

Constitutionalizing Women's Equality Rights: There is Always Room for Improvement¹

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Abstract

This article recommends six improvements in regard to women's equality rights in Canadian constitutionalism. They are: 1) detail the harms; 2) advocate women's equality; 3) delete formal equality; 4) make equality absolute; 5) stop comparing women; and 6) recognize intersectionality. Some of these recommendations are directed to legislators; others to judges. It is premature for women to celebrate. Canada's constitutional guarantees of women's equality rights are inadequate to the task of protecting us.

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Résumé

Cet article recommande six améliorations en ce qui concerne les droits à l'égalité des femmes dans le constitutionnalisme canadien. Il s'agit des suivantes : 1) préciser les préjudices; 2) prôner l'égalité des femmes; 3) supprimer l'égalité formelle; 4) rendre l'égalité absolue; 5) cesser de comparer les femmes; et 6) reconnaître l'intersectionnalité. Certaines de ces recommandations s'adressent aux législateurs; d'autres aux juges. Il est trop tôt encore pour crier victoire. Les garanties constitutionnelles des droits à l'égalité des femmes au Canada sont insuffisantes pour nous protéger.

Introduction

Is it wrong to celebrate the work of the women who lobbied for a more meaningful guarantee of women's equality rights in the Canadian Constitution? As one of these women, I never imagined asking this question. Its implication—that the Constitution might not protect women's sex equality rights—was unthinkable. After all, the women's lobby succeeded in convincing politicians to include two sex equality guarantees in the *Canadian Charter of Rights and Freedoms* (Charter).² A year later, Aboriginal women successfully lobbied for the inclusion of another sex equality guarantee in the *Constitution Act, 1982*.³ I set out the full texts of these three guarantees in Part 1 of this article. Recognizing how clearly they express the right to sex equality is essential to deciding whether to celebrate the women who lobbied for their inclusion in the Canadian Constitution.

However, something more is required to answer this question. Like all legal texts, these guarantees are subject to interpretation by judges. We must ask how the highest court in the land, the Supreme Court of Canada, has decided cases in which parties invoked the constitutional guarantee of sex equality. Part 2 contains a brief survey of this jurisprudence. In the thirty years since Canada adopted the *Constitution Act, 1982*, women relied on their right to sex equality in five cases, all of which they lost. By comparison men claimed sex equality rights in four cases; they lost the first two, but won the remainder. This record suggests that the unthinkable happened: the constitutional guarantees of sex equality did not protect women. Part 3 subscribes to the adage: "There is always room for improvement."

Part 1. The Constitutional Texts

The three written guarantees of sex equality are found in sections 15 and 28 of the Charter and in section 35(4) of the *Constitution Act, 1982*. The text of each follows with a brief introductory comment.

Before 1982, the Canadian Constitution contained no protection of sex equality or of equality rights more generally. What became section 15 represents the general attempt to protect equality rights, including a prohibition against discrimination on the ground of sex. The opposition to entrenching section 15 focused on the general idea of protecting equality rights and not specifically on that of protecting sex equality, unlike the situation that had obtained 20 years earlier when the federal government adopted an equality rights provision in the *Canadian Bill of Rights*.⁴

During debate on the *Canadian Bill of Rights* in 1960, then Minister of Justice Davie Fulton felt compelled to offer the following reassurance specifically about including sex in the list of grounds protected in the general equality rights provision: “I do feel that the expression... would not be interpreted by the courts so as to say we are making men and women equal, because men and women are not equal; they are different.”⁵ His words may have resonated with Justice Roland Ritchie, who wrote the majority opinions for the Supreme Court of Canada in the two sex equality cases litigated under the *Canadian Bill of Rights*. First, they denied that section 12(1)(b) of the *Indian Act* discriminated against women by depriving them of their Indian status if they married out even though men who married out did not lose their Indian status.⁶ Then, the Justices told Stella Bliss that the *Unemployment Insurance Act* did not discriminate against her when she was denied both pregnancy benefits and regular unemployment benefits.⁷

In the 1980-1982 discussions about the Charter, the women’s lobby was determined to word the equality rights provision in such a way as to counter any suggestion that it resembled the version in the *Canadian Bill of Rights*. Ultimately section 15 provided:

- s. 15. (1) Every individual is equal before and under the law and has the right to 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.⁸

Section 15(1) is the general equality rights provision and section 15(2) is the provision that protects affirmative action programs.

