

# *LAW IN SOCIETY: THE PRINCIPLE OF SEXUAL EQUALITY*

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## Introduction

I think Lord Macmillan would have approved of the topic assigned to me on this symposium — “Law in relation to other institutions in society, such as the school, the Church and the family” — for it was he who said:

The lawyer does well from time to time to lift his eyes from his desk and look out of the window on the wider world beyond.<sup>1</sup>

The topic, however, is so broad that I have taken the liberty of reducing it to a more manageable compass. I have chosen as my theme one aspect of the law, the principle of sexual equality, because it, perhaps more than any other, both affects and is affected by these other institutions in a very intimate and fundamental way.

I have broken down my subject this way: first, a brief look at recent history beginning with the Royal Commission on the Status of Women and leading up to the *Charter of Rights*; second, my submission that the main impediment to the implementation of sexual equality provisions is prevailing social attitudes, especially the conditioning by Church, school and family; and lastly, a look at two other obstacles to the implementation of the principle of sexual equality — (1) legislative impediments and (2) the difficulty inherent in the concept itself.

So, to our task!

## Recent History

The enactment of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> on April 17 last year marks what many Canadians, men and women alike, hope will be a decisive step in the movement towards sexual equality in Canadian life. Section 15 reads:

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.

Section 28 states:

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

The law has now assumed, at least formally, a leading role in addressing the issue of sexual equality. Does this mean the problems are solved, that we can all sit back and relax? By no means. We are all well aware of the human paradox that one can commit oneself to an idea, consciously intending to pursue a certain course, while subconsciously retaining the discriminatory attitudes of the past.<sup>3</sup> Legislation is only the beginning. It is in the implementation that the problems must be wrestled with, particularly in an area such as this

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1. Lord H.P. Macmillan, *Law and Other Things* (1938), at 138.

2. *Constitution Act, 1982*.

3. See, E.I. MacDonald, “A View from Ottawa: The Role of Federal Government as Regards the Status of Women” (1975), 21 McGill L.J. 601 at 610.

one where obsolete social attitudes persist and the concept of sexual equality itself contains a large element of abstraction.<sup>4</sup>

A word or two now about some of the steps which culminated in the equality provisions in the *Charter*. There can be little doubt that the initial impetus for legislating women's rights came from the Royal Commission on the Status of Women which was created in 1967 with a mandate "to ensure for women equal opportunities with men in all aspects of Canadian society".<sup>5</sup> In 1970, after extensive hearings and research, the Commission issued a wide-ranging report suggesting the establishment of various mechanisms for reform and setting out a substantial number of specific recommendations for legislative change. These suggestions and recommendations laid the groundwork for almost all the legal innovation which has since taken place.<sup>6</sup> A Minister was appointed in 1971 with special responsibility for the status of women. The office of Coordinator, Status of Women, was created within the Privy Council Office, now a separate entity known as Status of Women, Canada, which reviews for the Minister all federal programs and policies as they affect women, and also provides a liaison with provincial governments, advisory councils and national women's organizations.<sup>7</sup> The most significant of these advisory councils is the Canadian Advisory Council on the Status of Women, created in 1973 at the suggestion of the Royal Commission to bring before the government and the public all matters of interest and concern to women.<sup>8</sup> An interdepartmental committee was formed to suggest strategies for the implementation of the Commission's specific recommendations for change in the law, and this led to the creation of special structures within federal government departments, such as those responsible for employment and immigration, and health and welfare.<sup>9</sup> Many of the provinces followed the federal lead by setting up their own advisory councils and adding responsibility for the status of women to the portfolios of existing ministers.<sup>10</sup> An elaborate formal machinery was thus set in place across the country.

