

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: IMPACT ON ECONOMIC POLICY AND ECONOMIC LIBERTY REGARDING WOMEN IN EMPLOYMENT*

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I. Introduction

To what extent does the *Canadian Charter of Rights and Freedoms*.¹ limit economic liberty in service of the rights and freedoms it expressly guarantees? To what extent does the *Charter* shift from legislatures to courts the power to determine important questions which have an impact on economic policy*making? These questions require analysis of the operation of the *Charter* in diverse spheres.

In this note, I assess the effect of the equality provisions of the *Charter* on the position of women in employment. I argue that the expectation of some that section 15² of the *Charter* will be a significant instrument for achieving equality in employment, and the concern of others that it will be a significant impediment to the economic liberty of employers, are alike based on a misapprehension of its probable impact. I first outline briefly the nature of the inequality between women and men in employment and then consider to what extent the *Charter* compels its eradication. Finally, I examine whether the nature and pace of the required changes will be left to politically accountable institutions or determined by the courts.

II. The Inequality of Women and Men in Employment

An ever increasing number of women are working outside the home, but the range of and remuneration for their employment lags behind that of men. Men and women are largely segregated into "male" and "female" occupations;³ yet even within the occupations in which women predomi-

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1. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2. Section 15 of the *Charter*:

(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.

3. 77% of employed women work in clerical, service, sales, health or teaching jobs; 26% are in the clerical category: Canada, *Women in the Labour Force: 1986-87 Edition* (Ottawa: Labour Canada, 1987) at 17.

nate,⁴ men have higher average incomes.⁵ In 1985, women's earnings ranged from 51% of men's in sales to 66.7% of men's in clerical work.⁶ The gap appears to be gradually narrowing. In 1971, the average annual earnings of women employed full-time was 59.7% of men's,⁷ but by 1985, the percentage had increased to 65.5%.⁸ The gap is narrower for younger than for middle-aged workers. For the year 1982, average annual earnings for women in the 25-34 year old age group were 78.2% of men's, as compared with 58.7% in the 45-54 year old age group.⁹

Not only do women benefit less than men from full-time employment, but they are at a further disadvantage in that more of them tend to work part-time. In 1985, 26.3% of female workers were employed part-time, as compared with 7.6% of employed men, and 71.9% of all part-time workers were women.¹⁰ The failure to provide part-time workers with proportionally equal pay and benefits¹¹ thus has a greater adverse impact on women.

To the extent that men and women do not participate equally in the range and benefits of employment, women are a disadvantaged group. Their disadvantage results from a number of inter-related differences between women and men referable to the nature and quality of their education and training, the nature and continuity of their work experience, their mobility and flexibility, their responsibility for child care and household management, and their expectations and tastes. These differences are not absolute; rather, they are conditioned by cultural and social values and in turn perpetuate stereotypes which re-enforce those values.

It is sometimes argued that if women are disadvantaged, it is due neither to discrimination, nor to their reproductive role, but is the result of the choices they themselves make.¹² But why is it that women tend to invest less in education or training? Why is it that their work patterns are not like to those of men? Why do they have different expectations and tastes? Why is it that they end up assuming the major responsibility for household management and child care? It is not because of biological necessity but is rather due to ingrained and interlocking expectations about the role of women.

No doubt a portion of the wage gap and occupational segregation can be attributed to overt discrimination against women, but even that, for the

4. *Ibid.*, at 36, 48.

5. *Ibid.*, at 35: "...in 1984 and 1985, there were no occupational categories where the average earnings of women exceeded those of men."

6. *Ibid.*, at 47.

7. *Women in Canada: A Statistical Report* (Ottawa: Statistics Canada, 1985) at 61.

8. *Women in the Labour Force*, *supra*, note 3 at 45. See also at 36: "In 1985, women's average wages as a percentage of men's showed some gain in half of the 24 listed occupations."

9. *Women in Canada: A Statistical Report*, *supra*, note 7 at 61.

10. *Women in the Labour Force*, *supra*, note 3 at 5, 22, 23.

11. See Jeannine David-McNeil, "The Changing Economic Status of the Female Labour Force in Canada", in *Towards Equity: Proceedings of a Colloquium on the Economic Status of Women in the Labour Market* (Ottawa: Economic Council of Canada, Minister of Supply and Services, 1985) 1 at 4.

12. See, e.g., the commentary of Professor Jack Carr which follows this paper.

most part, is the result of stereotypical notions which reflect the systemic disadvantages under which women labour. Overt discrimination is an effect as well as a cause of women's disadvantaged condition. Theoretically, as Professor Becker has argued, a preference to hire, work or deal with men rather than women, regardless of whether the preference is based on prejudice or misinformation, would be costly and in the long run competitive market forces should dissipate it.¹³ However, Professor Gunderson has pointed out that an employer confronted with a costly error may rationalize rather than correct it.¹⁴ When the prejudice, misinformation or rationalization is widely held, the economic costs may not be detected. In any event, as Professor Gunderson notes, even when the costs of discrimination are detected, the cost of adjusting to correct them may outweigh the benefits of doing so.¹⁵

The tendency of sex stereotyping and discriminatory behaviour is to reduce the opportunities available to women, overcrowd those occupations which are considered open and drive down women's wages within those occupations.¹⁶ Thus, even when women make work commitments comparable to those made by men — investing in training, assuming equivalent risks and responsibilities, accepting equivalent working conditions, such as working shifts — they still tend to be paid less than men. Hence nurses, for example, are paid less than electrical repairers.¹⁷

Social attitudes regarding the role of women, although changing, are deeply ingrained. The results of one American study suggest that the disadvantage of being a woman outweighs the disadvantage of being a member of a minority race in that there is greater occupational segregation between white men and white women than there is between white men and black men.¹⁸ Another American study demonstrates that there is no wage gap between white and black women, as there is between white and black men.¹⁹ Even women who have never married and who therefore tend not to be burdened with extra household and childcare duties appear to be dis-

13. Gary S. Becker, *The Economics of Discrimination* (Chicago: U. of Chicago Press, 1967) and various other publications, including "An Economic Theory of Discrimination", in W.E. Block and M.A. Walker (eds.), *Discrimination, Affirmative Action, and Equal Opportunity* (Vancouver: The Fraser Institute, 1982), at 129.

14. Morley Gunderson, "Labour Market Aspects of Inequality in Employment and Their Application to Crown Corporations" in *Research Studies of the Commission on Equality in Employment*, Royal Commission on Equality in Employment (Ottawa: Minister of Supply and Services Canada, 1985) (Commissioner: Judge Rosalie Silverman Abella) 1 at 14.5.

