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SEX EQUALITY AND NATION-BUILDING IN CANADA: THE MEECH LAKE ACCORD*

Catharine A. MacKinnon†

INTRODUCTION

After successful agitation, Canadian women secured in Canada's new constitution, the Charter of Rights and Freedoms, sex equality guarantees with more direct potential to produce actual sex equality than exists in the constitutional language of any other democracy. These equality provisions, which came into effect in April 1985, prohibit discrimination on the basis of sex through law¹ and also expressly guarantee all Charter rights equally to "male and female persons."² The first decision under the broad equality rights provision, *Law Society of British Columbia v. Andrews*,³ begins to deliver upon the promise of the Charter's language. It rejects the usual "similarly situated" approach, under which equality means treating likes alike and unlikes unlike, and embraces instead an approach the purpose of which is to rectify the systematic disadvantage of historically subordinated groups.

A defect in the 1982 compact which created the Charter was its lack of approval by Quebec. A long-term conflict exists in Canadian society

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1. CAN. CONST. pt. 1, § 15 (The Canadian Charter of Rights and Freedoms). Section 15 provides that:

(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.

Id.

2. CAN. CONST. pt. 1, § 28. Section 28 provides that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." *Id.*

3. [1989] 1 S.C.R. 143 (Can.).

between the English and French heritage, culture, language, and peoples. Francophones are in the minority except in Quebec; Anglophones dominate throughout Canada but are numerically a minority in Quebec. The cultural dignity and particularity of the French is not sufficiently respected by much of Anglo Canada, producing a wariness of the Charter as a possible device for imposing Anglo-Canadian values, culture, legal traditions, and language. At the same time, the nonacceptance of the Charter by Quebec leaves for many a legal and political gap, a sense in which the nation is not whole.

Eleven men—ten Premiers and the Prime Minister—met in 1987 to attempt to devise terms for confederation acceptable to all. The Meech Lake Accord was the result. It provides for the recognition of Quebec as “a distinct society” within Canada⁴ and also reiterates the recognition of multicultural and aboriginal rights, thought in jeopardy without reaffirmation.⁵

Women, including some in Quebec, reacted immediately to the lack of recognition of sex equality rights in the Accord. At the same time, any criticism of the Meech Lake Accord has often been taken as, and has often been, anti-French. As the debate has progressed, concerns with the Accord that nonetheless respect the French “distinct society” have been virtually drowned out by often vicious (and sometimes subtle but equally invidious) anti-French sentiment. It has become almost impossible to be heard as anything other than anti-Quebec when expressing reservations about the Accord.

4. The Meech Lake Accord is in the form of amendments to the Constitution Act, 1867 (British North America Act, 1867, 30-31 Vict., ch. 3). The Accord includes a new section 2 of the Constitution Act as follows:

- (1) The Constitution of Canada shall be interpreted in a manner consistent with
 - (a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
 - (b) the recognition that Quebec constitutes within Canada a distinct society.
- (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.
- (3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.
- (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

Id.

5. Section 16 of the Meech Lake Accord states: “Nothing in section 2 of the *Constitution Act, 1867* affects section 25 or 27 of the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or class 24 of section 91 of the *Constitution Act, 1867*.” The provisions referred to in section 16 protect multicultural rights and the rights of aboriginal peoples.

June 23, 1990, was the deadline for ratification by the provinces. Two refused to ratify and one talked of rescinding, under rules that seem to require unanimity. The opposition of one Manitoba legislator, a Native man, prevented its ratification conclusively. Failure of ratification leaves further negotiation of terms including possible companion resolutions, continued limbo, or the partial or complete separation of Quebec as among alternatives being actively discussed.⁶

The testimony below was given at the request of the Ontario Legislature at hearings on the Accord. When the Ontario Legislature approved Meech Lake, women sang songs of protest in the gallery.⁷ Perhaps these reflections on the place of women in Canadian nation-building will apply in some ways to Eastern Europe, particularly in light of the internal ethnic tensions there. The argument is that national unification not be accomplished at women's expense.

TESTIMONY BEFORE THE LEGISLATIVE ASSEMBLY OF ONTARIO⁸

MR. CHAIRMAN: Good afternoon, ladies and gentlemen. We can begin our afternoon session. I would like to call upon our first witness for this afternoon, Professor Catharine MacKinnon, a constitutional lawyer and political scientist. She has taught at Yale, Harvard, Stanford, and most recently at the University of Chicago and Osgoode Hall.

I understand that next fall you are going to be teaching constitutional law and sexual equality at Osgoode Hall.

DR. MACKINNON: Yes, I will.

MR. CHAIRMAN: I am sure this whole topic is going to provide years of teaching material if one just looks at the testimony before our committee. I want to thank you very much for coming here this afternoon. I will let you go ahead with your presentation, following which we will go ahead with questions.

DR. MACKINNON: Actually, the controversy on the Meech Lake Accord has provided me with, among other things, an in-depth, quick immersion in the law and politics of Canada. I am deeply honored to be

6. *Canadian Leader Appeals for Calm on Quebec Dispute*, N.Y. Times, June 23, 1990, at 1, col. 6 (nat'l ed.). Last-minute attempts to reach a compromise on the Accord failed, and the issues discussed in this Article remain unresolved. *Id.*

7. Spears, *Peterson's Problems as Meech Pact Salesman*, Toronto Star, July 2, 1988, at D5, cols. 1-4.

8. LEGISLATIVE ASSEMBLY OF ONTARIO, SELECT COMM. ON CONSTITUTIONAL REFORM, 1987 CONSTITUTIONAL ACCORD, HANSARD OFFICIAL REP. OF DEB., 34th Parl., 1st Sess. C-1162 to C-1172 (Mar. 31, 1988). Footnotes are added here.

asked, as a citizen of the United States, to address this committee on this deeply Canadian issue.