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4. See generally, P. Westen, "The Empty Idea of Equality" (1982), 95 Harv. L. Rev. 537, where it is argued that the principle of equality is empty of content.
  5. *Report of the Royal Commission on the Status of Women in Canada*, Queen's Printer, 1970, at vii (hereinafter referred to as *Report*), citing Canada, Privy Council, Order in Council P.C. 1967-312. Lord Scarman, *Women and Equality Before the Law*, (Fawcett Lecture, 1971), described the Report as "a bold attempt to master-mind a programme for the universal implementation of a genuine equality of the sexes", at 4.
  6. Apparently almost 100 of these have been given effect: see, Canadian Advisory Council on the Status of Women, *Ten Years Later — An assessment of the Federal Government's implementation of the recommendations made by the Royal Commission on the Status of Women* (1979).
  7. This is a "central coordinating agency" which supports the Minister, not a ministry proper. It also has a responsibility to ensure that Canada's participation in international dialogue reflects national commitments to improve the status of women. In this context it may be helpful to set out the international instruments ratified by Canada relating to equality for women: *Convention on the Political Rights of Women* (30 January 1957); *Convention on the Nationality of Married Women* (21 October 1959); *Convention concerning Discrimination in Respect of Employment and Occupation* (ILO Convention 111) (26 November 1964); *Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (ILO Convention 100) (16 November 1972); *International Covenant on Economic, Social and Cultural Rights* (9 May 1976); *International Covenant on Civil and Political Rights* (9 May 1976); *Optional Protocol to the International Covenant on Civil and Political Rights* (9 May 1976); *Convention on the Elimination of All Forms of Discrimination Against Women* (10 December 1981).
  8. *Report*, supra n. 5, at 389-92. See Canada, Privy Council, Order in Council P.C. 1976-781.
  9. The committee no longer exists: its work has been inherited by Status of Women Canada. Examples of these departmental mechanisms include the Women's Employment Division within Employment and Immigration Canada, the Women's Program within the Department of the Secretary of State, and a Status of Women Senior Advisor to the Minister in Health and Welfare Canada. Formerly there was only the Women's Bureau in Labour Canada.
  10. The provincial commitment has been less complete. The advisory councils often receive minimal funding, and only one province (Quebec) has established a central coordinating mechanism along the lines of Status of Women Canada; and the responsibility of the provincial Ministers carrying the additional portfolio is primarily within their own departments.

The Commission recognized, of course, that laws forbidding discrimination against women were useless without agencies to police them, and one of their important recommendations was the establishment of a federal Human Rights Commission.<sup>11</sup> Many of the provinces already had human rights legislation and a number had Human Rights Commissions with ongoing responsibility for investigation, prosecution, education and law reform.<sup>12</sup> In 1977 the *Canadian Human Rights Act* was passed and the Canadian Human Rights Commission was established. Provisions prohibiting discrimination on the ground of sex were included in the Act and were also added by all the provincial legislatures to their statutes.<sup>13</sup>

Since these sexual discrimination provisions came into effect — and we now have in some provinces almost a decade of experience with them — one of the most contentious areas has been the area of employment, access to the work place, and particularly the problem of equal pay. As a result every province now has a specific provision dealing with this matter although in several of the provinces it is found, not in their human rights legislation, but in their *Employment Standards* or *Labour Standards Acts*.<sup>14</sup> There are two types of equal pay provision. There is the provision which requires the employer to give equal pay for “equal work”, and the provision which requires equal pay to be given for “work of equal value”.<sup>15</sup> The concept of “equal work” proved too hard to administer. It was so easy to get around it by adding some distinctive task to the male employees. It was also unworkable in large areas of the work force serviced exclusively by women. There were, for example, no male counterparts of the laundress and the seamstress. The equal pay for work of equal value concept permits a broader comparison of job functions and seems to be more efficient.<sup>16</sup>

The other pressing issue affecting women in the work force is sexual harassment. Only this week a survey released by the Canadian Human Rights Commission revealed that one and a half million Canadian women and one million men have experienced sexual attention in a work or service related situation.<sup>17</sup> Because of the doubt as to whether sexual harassment was covered by the anti-discrimination provisions based on sex,<sup>18</sup> the Ontario *Human Rights Code* was amended to include a separate provision which reads:

11. *Report, supra* n. 5, at 388-89

12. Ontario, British Columbia, New Brunswick and Nova Scotia each had Commissions before 1970. But note, I. Hunter, “The Origin, Development and Interpretation of Human Rights Legislation” in *The Practice of Freedom* (Macdonald & Humphrey eds., 1979) 77 at 100, saying: “Since 1970 eight of the ten provinces, as well as the federal government, have either introduced or substantially amended their human rights legislation.”

13. *See*, S.C. 1976-77, c. 33; S.O. 1971-72, c. 119; S.Q. 1975, c. 6; S.N.B. 1971, c. 8; S.N.S. 1972, c. 65; S.P.E.I. 1975, c. 72; S.Nfld. 1974, no. 114; S.M. 1974, c. 65; S.S. 1971-72, c. 104; S.A. 1971, c. 48; S.B.C. 1973, c. 119.

14. *See e.g.*, *Employment Standards Act*, R.S.O. 1980, c. 137, s. 33.

15. The “work of equal value” concept is found in the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, s. 11. The *Quebec Charter*, S.Q. 1975, c. 6, s. 19, provides something similar in the notion of “equivalent work at the same place”.

