GENDER EQUALITY

IN CANADIAN JURISPRUDENCE

BY

GREGORY K. WALKER

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ABSTRACT

Have the intentions of sections 15 and 28 of the Canadian Charter of Rights and Freedoms been fulfilled by the decisions of the Supreme Court? Have gender equality rights made a difference in the lives of women? As a tool for the amelioration of gender inequalities, the intentions of the equality provisions have been fulfilled by Supreme Court decisions. This thesis utilizes Alan Cairns' "embedded state" theory to demonstrate two points: first, that the dialectic relationship of state and society is applicable to the women's movement seeking gender equality; and second, that the Charter's equality provisions have provided a means for the improvement of gender inequalities. The thesis focuses on the political aspect of these two points, illustrating that the Charter was a political compromise, agreed upon by national leaders, provincial leaders, and various interest groups. Thus, the political motivations of the constitutional actors shaped the equality clauses, empowering certain sectors of our society, stimulating the politics of recognition, and expanding the role of the Supreme Court in Canada's political system.

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CHAPTER ONE - RECONFIRMING THE EMBEDDED STATE

Today, public institutions, including government agencies, schools, and universities, have been subject to severe criticism for failing to recognize or respect the particular cultural identities of citizens.[1] In Canada, the controversy most often focuses upon the needs of francophones (inside and outside of Quebec) , Native Canadians, and women. Political journalist Jeffrey Simpson refers to this social phenomenon as "faultlines" in the Canadian political landscape.[2] And it is hard not to find other democratic or democratizing societies that are not sites of some significant controversy over whether and how public institutions should better recognize the identities of cultural and disadvantaged minorities. In short, we live in a society rife with demands for individual recognition based on ethnic, gender, or minority classifications.

Why? Where has the need for recognition originated? The key to answering these questions, argues Charles Taylor, is

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[1] An excellent example of this social phenomenon within the university atmosphere is the recent McEwen report on racial and sexual harassment problems at the University of British Columbia. See CBC Broadcasting, "The National - Television News," Wednesday, September 20, 1995.

[2] Jeffrey Simpson, Faultlines: Struggling for a Canadian Vision, (Toronto: Harper Perennial, 1993), chp.1.

individual identity.[3] In contemporary politics, demands for recognition are urgent when they are linked to identity. But identity is partly shaped by recognition or its absence. For example, some feminists would argue that women in patriarchal societies have been induced to adopt a deprecating image of themselves.[4] Therefore, due recognition is not just a courtesy we owe people; it is a vital human need. There is no such thing as inward generation or monological understanding of one's identity. Rather, the dialogical character of human life is fundamental.[5] For example, language enables an individual to understand oneself, to define oneself, and to communicate with others. As well, language is dialogical in order to communicate or form ideas. As Taylor states, "...my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others."[6] In short, identity must be recognized, especially by the state.

In Canada, recognition has precipitated a politics of

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[3] Charles Taylor, "The Politics of Recognition" in Multiculturalism, ed. Amy Gutman, (Princeton: Princeton University Press, 1994), p.25-73. Also Alan Cairns discusses the political influence of positive self-consciousness in Disruptions: Constitutional Struggles from the Charter to Meech Lake, (Toronto: McClelland and Stewart, 1991), especially chp.3.

[4] See Susan Wolf's comments in Multiculturalism, p.75-85.

[5] Taylor, p.29-34. Also see Charles Taylor, Sources of the Self, (Cambridge: Harvard University Press, 1989).

[6] IBID, p.34.

universalism, emphasizing the equal dignity of all citizens. The politics of equal dignity has emerged in two ways, which could be associated with the Charter of Rights and Quebec nationalism. Advocates of the Charter take the view that individual rights must always come first, and, along with nondiscrimination provisions, must take precedence over collective goals.[7] This view understands human dignity to consist largely in autonomy; in other words, the ability of all persons to determine for themselves a view of the "good life." But a society with collective goals, like Quebec's innate sense for preservation, violates this model of liberalism. This collective view, however, is not a repudiation of liberalism, but rather, a different approach. In Quebec's nationalism, there is a view of society that can be organized around a definition of the "good life," without this being seen as a depreciation of those who do not personally share this definition. A society with strong collective goals can be democratic, provided it is capable of respecting diversity and can offer adequate safeguards for fundamental rights.[8]

In the last thirty years, these two forms of political

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[7] This form of liberalism is most often associated with John Rawls, A Theory of Justice, (Cambridge: Harvard University Press, 1971); Ronald Dworkin, Taking Rights Seriously, (London: Duckworth, 1977); and Bruce Ackerman, Social Justice in the Liberal State, (New Haven: Yale University Press, 1980).

[8] Taylor, p.51-61.

universalism have clashed over the Constitution, and especially the Charter of Rights and Freedoms.[9] Modern constitutions owe their existence to the concept that citizens come together voluntarily to form a legal community of free and equal consociates. The constitution puts into effect precisely those rights that those individuals must grant one another if they want to order their life together legitimately by means of law. This concept assumes the notion of individual rights and individual legal persons as the bearer of rights.[10] Therefore, the Constitution, as the fundamental law upon which our political community exists, is the focal point for the recognition of equality in Canadian society.

There are two sections of the Charter of Rights specifically pertaining to gender equality, sections fifteen and twenty-eight. These sections, like the Charter itself, were a political compromise, agreed upon by national leaders, provincial leaders, and various interest groups. The political motivations of the constitutional actors shaped the sections, empowering certain sectors of our society, and re-

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[9] See Robert Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, (Albany: State University of New York Press, 1991), p.2-3.

[10] See Edward McWhinney, Constitution-making: Principles, Process, Practice, (Toronto: University of Toronto Press, 1981); Peter Russell, Constitutional Odyssey:Can Canadians Become a Sovereign People?, 2nd ed., (Toronto: University of Toronto Press, 1994), p.1-33; Jurgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Multiculturalism, ed. Amy Gutman, (Princeton: Princeton University Press, 1994), p.107-08.

shaping the role of the Supreme Court in the polity. But have the intentions of sections fifteen and twenty-eight of the Charter been fulfilled by the decisions of the Supreme Court? Have equality rights made a difference? What has been their impact upon Canadian federalism? Since the hopes for equality rights were to be a counterbalance between certain kinds of inequalities between people, then intentions have been relatively fulfilled. In other words, the Charter has made some movement in resolving discrimination based upon the kinds of personal and socially attributed characteristics written in section fifteen.

The intention of this study is to analyze the political motivations and purposes of those individuals or groups involved in the drafting of sections fifteen and twenty-eight of the Charter. These motivations have been heavily influenced by traditions in Canadian constitutional politics, beginning with Confederation in 1867 and culminating in the Charter. It is important to note that unlike today, traditional constitutional politics in Canada did not originally emphasize the precepts of individual rights. Current literature on the subject indicates that Canada's Founding Fathers began their campaign for Confederation by distancing themselves from the American constitution and, above all, the idea that the constitution should be derived from the people. As Peter Russell suggests, the enigma of current constitutional wrangling in Canada is based on the

fact that we, as a society, have not yet agreed to be a people.[11] Thus, we are unable to come together, under the constitution, to form a legal community. In 1867, our nation's Founding Fathers agreed to articles of Confederation, recognizing the British tradition of Parliamentary supremacy and arrived at our most comprehensive constitution by "consociational democracy."[12] In short, the British North America Act was derived from the legislative branch of government, and not from popular sovereignty.

Constitutional supremacy, resting on popular sovereignty, carries with it the function of judicial review. This is the process by which the judiciary functions within the democratic constitutional state. Judges compare lower-status laws to the constitution with the view of striking down those laws that are incompatible with the constitution.[13] If the constitution is viewed as the rules of the political game for a given nation, then judicial review is the process by which legislated statutes are measured to ensure they comply to the rules of the game. There is debate, however, on the extent to which judicial review should be utilized. A limited form of judicial review is inherent in any federal system, whereby the highest court reviews the constitutionality of legislation on

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[11] Russell, chp.1.

[12] Russell, p.5.

[13] Ian Greene, The Charter of Rights, (Toronto: James Lorimer & Co., 1989), p.17.

the basis of assigned jurisdiction.[14] This has been the case in Canadian judicial history.

However, somewhere along the historical continuity of Canada, there occurred a break which ushered the notion of popular sovereignty into Canadian constitutional politics. Russell argues this change was gradual, concomitant to the nation's political maturity.[15] At the turn of the nineteenth century, federal politics experienced the insurgence of the provincial rights movement, with its objective to shed the image of provincial governments being subordinate to the central government. Most tangible gains for the provincial rights movement came not through formal constitutional amendment, but through the courts, especially the Judicial Committee of the Privy Council (JCPC). What the JCPC did was to give official legal sanction to a theory of federalism congenial to those who, at the time of Confederation, could not accept centralized power. The sovereignty the JCPC ruled on was not the sovereignty of the people, but the sovereignty of governments and legislatures.[16] Robert Vipond has shown how exponents of provincial rights defended the sovereignty of provincial legislatures against federal intrusions by

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[14] See Rainer Knopff and F.L. Morton, Charter Politics, (Scarborough: Nelson Canada, 1992), chp. 6, 7.

[15] IBID, chp.1.

[16] IBID, p.48-49.

emphasizing the right to self-government of local electorates.[17] The belief that the provinces were the constituent units in agreement to Confederation, and could therefore secede, known as the "compact theory", was a development of this period in Canada's constitutional evolution.[18]

The First World War marked the end of the provincial rights movement, and Canada's constitution continued to evolve, in what Russell calls "micro constitutional" politics. Through to the end of World War Two, the federal government made several changes to the constitution via executive federalism, negotiating directly with the provincial cabinets, and not requiring legislative ratification. This changed in 1949 when the federal government made two constitutional amendments. One was for Newfoundland's entry into the union, the second gave the federal Parliament the power to amend the British North America Act without going to Britain. Since Confederation, any amendments to the patriation process of the BNA required British parliamentary approval, but by 1949, this

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[17] This attitude was partly in response to the federal government's constitutional powers of reservation and disallowance. Clearly, the Fathers of Confederation thought executive federalism would be maintained by these powers - consequently using them - and not by the judiciary. See Robert Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, (Albany: State University of New York Press, 1991), chp.3.

[18] From a strictly legal point of view, the founding colonies in 1867, as colonies, did not have sovereign powers to retain. Therefore, they had no legal authority in the Constitution. See Russell, 50-53.

power was quickly becoming redundant. However, in its context, the federal government's initiative in 1949 was a mini-patriation of the Constitution since it related to federal jurisdiction. Nonetheless, the provincial governments felt their powers were being challenged, so the traditional machinery of constitutional bargaining was called into question, and a federal-provincial conference met in 1950. This, Russell suggests, was the beginning of "mega constitutional" politics, the publicly negotiated attempts at overhauling the Canadian constitution, which culminated in the 1982 patriation of the Constitution.[19] Through the period from 1950 to 1980, many Canadians became more aware of their constitution, and some demanded more explicit recognition of their rights. This rights-oriented discourse was a great political resource for Prime Minister Trudeau as he attempted to find a solution to the Canadian unity enigma with a renewed federalism, including the Charter.

Alan Cairns agrees with Russell, arguing that the political and constitutional emergence of politicized interest groups was stimulated by the diffusion of an anti-majoritarian ideology of rights. Clearly, " the traditional elitism of the constitution was no longer legitimated by its now fading

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[19] Indeed, Russell distinguishes the five rounds of mega constitutional politics that has steered the ship of state to its post-Charlottetown situation. He clearly sees no future for wholesale constitutional amendments, but rather, predicts the state will return to micro constitutional politics, with the new twist of interaction with society. See Russell, p.228-35.

British imperial roots." Cairns has summarized this transition:

> As the British past became more memory than living reality the explicit language of rights displaced the implicit trust in authorities and the related hierarchical community assumptions formerly fostered by a monarchical tradition.[20]

The insertion of the Charter of Rights into the Constitution, he argues, is the key turning point in the shift from executive federalism to the idea that the constitution should be derived from the people.[21] This change meant that Canada's constitution was increasingly regarded as a "citizens" constitution rather than a "government" constitution.[22] Since 1982 it seems likely that more citizens have developed a greater stake in the constitution, its interpretation, and its amendment. If so, this development may help explain why the Meech Lake and Charlottetown initiatives failed; the public, or some significant proportion of it, did not feel that they had been properly represented, politically perhaps, or constitutionally.

In the post-Charter era, law and politics have become

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[20] Cairns, Disruptions, p.17.

[21] Cairns argues that the change precipitated by the Charter is not a radical change from tradition, but rather analogous to discrete addition of a new element. See Alan Cairns, Charter versus Federalism: The Dilemmas of Constitutional Reform, (Montreal: McGill-Queen's University Press, 1993), p.72-79.

[22] Alan C. Cairns, Disruptions: Constitutional Struggles from the Charter to Meech Lake, ed. Douglas E. Williams, (Toronto: McClelland and Stewart, 1991), chp.4.

indistinguishable. Jurisprudential decisions are politically charged and political controversies are cast in legal theories and abstractions. Hence, there has been a metamorphosis of the Canadian political landscape by the Charter. This, Alan Cairns argued, has consequently transformed Canadian society into a rights-seeking entitlement society. Consequently, the discipline of political science has been challenged to explain the relationship between state and society under the influence of the Charter.

The core of traditional political science was the study of institutions and of political philosophy. However, the behaviourial revolution focused political scientists on the study of political behaviour. Borrowing from sociology and psychology, behaviourial students of politics sought to understand empirical regularities by appealing to the properties and behaviours of individuals. This, arguably, was because individuals and individual action constituted the building blocks of politics. In the end, behaviouralists provided a clear break from the legalistic, formalistic work that characterized the study of institutions. Then came the onslaught of rational choice theory. This paradigm introduced the notion of a purposive, proactive agent, a maximizer of privately-held values into the discipline. As a result, political scientists were introduced to a "new institutionalism," that tries to incorporate behaviourial and

rational choice into an equilibrium theory.[23]

This neo-institutionalism has been an important development for Canadian political scientists because the state and its institutions have been the central focus of the discipline.[24] Concomitant this trend has been the discipline moving from a focus on the state to conceptualizations of identity within Canadian society.[25] No political scientist has been more important to the development and understanding of these two trends in Canadian institutional study than Alan Cairns. Throughout his career, Cairns has strived to re-invigorate the dilapidated institutionalist school of thought. In doing so, he has rejected traditional institutional concepts, leading the way to a neo-institutionalist perspective of Canadian politics and constitutional affairs. First, he criticized legal determinism because it assumed that social behaviour followed legal categories, and that the most important scholarly task was to describe the relevant law. Cairns' dissension from legal determinism concentrated on the

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[23] Kenneth A. Shepsle, "Studying Institutions: Some Lessons from the Rational Choice Approach," Journal of Theoretical Politics, 1:2 (1989), p.131; James G. Marsh and Johan P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," American Political Science Review, 78:3 (September, 1984), p.734.