15. *Ibid.*, at 7.

16. *Ibid.*, at 6.

17. In 1983, a general duty hospital nurse (likely to be a woman) earned \$507 per week whereas an electrical repairer (likely to be a man) earned \$525 for the same hours of work: *Wage Rates, Salaries and Hours of Labour* (Ottawa: Supply and Services Canada, 1983), Table A, Maintenance Trades; Table A, item 48, Hospitals.

18. See V. Fuchs, "Differences in Hourly Earnings Between Men and Women" (1971) 94 *Monthly Labor Review*, at 9-15, cited by Naresh C. Agarwal in "Economic Costs of Employment Discrimination" in *Research Studies*, *supra*, note 14, 401 at 409.

19. Walter Williams, "On Discrimination, Prejudice, Racial Income Differentials, and Affirmative Action", in Block and Walker, *supra*, note 13, 69 at 70-73.

advantaged in employment — not in comparison with single men, but as compared to men as a whole.²⁰

Where neither market forces nor government intervention correct these inequalities the economy itself may suffer the consequences. In a study conducted for the Royal Commission on Equality in Employment, Professor Agarwal argues:

Such underutilization of the minority labour force can cause a serious loss of potential national output. It can also prevent the labour market from efficiently correcting demand and supply imbalances in the “bottleneck” industries and occupations. This in turn can cause higher rates of inflation in the economy. Employment discrimination can also produce a higher incidence of poverty among minority workers, necessitating higher social assistance costs.²¹

The economic costs of discrimination may tend to encourage employers to give it up. Similarly, the economic, social and political costs of discrimination may impel governments to adopt policies and enact laws to eliminate discrimination and facilitate equality. Eradication of the inequality between women and men in employment would require fundamental and far-reaching social change. The question I seek to address, however, is not whether governments, employers and others should seek to effect such systemic change, but whether they can now be constitutionally compelled to do so. In other words, the question is the issue of whether the extent and pace of such change will be left to politically accountable institutions or determined by the courts.

III. The Impact of the Equality Guarantees.

A. No Affirmative Constitutional Obligation to Ensure Equality

The *Charter* imposes no express affirmative constitutional obligation on governments or legislatures to take steps to enhance equality or eradicate inequality. The strongest suggestion of such an obligation appears in section 36(1)²² which goes no further than to record a government commitment — but not a guarantee — to “promot[e] equal opportunities for the

20. See Walter E. Block, “Economic Intervention, Discrimination and Unforeseen Consequences” in Block and Walker, *supra*, note 13, 103 at 108–118, wherein he compares the wages earned by never-married men and women and finds a female/male earnings ratio of 99.2%. However, as Prof. Gunderson notes, *supra*, note 14 at 12: The problem with this methodology is that it likely introduces a bias in the other direction (i.e., understating the degree of discrimination) because males and females who are never-married and over 30 may systematically differ in terms of unmeasured factors that are correlated with their earnings. For example, females who are over 30 and never married may be career-oriented whereas males in that state may have personality traits that are undesirable for labour market behaviour. In essence, one may be comparing a select sample of some of the ‘best’ females with some of the ‘worst’ males; hence, one ought not to be surprised that much of the overall earnings gap disappears. (Formally, this is an econometric problem of sample selection bias due to differences in unobserved heterogeneity.)

21. Agarwal, *supra*, note 18 at 403.

22. The provision is included in Part III of the *Charter’s* Equalization and Regional Disparities 36(1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians,
 (b) furthering economic development to reduce disparity in opportunities; and
 (c) providing essential public services of reasonable quality of all Canadians.

well-being of Canadians." As Professor Hogg points out, "this obligation is probably too vague, and too political, to be justiciable."²³ In addition, the commitment, though couched in general terms, is limited by the context and the heading under which it appears to regional disparities.²⁴ Accordingly, it imposes no affirmative constitutional obligation even to provide equal opportunities to Canadian men and women, much less to establish their equality in Canadian society.²⁵

It may be argued that section 28, which guarantees all *Charter* rights and freedoms equally to male and female persons, could operate together with a liberal construction of section 7²⁶ to impose an affirmative constitutional obligation to provide equal economic security to men and women.²⁷ However, this argument faces significant — and probably insurmountable — hurdles: first, establishing that "security of the person" includes economic security; and second, establishing that such economic security means more than "the ability to earn enough to provide necessities."²⁸

As discussed below, section 15 of the *Charter* does not guarantee either equality of opportunity or equality in the allocation of power and benefits in Canadian society. It is limited to precluding governments from creating or perpetuating inequalities by operation of law.²⁹ Governments are not required to take steps to enhance equality but are merely permitted to do so.³⁰ In short, the *Charter* does not guarantee equality at large, but only equality in the operation of law.

B. Equality in the Operation of Law

Section 15(1) of the *Charter* guarantees procedural equality in the application of the law (equality before the law) and substantive equality in the provisions of the law (equality under the law, equal protection of the law and equal benefit of the law). Theoretically, it is possible that this guaran-

23. Peter W. Hogg, *Constitutional Law of Canada*, 2nd Ed. (Toronto: Carswell, 1985), at 119.

24. For a discussion of the extent to which headings and context will be considered to restrict the application of otherwise general language such as that used in section 36(1), see *Shapinker v. The Law Society of Upper Canada* (1984), [1984] 1 S.C.R. 357, 53 N.R. 169, 9 D.L.R. (4th) 161. See Hogg, *supra*, note 23 at 659.

25. But see Mary Eberts, "Sex and Equality Rights", in Bayefsky and Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), 183 at 225.

26. Section 7 of the *Charter*:

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.

See *Reference re Section 94(2) of the Motor Vehicles Act* (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, [1986] 1 W.W.R. 481 (S.C.C.) and *R. v. Morgentaler, Smoling and Scott* (1988), 82 N.R. 1 (S.C.C.), in which the Supreme Court of Canada construes section 7 of the *Charter* as protecting substantive as well as procedural interests.

27. See Mary Cornish, "Ontario Equal Pay Legislation as Sex Discrimination Under the Charter", in *Report on the Statute Audit Project (Charter of Rights Educational Fund, Toronto, 1985)*, at 5.23-47; and "Present Equal Pay for Equal Work Legislation: Does It Violate the Charter?", in *Equality Rights and Employment Law: Preparing for Fundamental Change* (Toronto: The Canadian Institute for Professional Development, 1985), B.1 at B.24-27 and B.39.

