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**In Their Finest Hour :  
Deciphering the Role of the Canadian Woman's Movement in the Formulation of the Charter of  
Rights and Freedoms**

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**IN THEIR FINEST HOUR:**  
**Deciphering the Role of the Canadian Women's Movement in the Formulation of  
the Charter of Rights and Freedoms**

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By Amy Gill

Thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial  
fulfillment of the requirements for the MA degree in History

University of Ottawa

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**ABSTRACT**

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**IN THEIR FINEST HOUR:****Deciphering the Role of the Canadian Women's Movement in the Formulation of the Charter of Rights and Freedoms**

Amy Gill  
University of Ottawa, 2010

Supervisor:  
Dr. Michael Behiels

This thesis analyzes the role of the Canadian women's movement in the formulation of sections 15 and 28 in the *Canadian Charter of Rights and Freedoms*. Grounded in the context of the decade leading up to the 1980-1982 mega-constitutional debates, the ideas and actions of the women's movement demonstrate both their intellectual and political agency in securing a new interpretation of equality rights within the Charter. Intellectually, women drew on the legal experiences of Canadian, American, and international interpretations of equality as well as feminist ideology to conceive of a more substantive equality. Built out of two principles, equality of opportunity and equality of results, Canadian women devised a new language to reinforce the interpretation of substantive equality and sought out the means to transform their idea into reality.

The success of the women's movement in this era is typically attributed to its effective mobilization, profiting from an environment in which Canadian women were able to develop a complex network of organizations at the national, provincial, local, and grass roots level. Moreover, the structure of the women's movement provided a powerful platform for key figures within the movement to articulate women's concerns and have those opinions respectfully considered. Only in tandem do the ideals championed by the women's movement and the structure of the movement allow for its eventual success. The women's movement was riddled by strong cleavages, including ideological, regional, class, and ethnic cleavages, but held together in this era by a common commitment to substantive equality.

Providing an arena for action, the critical events that mark the 1980-1982 mega-constitutional debates showcase these elements and illustrate how Canadian women transformed their ideas into action. Examining the context leading up to the debates along with the events during the fourteen-month span of negotiations, it is argued that women played both an intellectual and political role in shaping equality rights in Canada. Their contributions not only secured an effective path to substantive equality but also irrevocably altered the nature of the debate surrounding human rights and changed the way Canadians understand, interpret, and practice equality.

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## ACKNOWLEDGEMENTS

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There are many people I would like to thank for helping bring this project to a successful completion. First, I wish to extend special thanks to my thesis supervisor Professor Michael Behiels, for his ongoing support, patience, encouragement and valuable comments that helped strengthen this project. With my initial interests situated in the realm of political and intellectual history, Professor Behiels was responsible for introducing me to women's history – a facet that has since eclipsed my intrigue and will forever encompass my future endeavours – and for that I am extremely grateful. With his assistance I was able to acquire access to the newly collected and unreleased fond of Marilou McPhedran and I would like to thank both individuals for allowing me the opportunity to utilize this precious source.

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## ABBREVIATIONS

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- AFEAS – Association féminine d'éducation et d'action sociale
- AFN – Assembly of First Nations
- CACSW – Canadian Advisory Council on the Status of Women
- CEW – Committee for the Equality of Women
- CR – consciousness-raising
- ERA – Equal Rights Amendment
- FFQ – Fédération des Femmes du Québec
- FLF – Front de libération des Femmes
- FLQ – Front de libération du Québec
- IRIW – Indian Rights for Indian Women
- IWDC – International Women's Day Committee
- LEAF – Legal Education and Action Fund
- NAC – National Action Committee on the Status of Women
- NAWL – National Association of Women and the Law
- NIB – National Indian Brotherhood
- NWAC – Native Women's Association of Canada
- OWW – Organized Working Women
- RAIF – Le Réseau d'action et d'information pour les femmes
- RCSW – Royal Commission on the Status of Women
- SACSW – Saskatchewan Advisory Council on the Status of Women
- SORWUC – Service, Office & Retail Workers Union of Canada
- TRCC – Toronto Rape Crisis Center
- UDHR – Universal Declaration of Human Rights
- WAVAW – Women Against Violence Against Women

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## INTRODUCTION

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In November 1980, the National Action Committee on the Status of Women, (NAC), boldly proclaimed to the Special Joint Committee on the Constitution, “Women will be worse off if the Charter is entrenched.”<sup>1</sup> As the largest national women’s organization representing over six million women, this statement underscored the vehement displeasure women and the Canadian women’s movement had over the existing language used to frame gender equality rights in Canada. Yet, despite this seemingly unshakable conviction, only a year and a half later NAC praised the *Canadian Charter of Rights and Freedoms* as fundamental to ensuring equality rights and advancing the Canadian women’s movement.<sup>2</sup> How had this group, with their fingers on the pulse of the Canadian women’s movement and convinced of the detrimental effects of a weak Charter, come to change their position so radically in fourteen months? The answer is not obvious. But from a close analysis of the events surrounding the creation of the Canadian Charter, it is apparent that this accomplishment was not without conflict and controversy.