[24] Leslie A. Pal, "From Society to State: Evolving Approaches to the Study of Politics," in Canadian Politics, 2nd ed., James P. Bickerton and Alain-G. Gagnon, eds. (Toronto: Broadview, 1994), p.39-53.

[25] Jane Jenson, "Understanding Politics: Contested Concepts of Identity in Political Science," in Canadian Politics, p.54-74.

analysis of the JCPC, which functioned as the final court of appeal in Canada until 1949. Nationalist critics of the JCPC claimed its decisions enhanced regional disparity and provincialist sentiment, which in turn weakened the Federal government. Adeptly arguing the absurdity of this notion, Cairns fails to see how two or three judicial decisions a year by a court in London could possibly alter the behaviour of Canadians. Directly linking common human behaviour alterations to socially removed judicial proceedings, Cairns posited, was a quantum leap of logic.[26]

The second perspective undermined by Cairns was sociological determinism. As applied to Canadian federalism, this deterministic paradigm suggested the forces of industrialism would make societies similar, thus precipitating the decline of federalism. Accompanying this decline would be a reduced need for constitutions, essentially making them anachronistic. Cairns argued, however, that the increased regional sentiments in Canada, especially the incessant nationalism of Quebec francophones, established the need for a cooperative federalism and an entrenchment of that federalism's fundamental principles. Thus Cairns arrived at his theory of the "embedded state", that state and society are engaged in a dialectical relationship of mutual influence. In short, political institutions are as much shaped by society as

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[26] Alan Cairns, "The Judicial Committee and Its Critics," in Constitution, Government, and Society in Canada, (Toronto: McClelland and Stewart, 1988), p.84-85.

society is by institutions.

Essentially, Cairns refuses to make a hard distinction between the state and civil society. Instead, he forwards the concept of "embeddedness," by which he means a simultaneous process wherein the state increasingly penetrates and organizes civil society, even while this penetration binds the state ever more tightly and constrains its manoeuvrability.[27] His point is that civil society itself is increasingly the result of previous state actions, so that the state is embedded in society through the effects of its policies. He argues that the state should be seen as "the sum total of the programs it administers," and thus that civil society is shaped by past decisions and old policies.[28] For Cairns, the Canadian state is fragmented and thus contributes to societal fragmentation. The uncoordinated effects of policies on civil society reinforce and accentuate cleavages and differences; moreover, as the state's influence and salience grow, more and more societal conflict is framed in political terms. In short, if the trend in Canadian politics is the study of identity, then Cairns suggests that Canadians' identities are defined, relatively, by political institutions.

There are critics of the embedded state theory. Sylvia

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[27] Cairns, "The Embedded State: State-Society Relations in Canada," in State and Society: Canada in Comparative Perspective, Keith Banting ed., (Toronto: University of Toronto Press, 1986)

[28] IBID, p.57

Bashevkin has noted that Cairns' theory does not focus clearly on domestic and international political variables in comparison with other countries, which results in the lose of ideological and political resonance of nationalist policy debate.[29] Legal theorist Catherine MacKinnon suggests that the reciprocal constitution of state and society is useless because feminism has no theory of the state; rather it has a theory of power based on gender and sexuality.[30] MacKinnon's theory challenges the traditional notions of state, but it is difficult to visualize Canada as a nation without a state. As Bertrand Badie and Pierre Birnbaum have suggested, in order to have a weak or non-existent state, the society must be capable of governing itself well.[31] Even if one only considers the notion of two solitudes in Canada, then it is hard to see how Canadian society could govern itself, thus precipitating the need for a state.

The embedded state theory is attractive because it allows a deeper understanding of Canadian political culture. Today, the law is inevitably entwined with politics, which influences our lives, in some aspect, everyday. The anthropologist

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[29] Sylvia B. Bashevkin, True Patriot Love: The Politics of Canadian Nationalism, (Toronto: Oxford University Press, 1991), p.48-49.

[30] Catherine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," Signs, vol.8, no.4 (1983), p.635-642.

[31] Bertrand Badie and Pierre Birnbaum, The Sociology of the State, (Chicago: University of Chicago Press, 1983), p.103-134.

Clifford Geertz has suggested that at a deeper level, law exists as one of the ways in which people make sense of the world around them and make it coherent. As Geertz puts it, "law" provides a way by which we sort out and give meaning to social "facts."[32] Far from being an instrument of political interest, law serves both to reflect and embody distinctive "visions of community." Law "contributes to a definition of a style of social existence."[33] This approach, I believe, leads us to the embedded state theory, helping to connect the struggle for equality rights in the Charter to the larger process of defining a distinctive Canadian political culture. This is not a thesis about law, nor is it a study of the political action that defined the law, though both are recognized and studied. Often, recent scholarship has been marred by analysis focusing on the road to the Charter, or its political and legal impact. Rather, I hope to combine the two approaches, within the narrow field of gender equality, and re-confirm the embedded state theory, allowing for an appreciation of the Charter within Canadian political culture.

In considering gender equality rights, federalism and the Constitution, the embedded state theory provides an excellent framework. The mutual influence of state and society is demonstrated at two points: first, the contributions of

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[32] Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology, (New York: Basic Books, 1983), p.167-234.

[33] Ibid., p.218.

women's interest groups to the constitutional debate from 1979 to 1982; and secondly, the more recent decisions of the Supreme Court on equality rights, in such contentious areas as abortion, rape, sexual harassment, and single parenthood. Thus, we must begin with the women's lobby acting on the Trudeau government during negotiations to patriate the constitution.

CHAPTER TWO - THE LOBBY

In Alan Cairns' "embedded state", the centrifugal state and the fragmented society, locked in multiple embraces and exchanging reciprocal influences, meet in many political arenas, but the most important is federalism. The purpose of the national government in Canadian federalism is to inject the concerns of the national community into provincial political arenas. The most dramatic result of this intention was the Charter of Rights and Freedoms. In design, the Charter was a nation-building, nation-preserving, and rights protecting document. Nonetheless, the complex political process out of which it emerged produced a Charter in which many internal divisions and cleavages were accorded recognition and stimulation. One of these cleavages was gender and the entrenchment of equality rights. But this cleavage was not necessarily state-designed; it was a result of the influence exercised by the women's rights lobby during the drafting of the Constitution. And as such, it is one point in the dialectical relationship between state and society.

A BRIEF HISTORY OF WOMEN AND EQUALITY

Canadian women have long suffered the slings and arrows of socio-political discrimination, so there is a history of women's struggle in Canada. The "first wave" of the women's

movement included the suffrage and educational movements of the late nineteenth and early twentieth century, where women, primarily privileged, saw their goal as achieving equality with men in the existing political structure. At that time, some expected that social reforms would be achieved through the "special" nature of women. The early stages of industrial capitalism involved increasing specialization and the movement of production out of the home, which resulted in heightened sex segregation. Men went out of the house to work; and women's work, influence, and consciousness remained focused at home. Women came to occupy a "separate sphere," a qualitatively different world centred on home and family. Women's role was by definition incompatible with full participation in society.

Because of the social distinction between the private and public spheres in Canada, women were considered to have inherent talents for being guardians of the home, children and moral values.[1] When applied to social reform, a "maternal" or "social" feminism became the dominant characteristic of early Canadian feminism. Arguing that women had special experiences and values that could assist social reformation, if men would only allow them equal participation, women activists insisted on their responsibility to establish order and well-being, not

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[1] See Barbara Welter, "The Cult of True Womanhood, 1820-1860," American Quarterly, 18 (1966): 151-75

just for the families, but for the country.[2] Hence, issues such as suffrage or the right to be appointed to the Senate (the 1929 Persons Case) tended to be dominated by social improvement initiatives and maternal feminism.

Out of the radicalism of the 1960s came a new wave of the women's movement, what Naomi Black, among others, called the "second wave".[3] Few Canadians seemed to expect the women's movement to re-emerge, since most articulate women seemed to be both economically and politically secure. From this perspective, the dramatic American feminist movement, led by New Left women disgruntled with systemic discrimination, was interpreted in Canada as just another symptom of alien activism, and thus, an import of peripheral relevance. It was all the more astonishing, therefore, when Canadian feminism proved able to tap massive discontent even among apparently contented women. Black argues that the surprise of the feminist stirring is analogous to why it occurred; women had retained responsibility for the household and family at the same time as their participation in the paid labour force had increased. More specifically, two sorts of grievances fuelled the second wave of the women's movement. First, women were

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[2] Alison Prentice, et al., Canadian Women, (Toronto: Harcourt Brace Jovanovich, 1988), p.169

[3] Naomi Black, "The Canadian Women's Movement: The Second Wave," in Changing Patterns: Women in Canada, 2nd ed., Burt, Code and Dorney, eds., (Toronto: McClelland and Stewart, 1993): 151-75

excluded from men's legal rights and privileges. Second, to succeed in public life, women had to "masculinize" themselves, hiding their feminine qualities, or be marginalized and discredited.[4]

For example, Judy LaMarsh made great strides for women in political power (and public life) as the first female Minister of Health in the Lester Pearson cabinet. However, as Sydney Sharpe points out, LaMarsh was the only woman in Pearson's cabinet, and only the second woman ever to be appointed to cabinet. As a result, LaMarsh faced discrimination by her colleagues and was plagued with the extra burden of all the Pearson administration's "women's work". LaMarsh had to constantly cope with lurid questions about her sexuality (she was single) which her male colleagues never did, and her weight gain, caused by stress, was a favourite target for ridicule.[5] Sharpe posits that LaMarsh and other female politicians, have suffered in the "gilded ghetto". Women politicians in Canada are among the most privileged people in society, yet they are a ghettoized minority, marginalized within political parties, legislatures and governments. Between 1953 and 1972, only 36 women, or 1.3% of the total

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[4] Ibid., p.152

[5] Sydney Sharpe, The Gilded Ghetto, (Toronto: Harper Collins Publishers Ltd., 1994), p.80-85

number of M.P.s, were elected to the House of Commons.[6]

Excluded from men's rights and marginalized by politics, women wanted to remain different without being disadvantaged. They wanted credit for their female qualities and protection from discrimination. The new wave of Canadian feminism inherited the situation and the goals of its predecessor, and therefore had a sense of continuity with the long-held goals of the suffragettes, reinvigorated to ameliorate to the modern conditions of women's lives. To this end, the movement's various groups established rape crisis centres, consciousness-raising groups, feminist presses, day cares, and job search collectives. By the 1970s, lobbying familiarized women with the corridors of power, created networks across the country and established the National Action Committee on the Status of Women (NAC) in 1972.

As well, action begun by Doris Anderson, then editor of Chatelaine magazine, in 1966 led to the women's movement successfully lobbying the Pearson government to establish the Royal Commission on the Status of Women, which reported to Parliament in 1972. Many newspapers ignored the Commission editorially, others were condescending, and a few were critical. The Calgary Herald blamed "vocal militants who make a fetish of women's rights," for the allegedly unnecessary Commission. "Men and women are not equal," the Herald

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[6] Ibid, p. 4-12, 225

declared. "Nature has ascribed roles to women which makes it impractical for them to be regarded on the same basis [as men] in many instances."[7] By the time the Commission reported, these negative sentiments were already being described in some quarters as anachronistic. As for the women's movement, the Commission served to focus its core tenets and political goals. One of those goals was legal recognition of equality rights.

Equality rights had been asserted in Canadian law by John Diefenbaker's Bill of Rights (1960). However, the Bill of Rights was a unilateral federal policy initiative limited to federal jurisdiction. Partly as a result, it proved somewhat disappointing. For the women's movement, this was evident in Supreme Court decisions in the *Lavell and Bedard* (1974) and *Bliss* (1978) cases. Jeanette Lavell challenged section 12(1)(b) of the Indian Act, which provided that Indian women who married non-Indians lost their Indian status, while Indian men who married non-Indians did not lose their status and , in fact, conferred status on their non-Indian wives. Because of this provision, Lavell had lost her membership in her band and all the ensuing rights, including the right to hold property and to live on her reserve. Lavell alleged that this amounted to discrimination because of sex and violated her right to

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[7] Cited in Robert Bothwell, Ian Drummond, and John English, Canada since 1945, Revised Edition, (Toronto: University of Toronto Press, 1989), p.311

equal treatment before the law. In its ruling, the Supreme Court found no violation of equality in section 12 of the Indian Act, because the equality provision in the Bill of Rights merely implied treating all aboriginal women equally in the case. The court ruled there was no violation because the Canadian Bill of Rights' "equality before the law" was a procedural guarantee only, a protection in the administration of the law, and not a guarantee of equality in the substance of the law. Thus, equality before the law was protected, but equality under the law was not, said Justice Ritchie.[8]

In the other case, Stella Bliss was denied regular unemployment insurance benefits, even though she had worked the requisite number of weeks to qualify, because she was pregnant. The Unemployment Insurance Act required a woman to have been employed for "ten or more weeks of insurable employment in the twenty weeks that immediately precede the thirtieth week before her expected date of confinement" in order to qualify for pregnancy benefits. Because she did not meet this rule, Bliss could not get benefits. The Supreme Court found that unemployment insurance regulations did not violate equality rights as long as all pregnant people were treated equally.[9] The court ruled that Bliss' right to

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[8] R. v. Lavell, [1974] SCR 1349.

[9] For further reference, see Michael Manfredi, Judicial Power and the Charter, (Toronto: McClelland and Stewart, 1993), p.131-32. For a history of the *Bliss* case and its political consequences up to 1985, see Leslie A. Pal and F.L. Morton, "Bliss v. Attorney General of Canada: From Legal

equality before the law was not violated because the qualifications for entitlement to benefits were involved, and not the imposition of a penalty.[10] It was thus clear to women's activists that equality rights had to be affirmed in a more meaningful manner. But what was to be the means?

WOMEN AND CONSTITUTIONAL POLITICS

The avenue for gender equality guarantees became the constitutional debates of 1979-1982. It is important to note that the constitutional controversy was partly instigated by some provincial governments, frustrated by the limitations they felt the existing federal system imposed on their ambitions. The source of the confrontation was governmental rivalry rather than some fundamental public demand. Indeed, the drive for constitutional change cannot be understood without reference to the widespread ambivalence toward the constitution. The Canadian search for constitutional renewal was not a response to a complete constitutional breakdown; in other words, the alternative to change was not chaos.[11] One central purpose was the goal of patriating the constitution with an acceptable amending formula. The catalysts for a renewed federalism were the provinces, specifically Quebec

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Defeat to Political Victory," Osgoode Hall Law Journal, 24 (1986): 141-60.