16. *See*, J. Macpherson, “Sex Discrimination in Canada: Taking Stock at the Start of a New Decade” (1980), 1 C.H.R.R. C7 at C9-10.

17. Release, Canadian Human Rights Commission, April 5, 1983.

18. The argument is that such treatment amounts to discrimination based on sex. *See*, *Bell & Korczak v. Ladass & The Flaming Steer Steak House* (1980), 1 C.H.R.R. D155 at D156 (Ont. Bd. of Inquiry, Chairman Shime) where it is stated:

The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.

6. (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.<sup>19</sup>

An issue which has arisen even more recently is whether or not an intention to discriminate is required for a violation of the anti-discrimination provisions in the various Human Rights Codes.<sup>20</sup> An appeal from the Ontario Court of Appeal will be heard shortly by the Supreme Court of Canada on this issue.<sup>21</sup> Section 10 of the new Ontario *Human Rights Code, 1981* addresses the issue explicitly by introducing the concept of "constructive discrimination".<sup>22</sup> If the result of the conduct is discriminatory the case is made out regardless of intent. The result of the appeal in the Supreme Court will determine the issue under all the other Human Rights Codes.

So much then for the existing mechanisms in place, governmental and legal, and the kind of issues confronting them. What role does the *Canadian Charter of Rights and Freedoms* have to play in all this? The essential difference, of course, between the *Charter* and the earlier human rights legislation is that the *Charter* applies to legislatures and governments. Its object is to invalidate laws and governmental activity which violate the fundamental rights and freedoms of the citizen set out in the *Charter*. The citizen alleging that he or she has been discriminated against by another citizen will continue to proceed under a Code or, of course, under s. 1 of the *Canadian Bill of Rights* which continues to apply at least until s. 15 of the *Charter* comes into effect in two years time.

Some commentators on the *Charter* have expressed the view that the *Charter* applies also between citizens. This view stems from the fact many provisions state that "everyone" or "every citizen of Canada" has certain rights, and can seek relief from a court of competent jurisdiction if any of these rights has been violated. Indeed, it may well be the public's perception that the *Charter* opens up a new and more effective avenue through which individual redress may be obtained. However, section 32(1) specifically provides that the *Charter* applies to "the Parliament and Government of Canada in respect of all matters within the authority of Parliament". The more prevalent view, therefore, appears to be that it is legislative and governmental action and not private action which is caught. Even if this is so, however, Canadians view the *Charter* as a statement of faith, a guarantee of the equality of all persons before the law, and they expect it to usher in a new era in the quest for equality. Are their expectations likely to be fulfilled?

19. S.O. 1981, c. 53.

20. See generally, W.S. Tamopolsky, *Discrimination and the Law* (1982), at 281-83. The issue of intention is explored in Black, "From Intent to Effect: New Standards in Human Rights" (1980), 1 C.H.R.R. C1.

21. *Ontario Human Rights Commission v. Simpson Sears Ltd.* (1982), 38 O.R. (2d) 423. (C.A.): leave to appeal granted by the Supreme Court of Canada, November 1, 1982.

22. *Supra* n. 19, at s. 10, which reads:

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where:

- (a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances; or
- (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

### Prevailing Social Attitudes

The voluminous studies and research done since the Royal Commission on the Status of Women brought in its report in 1970 show that the main impediment to the implementation of sexual equality provisions is prevailing social attitudes. You can legislate equality all you want, but you cannot make people *think* it and *live* it, particularly if they have been conditioned through inherited tradition and their own life experience to the concept of inequality. Indeed, the first step, I believe, is to appreciate the common humanity of men and women. We are human beings first and foremost, and only secondarily male and female. Dorothy Sayers made the point very well in an address given to a Woman's Society in 1938. She said:

A man once asked me — it is true that it was at the end of a very good dinner, and the compliment conveyed may have been due to that circumstance — how I managed in my books to write such natural conversation between men when they were by themselves. Was I, by any chance, a member of a large, mixed family with a lot of male friends? I replied that, on the contrary, I was an only child and had practically never seen or spoken to any men of my own age till I was about twenty-five. "Well," said the man, "I shouldn't have expected a woman [meaning me] to have been able to make it so convincing." I replied that I had coped with this difficult problem by making my men talk, as far as possible, like ordinary human beings. This aspect of the matter seemed to surprise the other speaker; he said no more, but took it away to chew it over. One of these days it may quite likely occur to him that women, as well as men, when left to themselves, talk very much like human beings also.<sup>23</sup>

There is little doubt that the social institutions I have been asked to consider, the school, the church and the family, each played a key role in the formation of social attitudes inimical to the concept of sexual equality.

