Department of Justice
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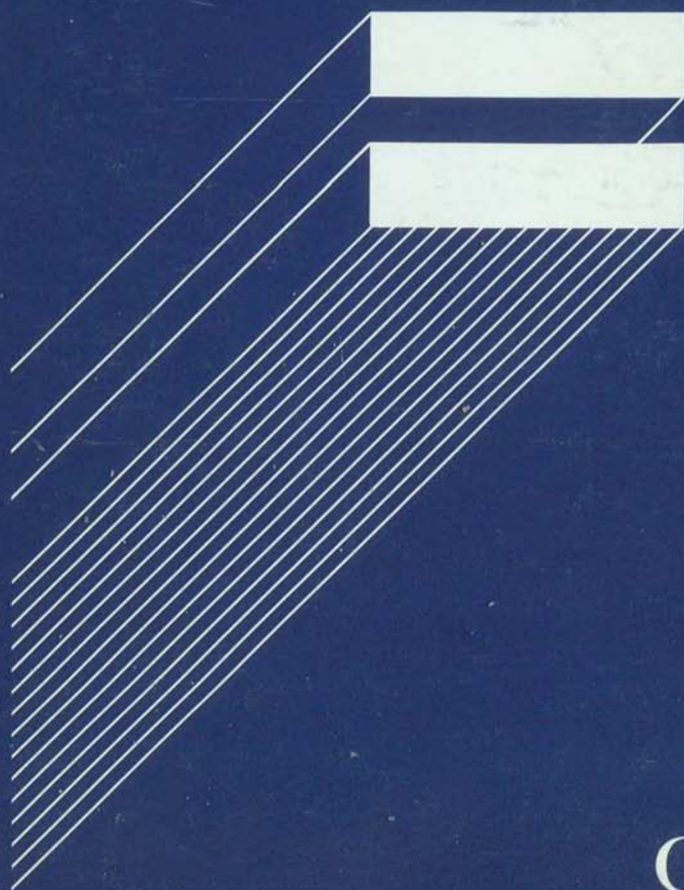
Ministère de la Justice
Canada

Equality Issues in Federal Law

A Discussion Paper



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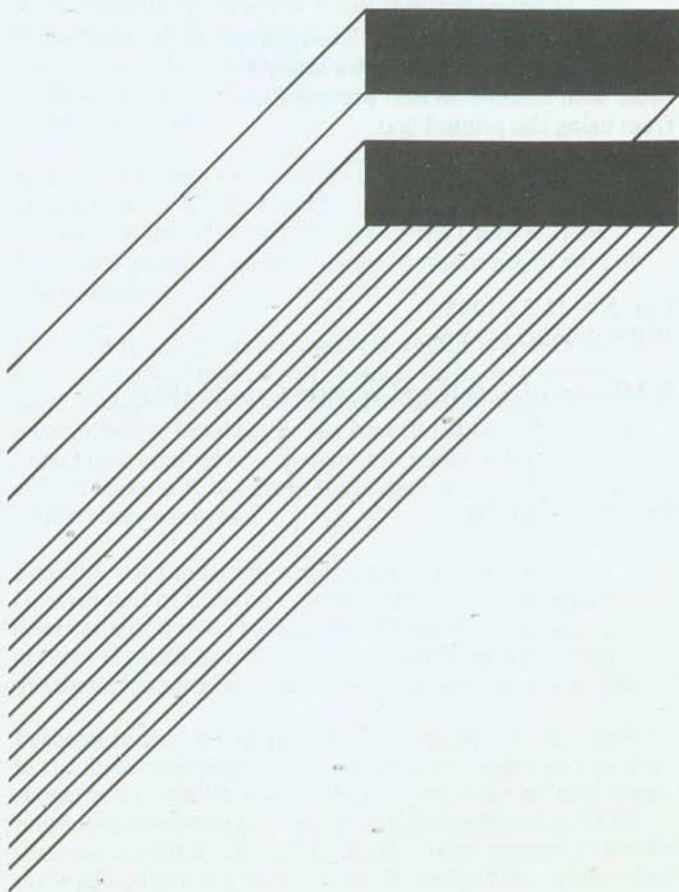

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Foreword

Canadians and their governments have in the last few decades been particularly concerned with the protection of rights and freedoms. This concern was embodied in the highest law of the land when the *Canadian Charter of Rights and Freedoms* was entrenched in the Constitution on April 17, 1982. It is important that the people of Canada and their legislatures work together to ensure that *Charter* values form an integral part of our laws.

As Minister of Justice and Attorney General of Canada, I have a duty, together with the Ministers whose legislation is affected, to ensure that all federal laws meet the standards of the *Charter*. To help me fulfill this responsibility, the Department of Justice has examined all statutes of general application in light of both the provisions of the *Charter* now in effect and of the equality guarantees that come into force on April 17, 1985.

As a result of that analysis, I will be introducing in Parliament an initial Bill to amend a number of federal statutes to bring about greater conformity with the *Charter*. This discussion paper on equality issues is also a major part of this endeavour.

The need to bring our statutes into conformity with the *Charter* is also fundamental to other legislative reviews, most notably the review of the criminal law under my responsibility. In addition, the overall review will not end here. Once appropriate changes are made to legislation it will be important to ensure that regulations and policies reflect these changes.

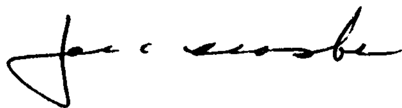
Equality is a fundamental goal in Canadian life. The Government of Canada is committed to eliminating any discrimination in its legislation and policies that could prevent Canadians from moving towards equality. This discussion paper is a step towards attainment of that goal.

I recognize that giving people a reasonable time to respond to the discussion paper means that some important equality concerns will not be dealt with by April. But the legal issues presented here raise difficult policy questions upon which reasonable people may differ. Rather than proceed to resolve these difficult issues on the basis of considerations identified

by itself, the Government prefers to have the widest possible consultation with the people of Canada first. Individual Canadians played a significant role in shaping the *Charter*; they should also be involved in determining the scope of the rights it guarantees.

I hope that Canadians will feel free to bring forward concerns about equality issues that may not appear in this paper.

I look forward to receiving the views of Canadians on the issues raised in the discussion paper. The views of Canadians will help the federal government assess the need to change some of its basic assumptions, policies and programs so as to help it promote equality for Canadians.



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Introduction

When the *Canadian Charter of Rights and Freedoms* was proclaimed on April 17, 1982, there was an important reservation: Equality rights set out in section 15 were not to come into force for another three years, until April 17, 1985.

This delay testified to the importance accorded equality as a fundamental goal in Canadian life. For it was intended to give governments time to review and seek amendments to any laws on the books that failed to meet section 15's safeguards against discrimination and, in particular, discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Working closely with other departments, the Department of Justice began to examine the more than 1,100 federal laws that are of general application, testing them against likely interpretations of the *Charter* and, in particular, section 15.

One important product of this review is the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Bill* placed before Parliament at the same time as this discussion paper. The equality portions of this Bill are designed to dispose of a number of straightforward matters — substituting the word "spouse" for the word "wife" in a number of federal laws, for example, to end one obvious bit of sex discrimination.

Among the Government's objectives in seeking such amendments now, before section 15 comes into effect, is to spare Canadians legal confrontation over constitutional rights. When legislation conforms to the *Charter*, the need for litigation to assert *Charter* rights is minimized.

Gray Areas

But the review brought to light a great many legislative provisions that were not so readily dealt with. Some of the distinctions made in law on grounds listed in section 15, and on other grounds that may be protected, raise new questions about some familiar social and economic policies.

Mandatory retirement is one example. Section 15 bans discrimination based on age. Yet many laws (to say nothing of many more policies and regulations sanctioned by laws)

fix an age at which employees must go into retirement, regardless of the wishes some may have to stay on the job and regardless of the abilities some surely have to keep doing the job productively and safely.

Because equality rights are not absolute, there is no clear answer to the question whether mandatory retirement is acceptable. Reasonable people may differ on such a significant policy question.

Opening A Dialogue

Before making firm proposals, the Government needs to know the views of Canadians on such issues. Theirs is the free and democratic society described in section 1 of the *Charter*; theirs must be an opportunity to advise on the way the equality rights of section 15 are applied. So this discussion paper is being published to serve as the basis for consultation with the people of Canada.

Accordingly, no recommendations are presented in this paper. Indeed, the mention of a particular legislative provision in the discussion paper should not be read as an indication that the Department of Justice considers it to be contrary to the *Charter*.

Several Avenues

It should also be understood that not every facet of the issues raised by section 15 is dealt with fully in this paper. Some are being addressed elsewhere, in particular:

> *Criminal Law Review:* A fundamental review of criminal law is now underway as the result of federal-provincial agreement in 1979. Because equality is closely related to other substantive and procedural criminal law issues, it is logical that equality issues be dealt with as part of the overall reform process. The Law Reform Commission of Canada, provincial governments and individuals and groups with an interest in criminal law are already involved. Thus, criminal law is not extensively analyzed in this discussion paper.*

* Submissions on criminal law reform may be directed to the General Counsel, Policy Planning and Criminal Law Amendments, Department of Justice, Ottawa, Ontario K1A 0H8

Indian Act: The Department of Indian and Northern Affairs has been involved for some time in initiatives aimed at resolving sexual equality issues in the *Indian Act*. The Minister of Indian and Northern Affairs has indicated that legislation on these issues will be introduced in the near future.

Lord's Day Act: Religion is a notable example of an issue already before the courts, with a challenge to certain provisions of the *Lord's Day Act* now before the Supreme Court of Canada. Since the Supreme Court is the ultimate arbiter of *Charter* rights, it seemed sensible to await its decision before proceeding further on the question of religious discrimination.

Unemployment Insurance: While equality issues raised by the *Unemployment Insurance Act, 1971* are dealt with in this discussion paper, it should be noted that the Department of Employment and Immigration will be conducting a complete review of this Act, which will extend beyond *Charter* concerns.

Affirmative Action And Contract Compliance: The discussion paper does not deal with affirmative action in any depth or with contract compliance at all because the Government is currently considering recommendations on both these subjects by the Royal Commission on Equality in Employment in its recent report (the Abella Report).

Equality Now: Issues raised by the Special Committee on Visible Minorities in its report, Equality Now, are also under consideration by the Government and are thus excluded from this discussion paper.

Public Service Pensions Statutes: While this paper raises a number of equality issues in connection with federal superannuation plans, all features of these plans are in fact being assessed against *Charter* provisions as part of a broader analysis of the Public Service pension system undertaken jointly by the Treasury Board, its employees and pensioners.

An Issues-Based Approach

Clearly, this discussion paper is not exhaustive. It does not try to be. Rather than present every law that might not

comply with section 15, this paper raises broad issues on which policy decisions, once made, will have an impact on many statutes — including some that have not been referred to here for illustrative purposes.

I — Equality In Canada And The Interpretation Of Section 15

It would be impossible to end every distinction that is drawn between one Canadian and another. In fact, it would be wrong to end many of them. Clearly infants must be treated differently from adults for their own protection. The opportunities that different people have to choose different options make good Canada's boast that it is a free and democratic society.

Yet Canadians do not want distinctions based on characteristics like age, sex and race unless there is good reason for them. When unnecessary distinctions are made for irrelevant or capricious reasons, that is discrimination.

Canadians have also shared in a worldwide awakening since the end of the Second World War to the importance of human rights generally and of equality rights that shield individuals and categories of individuals from discrimination. In Canada, these four decades have brought:

Human Rights Laws: Parliament and all 10 provinces have adopted legislation that bans discrimination in employment and in the provision of goods, services, facilities and accommodations, that offers victims of discrimination ways of seeking redress, and that helps make all Canadians aware of the invidious nature of discrimination and the damage it does. Parliament also, in 1960, adopted the *Canadian Bill of Rights.*

International Obligations: Canada has bound itself by a number of international human rights agreements including the *International Covenant on Civil and Political Rights*, the *Covenant on Social, Economic and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women.*

Charter Of Rights And Freedoms

In 1982, Canada also gave itself a constitutional *Charter of Rights and Freedoms*. Section 15, which comes into force on April 17, 1985, sets out equality rights that require the state to have a rational and fair basis for distinctions that it makes among persons or classes of persons, particularly on the grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 will be a far stronger bulwark against discrimination than human rights laws and the *Canadian Bill of Rights* have been. Human rights laws can deal with incidents of discrimination but, as ordinary statutes themselves, they are often powerless against discriminatory practices sanctioned — whether deliberately or not — by other laws.