[10] R. v. Bliss, [1979] 1 SCR, 183.

[11] Cairns, Disruptions, p.66-78.

with its explosion of Quebec nationalism, and Alberta with its attempts to attain sole control over its booming energy resources.[12] This was met by a central government that viewed constitutional change more as a vehicle for its own ambitions than as one attuned to provincial visions.[13]

Enter the charismatic Prime Minister Pierre Trudeau and his "magnificent obsession,"[14] the patriation of the Canadian constitution. His goal, briefly achieved with the Victoria Accord (1971), had been dashed by his political enemies in his home province of Quebec, the sovereignty-oriented Quebec nationalists. In 1976, Trudeau was confronted by the threat to Canadian unity presented by the separatist Parti Quebecois' election and his own dwindling term in office before an election in either late 1978 or 1979[15]. His solution was to suddenly present new constitutional proposals to the

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[12] The federal system experienced a fundamental structural disequilibrium by the 1970s: the relatively stable regional distribution of political power at the centre was challenged by significant shifts in the regional distribution of wealth and economic power. Accordingly, the provincial governments of Alberta and British Columbia developed clear constitutional positions which increased their jurisdiction and power.

[13] Ibid., p.66.

[14] Stephen Clarkson and Christina McCall, Trudeau and Our Times: Volume One, (Toronto: McClelland and Stewart, 1990).

[15] Trudeau and his advisors decided not to call a general election campaign in 1978, the year it would normally have fallen due, but to hold by-elections for 15 parliamentary vacancies that had to be filled. To their dismay, the results of these by-elections were a near rout that predicted the Liberals defeat in 1979.

provinces, including a transfer of jurisdiction from the federal government to the provinces for family law. Superficially, the proposal stood in the mainstream of conventional constitutional horse-trading between the two levels of government. Trudeau felt he had offered new powers to appease provincial demands without offering the wholesale decentralization of power, which he had always opposed. Indeed, family law seemed fairly innocuous.[16]

Women's rights advocates had been working with family law statutes for just over ten years. They had tried with modest success to change the law so that women received a fairer deal after divorce. In particular, they insisted that the laws should be universal, compatible across Canada, to facilitate the enforcement of child support orders. It was feared that constitutional horse-trading in this area could produce a patchwork of different laws and compromise the enforcement of support payments across provincial boundaries. Therefore, the constitutional debate moved from the arcane minutiae of amending formulas and power transfers to issues of direct consequence to women. As Jeffrey Simpson suggests, the constitution took on a new life of its own because it threatened the lives of women.[17] Thus, Trudeau's

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[16] Jeffrey Simpson, Faultlines: Struggling for a Canadian Vision, (Toronto: Harper Perennial, 1993, p. 76

[17] Ibid., p.77

constitutional proposal galvanized the women's movement, making it a new constitutional lobbyist, and raising women's concerns for their rights.

In March 1979, Trudeau's government was defeated by the young Joe Clark and his Conservative party. Réne Lévesque, premier of Quebec, acted swiftly to take advantage of Clark's lack of political ability on federalism and Quebec nationalism by announcing the anticipated sovereignty referendum the same month. To the surprise of both Clark and Lévesque, the Conservative government's first budget was defeated in the House of Commons in December precipitating another federal campaign, which Trudeau's Liberals won in February, 1980. Restored and reinvigorated by a fresh mandate from the people, and a comfortable majority in the House, Trudeau set about winning the Quebec referendum and finally achieving a repatriated Canadian constitution.

At about the same time, Trudeau appointed Doris Anderson president of the newly-formed Canadian Advisory Council on the Status of Women (CACSW).[18] With the help of Hellie Wilson, she steered the CACSW into concentrating its resources and efforts on the constitutional protection of women's rights. Soon after taking office, Anderson began clashing with the

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[18] The CACSW was one of the few recommendations of the Royal Commission Report to be implemented by the Liberal government. Appointments to the new Council tended to be partisan and Anderson was apparently seen as a relatively safe appointment, unlikely to cause trouble or make demands.

newly appointed Minister for the Status of Women, Winnipeg MP Lloyd Axworthy. Their first altercation came after Anderson decided to streamline the Council, relieving nonproductive staff members, one of whom happened to be a loyal supporter of Axworthy's. Despite Axworthy's demand that the worker be re-instated, Anderson refused.

Their next clash came in the fall of 1980, after Justice Minister Jean Chrétien introduced the government's proposed constitutional package, including the Charter of Rights and Freedoms. Without consulting the CACSW or women's groups, Axworthy had assured the Prime Minister and Cabinet that they would support an entrenched Charter. Anderson wrote a letter to Trudeau, with a copy to Axworthy, detailing CACSW's objections to the wording of the proposed Charter. That same day, she held a press conference on the subject, and according to reports, Trudeau warned Axworthy of his duties.[19] The CACSW's objections to the proposed Charter stemmed from studies documented by in-house legal experts. The studies clearly underlined that the equality clause in the 1960 Bill of Rights had never been interpreted to women's benefit. Since almost the same wording was being proposed for the Charter, the CACSW initiated a national campaign for women to voice their grievances on the equality rights clause. A

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[19] Penney Kome, The Taking of Twenty-Eight: Women Challenge the Constitution, (Toronto: The Women's Press, 1983), p.27-29

national conference on women and the Constitution was announced for the first weekend in September, 1980. But by August, the planned CACSW conference was postponed indefinitely because of government action and a labour dispute. The following October, at a NAC workshop in Toronto, it was decided that the Charter, as it stood, seemed to jeopardize women's legal rights rather than protect them. A primary problem was the inherent vagueness and resulting broadness of the proposed Clause 1 of the Charter, declaring that all rights were subject to "reasonable limits" as determined by the courts. In response, the NAC workshop proposed that Clause 1 be "rewritten as a ringing statement affirming human rights, including an overriding statement of equality between men and women."[20] This idea, and others, were given consideration later when women's groups were given an opportunity to address changes to the Charter with the government.

By this time, the Progressive Conservative M.P.s had effectively demanded that public hearings be held across the country. The Liberal government responded by giving a mandate to a Special House-Senate Joint Committee on the Constitution, to hear submissions from the public. Some regarded this as a "Gaullist" technique, using the public and interest groups to outflank the opposition; in effect, it greatly expanded the

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[20] Ibid., p.34

number of participants in the constitutional change process.[21] More than one thousand public and private interest groups submitted briefs and about three hundred made presentations to the Committee. Most of the twenty women's groups that presented briefs asked for the same sorts of changes in the Charter. In regard to Clause 1, they wanted the preamble replaced with a statement of purpose that would include a guarantee of equality for women and men. In Clause 7, which guaranteed legal rights to life, liberty, and security of the person, women wanted to see protection of reproductive rights.[22] Much attention was also paid to Clause 15, concerning "Non-discrimination Rights". The CACSW and the National Association of Women and the Law (NAWL) wanted it renamed "Equality Rights", to emphasize that equality meant more than nondiscrimination They also suggested expanded wording for the section, to ensure that it would stand up in court, providing clearer, unambiguous guidance to judges on what was intended. Because they wanted to avoid future misunderstandings, they asked that Clause 15(2), which allowed for affirmative-action programs, be open to members of disadvantaged groups and not only to individuals.[23] Since the

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[21] Cairns, Disruptions, p.78-81.

[22] Canadian Advisory Council on the Status of Women Brief, Special House-Senate Joint Committee on the Constitution, November 20, 1980, (Canada: Canadian Government Press, 1980): 123-52

[23] IBID.

prohibited grounds of discrimination might include age and mental or physical disability, a two-tier test was suggested in order to distinguish cases in which reasonable limits might apply.

The three year moratorium on section 15 proposed by the Trudeau government was unacceptable to the women's groups presenting to the Commission. The groups argued that it was unrealistic to believe that the three years would provide federal and provincial governments time to adapt statutes to compliance with section 15. They argued the grace period would be available with or without a moratorium. As CACSW lawyer Mary Eberts stated:

> We believe that if the cases were filed tomorrow, it would still be at least three years before they were heard by the Supreme Court.... So if it is desired to have a moratorium for three years, then we would regard it as most desirable to make two things explicit: first of all, that governments are bound to embark upon a program of reform; and secondly, that no one is going to lose the right of recourse to the courts in the interim....[24]

Additionally, the CACSW called for the consistent use of the word "person" throughout the Charter, rather than "everyone", "every individual", and "chacun" or "individuel" in French. "Person" or "personne," has a clear definition in Canadian law, women argued, *signifies* an individual human being (not a corporation) who has already been born (not a fetus). As well, for the women's groups, "person" carried a symbolic

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[24] Ibid., p. 144.

significance from the "Persons Case".[25]

On January 12, 1981, Justice Minister Jean Chrétien went before the Joint Commission and announced major revisions to the proposed Charter, which answered some of women's concerns.[26] As suggested by CACSW, section 1 was tightened up to encourage courts to strike down unconstitutional law, like the American system, rather than uphold bad laws which seemed to be the tradition of the parliamentary system of government. The nondiscrimination rights in section 15 were renamed "Equality Rights" and provided four kinds of guarantee; "equality before the law and under the law" and "equal benefit and protection of the law".

By adopting some of the demands made by the public, the Trudeau government gave its position a certain amount of legitimacy, presenting itself as the representative of the people, responding to the needs of Canadian citizens. This then put Trudeau's political opponents, namely the federal Conservative party and the eight provincial premiers opposed to the Charter, at a disadvantage. However, section 15 contained no guarantee of equality rights, so they were still subject to reasonable limitation. As well, the three year

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[25] Ibid., p.131

[26] Jean Chretien, Statement of the Honourable Jean Chretien Minister of Justice to the Special Joint Committee On the Constitution, January 12, 1981, (Ottawa: Canadian Government Presses, 1981): 2-21

moratorium on equality court cases still applied.[27] In short, though women's groups had presented their case and urged that sexual equality be absolute, it was still limited.

Exhausted by her battles with Axworthy over the cancelled national women's conference and dissatisfied with Chrétien's response to the CACSW's brief, Doris Anderson resigned from the Council in late January. The political result was stunning as Tory and NDP women hammered Trudeau in the House for two days demanding the resignation of Axworthy.[28] While the political irons were hot, a coalition of feminist activists united with the intention of holding the cancelled women's conference. This was the inception of the Ad Hoc Committee, which, in a little over three weeks, organized a national conference, raised funds, established panels and speakers, and managed to avoid partisan identification.

On February 14, 1981, over 1,300 women assembled in the West Block of Parliament Hill at the Ad Hoc Conference on Women and the Constitution. Surprised by the turn-out, organizers had to scramble to find space for all the participants, since the originally scheduled room had a maximum capacity of only 600 hundred. Over the two-day conference, some Tory women, such as Maureen McTeer, tried to

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[27] Ibid., p.2-3, 7-10

[28] See Debates, House of Commons, Canada, 32nd Parliament, 1st Session, 1981, vol. VI, p.6409-6412, 6459-6469

the steer the conference toward debating entrenchment of the Charter. Having previously decided to endorse entrenchment, the Ad Hoc Committee manuevered away from this issue, and concentrated the conference on gender equality rights and women's demands in the Charter.[29]

Of the various resolutions agreed to,[30] the most important was re-affirmation that sexual equality had to be a constitutional absolute, free of any limitations. At the concluding meeting, some of the Ad Hoc Committee met in a back room and realized that conference participants expected the women's lobby to continue its work for constitutional reform. Marilou McPhedran, an Ad Hoc Committee member, recalled:

> Somebody stopped me and asked what we were planning to do with the conference resolutions, and I said, "I'm not going to do anything with them. I'm going home to Toronto, to a family engagement and a dentist appointment."[31]

It was then that the Ad Hoc Committee decided the conference resolutions had to be taken directly to the Members of Parliament, who seemingly had to be pushed until the resolutions were adopted.

The Monday following the conference, the "Ad Hockers" met

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[29] Kome, p.57-61

[30] Many resolutions presented, debated and accepted by the Ad Hoc Conference were similar to those outlined in the briefs to the Joint Committee.

[31] Cited in Kome, p.61

with all three House leaders. Stanley Knowles (NDP) and Walter Baker (PC) were sympathetic, but feared that the other parties would block any motion to introduce the Ad Hoc Committee's concerns. It was clear that no further bargaining or progress would be made on sexual equality unless women's issues became a higher priority on the political agenda.

Meanwhile, displeased with the lack of progress in his negotiations with the provincial premiers, Trudeau had resorted to a controversial strategy of attempting to patriate the constitution unilaterally. The opposition parties then reacted with a filibuster; and three provincial governments, in Quebec, Newfoundland, and Manitoba, launched challenges, in the judicial system to the federal government's action, on the ground that it violated the constitution. While these were being considered, the delay assisted the "Ad Hockers," allowing them the time to establish a forceful lobby that pressured federal politicians.

After a month of daily press conferences, meetings with MPs and party caucuses, and soliciting a deluge of mail, the "Ad Hockers" felt they were making progress.[32] All three political parties seemed sympathetic to their demands, but there were pending procedural problems preventing legislative action. Ed Broadbent supported equal rights, but if the parties were allowed to introduce further amendments, the NDP

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[32] Ibid., p.70

would fulfil their promise and promote Native rights first. Joe Clark refused to conclude the filibuster since his party opposed entrenching the Charter and could not, therefore, support amendments. However, he did promise the Ad Hoc Committee that the Tories would not oppose equality rights. The Liberals, struggling to accomplish their constitutional strategy, allowed the Ad Hoc Committee to meet with Justice department officials in March. At that meeting, the "Ad Hockers" successfully negotiated the inclusion of section 28, providing for an overriding statement of sexual equality. The next day, Pauline Jewett sponsored the amendment in the House, and because of Justice department participation, the Liberal government accepted the proposed measure. Feminist activists considered this their most significant constitutional victory.

The Constitution stayed in limbo until the Supreme Court ruled on the provincial challenge to the federal government's unilateral action. In its decision, the Court struck a political balance: it ruled, on the one hand, that the federal government's unilateral procedure was legal, but concluded that, on the other, there was a constitutional convention that provinces should be consulted regarding constitutional changes that affected them. This led both sides to return to the negotiating table, and the convening of a First Ministers Conference on the Constitution in November, 1981. The result was a constitutional accord that included a new section 33, a "notwithstanding" legislative override of

the Charter.