#### (A) The School and Family

Sociologists seem to agree that sex stereotyping begins in infancy, and that long before they reach school age children are aware of many aspects of the sex structure. Dr. Esther Greenglass of the Department of Psychology at York University says:

In (fairy tales), part of the generally accepted child folklore, a girl has only to be beautiful to get the reward — the boy. Girls frequently win the prize if they are "the fairest of them all". Boys, on the other hand, win if they are bold and active. The prince forges his way through a jungle full of thorns and other dangers because he has heard of sleeping Beauty's loveliness. She lies asleep in the ultimate state of passivity, waiting for her brave prince to awaken her and save her. Cinderella, too, leads a passive existence until her beauty captivates the prince during the ball. In fairy tales, girls are not merely passive, they are also often victims and even martyrs. Cinderella, for example, is victimized by her ugly sisters, who keep her dressed in rags and hidden at home. In many of the fairy tales, the glamorous heroine is a passive victim who has to depend on others, such as men and fairy godmothers to improve her lot.<sup>24</sup>

Research on picture books and school readers also discloses this kind of stereotyping of masculine and feminine characteristics to which the child is exposed from a very early age. Indeed, by the time they reach five or six years old, children are already conscious of the superior value placed on masculinity in our society. Most little boys, and a substantial proportion of girls, exhibit a

23. D.L. Sayers, *Are Women Human?* (1971), at 35 (Address given to a Women's Society, 1938).

24. E.R. Greenglass, *A World of Difference: Gender Roles in Perspective* (1982), at 59.

preference for the male role. This is natural: it is much more exciting and adventuresome and more in tune with that stage in a child's development.

Parents, however, play a major role in injecting sex type behaviour in their children. They encourage an interest in the appropriate types of games and activities. Girls are given toys such as miniatures of cooking and homemaking utensils which encourage passivity, uncomplicated behaviour and solitary play. Boys are given action toys that encourage rougher play, curiosity, creativity and achievement. Girls are encouraged to help with the younger members of the family, to dress and feed and change them. Boys may, at most, be asked to keep any eye on them. Mothers at an early stage inculcate in their daughters the importance of their appearance and their looks. Boys, on the other hand, are suspect if they are "too clean" or "fussy as a girl" about their appearance. Girls are told that they must learn how to perform domestic tasks, because when they grow up they will have homes of their own and be wives and mothers. Boys are seldom told that they must prepare themselves to become husbands and fathers. Rather they are encouraged to think about what they want to be when they grow up: a doctor, an airline pilot, a hockey player or an engine driver — an active provider like father.

Mother and father also constitute role models for their children and the child subconsciously absorbs the values implicit in the parents' conduct. This is well illustrated by the following anecdote. The scene is set in a fairly expensive restaurant to which a man has taken his wife and six year old daughter for dinner. The black tie waiter is politely taking the order. "Yes, I think I will have the soup and veal; my wife is rather fond of fish so she will have the broiled lobster; and Suzanne here will have the child's portion of chicken." The waiter then turned to the wife "And for you, Ma'am?" "Yes, I think I'll have the lobster as my husband suggested." The waiter then turned to the young girl "And you, young lady, what will you have?" Before she could answer the husband interjected "The child's portion of chicken for her." Completely ignoring him the waiter insisted "Suzanne, what would *you* like?" Astonished, she turned to her father and blurted out "Gee, Daddy, he thinks I'm real!"

The values inculcated in the family are reinforced in the school system. Textbooks feature girls with dolls and teacups, and boys with fire engines and scientific equipment. Girls congregate in school playgrounds in small groups spending considerable periods of time talking and socializing. Boys play action games that encourage mastery of the environment, decision-making and the spirit of competition. They learn to be assertive and aggressive. Girls learn to express themselves, to be sociable and to develop their interpersonal skills. By the time they enter their teens the stereotyping is almost complete.

But all this is changing. Due in large part to the influence of the feminist movement, a dramatic re-assessment of these stereotypes has taken place over the past twenty years. Parents today don't want to have their children trained for a way of life which is no longer relevant. They have become acutely conscious of the conditioning effect of children's books and games and now, of television, on the minds of their children. They are sufficiently concerned to form themselves into parent action groups to confront the toy manufacturers, the publishers, the broadcasters and the teachers.

Moreover, the family itself has changed. Today's young people are living different lives from their parents and grandparents. They are developing new lifestyles more responsive to their needs and to their social and economic surroundings. The dual-income family, the single-parent family, even the gay couple are becoming common-place. Indeed, I note that a hotel here is offering in its brochure a "Weekender" family price and a single parent price! Statistics show that the percentage of married women in the work force in Canada rose from 4.5% in 1941 to 47.4% in 1979. Men are shopping for the groceries, doing their share of the household chores, dropping their wives off at the office. They are participating in the rearing of their children as never before.

