Office that, "(I)n proceeding with these amendments, all First Ministers have been mindful of their role as modern **Fathers** of Confederation [emphasis added]."[5] As we indicated above, it has been the experience of the women of Canada that the "mothers" of Confederation must also be present to ensure that their concerns are addressed. In the short time available, the Council, together with many women's organizations within and outside Quebec, has scrutinized the proposed amendments. On the basis of information available, some of it after the signing of the Accord, the Council believes that there are serious matters for discussion.

11. **Therefore, as a matter of first priority, the Canadian Advisory Council on the Status of Women recommends that the public hearings conducted by the Special Joint Committee on the 1987 Constitutional Accord be extended to ensure the widest possible public advice and consultation on the implications of the Meech Lake Accord. We further recommend that the Special Joint Committee invite the federal government to encourage all**

provincial governments to organize public hearings on the implications of the Meech Lake Accord.

EQUALITY RIGHTS[6]

12. Even with the *Canadian Charter of Rights and Freedoms*, women's claims to equality are seldom, if ever, unopposed. The meaning of equality is neither defined nor self-evident in the Charter, and therefore becomes what legislators and judges can be persuaded that it is. The Supreme Court of Canada has yet to give much direction with respect to the meaning of equality rights in the Charter. In the only gender equality case to be heard thus far, the Court refused leave to appeal.[7] It is impossible to know how the Court will decide the four or five pending cases that raise equality issues. Thus, women's constitutional guarantees of equality are still in the early stages of development.

13. For this reason, the Council and other women's organizations are particularly attentive to constitutional reform. Women's constitutional guarantees of equality are being defined daily by our courts. Organizations such as the Women's Legal Education and Action Fund have been working intensely to develop a litigation strategy to ensure an intelligent and sensitive foundation for Charter-based equality rights. If there is any reasonable risk that the Accord could endanger women's constitutional guarantees of equality, then we must act immediately to prevent it.

14. As part of its mandate, the Council has the responsibility to advise the federal government on status-of-women issues and to bring these issues to the attention of the public. It is the Council's advice that there are serious concerns that the 1987 Constitution Amendment will jeopardize women's hard-won constitutional guarantees of equality. It is also our advice that this is an egregious error and must be corrected immediately.

15. The Council's concerns in this regard are no longer new to the members of the Committee. The National Association of Women and the Law and the Women's Legal Education and Action Fund have already testified about the nature of these concerns. In addition, several scholars have confirmed our interpretation. A full legal analysis of the Council's concerns about equality rights is forthcoming; however, we take this opportunity to summarize the basis for these concerns.

16. The Council's concerns are two-fold and arise mainly, although not exclusively, from section 16 of the 1987 Constitution Amendment. This provides:

> Section 16. Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867.

17. Our first concern is that section 16 will invite the courts to interpret the Constitution as providing a hierarchy of rights. This analysis derives from the principle of statutory interpretation: *expressio unius est exclusio alterius*. Our concern is fortified by the express application of the entire *Canadian Charter of Rights and Freedoms* in section 3 of the 1987 Constitution Amendment. (See the proposed subclause 95B.(3) in section 3 of the Accord, applying the Charter to agreements on immigration and aliens.) Therefore, because section 16 of the 1987 Constitution Amendment expressly singles out aboriginal and multicultural Charter rights for protection, other Charter rights, including women's constitutional guarantees of equality, will be excluded.

18. It has been argued that women's Charter-based equality rights are unlike those of aboriginal peoples and the multicultural heritage of Canadians, and for this reason it would have been inappropriate to include them in section 16. This argument has been offered in one of three ways:

> (a) sections 1 and 16 of the 1987 Constitution Amendment are "interpretation" clauses; or

(b) they involve group or collective rights; or
(c) they involve cultural considerations.

19. The first argument, that sections 1 and 16 are "interpretive" clauses only, relies on the text of section 1 of the 1987 Constitution Amendment and sections 25 and 27 of the Charter.[8] The word "interpreted" appears in section 1 of the Accord and section 27 of the Charter, while the synonym "construed" appears in section 25 of the Charter. Neither word nor any other synonym appears in sections 15 or 28 of the Charter (the operative sections for women's equality guarantees). Therefore, it is argued that sections 15 and 28 are "substantive" rather than "interpretive" clauses.

20. Does this mean, then, that those who rely on section 1 of the 1987 Constitution Amendment, or section 25 or 27 of the Charter, do not also have "substantive" rights? No, it is argued, the substantive rights which give meaning to the "interpretive" clauses are found elsewhere in the Charter, for example, in section 15. This takes us full circle. Section 1 of the 1987 Constitution Amendment and sections 25 and 27 of the Charter can be used to interpret section 15 of the Charter. What about section 28 of the Charter? Can it not also be used for interpretive purposes? If not, then it is redundant. However, the courts have been making valiant efforts to avoid redundancy in the context of Charter equality rights, so it is likely that they will attribute some meaning to section 28.[9] Given the effort which has been expended to preserve the phrase "without discrimination" from redundancy, we can expect the judiciary to contribute at least as much effort to preserve section 28 of the Charter from redundancy. They might then conclude that section 28 is "interpretive", to distinguish it from the "substantive" provisions of section 15.

21. This reasoning suggests that section 28 must, at a minimum, be recognized as an "interpretive" clause to give it meaning within the Charter. However, logically, because some but not all "interpretive" clauses have been preserved in the 1987 Constitution Amendment, those that have been excluded, such as women's equality guarantees, may be viewed as less important, or perhaps even subject to those which have been expressly preserved.