Section 33 allows the federal Parliament or a provincial legislature to insert a clause into any specific statute declaring that the statute will operate "notwithstanding" sections 2 and 7-15 of the Charter. Any application of the override will automatically expire at the end of five years, but it may be renewed. The clause does not release legislatures and Parliament from their obligations under the Charter, but it permits them to put off particular cases of judicial review under the Charter so that they themselves can determine their obligations for five-year intervals.

This, in short, ensured that the judiciary would not be able to exercise absolute authority over the democratic legislative branch of government.[33] At first, women's groups and the Ad Hoc Committee were not alarmed by the notwithstanding clause because it did not seem to threaten the overriding nature of section 28. However, four days after the agreement was reached, Trudeau announced that section 28 would be subject to section 33;[34] because sexual equality was once again apparently compromised, the "Ad Hockers" were forced to

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[33] The paradox of the legitimacy of judicial review in our Canadian liberal democratic system has been excellently researched by Christopher Manfredi Judicial Power and the Charter, (Toronto: McClelland and Stewart, 1993), and F.L. Morton and Rainer Knopff, Charter Politics, (Toronto: Nelson, 1992)

[34] The Globe and Mail, November 9, 1981, p.1, 11

re-organize.

With little time, the Ad Hoc Committee decided to focus its new lobbying efforts on exempting section 28 from the legislative override. Within a few days, the "Ad Hockers" had consolidated the agreement of five premiers, but encountered a setback when the Prime Minister argued that any such reinstatement of section 28 required unanimous consent of the provinces. However, Trudeau was not, it seems, trying to divert the women's rights group since he provided them with a small reprieve. He agreed not to table the new accord in the House of Commons until November 17, giving the Ad Hoc Committee one week to gather the consent of all the premiers.[35]

It turned out to be a harrowing week for the lobbyists. Manitoba was in the late stages of a provincial election, so it was unclear as to who would be in power there; the ruling Prince Edward Island Conservatives were in the process of choosing a new leader and premier; Nova Scotia's John Buchanan was in New York; and Saskatchewan's Allan Blakeney refused to "re-open" the Accord except for the entrenchment of Native rights, which Bill Bennett of British Columbia resisted. By utilizing extensive provincial networks, the Ad Hoc Committee pressured and was able to attain the ready consent of Alberta, Ontario, New Brunswick and Newfoundland. Quebec's Rene

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[35] Kome, p.90-95

Lévesque gave his consent in a public statement saying that Quebec would never have accepted an override of section 28. Conservative MP Flora MacDonald called her friend John Buchanan in New York until he consented, and the newly-elected Howard Pawley gave his consent upon taking office in Manitoba.[36] The two hold-out provinces - Saskatchewan and B.C. - finally consented when Justice Minister Jean Chrétien announced their agreement on a modified Native rights clause. Thus section 28 was reinstated, beyond the scope of the legislative override in section 33. By lobbying and influencing government during the nation's constitutional debate, women had achieved legal equality rights.

In comparison with the American feminists, who had been proposing an Equal Rights Amendment to their constitution since 1923, and who had been working to have the ERA ratified by thirty-eight states, and who were watching it die unfulfilled, the Canadian effort was an impressive success. Clearly, several different factors assisted Canadian women in the fight. First, they had the advantage of surprise. The federal government, forced by the Parti Quebecois' election, put the Constitution on the national political agenda.

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[36] Some of the women activists had the added pleasure of seeing Tory premier Sterling Lyon of Manitoba, their most antagonistic constitutional adversary, defeated at the polls. See Sharpe, The Gilded Ghetto, p. 108-110. Also, see Sterling Lyon's briefs to Canada, Federal-Provincial Conference of First Ministers on the Constitution, vol.2, September 8-13, 1980.

Politicians paid little attention to women's groups' preparations, namely the CACSW and NAWL, for the Constitution, which took more than a year; so to them, the lobby campaign seemed to come from nowhere. This is evident in the unprepared manner in which both Axworthy and Trudeau reacted to the women's lobby during constitutional discussions.

Second, in their remarkable effort to save section 28, the Ad Hoc Committee had the strength of ninety women's groups, including five national networks, as well as support from women in all levels of the political parties and the government.[37] It was a sign of the lobbyists' strength that potential adversaries saw their best interest lay in co-operating with them. For example, Jean Chrétien credited CACSW and NAWL for the early reforms to section 1 and section 15 of the Charter.[38] Similarly, Margaret Fern, of the Saskatchewan Council on the Status of Women, held closely to Blakeney's position that entrenchment was not the best way to protect civil rights; but though she presented that position at the Ad Hoc Conference, she never tried to lead women against the lobby at any point.[39] Thus the movement's

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[37] Kome, p.103

[38] See Jean Chretien, Statement by the Honourable Jean Chretien Minister of Justice to the Special Joint Committee On the Constitution, January 12, 1981, p.1-2

[39] Kome, p.103-04

solidarity of purpose held firm.

Third, there was the CACSW. Under Anderson's direction, it had brought the constitutional question to women's attention and provided the solid research that informed the lobby throughout. It was the CACSW brief, in close conjunction with NAWL and other women's groups, that brought about the first changes to the Charter and strengthened the resolve of the lobby to achieve unequivocal sexual equality rights. Finally, the women's lobby enjoyed a unique political leverage because of their financial independence. The Ad Hoc Committee and its conference were underwritten by private donations, so the lobby was a true representative of the membership and could not be co-opted by any government.[40]

There appear to have been three clear stages of women's involvement in the constitution-making process.[41] First, before December 1981, the participants tended to be the legally knowledgable members of the established women's organizations. To some extent, these groups educated their own members and lobbied government, principally through presentations to the Joint House-Senate Committee on the Constitution. These women had a clear understanding of the specific areas of the law that a constitutional amendment

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[40] Sherene Razack, Canadian Feminism and the Law, (Toronto: Second Story Press, 1991), p.29-35.

[41] Sharpe, p.109-110.

might remedy. Many saw the constitutional conference as an opportunity both to ensure that existing gains were not lost, and to improve their status in the future. Accordingly, the women's groups' briefs to the Joint Committee stressed the requirement for entrenched equality between men and women as a non-negotiable demand.

The second stage tended to be drawn from the wider membership of the established women's groups, all working under the aegis of the Ad Hoc Committee of Canadian Women on the Constitution, lobbying in an effort to write equality rights into the Constitution. However, the first two stages are considered conjunctive because they seem, on the whole, as a negotiating phase. Indeed, the first two stages of the women's lobby were negotiating phases within which expertise on the issues and shows of organizational strength, such as the Ad Hoc Conference, were defining and crucial.

The third phase, the lobby of the premiers to reinstate section 28, required little or no specific knowledge of the issues except that "equality" was endangered. Acting on minimal information, women responded at an individual level using whatever channels were available. They used traditional pressure-lobbying techniques, like letter-writing and phone calls to their representatives, but they also used personal and political relations within the party system. For example, Flora MacDonald influenced John Buchanan and Brian Peckford. A unique phenomenon of this stage of the lobby included

federal politicians of all political strains, perhaps feeling free to more actively participate. Beside MacDonald's manuevering, Richard Hatfield, premier of New Brunswick, found himself besieged by former Speaker of the Senate, Renaud Lapointe, former Minister responsible for the status of women, David MacDonald, and Human Rights Commissioner, Gordon Fairweather.[42]

With the success of the women's lobby in the constitutional process, the task of defending those gains fell to litigators and the judiciary. The fundamental questions that arose concerned how the judiciary was going to interpret the Charter's equality rights, and whether the gains made by the women's movement would be sustained in the courts. The feeling that the process needed to be thoroughly monitored led to the creation of the Legal Education and Action Fund, the women's rights "charterwatching" group.

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[42] Kome, p.90

CHAPTER THREE - L.E.A.F AND EQUALITY JURISPRUDENCE

When Prime Minister Trudeau and Queen Elizabeth II signed the Constitution Act in April, 1982, it was the culmination of three years of political activity and lobbying for the Canadian women's movement. Women had achieved a significant victory, entrenching gender equality rights into the Constitution. What this would mean in practice was now subject to the interpretation of the Canadian judiciary. As such, the phenomenon of "charterwatching" demonstrates the "embedded" influence of the state on Canadian society.

The women's lobby expected progressive social decisions. Remembering how the National Association for the Advancement of Coloured People (NAACP) successfully used the United States courts in declaring segregation unconstitutional, they established the Legal Education and Action Fund (LEAF) to ensure that women's arguments would be heard in court[1], and help achieve "substantive equality of disadvantaged groups such as women," by which they meant "not simply equality in the form of law, but equality in the actual conditions of women's lives."[2] In the end, gender equality rights have

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[1] M. Elizabeth Atcheson, Mary Eberts, and Beth Symes, Women and Legal Action: Precedents, Resources and Strategies for the Future, (Ottawa: Canadian Advisory Council on the Status of Women, 1984), chp.1.

[2] Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?, (Ottawa: Canadian Advisory Council on the Status of Women, 1989), p.29.

become the charge of "charterwatching" groups like LEAF, who struggle to influence the judicial interpretations of the Charter for the benefit of women.

Feminist jurisprudence in Canada has followed a similar theoretical path to that in other rights-conscious, liberal democracies. Much of the basis for thinking about rights comes from liberal ideology, developed during the Enlightenment era of the 19th century. Liberalism, as one of its most well-known contemporary exponents John Rawls developed it, is about justice, fairness, and individual rights.[3] The bedrock of this view is that we are rational human beings who have individual aims, interests, and concepts of good.[4] Thus, no arbitrary distinctions between individuals can be made because of an emphasis on autonomy of the individual. However, self-interested individuals do not exist alone; they come in contact with other individuals, and all compete to satisfy their own self-interest. Consequently, because competing claims must be resolved, an individual's autonomy has to be circumscribed by principles of justice.[5]

In liberalism, the concept of self (with independent

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[3] See Mari Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice," New Mexico Law Review, 16 (1986), p.613. Also see Sherene Razack, Canadian Feminism and the Law, (Toronto: Second Story Press, 1991), p.13-20.

[4] Michael J. Sandel, Liberalism and the Limits of Justice, (Cambridge: Cambridge University Press, 1982), p.1.

[5] John Rawls, A Theory of Justice, (Cambridge: Harvard University Press, 1971).

existence) is decontextualized when the individual is placed in his or her community. Modern legal thinking is based upon the liberal notion of self, and thus has inherited liberalism's abstraction and limits. Therefore, it is unclear what the relationship is between individuals and groups before the law.

Feminist jurists have attempted to confront the boundaries between self and community, trying to come to terms with the meaning of engendered differences. As Sherene Razack suggests,

> Feminism applied to law insists on law's transformative potential, that is, on the role that law can play in the creation of a society based on an ethic that responds to needs, honours difference, and rejects the abstractions of scientific discourse.[6]

Feminist jurisprudence is a form of feminist theory-making. Feminist theory-making is a form of feminist political activity. Linked to "critical legal studies," feminist jurisprudence focuses upon the "politics of law," that is, upon the ways law legitimates and serves the distribution and retention of power in society.[7] Theorists posit that this focuses legal scholarship on the law's role in

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[6] Razack, p.21.

[7] Jaff, "Radical Pluralism: A Proposed Framework for the Conference on Critical Legal Studies," Georgia Law Journal, 72 (1984), p.1143; Roberto Mangabeira Unger, "The Critical Legal Studies Movement," Harvard Law Review, 96 (1983), p.561.

perpetuating patriarchal hegemony.[8] Such inquiry is grounded in concrete women's experiences, applying the notion of "personal as political," making feminist jurisprudence political action. In short, "[f]eminist jurisprudence is an examination of the relationship between law and society from the point of view of all women."[9] Litigation as feminist activity is in essence the telling of women's stories. Mary Eberts and Lynn Smith describe the application of feminism to law as an "art rather than a science"; the challenge has been to introduce into the courts a sense of women's reality, even though it is usually inadmissible because it is considered anecdotal and lacking empirical validation.[10] Canadian women's search for ways to present their reality in court and to be heard became considerably more directed and intense once the Charter came into effect.

Rights on paper mean nothing unless the courts "correctly" interpret their scope and application.[11]

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[8] Heather Ruth Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence," in Feminist Legal Theory: Foundations, (Philadelphia: Temple University Press, 1993) ed. D. Kelly Weisberg, p.23-26.

[9] Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," Signs, vol.8, no.4 (1983).

[10] Cited in Razack, p.69-71.

[11] Canadian political scientists have debated this point with reference to the Judicial Committee. See Frederick Vaughan, "Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation," Canadian Journal of Political Science 19 (September, 1986): 495-519; Alan C. Cairns, "The Judicial Committee and Its Critics," in Constitution,

"Charterwatching," to promote acceptably "correct" rulings, began as legal activists tried to influence judicial interpretation. This precipitated the creation of LEAF, initiated by several veteran lobby leaders, including Mary Eberts, Beth Atcheson, Beth Symes and Lynn Smith. From 1985 to 1987, LEAF concentrated on acquiring the funds to be an inclusive, national legal association by capitalizing on its members' insider status in the legal corporate world.[12] Many supporters were attracted by LEAF's image as an "intellectual, trail-blazing organization" with a stellar legal cast. Unfortunately, some of these recruits became uncomfortable with the association's "corporatist-feminist" approach and the priority litigation had, in the first years of LEAF, over the building of a more traditional community base.[13] Nonetheless, LEAF's executive pushed toward an aggressive style of litigation.

In the early 1980s, the social, political and judicial climate in Canada appeared to offer certain advantages or cracks in the system, that could work to the advantage of Canadian women. Their lobbyists had fought for and won

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Government, and Society in Canada, (Toronto: McClelland and Stewart, 1988): 43-85; and Peter Russell, "Comment on "Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation"," Canadian Journal of Political Science 19 (September, 1986): 531-36.

[12] For example, Mary Eberts was/is a partner in the Toronto law firm of Tory, Tory, Deslaurers and Binnigton.

[13] Cited in Razack, p.55.

constitutional provisions acknowledging the need to address substantive inequality sustained by unintentional practices adversely affecting them. Section 15 of the Charter explicitly stated that Canadians were not to be discriminated against on the basis of sex, and that all Canadians enjoyed equal benefit and protection of the law; these phrases were meant to protect disadvantaged groups even from the unintended harm of routine or systemic practices. Decisions on cases originating in Human Rights Commissions in 1985 indicated support for the concept of adverse impact. For example, in *O'Malley v. Simpson Sears*, a commission held that no intent was necessary to prove that a practice had discriminatory impact.[14]

The philosophic principles involved have a history of diverse interpretation. According to one authority, theories of equality can be divided into three categories: formal equality, numerical equality, and normative equality.[15] Formal equality urges treating one level of society equally and the next level of society unequally, though equally amongst that level, such as the notion of *separate but equal* in 1890s America. For instance, in the form known as the Jim Crow laws, this interpretation of equality was adopted by

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[14] Beatrice Vizhelety, Proving Discrimination in Canada, (Toronto: Carswell, 1987), p.3.

