

New round of constitutional battles ahead

Constitutional guarantees suspect

by Alayne McGregor
for Canadian University Press

If we have a charter of rights in the Constitution, won't our rights then be guaranteed?

Not necessarily, according to experts at the Women and the Constitution Conference.

At least five clauses in the Trudeau government's proposed Charter of Rights are so poorly worded, they said, that the only people they'll help will be the lawyers who will conduct the interminable court battles over their interpretation. Even worse, they predict that many of the worst court decisions against women would not be changed under the charter.

• Clause 1 of the proposed charter guarantees the rights spelled out in the charter "subject to reasonable limits in law as can be demonstrably justified in a free and democratic society." Ottawa lawyer Tamra Thomson dubbed this the "Mack Truck" clause, because, she said, it allows the government to drive through rights at any time.

She pointed out the clause would allow even the rights of equality between the sexes and among the races to be taken away by Parliament and would give no protection from the "tyranny of the majority."

The conference asked that all rights in the charter apply to men and women equally with no limitations, and that any limitations to those rights follow the more exact format of the U.N. Covenant on Civil and Political Rights.

• Clause 7 guarantees life, liberty and security to "everyone". Unfortunately, according to Victoria lawyer Deborah Acheson, there is no legal definition of "everyone", inviting long, involved court battles over issues such as whether a foetus would be covered by the clause.

The conference recommended that "person", which has been legally defined, be used throughout the charter to specify a human being, and that the rights to reproductive freedom and the equality of

economic opportunity be included in Clause 7.

• Clause 15 (1) guarantees equality before the law and equal protection and benefit from the law for everyone without discrimination, particularly on the basis of sex, race, national or ethnic origin, color, religion, or age. According to Queen's law professor, Beverly Baines, however, its wording is "too vague" to unambiguously tell the courts no discrimination is allowed.



Unless it is made stronger, she said, judges will only consider whether the discrimination is relevant to the purpose of the legislation, on that basis, the Supreme Court ruled that native women who marry white men lose their Indian status, although Indian men who marry white women do not.

The conference added three more prohibited grounds for discrimination — marital status, sexual orientation, and political belief. It also asked that the grounds be grouped into two categories — those like sex or race on which discrimination should never occur, and

those like age on which in certain cases discrimination could be allowed. Without the separation, speakers argued, the never-occurring grounds would be weakened by being associated with the others.

• Clause 15 (2) allows affirmative action programs for disadvantaged individuals or groups. However, Thomson pointed out this clause would allow a Bakke case in Canada, where persons not part of a disadvantaged group could claim they were being discriminated against by affirmative action programs.

The conference recommended the clause only mention groups arguing that disadvantaged persons would be part of disadvantaged groups.

Clause 26 specifies that the entire charter be interpreted in light of Canada's multicultural heritage. Acheson pointed out, though, that this would include rights of equality in clause 15, possibly allowing sexual discrimination if it were culturally based.

She suggested that this clause might even allow genital mutilation of women because such mutilation is part of some African cultures.

The conference recommended the clause be put in a preamble to the charter.

• Clause 29 (2) specifies that none of the equality rights in clause 15 will come into force until three years after the rest of the charter has been applied. The conference asked this clause be deleted, on the grounds there was no need for the delay.

...and in this corner

Analysis by Peter Michalyszyn

While Pierre Trudeau turns the country inside out in his quest to patriate (sic) the BNA Act and its amendments from Great Britain, is anyone asking what difference the whole bloody thing will make to the average Canadian?

It appears there is agreement among Canadians that we should own our own constitution (that is, the written part now residing in Britain), regardless of the fact we've managed as a sovereign nation since 1931 without it. It seems only polite, however, that we should unburden some underworked British bureaucrat whose job it is to keep track of such dated documents.

But when you add the little extras Trudeau proposes — a Charter of Rights and Freedoms and an amending formula or at least promise of one within six months of patriation (sic) — you've got to wonder what the man is up to and why he

is in such a great damn hurry to see it through.

At a public forum before Reading Week Richard Simeon, a political scientist from Queens University, drew his own conclusions about Trudeau's seeming haste.

First, there is a recent electoral majority, which, Simeon said, Trudeau interprets as giving him the nation's mandate to do anything he thinks is the nation's business.

Second, there is the Quebec referendum, during which Trudeau promised he wouldn't ignore the French-Canadian problem if the separatists were defeated.

And finally, there is a 61 year old politician, who, as if he hasn't already transformed the nation to his image, wants his name in the books for yet another inglorious deed.

Not everyone agreed with what Simeon had to say. Garth Stevenson, a political scientist at the U of A, responded to Simeon Thursday night, saying unilateral patriation (sic) was the expedient necessary to break the "logjam" between governments in Canada.

The obvious question, however is whether today's unilateral action will sufficiently alienate the provinces so that friendship tomorrow is impossible.

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