The passage of the *Constitution Act, 1982* included a Charter of Rights and Freedoms and brought about a fundamental shift in the way Canadians viewed rights, the protection of rights, and the function of this protection. What became embedded in the Charter was the concept of substantive rights, a concept that emerged in Canada out

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<sup>1</sup> NAC, *Presentation to the Senate, House of Commons, Special Joint Committee on the Constitution of Canada, November 20, 1980* (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1.

<sup>2</sup> Bill Fox, “Women, natives win rights in final constitutional deal,” *Toronto Star* (Tuesday, November 24, 1981), A1, A13.

of the debate surrounding sections 15 and 28 of the Charter.<sup>3</sup> Currently, the concept of substantive rights, their interpretation, and their implementation in the Supreme Court's rulings are still being discussed with great vigour.<sup>4</sup> The ramifications of this ongoing debate over substantive rights have had a subsequent effect on how Canadians conceptualize human rights, especially equality. Both the extent of this shift and the impact of differing interpretations make it essential to understand the origins of the concept of substantive rights and to decipher how they became an integral part of the Charter and Canadian governance.

The interpretation of substantive equality rights seeks to accommodate the differences between parties and remedy the disadvantages experienced by subordinated individuals and groups. Built on two inherent principles, "equality of opportunity" and "equality of results," substantive equality ensures that even those who are different will still have access to equal provisions. It rejects the long standing formal model of determining equality known as the "similarly situated test," which encourages that those who are alike be treated alike and those who are different be treated accordingly.<sup>5</sup>

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<sup>3</sup> Canada. *Canadian Charter of Rights and Freedoms*, Assented to 17 April 1982 (Ottawa, ON: The Department of the Minister of Justice, 1982).

15(1) "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, within discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

15(2) "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, religion, sex, age or mental or physical disability."

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

<sup>4</sup> James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver, BC: UBC Press, 2005); and, Sheila McIntyre and Sanda Rodgers, eds. *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006).

<sup>5</sup> This "similarly situated" tested is based on the Aristotelian principle of formal equality, as he stated, "... justice considers that persons who are equal should have assigned to them equal things", "... that there is not inequality when unequals are treated in proportion to the inequality existing between them." Thus

Demanding that equality rights be more tangible and comprehensive to all peoples, substantive rights veered from this conventional model seeking equality within differences.

Largely responsible for this transformation, Canadian women and the efforts of the Canadian women's movement are key components to understanding the nature of these mega-constitutional debates. Leading to their finest hour, Canadian women's organizations helped bring about what was initially considered unimaginable to most of the public and unacceptable to many of Canada's political leaders and gained an unprecedented set of gender equality rights, entrenched as sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*. The role that women played in building the *Constitution Act, 1982* and its Charter reveals a conjuncture in Canadian history when political forces from above and below engaged each other in debate over fundamental human rights. The achievements of sections 15 and 28 demonstrate how women representing an array of socio-economic, ethnic, and language backgrounds were able to assemble a concept that transcended traditional barriers and went to the very heart of women's issues. These contributions not only secured an effective path to substantive equality but also irrevocably altered the nature of the debate surrounding human rights and changed the way Canadians understand, interpret, and practice equality.

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Aristotle's principle of equality requires that persons should be treated equally if they are equal in relevant respects and that unequals should be treated unequally in proportion to their inequality. Aristotle, *The Politics of Aristotle*, trans. E. Barker (Oxford, NY: Oxford University Press), Book III, xii, 1282b, Book V, i, 1301a. A further discussion of this concept and its application of Equality Rights in the Charter can be found in Anne Bayefsky and Mary Eberts, eds. *Equality Rights and The Canadian Charter of Rights and Freedom* (Toronto, ON: Carswell, 1985), 2-3.

## **Objectives of Study**

This thesis argues that Canadian women played both political and intellectual roles in the formulation of substantive equality rights as they were written into the *Canadian Charter of Rights and Freedoms*. Analyzing both the political and intellectual contributions of the women's movement, this thesis proposes that it was these two roles in tandem that secured the success of Canadian women during the constitutional negotiations. Void of one, the movement would not have achieved the entrenchment of substantive equality rights.

The legal articulation of equality rights was recognized by leaders of the women's movement as a critical aspect to reinforcing their understanding of substantive equality rights and thereby changing how Canadians interpreted equality. Prior to the Charter, equality rights were protected either through the federal 1960 Bill of Rights or through provincial and federal Human Rights Codes and Commissions. However, gender equality rights were not always recognized in judicial decisions and, nor, when rights were recognized, was that recognition consistent. Gathering the knowledge and skills to properly assess the jurisprudence established in the major legal cases, women firmly equipped themselves with the language to dissect, dismantle and refute the courts' rulings. Drawing from both international and American conceptions of legal equality rights, the women's movement found the means to legally articulate their own notion of equality – one that matched their ideals and would effectively resonate within the Canadian judicial system.

During the decade leading to the Charter, Canadian women's groups began to come together to more accurately name their oppression and discover its pervasive

nature. Feminist ideology became a hotbed of discussion as liberal-feminist, socialist-feminist, and radical-feminist ideologies proposed theoretical principles of state, structure, equality and oppression. From this, Canadian women were able to formulate definitions and frameworks of equality that challenged traditional notions of sex, gender, equality and difference. In so doing, they also questioned the role of the Canadian state and within this realm the function of protection. Built from the underlying principles of equality of opportunity and equality of results, substantive equality was constructed and reinforced by multiple feminist ideologies. Significantly, as the 1980-82 mega-constitutional debates demonstrate, the effect of this allowed the women's movement to overcome many of the cleavages that traditionally challenged its attempts at unity.