[15] For further reference see Ployvios Polyviou, The Equal Protection of the Laws, (London: Duckworth, 1979).

Southern states after the American Civil War.[16] In the American case, the white class enjoyed an equality amongst its members, as did the African American class, but the white class was believed to be "superior" to the African American class.

Numerical equality in contrast assumes that all humans share similar traits, and so deserve to be treated as equals. Both formal and numerical equality may be associated with the conservative or right-wing of the Canadian political spectrum. Modern conservatism, for example, may advocate that the rules of the market economy should apply equally to everyone. In opposition to this, the radical or left-wing exponents of normative equality typically argue that compensation for past disadvantages, as in *affirmative action* policies, should be provided before marketplace competition is allowed free rein. Normative equality, also known as "social equality", is similar to numerical equality because it accepts the premise that individuals should ultimately be treated equally, but can initially deviate by attempting to establish compensatory exceptions to absolute equality, to equalize opportunities and life-chances.[17]

Despite the current backlash against such affirmative

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[16] C. Vann Woodward, The Strange Career of Jim Crow, 3rd ed., (New York: Oxford University Press, 1974), p.3-11. For an excellent modern account of racial inequality in America see Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal, (New York: Charles Scribner's Sons, 1992).

[17] Greene, p. 163.

action policies,[18] it has been argued that Canadians' attitudes generally favour the more left-wing view of social equality. This is the conclusion, for example, of Paul Sniderman and his colleagues who found through surveys that 72 per cent of Canadians disagreed with the statement "Some people are better than others" and 73 per cent disagreed with the proposition "All races are certainly not equal."[19] As a reflection perhaps of these attitudes, the Charter of Rights and Freedoms, and especially sections 15 and 28 are worded in the concepts of social equality. In particular, it is worth noting that section 15(1) ensures the "equal benefit of the law," which according to Anne Bayefsky, makes it one of the most far-reaching equality clauses in any modern constitution.[20] More importantly, LEAF litigators believed that the judicial climate was propitious for their normative equalitarian understanding of the Charter.

The judicial decisions in the 1970s had given women litigating for their rights little encouragement; but early

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[18] For example, William Thorsell, "There are not two kinds of equality in the world," The Globe and Mail, March 18, 1995, p.D6.

[19] Paul Sniderman, Joseph Fletcher, Peter Russell and Phillip Tetlock, "Liberty, Authority and Community: Civil Liberties and the Canadian Political Culture," Paper delivered at the annual meeting of the Canadian Political Science Association and the Canadian Law and Society Association, University of Windsor, June 9, 1988.

[20] See Anne Bayefsky and Mary Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms, (Agincourt, Ont.: Carswell, 1985)

Supreme Court Charter decisions in the 1980s reinforced their mounting sense of optimism. In *R. v. Oakes*, the Court fortified the importance of equality guarantees in the Charter.[21] In 1981, David Oakes was charged with unlawful possession of a narcotic for the purpose of trafficking, but was only convicted of unlawful possession. Section 8 of the Narcotic Control Act (NCA) provided that if the Court found the accused in possession of a narcotic, then the accused was presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, must be convicted of trafficking. Oakes challenged the constitutional validity of this charge by suggesting it violated the presumption of innocence entrenched in section 11 (d) of the Charter. At issue, if it was found that section 11 (d) had been violated, was whether or not section 8 of the NCA was a reasonable limit prescribed by law and demonstrably justified for the purpose of section 1 of the Charter.[22]

Oakes won against appeal before the Supreme Court in 1985, and in the decision, the Court defined a test of what constitutes a "reasonable limit" on rights. Known as the *Oakes test*, it has two components. First, the objective of the government in limiting a right must be of sufficient importance to society to justify encroachment. Second, the

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[21] More than ten years after the *Oakes* decision, it remains central to guarantees of equality rights. See The Globe and Mail, Saturday, March 11, 1995, p.D2.

[22] The Queen v. Oakes, [1986] 1 SCR, 103.

limit must be reasonable and demonstrably justified in terms of not being out of proportion to the government objective, satisfying three criteria: (a) it must be rational, not arbitrary; (b) it should impair the right as little as is necessary; and (c) even if all of the above points are satisfied, the effects of the limit cannot be out of proportion to what is accomplished by the government objective. In short, the cure cannot be more harmful than the disease.[23] What was momentous to LEAF was that the Court supported the view that once an infringement of a right was found to have occurred, the onus then shifted to the party denying the right to prove under section 1 of the Charter that the limitation was reasonable. For litigating gender equality, LEAF would simply have to prove infringement of a right under sections 15 and 28.

As LEAF entered the courtroom with its own cases, it brought into public discourse, "women's daily, personal experiences of giving birth, working for pay, taking care of children, and of being raped, battered and harassed...."[24] First, pregnancy and childbirth are immutable characteristics which differentiate the sexes. However, Canadian courts have not always viewed pregnancy and femaleness as intrinsically related. In the *Bliss* decision, as noted in chapter two, the Supreme Court maintained that since not all women get

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[23] Greene, p.55, 150-52.

[24] Razack, p.73.

pregnant, the capacity for pregnancy could not be an immutable sex characteristic. As well, women choose to become pregnant, a personal choice for which they must bear responsibility.[25] After the Charter, LEAF entered the courts to argue that ignoring or discounting women's capacity for bearing children could lead to discrimination based on gender.

The first case involved Susan Brooks, Patricia Allen and Patricia Dixon. In 1982, all three women were employed by Canada Safeway, a grocery chain, and all three became pregnant. Under Safeway's group insurance plan, a pregnant employee was only eligible for accident/sickness benefits until the tenth week prior to expected confinement. Then, she was expected to claim maternity benefits under the Unemployment Insurance Act, which were lower than possible benefits under the group insurance plan. LEAF's goal was to convince the courts that pregnancy discrimination was tantamount to sex discrimination, and thus discounted the reality of women. Sherene Razack notes:

> LEAF began in *Brooks, Allen, Dixon* by noting that the only persons affected by pregnancy discrimination were women and that a rule or a practice which applied to members of a group who possessed a particular characteristic had the impact of singling out that group for differential treatment.[26]

In 1989, the Supreme Court reversed the *Bliss* decision, and accepted the argument that discrimination based on pregnancy

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[25] IBID, p.81-82. Also see Chapter Two.

[26] IBID, p.83.

was indeed discrimination based on gender. The Court held in *Brooks, Allen, Dixon* that, under the Manitoba Human Rights Act, sex discrimination included discrimination based on pregnancy, such that an employer's sickness and accident benefits plan could not exclude employees during pregnancy or confinement. The Court's conclusion was forthright:

> In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.
>
> Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose...is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women.... Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers that purpose.[27]

A different challenge confronted LEAF when litigating issues of child-rearing. From pregnancy, an obvious biological condition, to child-rearing, which is a socially produced condition, LEAF had to make clear to the judiciary where biological imperatives ended and social practices began.

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[27] Brooks v. Canada Safeway Ltd., [1989] 1 SCR, 1219.

At the heart of any judicial assessment of this issue is what constitutes the proper care of children. LEAF's success in court has depended on the extent to which patriarchal ideals are challenged, and also, conversely, the extent to which they can be appealed to in the interests of women's rights. As Razack argues, "[i]n those cases involving childrearing, one can see clearly that judges are more receptive to women's realities, and less receptive to men's, whenever women's claims sustain patriarchal family ideas."[28] One example of this is the *Klachefsky v. Brown* case.

After their divorce, Michael Klachefsky and Isabel Brown amiably shared custody of their two children until Brown accepted a job promotion in another city. At this point, both parents applied for sole custody, offering each other generous access to the children. In the first custody suit, Klachefsky was awarded custody, though Brown was recognized as the better parent, because he had recently re-married, providing the children home care rather than day care arrangements. As a working mother, Brown had to hire a caregiver between the hours of 3:00 PM and 5:30 PM. At the time, the trial judge believed the decision was in the best interest of the children.[29]

When interpreting contestable phrases or issues that

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[28] Razack, p.85.

[29] Brown v. Klachefsky, suit no.400/87, Judgement - January 8, 1988, O'Sullivan, Hubard, Philp JJ.A. (Man. C.A.), p.2-6.

imply a community standard, judges often attempt to apply their own standard of what the average reasonable person, informed of the relevant circumstance, would likely think. Dale Gibson has suggested that some judges even use public opinion polls as a measuring stick of public opinion when adjudicating.[30] However, the judiciary has generally rejected any formal proposal to adopt this practice because it would increase costs to litigants, and because the technique of polling is incapable of explaining all the relevant circumstances of a case in order for an "average" person to develop an opinion. Also, this approach clearly goes too far if it assumes that polling data will necessarily result in good judgements or that the wording of the polling questions could even be as objective as the independent judiciary strives to be. Thus, in the absence of any empirical indicators of public perceptions, the standard of the average reasonable person becomes a subjective standard established by judges alone. The *Klachefsky v. Brown* case offers some insight into this standard and the assumptions that influence judicial assessments of what constitutes the proper care of children.

In the final decision, two of the three Manitoba judges ruled in favour of Isabel Brown, noting that in doing so they were not disputing the opinion of the trial judge who

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[30] Dale Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms," The Canadian Bar Review, 61 (1983), p.37.

considered her the better parent but did not award her custody. Commenting on Brown's ability to provide care for her children, Justices Hubbard and O'Sullivan considered it inappropriate to identify home care as superior to day care. They argued, "whether an alternate caregiver is paid or unpaid, cannot be decisive of what is in the best interests of the children."[31] In conclusion, the justices found that, in the course of five years, Isabel Brown provided a stable home, whereas her ex-husband did not, having had relationships with three different women. Hence, the family ideal was held up as justification for both opinions; Brown was criticized for her inability to accept her duties of motherhood over her career, and Klachefsky lost custody because he failed to live up to the standard of a stable, monogamous family man.[32]

In the *Shewchuk v. Ricard* case, LEAF utilized such patriarchal assumptions to its advantage. Vicki Shewchuk alleged that Jerry Ricard was the father of her child, born out of wedlock, and should be compelled to pay maintenance. Ricard claimed that the British Columbia Child Support and Paternity Act forced fathers to pay support, but not mothers, and was thus discriminatory. The first trial judge agreed with Ricard and dismissed Shewchuk's appeal, but noted that

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[31] Op cit, p.4.

[32] Razack, p.86.

the court lacked the authority to strike down the statute.[33]

When LEAF intervened in the case, it had two goals. First, LEAF hoped that the paternalistic attitude of the court would lead it to rule in favour of Shewchuk. Lynn Smith, LEAF lawyer in the case, anticipated the unpopularity of the Ricard's position, a plaintiff seeking to avoid his paternal responsibility. Second, LEAF could not disregard the notion that the British Columbia Child Support and Paternity Act was discriminatory in tending to give preferential treatment to women. To argue that the legislation was an affirmative action policy, thus protected under section 15 (2) of the Charter was not desirable because it entrenched the notion that child rearing was solely a mother's responsibility. Thus, Smith sought the court's acceptance of broadening the legislation to include both men and women. The only problem with this approach stemmed from the fact that Canadian courts had generally avoided broadening or "reading up" legislation, believing this to be the sole function of Parliament.

In the final decision, two out of three judges ruled that the Act violated Section 15 (1) of the Charter, because it discriminated on the basis of sex. However, both ruled that although the Act could not be justified as an affirmative action measure, it could represent a reasonable limitation on Jerry Ricard's rights given its broader public purpose "to

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[33] "Shewchuk v. Ricard," Western Weekly Reports, 6 (1985), p.427-35; "Shewchuk v. Ricard," British Columbia Law Review, 66 (1985), p.117.

establish paternity and therefore provide a basis for shifting the financial responsibility for the child from the public to the private domain."[34] In short, fathers had an obligation, as did mothers, for the support of their children.

Though it appeared to have little to do with sexual equality and women's Charter rights, *Schacter* became a watershed case for LEAF. At issue in *Schacter* were the provisions of the Unemployment Insurance Act that provided natural parents with less extensive leave benefits than those available to adoptive parents. The Act provided fifteen weeks of maternity benefits to the natural mothers of children that could, in the event of the mother's disability or death, be transferred to the natural father. On the other hand, adoptive parents, regardless of gender, could claim fifteen weeks of parental leave benefits on the sole condition that the claimant demonstrate the reasonableness of remaining at home.[35] Schacter, a former student in political science at the University of Manitoba, and a practising lawyer, argued that these provisions denied him the equal benefit of the law guaranteed in section 15 of the Charter.

During the trial, Schacter's lawyer, Barry Morgan, urged the federal judge to consider three possible remedies: (a) extend the law to allow natural fathers to claim 15 weeks of paternity leave benefits; (b) strike out the section of the

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[34] Cited in Razack, p.88.

[35] IBID., p.141.

Act which gives natural fathers the right to claim benefits *only* if their wives die or are disabled; and (c) change the section of the Act that allows adopting fathers to get benefits by including natural fathers in the law.[36] The Federal Court of Canada agreed with Schacter, having found unequal treatment contrary to section 15. In this case, the court concluded that the impugned provisions of the Act were "under-inclusive" and that the "appropriate and just remedy" consisted of extending to adoptive parents the same benefits available to natural parents until such time as Parliament otherwise amended the Act to bring it into accord with the Charter.[37]

LEAF intervention in the *Schacter* case was spurred by concerns that maternal rights would be disregarded. Assuming that the woman who is pregnant, gives birth, and breastfeeds is not similarly situated to natural or adoptive fathers or to adoptive mothers, LEAF's involvement centred around what would happen to natural mothers who ended up sharing their fifteen weeks leave.[38] It was recognized that both fathers and mothers have similar needs with respect to developing a relationship with the child, but natural mothers require physical recuperation from the confinement and birth.

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[36] Toronto Star, April 20, 1988, p.A9.

[37] Schacter v. The Queen [1988] 52 D.L.R. (4th) 525 at 539.

[38] Razack, p.89-94.

Therefore, while supporting Schacter's wish to actively parent and have state support in his role, LEAF tried to ensure that it would not come at the expense of maternity benefits.