28. See the discussion in *Re Service Employees' Int'l Union and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231, 44 O.R. (2d) 392 (Div. Ct.), per O'Leary J., referring to the Law Reform Commission of Canada's consideration of "security of the person". See Hogg, *supra*, note 23 at 745.

29. See section 15(1) of the *Charter*, *supra* note 2.

30. See section 15(2) of the *Charter*, *supra*, note 2.

tee could be very broadly read as requiring that everyone "benefit equally from the existence of a given legal regime,"³¹ thus imposing an affirmative obligation on legislatures, governments, and courts to cure inequalities. In its widest conceivable scope, then, section 15(1) could be interpreted as mandating a socio-economic revolution. It goes without saying that there is no evidence in the legislative history of the *Charter* that this result was intended; nor would this interpretation be textually sound. Section 15(1) guarantees only that the law will operate without discrimination. It does not require that the law be used to put everyone in an equal position. The express allowance of affirmative action in section 15(2) would not be necessary if section 15(1) imposed a constitutional obligation to enhance equality and eradicate inequality.

At the other end of the spectrum, the narrowest meaning that could be given to the guarantee of equality in the operation of law would restrict it to laws actually enacted or promulgated (as the phrase "laws of Canada" in section 101 of the *Constitution Act, 1867*³² has been restricted). This interpretation has been much criticized.³³ For the purpose of section 15(1), courts are more likely to hold that — as in sections 1³⁴ and 52(1)³⁵ of the *Charter* — "law" includes the common law. Principles of common law which could be codified in or altered by legislation should be treated as subject to the same equality standards as is legislation.

If the equality provisions apply only to legislation, their impact could theoretically be constrained by the political majority, or at least by those who dominate the political process. By refusing to pass new legislation or by repealing existing legislation the majority could remove whole areas of economic and social policy from the purview of section 15(1). Professor Tarnopolsky, as he then was, explains:

Section 15 refers to equality before and under the law, as well as equal protection and benefit of the law. Therefore, although an anti-discrimination law would itself have to conform to section 15, it, and not section 15, would be directly applicable to discriminatory actions by private persons.³⁶

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31. This reading is considered, but not advocated, by Prof. Marc E. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 *Supreme Ct. L. Rev.* 131 at 135, note 21.
 32. *Constitution Act, 1867*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11, section 101: The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide ... for the Establishment of any additional Courts for the better Administration of the Laws of Canada.
 33. Peter W. Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981) 30 *U.N.L.* 9; John M. Evans, "Federal Jurisdiction — a Lamentable Situation" (1981) 59 *Can. Bar Rev.* 124; John B. Laskin and Robert J. Sharpe, "Constricting Federal Court Jurisdiction: A comment on Fuller Construction" (1980) 30 *U.T.L.* 283.
 34. *R. v. Therens* (1985), [1985] 1 *S.C.R.* 613, 18 *D.L.R.* (4th) 655, [1985] 4 *W.W.R.* 286 per LeDain J., obiter, at 680; see Hogg, *supra*, note 23 at 684–86.
 35. *Dolphin Delivery v. Retail, Wholesale and Dept. Store Union* (1986), [1986] 2 *S.C.R.* 573, 33 *D.L.R.* (4th) 174, [1986] 1 *W.W.R.* 577 per McIntyre J., at 190–191.
 36. Walter S. Tarnopolsky, "The Equality Rights in the *Canadian Charter of Rights and Freedoms*" (1983) 61 *Can. Bar Rev.* 242 at 256.

This view is also reflected in cases like *Harrison v. University of British Columbia*³⁷ in which the British Columbia Supreme Court held that section 15(1) applies to "law" and to the way in which law is applied; it is not relevant to conduct unconnected with the creation or application of law. In the absence of legislation, entitlements and obligations would be determined in accordance with the common law. Yet according to the reasoning of the Supreme Court of Canada in *Dolphin Delivery v. Retail, Wholesale and Department Store Union*,³⁸ the *Charter* would apply to litigation between private parties based on common law "only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom."³⁹ This view has been criticized because it affords little scope for the operation of section 15(1) in private sector employment disputes governed by the common law.⁴⁰

Even if the *Charter* did apply to ordinary private litigation involving common law issues there would appear to be little scope for its application to sex equality in employment. At common law, an employer can contract with an employee for her services at whatever wage and working conditions are mutually agreeable in the circumstances. Presumably, the terms of such a contract, which are determined by the parties and not by the common law,⁴¹ would not be reviewable under section 15(1) of the *Charter*.

Accordingly, I conclude that the *Charter* does not guarantee equality to all Canadians. It imposes no affirmative obligation on legislatures, governments or courts to achieve equality; rather, it requires equality only in the operation of the law. To the extent that relationships and activities are not regulated by law, they are not subject to review on equality grounds. This interpretation enhances the choices available to democratically elected governments under the Constitution. They need not intervene in matters of economic and social policy, but, if they do, they must provide for procedural and substantive equality in the operation of the law. Hence the guarantee of equality in the operation of law does not preempt political responsibility by requiring legislative action, but where the legislature does choose to intervene it must meet constitutional standards. Thus, if those who favour de-regulation could actually persuade a majority to return to *laissez-faire*, they could limit much of the impact of the equality guarantee.

37. (1986), 30 D.L.R. (4th) 206 at 215; 14 C.C.E.L. 90 at 99 (B.C.S.C.). The Court held that mandatory retirement practices at the University did not involve "law" within the meaning of subsection 15(1) of the *Charter*.

38. *Dolphin Delivery*, *supra*, note 35 at 191 ff. See also *Re Blainey and Ontario Hockey Association* (1966), 24 D.L.R. (4th) 728, 54 O.R. (2d) 513, 14 O.A.C. 194 (C.A.), leave to appeal to S.C.C. denied (1967), 73 N.R. 76n, 58 O.R. (2d) 274n., 21 C.R.R. 114n.

39. *Dolphin Delivery*, *supra*, note 35, per McIntyre J. at 195.

40. (See Brian Slattery, "The *Charter's* Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32 McGill L. 905.

41. Where the common law does distinguish between the rights and obligations of women and men (as, for example, in obliging a husband to support his wife but not vice versa) the *Charter* could apply.

C. The Standards of Equality and the Structure of Analysis

The impact of the equality provisions will depend not only on the range of activities and relationships regulated by law — which is at least partly within political control — but also on the standards of equality applied by courts when the operation of a law is challenged. Where sex equality is at issue, courts must deal with two questions. The first is whether it is sufficient simply to accord women “formal legal equality”.⁴² It is beyond controversy that, at the very least, section 15(1) of the *Charter* guarantees this kind of equality. Women are entitled to the same legal rights and possess the same legal capacities as are enjoyed by men. They are entitled to vote,⁴³ to hold property, to enter into contracts, to hold public office and to enter the professions to the same extent as are men. The removal of legal disabilities and incapacities, while necessary, will not, however, be sufficient to establish equality before and under the law.