Going far beyond simply lobbying the government, the women's movement also played an active and organized role in determining how equality would be written into law. Between the period spanning 1980 – 1982 women in Canada were engaged with the federal and provincial governments. Marked by four critical episodes, the 1980 House of Commons and Senate Special Joint Committee on the Constitution; the Axworthy Affair; the 1981 Ad Hoc Conference on Women and the Constitution; and the dramatic weeks during the final November 1981 provincial negotiations, the women's movement was transformed into an active and mobilizing force, engaging the state intellectually and politically. These political encounters highlight the structure of the women's movement, its strength, and complexity, demonstrating the political agency that the women's movement exercised during the constitutional negotiations.

As such, the structure of the women's movement is a critical aspect to understanding the political clout of women's organizations during the 1980 debates.

Subsequent to the study conducted by the Royal Commission on the Status of Women, (RCSW), the women's movement began to acquire and develop tools that would significantly strengthen its political agency. Built out of the practice of sharing ideas, consciousness-raising techniques brought thousands of women into the movement and became a key element in disseminating information and mobilizing awareness.

Moreover, impromptu demonstrations and local and provincial level lobbying gave way to large scale national and organized protests along with concerted and targeted lobbying campaigns. During the 70s, these skills were refined within a formidable structure and supportive environment as women began to demand not only change but inclusion in the transformation process. At local, provincial, and national levels, women were taking what they were learning and re-applying it again and again. Galvanized by the hope that some earlier small but necessary victories provided, and spurred on by remaining evidence of discrimination, Canadian women at all levels were becoming active and participating in the drive for equality.

Coalitions and structural umbrella groups allowed for many different organizations to co-exist despite their sometimes opposing positions on state and structure. Providing the means whereby Canadian women were exposed to a variety of ideals, this structural framework also facilitated the incorporation of multiple perspectives as the movement formulated the concept of substantive equality. Not only establishing a link between women and organizations at the local, provincial, and federal levels, the structure of the movement also provided a platform for key figures within the women's movement. Affording a system of support, flexibility, and clout, the structure of the women's movement became the forum for leaders within feminist, legal, and

political arenas to speak for the women's movement and effectively fight for a participatory role in their governance.

However, by no means was the movement completely unified throughout the constitutional debates. As the positions of various groups surfaced throughout the negotiations, it becomes apparent that, while the women's movement with multiple streams of ideology and nationalist identity were able to agree that substantive equality was necessary, they were sometimes unwilling to set aside their differences on how to achieve this. Not only separated along lines of feminist ideology, the women's movement in Canada was also splintered into Anglophone, Franco-Quebec, and Aboriginal divisions. Addressing the motivations behind the positions of these groups establishes both the complex nature of the women's movement and exposes the "dynamics of priority." This term reflects the hierarchy of interests that women held and the varying degrees to which these priorities coincided or conflicted with one another. Transcending the traditional barriers to unity, the women's movement was able to reinforce the strength of its bargaining position by collectively sponsoring the concept of substantive equality. As the dynamics of priority show, while differing splinters of the women's movement had sometimes opposing priorities, they remained committed to the recognition of substantive principles of equality rights.

This study illustrates that Canadian women had a far greater role in the formulation of the Charter of Rights and Freedoms and specifically gender equality rights than is generally assumed. Women reflected upon their predicament and actively sought out and thought out, complex, and effective solutions. The steps required to materialize these ideas is a great testament to the strength of the women's movement.

Moreover, the dynamic nature in which the women's movement operated during these negotiations demonstrates that women were not a homogenous entity espousing only one position. In this sense, women clearly qualify as the subject and occupy the focus of this work. However, equally as important and perhaps more pertinent to the future of female representation in history, women also belong in the threads of larger political and constitutional history. Integrated as key players with significant political and intellectual roles it is apparent that women deserve a respected position within the mainstream of contemporary constitutional history.

### **Historiography**

As historians explore the meaning of sections 15 and 28 and women's participation in their formulation, their approaches often comprise three distinct rubrics: the history of human rights, constitutional and political history, and women's history. Each facet provides valuable analysis relevant to the approach and findings of this study. The difficulty is that most often these histories do not intersect whereby the role of the women's movement during this episode in Canada's past is often obscured or minimized. By highlighting the central themes within each trajectory, this study seeks to merge and apply them to one another. Simultaneously applying the arguments of traditional political and legal constitutional history to the context and activities of the Canadian women's movement, a more holistic approach is achieved.

One approach to analyzing the development of sections 15 and 28 of the Charter is to fit it into the history of equality rights as well as the evolution of human rights in Canada. This approach has produced fewer works on the subject than other streams of history. However, these publications are important as they provide context to the

conceptions of equality that have existed in Canada and how they have shifted over time. Moreover, these works attempt to explain why concepts of rights are able to evolve over time and identify what factors are necessary for a rights revolution to occur. Although women remain relatively negated in the equality theorists' investigations, their analysis is applicable to a study on the subject of the women's movement and its involvement in the formulation of the Charter.