### **(B) The Church**

And what of the church, that all pervasive institution which has had such an influence on the school and family and even on the law itself?

Virtually all theological writing has been done by men. Some twenty years ago I belonged to a study group of four married couples whose object was to examine the effect of this phenomenon on the development of church doctrine. Our interest had been sparked by an article written by a woman in which she pointed out a distinct masculine bias in what constituted sin and temptation. The biblical myth of creation had been interpreted in such a way as to make the woman responsible for the man's fall and all the dire consequences which followed. It was well illustrated in the *New Yorker* cartoon depicting an incredulous Adam accepting the forbidden fruit from the temptress Eve with the caption below: "What! An apple for me? Well I'll be damned!"

We soon learned that the important element in theological thinking was not simply what the biblical texts said, but the interpretation which was placed upon them. The Bible, of course, reflected the socio-cultural standards of the time and reinforced the traditional superiority of the male. The descriptions of God as King, Judge, Warrior and Father are all overwhelmingly masculine. It has been said that the Hebrew Bible "is a man's 'book', where women appear for the most part simply as adjuncts of men, significant only in the context of men's activities".<sup>25</sup> The Christian scriptures, the Gospels and Letters, and other early Christian writings were all composed by men and new religion was still heir to the male-oriented tradition of Judaism. It was taken for granted in the early church that women would stay at home, bear children, obey their husbands and keep quiet.

As the tangled web of Christian theology developed over the centuries, the male obsession with the sin of lust and the evils of the flesh did little to promote an objective understanding of women. It has been pointed out that in the writings of the church fathers the three faces of Eve were (1) that of harlot — to tempt man to sin; (2) that of wife — his property and instrument of procreation; and (3) that of virgin — a spiritualized ideal. And these concepts and definitions by men have, without a doubt, influenced the image of women in Christian thinking throughout the years.

Some writers allege that these same concepts have determined women's place in the church as an institution and that this became especially apparent as

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25. P. Bird, "Images of Women in the Old Testament" in *Religion and Sexism* (R. Reuter ed., 1974) 41 at 41.

canon law developed. It has been said that "canon law demonstrates better than perhaps any other discipline the inordinate degree to which Christianity has guided Western civilization in its attitudes toward women".<sup>26</sup> The history of canon law reveals the subordinate and inferior status to which woman is relegated when her nature is defined by men. The rules relating to marriage, property, priesthood, inheritance, testimony, criminal punishment, education and even her own person amply demonstrated her inequality before the law. But more serious, perhaps, was the deleterious effect that canon law had on the development of the common law. Blackstone declared in his Commentaries that whoever wished "to gain insight into that great institution, the common law, could do so most efficiently by studying canon law in regard to married women".<sup>27</sup> As a result of the gradual but steady incorporation into English common law of those aspects of ecclesiastical canon law the inequality of women was upheld by the state as well as by the church.

As the years moved on the so-called reformation, while introducing the new doctrines of vocation and the priesthood of all believers, did little to advance the social status of women. It has been pointed out that Martin Luther "contributed only one new feminine identity, the parson's wife".<sup>28</sup> These minister's wives were given some responsibility in the areas of administration, counselling and music, but they were still subject to the husband as master and head of the household. The woman was still "named by the man she married in much the same way as Adam named Eve, along with the animals".<sup>29</sup> John Knox in his opposition to a Catholic Mary Queen of Scots wrote that women, contrary to nature and the Bible, were usurping man's God-given authority to rule nations. The title of this pamphlet speaks for itself: "The First Blast of the Trumpet against the Monstrous Regiment of Women"!

The protestant churches, as they proliferated in their "57" different varieties, reflected the traditional attitude of women, and even in Karl Barth, the great exponent of neo-orthodox protestant theology, woman still remained in a position of subordination.<sup>30</sup> In the western world, then, a strong argument could be made that women have been ill-served by their male-dominated religions. One statistic remains patently irrefutable. In the three religious traditions that predominate in our society — Catholic, Jewish and Protestant — nearly all Ministers are men, nearly all Rabbis are men and all Priests and Bishops are men. It is almost inevitable that a male view-point should continue to be dominant.