Courts must select an appropriate test for determining whether the law operates equally in conferring protections and benefits on women and men. At least two choices are available. First, a court could hold that equality in the operation of law is denied only if the law treats men and women differently. This approach would ignore any physiological or socio-economic differences between women and men which could cause the same treatment to have a different impact on them. Proponents of this approach argue that, even though its short-term impact on women would be harsh, it is the only way to ensure eventual elimination of stereotypes which subjugate women.⁴⁴ The difficulty with this approach, however, is that it forces women to conform to male norms in order to be “equal”, which may simply be another type of inequality. In my view, courts can guard against the influence of stereotypes without denying that, in some circumstances, women and men may require different treatment in order to achieve equality. It is important, however, to determine, first, whether there is a *prima facie* inequality in the operation of law, and, second, as a separate question, whether any such inequality, can be justified in constitutional terms. It is at this latter stage that one must guard against the influence of stereotypes.

For the purpose of determining whether a law *prima facie* infringes equality, impact as well as treatment is material.⁴⁵ A law which appears to be neutral in its application to women and men may actually operate to the disadvantage of women and infringe section 15(1) of the *Charter* as, for example, where requirements for entitlement to government pension benefits fail to take account of and unduly penalize women who have withdrawn from the labour force to bear and raise children. Such a provi-

42. See Eberts, *supra*, note 25 at 185.

43. This right is expressly guaranteed by section 3 and section 28 of the *Charter*.

44. Wendy Williams, “Sex Discrimination Under the *Charter*: Some Problems of Theory” (1984), C.H.R.R. C/83-1, C/83-4.

45. See *Re Blainey and Ontario Hockey Association*, *supra*, note 38 at 526; and *Re Ontario Human Rights Commission and Simpsons-Sears Ltd.* (1985), 64 N.R. 161, 23 D.L.R. (4th) 321, 52 O.R. (2d) 799 (S.C.C.), per McIntyre J., at 331-332 (D.L.R.).

sion should be struck down leaving government to develop other neutral criteria which accommodate the career models of both men and women. Accordingly, I suggest that a court should find a *prima facie* inequality in the operation of law if: (1) the law denies women formal legal equality; (2) the law treats women differently from men; or (3) the law has a disparate impact on men and women.

Once a person challenging the operation of a law has established a *prima facie* inequality, the onus should then shift to the proponent of the law to establish one of two things, namely: either that the law is intended to ameliorate the conditions of disadvantaged women — whether individually or as a group — and is therefore justified under section 15(2) of the *Charter*, or that the law distinguishes between men and women in a way which is demonstrably justified in a free and democratic society as provided in section 1 of the *Charter*.⁴⁶ In light of the special priority given to the guarantee of equal rights and freedoms to male and female persons under section 28 of the *Charter*,⁴⁷ the standard of justification for any such distinction should be strict. As will be argued later, in my view the only distinctions which should be upheld under section 1 are those specifically related to reproductive differences.

The advantages of adopting this approach to the sex equality provisions of the *Charter* are two-fold. First, it accords a reasonable meaning to each of section 1, sections 15(1) and 15(2), and section 28. Second, it enables courts to distinguish reasonably among the three types of sex inequality which might appear in the operation of law. The first type consists of special protections, benefits, opportunities or preferences provided to individual women or women as a group in order to compensate for the effects of unequal treatment in the past or to interrupt the cycle of socio-economic inequality so that it will not be perpetuated into the future. Such measures could be justified, where appropriate, under section 15(2). Insofar as these measures and policies are ultimately effective, the opportunity to make such justifications would be temporary.

The second type of sex inequality which may appear in the operation of law is based on what seems to be — at least in the present state of technological development — an immutable difference between the sexes, namely, the ability to bear children. Special benefits or protections accorded to women on the basis of this reproductive distinction could not be justified under section 15(2) of the *Charter* as ameliorating conditions of disadvantage; women are childbearers by reason of genetics and not because they are disadvantaged. However, special benefits or protections related to childbearing could be justified under section 1 of the *Charter*. By operation of section 28, section 1 is arguably limited to justifying only

46. Section 1 of the *Charter*:

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.

47. Section 28 of the *Charter*:

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

those sex inequalities in the operation of the law which are required because of reproductive differences.

Finally, any sex inequality which is not justified as affirmative action or based on reproductive differences would result in a declaration that the law which embodies it is of no force and effect.⁴⁸ Any law which has a disparate impact on women, denies to them an opportunity or benefit which is available to men, or confers on them a "protection" or "benefit" not available to men, would infringe the *Charter*, unless, as noted above, it could be upheld under section 15(2) or section 1.

Requiring the proponent of an otherwise infringing law to justify the law as either a temporary protection or opportunity, or as necessitated by immutable sex differences, means that a court must be prepared and willing to distinguish real differences which obtain between the sexes from differences that reflect social and cultural role stereotypes. Alternative approaches to the construction of those provisions of the *Charter* concerned with sex equality cloud this important distinction. Thus, if the *Charter* were read as requiring the same treatment of the sexes so as to break the hold of stereotypes, women whose lives have been constrained by those stereotypes would then be deprived, unfairly, of protections upon which they have had to rely. If, on the other hand, socially and culturally induced role separation is accepted as a legitimate basis for differential treatment, the sex stereotypes will be perpetuated indefinitely. By separating real differences from culturally determined differences, courts can uphold only those special protections and benefits tailored to ameliorate conditions of disadvantage or required by physiological differences. In the process sex stereotypes which have already crumbled a good deal will continue to crumble. If governments introduce affirmative policies which, together with changes in social attitudes, enable women to participate more effectively in political and economic spheres, gradually the protections and benefits — other than those related to childbearing — may no longer be necessary.

IV. Potential Problems

A. "Discrimination" in Section 15(1)

The rights guaranteed by section 15(1) of the *Charter* is equality in the operation of law without discrimination. If "discrimination" merely means "distinction,"⁴⁹ then it poses no problem for the analysis suggested above. If, on the other hand, it means "unwarranted distinction,"⁵⁰ an inequality could be justified under section 15(1) itself without recourse to section 15(2) or section 1 of the *Charter*. At this early stage of equality adju-

48. Section 52(1) of the *Constitution Act, 1982*, *supra*, note 32:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

49. Hogg, *supra*, note 23 at 800.

50. See Gold, *supra*, note 32.

dication, several courts have construed "discrimination" to mean "unwarranted distinction", holding that the purpose of section 15(1) is to ensure that persons who are similarly situated be similarly treated.⁵¹ Courts should, however, be cautious in adopting this approach, particularly in cases involving alleged discrimination on the ground of sex.