22. The Ad Hoc Conference on Women and the Constitution, February 14 and 15, 1981, had a major role in the implementation of section 28 of the Charter. The Conference Resolution which endorsed a "purpose clause" like section 28 was premised upon the following:

> Summary of effects of the Purpose Clause:
>
> (1) guarantees the equal right of men and women to the enjoyment of all of the rights and freedoms contained in the Charter;
>
> (2) makes it clear that distinction in laws based on sex require the highest level of judicial scrutiny even without specifically including a two-tiered test in clause 15; and
>
> (3) overcomes a possible interpretation of clause 27 (the multi-cultural clause) which could limit the right to equality set out in clause 15.[10]

"Purpose" clauses and "interpretation" clauses serve the same function. "Interpretation" clauses offer a basis for understanding constitutional phrases which "cannot intelligibly be given content solely on the basis of their language and surrounding legal history."[11] This approach was described as "purposive" in *R. v. Big M Drug Mart Ltd.*:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.[12]

In fact and in theory, section 28 of the Charter is not only a purpose clause but also an "interpretation" clause. Thus, any constitutional amendment which undermines the effects anticipated by the Ad Hoc Committee is unacceptable to the women of Canada.

23. A second argument which has been used to justify the current wording of section 16 of the 1987 Constitution Amendment is that "distinct society", aboriginal rights, and multicultural heritage refer to group or collective rights, while Charter guarantees of gender equality refer to

individual rights. This assumption is by no means warranted. There is currently much discussion about the extent to which the Charter can be used to provide redress against the structural bases of discrimination against women as a group. Both sections 15 and 28 have been relied on to illustrate this point. Nor is this an "academic" debate. Although in an embryonic state, there are glimpses of recognition by the courts of the group characteristics of women. There has also been some recognition that section 15 refers to group rights.[13] The Ontario Court of Appeal has already defined collective or group rights:

> Collective or group rights . . . are asserted by individuals or groups of individuals **because of** their membership in the protected group [emphasis added].
>
> Individual rights are asserted equally by everyone **despite** membership in certain ascertainable groups [emphasis added].[14]

One way of resolving the question of whether women have individual or collective rights is to ask which definition includes affirmative action. Are affirmative action claims asserted "because" of membership in a protected group, or "despite" it? The answer is in section 15(2) of the Charter, which provides for affirmative action programs which ameliorate the "conditions of disadvantaged individuals or groups". An affirmative action claim arises "because" of rather than "despite" the fact of group membership.

24. We offer affirmative action as an illustration because the Supreme Court of Canada has recently decided a case involving gender equality and affirmative action.[15] In another case currently before the courts, a different and more positive argument is offered. The Federation of Women Teachers' Associations of Ontario is defending the Ontario Teachers' Federation bylaw that assigns women and men to different teachers' organizations. Their defence includes historical, financial, political, and functional reasons for preserving the status quo.[16] Included is the argument that women have group rights and are entitled to take collective action to preserve them. In connection with the third argument (culture) mentioned earlier, it is interesting to note that much of the evidence in such a case is about the

culture of discrimination against women. Therefore, it is at the very least premature to conclude that women do not have collective rights under the Charter.

25. Finally, in relation to the third argument, we simply acknowledge that there is contemporary scholarly discussion about the existence of a women's "culture". For example, Carol Gilligan's research suggests that men and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships.[17]

26. What these three variations have disclosed is that arguments relating to "interpretation" clauses, collective or group rights, and culture actually support the inclusion of women's Charter-based equality rights in the Accord. What we will proceed to argue is that they must be included in the *Constitution Act, 1867*.

27. The Council's second concern is that a June 25, 1987, decision by the Supreme Court of Canada could have the effect of creating a hierarchy between the various documents which make up the Constitution of Canada.[18] In that case, the Court ruled that the *Constitution Act, 1867* was not subject to Charter review. All seven of the Supreme Court judges who decided the case agreed that the Charter could not be used to invalidate a section of the *Constitution Act, 1867*. Madame Justice Wilson clearly stated,

> It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the constitution. . . .[19]

Mr. Justice Estey also wrote,

> The role of the Charter is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada. . . .[20]

This decision causes several concerns.

28. It has been suggested that section 1, and by implication section 16 of the 1987 Constitution Amendment, are meant to operate in the *Constitution Act, 1982*; in fact, to operate within the context of the *Canadian Charter of Rights and Freedoms*. This interpretation reinforces the concerns argued above about the effect of expressly preserving some Charter rights and not others. In addition, the *Reference re an Act to Amend the Education Act* suggests that perhaps our constitutional documents cannot be read together in the manner envisaged at all; that the *Constitution Act, 1867* can operate independently of the *Canadian Charter of Rights and Freedoms*. Does this lead to a "substantive" interpretation of sections 1 and 16 of the 1987 Constitution Amendment?

29. More significantly, this Supreme Court decision suggests to us that constitutional provisions physically located in the *Constitution Act, 1867* (as are the majority of sections proposed in the Accord) are not subject to the Charter. Federal government lawyers have recently relied on this argument in defending against the Yukon government's challenge to the constitutionality of the proposed 1987 constitutional amendments.[21]

30. Either way, the potential exists to affect women's constitutional guarantees of equality.

31. It would be truly shocking if the drafting of the Accord and/or the subsequent decision of the Supreme Court laid the foundation for legal arguments which would undercut women's Charter-based equality guarantees. For this reason, the Council believes that the *Constitution Act, 1867* must contain a clear commitment to the *Canadian Charter of Rights and Freedoms*; one which ensures that equality rights do not take a subordinate role in a multi-tiered approach to equality, and which ensures that all our constitutional documents can be interpreted in a manner which retains the integrity of our commitment to equality rights.

32. **The Council recommends, therefore, that the 1987 Constitution Amendment be amended as follows:**

A. Section 1 of the Constitution Amendment, 1987 is amended as follows:

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:

"2.(1) The Constitution of Canada shall be interpreted in a manner consistent with . . .