Understanding that governments in Canada might try to justify infringing the equality rights protected in section 15 by invoking the limitations clause in section 1 of the Charter,⁹ women also lobbied for another equality guarantee. We argued for a new provision that would refer only to the right to sex equality, thereby emphasizing the singular importance of sex equality in the overall culture of rights protections (Baines 2005, 55). As well, we maintained that this guarantee should not be subject to the limitations clause in section 1. In other words, governments should never be permitted to justify infringing the guarantee of sex equality when this new provision is invoked. Our efforts resulted in section 28 which provides:

- s. 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.¹⁰

Of this provision Linda Ryan Nye presciently concluded: “Twenty-eight was a helluva lot to lose... But it was not a helluva lot to win” (Kome 1983, 95).

Within a year of the adoption of the *Constitution Act, 1982*, the first ministers met with Aboriginal leaders to discuss constitutional matters affecting Aboriginal peoples. As the result of an Aboriginal women’s lobby, they added the third sex equality provision to the *Constitution Act, 1982*. This provision is section 35(4) which provides:

- s. 35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.¹¹

This provision was included to protect Aboriginal women’s right to sex equality because some Aboriginal rights are articulated outside the Charter, but within the *Constitution Act, 1982* in section 35.

The similarities between section 35(4) and section 28 are noteworthy, as are the similarities between these two provisions in the *Constitution Act, 1982*

and the provision that Québec subsequently added to the *Québec Charter of Human Rights and Freedoms* in 2008.¹² When section 15 of the Canadian Charter is added to the foregoing provisions, it is obvious that our constitutional texts recognize the normative importance of sex equality.

Part 2. The Jurisprudence

In this section, I describe how the constitutional texts and the jurisprudence part company. While the former explicitly and repeatedly guarantee sex equality, the latter reveals that the Supreme Court of Canada has denied this right in all five of the cases where women raised it. Of course, the women might have been wrong to believe they were entitled to sex equality, but it is a stretch to attribute such a mistake to all five of these cases. I propose to explain why it was the Supreme Court and not the women who were wrong. The court misunderstood the constitutional norm of sex equality, a misunderstanding that also permeated the four cases in which men claimed sex equality rights.

First, the women's cases. Four of the five were split decisions. Moreover, the justices split along gender lines. The majority justices were always men; the women justices always dissented. The fifth and most recent case was a unanimous opinion, raising a question about whether the women justices have given up dissenting.

In the earliest decision in 1993, the male majority told Beth Symes that the *Income Tax Act* did not discriminate against women by not recognizing childcare expenses as a business tax deduction.¹³ Next, in 1994, they told the Native Women's Association of Canada (NWAC) that Canada was not discriminating against them by refusing to fund their participation in the constitutional discussions that led to the *Charlottetown Accord*.¹⁴ Then, the court decided in 1995 that the *Income Tax Act* did not discriminate against Suzanne Thibault by compelling her, rather than her ex-husband, to pay the income tax on the alimony she received from him.¹⁵ In the fourth case, the male justices told the Vancouver Society of Immigrant and Visible Minority Women in 1999 that denying them charitable status under the *Income Tax Act* was not discriminatory.¹⁶ Finally, in the only unanimous decision, the court decided in 2004 that Newfoundland did not have to honour a pay equity agreement it had signed in favour of female employees in the healthcare sector.¹⁷

Although these five cases qualified as sex equality contests because women were burdened because they were women, none would have burdened men as men had the outcomes been different. If Beth Symes had won, women and men could both have claimed childcare expenses as a business tax deduction. If NWAC had won, the money would have come from the state and not the pockets of the other male-dominated Aboriginal organizations. If Suzanne Thibault had won, her husband would have paid income tax on his own earnings as is required of all other taxpayers. If the Vancouver Society of Immigrant and Visible Minority Women had won, its charitable status would have had no impact on men. And finally, if the Newfoundland Association of Public Employees (NAPE) had won, the province and not men *per se* would have been required to conform to its responsibilities under the pay equity agreement that it had signed. In virtually every case, in other words, the state and not men would have borne the burden of equalizing the conditions under which women work.