Three key studies analyze the evolution of rights activism in the Canadian context. Ross Lambertson, Christopher MacLennan, and Dominique Clément have all addressed the nature of human rights in Canada and the earlier processes through which the Charter was grounded.<sup>6</sup> Both MacLennan's and Lambertson's books focus on Canada from 1930 to 1960 and provide a precursor to the formulation of the Charter. Charting the social mentality of Canadians during this period, MacLennan provides an early context to understanding how Canadians conceived of equality. Although only 2-3 pages are devoted to describing the position women's organizations took on the issues of the day, MacLennan accurately notes the importance of popular consciousness and the necessary consensus needed for change.<sup>7</sup> Lambertson uses the same period to extend his study on Canada's evolution of rights. Accordingly, he identifies elements of Canadian society that allowed fundamental changes in the recognition of rights to occur, including: the emergence of new organizations forming a loosely linked community; a shift in the language and focus of rights, and; the changes in legal status of human rights

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<sup>6</sup> Christopher MacLennan, *Toward the Charter: Canadians and the demand for a national bill of rights, 1929-1960* (Montreal, QC: McGill-Queen's University Press, 2003); Ross Lambertson, *Repression and Resistance: Canadian human rights activists, 1930-1960* (Toronto, ON: University of Toronto Press, 2005); and, Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver, BC: UBC Press, 2008).

<sup>7</sup> MacLennan, *Toward the Charter: Canadians and the demand for a national bill of rights, 1929-1960*, 5.

to account for why Canada underwent a transformation during this period.<sup>8</sup> However, like MacLennan, Lambertson also places little emphasis on the role of women during this period or their positions within these debates.

The most recent publication concerning the history of Canadian human rights is Dominique Clément's book *Canada's Rights Revolution*. Exploring social movements and social change, Clément bookends his study from 1937-1982. Clément distinguishes his study from MacLennan and Lambertson by focusing on social movement activism and rights associations. Marking a difference between other social movement organizations dedicated to the interests of homosexuals, women or African Americans, Clément uses self-identified human rights associations as specific case studies to investigate how people sought to define and apply ideas about human rights. Offering some relevant points of interest, Clément distinguishes between women's organizations and rights associations and notes that, unlike women's organizations, rights associations did not deploy strategies for dealing with systemic inequality but rather embraced the state as a vehicle for social change.<sup>9</sup> By suggesting that the strategies of organizations are critical to the success of achieving their mandates, Clément identifies a critical element to the evolution of human rights. While women remain outside the main scope of all of these studies, these works still provide important analyses on the intricacies of rights revolutions and can be correlated to the efforts of the Canadian women's rights movement.

In addition to the three works which focus exclusively on Canada, Charles Epp also provides a pertinent study entitled *The Rights Revolution: Lawyers, Activists, and*

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<sup>8</sup> Lambertson, *Repression and Resistance: Canadian human rights activists, 1930-1960*, 378.

<sup>9</sup> Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82*, 210.

*Supreme Courts in Comparative Perspective*. Using American, British, Indian, and Canadian case studies, Epp explores how and why Canada's rights revolution was successful in the 1980 constitutional re-negotiations and tests the accomplishments of the Charter in the aftermath of court decisions. The crux of Epp's argument affirms that while judges, constitutional texts, and popular culture are all factors in a rights revolution, a substantial support structure is the essential component.<sup>10</sup> In this case, women do not occupy the peripheral of this story and instead Epp integrates the women's movement using it as a core case study to demonstrate his argument. Although not the only focus of this work, his treatment of the women's movement offers a critical perspective on the structure of the movement, its role during the constitutional negotiations, and the extent that it facilitated the success of sections 15 and 28 being written into the Charter.

The second trajectory within this historiography focuses on the legal constitutional and political history surrounding the Charter of Rights and Freedoms. There is an expansive breadth of historical and academic literature written on this subject, which tends to focus on large overarching themes such as the division of power, federalism, and parliament v. judicial supremacy. For the most part these works have either ignored women's participation and concerns,<sup>11</sup> glossed over their involvement,<sup>12</sup> or acknowledged their political participation but only as "special interest groups" rather

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<sup>10</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, IL: The University of Chicago Press, 1998), 6.

<sup>11</sup> Thomas S. Axworthy, "Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-1981," in J. Weiler and R. Elliot, eds. *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto, ON: Carswell, 1986); Peter Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Toronto, ON: Thomson Canada Limited, 1996); and, David Beatty, *Constitutional Law in Theory and Practice* (Toronto, ON: University of Toronto Press, 1995).

<sup>12</sup> Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3<sup>rd</sup> ed. (Toronto, ON: University of Toronto Press, 2004); and, Robert Sheppard & Michael Valpy, *The National Deal: The Fight for A Canadian Constitution* (Toronto, ON: Fleet Books, 1982).

than as persons who constitute over half of the Canadian population and hold legitimate concerns regarding gender equality and systems of governance.<sup>13</sup> Some academics briefly acknowledge Anglophone women's concerns about the Charter, but regrettably provide little insight into how these concerns emerged or were formulated.<sup>14</sup> Chaviva Hošek, a well known feminist activist during this period and vice-president of the NAC, admirably captures the struggle and involvement of Canadian women during the 1981 constitutional negotiations.<sup>15</sup> However, as only a chapter in a much larger work, her study, while comprehensive, does not go into enough depth to adequately analyze the organizational intricacies or the substantive intellectual issues behind women's contribution. This stream of historiography, focusing on the political aspect of the constitution, is not a sufficient source for deciphering the materialization of substantive equality rights nor does it explain the role that women's organizations took on during this crucial period of constitutional transformation.