(c) The Canadian Charter of Rights and Freedoms and section 35 of the Constitution Act, 1982 and class 24 of section 91 of the Constitution Act, 1867."

B. Section 3 of the Constitution Amendment, 1987 is amended by deleting subclause 95b.(3).

C. Section 16 of the Constitution Amendment, 1987 is deleted.

33. With this proposal, the Council's intention is to return women's Charter-based equality rights to the position they held prior to the Accord and the Supreme Court of Canada decision in the *Reference re an Act to Amend the Education Act*. Section 16 of the Accord would be incorporated into the proposal to amend section 1 by adding a subclause 2(c). Subclause 95B.(3) of section 3 of the Accord, which expressly applies the Charter to agreements on immigration and aliens, would be redundant. If it were not deleted, the courts would struggle to attribute some meaning for a second Charter reference, potentially undermining the results aimed at in the proposed section 2(c). Therefore, it must also be deleted.

34. The Council cannot overstate its commitment to women's constitutional guarantees of equality. It has been suggested that "(T)he Accord does not jeopardize the fundamental equality of male and female persons."[22] The Council believes these statements fail to acknowledge that women in Canada are not prepared to tolerate risk in the constitutional grounding of their equality guarantees. Finally, there have been a number of denials that the Accord in any way affects equality rights; denials that have yet to be explained. To date, the courts have not been influenced by statements of intention, nor will they unless cogent reasons are provided. In the short time

available, the Council and other women's organizations have canvassed the opinions of constitutional scholars, lawyers, and the women who lobbied so hard for women's equality in 1982. It would be an affront to continue the ratification process without serious and thoughtful pause to consider their advice.

SPENDING POWER

35. In fiscal 1986-87, $28.6 billion in cash and tax points were transferred from the federal government to provinces and municipalities for programs with joint or intergovernmental administration. This represents approximately one-quarter of the federal budget; if we were to include transfers to individuals through such programs as Family Allowances, Old Age Security, government contributions to Unemployment Insurance, the Guaranteed Income Supplement, Spouse's Allowance, etc., this figure would jump to just under half of the federal budget.[23]

36. Federal government transfers are big business; they empower our major social programs and national and regional economic development. Under these arrangements, 22 federal departments and 12 Crown corporations and agencies administer federal government contributions to programs and activities such as medicare, post-secondary education, equalization grants, social assistance, child care, the Canadian Jobs Strategy, compensation to victims of violent crimes, labour statistics, economic development agreements, crop insurance, vocational rehabilitation, young offenders, public housing, meetings and conventions, rent supplements, student loans, etc. These transfers take a variety of forms. Some involve direct cash contributions, with and without conditions. Others involve tax credits or points, loan guarantees, preferential pricing, property transfers, or separate direct payments to third parties.

37. These programs and activities profoundly affect women's lives, every day, in every part of the country. They are not new concerns for us. For the past 20 years, since the formation of the Royal Commission on the Status of Women, women have been examining these issues in the context of our experience and the abilities of federal, provincial, and territorial governments to respond. We have spoken out on the question of health care, social services, education and training, budgets, tax policy, federal-provincial fiscal arrangements, child care, family law, overlapping jurisdictions, and many others.

38. Today, it is a bit misleading to talk about areas of exclusive federal or provincial jurisdiction, particularly in connection with shared-cost programs.

> Experience has already demonstrated that a national interest may be found in many areas of provincial jurisdiction and, to a certain extent, the converse has been claimed. In practical terms, the constitutional division of powers has hardly acted as a constraint on government activity at either level.[24]

39. In legal terms, the constitutional responsibility for these programs is sometimes federal, sometimes provincial, and sometimes mixed. It is often unstated and uncertain and, in recent years, our courts have made considerable efforts to reconcile potential conflicts. For example, in *Schneider v. The Queen* (1982), 68 C.C.C.(2d) 449, the Supreme Court of Canada commented on the constitutional division of authority in relation to health care. A majority of the court noted that there is no specific head of power under the Constitution for health and public welfare, the administration of public health being at a primitive stage in 1867. They indicated that general jurisdiction over health is provincial, allowing for limited federal jurisdiction either ancillary to the express heads of power in section 91 or the emergency power under peace, order, and good government. Estey, J. refined this analysis:

> Health is not a subject specifically dealt with in the Constitution Act either in 1867 or by way of subsequent amendment. It is by the Constitution not assigned either to

> the federal or provincial authority. Legislation dealing with health matters has been found within the provincial power where the approach in the legislation is to an aspect of health, local in nature. . . . On the other hand, federal legislation in relation to "health" can be supported where the dimension of the problem is national rather than local in nature . . . or where the health concern arises in the context of a public wrong and the response is a criminal prohibition. . . . In sum, "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.[25]

40. Thus, in both practical and legal terms, the interaction of governments in developing social and economic policy is complex. Federal-provincial fiscal arrangements are treated publicly as technical matters, and, like constitutional change, historically have been discussed behind closed doors by executive governments, without consultation with Canadians.

41. The Parliamentary Task Force on Federal-Provincial Fiscal Arrangements recommended in 1981 that "prior to future intergovernmental negotiations on fiscal arrangements, members of Parliament again have a similar opportunity for consultation with the public."[26] If public consultation is important for selected intergovernmental initiatives, it is even more important in negotiating the underpinnings of the federal-provincial negotiation process — the federal spending power.

42. Section 7 of the 1987 Constitutional Accord provides:

> The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a **national shared-cost program** that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is **compatible** with **the national objectives** [emphasis added].