In my view, the definition of "discrimination" as simple "distinction" is to be preferred for several reasons. First, it provides a consistent and sensible definition of "discriminate" in section 6(3) and "discrimination" in section 15(1).⁵² Second, it is nearer in meaning to dictionary definitions.⁵³ Third, if the operative part of section 15(1) of the *Charter* — like clause 1(b) of the *Canadian Bill of Rights*⁵⁴ — proscribes denial of equality in the operation of law with or without "discrimination" on a named ground, it should not be more difficult to establish *prima facie* infringement of a right when discrimination is alleged; only establishment of the distinction, not its unwarranted nature, should be required. Finally, and most important, it ensures that any justification of an inequality complies either with section 15(2) or with the onus and standard of proof required by sections 1 and 28 of the *Charter*.⁵⁵

B. Effect of Section 28

Section 28 of the *Charter*⁵⁶ appears to preclude Parliament or a legislature from overriding, pursuant to section 33,⁵⁷ the guarantee of equality in the operation of law without discrimination on the basis of sex. Presumably this is not its only function since section 28 was inserted in the draft *Charter* before section 33 was introduced.⁵⁸

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51. See, for example, *Re Andrews and Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305 (B.C.C.A.), decision pending in the Supreme Court of Canada; *Re Blainey and Ontario Hockey Association*, *supra*, note 38; *Smith, Kline & French Laboratories Ltd. v. A.G. Canada* (1986), 34 D.L.R. (4th) 584, 12 C.P.R. (3d) 385 (Fed. C.A.), leave to appeal to S.C.C. refused April 9, 1987 (unreported).
52. See Eberts, *supra*, note 25 at 210.
53. Shorter Oxford English Dictionary:
Discriminate: "to make or constitute a difference in or between; to differentiate..." Discrimination: "the action of discriminating or distinguishing; a distinction (made with the mind or in action); the condition of being discriminated or distinguished."
54. S.C. 1960, c. 44, section 1(b):
"It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ... (b) the right of the individual to equality before the law and the protection of the law; ... See *Curr v. The Queen* (1972), [1972] S.C.R. 889 at 896, 26 D.L.R. (3d) 603 at 611, 7 C.C.C. (2d) 181 at 189.
55. It should be noted, however, that allowing justification of a distinction as warranted under section 15(1) would not necessarily be inconsistent with the scheme of the *Charter* (cf. Eberts, *supra*, note 25 at 215.) Other rights, including the right to be secure against unreasonable search and seizure (section 8) and the right not to be arbitrarily detained (section 9) require a judgment to be made about the validity of a restriction before recourse to section 1.
56. See, *supra*, note 47.
57. Section 33(1) of the *Charter*:
Parliament or a legislature of a province may expressly declare in an Act of Parliament or a legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter*.
58. Chaviva Hosek, "Women and Constitutional Process", in K. Banting and R. Simeon (eds.), *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 280 at 291-95.

The impact of section 28, other than to exclude the operation of section 33, is uncertain. One suggested interpretation is that section 28 precludes any resort to section 1 or section 15(2) to justify a law which operates differently on men and women. This interpretation should be rejected because it begs the question of what is required in order to "guarantee rights equally to male and female persons." It leads inevitably to implementation of a concept of equality which admits of no differential treatment in order to break the legal reinforcement of sexual stereotypes.

This approach to achieving equality does not appear to be widely approved even by Canadian feminists,⁵⁹ let alone by those governments which agreed to the *Charter* and those legislators who enacted it. A holding that section 28 precludes resort to section 1 would put pressure on the judiciary to adopt a definition of "discrimination" in section 15(1) which would enable a court to find that some differences in the operation of the law can be justified. This development could have the unfortunate result of circumventing the onus and substantial burden of proof imposed by section 1 on a party seeking to uphold legislation which otherwise infringes the *Charter*. This risk could be avoided if the equality guarantee were regarded as composed of sections 15(1), 15(2), and section 1 read together. In that event, a role could still be found for section 28.

As argued above, section 28 of the *Charter* serves to emphasize that unequal treatment of women and men before or under the law is to be particularly closely scrutinized to ensure that it is warranted in fact and is not simply a reflection of stereotypes. Furthermore, it gives priority to the equality rights of women and men over other guaranteed rights. Thus, as Professor Hogg asserts, section 28 operates to ensure that "other provisions of the *Charter* be implemented without discrimination between the sexes."⁶⁰ This may be particularly important in light of section 27 which requires that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada. Accordingly, section 28 could be given a fair and full reading without construing it as excluding resort to section 1 and section 15(2).

V. Standards of Proof

Because section 28 of the *Charter* gives special emphasis and priority to guaranteeing rights equally to male and female persons, rigorous scrutiny should be given to any law which treats men and women differently or has a diverse impact upon them.⁶¹

A. Section 15(2)

Section 15(2) of the *Charter* is permissive. Despite the guarantee of equality in section 15(1), section 15(2) allows a legislature or government

59. See, e.g., Eberts, *supra*, note 25, and Mary Jane Mossman, "Gender, Equality and the *Charter*" in *Research Studies*, *supra*, note 14 at 299.

60. Hogg, *supra*, note 23 at 802. Note, however, that Prof. Hogg considers section 28 to be limited to this role.

61. See text, *supra*, at note 43 *ff.*

to enact a law, establish a program or enter into an activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of sex. Section 15(2) could arguably operate in two different ways. First, it could provide support for special protections or benefits which are designed to compensate women for conditions created by their past disadvantage. Second, it could support special programs designed to enhance the equal participation of women in society.

1. Compensation

A law which distinguishes between men and women should not be justifiable on the basis that it compensates women for past disadvantages unless it is established that the law does not simply reflect a stereotype of the nature and role of women but specifically seeks to redress a past disadvantage. Thus a law which makes child support⁶² or family benefits⁶³ available only to female parents should be struck down because it reinforces a sex role stereotype rather than compensating for any past disadvantage. Legislatures must define with more specificity the groups they intend to benefit and not rely on sex stereotypes which are thereby perpetuated.