The *Canadian Bill of Rights* was intended to be a weapon against discrimination found in law, but its status as an ordinary law itself was one of the things that reduced its usefulness. Nor did the *Canadian Bill of Rights*, as an enactment of Parliament, apply to the provinces.

But section 15 is part of the Constitution. It can be used to strike down laws that offend its principles. And it is binding at both federal and provincial levels.

Roles For Canadians

Section 15 reinforces the responsibility that governments have to shape laws, policies and programs to the goal of equality, but the government alone cannot achieve equality. Individuals and groups can promote equality through their relationships with each other. They can also challenge governmental action that they believe has infringed their rights.

At a more fundamental level, it is the Canadian people who set the nation's priorities. While laws and policies sponsored by governments may influence the norms of society by imposing constraints, they do not create the norms. Law usually flows from norms, not the contrary.

The importance of social norms to the application of the *Charter* will be evident in debate about the reasonable limits that may be placed on the equality guarantees of section 15 — when it is a matter, for example, of balancing the arguments for and against mandatory retirement at a fixed age regardless of individual choice. In this debate, financial costs must also be considered. Correcting an inequality may result in increased costs to a program, which could mean reduced resources for other programs. Since Canada has limited resources, the effects on society as a whole of increased costs of any program must be kept in mind.

Interpreting Section 15

The precise terms of equality rights in the *Charter* are as follows:

> 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.

Equality guarantees in section 15 do not stand alone. To be properly understood, they must be read in the context of the *Charter* as a whole — indeed, of Canadian life as a whole.

Other Charter Provisions

The first step towards an understanding of section 15 is to look at other provisions of the *Charter* itself.

Scope: Section 32 makes all matters within the authority of Parliament and the federal government (as well as of provincial legislatures and governments) subject to *Charter*

guarantees. But it is not clear to what extent, if any, private activities are covered. In the United States, the *Bill of Rights* has been applied to private activities only when government has been involved in some way. In Canada, this issue will have to be resolved by the courts as cases come before them.

Limitations: Section 1 provides that reasonable limits may be set by law on *Charter* guarantees. The precise nature of reasonable limits will be determined by the courts. Section 33 allows Parliament (or a provincial legislature) to override equality rights and some other *Charter* provisions when they adopt a law. Both these sections recognize that the assertion of one right may make it necessary to interfere with another. Section 33 leaves the last word on important matters of public policy to the elected representatives of the people rather than transferring it to the courts.

Related Charter Rights: Certain persons and groups protected by section 15 also get special attention elsewhere in the *Charter*.

Under section 28, all *Charter* rights and freedoms are guaranteed equally to women and men. This may require particularly careful scrutiny of laws that make distinctions based on sex.

Sections 16-23, 25 and 27 must be read together with the race, national or ethnic origin and colour grounds set out in section 15. Sections 16-23 guarantee special rights in the use of the English and French languages. Section 25 says that *Charter* guarantees must "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". Section 27 directs that the *Charter* "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians".

It is clear from these sections and from section 15 itself that not every distinction constitutes discrimination. Distinctions based on race are likely permissible, for example, when they flow from aboriginal rights.

Some Other Factors

The international obligations cited earlier figured prominently in the process leading up to adoption of the *Charter*,

and they have been considered in the review that produced this discussion paper, both in assessing the conformity of federal laws with the *Charter* and in interpreting the *Charter* guarantees themselves.

Secondly, it should be kept in mind that there is no case law where guidance may be found. While jurisprudence and experience from other jurisdictions like the United States and Europe are helpful, Canadian legal policy must be made in Canada so it reflects uniquely Canadian circumstances and history.

Comprehensive Protection

Protection under section 15 was clearly intended to be comprehensive. It includes equality before the law, equality under the law, equal protection of the law and equal benefit of the law.

Inequality can apparently be found not only on the face of a law, spelled out for all to see, but also in the way the law is administered.

Systemic Discrimination

Although section 15 does not plainly say so, it might be applied to "systemic" discrimination, or adverse impact of an apparently neutral law.

An example might be a law that excluded part-time workers from a pension scheme. This appears to be a neutral provision that does not make distinctions based on any of the grounds set out in section 15. But if most part-time workers prove to be women, then the law might be challenged in the courts on the basis of section 15.

During its *Charter* conformity review, the Department of Justice examined legislation with an eye to systemic discrimination and disparate impact. But this form of discrimination is often not readily identified; it commonly takes statistical analysis to detect it.

Thus public consultation will be especially valuable in ensuring that all systemic discrimination that occurs because of federal laws has been found.

Defining Discrimination

Discrimination does not lend itself to precise definition. There was no universal definition prior to the *Charter*, nor does the *Charter* offer a definition.

As indicated in the opening paragraphs of this chapter, a general definition would include unnecessary distinctions between persons for reasons that are not relevant in the circumstances. It might be added that such distinctions may proceed from stereotyping — for example, if all workers are forced into retirement at age 65 because some people of that age no longer have the physical and mental capacities required by the job.

Another refinement is highlighted by the discussion of systemic discrimination. It is discrimination when neutral administration and laws have the effect of disadvantaging people already in need of protection under section 15.

The Department has not tried to cast a narrow, legalistic definition of discrimination, preferring to focus broadly on distinctions that are drawn in legislation, the purposes and justifications for them and their impact.

An Open-Ended List

Can individuals complain of a denial of equality based upon grounds other than those enumerated in section 15 of the *Charter*? The Department took the position in its review of legislation that the wording of section 15 suggests that while certain grounds are enumerated for emphasis, there could be successful complaints of a denial of equality based on other grounds.

There is another general reason for considering the list open-ended. It is well-established that Canada's international obligations must be taken into account in the interpretation of Canadian law. International agreements such as the *Convention on the Elimination of All Forms of Discrimination Against Women* contain grounds such as marital status that are not listed in section 15.

This raises the question of whether the same standards are appropriate in protecting individuals and groups against discrimination on listed and unlisted grounds.

One initial difference is obvious. Section 15 makes it clear that listed grounds, such as race, sex and age, are worthy of protection; unless reasonable limits have been imposed, discrimination on these grounds is prohibited. In addition, section 28 seems to reinforce the protection against sexual inequality.

With non-enumerated grounds there may first have to be a demonstration that the ground is worthy of constitutional protection. The presence of such a ground in Canadian human rights legislation and international covenants might assist in such a demonstration. This was used as a guide by the Department in deciding which unlisted grounds to include in its review.

The Review Process

A number of steps were involved in the Department's review of each distinction found on both listed and unlisted grounds. When it was determined that a distinction resulted in an apparent denial of equality, the objective of the provision was examined to see whether it was itself in conflict with the *Charter* because it was, for example, based merely on stereotypes or other unwarranted ideas about the characteristics of the category of person concerned. (One factor that had always to be kept in mind was whether the law had more then one objective.)

When an objective was considered justifiable, then the means of achieving it were examined to see whether they were truly related to the objective and whether other means were available to achieve the objective without infringing on equality rights.

Even when it is clear that the law makes distinctions on grounds listed in section 15, there may be disagreements about the validity of the objectives. Indeed, it is not always easy to ascertain what the objectives of a law are.

Then, even when the objective is clearly valid, the means of attaining it and the nature of alternative means may engender further disagreement.

While all the listed grounds and some unlisted grounds were covered in the review, it became apparent that it may be easier to find justification for distinctions made on the basis

of some grounds such as age than on those of race or sex. For example, it would be reasonable to prohibit a ten-year-old from driving an automobile for public safety reasons. It is hard to conceive of a situation where it would be permissible to distinguish in a way that is detrimental to a racial group.

The Department is aware that there may be conflicting views on the meaning of discrimination and on the relationship among sections 1, 15 and 28. It does not maintain that the approach it took was the only one possible. However, rather than become embroiled in these debates, the Department preferred to examine whether laws were in conformity with both the letter and the spirit of the equality guarantees. The focus is thus on the nature of the distinctions found and on their possible justifications rather than on formal doctrines of interpretation.

Affirmative Action

Further, the Department of Justice considered whether apparent discrimination could be justified as affirmative action under subsection (2) of section 15. This can only be a justification when there is a clear demonstration that the group concerned is disadvantaged and that the law in question is designed to improve its conditions.

II — Age

Age is listed as a ground of distinction in section 15 of the *Canadian Charter of Rights and Freedoms*. Age-based distinctions are common not only in our society but throughout the world. The rationale for many of these distinctions originates in earlier times and in different societies. Many have been continued without an extensive examination of the assumptions underlying the distinction. Most age distinctions are made with respect to youth and to the elderly in Canada. An age of majority is used to denote the transition from child in need of restriction or protection to adult with full rights and responsibilities. An age for mandatory retirement has been used as a means to take the older person from the work place. While age is an enumerated ground under section 15, there will undoubtedly be justifications for age distinctions in our society. As such, age distinctions in Canadian society must be re-examined to determine if they are justifiable in today's society.

Mandatory Retirement

The concept of mandatory retirement apparently evolved with pension plans and security programs for older workers. Often the adoption of age 65 as a normal retirement age is traced to social legislation sponsored by Prince Otto von Bismarck, chancellor of the German empire. In 1889, Bismarck's old age security law made age 65 the criterion for an impoverished individual to obtain a benefit.

Similar legislation did not develop in North America for another 40 years. Mass unemployment in the early 1930s resulted in the discharge of older workers first in the interest of maintaining employment for younger workers with dependent children. In 1935 the United States *Social Security Act* was passed to provide unemployed persons over the age of 65 with some income. This legislation did much throughout the western world to reinforce the idea that age 65 is a normal age of retirement.

By the 1940s and 1950s the concept of retirement had become accepted on the basis that the life cycle should include a period of work followed by a period of leisure. Thus, mandatory retirement became accepted as a normal and even welcome end to working life.

Mandatory retirement is very widespread in Canada. Retirement policies are set out in collective agreements, company employment policies, laws and individual contracts. In addition, about 95 per cent of pension plans in Canada require most beneficiaries to retire at a given age — usually 65 or 70. However, only about 54 per cent of full-time paid workers in Canada are employed by organizations with pension plans. Also, many persons do not work until age 65 and so are not affected by a mandatory retirement age of 65 or more.

In recent years, mandatory retirement has been called into question both in Canada and internationally. The International Labour Conference agreed in 1979 to adopt in principle a recommendation that would allow "retirement to take place on a voluntary basis". In 1982 the Council of the European Community urged member states to implement flexible retirement policies. In the United States the mandatory retirement age in the private sector has been raised to 70, and for most federal government employees mandatory retirement has been abolished.

In Canada, the Quebec National Assembly recently enacted legislation abolishing mandatory retirement. In Manitoba, a court decision on the *Human Rights Act* of Manitoba has declared invalid mandatory retirement provisions in that province's public service legislation.

Social And Economic Concerns

Arguments are made for both maintenance and abolition of mandatory retirement. It might be noted that many of the arguments on both sides have never been proven conclusively. The term mandatory retirement is used to designate the age at which an individual must leave his or her job. It is different from "pensionable age" which designates when an individual is eligible for a pension.

Those who favour mandatory retirement say that:

> It lets older workers who are having difficulty performing their duties leave the job market with dignity. And — the other side of the same coin — personnel management is simplified because procedures for terminating employment can be applied uniformly without individual evaluations.

Anticipating retirement at a fixed age, employees are encouraged to make financial arrangements for their old age.

Old Age Security and Canada Pension Plan benefits are payable at age 65. Therefore an older worker has a source of income.

Mandatory retirement opens more jobs and promotions for young workers.

The removal of mandatory retirement may disrupt the intricate, interrelated pension and retirement system now in place. For example, it may be necessary to reconsider age 65 as the earliest date on which certain benefits provided by Old Age Security and the Canada Pension Plan may be paid.

There is also a feeling that as a group, older people are less qualified than young people for certain functions because of declining physical and mental capacities and declining ability to adapt to changing circumstances.

The present system works well and the number who stand to benefit from a change are small.