In short, LEAF suggested the extension remedy, that unemployment insurance benefits should be available to all parents, natural or adoptive, without taking away from the vital leave required by natural parents. The case set precedents for feminist jurisprudence because it provided opportunity for LEAF to clearly describe, before Federal Court, the experiential world of pregnancy, birth, recovery, and breastfeeding - the world of the traditional private sphere, an area foreign to legal discourse. In the end, the court focused on the issue of parenting, and not on the legalistic abstract of competing claims.[39]

The concern for gender equality faced new challenges with the first Section 15 case to reach the Supreme Court, since it represented the first time the Court would interpret the section and its relationship to Section 1 of the Charter. As always, LEAF's fundamental concern was how the judgement would affect the interests of women and minorities. The *Andrews* case arose as a result of the British Columbia Law Society's refusal to admit Mark Andrews to the practice of law because he was not a Canadian citizen. At the time, Andrews was a British citizen residing permanently in Canada after marrying a Canadian citizen. He had acquired law degrees from Oxford

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[39] IBID., p.94.

University, and except for the citizenship requirement, had completed the requirements for admission to the British Columbia Bar. As a non-citizen, Andrews was denied certain entitlements granted to citizens. The Supreme Court of Canada struck down the citizenship requirement as a violation of section 15(1) of the Charter, although two justices would have upheld the citizenship provision on the basis of section 1.[40]

The thrust of LEAF's intervention in the Andrews case was to ensure that Section 15 fulfilled the function for which it was intended, that is, to secure equality for those groups historically denied it. In a historic context, LEAF counsel was firmly entrenched in the same ideological mould as the women's rights movement that ensured gender equality in the Charter. This was a radical departure from the judiciary's traditional, individualist orientation. What LEAF was asking the court to do in *Andrews* was to approach its traditional task of balancing competing claims with due regard to an individual's group situation. When that group situation is described as oppressed or disadvantaged, nothing is more revolutionary in a court of law. In short, LEAF was asking the court to shed old habits and judge society with a new world view. The significance of LEAF's approach and the court's decision were recognized as *The Toronto Star* headline

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[40] Wilson (Dickson, L'Heureux-Dube concurring) struck down the citizenship requirement; LaForest concurred for separate reasons. McIntyre and Lamer dissented, considering the provision within reasonable limits of violating equality rights.

screamed, "High Court Launches New Legal Era With Equality Ruling."[41] In the end, the Supreme Court responded favourably to LEAF's argument.

Justice McIntyre's opinion on equality was adopted by the court. He objected to the B.C. Court of Appeal's application of formal equality to section 15 since,in his view, it had led to unacceptable results under the Bill of Rights (1960), namely the Lavell and Bliss cases. McIntyre explicitly rejected the formal equality interpretation:

> [Formal equality] is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremburg laws of Adolf Hitler. Similar treatment was contemplated for all Jews. The similarity situated test would have justified the formalistic separate but equal doctrine of Plessy v. Ferguson [65] a doctrine that [entrenched racial discrimination in the U.S. until the case of Brown v. Board of Education [23], which overruled Plessy in 1954].[42]

Upon rejecting the theory of formal equality, McIntyre proceeded to adopt a social equality interpretation of the Charter, arguing section 15 provided for a dramatic broadening of its definition. McIntyre explained that the equality referred to in section 15 could not have been intended to require the elimination of all distinction:

> If the Charter was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a)

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[41] The Toronto Star, February 3, 1989, p.A1-A2.

[42] Andrews v. Law Society of British Columbia, [1989] 1 SCR 143; LCD, 5th ed., no. 52A; LCDSCC, np.57, on appeal from [1986] 4 W.W.R. 242.

> (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s.15(2), which [allows affirmative action programs].[43]

Subsequently, Justice McIntyre posited that parameters of equality must be established, which he did by clearly defining the Court's notion of "discrimination":

> Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burden, obligations, or disadvantage on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[44]

In *Andrews*, the Supreme Court decided that by creating a distinction based on citizenship, the Law Society of British Columbia had imposed a burden upon permanent residents, like Mark Andrews, thus discriminating and violating the equality principle of the Charter.

The *Andrews* interpretation of equality rights was re-enforced when the judiciary again avoided the theory of formal equality in interpreting section 15. In May, 1989 the *Turpin*

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[43] IBID.

[44] IBID.

case, on appeal from the Ontario Court of Appeal, was presented to the Supreme Court. The case concerned the sections of the Criminal Code which required murder cases to be tried before a trial by jury. In the province of Alberta, however, murder cases can be tried either before a trial by jury, or before a judge only. Sharon Turpin and her co-accused, who had been charged with first-degree murder in Ontario, petitioned the Court to be tried by judge alone. They argued that they had a right to choose either a jury trial or trial by judge alone under section 15 of the Charter, which states that citizens are "equal before the law." They claimed that the guarantee of equality before the law meant that advantages granted accused people in Alberta under federal law should be available to people across the country.[45] In the end, Turpin's appeal to the Court was lost.

Justice Bertha Wilson wrote the opinion for a unanimous Court. In her opinion, Wilson turned to section 15 of the Charter and applied a two-step system of analysis developed in the *Andrews* case. For the first step, Wilson had to determine whether there had been any violation of section 15 of the Charter by the Criminal Code. Because the Criminal Code treats accused persons outside Alberta more harshly than those within, Wilson concluded that the Code violated the principle of equality before the law. However, the second step, which determined whether there had been justifiable discrimination,

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[45] Greene, p.170.

was the linch-pin of the Court's decision. Concurring with McIntyre's previous definition of discrimination, Wilson argued that only when the four principles of equality outlined in the Charter were violated was discrimination present. In short, the Court decided that the "unequal" treatment of Turpin was justifiable and thus was within the mandate of section 1 of the Charter.[46] Again, as in the *Andrews* case, the Supreme Court shied away from applying the formal equality theory to the Charter. Thus, it would seem that the Supreme Court has followed, at least to a modest degree, the direction that feminists had hoped for during their constitutional lobby.

Indeed, feminists had hoped the judiciary would use section 15 "proactively", to institute result-oriented policies where none existed. To their dismay, however, judges have sometimes used notions of formal equality to undermine such policies even when legislatures have established them. A good example is the prison guard issue, which raised the question of employment of female prison guards in male prisons and vice versa. Regulations had been established to permit female guards to be employed in male prisons, thereby invading the privacy of the prisoners, while at the same time, preventing male guards from being employed in female prisons, thereby protecting the privacy of female prisoners. When

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[46] Regina v. Turpin, [1989[1 S.C.R., S.C.J. no.47 on appeal from the Court of Appeal for Ontario.

these regulations were challenged by male prisoners, the Court upheld the regulation permitting women to be employed in male prisons, but in order to maintain equality, struck down the corresponding prohibition of men working in female prisons. Feminists applauded the first conclusion, but were shocked by the second.[47]

Nonetheless, with the *Andrews* decision, noted a *Toronto Star* editorial, "the less equal can expect to have a better day in court."[48] LEAF now had something to work with, as a foundation for future litigation efforts seeking gender equality. *Andrews* was not a case about women's daily reality, but it was a significant reference point for LEAF in cases about women's experiences as victims of harassment and rape. Again and again, the approach in *Andrews* was emphasized, to rebut the individualist perspective and confirm LEAF's commitment as a feminist organization.[49] This commitment was next demonstrated in the *Janzen/Govereau* case.

Diana Janzen and Tracy Govereau were waitresses who were sexual harassed by a cook in the restaurant where they worked. The Manitoba Human Rights Commission found that there had been harassment, that the complaints had indeed suffered, and that they had been obliged to work in a "poisoned environment." On appeal, the presiding judge declined to consider the notion

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[47] Brodsky and Day, p.53,83-84.

[48] The Toronto Star, February 18, 1989, p.D2.

[49] Razack, p.107.

that sexual harassment was a form of sexual discrimination; he decided instead that the case involved an individual who was sexually attracted to two female, co-workers. Indeed, the judge ruled that the cook had never intended his actions to discriminate against women as a social group.

When *Janzen/Govereau* was appealed to the Supreme Court, LEAF intervened in order to spell out how it felt sexual harassment reinforced men's economic and sexual dominance over women. Sexual harassment, it argued, "both mirrors and reinforces a fundamental imbalance of power between men and women in the workplace and in society," and it was within the context of this imbalance that the meanings of male and female were socially constructed.[50] Thus, each gender construct or stereotype increased the inequality of the sexes. Again, LEAF's approach was radical for the Court since its premise was that a harassed woman's experiences are not due to her individuality, but because of her membership in the group collectively characterized as "women". As in *Andrews*, LEAF attorneys urged the Court to dispense with its individualist thinking and abstract balancing of claims. In its decision on May 4, 1989, the Supreme Court declared that only female employees run the risk of sexual harassment, stating, "[s]exual attractiveness cannot be separated from gender"[51]:

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[50] Cited in Razack, p.108.

[51] Janzen/Govereau v. Platy Enterprises, [1989] 1 SCR, 1252.

> Sex discrimination does not exist only where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that the ascribing of a group characteristic to an individual is a factor in the treatment of the that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value.[52]

As well, the Court understood sexual harassment to be an experience women have because they are women, who typically constitute a discriminated group in society because of harassment. Clearly, then, the Supreme Court's decision made a connection between sexual harassment and gender inequality.[53]

Like sexual harassment, the issues of sexual assault and rape are sensitive for both men and women. Presiding over such cases, judges have had to cope with a variety of emotional issues, like the fundamental social assumptions of male and female sexuality, the "vengeful women" image, and the inhibitive legal nature of the Criminal Code's rape shield provisions.

Steven Seaboyer was accused of raping a woman, whom he had met in a downtown tavern and taken to his residence.

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[52] IBID.

[53] Razack, p.107-09.

During his trial, Seaboyer's lawyer attempted to question the victim about her past sexual life. The presiding judge intervened in protest citing Sections 246 (6) and 246 (7) of the Criminal Code, which prohibits as evidence information about the past sexual activity of the complainant with any other person except the accused. This rendered inadmissible any evidence of sexual promiscuity that might be cited for the purpose of undermining the credibility of the complainant.[54]

In another case, Nigel Gayme was accused of sexually assaulting a fifteen year old girl in a school basement, and when his lawyer attempted to use the same tactic, the same result ensued. Both men then applied to have the relevant sections of the Criminal Code tested on the basis that they were denied their right to a fair trail guaranteed under the Charter.[55] In its decision, the Supreme Court dismissed the appeals, finding s. 276 to be inconsistent with the Charter's section 7 and that inconsistency was not justified under section 1 of the Charter. However, section 277 was found to be consistent with the Charter. In its decision, the Court stated:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues....A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our

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[54] R. v. Seaboyer/ Gayme, [1991] 2 SCR, 577.

[55] See Razack, p.109-20.

> fundamental conceptions of justice and what constitutes a fair trial. The trial judge must balance the value of evidence against its potential prejudice.[56]

Further, the Court suggested that sections 276 and 277 of the Criminal Code had to be measured against this yardstick. Thus, it rejected the idea that a complainant's credibility might be affected by whether she has had other sexual experience. The justices concluded, "there is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness."[57]

By intervening in the *Seaboyer/Gayme* cases, LEAF has demonstrated why the rape shield provisions are essential for gender equality. It argued that sexual reputation is no more an indicator of credibility in a woman than it is in a man. What is important is that the rape shield laws reject two assumptions: (a) that an unchaste woman is/was more likely to consent to sex; and (b) that such a woman is/was less likely to tell the truth about it in court.

Among the lower court decisions on section 15, the two most significant are: *Blainey v. Ontario Hockey Association* (1986) and *Schacter v. The Queen* (1988). At issue in *Blainey* was whether section 15 prohibits private athletic organizations from excluding participants on the basis of sex. In this case, Justine Blainey, a twelve-year-old girl, was

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[56] R. v. Seaboyer/ Gayme, [1991] 2 SCR, 577.

[57] IBID.

prevented from playing on a boys' hockey team. Under the Ontario Human Rights Code, there is an exemption to prohibition against sex discrimination that expressly permitted private athletic associations to discriminate on the basis of sex. Although the Ontario Court of Appeal held that the Charter did not directly apply to the hockey association, it did find that the Code's exemption did precipitate discrimination contrary to the Charter. Consequently, the court declared that the code must operate without any exemption for single-sex athletic associations.[58] The ramifications of this case were two-fold. First, it signalled that the legislative compromises and complex social policy choices underlying human rights legislation were subject to judicial review under the Charter. Second, it illustrated the problematic consequences of constitutionally-based judicial review of legislation concerning complex social policy issues.[59]

In conjunction, these cases reflect a general characteristic of gender equality rights litigation; for the most part, these cases have involved subtle policy questions about the delivery of public goods, and in the process, outlined the pernicious discrimination against a vulnerable group. Clearly, as Christopher Manfredi has argued, the

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[58] See The Globe and Mail, June 12, 1987, p.A12, January 16, 1988, p.A15; and The Toronto Star, August 27, 1988, p.A13, December 5, 1987, p.A1, A12.

[59] IBID., p.140.

courts have faced a daunting series of interpretive questions in undertaking their responsibility for determining precisely what "equality rights protect Canadians against" or, alternatively, entitle them to receive.[60] He concludes that "[b]oth textual structure and judicial interpretation of section 15 reflect the ascendancy of substantive equality as a fundamental principle of Canadian public policy."[61] In agreement with Manfredi, Ian Greene has suggested that the wording of section 15 is in tune with the more radical concepts of social equality of the late 1970s. It was an attempt, he argues, to broaden the scope of legally enforceable equality in Canada in reaction to the limited equality and largely ineffective provisions of the 1960 Canadian Bill of Rights.[62] In short, the Canadian judiciary, including the Supreme Court, has arrived at a working definition of equality which is in concurrence with attitudes exhibited that are widespread, if not universal, in Canadian society. What remains to be considered is whether the equality provisions in the Charter, and the generally supportive court rulings over the past twelve years, have made any significant, appreciable improvement in the actual lives of Canadian women.

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[60] Manfredi, p.142.

[61] IBID., p.152.

[62] Greene, p.164.

CHAPTER FOUR - HAVE EQUALITY RIGHTS MADE ANY DIFFERENCE?