So much in history. Where are we today? In the two decades that have elapsed since my membership in that study group there has been a feminist revolution which has precipitated a crisis of confidence in the heart of the church itself. For the first time in Christian history, a new profession has appeared on the horizon: the woman theologian. For the first time, we have a genuine feminine view-point on and critique of the content of Christian doctrine. I said at the beginning that what was significant was not what was

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26. C.M. Henning, "Canon Law and the Battle of the Sexes" in *id.*, 267 at 268.

27. W. Blackstone, *Commentaries on the Laws of England*.

28. E. Erickson, *Young Martin Luther* (1963), at 71.

29. "Luther and the Protestant Reformation: From Nun to Parson's Wife" in *Women and Religion* (Clark and Richardson eds., 1977), at 133-34.

30. "The Triumph of Patriarchalism in the Theology of Karl Barth" in *id.*, at 239.



written in the sacred texts, but how they were interpreted. Until the present, a male interpretation has been the only interpretation. Now women theologians are contributing a new and fruitful interpretation of the Bible, discovering among other things, as did Mary Daly<sup>31</sup>, that God is non-sexual and no longer needs to be characterized as He; that women in the the Hebrew bible were held in higher honour than in other contemporary religions, but unfortunately their status became frozen in tradition and evolved no further; that the so-called fall of Eve may be interpreted as a leap into freedom and knowledge; that in the Acts of the Apostles a fairly prominent role was given to women in the primitive church and that only later did the institution revert to traditional ideas of women's place in the social order; that the heresies of the early church preserved a greater tradition of female freedom; that there are specific ethical issues concerned with child-bearing of which men have no direct experience.

The new liberation theology which originally dealt with racism and poverty now includes a theology of human liberation in a feminist perspective. In a profound work, Letty M. Russell insists that a "feminist theology strives to be *human* and not just *feminine*, as other forms of theology should strive to be *human* and not just *masculine*".<sup>32</sup>

Women are involved now in the study of canon law and some of them have come to the conclusion that, at least theologically, there is no reason why women should not be admitted to the priesthood. Several protestant churches are giving a full and equal role to women in the ministry and just two years ago the United Church of Canada elected its first woman Moderator.

It is apparent that lay women in the church are no longer content to be "ladies auxiliaries", to be bakers of cakes and lickens of stamps. Their involvement with civil rights on behalf of others has led them to seek equal rights for themselves. As Elizabeth Farians has written:

The basic argument for women's rights is justice. The hardness of the line is most evident in relation to the church. The church itself, i.e., its doctrine, practice and law, cannot be excepted. Justice does not admit of exception. If something is due, it is due. If women have rights, they have rights in the church the same as anywhere else.<sup>33</sup>

Given that we have made some progress in breaking down the deeply rooted social attitudes that have impeded equality in the past, what other obstacles are there to the implementation of the principle of sexual equality? I think there are two major ones.

### 1) Legislative Limitations

The first is the paradox at the heart of our human rights legislation. I referred earlier to the multifunctional role of the various Human Rights Commissions: their administrative and enforcement function and their research and education function. Enforcement involves four phases under all the Acts: complaint, investigation, settlement and adjudication. Once an acceptable complaint is filed, the Commission, not the complainant, controls the

31. See, M. Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (1973) and M. Daly, *The Church and the Second Sex* (1975).

32. L.M. Russell, *Human Liberation in a Feminist Perspective* (1974), at 19. See also, O'Connor, *Liberation Theologies and the Women's Movement: Points of Comparison and Contrast* (1975).

33. Elizabeth Farians, "Justice: The Hard Line" (1971), 12 *Andover Newton Quarterly* 191 at 199.

process. The Commission must investigate the complaint and attempt to settle it. If attempts at settlement fail, then the Commission may (or may not) ask the Minister to appoint a Board of Inquiry to look into the complaint. The Minister may (or may not) do so. If he does, the Commission then becomes an advocate in the cause. The complainant may obtain his own counsel if he wishes.

Several problems arise from this procedural framework. The first is that the private interest of the complainant in vindication may be quite at odds with the public interest in settlement. Yet, in the initial stages of the proceeding, the Commission is responsible for both. How can you enforce the Act in the complainant's interests and conciliate and settle the claim in the public interest at the same time? How can you wear these two hats? How can you be both master of the process and advocate in the cause? And how can the complainant who has refused to settle feel confident that his refusal has not influenced his chances of appearing before a Board of Inquiry or, worse still, has not influenced the position taken by the Commission at the hearing before the Board? One wonders if the public interest in settlement has not usurped the means available to the victims of discrimination for redress of the wrongs done to them.