As an American constitutional lawyer and a political scientist working internationally in the area of sex equality, I am going to offer for your consideration a comparative perspective on the potential impact of the Meech Lake Accord on women's equality.

From my observations of the debate to date on the Accord, I have noticed that when women ask questions about the impact the Accord may have on their legal rights, they are reassured that the issues are not legal, but political. When they then ask questions about the impact of the Accord on their political status, they are reassured that the issues are legal and will be dealt with by the courts. Across cultures, this supports a certain suspicion that the politics of men have in fact created the law for women, have been the law for women, at the same time that the laws of men have determined women's relative standing within the political order.

In order for this not to happen in Canada, it seems that a combination of those expertises you have sought out—that is to say, political with legal analysis—is necessary to make a realistic assessment of the meaning of this particular provision.

Comparatively viewed, the Canadian Charter of Rights and Freedoms is advanced beyond any comparable instrument in the world today in promising full citizenship to women. Its combination of equal protection of the laws with specific nondiscrimination guarantees, together with its substantive recognition of disadvantage and support for affirmative relief on a constitutional level, singles it out in laying a legal foundation for some of the most significant advances in sex equality ever to be made for women under law.

The Canadian commitment to diversity, with the political mobilization of the women's community that the Charter has occasioned, has produced a very particular equipoise among the various bases for nondiscrimination under section 15 and also an equipoise between equality rights and other rights throughout the Charter. This means that women's interests, for one thing, are not divided by the Charter between those based on sex on the one hand and those rooted in language, culture, nation, religion, ethnicity, and race on the other. In other words, a unitary approach to social inequality is structural to the Charter and possible under it.

The Meech Lake Accord disturbs this structural equality among

equality rights and threatens to qualify, limit, and undermine both the Charter's distinctive legal contributions in this area and, equally important, the climate of political will so crucial to a realistic delivery on their promise.

In a comparative perspective, the experience of the United States with sex equality rights—or more accurately the lack of them—may be instructive. Sex equality in the United States has constitutional dimension only by analogy. The equal protection clause of the fourteenth amendment was passed to respond to a perceived emergency to the unity of the nation, that is to say, to white America's history of imposing chattel slavery, social segregation, and disenfranchisement on Black Americans. In other words, the equal protection clause was, if you will, part of a national reconciliation, the need for which had been created by these institutions of racial bigotry.

The equal protection clause is gender-neutral on its face, except for the part on voting, which is written to address male citizens only.⁹ The rest is gender-neutral on its face, and does not mention sex, but then again, neither does it expressly mention race. Attempts to add express sex equality guarantees to the U.S. Constitution, which would have removed at least the question of whether the U.S. government is committed to sex equality from the contingencies and vicissitudes of shifting political winds and shifting majorities, have failed.

In 1971, the equal protection clause was first applied to gender¹⁰ and has increasingly been used ever since, largely moving forward through an extremely uneven and often inadequate process of analogizing sex to race. The experience of the difficulties of attempting to achieve sex equality, not on its own terms—as is possible under the Canadian Charter of Rights—but through analogical method, has served to highlight the dangers for all women, including women of color, of elevating some bases for prohibited discrimination over others.

Section 2 of the Meech Lake Accord enters the field of rights selectively, potentially elevating some cultural rights over equality rights. Section 16 of the Accord enters the field of equality rights selectively, potentially elevating some equality rights over others. By combination,

9. U.S. CONST. amend. XIV, § 2 (The right to vote in federal elections may not be denied or abridged as "to any of the *male* inhabitants of such State" (emphasis added)).

10. *Reed v. Reed*, 404 U.S. 71 (1971).

the “distinct society” clause, with the guarantees and recognitions of aboriginal and multicultural rights, is then structural to Canadian federalism and equality rights are not. Some rights are more important than others and some equality rights are more equal, in Orwell’s phrase, than others.

This poses concerns for the effective pursuit of sex equality, which is relegated to a nonstructural constitutional plane. It poses concerns for the vitality of section 15’s protections from discrimination on the many bases section 15 covers, all of which are crucial for the advancement of women. It poses concerns for the coherent and predictable development, and even development, of section 15 jurisprudence. It also poses concerns about balances to be struck in cases of potential conflicts of rights, both under section 1¹¹ and otherwise, because some constitutional rights are thereby given more weight than others.

Examples have proven treacherous in this area, and this has not escaped my attention, largely because whenever the possibility of anyone treating anyone else unequally is raised, someone is insulted. No one wants it implied that he or she would institutionalize sex inequality. I think it speaks well for Canada that the value of equality is so widely held that no one wishes to be considered, even hypothetically, as a possible perpetrator of sex discrimination.

However, the fact is that across culture, sex inequality has been more the rule than the exception. All cultures, all groups, have discriminated. Most do now—and I dare say most will at some point in the future, at some time, in some way—discriminate on the basis of sex, very often without intending, meaning, or knowing that that is what they are doing. In fact, often it is not thought that the allegedly discriminatory treatment is discriminatory, because it is thought to be so important under some other set of values, for example, culture, religion, privacy, or freedom of expression.