Those who would abolish mandatory retirement say that:

Setting a mandatory age of retirement is an arbitrary measure, not based on specific criteria that would enable an employee's ability to be accurately evaluated. It ignores the specific character of the individual in favour of a stereotype of a group, thus undermining basic concepts of equality and individual worth.

Age is not a clear and certain measure of abilities because the aging process varies considerably from one individual to another and so do the demands from one job to another.

Mandatory retirement for everyone at a fixed age may be harmful to the physical and mental health of employees whose lives are entirely centred on their work.

The number of job openings resulting from retirement of older workers is not substantial. A declining birth rate will cause a decrease in the number of young workers —

resulting, indeed, in future burdens on pension schemes because a larger proportion of the population will be retired.

Employers and society lose productive, valuable workers because of mandatory retirement.

It is already common practice to subject employees to periodic evaluation throughout their careers, long before they reach retirement. These evaluations, not age, should determine whether the employee is still capable of doing the job.

Mandatory retirement can cause considerable hardship for those who are financially unprepared.

Abolishing mandatory retirement would benefit women who typically have fewer years in the labour force and must work later in life to get pensions as big as men do.

The experience of jurisdictions that have raised or abolished the mandatory retirement age shows that a vast majority of the working population retires at or before the age of 65.

Legislative change would allow more employees to keep working past the normal retirement age when they are physically able and willing to do so. However, the number of employees who wish to work substantially beyond 65 is a small fraction of their age group, a smaller fraction still of the labour force.

In Quebec, a relatively high proportion of public and para-public sector employees have shown a tendency to stay at work past the age of 65, but many decide to retire six to eight months later.

Although an employee's health greatly influences the decision to retire, experience in jurisdictions such as Quebec and the United States has underscored the importance of financial security as well. The proportion of those who continue working after reaching age 65 will vary with the adequacy of private and public pension plans, financial incentives, anticipated inflation, availability of part-time work, whether the spouse is employed, and similar economic factors.

Competing social and economic concerns make it difficult to resolve this issue. Although it is clear that age is a distinc-

tion which may be discriminatory, the justification for mandatory retirement is a matter upon which reasonable people may differ.

Bona Fide Occupational Qualifications

Even if mandatory retirement is considered unacceptable as a general principle, it may be justified in certain occupations.

Except Nova Scotia's, all Canadian human rights legislation provides exemptions from the prohibition against age discrimination where it can be established that age is a bona fide occupational requirement.

Despite a limited scope which does not necessarily correspond to the variety of justifications that might be raised to defend legislation that provides for a mandatory age of retirement, this concept could help identify occupations where it may be acceptable to classify individuals by age.

Decisions by Canadian courts suggest that a bona fide occupational qualification exception can be justified by uncertainty about the effects of aging on individuals. In certain occupations that affect public safety, the unpredictability of individual human failure beyond a certain age may justify an arbitrary retirement age for all employees.

The concept of bona fide occupational qualification may be applied where it can be established that the age limitation is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, fellow employees and the general public. An employer must adduce evidence on a number of factors including the precise nature of the duties to be performed and the relationship between the aging process and the safe and efficient performance of these duties. This evidence must be more than impressionistic. The employer must demonstrate objectively that the conditions of work require a skill that may diminish with age and that the job involves dangers for employees or the public that may be compounded with age.

There is an alternative to mandatory retirement — individual assessment. If there are medical tests that can be administered on a regular basis to predict individual ability

to perform the job adequately and safely, it would not be necessary to have a uniform retirement age. However, it is not clear that tests currently exist which are able to measure not only present capability but future performance.

Special Cases

A full list of occupations in which a uniform mandatory retirement age may be justified cannot be drawn up without more information. But some possible ones have been identified and will be discussed here, although the list is by no means exhaustive.

Canadian Forces: The Canadian Armed Forces compulsorily retire officers on a rank, age and length-of-service basis. Under the Officers Career Development Program (OCDP) no officer enrolled under the plan can work beyond age 55, unless granted a special extension. A similar program exists for the non-officer ranks, which raises similar problems. There are provisions for earlier retirement, depending on rank and length of service. The *National Defence Act* permits enrolment for fixed or indefinite periods of service. Although the latter is essentially a career engagement, the fixed period is akin to a mutually-agreed contract for a limited term.

There are two approaches, depending on the term of engagement, for the career members of the Canadian Forces. The first is mandatory retirement after 20 years of service or at age 40, whichever is later (the 20/40 point). A member can then receive an annuity under the *Canadian Forces Superannuation Act*. Those who are offered an extension leave the Canadian Forces at age 55, and their annuity arrangements commence then.

Although the age of 55 may be justified by considerations of fitness, it may be more difficult to justify the fact that an individual may have to retire at age 40 or after 20 years of service.

Earlier retirement is claimed to be justified by the very nature of the Armed Forces, which are hierarchical and must build membership through recruitment in the lower ranks. A constant flow-through of members is required to maintain a dynamic, operationally-oriented military force that can meet government directed roles, maintain the

personnel ceiling and prevent stagnation in the junior ranks. The 20/40 point seems to be inspired by the need for economy, in that it would be unacceptable to pay unreduced annuities to people under 40. Secondly, some medical evidence seems to indicate that age-related medical problems show a measurable increase at about 40. Thirdly, studies done with the assistance of Canada Employment and Immigration indicate that a more effective age for entering a second career is around 40.

Consideration needs to be given to the justification for variable retirement ages according to rank. Can each age limit be correlated with the demands of the job? Is the military unique in this regard? Does combat readiness call for a higher standard of fitness than would be needed for the same job in peacetime?

RCMP: Compulsory retirement ages for RCMP officers are set out in the *RCMP Superannuation Regulations* which establish different retirement ages for different ranks. Constables and corporals must retire at age 56, sergeants at 57, staff sergeants at 58, officers at 60, deputy commissioners at 61 and commissioners at 62. While a rationale may once have existed for these distinctions, it is not apparent today. Mandatory retirement as a general proposition may be justifiable in police forces, but apart from a personnel policy favouring early retirement at lower ranks to maintain a low average age, the particular age distinctions drawn are hard to relate to the duties of the various ranks. The ages of retirement are subject to section 80 of the *RCMP Regulations* which provide for maximum service of 35 years. Therefore, it will be the age provided by the regulations or the completion of 35 years of service, whichever comes first, that determines the retirement date.

The entire mandatory retirement age structure has been examined by the RCMP to determine possible alternatives to present rules. As a result, the RCMP has suggested alternatives such as a uniform retirement age of 60 for all regular members. Moreover, it has been suggested that the 35-year maximum period of service in the *RCMP Regulations* be revoked.

Judges: Although exemptions from mandatory retirement provisions in current human rights legislation normally relate to occupations involving public safety or the safety of fellow workers, the judiciary might be exempted if manda-

tory retirement as a general principle was abolished. Justices of the provincial Superior Courts are required by subsection 99(2) of the *Constitution Act, 1867* to retire at 75. The same retirement age is fixed for Justices of the Supreme Court of Canada by statute. Other federally-appointed judges are forced by statute to retire at age 70.

The main reason for maintaining a mandatory age of retirement for judges lies in a concern for their independence. If there were no fixed retirement age, the possibility of incapacity might necessitate the individual evaluation of older judges. Such evaluations by the executive could undermine judicial independence.

Even with retention of mandatory retirement, the current system needs re-evaluation because judges are compelled to retire at different ages depending upon their constitutional status.

Superannuation And Pensions

Another area of age distinction which may be substantially affected by mandatory retirement is pensions. The Canadian pension system is a balance of public and private plans and of mandatory and voluntary arrangements built through federal-provincial cooperation and the efforts of business, labour and individuals. The purpose of these plans is to help people set aside money for retirement at an older age. There are a variety of plans with a variety of provisions, many of which involve cross subsidies among plan members and differing entitlements based upon age, sex or marital status. Although the majority of employer-sponsored pension plans in Canada have been modified to conform to the requirements of human rights legislation, pensions by their very nature make distinctions which might be challenged under section 15.

Along with mandatory retirement, the entire range of national programs such as Old Age Security and the Canada Pension Plan that commence at age 65 might have to be reassessed in light of the *Charter*. Can the year in which a person attains age 65 remain the earliest point at which retirement benefits could be paid if it is no longer accepted as the "normal" retirement age? Can governments choose an age for commencement of benefits in pension plans? These questions are significant to private plans because they are

generally integrated with public pensions plans. Consideration must also be given to cost if it is suggested that public benefits be provided at earlier ages, since there are only limited resources to pay for them.

The 1983 Parliamentary Task Force on pensions made comments which may assist in this discussion. It stated that Canada's retirement system should be more flexible and adaptable. It also recommended that Canadians should be able to receive Canada Pension Plan benefits earlier or later than at age 65, according to individual choice, with appropriate actuarial adjustments. Currently one can continue to work and contribute to the CPP after age 65 to increase the amount of benefits payable. The Quebec Pension Plan was recently amended to provide for early retirement with the appropriate actuarial reductions and actuarially-increased benefits for retirement after age 65. In addition, the Task Force proposed similar changes to the *Old Age Security Act*. The Government is examining pension reform at this time.

Any decisions about mandatory retirement would have to be considered in pension reform. If mandatory retirement were abolished, specific questions about the design of pension plans would have to be addressed. It is not uncommon, for example, that abolition of mandatory retirement is accompanied by a bonusing system whereby individuals who work beyond the normal pensionable age and have their pensions postponed until actual retirement have their eventual pensions actuarially increased to reflect the shorter period during which a pension is likely to be received. New Brunswick and Quebec both have such legislative direction. If such a feature were required in the federal Public Service superannuation plan, studies would be needed to ensure the appropriateness of using age and years of service to determine normal pensionable age. Then decisions would have to be taken on what would be a "normal" pensionable age, whether based on age or years of service or other measures. This is only one example of the issues that would have to be considered if mandatory retirement were abolished. Other aspects of pensions are dealt with elsewhere in this paper.

Canadian Human Rights Act

An examination of mandatory retirement requires a re-examination of the *Canadian Human Rights Act* provisions on mandatory retirement.

Section 14(b) provides that it is not a discriminatory practice to refuse employment or to terminate employment because an individual has reached the maximum age that applies to that employment by legislation or under regulations. This stops the Canadian Human Rights Commission from challenging mandatory retirement provisions in laws enacted by Parliament. It would not, however, preclude a court from considering the validity of such a law under the *Charter*. An individual could use the courts to challenge a legislative imposition of mandatory retirement instead of using the Commission. Without section 14(b), the Commission would be free to pass judgement on a law or regulation. There are some concerns about the desirability of a commission having power to determine the validity of federal laws, although both Ontario and Saskatchewan have given their commissions power to determine whether provincial laws infringe human rights legislation.

The second provision which raises concerns is section 14(c). It provides that to terminate the employment of an individual because that individual has reached the normal age of retirement for employees working in similar positions is not a discriminatory practice.

Whether this provision is justifiable will depend upon the ultimate resolution of the question of mandatory retirement. If a general policy of mandatory retirement is unjustifiable under the *Charter*, then such a provision may not be acceptable because it does not require any justification beyond evidence of normal retirement age. If, however, a general policy of mandatory retirement is acceptable, then this provision of the Act would also be justifiable.

Age Of Majority

A second age distinction is the age of majority. The federal Government has adopted age 18 for voting and other purposes such as the young offender legislation. All provinces have minimum ages for voting, for obtaining alcohol and for driving a motor vehicle. There is generally an age after which parents are not required to support their children. The rationale is to protect both young people and society. A uniform minimum age also recognizes the difficulty of trying to make individual assessments of fitness to vote, drive an automobile and so on. Some individuals may be prejudiced by the rules. However, this is balanced against larger concerns for society as a whole.

There may, however, be situations in which a minimum age raises questions. For example, a person under 18 is not entitled under the *Income Tax Act* to benefit from a Registered Home Ownership Savings Plan. The reason given is that those under 18 are not ordinarily in the work force and are still dependent on others, so they should not be regarded as independent economic actors for the purpose of the tax system. A right of young persons to contribute to an RHOSP might benefit only those who are independently wealthy and would also provide an effective means for income splitting by taxpayers who would use this tool to lend money to their children for them to invest in RHOSPs. However, an alternative argument is that the existence of earnings for the purpose of participation in an RHOSP is an objective factor which may be easier to establish than qualification for voting. If individuals are entitled to work on a full-time basis at age 16, is there any reason to deny the advantages of access to an RHOSP and the capacity to save in this way towards a future residence? Perhaps the eligibility requirements could be tied to earnings, although for those over 18 this limitation would reduce the number who would qualify.