The meaning of many of these words is unclear. While elaborate detail may be inappropriate in a constitutional document, Canadians, including judges, are

entitled to be clear about the basic principles of a constitutional statement. We need a "well-defined framework of norms".[27]

43. There are no "terms of art" to guide us here; to date, none of the operative words in this section has received authoritative definition in our courts. It is difficult to support the amendment when we do not know what the various pieces mean. For example, what is the scope of this provision? What is a national shared-cost program? In its annual inventory of federal-provincial programs and activities, the federal government uses the following categories:

- federal-provincial fiscal arrangements and federal post-secondary education and health contributions. These include equalization, medicare, post-secondary education, and tax collection agreements;
- unconditional payments to the provinces and municipalities. These include grants-in-lieu of real estate taxes, etc.;
- conditional grants and payments for shared-cost programs and activities. These include the Canada Assistance Plan, Vocational Rehabilitation, Young Offenders Agreements, etc.;
- payments under contracts for goods or services. These include programs for student employment, job re-entry, skills retraining and shortages, etc.;
- payments relating to the transfer of land, improvements, or other physical assets. These include national parks, assistance to municipalities (sewers, roads, interprovincial transit subsidies), capital assistance for provincial and municipal construction projects (road safety, school and recreational facilities, etc.);
- loans to provinces or municipalities (crop insurance, hydro research, public housing, etc.);
- joint activities where each level of government independently finances its share of the responsibilities. These include the Canadian Jobs Strategy Program, annual consultations on immigration levels, fish and wildlife projects, police services, etc.;

- support of intergovernmental liaison and joint administrative bodies. This includes human rights coordination, the Inuit Economic Development Program, etc.;
- miscellaneous. This includes Canada Student Loans, telephone referral services, etc.

Which of these constitute shared-cost programs under the terms of the 1987 Constitution Amendment is not clear. Are they socially directed programs (such as medicare, education, social assistance), or construction projects, or financing strategies? As indicated later in our discussion on the meaning of national objectives and standards, it makes a difference.

44. Some will argue, as the inventory implies, that shared-cost programs are those in which there is a matching-funds arrangement; conditional and unconditional grants which transfer funds without requiring a corresponding provincial contribution are not true shared-cost programs. Thus, the Canada Assistance Plan, which funds social assistance, child care, shelters for battered women, etc. is a shared-cost program, but the *Canada Health Act* (conditional grant) and post-secondary education (unconditional grant) are not. Others will argue that, in reality, many provinces would not be able to support programs such as medicare without federal contributions, so that regardless of the formal structure of the funding, the programs are the result of cost-sharing and must be included.

45. In addition, what makes a shared-cost program national? Must it be offered to all provinces, to a majority of them, or an undefined collection of individual provinces? How does the federal government intend to proceed? Will it wait for unanimous consent, what "price" will we pay for agreement, and how will we resolve conflicts?

46. What are national objectives? There is no jurisprudence to guide us here, other than a passing suggestion in one Supreme Court of Canada decision that "objectives" must refer to something more than "competence" to enact legislation on a particular subject matter.[28] Thus, we must resort to basic principles of statutory interpretation, existing legislation, and the

language of the 1987 Constitution Amendment itself to estimate how this language will be interpreted for us.

47. The enabling legislation governing many of our national programs makes no mention of "national objectives". For example, the Canada Assistance Plan sets out the "undertakings" by a province that must be contained in agreements negotiated under the authority of the Act. These "undertakings" include eligibility (persons in need), access (no residency requirements), appeals procedures, ongoing provincial commitment to the program, and federal audit and information requirements. The *Vocational Rehabilitation of Disabled Persons Act* also does not set out objectives; it speaks of a variety of "services and processes" which may be included in a federal-provincial agreement. The *Trans-Canada Highway Act* sets out mandatory terms of agreement (location, standards, and the time and method of construction). It is interesting that this Act authorized compensation to provinces which had already constructed portions of what would become the Trans-Canada Highway, but stipulated that no payment be made unless the highway met the standards and specifications prescribed in an agreement. Finally, there is the *Canada Health Act*. This Act mentions a "primary objective": to protect, promote, and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial and other barriers. There are no "national objectives"; rather, the Act specifies five program criteria (public administration, comprehensiveness, universality, portability, and accessibility) and further elaborates on the requirements for satisfying the individual criteria. For example, the public administration requirements include non-profit administration, accountability to the provincial government, and public audit procedures.

48. In sum, there is no legislative practice which can aid us in interpreting "national objectives". However, we may find that this term will be defined for us by default. Section 3 of the 1987 Constitution Amendment, which deals with agreements on immigration and aliens, provides:

> 95B.(2) An agreement that has the force of law under subsection (1) shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets **national standards and objectives** relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada [emphasis added].

It is a matter of statutory interpretation, although we need only common sense to know, that "national objectives" will mean something different (less?) than "national standards and objectives" where both terms are used in the same instrument. The result is that, as section 7 of the Accord refers only to objectives, provinces will clearly not be required to meet "standards" set by the federal government for national shared-cost programs in order to opt-out with compensation. Thus, it becomes clear that **the salient question here is not "what are national objectives", but "what are standards"?**

49. Public opinion is divided on whether the federal government should be able to impose standards; however, the term "standards" is itself used in a variety of ways. For example, in section 3 of the 1987 Constitutional Amendment, "standards and objectives" is used in relation to establishing classes of immigrants, levels of immigration, and inadmissible classes of individuals. At a general level, these could be described as principles or categories of comprehensiveness, universality, and accessibility. For the purposes of the 1987 Constitution Amendment, are they standards or objectives? When a category is established in legislation, whether it is a "class of immigrant" or a "person in need", have we established a standard or an objective?