There are, in fact—need one point out?—two sides to every case of sex inequality and the issues are often decided between them on a matter of interpretation. It is when there is doubt about whether a case is really a case of sex inequality, and it is the nature of legal actions that there is often that doubt, that the structural weighting is dispositive in the outcome. It is also a bit difficult to be required to give examples of what

11. CAN. CONST. pt. 1, § 1. Section 1 states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Id.*

might happen under a projected legal state of affairs and then be told that, because these things have not yet happened under a legal regime that is as yet untested and uncertain, all these examples are merely hypothetical.

However, an example: Were a significant advance to be made in an area covered by the Accord, analogies to the areas the Accord does not mention would not necessarily be as available as they otherwise would, with the Charter now structured as it is with these rights in clear equipoise.

Suppose that a significant advance were made in, say, the recognition of some group's cultural rights and an analogy were sought to support a parallel initiative for women's rights—women at once both having a culture and having been denied a culture through inequality, but both women and the other cultural group being threatened by the dominant culture—the Accord would be persuasive in undercutting the full application of such an analogy as precedent in a case that was based on sex equality.

One also wonders, could, for example, hate literature laws be upheld over an expressive rights challenge as applied to, for example, Jews, with the added support of Meech Lake but not, were such laws amended to cover sex, supported as applied to women, who of course might not be found to have the support of the Accord.

By another example, suppose after Meech Lake Native women chose to challenge some sex inequality within their nations and the rule that they challenged as discriminatory was defended as a necessary and integral part of aboriginal culture and aboriginal rights. One could argue that the tribal rules which are male dominant are not in fact truly aboriginal for those tribes whose inequality on the basis of sex tends to date since contact with the West. This does not address the issue, of course, of whether Native women should resort to the Charter, but merely, if they chose to do so, whether they would meet a deck stacked against them on the basis of gender. It seems that the interpretation of the Charter could well be structured against such a sex equality claim, not to mention the rather obvious fact that many features of Anglo culture are predicated on sex inequality and thus could be defended as part of multicultural rights.

In this area, which you might find to be farfetched, I suggest for your consideration the problem of pornography. If a statute were passed as a way of furthering women's equality rights, one of the ways it could

be attacked would be not only as a restriction on subsection 2(b) rights, that is, expressive rights, but also potentially as an expression of cultural rights, in a way that, under Meech Lake, could outweigh sex equality rights. If you think that is farfetched, I think perhaps you have not litigated against the pornographers as I have. Particularly for the American pornographers. nothing is farfetched.

You might note that none of these examples is specific or particular to Quebec women, whose situation under the Accord, it would seem to me, is probably in no more jeopardy and—I would say, given Quebec's laws and other factors of their political culture—may be in less jeopardy than the rights of women elsewhere throughout Canada.¹²

The point is, both litigation and legislation that is pursued to guarantee sex equality can be opposed already by other Charter provisions, and the Meech Lake Accord would give additional support to those other charter provisions. When this occurs, equality rights are unequally situated in a way that they are not now under the Charter without the Accord. To ask whether the Accord overrides the Charter is thus not precisely the issue. There will be conflicts of rights within the Charter, and the Accord takes sides in those disputes.

I have also noticed there has been something of a double standard of proof in the discourse on whether equality rights should be added to the Meech Lake Accord. This committee has been told, for example, that sections 2 and 16 of the Accord are hortatory and largely symbolic; that is to say, not strictly legal. Yet one searches your transcripts in vain for concrete examples of how the "distinct society" clause, which is clearly essential to the fair deal that Quebec was promised, is concretely contemplated to change legal outcomes in particular cases. Clearly, it was included, however, because someone thought it would make a difference. The difference has been explained in these terms: (1) It was important to bring Quebec into the Confederation; they required it and they count. (2) It grants legitimacy and recognition to the distinct society. Then the rationale for section 16 is provided on similar level. It provides (3) reassurance that the right of cultural groups and aboriginal peoples will be respected.

Section 2 may not be adequate for the rights of French people

12. *But see Tremblay v. Daigle*, 62 D.L.R.4th 634 (Can. 1989), in which the Supreme Court of Canada overturned two levels of Quebec courts which had permitted an injunction by a putative father and former boyfriend against Chantal Daigle's abortion. If the constitutional issues were reached, and the Meech Lake Accord were in effect, could opposition to abortion be legally justified as part of the "distinct society" in largely Catholic Quebec?

outside Quebec, and section 16 may not be adequate for the rights of many cultural groups or for aboriginal peoples, but the voice of women was regarded in this process as so negligible that it was seen as something that could afford to be ignored entirely.

When women then ask in essence, politely but firmly as one does in Canada, "Is it not important to bring women into the Confederation?" they are treated as if their consent to this structure of government can be assumed. No one seems very worried that they might be alienated from the state or that they might regard such implied consent as coerced consent—as they have made clear they do, for example, in cases of marital rape.

Have you not, I would ask, seen evidence that women might require some form of national reconciliation? When women ask for legitimacy and recognition for women's equal place under this state, they are told it is so obvious that it would be redundant. But if it is redundant, it was redundant for at least aboriginal groups and multicultural peoples. If it is redundant, what is the harm in stating it and why is there resistance to it? Apparently, it would add something that someone who counts does not want to add.