In tracking the history of equality rights there is a small collection of strong sources which discuss the legal aspects of equality and assess how this applies to gender rights and the Charter. Cognisant of the intricacies involved with the precise wording of statutes and the importance of jurisprudence, women such as Anne Bayefsky, Mary Eberts, Lynn Smith, Sheilah Martin and Kathleen Mahoney have collaborated on many

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<sup>13</sup> Alan Cairns, *Constitutional Struggles from the Charter to Meech Lake* (Toronto, ON: McClelland & Stewart, 1991); Michael Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto, ON: Thompson, 1991); Rainer Knopff & F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992); and, Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* 3<sup>rd</sup> ed. (Toronto, ON: Irwin Law Inc. 2005).

<sup>14</sup> Mandel, *The Charter of Rights and the Legalization of Politics*; and, Richard Sigurdson, "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics," *International Journal of Canadian Studies*, vol. 2, no. 7-8, (Spring-Fall 1993).

<sup>15</sup> Chaviva Hošek, "Women and Constitutional Process," in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto, ON: Methuen, 1983).

works elaborating on this subject.<sup>16</sup> Throughout, the focus remains on the law as each author deconstructs sections 15 and 28 and paints the inclusion of these sections as part of a logical evolution in the legal jurisprudence of equality.

By exploring the orientation of the terms “before the law,” “under the law,” “equal protection of the law,” and “equal benefit of the law,” along with the historical interpretation and intent of this wording, it becomes apparent that section 15 significantly advanced equality rights in Canada. Bayefsky and Eberts consistently address the inadequacies of the law previous to the Charter by mapping the cases that appeared before the courts prior to the entrenchment of rights legislation into the Constitution.<sup>17</sup> Through these court challenges the weaknesses of the law were exposed galvanizing women to take part in reshaping gender equality rights. Moreover, it is in direct response to these limitations that women fought for the specific wording of section 15 to ensure that a greater measure of equality was administered and achieved.

Although section 15 has become the clause most generally used and applied in equality claims since the inception of the Charter, section 28 remains a significant element when discussing gender equality rights. Designed to specifically address equality rights for both men and women, academics have identified section 28 as the strongest reinforcement of sex equality for women present in the Charter.<sup>18</sup> As William Black and Lynn Smith argue, section 28 was designed with the flaws of the American

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<sup>16</sup> Bayefsky & Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms*; Kathleen Mahoney & Sheila Martin, eds. *Equality and Judicial Neutrality* (Toronto, ON: Carswell, 1987); and, Lynn Smith, ed. *Righting the Balance: Canada's New Equality Rights* (Saskatoon, SK: The Canadian Human Rights Reporter Inc., 1986).

<sup>17</sup> Anne Bayefsky, “Defining Equality Rights,” in Bayefsky & Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms*, 1 – 81; and, Mary Eberts, “Sex and Equality Rights,” in Bayefsky & Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms*, 183 – 230.

<sup>18</sup> Gwen Brodsky & Shelagh Day. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1989), 37.

experience in mind, clearly influencing the articulation of this clause.<sup>19</sup> Moreover, as Katherine de Jong illustrates, this section provides insight as to how feminist ideology situated itself within a legal framework.<sup>20</sup> Although remaining focused on the legal intricacies of the Charter, these works keenly hint at the possible correlation between the legal articulation of equality and the ideals of the Canadian women's movement.

The third trajectory within this historiography focuses on the women's movement and Canada's second wave feminism. In this trajectory, women become the subject of investigation taking centre stage when discussing topics such as labour, education, family, culture, politics, and the law.<sup>21</sup> These works focus on prominent institutions and highlight the tangible actions women took to challenge and alleviate the discriminations they faced within these sectors.

Works that focus directly on women and the Charter tend to spotlight the material assistance women contributed to this moment. *The Taking of Twenty-Eight: Women Challenge the Constitution*, is one of the only complete works that focuses exclusively on the creation of sections 15 and 28 of the Charter.<sup>22</sup> Providing a journalistic account of the dramatic period leading up to and finalizing the entrenchment of the Charter, Penny Kome, member of the women's movement and feminist journalist,

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<sup>19</sup> William Black & Lynn Smith, "The Equality Rights," in Gérald-A Beaudoin & Ed Ratushny, eds. *The Canadian Charter of Rights and Freedoms*, 2<sup>nd</sup> ed. (Toronto, ON: Carswell, 1989), 598; and, Dale Gibson, *The Law of the Charter: General Principles* (Toronto, ON: Carswell, 1986), 40.

<sup>20</sup> Kathleen J. de Jong, "Sexual Equality: Interpretation Section 28," in Bayefsky & Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms*, 493-528.