Have the equality rights of the Canadian Charter of Rights and Freedoms been fulfilled by the decisions of the Supreme Court? Has section 15 of the Charter made a difference? How? As a tool for the amelioration of gender inequalities, the intentions of section 15 have been fulfilled by Supreme Court decisions, and thus made a positive difference for Canadian women. Long burdened with the tacit discrimination of society, Canadian women have struggled for political recognition since Confederation. And this struggle has been capped by two important successes: a) gaining of the franchise in 1920 and, b) the recognition of gender equality rights in the Canadian constitution. The political motivations of the constitutional actors shaped the crucial sections, empowering certain sectors of society, and re-shaping the role of the Supreme Court. Indeed, equality rights were a political compromise, agreed upon by national leaders, provincial leaders, and various interest groups. Of the interest groups lobbying the constitutional process of 1979-82, the women's rights movement, made up of several diverse groups, utilized the momentum of the "second wave" of feminism to forge a political victory its sister movements in other countries have not yet achieved.[1]

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[1] In a 1992 Toronto appearance, the celebrated American feminist Gloria Steinem suggested that Canadian women's entrenchment of equality rights in the constitution was

In order to demonstrate conclusively that the Charter's equality provisions have made a positive difference in Canadian women's lives, women's pre-Charter condition needs to be studied much more thoroughly than is possible here. What is undeniable is that most women's lives were characterized by a lack of autonomous control over their bodies, their sexuality, their children, their homes and their workplace. As well, they lacked power in the institutions that governed them, especially the law.[2] Neither the common law nor the Canadian Bill of Rights (1960) had been a source of positive response to women's equality claims. For centuries, in common law, women were understood to be incapable of engaging in public life. Claims by women in Canada to the same rights as men to vote, enter professions, and hold public office were rejected by the courts. Despite the fact that it explicitly guaranteed equality, identified sex as a prohibited basis for discrimination, and required that all federal laws be applied and interpreted in compliance with it, the Canadian Bill of Rights was a failure for women. The courts interpreted it timidly, and the history of denying women's equality claims

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unprecedented. "You've pioneered so many things," she said. "There is a greater degree of justice for women on this side of the border than on my side of the border." Cited in Sydney Sharpe, The Gilded Ghetto: Women and Political in Canada, (Toronto: HarperCollins, 1994), p.109.

[2] Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?, (Ottawa: Canadian Advisory Council on the Status of Women, 1989), p.11-18.

continued, as was evident in the *Lavell* and *Bliss* cases.

This is not to suggest, however, that the present Charter has dramatically ameliorated the condition of all or even most women. As a group, women are poorer than men. They work in ill-paid female ghettos, doing mostly part-time work, have few job protections, and less access to benefits and pensions. As commentators have suggested, "Their gender determines the work they do and the pay they receive."[3] Sixty per cent of single-parent mothers live below the poverty line, trying to feed, clothe and house their children. They suffer both material deprivation and loss of dignity, self-respect, and autonomy.[4] Women are also victims of social violence. They are sexually abused as children, sexually assaulted as adults, and battered in their homes. Too often, women attempting to leave abusive relationships become murder victims at the hands of their estranged husbands or boyfriends.[5]

Nonetheless, despite its shortcomings, the Charter has made some improvements. Any analysis of these possible improvements needs to consider two distinct categories: first,

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[3] Brodsky and Day, p.11.

[4] See H. Echenberg and B. Porter, "Poverty Stops Equality, Equality Stops Poverty: The Case for Social and Economic Rights," in D. Williams and P. File, eds., Human Rights in Canada - Into the 1990s and Beyond, (Ottawa: University of Ottawa Press,, 1990).

[5] A recent example of this occurred over a five week period in the summer of 1995: five women were killed by estranged partners in Edmonton and Calgary. See the Edmonton Journal, August 15, 1995, p.1 and the Calgary Herald, July 29, 1995, p.1.

in women's daily lives; and second, in women's treatment in the judicial process. In the first category, clearly the Charter has made little to no difference. However, in terms of the second category, the Charter has had a positive impact. As Sherene Razack argues, from a feminist litigator's perspective, LEAF has enjoyed several gains.[6] It has been granted intervener status a number of times, evidence of the credibility it has established as an organization able to speak on behalf of women's interests. LEAF has successfully conveyed its position on the importance of the equality guarantees of the Charter, and Canadian courts appear to have accepted its arguments about the adverse impact of certain practices on women. For example, LEAF has demonstrated why the rape shield provisions are essential for gender equality. This was accomplished in the *Seaboyer* and *Gayme* cases (1991). In *Schacter* (1988), the Supreme Court sided with LEAF when it recognized the potential impact on women of sharing their childbirth leave with men. The watershed case was *Andrews* (1989), when the court paid heed to LEAF's arguments for its own approach to the balancing of competing claims under the Charter and for the rejection of formal equality. Subsequent to *Andrews*, the *Brooks, Allen, Dixon* (1989) case established that pregnancy discrimination was sex discrimination, and *Janzen/ Gavereau* (1989) made clear that sexual harassment was sex discrimination. Clearly, in its decisions, "the court has

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[6] Razack, p. 128.

signalled its understanding of the impact that women's unequal status has on their rights and opportunities."[7]

There are, on the other hand, legal theorists who believe that the Charter rights, including the equality rights, have not, and perhaps cannot, be used to attain progressive goals.[8] This position is emphasize in Michael Mandel's book *The Charter of Rights and the Legalization of Politics in Canada*. Mandel suggests that those who expect great things from judicial activism have been too bedazzled by the Warren Court era (1953-1969) in the United States. Over the long term, he argues, judicial review has served conservative rather than liberal causes, and the twenty years between *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973) were an exception.[9] Nor, according to Mandel, does the exception show that the judicial arena is "an empty vessel into which any form of politics can be poured, conservative, liberal, right wing or left wing."[10] Mandel insists that if equality of result is the goal, judicial politics is destined to be conservative

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[7] Ibid., p. 8.

[8] This group of critics includes Joel Balkan, "Strange Expectations: A Review of Two Theories of Judicial Review," McGill Law Journal, 35 (1990): 439-58; Andrew Petter and Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy," UBC Law Review, 23 (1989): 531-48; and Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada, 2nd ed., (Toronto: Thompson Educational Publishing, 1994).

[9] Mandel, p. 57.

[10] Ibid., p. 63.

politics. It is so destined because judicial politics is characterized by an abstract and tradition-bound formalism. Mandel shares Donald Smiley's pessimism:

> It seems unreasonable to expect in the short-term future of a decade or so that the Court in interpreting the Charter will completely abandon its former dispositions towards a presumption of constitutionality.[11]

These critics also argue that by holding out an empty promise, the Charter rights lead to wasted efforts, and that by permitting the assertion of individual rights against state or collective goals they reinforce a retrogressive legal system. Worse, by requiring enforcement of rights through an expensive and elitist judicial process, the Charter discriminates against the economic disadvantaged, and empowers judges to determine the legitimacy of legislation or government action without effective constraints, or any true accountability. This, it is said, seriously undermines democracy and potentially progressive political processes in the responsible, elected legislatures of the country.[12]

This position is not without justification, but women have not chosen the courts as the sole forum to seek advancement of their equality. Women's groups are still pressing governments actively and continuously for

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[11] Donald Smiley, The Canadian Charter of Rights and Freedoms, (Toronto: Ontario Economic Council, 1981), p. 45.

[12] Cited in Lynn Smith, "Have the Equality Rights Made Any Difference?" in Protecting Rights and Freedoms, P. Bryden, S. Davis, and J. Russell, eds., (Toronto: University of Toronto Press, 1994), p. 64.

improvements in laws and programs. It would be misdirected activity to concentrate only on the judicial system for advancement of women's interests. Nor should government lobbying be the only forum for the same purpose. In short, women must press for changes in both arenas.[13] This is what they have done.

Like other political actors using the judicial system as a means of social change, Canadian feminists have a vested interest in the appointment of women to the bench. However, the major concern is not sheer numbers, but rather, how prospective female justices will interpret the Charter. Clearly, the concept of representation is not the major issue in the appointment of judges where women's groups' interests are concerned.[14] If one female justice is to represent women, then what do the other eight justices represent? What is important to note is that representation is not as much a concern in judicial politics as it is in legislative politics. Hence, when Bertha Wilson retired from the Supreme Court, feminists mobilized to replace her with someone who favoured

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[13] Brodsky and Day, p.4.

[14] However, this is not to suggest that Supreme Court Justices are not representative of Canadian society. My assumption is that they do represent something, the only question is do they represent specific groups or minorities like the other branches of the Canadian political system do, or are they to represent various opinions within legal thought. See Beverly Baines, "After Meech Lake: The Ms/Representation of Gender in Scholarly Spaces," in <u>After Meech Lake: Lessons for the Future</u>, David E. Smith, Peter MacKinnon, John C. Courtney eds., (Saskatoon: Fifth House Publishing, 1991), p.215.

the "substantive" and wide interpretation she had always preferred for the Charter. The leading candidate was Mary Eberts, who was considered an excellent choice because of her intimate knowledge and experience with the development of the Charter and its litigation. As well, feminists believed Eberts articulated better than anyone the vision of equality rights favoured by women's groups, especially since she had published an impressive array of scholarly and political writing during her ten years of legal practice in Toronto.

Therefore, a lobbying campaign began on her behalf by women's organizations, to which a number of leading Conservatives contributed their support. Two other prominent women lawyers also were entered into the race - Rosalie Abella and Louise Arbour - which was fought through letter campaigns, phone calls and personal representations to the Prime Minister, cabinet ministers and officials in the Department of Justice. But Prime Minister Mulroney selected none of the women, instead, appointing Frank Iacobucci to the post. Iacobucci was a former dean of the law school at the University of Toronto, a former deputy minister in the Department of Justice, and chief justice of the Federal Court.[15] Despite his credentials, Iacobucci's appointment was a disappointment to women's groups because he avoided the wide interpretation of the Charter that Wilson had championed. In

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[15] Jeffrey Simpson, Faultlines, (Toronto: Harper Perennial, 1993), p.102.

a sense, then, proactive judicial interpretation of the Charter was under scrutiny within the Supreme Court.[16]

Like the trend in judicial appointments during the Mulroney era, there are critics who express grave concerns about the way the Charter permits "interest groups"" to assert Charter rights that could conceivably defeat the will of duly elected governments.[17] The nature of the Supreme Court has made this issue more complex. According to F.L. Morton and Rainer Knopff, the Canadian judiciary has faced a troubling dichotomy in its search for a definition of equality. They argue that Canadian conservatives have called for a definition of equality based on "equality of opportunity" while the women's movement has sought an "equality of result".[18] As the Supreme Court considers equality, therefore, its own judicial legitimacy may be caught up in a political debate on the allegedly conservative, or progressive, nature of the judicial system.

Theoretically, as judges rule on policy initiatives of

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[16] There have been suggestions that a backlash against equality rights has occurred in Canadian judicial decisions with the May 1995 Supreme Court decisions against working mothers gaining a day care tax exemption and gay men's rights to family benefits. This was a blow to feminist jurists, and may signal a new direction for the Court. See Winnipeg Free Press, May 26, 1995, p.A1, B3 and The Globe and Mail, May 26, 1995, p.A1, A3, A20, B18.

[17] This group of critics includes Christopher Manfredi, Judicial Power and the Charter, (Toronto: McClelland and Stewart, 1993); and Rainer Knopff and F.L. Morton, Charter Politics, (Scarborough: Nelson Canada, 1992).

[18] Knopff and Morton, chp.8.

the legislative and executive branches of government, they decide if policy conforms to the tenets of the constitution. In reality, the Supreme Court has performed its task not in defining the substantive meaning of constitutional rules of rights and freedoms, nor in measuring government action against those definitions, but in applying the section 1 test of reasonable limits.[19] Therefore, keeping with tradition, and despite its new powers, the Supreme Court has shied away from becoming overly assertive or proactive in policy-making, or otherwise trespassing on traditional prerogatives or functions of Canadian legislatures, whether provincial or federal.

Nonetheless, the judiciary has powers, exercised or not, and there are concerns about the relationship between judicial power and liberal constitutionalism. In particular, the most problematic aspect of this relationship is the use of judicial power to review and to nullify or modify the policies enacted by democratically accountable policy-making bodies. As Christopher Manfredi suggests; "Judicial power....is problematic because of the ambiguity surrounding its legitimacy within liberal democratic theory."[20] Democratic liberalism posits the notion of popular sovereignty: that government is legitimized by the public's choosing of its

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[19] Christopher Manfredi, Judicial Power and the Charter (Toronto: McClelland and Stewart, 1993), p.157.

[20] IBID., p.9.

representative and responsible leaders. In Canada, the judiciary is appointed by government, not by the people, so its legitimacy is questionable, if legitimacy is to be determined by direct accountability to the electorate. But "Justice is blind" and the Canadian judiciary is also expected to be objective and impartial, responsible only to the constitution, with its independence protected from legislative or executive interference and from popular pressure. In light of this, the Charter has proven to be a challenge to the judiciary as it has interpreted equality rights. It must walk a fine line between integrity and popularity.

In *Democracy in America*, Alexis De Tocqueville knew that although equality encouraged personal independence and a desire for free political institutions, it also supported tendencies toward both anarchy and political servitude:

> It cannot be denied that democratic institutions strongly tend to promote the feeling of envy in the human heart; not so much because they afford to everyone the means of rising to the same level with others as because these means perpetually disappoint the persons who employ them. Democratic institutions awaken and foster a passion for equality which they can never entirely satisfy.[21]

In this perspective, the equality guarantees found in section 15 of the Charter may represent a mixed blessing. As Alan Cairns argues, the equality guarantees of the Charter can contribute to the erosion of the traditional constitutional discourse between federal and provincial elites in favour of

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[21] Alexis De Tocqueville, Democracy in America, ed. J.P. Mayer (New York: Harper, 1969), p.504.

a plethora of independent, individualistic interests. Consequently, this new openness allows more citizens to participate in constitutional negotiations, but also raises the possibility of constitutional and social disintegration.[22] Because constitutional equality rights are so debatable, there arise competing claims between government interests and individual citizens' rights, causing litigious conflict. It is the judiciary's task, under section 15, to manage these disputes. Defining "equality" in its constitutional context, therefore, has been the judiciary's primary objective is managing this task.[23] But because the Charter is both new and far-reaching, the judiciary has been understandably cautious in meeting its new responsibilities.

Even so, critics such as Morton and Knopff already accuse it of generating anti-democratic political consequences. UBC Dean of Law Lynn Smith disagrees when she defends the new, enhanced role of the courts as an improvement:

> To the extent that the Charter, as applied by the courts, can increase the full and free participation of all Canadians, whatever their racial or gender characteristics, sexual preference, age, disability, or religion, in the political process in its widest sense, it does not hinder the democratic process. It improves it.[24]

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[22] Alan Cairns, "Constitutional Minoritarianism in Canada," in Ronald Watts and Douglas Brown, eds., Canada: The State of the Federation, 1990 (Kingston: Queen's University Institute of Intergovernmental Relations, 1990), p.77.