The only other answer to this question I have heard is that if women are granted equality rights under the Meech Lake Accord, many other issues will have to be reopened, in other words the perennial slippery-slope question. Perhaps they should be reopened. Also, women are over half of the population. They are not like any other group and their interests are not like any other interests. They are in fact half of virtually every other group.

When women ask for reassurance that the pact the Charter made with Canadian women is not being impliedly abrogated, they are told that it is only a matter of interpretation, and as Mary Eberts put it, they are told, "Trust us." Yet concrete guarantees were considered appropriate to provide a comparable level of reassurance to other groups, other groups that matter, other groups that one cannot help noting include men as well as being half women.

The Accord apparently gave some satisfactory answer to the question, "What does Quebec want?" It did not, however, answer the question, "What do women want?" because as has so often been the case worldwide, those who made the decision apparently did not even ask.

In your hearings, you have been told that the insult of women's exclusion from the Meech Lake Accord has no practical significance because the Accord is merely interpretive while other sections of the Charter are rights-granting. With respect, this is a false distinction in legal practice. For example, which was the *Morgentaler* case?¹³ Section 7 by its language does not grant women a right to abortion.¹⁴ But, by interpretation, section 7 was strong enough to invalidate the procedures for access to it as impermissibly restrictive.

Very few constitutional rights are so obvious as to be granted by self-execution. Those cases rarely go to court, in fact, but women in contested situations get rights by interpretation or we do not get them at all. To observe that the Meech Lake Accord is only a matter of weight is similarly unhelpful. In the legal arena, interpretation is everything and, in interpretation, weight can be all.

After being told that it is all interpretive, as if that makes women's disquiet trivial, then the most basic canon of interpretation does not even seem to be mentioned. That is to say, *exclusio unius*, that which is not mentioned is excluded.

Now consider concretely the situation of women, the possibilities of the Charter of Rights and Freedoms correctly interpreted, and what it could do for addressing that situation. Women have historically been second-class citizens in Canada as well as elsewhere, with indices of disadvantage including unequal pay, allocation to disrespected work, and demeaned physical characteristics. Women have been targeted for rape, domestic battery, sexual abuse as children, and systematic sexual harassment. Women have been depersonalized, used in denigrating entertainment, and forced into prostitution. These abuses have occurred in a historical context characterized by disenfranchisement, exclusion from public life, preclusion from property ownership, sex-based poverty, forced maternity, definition as sexual objects, deprivation of reproductive control, and devaluation of women's contributions in all spheres of social life which continues to the present day.

Constitutions are both statements of belief and vehicles for actualizing those beliefs. They are aspirational as well as declarative and admonitory. In the face of this overwhelming social reality of sex inequality,

13. *Morgentaler, Smoling & Scott v. The Queen*, [1988] 1 S.C.R. 30 (Can.).

14. CAN. CONST. pt. 1, § 7 (The Canadian Charter of Rights and Freedoms) states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

the Charter's equality guarantees are clearly goal-oriented and aspirational. They do not merely or simply codify or recognize an existing state of affairs. It then becomes a matter of interpretation whether the Charter will treat equality as a positive goal needing to be affirmed, extended, and worked towards to be realized in a way that would, say, support positive legislation even against conflicting rights. Or, alternatively, whether equality will be treated in essentially negative terms, the state needing only to keep out of the social sphere and itself not moving to institutionalize inequality in order for Charter-based equality to be considered achieved.

Perhaps the deepest cause for concern then is the effect that the Accord would have on the social process of constitution-building, a process which affects the relationship between the Charter's political culture and its actual delivery of promised rights. In addition to being a species of law, the Accord works politically. It works to set priorities and agendas, to affect resource allocations, and to provide an interpretive understanding of the place of its values across the society. The Accord, as a species of constitutional law, as a document, is also then a political act. It enters into the atmosphere that surrounds the seriousness of commitment to equality rights on a day-to-day level. That is the level on which a constitutional right either becomes meaningful or it dies as a piece of paper.

On this level, a constitution affects perceptions, actions, and outcomes all the way from family court and rape trials to human rights adjudications. It shapes women's fortunes in the boardroom and at the bargaining table, in the home and on the street, in places where the Charter is invoked and also in places where, formally speaking, it would seldom appropriately be raised. A political act like the Meech Lake Accord either supports or detracts from a climate of concern in a way that affects the results of particular cases. It shifts the ground beneath legal arguments. It determines those things that become persuasive. In other words, it is part of what gives life to law.

On this level, constitutional process begins as politics, but it ends as law. This is what Quebec wanted. It is why it wanted what it wanted and it is what it got in the Accord. It is on this level also that multicultural groups and aboriginal peoples were regarded as needing reassurance—and they got it, and appropriately so. But this is also the level on which the equality rights of women were neglected. The place of sex equality as a fundamental commitment of the society, on this level, is as much constituted by documents like this as it is reflected in them.

Most broadly then, by choosing to reaffirm some interests and not to include gender, and not to include other equality rights that are crucial to all women and to all citizens, the Accord makes some rights structural to Canadian federalism in a way that excludes gender and it reduces the place of all equality rights from having a comparable place. It says simply that equality is not fundamental.

The record for women under the U.S. Constitution makes all too clear that neglecting to mention women's rights at constitutive moments like this one is predictably not gender-neutral in its effects, particularly under conditions, like women's situation, that require active change in the status quo in order for equality to exist. Facial gender neutrality in a non-gender-neutral world does not even guarantee gender neutrality, far less actual sex equality.