<sup>21</sup> Linda Kealey and Joan Sangster, eds. *Beyond the Vote: Canadian Women and Politics* (Toronto, ON: University of Toronto Press, 1989); Sandra Burt, Lorraine Code & Lindsay Dorney, *Changing Patterns: Women in Canada* (Toronto, ON: McClelland & Stewart, 1988); and, Ruth Roach Pierson & Marjorie Griffin Cohen, eds. *Canadian Women's Issues, vol. 1. Strong Voices, vol. 2. Bold Visions* (Toronto, ON: James Lorimer & Co., 1993, 1995).

<sup>22</sup> Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto, ON: Women's Educational Press, 1983).

diligently documents women's involvement in the Charter. Again, assuming this as a natural step in an evolution toward progress, Kome describes women's participation as something that arose "logically out of the women's movement's historic tendencies."<sup>23</sup> However, these tendencies are only alluded to in the sense of general narrative and therefore do not provide a strong analysis. Attributing the success of the women's lobby to three factors - solidarity, grassroots support, and surprise, Kome offers largely a chronicle of the political battle. Providing an excellent starting point, this journalistic account requires a more analytical examination of the factors and motivations behind women's ideas and actions during this era of constitutional renewal.

Furthermore, there is a collection of literature that explores second-wave feminism. Identifying three main currents within feminist ideology, scholars work to flush out the similarities and differences between liberal, radical, and socialist feminism. To this end, all feminists believe in equal rights and opportunities for women, all recognize that women are oppressed, and all feminists organize to make change – but where they differ is on the how.<sup>24</sup> As such, these works highlight and frame the parameters of feminist ideology, the spectrum of positions therein, as well as the divergences between Francophone, English-Canadian and First Nation movements.<sup>25</sup>

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<sup>23</sup> Rosemary Billings, "Introduction," in Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 13.

<sup>24</sup> Nancy Adamson, Linda Briskin & Margaret McPhail, eds. *Feminist Organizing for Change: The Contemporary Women's Movement in Canada* (Toronto, ON: Oxford University Press, 1988), 9.

<sup>25</sup> Janine Brodie, "Restructuring and the Politics of Marginalization," in Manon Tremblay and Caroline Andrew, eds. *Women and Political Representation in Canada* (Ottawa, ON: University of Ottawa Press, 1998), 19-37; Jill Vickers, "The Intellectual Origins of the Women's Movement in Canada," in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen's University Press, 1992), 39-60; Micheline Dumont, "The Origins of the Women's Movement in Quebec," in Backhouse & Flaherty, *Challenging Times: The Women's Movement in Canada and the United States*, 72-93; Marlene Pierre-Aggamaway, "Native Women and the State," in J. Turner and L. Emery, eds. *Perspectives on Women* (Winnipeg, MA: University of Manitoba Press, 1989), 66-73; and, Lilianne E. Krosenbrink-Gelissen, "The Canadian

However what remains uncharted is the connection between these ideologies and the notions of equality, the state, and the structure that they house, as well as the articulations of substantive equality as it is embedded in the Charter.

In this sense, broader sources that concentrate on women and politics are more apt at providing valuable insight into how women have engaged with the state over definitions of equality.<sup>26</sup> As Jill Vickers and others argue, the success of the women's movement depended on its leaders' ability to develop enduring institutions such as the NAC.<sup>27</sup> In a brief chapter entitled, "From Lobbying to Legal Action: Changing the Meaning of Equality, 1970 – 1985," Sherene Razack charts the inception of the women's Legal Education Action Fund, LEAF, which isolates the actions of some of the key female players in the constitutional negotiations. Astutely, Razack identifies and links these women and their commitment to gender equality with the attempt to connect the rhetoric of equality with the realization of the Charter.<sup>28</sup> This means of analysis needs to be expanded in all directions in order to understand the impact these women and their position within the larger context of the women's movement had on the articulation of sections 15 and 28.

What remains unexplained in the history of the women's movement are the divisions and differences between the Anglophone, Franco-Quebec, and First Nations

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constitution, the Charter and Aboriginal women's rights," *International Journal of Canadian Studies*, vol. 2, no. 7-8, (Spring-Fall 1993), 207 -224.

<sup>26</sup> François-Pierre Gingras, ed. *Gender and Politics in Contemporary Canada* (Don Mills, ON: Oxford University Press, 1995); Heather MacIvor, *Women and Politics in Canada* (Peterborough, ON: Broadview Press, 1996); and, Jane Arscott and Linda Tremble, eds. *In the Presence of Women: Representation and Canadian Governments* (Toronto, ON: Harcourt Brace, 1997).

<sup>27</sup> Jill Vickers, Pauline Rankin and Christine Appelle, eds. *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto, ON: University of Toronto Press, 1993).