Another aspect of the paradox in which Human Rights Commissions are caught, arises from their duty to resolve complaints through conciliation and settlement and their duty to educate. Complaints which are settled attract little publicity. Indeed, a substantial part of the inducement to the person complained against to settle is that his or her violation of the complainant's rights will be accorded complete confidentiality and anonymity. Yet, as Professor Harry Arthurs has pointed out, "public respect for the policies embodied in the statute is enhanced by publicity . . ." <sup>34</sup> Moreover, even complaints that go before a Board of Inquiry attract little publicity, although they are now reported in the Canadian Human Rights Reporter. They do not trigger public condemnation, and an excellent opportunity for education through illustration and example is thereby lost.

## 2) The Difficulty of the Concept

Quite apart from the problems pertaining to the legal mechanisms for achieving sexual equality, there is also the difficulty inherent in the concept itself. An excellent illustration is provided by the British Columbia case of *Tharp v. Lornex Mining Company Limited*.<sup>35</sup> Lornex ran a copper mining operation in the Highland Valley, British Columbia, and engaged some 500 employees, all males, in production and maintenance. The remaining employees, including about thirty women, worked in support functions. Free accommodation and board was provided in a camp at the mine site, but to men only. A complaint was filed that this amounted to discrimination and the Human Rights Commission ordered the company to make "camp accommodations available to female employees on the same terms and conditions as male employees". Ms. Tharp, a laboratory technologist, then applied for camp accommodation but when she arrived at the site she found that the

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34. *Ruest v. International Brotherhood of Electrical Workers* (unreported, Ont. Bd. Inquiry, April 9, 1983), at 24. This case is cited in Ian Hunter, "Civil Actions for Discrimination" (1977), 55 Can. Bar Rev. 106 at 118.

35. Unreported decision of a Board of Inquiry under the Human Rights Code of B.C. (1975). Reference is made to this and other unreported decisions cited at notes 37 and 38, *infra*, in Tamopolsky, *supra* note 20.

company had simply made the facilities, clearly designed for use by the male sex only, available to her just as they were for men. She faced the embarrassment of sharing the toilet and washroom facilities with the men. Lornex's position was that it was doing exactly what the Commission had ordered it to do, namely providing her with accommodation on the "same terms and conditions as male employees". How could it be discriminating if everyone received identical treatment?

The Board of Inquiry cut that argument short:

We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination.

It defined the discriminatory act as follows:

Lornex failed to offer to the complainant toilet and washroom facilities which could be used with the same degree of privacy provided to the male residents of the other bunkhouses and, indeed, to all male residents prior to her arrival. The privacy that was missing was freedom from intrusion from the opposite sex. We have concluded that Ms. Tharp was discriminated against by virtue of the nature of the accommodation provided to her and that the basis for that discrimination was Ms. Tharp's sex. She was inserted into an exclusively male domain and denied the privacy extended by Lornex to most of the male residents on the campsite. Ms. Tharp was therefore discriminated against on the basis of her sex.<sup>36</sup>

The message here seems to be that identical treatment is not necessarily synonymous with equal treatment if the identical treatment is imposed on those who cannot effectively utilize it.

The case of *Colfer v. Ottawa Board of Commissioners of Police*<sup>37</sup> highlights another difficulty with the concept. It raised the issue of mandatory height requirements which had a disproportionate impact on women. The Ottawa Police Department required a minimum height of five feet ten inches. Evidence showed that less than 5% of the general female population, but almost half of the male population, were that tall. When the complainant applied for membership in the Force there were 580 men in it and one woman, but no intention to discriminate against women was established. The Board was faced with the question: is a neutral employment standard which has a disproportionate impact upon women discriminatory? The Board felt that it was, unless it was a bona fide and reasonably necessary qualification for the job. Chairman Cumming held that it could not be justified on that ground. There was no rational relationship between the height requirement and the tasks police officers were required to carry out. This was therefore a clear case of what has come to be known as "effects discrimination".

A useful contrast to *Colfer* is the recent decision in *Marcotte v. Rio Algom Limited*.<sup>38</sup> In that case the employer introduced a housing assistance program for certain classifications of employees. The complainant, who belonged to one of the excluded classifications, applied for assistance. The evidence established that approximately 73% of the employees in the excluded classification were female and that the proportion of female employees in the eligible classification was negligible. The Tribunal said that it accepted in

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36. *Id.*, at 12-13.

37. Unreported decision of a Board of Inquiry under the Ontario Human Rights Code (Chairman Cumming, 1979). Hereinafter referred to as *Colfer*.