I think that the damage done to women's rights in Canada, which is of concern to all women worldwide, at this point in the process will be especially acute if no remedial action is taken, given that the issue has been so forcibly raised. Meech Lake fulfils the promise made in 1982 to Quebec to accommodate its aspirations within the Charter of Rights. Lack of action to rectify this situation by including both section 15 and section 28 of the Charter or by making clear that nothing in the Charter is abrogated or taken away from by the Accord squarely poses the question of whether sex equality is indeed basic to the Canadian polity. It also seriously undermines the compact that the Charter made between women and the Canadian state.

MR. CHAIRMAN: Thank you very much for a presentation in which frankly, even if we had all afternoon, I do not think we would probably be able to go through all of the various points and issues that I think would build off some of that discussion. That was a very full presentation, and I should express, on behalf of the committee, it is nice to hear someone who has sat down and actually read everything that has been going through this committee. That is a monumental task as well. We do appreciate the perspective on this and we will jump into questions now.

MR. BREAUH: It was bound to happen; I think I have finally met a good lawyer. When I go to jail, you are going to get a call.

You are basically making the argument that there is nothing that can be done short of amending this Accord to put in place something which establishes—I guess I would categorize it as saying it establishes—the supremacy of the Charter. It that the gist of the argument?

DR. MACKINNON: That is the argument in its strongest form. You have, of course, heard other good lawyers before this committee who have suggested other possibilities. The possibility of a reference was raised, which would clarify these matters.¹⁵ I am not informed as to whether that is practical, given your timetable and the apparent reluctance of the Attorney General (Mr. Scott) to proceed with it.

There are then, of course, the clearest possibilities of, yes, actually amending it. If I may say, it is my view that that is your responsibility. In the words of Mr. Peterson, it seemed that he did contemplate amendment as at least a possibility. He said, and I believe it is a good paraphrase if not a quote, "If it needs to be changed, yes, you change it." Of course, everyone knows both the politics of that and the tediousness of it.

I did actually have one sort of slight thought in addition to those. It may be somewhat fanciful. It is clearly a political thought. I would not put any legal weight on it, but it might be possible to build in your desired interpretation into this Accord, and as a contingency for your vote passing it, in such a way that if your interpretation were abrogated by a court, it would be clear that the approval of the Accord was then rescinded.

In other words, let us say you were to say, "All right; this is our interpretation of this," and write your interpretation in full: "It shall not be interpreted in any way to abrogate from any of the rights under the Charter of Rights. For example . . ." It would be preferable to do that by amendment, clearly, but were you to feel that that was an impossibility, to do that as an interpretation and say, "It is the will of this Parliament and its understanding that only to the extent that this in not interpreted to take away from those rights do we pass it, and the moment at which it is, our vote for it will be regarded as rescinded." It would, shall I say, place any court that was looking to that possibility in the position of facing what would amount to a constitutional crisis, which you would have by design placed them in, and a bind you would have placed them in to get your concerns before that court each time it was considering that interpretation.

15. A "reference" under Canadian law is a request for an advisory opinion from an appellate court on the constitutionality of legislation. At the national level, the Governor-General of Canada in Council may make a reference directly to the Supreme Court of Canada. Supreme Court Act, CAN. REV. STAT. ch. S-19, § 55 (1970). At the provincial level, the Lieutenant Governor in Council may refer a question to the provincial court of appeal, and the court of appeals' decision may then be appealed to the Supreme Court of Canada. See, e.g., Courts of Justice Act, ch. 11, § 19, 1984 Ont. Stat. 35, 45.

I would not give that possibility any legal weight, but as I was thinking how you could build your interpretation into your vote other than by amending, which is preferable, that was the only thing I could think of.

MR. BREUGH: Jeez, I am out of jail already. Let me run through the two or three options that have been put before us and test them with you, because I am interested in your legal opinion on what might work.

We have discussed, because it has been suggested to us from several sources now, a court reference. None of us has a good feel for precisely how that would be done, how quickly it could be done and, frankly, no one is stepping forward and saying, "Here's what it would look like and here's where it would go." That option, which was suggested to us very early on, has not been pursued. We would be on our own or we would have to trust Ian Scott to do it for us—

Interjections.

MR. BREUGH: There is the one option. The second option appears to be the straightforward amendment, which a number of people have now put to us as being the only way to go. The real difficulty with that is that it is the easiest thing in the world for me to do; as an opposition politician, I can put it on the table now, I have it, but it will not carry here and it will not carry upstairs and there are eleven other places where it would have to carry where there are all kinds of people who could jack that around until I am long in the ground, so what starts out as being a nice, neat piece of business never happens. That is precisely what happened at the federal joint committee. People said: "You want amendments? There they are." Boom. The amendment fails. "Fine. Let's go on with the Accord." So we search for other options.

We have had presented to us this idea of a companion resolution which would be put to the legislatures at the same time as the Accord but would stand on its own. That is a very attractive proposition in terms of being politically something that could be done. It certainly gets us over the initial hurdle of not withholding our approval of the Accord and at the same time forcing other assemblies right now to deal with our concerns.

Does it hold the same weight, though, in your view, as the amendment process, or is it just a good second option?