<sup>28</sup> Sherene Razack, *Canadian Feminism and the Law, The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto, ON: Second Story Press, 1991), 27-50.

women. Despite the fairly optimistic theorizing and the attitudinal disagreements of white, middle class, academic women of good will, the message from those who are women of color, Native women, visible-minorities, or working-class women clearly indicated that factors of class, race, and ethnicity were and are extremely divisive in the Canadian women's movement.<sup>29</sup> Micheline Dumont of the Collectif Clio considers the explanations of English-Canada's feminist movement inapplicable to Quebec. In a detailed and fascinating sketch of the history of the struggle for women's rights in Quebec, she demonstrates how the women's movement in Quebec evolved differently from the rest of Canada illuminating the intimate relationship between feminism and nationalism.<sup>30</sup> Micheline de Sève further reinforces this view claiming that most Anglo-Canadians had no idea of what it meant to live in Quebec and yet be a Canadian "administratively speaking."<sup>31</sup> This divide is further strengthened by the position of Native women who identify with the aspirations of neither movement.<sup>32</sup> Thus, when engaging in topics of this subject it is particularly important to delineate and formulate conclusions while remaining cognisant of these divisions within the broad Canadian feminist movement.

Therefore, upon review, while each of the three approaches within the historiography concerning the Canadian women's movement and the Charter do address

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<sup>29</sup> Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto, ON: Penguin Group, 2005).

<sup>30</sup> Dumont, "The Origins of the Women's Movement in Quebec," in Backhouse & Flaherty, *Challenging Times: The Women's Movement in Canada and the United States*, 72-93.

<sup>31</sup> Micheline de Sève, "The Perspectives of Quebec Feminists," in Backhouse & Flaherty, *Challenging Times: The Women's Movement in Canada and the United States*, 110-119.

<sup>32</sup> Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax, NS: Fernwood Publishing, 1995); and, Michael Behiels, "Native Feminism versus Aboriginal Nationalism: The Native Women's Association of Canada's Quest for Gender Equality, 1983-1994," in Michael Behiels and Marcel Martel, eds. *Nation, Ideas, Identities: Essays in Honour of Ramsay Cook*, (Don Mills, ON: Oxford University Press, 2000), 212-231.

significant aspects of this debate, they exist autonomously from one another. As these works are unable to provide a comprehensive analysis on women's involvement in the formulation of substantive equality rights, this study seeks to extend the historiography written on this subject while at the same time bridging the content between existing bodies of literatures. By combining these histories another can be articulated – one that speaks to a moment when forces from above and below engaged one another over the essence of governance and the very nature of fundamental human rights.

Women did engage the male-dominated political classes, challenging the traditional notions of equality and access to state participation. Supported by the structure and strength of the women's movement, Canadian women's organizations were able to present their ideas to the government and ensure that their voices did not go unheard. More importantly, their concept of substantive equality was constructed with clear intent. Built out of feminist theories of equality, the articulation of the recommendations put forward by these women's organizations also had intellectual roots in the legal interpretations and wordings of equality rights. By examining the legal and intellectual contexts from which Canada's feminist movement emerged, combined with the examination of women's organizations within the events between 1980 – 1982, this study will illustrate that women's constitutional involvement and concerns were: 1) broader in scope than has been documented; 2) more complex and controversial than has been generally noted; and, 3) more challenging to the constitutional status quo than has been previously recorded. Only by creating a complex picture of women's constitutional involvement can we begin to conceptualize and understand the depth and

breadth of women's concerns and involvement with gender rights and the pursuit of substantive equality rights for all.

### **Methodology**

This thesis examines the period from the draft of the Charter, tabled on 4 July 1980, to the final document passed by the Senate on 8 December 1981. This period was selected as it encompassed the four key events which elucidate the political and intellectual role of the women's movement during the mega-constitutional debates. Moreover, these dates are marked by clear transitions in the text of the Charter demonstrating its evolution and its articulation within this period.

Accordingly, an array of primary sources were collected from this period. Documents including meeting notes and notices, agendas, lobby tactics and personal reflections were found in the collections of the Canadian Women's Movement Archive and the personal and unopened collection of Marilou McPhedran, a central figure in the constitutional debates. These sources provide a clear insight into the women's movement, their conceptions of equality, the dynamics of priority surrounding this, and the strength and complexity of the structure which supported Canadian women and their ideas. Legal documents such as laws, court cases and government committee papers and minutes were also gathered. Often pre-dating the scope of this study, these sources provide the context needed to discuss the legal achievements of sections 15 and 28. International, Canadian, and American sources were all used to investigate the legal articulations of equality rights in different applications identifying the strengths, weakness, limitations, and opportunities found within each.

Combining these primary sources with a range of secondary sources previously noted, this study applies a historical approach to interpreting and analyzing these sources. Merging three different fields of history this topic differs in many ways from previous efforts as it combines the study of women, politics, ideas, and law. Testing the theories of Epp, Razack, Kome and others, this thesis also explores how these viewpoints stand-up when applied together. As fields that often operate completely in isolation from one another, it is important that this close relationship is shown. Moreover, it offers a new and comprehensive understanding of the women's movement, the shaping of equality rights, and Canadian governance.

Committed to the importance of women's experiences, this project also recognizes the postulation of power between the sexes as a base for analysis. Rather than simply involving the integration of women as a variable within a greater narrative, this study formulates an interpretation from the standpoint of women. This approach also makes a strong commitment to the notion of diversity while developing within these differences, elements of unity. Women are characterized by numerous differences that influence and structure the way in which they become involved in political society. Class, race, mental and physical abilities, sexual orientation, and language are only a few of the factors recognized that can influence the relationship between Canadian women and politics. These features are elaborated on in more detail and integrated throughout the study. However, the reflections made in this thesis offer only a small portion of the work which remains to be taken on.