50. Differences in the French- and English-language texts of the 1987 Constitutional Amendment have also raised questions. This may be a factor in the meaning of the word "compatible". The French-language text uses the word "compatible" in both sections 7 (national shared-cost programs) and 3 (immigration) referred to above. The English-language text uses the word "compatible" in section 7 and uses the phrase "not repugnant to . . . national standards and objectives" in section 3. Does "compatible" mean the same as

"not repugnant to"? The concept of repugnancy has a specific history in the development of our constitutional law in relation to the division of powers accorded to the federal and provincial governments under sections 91 and 92 of the *Constitution Act, 1867*. The concept of repugnancy has been used to determine whether there is conflict or inconsistency between "valid" federal and provincial laws. The jurisprudence suggests that "not repugnant to" could be interpreted as meaning "not in conflict with" or "not inconsistent with". Peter Hogg, a noted constitutional scholar, has suggested that the cumulative effect of decisions on this matter may be that the sole test of inconsistency in Canadian constitutional law is express contradiction.[29]

51. One might ask why this search for meaning is important. Our courts do not base their decisions on good intentions and common understandings. The recent fate of the guarantee of freedom of association in the *Canadian Charter of Rights and Freedoms* has taught us all an important lesson about precision in language. In 1981, the Special Joint Committee of the Senate and House of Commons asked the then Acting Minister of Justice to comment on the need to amend the proposed Charter guarantee of freedom of association to specifically include the right to bargain collectively. The Minister responded that

> . . . it is already covered in the Declaration or in the Charter; . . . by singling out association for bargaining one might tend to diminish all the other forms of association which are contemplated — church associations, associations of fraternal organizations or community organizations.[30]

In April of this year, the Supreme Court of Canada ruled that

> . . . the guarantee of freedom of association in Section 2(b) of the Canadian Charter of Rights and Freedoms does not include a guarantee of the right to bargain collectively and the right to strike.[31]

The Public Service Alliance of Canada has already appeared before this Committee to remind us that this "difference of interpretation" cost them five years of protracted litigation and several hundred thousand dollars of their members' after-tax dollars.

52. We use this example to illustrate two points. First, there is recognition for the principle raised earlier in our analysis of the impact of the Accord on equality rights: that by singling out some rights, others may be diminished. Second, it is difficult to predict what will happen when our intentions are clear; it is impossible to do so when our intentions are unclear.

53. The prospect of legal confusion is complicated by the differing political conclusions that have been drawn about this section of the Accord. For example, in a recent letter to the Council, the Prime Minister stated that

> We will still be able to exercise the spending power. Medicare will continue unaffected and a new national child care system will be made possible under the new arrangements. But we will make it possible for individual provinces to adapt shared-cost programs to suit their particular needs.[32]

Premier Getty has been reported as suggesting that interference in provincial affairs (citing housing and medicare as areas of past federal imposition) would no longer be possible. Premier Bourassa is reported as insisting on the word "objectives" so that Ottawa could not tell Quebec what "standards or criteria" to have in its programs. Premier Peterson suggested that "if the national objective is to provide services to children, then the provinces cannot offer a program focussed on wilderness parks or highways." The Quebec Minister for Intergovernmental Affairs told Quebec reporters that criteria on matters such as quality and accessibility must be left to each province. Premier Ghiz agrees with Premier Bourassa. If Canadians have been relatively silent, it is easy to understand why. No one is getting the same story.

54. "Women's issues" are not enumerated under either provincial or federal powers in the *Constitution Act, 1867*. In fact, the range of issues of concern to women covers a vast territory in which there are no "watertight

compartments". When drawing up a list of issues for women in the 1981 constitution debate, women initially identified 15 areas of concern: human rights, aboriginal women's rights, family law, economic policies, education, political representation, income security, health and welfare, criminal law, immigration, administration of justice, communications, cultural policy, housing, and the environment.[33]

55. In each of these areas, the efforts of both the provincial and federal governments have been required, regardless of their precise location in the constitutional division of powers. Many of these joint federal-provincial actions have been in the area of social legislation. In a sense, social legislation is the law of equality and inequality in our society, for it directly and intimately affects our quality of life. We have only just begun to explore the extent to which the Constitution of Canada ensures equality; therefore, it is vitally important that if any of the ground rules change as a result of the Accord, that we understand what they are, how they will operate, and why.

56. Section 7 of the 1987 Constitutional Amendment is about some categories of federal-provincial arrangements. The section specifically provides that it does not alter the legislative powers of the federal or provincial government. Its location in section 106 of the *Constitution Act, 1867* is not without significance; it is indeed about the federal spending power. Section 106 deals with the federal appropriations authority. The federal government has already argued that its power to provide grants or transfer payments to provinces can be supported by the general power in section 91, section 91(1A), sections 102 and 106 of the *Constitution Act, 1867*, and section 36 of the *Constitution Act 1982*: *Winterhaven Stables Ltd. v. Attorney-General of Canada*, 29 D.L.R.(4th) 394, at 413. There is nothing new in this argument. In fact, the federal government has been providing grants to provinces since before Confederation (note section 118, *Constitution Act, 1867*, repealed).

57. The evolution of social programs in Canada has been a complex interaction of social, economic, and political strategies. Different solutions have been required to accommodate the needs arising from a variety of issues. This has required creativity and flexibility. Our concern is that the federal

government has limited its ability to be creative, and to provide the necessary flexibility in policy development. While it is true that most major social programs have originated in one way or another in a provincial initiative, women in Canada have looked to the federal government to exercise leadership so that a comparable range of services and opportunities is available throughout the country. This requires clarity and a commitment to provide comparability in both the quality and quantity of social programs. This is not a new commitment for Canadians. It is not a negotiating posture. Section 36 of the *Constitution Act, 1982* states that

> (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (a) promoting equal opportunities for the well-being of Canadians;
> (b) furthering economic development to reduce disparity in opportunities; and
> (c) providing essential public services of reasonable quality to all Canadians.

It is the federal government's obligation and responsibility to ensure that there is comparable access to and quality of public services in all areas of this country. It would be a derogation of duty to put its ability to do so at risk.