It is important that legislatures take the initiative in curing equality infringements, especially with respect to laws conferring protections and benefits. Although courts have broad authority under section 24(1) to redress *Charter* infringements,⁶⁴ they are generally unwilling to read into infringing legislation provisions that will cure the infringement.⁶⁵ Instead, the infringing law is more likely to be declared to be of no force and effect. In an appropriate case the court could declare a constitutional exemption,⁶⁶ but it is unlikely to do so where the effect would be to extend a financial benefit to another category of individuals. It is for the legislature to decide whether to redefine the entitlement to benefit or take no action at all and thereby eliminate the benefit entirely. The court's role is simply to ensure that in allocating benefits, governments do not infringe constitutional rights. Accordingly, although courts may identify inequalities in the operation of law, the initiative to cure them should remain primarily with the legislatures. As institutions the legislatures are better equipped than the courts to determine how a law should be framed to apply equally to

62. *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429, [1986] 4 W.W.R. 289, 2 B.C.L.R. (2d) 324 (B.C.C.A.).

63. *A.G. of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633, 76 N.S.R. (2d) 240 (N.S.S.C., App. Div.).

64. Section 24(1) of the *Charter*:

Anyone whose rights or freedoms, as guaranteed by this charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

65. *Hunter v. Southam Inc.* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641, [1984] 6 W.W.R. 577 at 659-660; *A.G. of Nova Scotia v. Phillips*, *supra*, note 63.

66. In *R. v. Seaboyer* (1987), 58 C.R. (3d) 289 (Ont.C.A.), a majority of the Court held, per Grange J.A. at 308-313, that, where a legislative provision is not on its face inconsistent with the *Charter*, but occasionally its application might result in infringement of the *Charter*, the provision can be upheld, subject to a constitutional exemption which renders it inoperative in those applications which would infringe the *Charter*.

women and men in a manner which takes account of their different experiences and needs.⁶⁷

2. Preference or Affirmative Action

The merits and demerits of affirmative action are highly contentious and beyond the scope of this paper in considering the extent to which section 15(2) of the *Charter* constrains economic policy and economic liberty. Prior to the *Charter*, there were no constitutional constraints placed upon a legislature or government enacting or implementing an affirmative action program. Section 15 imposes no constitutional obligation on governments to adopt affirmative action policies. It permits such policies, but only to the extent that they come within section 15(2). Accordingly, there are now some constraints placed on affirmative action which did not exist prior to the enactment of the *Charter*.

Affirmative action is constitutional only if it applies to disadvantaged individuals or groups and only insofar as its object is the amelioration of conditions of disadvantage. While a court will no doubt defer to legislative or governmental judgment in determining whether individuals or groups are disadvantaged and whether a particular program is likely to ameliorate the conditions of disadvantage, it will still require that such judgments be reasonably exercised.

It is significant that section 15(2) of the *Charter* focuses not on "discrimination," but rather on "disadvantage". In so doing it appears to remove from consideration the thorny question of the extent to which inequality has resulted from discrimination as distinct from other cultural and social processes. Accordingly, it may be argued that section 15(2) is sufficiently broadly worded to justify measures in response to overall systemic disadvantage whatever its source. This proposition is somewhat clouded by the final clause of section 15(2) which provides that the disadvantaged individuals or groups include those that are disadvantaged *because of race, sex, etc.* Although this phrase does not demand proof of overt discrimination, it could be read as requiring evidence of a causal connection between being disadvantaged and being a member of a particular race or sex, etc. However, the final clause of section 15(2) must be read in context. It permits laws, programs and activities which seek to improve the lot of disadvantaged people in general, including — but not limited to — those who are disadvantaged by reason of race or sex, etc. Hence section 15(2) of the *Charter* is not limited to curing inequality in the operation of laws which discriminate among different groups of people.

It is not clear whether section 15(2) would support a program which has as its object the amelioration of the conditions of a generally disadvantaged group, but which confers benefits not only on disadvantaged individuals who are members of that group but also on members who have suffered no disadvantage.⁶⁸ It is arguable, however, that all members of dis-

67. See Kathleen Lahey, *Report on the Statute Audit Project*, (Toronto: Charter of Rights Educational Fund, 1985), *supra*, note 27 at 1-30.

68. Katherine Swinton, "Restraints on Government Efforts to Promote Equality in Employment: Labour Relations and Constitutional Considerations" in *Research Studies*, *supra*, note 14 at 287.

advantaged groups are likely to have suffered some disadvantage from stereotyped attitudes and social expectations. As well, a preference given to any member of the group may provide a role model and assist in breaking down stereotypes for the group as a whole.

Similarly, it is unclear whether the amelioration of conditions of disadvantage applies only with respect to opportunities, or is also referable to outcomes. As Professor Swinton explains:

[A] male employee, competing for a job with a qualified female craft worker, might argue that affirmative action is improper at the hiring stage, for the disadvantage to the female group that warrants redress is at the educational stage. Once women are trained, they should be at the same starting line as males, and no longer treated as a disadvantaged group. This would justify training tailored to the target group, but not job preferences.⁶⁹

Critics of affirmative action argue that the progress made in the United States toward racial equality is attributable more to programs directed at achieving equality of opportunity than it is to programs designed to achieve equality of outcome.⁷⁰ It is argued that quotas and preferential treatment in hiring

. . . harm highly competent minority persons, by making it appear that their accomplishments are not due to their own efforts, but to government "largesse"; they harm unqualified minority persons by placing them in positions which expose their incompetence; they harm minority persons excluded from affirmative action, by increasing their frustration and lowering their motivation to attain job qualifications on their own; as well, affirmative action exacerbates social and other inter-minority group animosity.⁷¹

It might further be argued that the cost of affirmative action to redress disadvantage created by the interaction of various social forces should not be shifted onto employers who are prevented from hiring the best qualified employees, or onto job applicants who are denied jobs despite their superior qualifications. Rather, the cost should be borne by society as a whole through special information and training programs, publicly financed parental leaves and adequate child care facilities.

A court might conceivably take into account evidence supporting such arguments in deciding that "amelioration of conditions" applies only to those programs which are aimed towards redressing the factors which create disadvantage. Courts should, however, exercise restraint in limiting the scope of affirmative action programs. If those who are not members of the disadvantaged group consider that a particular affirmative action program is ineffective — or indeed, too effective — they are in a position to exert political pressure to alter the program.