A similar question can be asked with respect to superannuation and other pension schemes which do not normally permit contributions before age 18. Again, it is assumed that individuals would not wish to contribute since their income would be low. This limitation may also be related to provincial laws which do not permit an individual to enter into a binding contract before the age of majority unless it is for necessities.

Other Age Distinctions

Other statutes contain age distinctions unrelated to mandatory retirement, pensionable age or age of majority. Serious questions of justifications arise in some of these, and examples are presented here.

Under the *Public Service Superannuation Act* and other federal pension legislation, for example, the spousal survivor's benefit is reduced if a widow or widower is more than 20 years younger than the contributor. The rationale is to protect the pension fund against excessive liabilities where a spousal pension is likely to be drawn for a long time by reason of an exceptional marital situation. The objective

may be well grounded in economic or actuarial terms since the plans are intended to be funded out of contributions by the participants. But the impact on the individual widow or widower may be serious and the question is whether increased costs to the fund are sufficient justification for this distinction.

A second example occurs in most federal superannuation legislation and the Canada Pension Plan, which provide that survivor benefits may be paid to a child until age 25 if the child is in university and unmarried, only until age 18 otherwise. While it may be justifiable to continue support to children in post-secondary education and to provide a reasonable cut-off for provision of survivor benefits, the question is whether these particular age limits are justifiable.

A third example, also found in federal superannuation supplementary benefits, relates to term life insurance whose purpose is basically to provide protection to the families of bread-winners who die before becoming entitled to full pension rights. At age 60, and each year thereafter, the benefit is reduced by 10 per cent. At age 65, $500 of benefit is paid up. The reason for the gradual reduction after age 60 is that this is the threshold for full pension benefits, including survivor benefits. Consequently, the need for the life insurance provided by the supplementary benefit plan is reduced. In addition, it costs more to provide life insurance for older workers.

At issue is the validity of the reduction in benefits to an individual over age 60 based on the assumption that those affected may get pension benefits. This assumption may be questionable for an individual who entered the workplace late in life or after an interruption to raise children. Furthermore, there is a concern that there is no relationship between the reduction in life insurance benefits and the increase in pension benefits.

A fourth example is Canada Pension Plan survivor benefits. When a contributor dies, a survivor's pension is paid to a surviving spouse who has reached 65 years of age, or if under 65 to a surviving spouse who had reached age 35 when the contributor died, or if under 35 was at the time of death of the contributor a surviving spouse with dependent children or was disabled.

Under section 56 of the *Canada Pension Plan Act*, a benefit at a given rate is payable to:

The surviving spouse aged 45-64.

The surviving spouse under 45 who is disabled or has dependent children.

There is a pro-rated reduction in this benefit when the surviving spouse is between the ages of 35 and 45, is not disabled and has no dependent children.

If the spouse is over 65 and not in receipt of a retirement pension, the benefit is equal to 60 per cent of the contributor's retirement pension.

Furthermore, the spouse is entitled to a survivor's benefit when he or she reaches the age of 65 even if at the time of the death of the contributor he or she was not eligible for the benefit. The spouse is also entitled to a benefit if he or she becomes disabled after the death of the contributor.

The philosophy behind these provisions was that survivors of age 45 or more would have greater difficulty getting employment if they had not previously been working. In contrast, survivors under age 45 without dependent children or a disability had a better chance of being employed — those chances being greater the younger the survivor. Thus, for survivors between ages 35 and 45 who are not disabled or do not have dependent children, the pension is reduced by 1/120 for each month under 45, while those under 35 receive no pension if they do not have dependent children or are not disabled. Questions arise with respect to these specific choices of ages for reduction of pensions and for determination of dependency because assumptions may be difficult to substantiate by data.

A fifth example comes from the *Income Tax Act* which provides special deductions for taxpayers 65 or older and a pension income deduction. The reason appears to be a desire to recognize the special economic burdens associated with older age and to recognize the contribution of older taxpayers, by granting them a subsidy. The Act also permits deductions for dependent children or grandchildren only to age 21, after which no deductions are provided unless the children or grandchildren are dependent by reason of infirmity or are full-time students. Secondly, the amount of the deduction increases when the child reaches the age of 18.

The overall legislative policy recognizes the impact that family support obligations have on ability to pay; it also encourages parents and grandparents to support children who are not economically independent. The deduction varies with the child's income. The basic question is whether 21 is an appropriate cut-off age if the primary concern is dependency.

The *Unemployment Insurance Act, 1971* excludes from coverage and from receipt of benefits claimants 65 years of age or over. The legislation does provide for a lump sum payment to retirees. The reasons for this are that individuals of 65 and over generally get Old Age Security and may be eligible for a pension under the Canada Pension Plan. Both Canada Pension Plan and Old Age Security benefits may be paid to those who have applied, even when they continue to be employed.

The fundamental question is whether a person who has not retired from the work force should be excluded from Unemployment Insurance coverage simply because he or she is entitled to OAS or CPP benefits. There may be a relationship between the benefits paid under Unemployment Insurance and those paid under Old Age Security and Canada Pension Plan which is a valid economic concern of the government. But the individual is cut off from Unemployment Insurance coverage and benefits irrespective of whether CPP or OAS is drawn.

One final example comes from the *Citizenship Act* which provides that a deserted child apparently under the age of seven years is deemed to have been born in Canada (although this record is corrected when the contrary is proven within seven years from the date the child was found). The stated rationale is that a child of this age does not know which country he or she was from. However, questions may be asked with respect to older children who are abandoned and have no ties to their country of origin.

III — Sex

Sex is a listed ground in section 15 of the *Charter*. In addition, section 28 of the *Charter* stipulates that *Charter* rights are guaranteed equally to men and women. This makes it very clear that any distinctions made on the basis of sex must be examined carefully to determine if they result in adverse consequences which cannot be justified.

There is some federal legislation which makes distinctions on the basis of sex. Those discussed here appear to have adverse consequences for women or men, but there are complex economic and social policy reasons for them which must be considered.

Unemployment Insurance

The central concept of the *Unemployment Insurance Act, 1971* is to shelter beneficiaries against the loss of employment income. This assumes an interruption of earnings when a person, following a period of employment, has a lay-off or separation from that employment.

Separation or lay-off alone is not a sufficient qualification for Unemployment Insurance benefits. Claimants must also prove that they have had enough weeks of insurable employment in the qualifying period. This qualifying period is generally either the 52 weeks that immediately precede the commencement of the benefit period or the period since the date of the last benefit period, whichever is shorter. In certain cases the qualifying period can be extended for up to 104 weeks. The number of weeks of employment required to qualify for benefits varies with the rate of unemployment in the region where the claimant normally resides. Persons who are new entrants or re-entrants to the labour force and those applying for adoption, sickness or maternity benefits must be "major attached", that is have 20 weeks of insurable employment in the qualifying period. Persons who drew unemployment benefits during their qualifying period may also require up to 20 weeks of insurable employment in order to qualify.

Prior to the 1971 revision of the Act, there were no benefits for women not capable of and not available for work during pregnancy and after childbirth. Maternity benefits were introduced in the 1971 revision in recognition that no other

scheme existed to cover the loss of earnings because of pregnancies. Pursuant to recent amendments, a woman is entitled to regular benefits during pregnancy and after childbirth as long as she is capable of and available for work.

To be entitled to maternity benefits, women must be "major attachment claimants". The longest benefits continue is 15 weeks, and there is no eligibility for the extended benefits available to some claimants of regular benefits. However, if maternity benefits are exhausted, further initial benefits (up to a maximum of 25 weeks) and extended benefits could be paid providing availability for work is proven.

Several reasons might be given for distinctions between regular benefits and maternity benefits. Payment of maternity benefits is a departure from the traditional availability-for-work principle underlying unemployment insurance. Insurance schemes generally impose additional rules in special situations. The 20-week entitlement requirement for maternity benefits was included on the assumption that this is a special benefit, so a stronger attachment to the labour force should be evident. Indeed, under provincial laws, eligibility for maternity benefits requires continuous employment for up to 12 months.

Although amendments since 1971 placed greater emphasis on the period of social adjustment required following pregnancy, rather than on incapacity, the physical birth of the child still determines when benefits become payable.

Distinctions between ordinary and pregnancy benefits raise several equality questions. The first is whether a distinction based on pregnancy falls within the ambit of section 15 of the *Charter*. The Supreme Court of Canada, in a case argued under the *Canadian Bill of Rights*, decided that distinctions based on pregnancy did not constitute distinctions on the basis of sex. However, the wording of section 15 of the *Charter* is much broader than that found in the *Bill of Rights*. Thus the issue can be re-opened before the courts.

Secondly, a question arises about the underlying objectives of the Act and whether the existing scheme is an appropriate means to achieve the policy objective. The primary objective is to protect individuals against loss of income resulting from interruption in employment. There are, however, distinctions among individuals whose employment is interrupted, based on the reason for the interruption. The distinction requires

careful examination because although there may be no obligation upon the Government to provide Unemployment Insurance, once a decision is made to do so, then it must conform with the equality provisions of the *Charter*. The Act generally ties regular benefits to availability for work. Women on maternity leave are not generally available for work. They must, therefore, rely on a separate scheme of benefits and the vehicle that has been chosen for delivery of those benefits is Unemployment Insurance. The basic issue is whether such a common event as pregnancy justifies a longer eligibility period in a scheme designed to ease the hardship of a temporary interruption of income. Should pregnancy be considered an adequate reason for departure from the availability principle without the need for special rules?

Another concern relates to the duration of maternity benefits. While there is a period of inability to work associated with a pregnancy, the primary reason given for the existence of a 15-week period is social adjustment. If it is the primary reason for a benefit period extending beyond physical incapacity, should the male parent be permitted to receive benefits for part of this period? Should a couple be able to choose which parent will stay home for the purposes of social adjustment? A comparative factor to consider is that adoption leave benefits provided by the Unemployment Insurance plan are not restricted to the female parent. A further consideration may be that making maternity benefits available on the same basis as ordinary benefits would result in greatly increased costs to the fund.

In January, 1984, adoption benefits were introduced in the *Unemployment Insurance Act, 1971*. Since the rules governing the payment of adoption benefits are similar to those of maternity benefits, many of the foregoing arguments respecting maternity benefits are applicable. Therefore any decision concerning maternity benefits would apply equally to adoption benefits except that adoption benefits are now payable to either parent whereas maternity benefits are payable only to the natural mother.

Canadian Forces

Women have served in the Armed Forces of Canada since the early years of Confederation when nurses served with Canadian military contingents. During both world wars, women participated extensively in the Armed Forces,

although not in combat roles. However, at war's end, most women were demobilized. In 1950, with Canada's involvement in the Korean War, Cabinet again authorized the increased employment of women in the military. However, in the early 1960's, the need for women declined and a ceiling of 1,500 women was set in 1965.

In 1970 the Royal Commission on the Status of Women recommended that all trades in the Armed Forces be open to women. After reviewing this recommendation, the Forces set out to expand the role of women. The fixed numerical limit was removed, but employment restrictions were maintained for primary combat roles, remote locations and sea-going service. In 1979, the military colleges were opened to women. In addition, a series of trials was initiated to assess the effect that the employment of servicewomen in near-combat or isolated units would have on operational capability.

However, women are still barred from performance of primary combat duties and from service with a unit whose primary mission is combat. Thus women are excluded from employment in many classifications and trades including naval sea operations and land combat arms.

Two issues are raised with respect to distinctions in the Forces on the basis of sex. The first is whether military effectiveness justifies such a policy. Secondly, are there compelling national, social or cultural reasons which would justify limitations on women's role in the Forces? These issues raise a number of questions and concerns.

The military effectiveness arguments raised by the Canadian Forces are that:

> Unrestricted employment of women may jeopardize national security, because a potential enemy may view a mixed force as less capable. The effect of a mixed force on the relationship of Canada and its allies is not certain.
>
> Women's reaction to combat situations is unknown, since there is no Canadian experience with women in combat roles and only limited international experience.
>
> There is potential for adverse social and sexual relationships in mixed units operating under conditions of great stress. What difficulties would this create for command-

ers in the field or at sea? Would the aggressiveness of servicemen on the battlefield be affected by the presence of women?

