

O Canada: in all of us command?

The lyrics to “O Canada” are considered by some to be immutable, an integral part of Canadian identity. Yet throughout their history they have not been spared from significant amendment.^[1] Liberal MP Mauril Bélanger’s recent private member’s bill^[2] is but one more proposed change. He argues that the anthem’s lyrics - “**True patriot love in all *th* sons command**” - imply that patriotism is something felt exclusively by men.^[3] Ensuring gender-neutrality, by substituting the words “**in all of us command**,” could remedy the situation. However, this change faces much public opposition and as such, an important Constitutional issue emerges from the fray:

Does the current wording of “O Canada” violate the equality rights protected by section 15(1) of the *Canadian Charter of Rights and Freedoms*? ^[4]

Section 15(1) of the *Charter* states:

(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.^[5]

The test for a violation of section 15(1) - as it has been set out in *Kapp* and *Withler* - has two distinct elements:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction perpetuate a disadvantage by prejudice or stereotyping?^[6]

This second element is interesting, largely because it raises the question: “how do claimants prove prejudice or stereotyping?”

The Court in *Withler* answers this question by telling us that the analysis is contextual and the claimant must prove that the law in question perpetuates prejudice and disadvantage by “treat[ing] a historically disadvantaged group in a way that exacerbates the situation of the group.”^[7] As for stereotyping, this is proven whenever the law in question employs assumptions that do “not correspond to the actual circumstances and characteristics of the claimant or claimant group.”^[8]

Sex is an enumerated ground of section 15(1). However, in order to succeed a potential *Charter* claimant would have to provide evidence proving that the distinction in “O Canada” perpetuates a disadvantage through prejudice toward, or by stereotyping, women. Mr. Bélanger’s claim - that the national anthem’s lyrics imply that patriotism is something felt only by men - might form the basis of such an argument.

Finally, we must consider whether or not the *Charter* even applies to “O Canada.” Generally speaking, the *Charter* would not apply to the lyrics of a song, however, the lyrics to our

national anthem are included in a schedule to the *National Anthem Act*.^[9] As the anthem can therefore be considered a piece of legislation passed by the federal government, the *Charter* would seem to apply.

[1] Gilles Potvin & Helmut Kallmann, "O Canada" in *The Canadian Encyclopedia*, ed by Andrew McIntosh (26 March 2012), online: <www.thecanadianencyclopedia.ca/en/article/o-canada/>

[2] Joanna Smith, "House to debate gender-neutral O Canada lyrics" *The Globe and Mail* (31 May 2016), online: <www.theglobeandmail.com/news/politics/house-to-debate-gender-neutral-o-canada-lyrics/article30216608/>.

[3] Joan Bryden, "Ailing MP to reintroduce call for gender-neutral O Canada" *The Globe and Mail* (25 January 2016), online: <www.theglobeandmail.com/news/politics/ailing-mp-to-reintroduce-call-for-gender-neutral-o-canada/article28368031/>; see also, House of Commons, *Debate Re Bill C-624*, 41st Parl, 2nd Sess (27 April 2015), online: <<https://openparliament.ca/bills/41-2/C-624/>> (as rejected by the House of Commons 29 April 2015).

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982(UK)*, 1982, c 11.

[5] *Ibid*,s 15[emphasis added].

[6] *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483.

[7] *Withler v Canada (Attorney General)*, 2011 SCC 12at paras 35, 37, 40, [2011] 1 SCR 396.

[8] *Ibid* at para 14.

[9] RSC, 1985, c N-2.