In sum, while the constitutional text guarantees the right to sex equality, from the standpoint of women, the jurisprudence of the highest court in the land has rendered this guarantee meaningless—in judgments rendered, for the most part, by men who were protecting the state. Nor were they the same men. From the *Symes* decision in 1993 to the *NAPE* decision in 2004, there was an almost complete turnover in male justices with only Justice John Major sitting on both cases. Yet, their conclusions remained the same; they protected the state and denied women's sex equality claims. Similarly, only one woman, Justice and, since 2000, Chief Justice Beverley McLachlin sat on both *Symes* and *NAPE*. She joined the unanimous court in *NAPE*. What can we conclude about gendered decision making—the women gave up resisting? It is too small a sample and too soon to draw this conclusion, but it is worth keeping a watching brief.

Perhaps not surprisingly, men have fared much better when they bring sex discrimination claims under the Charter. While they lost the first two, they won the next two. In the two cases they lost, unlike the five cases women lost, the men's losses redounded to women's benefit. In other words, they emphasized the reciprocity that we might have assumed would characterize sex equality cases. Moreover, one of their wins also im-

proved the position of women. But the most recent win harmed women.

In the first case, Justice Bertha Wilson decided in 1990 that two men accused of statutory rape could not use sex discrimination to strike down the statutory rape provision (which was then, but is no longer, written in gendered language).¹⁸ In the second, Justice Gerard La Forest told male prison inmates in 1993 that limiting cross-gender frisk searches to male prisoners was not discriminatory, but rather, the result of a new federal government affirmative action hiring policy to ensure that some women could work as guards in men's prisons.¹⁹ Although initiated by men, these two cases protected women's equality rights and the next case advanced them. In it, Justice Frank Iacobucci told Mark Benner in 1997 that requiring a security check of citizenship applicants who were children born abroad of Canadian mothers, but not of those born abroad of Canadian fathers, was discriminatory because it treated mothers, but not fathers, as dangerous transmitters of birthrights.²⁰ However, the fourth men's case harmed women's equality rights. In it, Justice Marie Deschamps ruled in 2003 that British Columbia's *Vital Statistics Act* discriminated against men because it provided birth mothers with discretion to "unacknowledge" (i.e. not name) biological fathers on birth registration forms and to not consult them when attributing surnames to their babies.²¹

Since men's equality rights claims may either assist or harm women's equality rights claims, they offer no reliable guarantee of protection for women's sex equality. Women are the objects, not the subjects, of these claims with no control over how they are framed or argued. Indeed, as the fourth men's case illustrates, the reciprocity they usually evoke can be toxic for women. What he wins (potentially lifelong interference), she may lose (independence in all childrearing matters).

In conclusion, the Supreme Court's sex equality jurisprudence only protected girls in statutory rape cases, women hired as cross-gender prison guards, and mothers who give birth to children while abroad. These were three good decisions—although the first and the third are no longer necessary thanks to legislative amendments removing the gender specificity of the impugned provisions. Moreover, women had no reason to bring either the statutory rape or the

cross-gender guarding cases; they were fought by men who, if they had won, would have harmed women. Only the birthright case survives as a case that could have been brought by a woman and, irrespective of who launched it, represented a win necessary to redressing women's inequality. It had no reciprocal effect on men; rather, it caught the state blatantly discriminating against women.

Therefore, when the five women's cases are added to the four men's cases, the jurisprudential record gives little reason to celebrate the entrenchment of the guarantee of sex equality. The jurisprudence negates the rosy picture portrayed by the texts of the Charter and the *Constitution Act, 1982*.

Part 3. "There is Always Room for Improvement"

For those of us who follow and care about constitutionalizing women's equality rights, three possibilities follow from the dismal picture I have just painted. One is to sit on our hands and hope that the justices on Supreme Court of Canada develop a better understanding of women's equality rights. The second is to give up on the law and resort to resistance and revolution to achieve women's equality. The third is to recommend improvements to the current constitutional regime that governs women's equality rights. This paper explores the ramifications of the third possibility without arguing for it. There are too many unknowns to assess reliably whether it holds promise.

I make six recommendations for improvements. Some derive from my conversations with women lawyers who are arguing for the inclusion of gender equality provisions in constitutions being drafted in post-conflict societies, particularly in the Middle East North Africa (MENA) region. I have learned much from these women and I owe my first recommendation for improving the Canadian Charter directly to them.

Detail the Harms

When it comes to drafting gender equality provisions for their constitutions, the women in the MENA region value the *Convention on the Elimination of Discrimination Against Women* (CEDAW), which sets out a series of specific contexts in which women's equality rights must be guaranteed.²² These contexts include marriage and the family, elections and political offices, education, employment, healthcare, as well as other ar-

eas of social, economic, cultural, and political life. Put differently, the CEDAW model details the harms faced by women who claim equality rights.