DR. MACKINNON: Perhaps not being as informed as I would have to be of the technicalities of the relationship between the amendment process and companion resolutions, I would have to say that I would be suspicious if someone told me it necessarily would have comparable

weight. I would need to be shown that it would. If you amend it, the thing itself then says what you want it to say. If you have a companion resolution, it would depend on how it was worded. If it said, "This companion resolution is the understanding of this assembly and the resolution to which it is a companion was passed only on condition that these things were also understood to be part of it," then it would have considerably more weight. As to your question "Would it have the same weight?" I do not see how it could, but it could be worded as to have a clear effect.

I guess I would say also to your point about the reference, if I recall your transcripts correctly Professor Baines offered to help frame such a reference, and it would also seem to me that the simple question "Would the Meech Lake Accord abrogate any Charter-guaranteed rights?" is a question to which if we had an answer we would know a great deal more than we do now.

MR. BREAUUGH: I was impressed with that, but having been in politics for a little while now, I am not stupid enough to be sitting down writing what that reference will look like and letting someone come along at a subsequent date and accuse me of being a really mean person, let alone a jerk, for excluding the specific words that have to be there. We have to see some consensus on what that reference would look like before it would be very palatable in political terms.

DR. MACKINNON: Then of course I think you would want to consider including all the other questions that have been raised before this committee, such as the question of the Northwest Territories and the Yukon and the question of the Senate.

MR. BREAUUGH: I will not pursue this much further, but the attractiveness of the companion resolution is that in the first place the concept was not suggested by anybody on that committee; it came from Native people. A number of groups have come before us and said: "Yes, we like the wording of those companion resolutions to the point that we would support that as an approach to meeting our reservations about Meech Lake."

There we have a document and a technique that is proposed by one of the groups directly affected and it is now being endorsed by other groups. That is far different from any one of us writing a little resolution and saying, "Do you like this?" and six months later somebody saying, "Yes, but you didn't put in the word that I needed to make it meet all of my requirements."

That is the attraction of the companion resolutions, that in a sense we are able to take almost neutral wording that has some measure of support and test it among other groups to see whether they too find it meets their needs. We do not have such a set of words having to do with the court reference on the other matters.

DR. MACKINNON: Right. I would think that it would be possible, in consultation with Canadian women lawyers and Canadian women's groups, to develop a position on that, either that this was something they wished to pursue and forward or, if it were pursued and forwarded, that this is how they would like to have it drafted.

MR. BREUGH: It would certainly be of great assistance to those of us who at least want to explore that idea.

DR. MACKINNON: As for my particular role in it, I cannot represent to you what their views might be on either whether that strategy would be acceptable or whether any particular wording would be acceptable. I would think, however, that it would be only marginally acceptable as a fallback or second-level position to an actual amendment. In other words, women are very sensitive to second-class ways of guaranteeing rights.

MR. BREUGH: I do not know why, but I understand it.

DR. MACKINNON: Sometimes that is better than no guarantee of rights, but it still is not the same as being fully represented in the document that represents those rights.

MR. BREUGH: Thank you.

MR. EVES: Like my colleague Mr. Breugh, I am wrestling with the way to do it. I know the way I would do it. As I said this morning to the Ad Hoc Committee of Women on the Constitution (Ontario), personally I think its suggestion with respect to section 16 is the only way to go. That is the only way you are going to resolve the issue and take a very ambiguous section of the Accord and make it crystal-clear.

Failing that, though, and dealing with the political realities that my colleague Mr. Breugh has enunciated—I hope they are wrong—some of us on this side of the committee are perhaps politically naive enough to believe that some government members actually will act according to their own consciences and not follow the dictates of their party or of their premier when this matter comes to a vote.

However, if that does not carry the day, I see second-rate or third-rate solutions to this problem. A court reference is one way we can at least find out what the Ontario Court of Appeal and perhaps ultimately

the Supreme Court of Canada think of section 16 as to whether rights under the Charter are derogated or abrogated or not.

The idea of companion resolutions, as Mr. Breaugh has indicated, is one that was put forward to this committee several weeks ago by some aboriginal groups who have accepted their lot in life. They have accepted political reality in their minds. They are not getting anything right now, and the Meech Lake Accord is not going to be amended to include their problems. So as far as they are concerned, a second-rate or third-rate solution—better than nothing—would be a companion resolution, which at least would put their agenda on the table.

You may or may not be aware that the next constitutional round includes such highly important matters as Senate reform and fisheries but not the rights of aboriginal people in Canada. There are other issues, and you have alluded to some of them, such as the rights of people living in the Northwest Territories and the Yukon and the right of individuals from those areas of Canada to be nominated for the Supreme Court of Canada or the Senate.

The attractiveness of a companion resolution is that it may allow Premier Peterson and others to swallow their political pride, yet still keep their deal, if you will, to not change a comma in the Meech Lake Accord. I suppose it also has the attractiveness in that you can put forward many companion resolutions. Some of them may succeed and some may fail.

The problem with it, though, as I see it, and I am far from being an expert on such matters, is that a companion resolution is really nothing more than a future amendment to the Meech Lake Accord or to the Constitution of Canada, and eventually you are going to have to get the approval of all ten provinces and their legislatures, and the federal government as well. I think it is just a way of fast-tracking a future amendment. I may be totally wrong, but that is my perception of what a companion resolution is.

Given those three opportunities, direct amendment, court reference, and companion resolution, what would be your hierarchy of preference?

DR. MACKINNON: It seems to me that a court reference could be pursued in tandem with an attempted amendment, so those are not exclusive. If anything, it is the disability of the reference procedure that it would take time. But if we were also pursuing amendment accordingly to satisfy the suspicions that we think we already have, while trying to

get clarification on those suspicions from the court, the amendment process could be carried out.