58. How does this relate to present and future shared-cost programs? Canadians endorse the fundamental principles contained in the *Canada Health Act*: universality, access, comprehensiveness, accountability, portability, and public administration. If we include the principle of quality, we find that these are the very criteria which the Council has been calling for in a national child-care system. The Council is fundamentally committed to the principle that Canadian children need to be assured of a reasonable standard of care no matter where they live, regardless of their family's circumstances. Given the wording in section 7 of the Accord, can a federal government deliver a national child-care program tied to these criteria? If a requirement

for non-profit administration, or the obligation to offer a range of programs for all pre-school age groups, or similar matters amounts to establishing "standards", then the answer may be no.

59. A second example arises in the case of post-secondary education. The Canadian Association of University Teachers (CAUT) has called for new federal legislation relating to post-secondary education, modelled somewhat on the *Canada Health Act*. The intent of the proposal is to guarantee core funding to the post-secondary system, and to encourage additional funding conditional upon a province satisfying certain "objectives" and provincial funding levels. It is interesting that CAUT used the term "objectives" throughout its proposed "Draft Post-Secondary Education Financing Act", outlining a primary objective and 11 additional objectives on issues such as accessibility, academic freedom, financial assistance for students, removal of barriers to disadvantaged groups, mobility, etc. Although women have been entering post-secondary institutions in record numbers, there remain a number of barriers to their participation. Given the wording of section 7 of the Accord, can "objectives" such as these be attached to federal spending in post-secondary education? This is not idle speculation. The federal government will be hosting a national forum on post-secondary education in Saskatchewan this fall and there will undoubtedly be much discussion about the restructuring of federal funding for post-secondary education. Preparations for that meeting will be impaired if there is uncertainty about the legal restraints on policy development.

60. A third example must allow for the possibility that a national shared-cost program may not necessarily relate to social legislation. The federal government contributes to highway construction and safety; construction projects involving schools, recreation facilities, and industrial structures; and reasonably complex insurance and other financing arrangements. It may be appropriate to establish "standards and specifications" in these situations. In fact, this will become an important issue in the near future as we find provinces and municipalities increasingly unable to service local infrastructures (sewers, roads, public facilities, etc.).

61. Finally, how will section 7 affect those issues which we can't yet imagine? Many of the needs which gave rise to present federal-provincial fiscal arrangements were beyond comprehension at the time of Confederation. Economic structures change. Social structures change. Political structures change. Will the federal government have sufficient flexibility to respond to these changes?

62. The possible effect(s) of section 7 are not known. For example, as one expert has suggested,

> . . . it is easy to overstate the effects of opting-out arrangements on provincial behaviour. Only Quebec exercised the right to opt out. Furthermore, those programs that Quebec opted out of had already been established programs, and Quebec undertook to maintain them virtually as is.[34]

Our existing shared-cost programs are not perfect, and there is no reason to preclude discussion of new possibilities. However, section 7 ties opting-out arrangements to one, as yet undefined, condition: the national objectives, or "non-standards". The Council believes that, with this language, Canadians are being asked to take a substantial and potentially costly risk.

63. In its brief to the Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, the Council reminded the federal government that women are a large consumer group in respect of social services such as medicare, extended health care, social assistance, old-age assistance, child care, etc., and that the ability of women to make other contributions to society may be, in large measure, a direct function of the support these programs provide. We stated then, as now, that despite the imperfection of current arrangements, women have the most to lose and are not comforted when the federal position is ambiguous. Some means or mechanism for maintaining adequate national standards (by whatever name) is necessary. If the 1987 Constitutional Accord puts the federal government's ability to do so at risk, then it must be corrected.

64. **Therefore, the Council recommends that section 7 of the 1987 Constitutional Accord be amended to ensure that it contains wording which clearly permits the federal government to attach conditions which will entitle Canadians to comparable access to and quality of services established by national shared-cost programs and which will enable the specific needs of women to be taken into account.**

65. In addition to the clarification recommended above, the Council is concerned here, as elsewhere, that equality guarantees contained in the *Constitution Act, 1982* and any other relevant constitutional documents may not apply to national shared-cost programs under section 106 of the *Constitution Act, 1867*. Unlike sections 3 and 16 of the 1987 Constitution Amendment, there is no reference to the Charter in section 7. As we indicated earlier, the effect of the drafting of the 1987 Constitutional Accord, taken together with the recent decision of the Supreme Court of Canada in the *Reference re An Act to Amend the Education Act*, introduces a substantial risk. A hierarchy of constitutional rights and a hierarchy of constitutional documents may well be created if the Accord receives legislative sanction in its current form. Because national shared-cost programs are fundamentally about equality, it is important that we be able to measure them against the equality guarantees contained in the *Canadian Charter of Rights and Freedoms* and the commitment to equal opportunity and the reduction of regional disparities expressed in section 36 of the *Constitution Act 1982.*

66. **Therefore, the Council recommends that section 7 of the 1987 Constitutional Accord be amended to include a clear statement applying section 36 and other relevant provisions of the Constitution Act 1982 to national shared-cost programs established under the 1987 Amendments.**

67. By way of clarification, it is the Council's position that the amendment proposed in paragraph 32 of this brief to ensure the application of the *Canadian Charter of Rights and Freedoms* to the Constitution of Canada obviates the need to restate its application in section 7 of the Accord.

68. In reviewing the 1987 Constitutional Accord relating to appointments to the Supreme Court of Canada, the institutions affected by the proposed changes to the amending formula, annual First Ministers' conferences on the economy, and annual First Ministers' conferences on the Constitution, Council members were struck by one overriding theme: the continuing absence of women.