Although CEDAW was adopted by the United Nations in 1979 and by Canada in January 1982, I do not recall any discussion about using the CEDAW model of detailing the harms in the Charter. Instead, we discussed the general equality rights model set out in other international conventions, such as Article 2 of the *International Covenant on Civil and Political Rights* (999 U.N.T.S. 171 1976) and Article 2 of the *International Covenant on Economic, Social and Cultural Rights* (993 U.N.T.S. 1976).

At the time, inserting the general equality rights model in the Charter seemed well ahead of what our American and British sisters had. In the U.S., there was no mention of sex equality in its Bill of Rights and, in Britain, there was neither a constitution and nor a bill of rights. However, the general equality rights model now seems vacuous in comparison to the CEDAW model of detailing the harms that women in the MENA region favour. Detailing harms might make it harder for the Supreme Court of Canada to deny them.

Moreover, the MENA region women answer the criticism that the CEDAW model may omit some kinds of harm by pointing out that CEDAW's list of harms has withstood the test of time. They also argue that nothing precludes adopting both models—the CEDAW model, detailing the specific harms that women face when they seek equality rights, and the general sex equality rights model that Canada currently has in the Charter.

Advocate Women's Equality

The women in the MENA region also talk about whether equality rights should be framed in terms of sex or gender or women. Many prefer the CEDAW approach of naming women as the equality seekers. In contrast, during the Charter debates, there was little, if any, discussion about guaranteeing of equality rights only to women.²³ Since the Charter uses sex equality in section 15 and male and female persons in sections 28 and 35(4), men can and have made Charter-based sex equality claims.

Moreover, as I already noted, men won two of their cases at the Supreme Court of Canada, unlike women who lost all of their sex equality cases at the court. In the more egregious of these wins, the *Trociuk*

case, a man was given the right to include his surname in his child's surname to show his biological ties to the child.²⁴ If you are tempted to ask "What's the harm?" consider the outcome for the mother who was raising the child—actually triplets—as a single parent. The court condemned her to years of bureaucratic educational and healthcare hassles because the children do not have her surname.

Put differently, if sex equality rights are reciprocal, what men win women lose. This outcome could be avoided if the Charter were framed like CEDAW, guaranteeing equality rights to women (and not to men—who have experienced centuries of privilege and power).

Delete Formal Equality

The legal meaning of the word "equality" is not self-evident. Neither CEDAW nor the Charter includes a definition of equality. However CEDAW guidelines²⁵ and Charter cases²⁶ both proclaim a willingness to define equality as a substantive, and not a formal, right. Substantive equality remediates historical disadvantage and oppression; formal equality offers to equalize the opportunities of those who are similar (Hughes 1999). Critics maintain that, while the judges give lip service to substantive equality in Charter cases, they, in fact, apply formal equality (McIntyre 2006, 99).

The problem with formal equality is that it remedies only gender-specific statutes. For example, if a statute bans women from doing something, formal equality will kick in to reject the ban. However, most legislation today is not gender-specific; most laws are expressed in gender-neutral terms.

To illustrate, in the *Symes* case, a woman lawyer challenged the gender-neutral definition of the business expense deduction in the *Income Tax Act*.²⁷ She argued that the business expense deduction should include the actual cost of childcare, an expense mainly incurred by women, just as it includes expenses claimed mainly by men such as cars, expensive dinners, golf club memberships, etc. The Canadian Supreme Court's decision in *Symes* was gendered. The male judges denied her sex equality claim because they could not see any difference between women and men with respect to costs supporting professionals. In other words, they relied on formal equality. In contrast, the women on the court dissented because they recognized that the

gender neutral wording of the business expense deduction obscured its gendered effect. The legislation deterred most mothers, but not most fathers, from setting up businesses because they could not deduct the cost of childcare.

Formal equality should be deleted from judicial minds. However, it is not precisely clear how we achieve this since formal equality is not written into the Charter. If we write substantive equality into the Charter, will that make a reality out of the current lip service that the judges give to it? Perhaps we need to say that gender-neutral statutes call for substantive equality analysis?