69. *Ibid.*

70. See, e.g., Williams, *supra*, note 19.

71. Block and Walker, Preface, *supra*, note 13 at xviii.

B. Section 1

If an inequality in the operation of a law as between male and female persons cannot be justified under section 15(2), there remains the possibility that it could be upheld under section 1 of the *Charter*. As discussed above, the operation of section 1 is restricted by section 28 and by the availability of section 15(2)⁷² and should be limited to upholding those laws which are based on the real reproductive differences between men and women. For example, maternal leave limited to childbirth could be justified, but a more extended leave for childcare should be available for parents of either sex. Laws which protect women of child-bearing age from hazardous substances in the workplace might be upheld, but only to the extent that it is established that the risk from such substances is limited to child-bearing and does not affect child-siring.

It should be noted that in both of these examples, benefits are not conferred on all women, but on a subset of women. The Supreme Court of Canada has held that discrimination on the basis of pregnancy does not amount to a denial of equality on the basis of sex.⁷³ In response, Parliament amended the *Canadian Human Rights Act* to provide that discrimination on the basis of pregnancy or childbirth is discrimination on the basis of sex.⁷⁴ Pregnancy is not expressly included in the prohibited distinctions of section 15(1) of the *Charter*, but those distinctions are not exhaustive.⁷⁵ A court could hold either that pregnancy is included in discrimination on the basis of sex or is a separate distinction which, because it is one of the essential capacities which distinguishes one sex from another, should be as closely scrutinized as any other distinction which results in unequal operation of law as between male and female persons. In either event, since rights are to be guaranteed equally to male and female persons, a right available to male persons should not be denied to pregnant female persons unless the fact of pregnancy requires it.

Whether limitations are imposed or benefits conferred on the basis of reproductive differences between men and women, under section 1 courts should ensure that they are required by and limited to actual differences and are not reflective of secondary stereotyped expectations that have evolved from them.

72. See text at notes 42 to 60.

73. *Bliss v. A.G. Canada* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, [1978] 6 W.W.R. 711. See also the similar holding of the United States Supreme Court in *Geduldig v. Aiello*, 417 U.S. 484, 41 L Ed 2d 256 (1974).

74. S.C. 1976-77, c. 33, as am. by S.C. 1980-81-82-83, c. 143, section 2, adding section 3(2) to the Act. See also the *Human Rights Code*, 1981, S.O. 1981, c. 53, section 9, as am. by S.O. 1984, c. 58, section 39 and S.O. 1986, c. 64, section 7. See also the amendment to the United States *Civil Rights Act*, Title VII, 42 U.S.C., section 2000e.

75. *Re Andrews and Law Society of British Columbia*, *supra*, note 51.

VI. Impact of the *Charter* on Wage Equity and Pensions

A. Wage Equity

The *Charter* does not guarantee wage equity, nor does it oblige a legislature to enact legislation to achieve wage equity. Nevertheless, Canadian legislatures have addressed this issue. The federal Parliament and the legislatures of Quebec and Ontario have enacted legislation providing for equal pay for work of equal value in the same establishment.⁷⁶ The Manitoba legislature has gone further to introduce equal pay for work of equal value but only for the public sector.⁷⁷ Other provinces have adopted the less onerous requirement of equal pay for equal work within the same establishment.⁷⁸

The equal pay for equal work requirement is likely to have little impact on the wage gap between men and women. It generally requires that an employer pay a female employee the same wage as is paid to a male employee in the same establishment for doing essentially the same work involving substantially the same skills, effort and responsibility and performed under similar working conditions. It permits wage differentials based upon a seniority system, a merit system, a system that measures production, or any differential based on a factor other than sex. The equal pay for equal work requirement has little impact because the wage gap is created more by segregation of men and women into different occupations and the undervaluing of women's work, than by overt discrimination between men and women who perform substantially the same job.⁷⁹ Indeed, even the requirement that an employer provide equal pay for work of equal value performed within the same establishment is not likely to address the problems arising from the occupational segregation of women.

Some commentators have argued that because the legislation is ineffective in narrowing the wage gap in any significant way, it discriminates against women and should be held to be of no force and effect.⁸⁰ This argument is surely incorrect and, even if correct, does little to benefit women workers since a court could not compel a legislature to replace the legislation with something more effective. Equal pay for equal work legislation does not infringe constitutional rights because it applies equally to men and women. Even if the legislation *prima facie* infringed section 15(1) of the *Charter*, it could be supported under section 15(2) as a law designed to ameliorate the conditions of disadvantaged women workers. It is not necessary to establish, under section 15(2), that the law in question is the most effective means possible for eliminating the entire disadvantage. A government

76. *Canadian Human Rights Act*, S.C. 1976-77, c. 33, section 11. *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. c-12, section 19. *Pay Equity Act*, S.O. 1967, c. 34.

77. *Pay Equity Act*, S.M. 1965-66, c. 21, sections 3 and 4(2).

78. See, e.g., *Individual's Rights Protection Act*, R.S.A., 1980, c. I-2, section 6; *Human Rights Act*, S.C. 1964, c. 22, section 7.

79. Gunderson, *supra*, note 14 at 9.

80. Cornish, "Ontario Equal Pay Legislation...", *supra*, note 27, at 5.39; "Present Equal Pay for Equal Work Legislation...", *supra*, note 27 at B.20-24.

is entitled to address only certain aspects of the problem, perhaps incrementally, as it gauges public acceptance of its policies and initiatives.

It has also been suggested that sections 7 and 28 of the *Charter* could be relied upon as guaranteeing equal economic security for men and women and thus requiring equal pay for work of equal value. However, as noted above, that argument is unlikely to be successful.⁸¹

Canada has entered into a series of international commitments to provide equal treatment to women in employment.⁸² In 1980, Canada ratified the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women* which provides, *inter alia*:

1. State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights in particular . . .
 - (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of quality of work;⁸³

Accordingly, Canada has undertaken to adopt affirmative measures to implement equal pay for work of equal value. However, the right was not guaranteed in the *Charter* and the *Charter* provides no mechanism for compelling its implementation..

B. Pensions

The *Charter* is likely to have an impact on sex distinctions in pension plans, particularly distinctions that are expressly authorized by legislation. In Ontario, section 34(2) of the *Employment Standards Act*⁸⁴ prohibits an employer from providing benefits that differentiate between employees on the basis of age, sex or marital status, except as provided by regulation. Regulation 282 permits distinctions to be drawn on the basis of sex, provided they are determined on an actuarial basis, and section 24(2) of *The Ontario Human Rights Code*⁸⁵ acknowledges the validity of this exception. Similarly, the Canadian Human Rights Benefit Regulation⁸⁶ (promulgated pursuant to section 11 of the *Canadian Human Rights Act*)⁸⁷ permits different treatment on account of sex for some types of pension plans provided the difference is determined on an actuarial basis. Only in Manitoba does section 21 of the *Pension Benefits Act*⁸⁸ prohibit different pension rates, amounts of contributions, benefits, options or membership requirements based on sex.