[23] Manfredi, p.120.

[24] Smith, p.76.

It would be too narrow an outlook not to see that our political institutions suffer from imperfections such as a lack of representativeness and a lack of responsiveness, especially to issues which are politically volatile. Furthermore, because the Charter applies to legislatures and to government administration, it is frequently the actions of civil servants and public officials that are being scrutinized. For example, in the *Brooks, Allen, Dixon* case, the challenge was not to the elected government, but to the administering of the Unemployment Insurance Act by civil servants and the decision they had made in regards to pregnancy benefits. In light of this, Smith concludes that the issue is more complex than a simple choice between unelected judge and elected legislator:

> In short, the simple dichotomy between democratically elected legislator and appointed (and essentially unaccountable) judge is a false one.[25]

From this perspective, it could well be argued that the courts now may help, rather than hinder, the legislature in preventing the arbitrary or sexist abuse of administrative authority.

There are those who, accordingly, believe that the equality rights have done more good than harm, and show clear potential for further development. Smith agrees that the risk of fixation upon rights is real as is the risk that rights as interpreted by the judiciary will become both the floor and

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[25] Ibid., p.76.

ceiling of what is possible. But using her criterion - have the Charter equality rights done anything to remedy inequalities affecting members of the disadvantaged groups in our society - Smith argues that section 15 counterbalances some inequalities between people.[26]

This may not be altogether surprising since Smith was one of the women who helped lead the Ad Hoc Committee's lobby of the Trudeau government for a strong equality rights clause, and became a prominent litigator for LEAF in both the *Bliss* and *Brooks, Allen, Dixon* cases. One could argue that her analysis is particularly apt given her personal involvement in all stages of the development of current Charter equality rights. A cynic on the other hand, could suggest that her analysis is self-serving in defending her own achievement.

For Smith, the best example of how the Charter equality provisions have benefitted women was the reversal of Supreme Court regarding pregnancy and discrimination. In chronological order, the major events she considers significant in this regard were as follows:

> - the *Bliss* case (1978), in which the Supreme Court held that discrimination based on pregnancy was not sex discrimination because any discrimination was created by "nature", not the statute;
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> - considerable public outcry from 1978 to 1980, including expressions of concern from women's organizations;
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> - legislative reform, over the next fourteen years, in several jurisdictions, to define "sex

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[26] Ibid., p.62.

discrimination" in human rights statutes to include pregnancy;

- frequent references to the *Bliss* case in the submissions from women's organizations about the proposed wording of equality provisions in the Charter of Rights;

- founding of the Legal Education and Action Fund in 1985;

- the *Andrews* decision (1989) under the Charter, in which the Supreme Court adopted an approach to equality inconsistent with that taken in Bliss; and finally

- the *Brooks, Allen, Dixon* case (1989), in which the Supreme Court reversed its own previous decision in *Bliss*, relying in part on the *Andrews* approach to equality.

According to Smith, the LEAF litigator in *Brooks, Allen, Dixon* and *Bliss*, the Supreme Court's reversal over one decade can be attributed to two inter-related factors. First, the social change that witnessed increased numbers of women in the paid work force (noted in the *Brooks, Allen, Dixon* case by the court) introduced an approach to pregnancy as a necessary and appropriate part of a working person's life, to be accommodated rather than penalized. Second, legal changes, including those suggested by women lawyers, were evident in the amendments to human rights legislation, the wording of the Charter, and the language used by the Supreme Court in *Brooks, Allen, Dixon*.[27]

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[27] Lynn Smith, "Have the Equality Rights Made Any Difference?," in Protecting Rights and Freedoms, eds. Philip Bryden, Steven Davis, and John Russell, (Toronto: University of Toronto Press, 1994), p.67.

Commenting on gender equality, Elizabeth Schneider has agreed that the women's movement has itself benefitted, in feminist theory and in practical lobbying skills, from its political experience:

> The women's movements' experience with rights shows how rights emerge form political struggle. The legal formulation of the rights grew out of and reflected feminist experience and vision and culminated in a political demand for power. The articulation of feminist theory in practice in turn heightened feminist consciousness of theoretical dilemmas and at the same time advanced feminist theoretical development. This experience, reflecting the dynamic interrelationship of theory and practice, mirrored the experience of the women's movement in general.[28]

What remains uncertain, however, is the extent to which even dramatic legal successes, such as the progress from *Bliss* to *Brooks, Allen, Dixon*, lead to actual improvement in the ordinary daily lives of most women, beyond the general social change and more informed discourse. It is likely that some employee benefit plans similar to the one at issue in Brooks, Allen, Dixon have been changed as a result of the decision, and that some women employees now receive payments during pregnancy that they did not receive before. But to demonstrate this statistically would require a survey of actual benefit plans that is beyond the capacity of this thesis.

Another method of assessment may consider constitutional

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[28] Elizabeth Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," New York University Law Review, 61 (1986), p.648.

political activity by women's groups. In the dramatic attempt to amend the Constitution Act with the Meech Lake Accord, women were in the forefront as never before. Because they perceived it as threatening the integrity of the Charter, they formed with other groups, including the First Nations, in raising serious questions about the wisdom of adopting the controversial Accord.

Changes in political leadership in Ottawa and Quebec City triggered the efforts culminating in the Meech Lake Accord. By 1985 the two great gladiators who had dominated the previous constitutional discussions, Pierre Trudeau and Rene Lévesque, had departed from the political arena. In February 1984, Trudeau took his famous walk in the snow storm and announced his decision to retire. His successor, the new Liberal leader John Turner, lost the general election of September 1984 and the new Conservative leader, Brian Mulroney became Prime Minister. During the campaign, Mulroney had pledged himself to negotiate an accommodation with the Quebec government, enabling Quebec to sign the 1982 Constitution Act "with honour and enthusiasm."[29] But this promise would not be fulfilled with Lévesque, who retired in 1985 and in December of that year his successor Pierre-Marc Johnson lost the provincial election to Robert Bourassa's Liberals. Bourassa, too, had made promises in his campaign to resume constitutional negotiations.

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[29] Russell, p. 133.

The focus of the Meech Lake Accord were the Bourassa government's five conditions for Quebec to accept the Constitution Act. The first, and most controversial condition, was the constitutional recognition of Quebec as a "distinct society" within Canada. Second, the provincial government's role in immigration was to be strengthened. Third, Quebec would have a greater role in selecting three Supreme Court justices from the province. Fourth, the province would be allowed to drop out of federal spending programs without penalty. And fifth, the Quebec government would have a veto on all constitutional amendments.

The problem Mulroney faced in attempting to satisfy the Quebec demands was opposition from the other provincial premiers, some of whom insisted that all provinces were equal under the Constitution, so none, not even Quebec, could enjoy special distinct status. Mulroney's solution was to give all provinces the same concessions, while retaining the "distinct society' clause for Quebec. Under pressure from Mulroney's formidable negotiating skills, all ten premiers approved the Accord.[30]

This agreement was never to be implemented, however, as political forces gathered over a three year period, culminating in Elijah Harper's dramatic refusal to consent to the Manitoba legislature's request for unanimity to consider

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[30] Russell, p.136. Also see Cairns, Disruptions, p.108-38.

the Meech proposals. On June 23, 1990 the Meech Lake Accord failed. Where did all the opposition to Meech come from? To begin with, it came mostly from outside Quebec. One fundamental reason so many Canadians outside Quebec rejected Meech is that they did not accept the premise that the 1982 Constitution had been imposed on Quebec against its will.[31] The Accord was also attacked in particular by some of the interest groups that had been active in the struggle to secure the Charter of Rights. They were now disturbed by their exclusion from the process, and feared their previous constitutional victories were at risk.[32]

As Alan Cairns argues, the public reaction to Meech Lake revealed two fundamental and contradictory visions of the nature of constitutions. The first views the constitution as a document mainly, if not exclusively, of concern to governments. The second perspective is more populist and emphasizes the rights and obligations of citizens to inform the constitutional process.[33] Among those with the latter view were women's groups, who were afraid that the government-initiated Accord would enhance provincial powers, to the possible determent of women's rights. What was most disconcerting was that their 1982 victory could be

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[31] See Andrew Cohen, A Deal Undone, (Vancouver: Douglas & McIntyre, 1990).

[32] Russell, p.143.

[33] Cairns, Disruptions, p.108-9.

circumvented without women's organizations being involved. In short, women's groups' opposition to Meech Lake came from their determination not to lose their right to be represented, directly, in any constitutional amendment process.

One prominent political female figure who openly opposed the Meech Lake Accord despite her party's support was Sharon Carstairs. Carstairs, leader of the Manitoba Liberal party, was an avid Charterist who saw the Accord as a direct challenge to the gender equality provisions of the Charter.[34] In an unexpected provincial election in the Spring of 1988, Carstairs was able to use her opposition to the Accord to catapult the Manitoba Liberal party from non-party status in the legislature into Official Opposition. On that election night, Carstairs insisted that with her parties electoral victory, "the Meech Lake Accord [was] dead!"[35]

Nonetheless, Carstairs was certainly not the only women with political opportunity to oppose the Accord. Women's groups expressed concern about their rights. The Legal Education and Action Fund informed Prime Minister Mulroney that "we are sounding the alarm that the equality rights of women and minorities have been forgotten in the accord."[36] Before the Joint Committee on the Accord, Louise Dulude of the

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[34] Sharon Carstairs, Not One of The Boys, (Toronto: MacMillan Canada, 1993), chp.11.

[35] The Winnipeg Free Press, April 27, 1988, P.A1.

[36] The Globe and Mail, June 24, 1987, p.A8.

National Action Committee on the Status of Women (NAC) argued that clause 16 of the Accord, "does present a real threat to the rights of women in Canada." "We all remember 1981," said Sylvia Gold of NAC, "when we were forgotten....There are unquestionable risks in this agreement....It would not be wise for the women of Canada to take the chance...."[37] The Ad Hoc Committee of Women and the Constitution hired the law firm of Tory, Tory, Des Lauriers and Binnington to write a legal opinion. That brief (written by Mary Eberts and John Laskin) concluded: "You cannot say that there is no risk of harm to women's rights....There is reason to believe that it could happen."[38] On June 29, 1988 Ontario became the sixth province to approve the Accord,but during the vote, proceedings were disrupted by a group of twenty women, members of the Ad Hoc Committee, singing, "We are gentle angry people, and we are singing, singing for our rights."[39]

Thus it seems clear that with their opposition to the Meech Lake Accord, women's groups were sending a message, that, though not perfect, the equality rights provisions of

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[37] Senate, House of Commons, Minutes and Proceedings of the Special joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, (Ottawa, 1987), 13:24. Also see The Globe and Mail, August 11, 1987 and August 12, 1987.

[38] IBID., 15:127,129.

[39] The Globe and Mail, June 24, 1988, p.A8; June 30, 1988, p.A1. Also see Catherine MacKinnon, "Sex Equality and Nation-Building in Canada: The Meech Lake Accord," Tulsa Law Journal, vol.25 (Summer, 1990), p.757.

the Charter had made a difference. They were willing to act as political opposition to ensure that their hard-earned rights would be respected and protected in the arena of constitutional negotiations.

CHAPTER FIVE - CONCLUSION

In Canada, when major policy controversies arise, the government and society now engage in a dialectical relationship of reciprocal influence. During the constitutional renewal process of the late 1970s and early 1980s, the women's movement was especially active among those social groups which lobbied the Trudeau government regarding the proposed Charter of Rights. Its involvement was unprecedented. For decades, women in Canada had been excluded from political decision-making. With little control even over their own lives, women had little or no voice in the institutions that governed them. The law and its interpretation in the courts was regarded as the exclusive responsibility of men. For women in trouble, this law often provided little or no help. Tradition still assumed that women were incapable of participating in any aspect of public life. Despite its well-intentioned provisions prohibiting discrimination based on gender, the 1960 Bill of Rights proved ineffective in advancing gender equality.

The constitutional renewal process of 1979-1982, and especially the development of sections fifteen and twenty-eight, reconfirmed Alan Cairns' theory of the embedded state. Clearly, the women's lobby influencing the Trudeau government's drafting of equality rights demonstrated the influence of society upon the state. Conversely, the

interpretation of those equality provisions by the Supreme Court demonstrated how state institutions can influence society. This can be seen not only in alterations of individual behaviour, but also in attitudes toward the state, such as the new legal phenomenon of "Charterwatching". Therefore, the constitutional development of equality rights illustrates the "embeddedness" of the state in Canadian society.

With the Charter, women earned constitutional equality rights, unparalleled in most other constitutional democracies. But rights on paper availed little if they were not enforced. To assist this enforcement, the Legal Education and Action Fund undertook to ensure that the substantive equality intentions of the women's lobby were fairly considered by the Canadian judiciary. LEAF has been able, until recently, to convince the Supreme Court to interpret section 15 taking into account considerations of substantive equality, beyond the more limited formal equality philosophy. The decisive victory for LEAF in this regard was the *Andrews* case.

In its decisions, the Supreme Court has generally interpreted the equality provisions of the Charter, in the direction advocated by the women's movement. Understandably, in such controversial matters, not everyone has been satisfied. Critics abound on both sides. Yet any fair evaluation must conclude, on the basis of their participation in the constitutional and judicial process since 1980, that

women have made truly significant progress in moving toward the ideal of true gender equality.

Governments in Canada now regularly assess whether proposed legislation is compatible with the Charter. Major businesses, in light of the *Brooks, Allen, Dixon* and *Schacter* cases, need to study their benefit policies carefully to ensure fair and equal provision for employees needing maternity or paternity leave. Likewise, public institutions such as crown corporations, universities, and hospitals, must scrutinize their procedures to eliminate discrimination and harassment and ensure equitable treatment of all employees regardless of gender.

Indeed, the politics of recognition has affected the arena of Canadian federalism. One of the mistakes the proponents of the Meech Lake Accord evidently made was to underestimate opponents, or ignore altogether those segments of society, such as women, who in the past could be taken for granted with impunity. Combined with the opening up of the constitutional renewal process, the new political awareness of various groups, including women, signalled that a larger proportion of Canadian society would now share responsibility for changes in the federal system. As Alan Cairns has suggested, the Meech Lake Accord brought the concepts of a "government" constitution and the "citizens" constitution to a head. Today, the new Constitution provides a legal definition of citizenship that has evidently altered the way

many Canadians, including many Canadian women, identify themselves and their rights to fair treatment under the law.

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