The advantage that female prisoners would present to an enemy and the impact on national and military morale is unknown, but concerns exist.

Some anatomical and physiological differences between men and women are evident with respect to strength, cardio-respiratory capacity, endurance in climatic extremes, quickness of reaction, speed and ability to throw and jump. Not all of these work to the disadvantage of women. The question here is what problems uneven performance will create for commanders.

It is anticipated that opening up all trades and classifications to women would increase costs. What effect will this have on the defence budget?

In assessing these concerns, consideration can be given to the policies and experiences of other countries. Currently, only Belgium, the Netherlands and Norway have opened all positions in the armed forces to women. Despite this, women continue to supply a small percentage of personnel in these forces. One reason is that compulsory military service applies only to males. Another is that women must meet physical requirements that exclude most of them. Belgium and the Netherlands have undertaken a review aimed at new standards that are more equitable to women without compromising military requirements.

Many questions arise with respect to the military effectiveness arguments:

Should Canada follow the example of those European countries that let women enter all trades and classifications, or should it follow the example of other countries such as the United Kingdom and the Federal Republic of Germany which are even more restrictive than Canada?

If women's roles are to be expanded in the Canadian Forces, should the decision be based on the evidence now available or should there be a series of additional trials to gain additional evidence?

How can evidence gathered in peacetime reasonably be considered valid in war? How can the reaction of men and women in combat be assessed or predicted if women do not have access to combat roles in peacetime?

Even if military effectiveness can be assured, are there social or cultural reasons that militate against women's access to all military trades?

There is some argument that limitations imposed on the employment of women in combat-related duties are based upon social and cultural patterns and expectations established over many years. In Canada and in most western democracies, there has been a general acceptance that actual combat is man's work. There has been a parallel consideration that men in combat have a special obligation to provide for the security of non-combatants, primarily women and children. Is this still society's view?

One question is whether Canadian society is prepared to say that equality requires that women be able to participate fully in all trades and classifications of the Forces. It might be noted that in the United States the equal protection guarantees in the constitution have not been interpreted as permitting women's participation in combat roles. Society's concerns may however reflect a stereotypic image of women's roles.

The current restriction on the employment of women in combat and combat-related roles limits their ability to progress to the more senior ranks. Access to these ranks is achieved through a combination of employment and training which, in most cases, is only available to those who participate in combat or combat-related functions. Is it necessary to open all trades and classifications to women to provide equal opportunity for advancement, or can some alternative method be found to provide that opportunity?

If combat roles are opened to women in the Forces, consideration will have to be given to the qualifications for each trade to ensure that they do not unnecessarily exclude women. Is it possible or practical to develop standards that are absolutely necessary for military effectiveness but permit the maximum eligibility for all Canadians irrespective of sex?

Finally, if women enter the Forces voluntarily (as they now do), should they be denied any opportunity to participate if they meet the qualifications and choose to take the risks associated with combat? A concomitant question is whether equal access in peacetime means equal liability for compulsory combat duty in war.

Canada Elections Act

Under the *Canada Elections Act* special voting rules, the "spouses" of armed forces electors are deemed to hold the same residence as the elector. The majority of spouses in these cases are women. These women are denied the opportunity to choose a place of residence for voting purposes. The question is whether this can be justified in present-day society.

Family Allowance

The Family Allowances program is intended to supplement the income of Canadian families, to assist with provision of necessities of life to unmarried children under the age of 18. In two-parent families, the allowance is usually payable to the female parent subject to certain limited exceptions. Benefits are considered as income for the purposes of income tax and must be reported by the parent who claims the tax exemption for the child.

The assumption behind this sex-based distinction appears to be that female parents are the primary care givers. This, therefore, excludes males from control over Family Allowances monies unless they have custody of the children.

The validity of the assumption underlying payment of Family Allowances to women needs to be re-examined. If the payment is for the benefit of the children, does it matter which parent receives the Family Allowance cheque? Both parents have an obligation in law to care for and support their children, and payment to the female parent disregards the sharing of this obligation. Should the state take the responsibility of selecting one of the two parents on an arbitrary basis when there are undoubtedly other selection mechanisms available? For example, one mechanism would be that parents be allowed to determine which should get the family allowance payment.

Criminal Code

The *Criminal Code* raises a number of questions related to equality and sex distinctions. A number of these appear in the *Criminal Code* sexual offence provisions. For example, section 146(1) makes it an offence for a male to have intercourse with a female under 14 who is not his wife. There is no corresponding offence by a female. Examples such as this may raise serious equality concerns that are being considered in the criminal law review now taking place within the Department of Justice. They are being considered along with the recommendations of the Badgley Committee Report On Sexual Offences Against Children. Recent *Criminal Code* amendments, which established a new regime based upon sexual assault and aggravated sexual assault, were part of this review process and were the first steps towards removing gender discrimination from the statutory language of the Code.

But the gender distinctions in issue are integrally related to the substance of criminal law which is under review. Accordingly that process of review is considered to be the most effective for consideration of equality issues. Consultation will take place during this review.

Pension Benefits Standards

The *Pension Benefits Standards Act* deals with pension plans organized and administered for the benefit of persons whose employment is governed by federal laws. The Act is similar to provincial pension benefits acts, and it facilitates pension portability. The Act itself does not make sex distinctions. However, to be registered, a pension plan must comply with standards set out in the Act and related regulations. The regulations require a review which must include the estimated cost of benefits under the plan, and the rules for computing the cost on the basis of actuarial assumptions or methods that are adequate and appropriate or in accordance with generally accepted actuarial principles and practices. One generally accepted actuarial principle is to use mortality tables to determine the cost of pension benefits. These tables are generally sex-based and tend to show that women, on average, live longer than men. Therefore, sex distinctions are a factor in calculating the cost of pension plans. Since these plans are normally required to be

funded, balancing benefit costs against premium and other income, these sex-based distinctions may have an effect on the rights of male or female participants in the plan.

This can have various results. One is that women pay more into the plan than men to get the same monthly or annual pension benefits. A second is that women receive smaller benefits than men if they have paid the same contribution. The third is that employers contribute more money to make up the difference.

Mortality tables are also used to assess insurance portions of pension schemes and result in different rates for men and women. Men pay higher premiums for insurance because the tables are based on a longer life expectancy for women. These tables are also used in making calculations under the *Income Tax Act* when Registered Retirement Savings Plans are used to purchase annuities.

The 1983 Report of the Parliamentary Task Force On Pension Reform has made recommendations on this issue. Recommendation 6.16 states:

> A majority of the Task Force recommends that, with three years' notice, and following full consultation with the pension industry on the precise universe of contracts to be covered, the relevant statutes be amended to provide that pension benefits be equal for males and females retiring under identical circumstances, with respect to pension credits that accrue from the date the legislation is proclaimed.

Equal benefits and premiums regardless of sex are now features of federal superannuation plans and the application of such a regime to other plans is a matter of some significance. Work is currently being done by the Government on pension reform, and this issue is among those being looked at. The Parliamentary Committee also addressed the problem of "homemaker pensions" which relates to more general equality concerns with respect to the Canada Pension Plan. This issue will not be discussed in this paper.

Veterans' Allowances

The *War Veterans Allowance Act* enables female veterans and widows of veterans to qualify for an allowance at age 55 while male veterans and widowers are not eligible until age

60. There is, however, provision under the legislation for applicants to qualify for the allowance at an earlier age if they are considered incapable of self-maintenance because of physical or mental incapacity or because of insufficiency combined with economic handicap.

The rationale for the different age levels has traditionally been one of protectionism, for widows in particular. In the past, women have had fewer opportunities than men to participate in the labour force. As a result women were less able to secure financial independence in their later years. In recognition of these reduced opportunities for economic self-sufficiency, legislators established a lower qualifying age for female applicants for the allowance.

Correcting the inequality has a number of effects. To raise the qualifying age from 55 to 60 for women would take away rights already acquired by this group. To lower the age from 60 to 55 for males could result in substantial costs. The initial cost could be as high as $50 million if one were to assume that the 55-to-59 age group would participate, immediately upon amendment, at the same rate as the 60-to-64 age group. There is, however, no means of determining how many applicants would apply initially. The Department of Veterans' Affairs is currently studying this question.

IV — Disability

Mental and physical disability are enumerated grounds in section 15 of the *Charter*. In recent years, Canadian society has become more aware of and concerned about the treatment of disabled persons. Federal and provincial anti-discrimination laws have increasingly sought to provide protection against discrimination on the basis of disability. The *Canadian Human Rights Act* prohibits discrimination on the grounds of both mental and physical disability. These laws reflect the view that disability is not a justifiable criterion for denying an individual equal opportunity with other individuals to make the life that he or she wishes, consistent with his or her duties and obligations as a member of society. The prohibition against discrimination on grounds of disability is qualified, however, where there is a bona fide justification (or occupational requirement) relating to the disability in individual circumstances. Generally bona fide justification would prevail where it is demonstrated that the different treatment of disabled persons was based upon:

A danger to others.

Undue hardship, which often includes economic concerns of an employer or provider of goods, services or accommodations.

Statutory or regulatory necessity, where breach of human rights legislation is for the purposes of compliance with other statutes or regulations.

Inability or unwillingness of disabled persons to comply with terms of service, provided these are uniformly or customarily applied to all patrons or customers and are reasonably necessary.

Inability to make a reasonable accommodation for the particular needs of disabled persons.

It is entirely possible that an assessment of reasonable limits under the *Charter* will consider factors similar to those used under human rights legislation. It is likely that the constitutional protections offered for the disabled are not absolute and reasonable accommodations will have to be made by society, employers and the disabled.

Canadian Forces

A candidate for enrolment in the Canadian Armed Forces is assigned a medical category by a medical examiner. The medical category of serving members may be amended to reflect disabilities resulting from illness or injury.

Recruits are required to have a certain score in their medical category to be fit for basic training and to be eligible for the widest selection of trades.

Each trade in the Forces has been assigned a medical category. These categories specify the minimum grading for assignment of a member to, and continued full employment in, a specific classification or trade. When a member's grading falls below an appropriate level, a Career Medical Review Board then examines the problem.

The effect of these Forces requirements is to exclude Canadians with physical or mental disabilities which prevent them from meeting the medical requirements.

The rationale presented by the Forces centres on the unique requirements of a military force. One is that members may be called upon to risk danger or death in many of their roles ranging from surveillance over and defence of Canadian sovereign territory, to provision of assistance to civil authorities in civil disaster and emergencies, to playing a role in NATO and international peacekeeping. It is considered that all members must be capable of fulfilling operational commitments, even those whose current role is non-operational.

It is argued that the Forces have a hierarchical structure which an individual enters at a junior rank. Since not all the skills required for work in the Forces are found in civilian employment, each applicant must be chosen for potential to progress through the ranks and to receive appropriate training for positions of leadership. This is supported by the findings of the Senate Subcommittee on National Defence which recommended in 1982 that military viability — the capacity to execute competently military tasks — remains the essential criterion for judging the operations of the Forces. The Canadian Armed Forces have detailed the specific requirements and duties of an operational force. The issue appears to be whether there is a satisfactory correlation

between medical and operational requirements and whether the Forces medical categories may include inaccurate assumptions about disabilities.

Criminal Code

The treatment of the mentally disordered offender under the law has received increasing attention by the courts, mental health associations, law reform commissions and many other groups and individuals over the past decade. The current *Criminal Code* provisions relating to them raise equality and other *Charter* issues.

As part of the criminal law review, a project was set up in 1982 to study the mental disorder provisions of the criminal law. The research and consultations focused on eight problem areas:

Remands for psychiatric assessment.

Fitness to stand trial.

The defence of insanity.

Automatism and criminal responsibility.

The disposition and continuing review of persons found unfit to stand trial.

Interprovincial transfers of persons in detention under a Lieutenant-Governor's warrant.

The convicted mentally disordered offender.

The mentally disordered young offender.

A discussion paper was released in September, 1983, outlining options available for reforming each of these eight areas. This document has been used in consultations with provincial governments, major national and provincial organizations and associations. One of the most important considerations in the development of new recommendations for the mentally disordered offender has been to promote conformity with the *Charter*. This process continues as part of the criminal law review.