69. For example, women continue to be vastly under-represented in Canadian courts. As the National Association of Women and the Law has already pointed out to this Committee, the Supreme Court of Canada does more than decide cases on federal-provincial issues. It is the final arbiter, short of constitutional amendment, of equality rights for women. And it is fundamentally important that women's experiences be taken into account in its judgements.[35]

70. There are currently four or five major equality cases before the Court. It is crucial that women's experiences begin to be heard and understood in our courts. For this reason, the Council has recommended that the federal Minister of Justice establish and provide the necessary funding for a Canadian Judicial Education Centre to provide equitable and comprehensive training programs for the judiciary with special emphasis on equality guarantees under the *Canadian Charter of Rights and Freedoms* and under relevant provincial legislation as they affect women. The Council believes that this training should be mandatory at an introductory level and that continuing education be provided on a voluntary basis.[36]

71. It is also important that women participate in the naming of candidates for appointment to the Supreme Court of Canada. Many national women's organizations are well-placed to compare the experiences of women across the country and to apply that information and expertise in nominating candidates. Whenever the opportunity has arisen, the Council has recommended to the federal government that a woman be appointed to the

Supreme Court of Canada. On occasion, the Council has been asked to present a list of qualified candidates for federal judicial appointments. The Council intends to continue to make every effort to ensure the appointment of judges who are attuned to women's experiences and equality rights. We give notice to the federal government that we expect it to exact the same standards of scrutiny when exercising its prerogative in the appointment of judges.

72. **Canada's Constitution is more than a simple legal document. It sets out the framework for decision-making and power in Canada through institutions such as the Supreme Court of Canada, the Senate, the House of Commons, the provinces and territories, and now through a process of First Ministers' Conferences. But there is a reality gap with regard to our Constitution; that is, historically, women have not been and are not yet participants in these fundamental processes. Nor are women's experiences taken into account in our decision-making and power structures. It is the Council's firm conviction and recommendation that the federal government, indeed all those charged with safeguarding the democratic process in Canada, take every step to ensure that, in the exercise of political responsibility and prerogative, the women of Canada are provided with a meaningful opportunity to contribute at all stages of the political and legal constitutional decision-making process.**

CONCLUSION

73. Throughout these summer weeks, the Prime Minister, the Minister of Justice, and many of the First Ministers have assured women's organizations that there was no intention to affect women's Charter-based equality rights. Unfortunately, the advice of the Council and other women's organizations is that these rights are indeed in jeopardy. These rights were hard won through the work of thousands of women from coast to coast. We cannot, and will not, permit a situation which puts them at risk. Equality litigation is in a

critical stage; some cases are now working their way through the legal process and others are embryonic. We cannot delay. If unchanged, the Meech Lake Accord may have a profound and devastating effect on women's equality for decades. In the opinion of the Council, it is an egregious error.

NOTES

1. A. Dubuc, "The Decline of Confederation and the New Nationalism", in *Nationalism in Canada*, ed. Peter Russell (Toronto: McGraw-Hill, 1966).

2. This history is well documented in Beverley Baines, "Women, Human Rights and the Constitution", in *Women and the Constitution*, ed. Audrey Doerr and Micheline Carrier (Ottawa: Canadian Advisory Council on the Status of Women, 1981).

3. These provide:

   Section 15. (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.

   Section 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

   Section 35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

4. Canadian Advisory Council on the Status of Women, *Council Recommendations* (Ottawa: March 1986), "Proposed Property Rights Amendment", September 1983, D1.3.

   Whereas
   - on March 29, 1983 an amendment to article 7 of the Canadian Charter of Rights and Freedoms, concerning property rights, was introduced in the House of Commons and was defeated;
   - a second similar amendment may be introduced;
   - the aim of the amendment of March 29, 1983 was to protect property rights in the traditional sense of the word, meaning primarily real property;
   - Canadian women in general are not owners of real property and, furthermore, own relatively little property of any kind;
   - the probable consequences of such an amendment have not been sufficiently studied and discussed;
   - such an amendment could have grave consequences on the rights

- such an amendment could have grave consequences on the rights which women have already obtained, such as the right to division of the matrimonial home;
- any increased protection of property in the Canadian Constitution must also protect new types of property, which are often social rights and benefits such as rent control, pensions, and labour standards;

1. the CACSW recommends that no new amendment be introduced in the House of Commons before an in-depth study can be made to establish the consequences of such a measure on the lives of Canadian women;

2. the CACSW also asks that any such measure be submitted to the general public, so that Canadian women be given the chance to voice their opinion on the matter.

5. *A Guide to the Constitutional Accord*, June 3, 1987 (Ottawa: Government of Canada, 1987).

6. Much of this section is taken from Beverley Baines, "Women's Equality Rights and the Meech Lake Accord", Canadian Advisory Council on the Status of Women (forthcoming).

7. Re Blainey and Ontario Hockey Association et al. (1987), 58 O.R.(2d) 274 (S.C.C.) refusing leave to appeal from 54 O.R.(2d) 513 (Ont. C.A.); 52 O.R.(2d) 225 (Ont. H.C.).

8. These provide:

Section 1. The *Constitutional Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

"2. (1) The Constitution of Canada shall be interpreted in a manner consistent with

(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
(b) the recognition that Quebec constitutes within Canada a distinct society.