38. (1982), 3 C.H.R.R. D988 (Tribunal decision under the *Canadian Human Rights Act*).

principle that discrimination can be indirect and unintentional and can result from adverse impact. It approved, in other words, the principle of "effects discrimination". However, it found that the real issue in the case was whether the employer was justified in implementing the housing assistance program and concluded that it was. Since the employer could not make housing assistance available to all employees, the only question was whether its selection policy was reasonable. The Chairman posed the question: "What constitutes the proper standard required of an employer in the establishment of policies or practices potentially discriminatory in result?" And provided the answer:

In the case before us the policy or practice adopted by the employer appears reasonable and fair on the face of it, as it provides employees with a clear statement relative to the employer's housing policy. The employer maintains that the excluded classifications are founded on the degree of skills and training required from employees, and the policy relating to the eligible classifications best answers the needs of the employer in what was recognized as a business necessity . . . .<sup>39</sup>

In making "business necessity" a good defence, this case may have gone quite a way towards undermining the concept of "effects discrimination".

*Dubniczky and Proulx v. Tiffany's Restaurant*<sup>40</sup> illustrates how the sexual equality principle can shatter a life-long dream. Mr. Kiriakopoulos owns and operates Tiffany's Restaurant in Hamilton, Ontario. According to the evidence it is a superior quality restaurant specializing in French cuisine prepared and served in the European tradition. This means, essentially, that many popular dishes, such as flambés, crepes, Caesar Salad, etc., are prepared, not in the kitchen, but "live" before the customer's eyes at his or her own table. Ever since his arrival in Canada from Greece Mr. Kiriakopoulos testified that he had dreamed of operating a fine restaurant in the European tradition, which means, among other things, that male waiters do the preparation of cuisine at table side.

On May 18, 1979 Mr. Kiriakopoulos inserted an ad in the *Hamilton Spectator* "Experienced waiters/waitresses in French service for elegant dining room. Apply in person to Tiffany's Continental Cuisine" and in response to this advertisement Dubniczky and Proulx attended at Tiffany's restaurant for an interview. However, they received no interview, and were told by the manager that the job was open to male waiters only. They were angry at this and filed complaints with the Ontario Human Rights Commission.

Mr. Kiriakopoulos was very frank. He admitted that he was looking only for male waiters and said the only reason the advertisement referred to waiters/waitresses was that the *Spectator* required it. Indeed, Mr. Kiriakopoulos indicated to the Board of Inquiry that he had continued to maintain the male classification when hiring. Since there was no evidence to establish that sex was a "bona fide occupational qualification and requirement" for this particular employment Mr. Kiriakopoulos was found in violation of the *Human Rights Code*. He admitted that a woman could do the job just as well as a man but said it was his personal preference to run his restaurant "on the

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39. *Id.*, at D990.

40. (1981), 2 C.H.R.R. D485 (Ont. Bd. of Inquiry).

European model". "Personal preference" was held to be no defence to discrimination under the Code.

And, finally, a case which illustrates that what is sauce for the goose is also sauce for the gander. In *William Boyd v. Mar-Su Interior Decorators Limited*<sup>41</sup> a young man of 19 was turned down for a position which involved putting the finishing or decorative touches to draperies being installed in customers' homes. These finishing touches included pleating or setting the drapes, straightening the hem line if necessary and, also if necessary, fixing the drapes by further sewing or by readjusting the lining. The employer called a variety of witnesses who testified that men were woefully inept at this sort of thing because as a species they lacked the special "touch" required. This was a peculiarly feminine talent which only women could ever hope to master. Needless to say, the Board had little difficulty with this one and expressed the view that the notion that men cannot perform tasks requiring care, taste and delicacy "must be based on myth and old fashioned notions of his conventional role because such an opinion is totally divorced from reality".<sup>42</sup>

The Board was quite right. Reality has changed. Indeed, it is because reality has changed that contemporary feminism has made such an impact. Unlike its predecessor, the woman's suffrage movement of the '20s and '30s, the contemporary movement is "going with the flow". The suffragettes were naive to think that obtaining the vote would lead to a changed social status for women. They completely underestimated the power of the traditional social structure, and were shocked and chagrined to discover that not only their male contemporaries, but their female contemporaries as well, viewed them as nothing more than a "lunatic fringe". The climate of the '60s and '70s was very different. It was a period of wide-spread social ferment characterized by a tremendous sensitivity to discrimination and injustice in all its forms. It was an environment in which the concept of sexual equality took root and flourished.

And the legislators and adjudicators, when they did as Lord MacMillan bade them — lifted up their eyes from their desks and looked out of their windows to the world outside — saw that it had happened.

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41. Unreported decision of a Board of Inquiry under the Ontario Human Rights Code (Chairman Mackay, 1978).

42. *Id.*, at 6.