Immigration

The *Immigration Act 1976* contains a broad articulation of Canadian immigration policy. That policy specifies that immigration rules and regulations should be "designed and administered in such a manner as to promote the domestic and international interests of Canada, recognizing the need to ensure among other things that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex". Section 15 of the *Charter* lists these grounds and also disability and age. The *Charter*'s protections are broader and perhaps should be directly reflected in the immigration policy. While it is doubtful the *Charter* would apply to circumstances occurring entirely outside of Canada, it would apply to the Act and regulations which govern the immigration process.

A general issue is whether the grounds of discrimination specified in the *Charter* and the grounds identified for particular purposes in other legislation must be identical.

The *Immigration Act 1976* makes several distinctions on the basis of disability. A person is considered to be a member of an inadmissible class if he or she is "suffering from any disease, disorder or disability or other health impairment which as a result of the nature, severity or probable duration would, in the opinion of a medical officer concurred in by at least one other, be a danger to public health or safety, or his or her admission would cause or might reasonably be expected to cause excessive demands on health or social services". While regulations are provided as general guidelines, medical officers have considerable discretion. These rules relating to an inadmissable class apply to all classes of immigrants and visitors, including those subject to the sponsorship rules and those classified as refugees under international conventions.

These distinctions relating to disability or health impairment must be assessed in the context of the policy stated in the *Immigration Act 1976*. Among other things, the policy seeks to:

> Ensure that demographic goals are met with respect to geographic distribution of the Canadian population.

Encourage and facilitate the adaptation to Canadian society of persons who have been granted admission as permanent residents, by promoting cooperation between the government of Canada and other levels of government and non-governmental agencies.

Fulfill Canada's international legal obligations to refugees.

Maintain and protect the health, safety and good order of Canadian society.

The reasons given for excluding those with the specified mental or physical disability are two-fold. The first is concern for the health and safety of all Canadians. Communicable diseases may cause harm to other Canadians. This would not be of concern with respect to other forms of disability.

The second relates to provincial concerns. The provinces have responsibility for medical care and social services. The federal government, however, determines who will be an immigrant to Canada. Therefore, the provinces may be faced with partial financial responsibility for persons admitted by the federal government. Larger concerns are the imposition of additional costs on Canadians if an immigrant or visitor requires long-term hospitalization or other special health care, and has a potential demand for specialized facilities or equipment that may be in short supply for the existing population.

These reasons raise the question whether financial burden is sufficient justification to exclude some disabled persons who are citizens or residents of other countries. It may be noted that financial considerations are not peculiar to disabled people. All immigrants and visitors without exception are subject to one or more provisions of the immigration legislation that are based on financial considerations. The further question is whether Canada has a responsibility to accept or assist those from other countries who are disabled to such an extent that they are inadmissible under the Act. Does the existence of similar restraints in other countries, which receive immigrants, support the justifiability of such a provision?

Canada Elections Act

The 1981 Report of the Special Committee on the Disabled and the Handicapped (Obstacles) recommended that section 14(4) of the *Canada Elections Act* be amended to "reduce the number of people disqualified from voting by reason of mental disease by providing clear criteria for determining the specific cases where exclusion from the democratic process is absolutely justified".

Section 14(4) of the *Canada Elections Act* makes a distinction not only on mental disability generally but also, and significantly, on whether an individual is voluntarily or involuntarily confined to an institution. The trigger for disqualification from voting is involuntary institutionalization. An individual who is voluntarily in an institution enjoys the vote irrespective of mental or other capacity. And persons who are not confined to an institution are not disqualified even though they may be very severely disabled.

Nowhere else in the *Canada Elections Act* is there a requirement to show capacity to understand the process before being allowed to cast a ballot, and there are no criteria that might recognize differing degrees of mental disability.

The Chief Electoral Officer, in his 1984 statutory report to Parliament, recommended that the sections prohibiting some individuals from voting be re-examined in the context of the *Canadian Charter of Rights and Freedoms.*

Thus even if it were considered justifiable to remove the right to vote from some persons who are mentally disabled, the approach in the Act may require reconsideration. It is when one considers options that difficulties arise. Because of the nature of mental disability, it is difficult to draw boundaries between those who can understand the consequences of actions such as voting and those who cannot. Questions may be asked as to whether a general test of capacity can be devised which would have an acceptable result. Several things must be considered, such as who is to make the decision with respect to voting capacity. Can such decisions be made in the course of enumeration, revision, and so on — tasks done by election officials who are not qualified to assess mental disability? Or can they be made

for election purposes during the adjudicative process which initially leads to confinement of an individual? The problem with this latter is that capacity may change with treatment.

Another possibility is to remove the disqualification altogether, which would make unnecessary such determinations. At least 10 American states have no restrictions on the right of mentally disabled persons to vote, so there is a precedent for such an approach. This would remove the distinction made between these involuntarily in institutions and other mentally disabled persons.

If a test is determined desirable, more work will be needed to select a test that adequately assesses the capacity of a mentally disabled individual.

Unemployment Insurance

The *Unemployment Insurance Act 1971* makes the same distinctions between eligibility for sickness benefits and regular benefits as between eligibility for maternity and regular benefits. Sickness benefits claimants must have 20 or more weeks of insurable employment in their qualifying period, the maximum period of eligibility for benefits is 15 weeks, and there is no eligibility for extended benefits unless the person is available for work. Sickness clearly disables a person from work and other activities. There is an argument that the guarantee in section 15 of the *Charter* of equality without discrimination based on mental or physical disability would include disabilities of a temporary nature. On the other hand, the meaning of disability may presuppose a physical or mental condition that is of some duration. If sickness is equivalent to disability, is there a justification for differentiating sickness benefits from regular unemployment benefits that are predicated on availability for work?

Sickness benefits were added to the Unemployment Insurance legislation in 1971 to fill a gap in Canada's social security program. It was determined at that time that sickness falls within the insurance principle of temporary involuntary loss of employment and that the unemployment insurance program was an appropriate mechanism for the delivery of benefits in such circumstances.

The rationale for a distinction between sickness and ordinary benefits was that coverage for sickness departed from the

ordinary requirement that a beneficiary be available for work. The 15-week period recognized that these benefits were to cover only short-term disabilities, because the Canada and Quebec Pension Plans and private insurance schemes were designed to cover long-term disabilities (although there is a three-month waiting period before CPP/QPP disability benefits are paid). The average duration of sick benefits is about nine weeks.

While the rationale for limiting the benefits to 15 weeks relates to the availability of Canada or Quebec Pension Plan benefits, it must be noted that the definition of disability in the CPP is very stringent and many persons who have a lengthy illness would not qualify for a pension. The QPP was, however, recently amended to relax the disability eligibility requirements for persons aged 60 and over. The amounts payable under these plans are significantly less than under Unemployment Insurance.

Similar issues arise here as with maternity benefits. Can sickness be considered a special kind of interruption of income which justifies separate rules, or is illness a good reason for being unavailable for work?

Other Issues

As in other sections of this discussion paper, only the issues which appear most contentious have been raised. There are many other distinctions premised on disability, such as special pensions under the Canada Pension Plan and deductions under the *Income Tax Act* for support of a disabled person or for special devices needed to assist a disabled person. However, these are likely justifiable under section 15 of the *Charter*.

V — Race

Race is an enumerated ground under section 15. United States courts have subjected distinctions based on race to very strict scrutiny. In the United States it has been virtually impossible since 1954 to justify any distinctions on the basis of race, other than the special regime applicable to American Indians. Human rights legislation in all jurisdictions in Canada identify race as a prohibited ground of discrimination.

The only direct distinctions on the basis of race in federal legislation relate to Indians and Inuit. These distinctions, however, are deeply rooted in the Constitution and history of Canada. Section 91(24) of the *Constitution Act, 1867* gives the federal government jurisdiction over "Indians and lands reserved for Indians". Pursuant to this authority, the *Indian Act* was enacted by Parliament, making special provision for Indians in Canada. In addition, section 35 of the *Constitution Act, 1982* recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada including the Indians, Inuit and Métis. Canadian history and these constitutional provisions make it clear that special provisions in legislation for native people may well be required or justified if they relate to their special position as aboriginal peoples in Canadian society.

This reality is reflected in the *Charter*. While section 15 makes race a prohibited ground of discrimination, section 25 states that the guarantees in the *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".

It should be noted that section 37 of the *Constitution Act, 1982* requires that two First Ministers Conferences be held before April 17, 1985, and April 17, 1987, for the consideration of constitutional matters directly affecting the aboriginal peoples of Canada. The question of special constitutional rights for the aboriginal peoples is very much a part of this process, which may well further define the constitutional context in which special statutory rights and protections for the aboriginal peoples can be considered. For this reason, only provisions which may have an adverse effect on native peoples are considered here.

One such problem arises indirectly because the *Indian Act* exempts Indians from paying taxes on income earned or received on a reserve. The *Income Tax Act* excludes these earnings from the definition of income. Because Canada Pension Plan contributions are based on income as defined in the *Income Tax Act*, the plan precludes consideration of the income Indians earn and/or receive on a reserve. Thus many Indians on reserves are not able to contribute to the Canada Pension Plan or receive benefits. However, other benefits such as the Child Tax Credit, which are reduced when the taxpayer earns income above a fixed amount, are much higher as a result of such earnings not being considered income for tax purposes. There is therefore a trade-off, and the provisions should be viewed in this context.

Another area where concerns are raised is with respect to section 13 of the Canada Assistance Plan, which excludes Indians on reserves from provincial welfare schemes. These Indians were excluded because similar services were to be provided by the federal government, either directly or by arrangement with the provinces since the federal government has authority over Indians on reserves. A number of studies have attested to the inadequacy of social services on reserves. If adequate alternative forms of service are not available, the compatibility of this provision with section 15 will have to be given careful consideration. While justification based on history and the Constitution may make some distinctions relating to Indians and aboriginal peoples acceptable, these distinctions must be carefully examined if they appear to be unfavourable.

VI —Citizenship

Citizenship is not specifically enumerated as a ground under section 15 of the *Charter*, although it prohibits discrimination on the basis of national or ethnic origin. Nationality has been interpreted to include citizenship under the Ontario *Human Rights Code, 1981*, but it is unclear that this ruling would be followed under the *Charter*; especially since the *Charter* itself accords special rights to citizens and makes distinctions between citizens and permanent residents and others. Section 3 of the *Charter* guarantees the right to vote only to citizens of Canada. The mobility rights in section 6 give only citizens the right to enter, remain in and leave Canada, while the right to move to and to take up residence or pursue a livelihood in any province is guaranteed both to citizens and permanent residents. The minority language educational rights guaranteed in section 23 of the *Charter* are only applicable to Canadian citizens.

Section 15 applies not only to citizens but to every "individual" in Canada, irrespective of citizenship. So section 15 is applicable to immigration and citizenship laws.

Special considerations arise in relation to the laws governing immigration and citizenship. Indeed, a major effect of existing legislation and regulations in these areas is to create distinctions amongst classes of people. Various criteria and conditions are established for entry on a temporary or permanent basis and subsequently for attaining citizenship status.

Eligibility for entry to Canada is governed by the *Immigration Act, 1976* while eligibility for citizenship is governed by the *Citizenship Act*. Under the *Immigration Act, 1976* individuals may come to Canada as visitors or as immigrants. An immigrant is a person who seeks landing. An immigrant becomes a permanent resident when landing has been granted. An individual remains a permanent resident until he or she becomes a citizen or until he or she abandons Canada or is subject to a deportation order.

The *Citizenship Act* defines citizenship and specifies who is eligible for it. Generally, anyone born in Canada is a citizen unless one or both parents were in a foreign diplomatic service. Anyone who has had permanent resident status for at least three years is eligible for citizenship providing he or

she is 18, has an adequate knowledge of French or English, understands the responsibilities and privileges of citizenship and is not under a deportation order. The Minister responsible for the *Citizenship Act* retains a discretion to grant citizenship in special situations.

Few would question the need to create distinctions between citizens, permanent residents and aliens. To exercise its authority, any sovereign state must be able to establish and maintain the physical integrity of its territory by imposing restrictions or conditions on the entry and continued presence of aliens. The state must also be able to define its membership particularly in relation to participation in its political process, perhaps the most important feature of citizenship.