Make Equality Absolute

We all know the rhetoric “no rights are absolute” and I suggest that it is time to challenge this rhetoric in women’s equality rights cases. “No rights are absolute” is a way of saying that the state is allowed to justify infringing women’s equality rights by invoking section 1²⁸ and the Oakes test.²⁹ The women in the equal pay case (*NAPE*) were the only women to make a successful section 15 argument, but they ultimately lost because the Canadian Supreme Court held that a financial crisis justified denying women equal pay.³⁰

No one mentioned section 28 of the Charter, which guarantees equality rights to female persons “notwithstanding anything in this Charter,” a clear statement that women’s equality rights should be construed as absolute. It is time to change the neglect of section 28 and to give it a robust role in guaranteeing women’s equality without the limitations imposed by section 1.

There is another reason for making women’s equality rights absolute. In recent cases involving polygamy³¹ and niqab-wearing Muslim women,³² governments have used women’s equality rights to justify criminalizing the women who live in polygamous relationships and requiring Muslim women to remove their niqab to testify in court. Put differently, instead of women using equality rights to fight governments (which is what the women who lobbied for equality rights intended), governments have deployed equality rights against women—the women who live in polygamous relationships or wear the niqab.

Stop Comparing Women

From its first equality decision,³³ the Supreme

Court of Canada has insisted that equality is a comparative concept. This conceptualization is not written into the Charter and some feminists are critical of it (Pothier 2006). As long as the Charter is expressed in terms of sex equality, I am prepared to accept comparison provided it is governed by substantive and not formal equality. What I cannot condone is the court’s use of some equality rights—usually, but not always, age equality—to hide the fact that women are being compared to women.

This happened in two cases involving social security benefits: *Law v Canada*³⁴ and *Withler v Canada*.³⁵ The outcomes would be farcical if they were not so problematic. In *Law*, the younger widow lost on the grounds that only older widows required survivor’s benefits under the Canada Pension Plan; younger widows could find employment or re-marry. However, the reverse prevailed in *Withler*, with the older widows losing to younger widows on the grounds that only the younger widows needed the unreduced supplementary death benefits available under federal public servant and armed forces pension plans; older widows either had more money or had less need of money. Neither case was litigated as a sex equality case; yet, they were both cases where the equality seekers were predominantly women. By deciding them as age, and not sex equality, cases, the court made women fight women when the real issue in both cases was women versus the state (Baines 2012b). We need to ensure that this kind of manipulation does not reoccur.

Recognize Intersectionality

Ever since feminist and anti-racist theorists began to argue for recognition of intersectional equality rights claims, feminist legal scholars have recognized the artificiality of constitutional litigation strategies that force women to choose between their race and their sex when advancing equality rights claims (Crenshaw 1989). Some theorists would limit intersectionality to claims made on the basis of race and sex. However, others argue that other forms of singular classification also hamstring equality claimants such that we should consider various combinations of intersectionality, including combinations that may be more than twofold.

Recent Canadian Supreme Court jurisprudence yields a number of cases based on ageism that should have been argued as age and sex because the group burdened was predominantly female.³⁶ Similarly, women

litigated or were predominantly burdened in some of the disability equality cases.³⁷ Three of the marital status equality cases were litigated by women who were discriminated against as much because of their sex as their marital status.³⁸ Three women launched the only national origin equality case³⁹ and at least two of the Aboriginal status cases arose out of dislocations women could trace back to the inequalities inflicted by section 12(1)(b) of the *Indian Act*.⁴⁰ Finally, the niqab case implicated both religious and sex equalities,⁴¹ while the polygamy reference focused on the harm to women who subscribed to polygamy for religious reasons.⁴²

Recognizing intersectionality is essential to understanding the substantive discrimination that women face because of sex and other grounds that make up their lived experience. Forcing them to choose between or among grounds is not only unrealistic, it may fail to expose the depth of the injustices they face.

Conclusion

All of the improvements that I suggest will require constitutional amendments. The lesson of the Charter era is that we should always be ready to propose constitutional amendments that would improve women's equality rights. If the Prime Minister tries to change the composition of the Senate without adopting a constitutional amendment and if Québec and other provinces successfully challenge the constitutionality of his approach, we may be back at the constitutional amendment table. Should this come to pass, women should be ready to propose their equality rights amendments.

To return to the question that opened this paper: is it wrong to celebrate the work of the women who lobbied for more meaningful equality rights during the debates surrounding the adoption of the *Constitution Act, 1982*? My answer is that it is never wrong to celebrate women who work to better the lives of other women. However, my better advice is to move on: find new ways to address the injustices that women face in Canada because equality rights jurisprudence has yet to measure up to the aspirations of those who supported constitutionalization.