I think to put the issue as whether one will take something or will take nothing, and also to suggest that what the concurrent resolutions would provide is an agenda for the future, places it in a position with which women are extremely familiar historically, that is to say: "Other things are more important than you are. Be patient. We will get to you eventually, sometime."

MR. EVES: Maybe next century.

DR. MACKINNON: Right. It is the time at which one is actually doing this process, which is what Canadian women, of course, learned and did and acted on at the time when there were no adequate sex equality rights in the Charter itself. It was then necessary, as some perceived, to go after the whole thing all over again versus getting it done when it is being done. Do it right the first time.

In that perspective, being told to be patient, particularly when we think you could fix this, does not carry a lot of weight. I think people are not—at least my sense of women I have spoken with in Canada—are not terribly sanguine about the possibilities for equality yet again being placed on a middle tier, or back burner, or whatever it is. A reference would provide some clarification and seems a creative idea. Amending it, however, seems the right thing to do. It seems as though it is something that should be pursued as top priority because it is the right thing to do.

MR. CORDIANO: Certainly everyone understands the desire of various groups that have come before the committee to have greater assurance with respect to the Constitution, to have a higher level of certainty about what things mean, and I can appreciate that.

I would like to get from you your view about the perception or the perspective that has been put forward by some with regard to section 16 of the Meech Lake Accord, namely, that section 16 refers back to two clauses in the Charter dealing with matters cultural and that they are put in there because section 2 of the Charter, the "distinct society" clause, deals with the whole concept of Quebec as a distinct society, as a cultural entity within Canada. Do you accept that view or do you think that is a flimsy argument in the legal sense?

DR. MACKINNON: I think it is not a flimsy argument, and it does seem to me that were I advising multicultural groups or aboriginal groups, I would urge that something like section 16, if not more, was

certainly called for, given the necessity for something like section 2. The other possibility, however, would be that there were no section 16. However, I would say at this point, particularly at this point, given that it does seem to be called for by section 2 and that it is there, it would be an extremely bad move, as an attempt to solve all these other groups' perceived problems to simply get rid of that one too.

MR. CORDIANO: There are two views on section 16, the one I have just expressed and the other that some have put forward, that section 16 was added as a last-minute effort to placate, if you will, certain groups within our society, aboriginal peoples and ethnic groups, which have a major concern with respect to multiculturalism. They are the two prevailing views, but when you try to work in the whole question of equality rights, it brings it to another level.

The people who put forward the first view I spelled out would argue that there is no need to bring in those sections in the Charter referring to equality rights because the Charter provisions stand on their own and are strong enough; the Charter stands on its own. That is the basic argument put forward. So you would accept that in fact section 16 needs to be there because it does deal with matters cultural, and that to have greater certainty with respect to section 16 of Meech Lake, "distinct society," it is required?

DR. MACKINNON: I would truly advise, as I said, those groups to seek that. I would advise them to demand it. They could not be adequately reassured without it. I would think their rights were threatened potentially without it, although that implies no concrete view on my part about how the "distinct society" itself might do so. I have no such a view.

I would like to add that equality rights are often in conflict with what are perceived as necessary cultural values within many cultures. This is surely not specific again to the "distinct society" in any way; in fact, it is more likely to be specific to other cultural groups. So that to say equality is equality and these other things are matters cultural, is to neglect the way in which equality rights do address matters cultural.

MR. CORDIANO: I did not want to leave you with that impression. Professor Baines put forward the notion that women as a group have a common culture that women can ascribe to; that in fact there is a culture surrounding women's beliefs and notions that prevails throughout history. That was her view. If you take that one step further, then you can

say that women could be tied into section 16, if you think of it as matters cultural.

DR. MACKINNON: Yes.

MR. CORDIANO: That is a plausible argument perhaps. I am not sure. Who knows? But Professor Baines certainly seems to think that you could ascribe a common culture to all women.

DR. MACKINNON: Yes, and I have noticed your fascination with the argument throughout the transcripts.

MR. CORDIANO: Jeez, you have done your reading.

DR. MACKINNON: That is what I thought you were thinking about.

MR. CORDIANO: I wanted to see if you agreed with Professor Baines's view that there is indeed a common culture that you can ascribe to women, because that is something quite different.

DR. MACKINNON: If that were actually something one could establish in law, then that would mean there would be no need to add equality rights to section 16 by means of reassuring women of equality rights because our culture of equality would be something we could pursue under multicultural. That is what you have thought about, right?

MR. CORDIANO: It is very vague in my own mind with respect to that because, as you say, it has never been brought forward as a legal argument.

DR. MACKINNON: Yes, I also recall that Mary Eberts suggested that she might find a way to use such an argument were the correct conditions available. I do not disagree with that. I do think that inequality is part of men's culture. It is part of the culture men have shared cross-culturally.

MR. CORDIANO: Not all men.

DR. MACKINNON: No, but I am saying as a cultural characteristic, sir, which does not necessarily address the efforts of individual men or women to contest that. For example, the exclusion of women from public life can remain a general fact in spite of the presence here of women members of the legislature. What I think is that women have also been deprived of a culture.

There are things that one can attempt to do to rehabilitate that lack and that deprivation and that inequality by pointing out the positive side of what women have done, what women have accomplished. But I think that does not make up for what women could have done, could have accomplished, what women could say or become as individuals and as a collective culture were it not for inequality. So I would be very hesitant

to rely on what women have been able to produce as a culture under conditions of inequality as a basis for fighting against the very inequality that has created the limits and bounds of that culture.