However, government regulation of immigration and citizenship must conform with the *Charter* equality guarantees. For example, it may be reasonable to impose different standards depending upon the circumstances of the person affected. Thus a person who seeks admission from abroad or at a point of entry to Canada may be given less protection since they have a more tenuous connection with Canada than do aliens who are legally and physically present. At the same time permanent residents may warrant more protection than aliens. Landing is the first and arguably the most difficult step toward becoming a Canadian citizen. The status of permanent resident may be seen as a temporary, intermediate one between total alien and Canadian citizen.

Two basic issues arise in relation to citizenship. The first involves the conditions on which a person is entitled to become a citizen. The second relates to the consequences that flow from the status of citizenship, and it is here that the discussion paper is focused. Citizenship may be described as the status which permits the fullest possible participation in the political and other processes of the state. From this flow certain consequences, defined by law, which must be in conformity with the equality guarantees in section 15 of the *Charter.*

Citizenship And Its Consequences

The *Citizenship Act* only establishes the requirements of obtaining citizenship. A range of federal and provincial statutes then use citizenship as a condition of eligibility for

some status or benefit. For example, an act establishing a board or commission may require that members be Canadian citizens.

The right to vote and to hold public office are reasonable concomitants of citizenship. It may also be reasonable to require the allegiance witnessed by citizenship in certain sensitive positions in law enforcement or in the Public Service. A degree of latitude may also be appropriate in requiring citizenship simply to encourage residents of Canada to acquire citizenship and participate more fully in our political process.

However, many distinctions based on citizenship may be difficult to justify. In the United States the Supreme Court has held that the equal protection clause of the United States Constitution was violated by attempts to exclude aliens from the practice of law while it upheld a law requiring all teachers to be citizens. Teachers were seen to have tremendous power to influence students' perceptions of government, the political process and social responsibility.

Canadian laws make distinctions between citizens and non-citizens. Furthermore a number of laws class citizens and permanent residents together to the exclusion of aliens. This latter form of distinction may be easier to justify than the former. While many statutes make such distinctions, this paper will only raise a few representative cases for discussion.

Public Service Employment

The *Public Service Employment Act* contains a number of provisions that grant a preference in appointments to the Public Service to Canadian citizens over non-citizens. Non-citizens can be employed in the Public Service only when no qualified citizens are available because it would not be in the best interests of the Public Service to leave the position vacant until a qualified Canadian could be found. The Public Service Commission, which administers the Act, does not differentiate between nationalities of non-Canadians nor does it differentiate on the basis of the amount of time that a citizen has been resident in Canada. The criterion is exclusively that of citizenship.

The rationale stated for this is threefold. First is the argument that one of the benefits of Canadian citizenship is the

right to seek and receive employment in the federal Public Service. While this preference is subject to certain obligations, it remains one of the advantages of Canadian citizenship.

Secondly, employees must recognize the authority of and faithfully serve the employer. In the Public Service, the Crown is the employer. Citizenship implies loyalty to the Crown, but non-Canadians, even if permanently resident in this country, owe loyalty to another state.

This rationale, however, raises questions because non-citizens can be granted Public Service positions. This preference for citizens does not, therefore, imply a want of recognition of service, loyalty or reliability on the part of the non-citizen. The citizenship requirement is merely a preference, although its effect is that very few positions in the federal Public Service are held by non-citizens. The same question applies to the third rationale which is a concern for national security if non-Canadians are employed.

The fundamental issue here is whether offering citizens a preference for positions in the federal Public Service should be considered an acceptable privilege that goes along with the acquisition of citizenship. Since citizenship must have some privileges, the concern is to delineate what privileges are justified.

Immigration

The *Immigration Act, 1976* makes several distinctions in the sponsorship program between citizens and permanent residents. First, both permanent residents and citizens can sponsor certain family members. However, a Canadian citizen can sponsor a parent for immigration as of right, but the right of non-citizens to sponsor a parent is restricted to those who are over 60, widowed or incapacitated. The rationale appears to be an assumption that citizens have a greater attachment to Canada than people with permanent resident status do, and this should give the citizen broader rights.

The second distinction occurs in the right of appeal to the Immigration Appeal Board against refusal of admission of a sponsored family member. The right of appeal is available only to sponsors who are Canadian citizens. This began as an

experiment which was unique in the world. The rationale again appears to be that it is reasonable to give broader rights to citizens because of the special and more permanent relationship of the citizen to Canada.

The issue is whether the assumed rationale for a preference for citizens is reasonable. The distinction could be eliminated by reducing the sponsorship right of citizens or by giving permanent residents larger sponsorship rights. Both options raise concerns which need more study.

Broadcasting And Other Acts

The *Canadian Broadcasting Act* provides an example of a common distinction. The Act requires that a director of the Canadian Broadcasting Corporation be a citizen. The only rationale for this type of provision seems to be that Canadians should have control of their institutions, in particular those with a special responsibility for conveying Canadian culture and values. A similar rationale may exist for requiring citizenship for membership on boards and agencies that are instruments of government policy.

The *Bank Act* and statutes in relation to financial institutions have both citizenship and residency requirements for directors. Also the *Livestock Pedigree Act* provides that only citizens can register pedigrees. The question is whether a requirement of citizenship is reasonable in these circumstances.

VII — Marital Or Family Status

Marital status is not an enumerated ground under section 15 of the *Charter*. However, every human rights code in Canada prohibits discrimination on the basis of marital status at least with respect to employment. Many of the codes, including the *Canadian Human Rights Act*, also ban it with respect to accommodation and services. While no universal definition of marital status exists, section 9(g) of the Ontario *Human Rights Code, 1981* is a useful example. It provides that "marital status means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship."

The Meaning Of Marriage

The concept of marriage has existed for many centuries in Western societies. The essence of marriage has been defined as the voluntary union for life of one man and one woman to the exclusion of all others. Marriage has been called an institution. It not only creates rights and obligations but confers the status of husband or wife upon the parties. The laws of Canada and other countries attach a variety of legal incidents to the lives of the married couple and bestow definite rights upon their children.

A marriage must meet certain conditions to be valid. Generally, a minimum age is required. In Canada, the age requirement varies from province to province. Most marriage validity laws allow only members of the opposite sex to marry. Both spouses must consent. In addition, conditions exist relating to degrees of consanguinity and the formalities that must take place.

Marriage has several effects by law. Personal, proprietary and possessive rights arise from marriage. In both common law and civil law jurisdictions in Canada, spouses owe an obligation of support to each other and spouses can bind each other by contracts made to meet the current needs of the family. Laws in each province, such as family maintenance acts, make clear these obligations of support.

Spouses also have legal rights and obligations regarding matrimonial property, including the family residence. Family law legislation in each province in Canada defines the extent of these obligations, which normally become an issue upon divorce or separation.

For many years distinctions have been drawn in our society between married spouses and "common-law" spouses and between married persons and single persons. Generally "common law" is a term used to describe those cohabiting together who are not legally married. These distinctions are reflected in laws that accord little or no recognition to common-law relationships. Distinctions have also been made which either confer upon married persons rights and privileges denied single persons or disallow to married persons rights and privileges enjoyed by single persons.

In recent years there has been a trend towards recognition of common-law marriages. Currently the definition of common-law spouse differs from province to province where it is recognized. For example, the British Columbia *Family Relations Act* defines a spouse to include a man and woman who have lived together for at least two years, whereas the Manitoba *Family Maintenance Act* requires either five years of cohabitation and a showing of substantial dependence or, if there is a child of the union, one year or more. Such acts set out when mutual support obligations exist, or, in some provinces, legislation provides that persons cohabiting as husband and wife may enter into a cohabitation agreement in which they agree on their respective rights and obligations during cohabitation, upon the end of cohabitation or upon death. The current state of Canadian laws reflects the difficulties associated with recognition of common-law spouses because unlike the situation in legal marriages, there is no objective factor, such as a marriage certificate, to prove the existence of the relationship.

Increasingly, federal laws and policies have recognized the claims of common-law spouses, primarily in situations where they would not receive a benefit but for this recognition. In fact, common-law spouses must be recognized in pension and insurance plans by virtue of the *Canadian Human Rights Act* and regulations.

The state has traditionally taken an interest in protecting and fostering respect for the family as one of the fundamental social institutions of the community. It is not clear,

however, that a state's concern should necessarily stop with traditional forms of family structures. With changes in social structure and moral values, already reflected in certain statutes, is it justifiable for the state to support and foster only the traditional form of family relationship?

Partial recognition of common-law spouses in federal legislation raises further concerns. In certain cases, such as the Canada Pension Plan and the *Old Age Security Act*, the state has recognized common-law relationships and accorded them a status similar to legal marriage where the appropriate requirements are met. However, in other legislation such as the *Income Tax Act* there is only partial recognition of common-law spouses. While the *Income Tax Act* recognizes certain support obligations imposed on common-law spouses by provincial family law, it does not recognize common-law relationships for other purposes. Is it justifiable for the federal government to give recognition to common-law spouses in some circumstances and not others?

Where common-law relationships are recognized, there is usually a specified time for which the couples have been together. Generally if one of the individuals is under an impediment to marriage, there is a three-year requirement. Three years was chosen because it is the waiting period to be eligible for a divorce under the marriage breakdown provisions of the *Divorce Act*. This rule is used under the Canada Pension Plan for recognition as the spouse of a contributor for the purposes of survivor benefits. Where there is no impediment to marriage, the individual need reside with the contributor for only one year. There is the added requirement that the contributor must have publicly represented the individual as his or her spouse.

Is it justifiable to require that a common-law couple live together for a specified period of time? Can the period vary depending upon the marital status of one or both of the parties? If so, must all federal legislation impose identical requirements or can it vary in accordance with the purposes of the legislation?

There is also a question whether it is legitimate to distinguish between married persons and single persons for the purpose of detriments or benefits. For example, two persons sharing expenses and living together, although not in a common-law relationship, are eligible for a combined Guaranteed Income Supplement under the OAS that is

greater than that available for a married couple. Also, survivor benefits provided by CPP or superannuation plans are not available to dependent survivors of single persons. For example, in the case of the death of a single contributor who was supporting a disabled parent, no survivor's benefits would be payable to the parent. This is of particular concern in federal superannuation legislation because it relates contributions to benefits. Thus, a single or married person each contributes the same amount although it is only the married person who would receive the benefits. The same is not true for the Canada Pension Plan because it is a social program where the benefits received tend to be greater than the contributions made because of cross-subsidization.

These issues will now be examined in the context of specific legislation to indicate examples where serious social and economic concerns are raised.

Income Tax

The *Income Tax Act* employs marital status as a criterion for distinction, to confer benefits in some situations and to create disadvantages in others. For example, paragraph 109(1)(a) lets a married person supporting a spouse make a deduction in calculating taxable income, but a common-law spouse is not permitted such a deduction.

The most difficult problem that arises with respect to recognition of common-law spouses in the *Income Tax Act* stems from the nature of the income tax system. Under many laws that recognize common-law spouses, a determination of status need be made only once or, possibly, a few times. Under the *Income Tax Act*, a determination of status would be required each year, and verification of status would become extremely difficult. It would be necessary to precisely define a common-law relationship.

On the other hand, some provisions create a disadvantage for a married person. One such is paragraph 74 of the *Income Tax Act* which disregards inter-spousal transfers of property and attributes the income from the property to the transferor. Carrying out similar transfers would not be subject to the same disadvantages for common-law spouses.

In any assessment, the rationale for the disadvantage arising out of a marital relationship for income tax purposes has to be briefly discussed. The tax policy underlying paragraphs

such as 74 is to prevent income splitting and to ensure that tax liability is not escaped by transfers that do not actually result in the taxpayer losing the control of and the benefit from property that has ostensibly been transferred away. The underlying assumption is that there is economic mutuality between spouses so that a transfer between spouses does not ordinarily deprive the transferor spouse of benefit or control. Because our system taxes individuals and not economic units, this provision is needed to curtail avoidance of taxes by income splitting.

It is these underlying assumptions that give rise to equality concerns based on marital status. Is it justifiable for the government to use tax policy to support traditional marriages? Would the difficulty of proving the existence of a common-law marriage put an impossible administrative burden on the tax system? Would a broad definition of common-law marriage inevitably result in abuse? Because there are both advantages and disadvantages to being married under the *Income Tax Act*, any definition of common-law marriage which was difficult to administer would allow taxpayers to chose their status depending upon which was more advantageous at the time. Finally, is there an effective mechanism for determining, for income tax purposes, the legitimacy of a claim of a spousal relationship unsupported by the evidence of a formal marriage without socially unacceptable infringements of personal privacy?