Endnotes

¹ I presented the first draft of this paper at the Revisit, Renew, and Rally Celebration of the 30th Anniversary of the Charter at Dal-

housie University Faculty of Law, October 26, 2012.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 15 and 28 [Charter].

³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(4) [Constitution Act 1982].

⁴ *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(b).

⁵ Canada. Special Committee on Human Rights and Fundamental Freedoms. *Minutes of Proceedings and Evidence*. Numbers 1 to 12 (July 12-29, 1960), 643.

⁶ *Canada v Lavell and Bédard* [1974] SCR 1349.

⁷ *Bliss v Canada* [1979] 1 SCR 183.

⁸ Charter, supra n. 2, s. 15.

⁹ Charter, supra n. 2, s. 1 which provides: "s. 1. 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."

¹⁰ Charter, supra n. 2, s. 28.

¹¹ *Constitution Act, 1982*, supra n. 3. S. 35(4) was added to the *Constitution Act, 1982* by the *Constitution Amendment Proclamation, 1983*, SI/84-102.

¹² *An Act to amend the Charter of human rights and freedoms*, S.Q. 2008, c. 15, s. 2 which provides: "s. 2. The Charter is amended by inserting the following section after section 50: 's. 50.1. The rights and freedoms set forth in this Charter are guaranteed equally to women and men.'"

¹³ *Symes v Canada* [1993] 4 SCR 695 [Symes].

¹⁴ *Native Women's Association of Canada v Canada* [1994] 3 SCR 627.

¹⁵ *Thibaudeau v Canada* [1995] 2 SCR 627.

¹⁶ *Vancouver Society of Immigrant & Visible Minority Women v. Canada* [1999] 1 SCR 10.

¹⁷ *Newfoundland Association of Public Employees v Newfoundland* 2004 SCC 66 [NAPE].

¹⁸ *R v Hess, R v Nguyen* [1990] 2 SCR 906.

¹⁹ *Weatherall v Canada* [1993] 2 SCR 872. Section 15(2) of the Charter protects affirmative action policies from the allegation that they infringe the equality rights set out in section 15(1).

²⁰ *Benner v Canada* [1997] 1 SCR 358.

²¹ *Trociuk v British Columbia* 2003 SCC 34 [Trociuk].

²² *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13 (1979).

²³ Beverley Baines (1981) recommended with respect to the draft Charter: "First, the proscribed classification, women, should be used to emphasize that it is women who have been traditionally, and who continue to be, disadvantaged with respect to the legal status of personhood because of gender. In view of the startling inability of the courts to recognize when a gender classification has been used, it seems to be necessary also to provide that a law would be construed as classifying on the basis of womanhood when only, but not necessarily all, women and no men are included in or excluded from the law in question" (55).

²⁴ Trociuk, supra n. 21.

²⁵ "The Concept of Equality," IRAW Asia Pacific at <http://www.iwraw-ap.org/convention/equality.htm>.

²⁶ *Andrews v Law Society of Upper Canada* [1989] 1 SCR 143

[Andrews]; *Law v Canada* [1999] 1 SCR 497 [Law]; *R v Kapp* 2008 SCC 41.

²⁷ Symes, supra n. 13.

²⁸ Charter, supra n. 9.

²⁹ *R v Oakes* [1986] 1 SCR 103.

³⁰ NAPE, supra n. 17.

³¹ Reference re s. 293 of the *Criminal Code of Canada* 2011 BCSC 1588 [Polygamy Reference].

³² *R v N.S.* 2012 SCC 72 [N.S.].

³³ Andrews, supra n. 26.

³⁴ Law, supra n. 26.

³⁵ *Withler v Canada* 2011 SCC 12.

³⁶ *McKinney v University of Guelph* [1990] 3 SCR 229; Law, supra n. 26; *Gosselin v Quebec* 2002 SCC 84; Withler, supra n. 35.

³⁷ *Eaton v Brant County Board of Education* [1997] 1 SCR 241; *Eldridge v BC* [1997] 3 SCR 624.

³⁸ *Nova Scotia v Walsh* 2002 SCC 83; *Hodge v Canada* 2004 SCC 65; *Quebec v A* 2013 SCC 5.

³⁹ *Lavoie v Canada* 2002 SCC 23.

⁴⁰ *Lovelace v Canada* 2000 SCC 37; *Lavoie v Canada* 2002 SCC 23.

⁴¹ N.S., supra n. 32.

⁴² Polygamy Reference, supra n. 31. See also Baines 2012a, 452.

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