81. See text at notes 25 to 28.

82. See Cornish, "Ontario Equal Pay Legislation...", note 27 at 5.32-34; "Present Equal Pay for Equal Work Legislation...", *supra*, note 27 at B.12-17.

83. Adopted 18 December 1979, in force for Canada 10 January 1982, U.N. Doc. A/Res/34/180 (1979), reproduced in Bayefsky and Eberts, *supra*, note 25 at 620 ff.

84. R.S.O. 1980, c. 137.

85. *Human Rights Code, 1981*, S.O. 1981, c. 249.

86. *Canadian Human Rights Benefit Regulations*, SOR/80-68, as am. by SOR/85-512.

87. S.C. 1976-77, c. 33.

88. S.M. 1975, c. 38, section 21(6.4), as am. by S.M. 1982-83-84, c. 79, section 14.

The exceptions in the Ontario and federal legislation are open to challenge for permitting different treatment of men and women. The distinction could not be upheld under section 15(2) of the *Charter* since it does not have as its object amelioration of conditions of disadvantage. Nor should it be upheld under section 1 of the *Charter* since it is not required by reproductive differences. Even if section 1 were given a more expansive reading in relation to section 15 than is advocated in this paper, it is arguable that actuarial evidence of the different life expectancies of women and men generally does not demonstrably justify different treatment of individual women and men.

In *City of Los Angeles Department of Water and Power v. Manhart*,⁸⁹ the United States Supreme Court held that a pension plan which required women employees to make larger contributions than men in order to be eligible for the same monthly benefits violated the *Civil Rights Act, 1964*.⁹⁰ The Court acknowledged that there was a verifiable difference in longevity between men as a group and women as a group; the difference was not simply a fictional stereotype.⁹¹ Nonetheless, the Court noted that what is true of a group is not necessarily true for each member of that group.⁹² Justice Stevens held that the *Civil Rights Act, 1964*, which precludes discrimination against an individual because of his or her sex,

. . . precludes treatment of individuals as simply components of a racial, religious, sexual or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.⁹³

The Court subsequently affirmed and extended the application of this reasoning in *Arizona Governing Committee v. Norris*⁹⁴ in which it held that

"Title VII also prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly benefits than a man who has made the same contributions."⁹⁵

Canadian legislation which permits distinctions in pension plans on the basis of sex should be held to infringe the *Charter* guarantee of equality in the operation of law. In light of the policy adopted in Manitoba and the decisions of the United States Supreme Court, it would be difficult to establish that legislation permitting such diverse treatment of individuals on

89. 435 U.S. 702, 56 L. Ed. 2d 657 (1978).

90. *Civil Rights Act*, 78 Stat. 255, 42 U.S.C., section 2000e-2(a)(1):
It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

91. *City of Los Angeles v. Manhart*, *supra*, note 89 at 707.

92. *Ibid.*, at 708.

93. *Ibid.*, at 708.

94. 103 S. Ct. 3492 (1983).

95. *Ibid.*, at 3494.

the basis of their sex alone is demonstrably justified in a free and democratic society. As argued above, since the diverse treatment is not related to reproductive differences, it should not even be open to proponents of such legislation to seek to justify it under section 1 of the *Charter*.

In addition to those legislative provisions which authorize different treatment of men and women in pension plans, there are also provisions pertaining both to government pensions⁹⁶ and private pensions⁹⁷ which arguably have a disparate impact on women. These provisions are neutral on their face, but they are predicated on the conventional career patterns of men and the assumption that men support their wives. They have been criticized as failing to provide sufficient flexibility to meet the rather different needs of women workers. Such "neutral" laws which have disparate impact on women are ripe for challenge.

VII. Conclusion

Those who, armed with the *Charter*, look to the courts to eradicate inequality between working women and men are likely to be disappointed. The *Charter* precludes legislatures and governments from creating or reinforcing inequalities in the laws which govern our society. Beyond that, however, it imposes no affirmative obligation to enhance equality or eliminate inequality. Nonetheless, the importance of the guarantee of equality in the operation of law should not be minimized. Laws play an ever increasing role in our regulated society. The constitutional guarantee of their equal operation promotes new awareness of minority interests in the legislative process and provides a means for minorities to challenge laws which treat or affect them adversely. To the extent, then, that inequalities are the product of laws, redress can be had through the *Charter*. "Protective" legislation which is based on stereotyped notions of the differences between and appropriate roles of men and women can be challenged as unconstitutional as can apparently neutral legislation which has a disparate impact on men and women. Benefits conferred by law on men but hitherto denied to women will either be extended to women or withdrawn from men. Each constitutional challenge should provoke a searching assessment of the assumptions which are reflected in and reinforced by legislation.

The examination and rejection of various sexual stereotypes may encourage other social forces which support equality for women, but the elimination of inequalities in the operation of law is unlikely in itself to have more than marginal direct impact on women's inequality in employment. It will not equalize the sharing of household and family responsibilities.

96. For a discussion of the impact of the *Charter* on public pensions see Andrea J. Seale, "Can the Canada Pension Plan Survive the *Charter*? Section 15(1) and Sex (In)equality", (1985) Queen's L.J. and see also, *Report on the Statute Audit Project*, *supra*, note 67 at 8.1-30.

97. For a discussion of the impact of the *Charter* on employer-sponsored pension plans, see Claudia Losie, "Employer sponsored pension plans under the *Charter*" (1984) 22 Osgoode Hall L. J. 513; and see also, *Report on the Statute Audit Project*, *supra*, note 67 at 8.31-49.

ties, improve the availability of quality child care, or lead women to seek out new opportunities in education, training and non-traditional careers. The *Charter* does not provide a means for addressing — or compelling governments to address — these social barriers to women's equality in employment. Governments may, but need not, address these social issues. The *Charter* expressly permits, but does not require, laws, programs and activities designed to ameliorate conditions of disadvantage. Theoretically — and notwithstanding the *Charter* — a legislature could decide to return to a *laissez faire* system leaving the market to regulate employment. To the extent that the legislature does intervene, however, it must do so evenhandedly (unless, of course, it intervenes in the interests of a disadvantaged group). At most then, the equality guarantees will have only a minimal constraining impact on employment policy and economic liberty. Constraints on economic liberty in the form of equal pay for work of equal value or obligatory affirmative action programs are more likely to be imposed by legislation or government contract compliance requirements. Hence, the extent to which actual equality — as distinct from equality in the operation of law — will be achieved in Canada remains substantially a matter of political choice.