Old Age Security

The *Old Age Security Act* provides a monthly pension to anyone aged 65 or over who meets certain residence requirements to ensure that these individuals have a guaranteed minimum income. The underlying philosophy is that elderly Canadians have made a substantial contribution to the country and should, therefore, be provided out of public revenues with some income as they move into retirement. In addition, until recent years, pension schemes either did not exist or were inadequate to provide an acceptable income for elderly Canadians. In 1966, the Guaranteed Income Supplement was introduced. This is a monthly benefit paid to those in receipt of Old Age Security pension who have little or no other income. The amount of a supplement is determined by an individual's marital status, income and the amount of the Old Age Security benefit which the pensioner is eligible to receive. In 1975, the spouse's allowance

program was introduced. This recognized the difficult circumstances faced by many older couples living on the pension of only one spouse, in particular when the other spouse is too old to find work easily though still under 65. A spouse's allowance may be paid to the spouse of a recipient of Old Age Security if the spouse is between the ages of 60 and 64 and has met the residency and need requirements.

Both the Guaranteed Income Supplement, and the spouses' allowance program make a distinction on the basis of marital status, although the consequences in each case are different.

Under the Guaranteed Income Supplement, a single pensioner would receive about 60 per cent of the amount paid to a married couple. When two single pensioners live together and share expenses they receive about 120 per cent of the benefits paid to a married couple. The stated reason for the distinction is that married persons normally help support each other and normally live together. There may be an assumption that it costs less for two people to live together, primarily because of a single accommodation cost. Tests which could measure the difference in expenses for single or married persons may be difficult to create or to apply without privacy concerns since it would be difficult to determine with certainty whether two or more pensioners were sharing accommodations. This would also result in higher administrative costs, leaving less funds for benefits. The question is whether this distinction in rate which permits two single persons to share expenses and receive more than a married couple results in a fair and reasonable allocation of benefit.

The spouse's allowance program raises another issue. Currently the allowance is paid to the spouse of a pensioner between the ages of 60 and 64 and to the surviving spouse if the spouse in receipt of Old Age Security dies before the survivor reaches the age of 65. There is currently a proposal to extend this benefit to all widows and widowers between the ages of 60 and 64. However, if an individual is single, separated or divorced and aged 60-64, no allowance is paid, even if the individual's needs meet the test for benefit to spouses. A decision has been made to allocate funds to married couples as opposed to single individuals in the age bracket 60-64. One of the rationales for this is that unmarried persons can get assistance from provincial welfare

programs, although they receive smaller benefits. Given that there are only limited resources to provide for needy people, this group was selected. The question is whether marital status is an appropriate reason for choosing between equally needy people, particularly when the criteria for receipt of an allowance is need.

Remarriage

A number of benefit statutes and superannuation schemes contain provisions that cut off benefits upon the remarriage of a spouse who was getting benefits. For example, the Canada Pension Plan has a surviving spouse's pension for the survivor when the deceased partner had made contributions for a minimum qualifying period. However, this pension ends if the spouse remarries but it resumes if the new marriage is terminated.

Under the *Public Service Superannuation Act*, a contributory pension plan for members of the federal Public Service, survivor benefits terminate upon remarriage. The underlying assumption seems to be that need arises upon loss of a spouse but disappears again when there is a new spouse. Married persons under provincial laws are obliged to support each other. Thus, if an individual has a spouse, there is an assumption of support irrespective of the ability of the spouse to provide this support. Since this rule does not apply to persons living common-law, it may discourage remarriage. The question which arises is whether marriage is an acceptable reason for terminating survivor's benefits which have been paid for by the contributor to the pension plan since the plan does relate benefits to contributions.

Another question is whether contribution to a pension plan should not entitle a spouse to survivor benefits, irrespective of marital status. This raises issues of cost. Actuarial assessments now take into consideration that a certain percentage of widows or widowers will remarry. If current arrangements for ending survivors' pensions upon remarriage are changed, actuarial assessments would have to be reconsidered. In essence, the question is whether the government can create a condition in pension plans which permits termination of survivor benefits upon remarriage.

A similar problem arises with regard to benefits paid to a survivor's children or to a disabled contributor's child under

the Canada Pension Plan and superannuation legislation. Benefits are normally paid to age 18 unless the child marries, but they can continue to age 25 if the child is in university. A child who is both in university and remarries loses the benefit. The age features of this were discussed under age distinctions. Basically, the issue here is whether marriage should be used as the sole test for disqualification. Should recognition be given to the fact that while marriage may legally create an obligation to support a spouse, in reality, university students who marry may still require support from parents while under 25.

Distinctions on the basis of marital status arise under the Canada Pension Plan. Upon divorce a spouse may be entitled to half of the pension credits earned by the ex-spouse during the marriage, if he or she meets the requirements of the Act and is not precluded by any term in a separation agreement. However, those who are separated or living in a common-law relationships are not entitled to pension credit-splitting. Several questions are raised. Should other forms of marital breakdown be included for credit-splitting purposes? Should there be credit-splitting for common-law spouses?

Immigration

The *Immigration Act, 1976* makes many distinctions on the basis of family status. In fact, the Act states that one of the objectives of Canadian immigration policy is to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad. The Act gives the Governor in Council authority to make regulations establishing selection standards based on family relationships, exempting members of the "family class" from general regulations and replacing these with special sponsorship regulations. These regulations include a myriad of classifications. They delineate the "family class" as including spouses, fiancé(e)s, unmarried children under the age of 21, parents or grandparents 60 years of age or over, parents or grandparents of any age who (with their spouses) are incapable of gainful employment, parents or grandparents of any age who are widowed, orphaned brothers, sisters, nieces and unmarried grandchildren under the age of 18. There is also an assisted relative category which has different rules. The distinction between married and unmarried children raises the issue of whether it is acceptable to use marriage as

the sole test of dependency for the purposes of entry into Canada. What must be considered in response is the fact that a married person brings in another person who has a separate family which may then be eligible for sponsorship. The basic principle of the family class is to include only close relatives who are likely to be totally dependent upon the sponsor or will not be joining the labour force. The inclusion of parents or grandparents under 60 years of age who are widowed presupposes that such relatives are more likely to be dependent on the sponsor. A question arises with respect to divorced or separated grandparents or parents, who are not included.

Dedication to the principle of family reunification inevitably generates marginal distinctions, difficulties in proving relationships and enforcement difficulties. It also creates other problems. Dependant family members may be included in a deportation order or departure notice, provided they are not permanent residents over the age of 17 or Canadian citizens. Family members accompanying an inadmissible member are also denied admission. This is based in part upon the principle of family unity, although the family itself may not be given any choice in the circumstances.

The major question here is whether use of family status is justifiable for granting special sponsorship rights which allow assistance to people in a family relationship who have some connection in Canada. Even if this is justifiable in general, are the current distinctions a reasonable means of achieving this objective?

Canadian Forces

Another example of the problems created by marital or family status is found in Canadian Armed Forces policy. Generally, Canadian Forces orders and regulations do not acknowledge common-law relationships or cohabitation arrangements apart from legal marriage for the purposes of a wide range of benefits. Among such benefits available only to members who are legally married are reimbursement of moving expenses, foreign service allowances and accommodation in married persons military housing. Where a family unit is composed of unmarried partners and children, the children may be treated as dependents whereas the partner may not. (Exceptions exist under Canadian Forces superannuation legislation where common-law spouses may be

recognized.) Statistics show that about five per cent of Canadian Forces personnel have "alternative" cohabitation arrangements.

The reasons given for this policy rest on the unique nature of a military force. The first is that the values of the military ethos must be congruent with such national institution as marriage and the traditional family. These values would be weakened by recognition of alternative cohabitation arrangements.

The military needs stability and dedication from its members, which requires a stable family environment. The Canadian Forces believe that traditional marriages can better withstand the stress associated with military life. Members of the Forces often live in close-knit communities whose harmony could be disrupted by alternative lifestyles.

The question arises whether these assumptions are now consistent with Canadian social values. Is there something particularly unique about military life which justifies such distinctions between legally-married and common-law spouses?

A further rationale is that recognizing alternative cohabitation arrangements would create difficulties when personnel are moved to foreign countries. Persons cohabiting without benefit of a legal marriage are not posted where the Canadian Forces presence in the host country is governed by the NATO Status of Forces Agreement (SOFA). SOFA defines and grants special status to Canadian Forces personnel and their dependants when they accompany members posted overseas. This status is not extended to the partner of members in cohabitation arrangements. Is the determination in such an agreement that the host country will recognize and provide the status that is a necessary incident of Canadian military presence a legitimate rationale for non-recognition of common-law relationships? Can this be accepted in view of Canada's international obligations under conventions that prohibit discrimination on the ground of marital status? Does the possibility or even the likelihood of posting to such a country justify excluding common-law spouses from benefits otherwise available to spouses in other circumstances within Canada? Can reasonable alternative arrangements be developed which could accommodate different spousal relationships?

VIII — Sexual Orientation

Sexual orientation is not an enumerated ground of discrimination under section 15 of the *Charter*. Courts in the United States have held that neither the prohibition of sex discrimination in the *Civil Rights Acts* nor guarantees of equal protection in the Constitution protect homosexuals, lesbians or transsexuals. Present Canadian jurisprudence seems to support the proposition that a prohibition of sexual discrimination does not encompass discrimination on the basis of sexual orientation. Quebec's is currently the only human rights legislation in Canada to specifically include sexual orientation as a prohibited ground of discrimination.

Distinctions on the basis of sexual orientation are not made on the face of any federal legislation. However, there are policies excluding homosexuals and lesbians from such bodies as the Canadian Armed Forces.

The Forces will not enrol a homosexual or a lesbian. An individual found after enrolment to be a homosexual or a lesbian is discharged, normally on an honourable release. This policy is consistent with those of the armed forces in the United Kingdom, the United States and the Federal Republic of Germany.

The Canadian Forces give a number of reasons for this policy. The first is that Canadian military personnel serve outside the country with the United Nations and NATO. In a great many cases, homosexuals or lesbians would be ineligible for such service because of the laws or the social mores of the host country.

The second reason given is that employment of homosexuals and lesbians would be disruptive to the efficiency of the Forces; their presence in situations where personal privacy is most difficult or impossible — in isolated postings, in communal life in barracks, on board ship, in the field and so on — often results in physical attacks on them.

A third reason often given is that homosexuals and lesbians are at greater risk of subversion by authorities of foreign countries whose interests are inimical to those of Canada and its allies. Such persons are either directly or indirectly subject to blackmail. Experience over the years has demon-

strated a degree of vulnerability and, therefore, unless and until social attitudes change considerably, it is impossible to place homosexuals or lesbians in security-sensitive positions.

Other reasons are given, such as the significance of a cohesive force, adherence to majoritarian values and public image.

This policy raises the question of whether refusal to employ a man or woman because of his or her sexual preference is consistent with the equality guarantees in section 15 of the *Charter.*

Conclusion

Enshrining human rights in the constitution is not an ending but a beginning. The example of the United States can be used. It has had a constitutional *Bill of Rights* since 1791, yet its courts continue to face civil rights issues to this day. History shows that as societies evolve, so do their approaches to human rights.

Thus, the *Canadian Charter of Rights and Freedoms* must be interpreted in the light of social norms — of what Canadians expect from their society. Deep feelings will be aroused by some of the questions posed in the discussion paper — for example, whether a ban on women in combat roles in the Canadian Armed Forces can be squared with equality between the sexes. Financial questions that arise particularly in connection with pensions and other social benefits are also a matter of social norms, for they involve choices between different ways that society can use limited resources.

While the government has the responsibility for making laws and policies, individual Canadians have a fundamental role in this process. Since the *Charter* is a reflection of the aspirations of Canadians, they must have an opportunity to shape legal policy as it relates to *Charter* issues.

So the questions posed in this discussion paper must be answered by Canadians themselves before government formulates plans for carrying out the consensus that emerges. That, after all, is what the *Charter* is all about — giving citizens more power to shape the Canada that they want and need.