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

Section 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

9. For illustration of judicial efforts to resist redundancy between the phrase "without discrimination" and what follows in section 15 of the Charter, see: *Reference re Family Benefits Act (N.S.)*, Section 5 (1987), 75 N.S.R.(2d) 338, at 346-51; Re McDonald and the Queen (1985), 51 O.R.(2d) 745, at 764 (Ont. C.A.); *Reference re an Act to Amend the Education Act* (1986), 53 O.R.(2d) 513, at 554-7; *R. v. Hamilton, R. v. Asselin, R. v. McCullagh* (1987) 25 C.R.R. 94, at 113-4; Re Blainey and Ontario Hockey Association (1986), 54 O.R.(2d) 513, at 523-7; *R. v. Century 21 Ramos Realty Inc. and Ramos* (1987), 58 O.R.(2d) 737, at 759-62; Re Shewchuk and Ricard (1986), 28 D.L.R.(4th) 429, at 434-6 (B.C.C.A.); Re Andrews and Law Society of British Columbia (1986), 27 D.L.R.(4th) 600, at 603-11 (B.C.C.A.); Re Rebic and Collver (1986) 22 C.R.R. 66, at 76-9 (B.C.C.A.); *R. v. Le Gallant* (1986), 54 C.R.(3d) 46, at 54-5 (B.C.C.A.); *McDonnell v. Federation des Franco-Columbiens* (1987), 26 C.R.R. 128, at 131-3 (B.C.C.A.); *Smith Kline & French Laboratories Ltd. v. Attorney-General of Canada* (1987), 12 C.P.R.(3d) 385, at 391 (F.C.A.).

10. Anne F. Bayefsky and Mary Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), Appendix VII, pp. 635-636.

11. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), p. 12.

12. [1985] 1 S.C.R. 295, at 344 (Dickson, CJC).

13. We are indebted to Mary Eberts for this observation.

14. *Reference re an Act to Amend the Education Act* (1986), 53 O.R.(2d) 513, at 566.

15. *Action Travail des Femmes and the Canadian Human Rights Commission v. Canadian National Railway Co.*, unreported, June 25, 1987.

16. Doris Anderson, "Wealthy women teachers balk at joining men", *Toronto Star*, September 13, 1986.

17. See: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); M.F. Belensky et al., *Women's Ways of Knowing: The Development of Self, Voice and Mind* (New York: Basic Books, 1986); Jessie Bernard, *The Female World From A Global Perspective* (Bloomington: Indiana University Press, 1987); Jessie Bernard, *The Female World* (New York: The Free Press, 1981).

18. *Reference re an Act to Amend the Education Act*, S.C.C., June 25, 1987, unreported.

19. *Ibid.*, p. 48.

20. *Ibid.*, p. 10.

21. *Ottawa Citizen*, July 29, 1987, p. A9.

22. *Notes for a Presentation by the Honourable Lowell Murray, Minister of State for Federal-Provincial Relations to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord*, August 4th, 1987 (Ottawa: Office of the Leader of the Government in the Senate and Minister of State for Federal-Provincial Relations, 1987), p. 21.

23. *Canada, 1987-88 Estimates, Part I, The Government Expenditure Plan* (Ottawa: Supply and Services Canada, 1987).

24. Audrey Doerr, "Overlapping Jurisdictions and Women's Issues", in *Women and the Constitution*, ed. Audrey Doerr and Micheline Carrier (Ottawa: Canadian Advisory Council on the Status of Women, 1981), p. 128.

25. At pp. 474-475.

26. Canada, Parliamentary Task Force on Federal-Provincial Fiscal Arrangements, *Fiscal Federalism in Canada* (Ottawa: Supply and Services Canada, 1981).

27. See: Dubuc, "The Decline of Confederation and the New Nationalism".

28. *R. v. Mackay*, [1980] 2 S.C.R. 370.

29. Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985).

30. Canada, Parliament, Special Joint Committee on The Constitution, *Proceedings*, January 22, 1981 (Ottawa: Supply and Services Canada, 1981).

31. *P.S.A.C. v. Attorney-General for Canada*, Supreme Court of Canada, April 9, 1987, per LeDain, J.

32. July 16, 1987.

33. See: Mary Eberts, "Women and Constitutional Renewal", in *Women and the Constitution*, ed. Audrey Doerr and Micheline Carrier (Ottawa: Canadian Advisory Council on the Status of Women, 1981), p. 6.

34. Robin W. Boadway, *Intergovernmental Transfers in Canada* (Toronto: Canadian Tax Foundation, 1980), p. 82, "Financing Canadian Federation: 2".

35. An excellent illustration of the need to include women's experiences in the judicial decision-making process is offered in *R. v. Chase* (1984), 40 C.R.(3d) 282 (N.B.C.A.), a case currently before the Supreme Court of Canada. The evidence was that the accused grabbed a girl by the arms, shoulders and breasts, saying "Come on dear, I know you want it." The legal issue before the court was whether the accused was guilty of sexual assault or assault. The court concluded that secondary sexual characteristics such as breasts were not included within the meaning of the term sexual because, if breasts are sexual, so are men's beards, and erogenous zones are not necessarily sexual "lest a person be liable to conviction for stealing a goodnight kiss." In her article on "Sexual Assault and the Feminist Judge", *Canadian Journal of Women and the Law/Revue juridique "la femme et le droit"*, vol. 1, no. 1 (1985), Christine Boyle gives an excellent analysis of judicial reasoning, and how the reasoning in the Chase decision would differ if a feminist judge were defining the term "sexual". She concludes that

> . . . whatever the test, it seems inevitably circular in the end. Judges are finally forced back on their own intuitions and experience of what is sexual in their culture. I think a feminist judge would have the best sense possible of when a women would experience the touching of her breasts to be sexual, and she would retain a good sense of when a man would so experience the touching of his beard. Such decisions would be based on her experience of life and her knowledge of how other people experience the world. This is an appropriate way for judges to make decisions. In fact they do it all the time. (p. 106)

36. Canadian Advisory Council on the Status of Women, *Council Recommendations* (Ottawa: March 1986), "Canadian Judicial Education Centre", September 1986, D1.5.

The CACSW recommends to the federal Minister of Justice

1. the establishment and necessary funding for a Canadian Judicial Education Centre to provide equitable and comprehensive training programs for the judiciary with special emphasis on equality guarantees under the Charter of Rights and Freedoms and under relevant provincial legislation as they affect women;

2. that the training program be mandatory at an introductory level and that continuing education be provided on a voluntary basis.

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