MISS ROBERTS: This is just a comment, and I apologize for not being able to hear the first part of your presentation. You are very good at putting across your point. If Mr. Breaugh ever compliments a lawyer, he must really mean it.

MR. EVES: Either that or he is very tired.

MISS ROBERTS: That is right.

MR. BREAUGH: That is not on the record.

MISS ROBERTS: Or else it is getting late in March.

DR. MACKINNON: Perhaps he also has a very well-founded skepticism of lawyers.

MISS ROBERTS: That could be very true.

It would appear to me that equality rights, legal rights, all the Charter rights that are there are going to be attacked from time to time, each time we look at the Constitution. That is something that Meech Lake has certainly pointed out very clearly.

DR. MACKINNON: Yes.

MISS ROBERTS: We have to be—and I use that in the sense that all people have to be—on guard with respect to that particular attack. Your coming here today and expressing your point of view is very helpful for us to realize how that attack is occurring; but how do we deal with that attack? You will note that from time to time, in the transcripts as well, I have dealt with this process. How do we deal with that attack?

Meech Lake does not occur—take that scenario—and there is going to be another presentation, and your points of view and your expertise in the area is required to help us, as legislators, deal with the problem. Do you have any wisdom with which you can help us with respect to that? How do we tap your expertise without being here at this particular time?

DR. MACKINNON: Were that to occur, it would be rather important to regard the existing provisions of Meech Lake as themselves essential to whatever the next document were to be; in other words, so that one would not in fact put the whole thing back to where Quebec did not know if there was going to be a “distinct society” clause. It seems to me the things that were in there would have to begin as non-negotiable and the question only what could be added. At least that is how it would seem to me. It just does not seem acceptable to once more subject those

clauses that are acceptable and necessary to Quebec to further negotiation and possible political compromise. That is just the first thing that occurs to me off the top of my head, not having considered this specific possibility.

In answer to your question about input and expertise, Canadian women are better organized both on the legal level and on the social and political level in terms of having clearly organized groups that expressly voice women's concerns in ways that are really rather difficult not to hear if the process is set up merely to make them accessible. In other words, the very process through which, for example, Quebec was represented in the Meech Lake situation, the process through which multicultural and aboriginal rights were brought to the attention, however inadequately, of the drafters, might seem to me to be the kind of process that should be made available to all groups that wish to have input into the further changes that would then be added to that basic document.

I may not be expressly addressing your underlying concern.

MISS ROBERTS: Your comments are very helpful, in particular your first comment with respect to what should occur, maybe, in the next draft. Thank you.

MR. CHAIRMAN: There is one point I would like to underline, which flows from Mr. Eves's earlier comment. I feel safe in making it, because while I am there, I am also here on this side, so I guess I have a foot on both sides of the—

MR. BREAUH: A classic Liberal position.

MR. CHAIRMAN: It is the yin and the yang.

MR. MORIN: But it works.

MR. EVES: It is fine if you have long legs.

MR. CHAIRMAN: It seems to me we have had the question today and on several occasions as we struggle with various alternatives in moving forward. It is important to make the point to you and in fact to some others who were here this morning that, clearly and understandably, we recognize that the option the women's groups which have been before us would like to see is an amendment to the Accord.

Whatever our problems might be in dealing with the Meech Lake Accord, whether as government members or as opposition members, what we have tried to say is that as we come at this issue as a committee, we have to still try to, in a sense, eliminate those other background noises and at least in our own minds determine: do we think this is a bad accord,

not just because of the reasons you have raised, but do we think it is bad? If not, do we think it is all great? How should we go about it?

There are a whole series of questions, it seems to me, that I, as a legislator, have to wrestle and struggle with. Obviously, we are dealing in a broader political process, and a lot of things have been said outside this room which at some point in this whole business we are going to have to come to grips with. I think as we have talked, particularly with women's groups and individuals, as we said this morning, some very clear and specific recommendations have come forward. It is perhaps quite understandable that a committee would be looking at or trying to search for what the options are, what the alternatives are, in dealing with this.

I think for us in a sense to be trying to get you to say, "I would give this nine out of ten and this seven out of ten"—clearly, for the women's organizations and groups that have been before us the preference by far is that if this is what in fact is meant then let us do it and get the whole thing over with. I guess in the whole balancing act of all the other things that are surrounding this issue, at some point we will have to make a decision and try to go with that. I just wanted to be clear that that message has come through. However we deal with that in the end, it is clear what the first priority is. I think you have made that clear and I think the groups this morning and others have made that clear.

That is just by way of a preamble or comment on everything that has been said. I would like to thank you very much on behalf of the committee for coming in this afternoon.

DR. MACKINNON: Thank you. I would just like to say to your last remarks that I hope I made as clear as I wished to that all equality rights are crucial to the advancement of women. In other words, one can say that section 28 should be added as parallel to 25 and 27 under section 16. I think, however, if one has at heart the interests, not only of all people but more particularly of all women, that the equality rights included in section 15 having to do with race, national origin, religion, mental and physical disability, and so on are also crucial to women getting out from under the situation we are in.

MR. CHAIRMAN: I think you made that quite clear but I appreciate the underlining. Again, thank you very much for joining us this afternoon.

DR. MACKINNON: Thank you very much.