The scope of this thesis is necessarily limited by the possible range of sources and the depth of analysis. To this end, sources were gathered based on their relevance to

the English-Canadian women's movement with secondary attention paid to Franco-Quebec and Aboriginal women's organizations. Omitted are the unpublished government documents depicting the position of federal and provincial bodies that have yet to be released to the public. Furthermore, readers will notice that a new concept, the "dynamics of priority," has been devised to help explain the complex nature of the women's movement. As an idea that deserves individual attention, this study is only an introduction to be followed by further elaboration.

Accordingly, with this study I intend to effectively demonstrate that the women's movement in Canada, although not uniformly coherent, did achieve considerable success in the formulation of substantive equality rights as embedded in sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*. Formulating their own ideas regarding equality, gender, federalism and the role of the state, women across Canada participated for the first time in formulating and implementing the rules of governance. Providing an arena for action, the 1980 mega-constitutional debates mark a critical moment for participation by Canadian women in democratic governance. For women, the outcome was the formulation and entrenchment of substantive equality. For Canadians alike, this forever altered the manner in which they perceived and applied equality rights. Therefore, an analysis of the complex manner through which this goal was achieved is necessary for our understanding of the broader role of the women's movement in Canada.

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**CHAPTER 1**  
**Conceptions of Universal Human Rights and Gender Equality: Canadian Applications, 1945 -1979**

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Although the *Canadian Charter of Rights and Freedoms* largely aims to protect civil and political liberties, it does contain significant elements whose purpose is to provide for the protection and implementation of substantive equality. The origins of these elements are not autochthonous to the Canadian women's movement but were built considerably upon definitions of human rights as developed within the international universal human rights movement and expressed in United Nations human rights instruments. And while these human rights ideals are distinct from notions of substantive equality they do provide a necessary precursor from which substantive equality could grow. Constructed in part out of the rhetoric and ideological framework of the human rights movement, it is important to briefly explore the context in which universal human rights were forged to understand their contribution to and underpinnings within the Canadian women's movement. By looking at the articulation of both international and Canadian human rights instruments and, in particular, the presence or omission of clauses which protect substantive equality, it is possible to demonstrate the significant disadvantages that can occur when such provisions are not included.

### **The International Context**

The creation of the United Nations in 1945 ushered in a new era of international law in which universal human rights were formally at the centre. While the primary purpose of the United Nations, as expressed in its Charter, was to safeguard peace

amongst states, the UN also aimed to “achieve international cooperation” in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>1</sup> The inclusion of provisions calling for the protection of universal human rights, even at the expense of state sovereignty, was partially justified by the belief that violations of human rights risked plunging states into war. Justifying intervention in sovereign state affairs emphasized the importance countries placed on the belief that each and every human being held basic rights, including the right to equality.<sup>2</sup> By placing international human rights as the first article in the UN Charter and before the protection of national sovereignty, governments, who were now part of this international body, became responsible not only for enforcing these standards but also undertaking the more difficult task of living up to them.

For the women present at the birth of the United Nations, the UN Charter’s provisions on gender equality offered the necessary instrument required to advance the political and legal status of women. As specifically stated within the purpose of the Charter, sex was one of several differentiating characteristics among people on which the basis of human rights were not to be denied.<sup>3</sup> However, as Margaret Galey points out, while the UN Charter did acknowledge the equality of women, this slim, formal

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<sup>1</sup> United Nations, *The Charter of the United Nations*, Adopted and Proclaimed by General Assembly, 26 June 1945 (New York, NY: United Nations, 1945), 3.

<sup>2</sup> Reeta Tremblay, et al., *Understanding Human Rights: Origins, Currents, and Critiques* (Toronto, ON: Thomson/Nelson, 2008), 11. Other authors discuss this concept of humanity and the growing conception of universal humanity: Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> ed. (Ithaca, NY: Cornell University Press, 2003); and, Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, CA: University of California Press, 2004).

<sup>3</sup> United Nations, *The Charter of the United Nations*, 2. Stated in the Preamble: “We the Peoples of the United Nations, determined...to reaffirm the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”

recognition did not provide substantive provisions.<sup>4</sup> Nevertheless, there was enough political leverage to inspire the creation of an International Commission on the Status of Women and women were awarded leading roles within the drafting of critical bills of governance including the *Universal Declaration of Human Rights, 1948* (UDHR).

The UDHR was not merely an expression of civil and political liberties, but rather encompassed a wide range of personal, legal, civil, political, subsistence, economic, social and cultural rights.<sup>5</sup> These extended beyond simply the “right to recognition as a person before the law, and to equality and equal protection under the law,” to also include “the right to equal pay for equal work, necessary social services, assistance for motherhood and childhood, and the right to security,” infusing equality into every sphere of life.<sup>6</sup> Historian Paul Gordon Lauren observes that the main difference between these articles relates to what must *not* be done *to* people rather than what *ought* to be done *for* people.<sup>7</sup> Defining positive and negative rights, the UDHR expressed the early features present in the concept of substantive equality. Accordingly, this newly unified relationship reflected a desire to provide everyone with a fair opportunity to exercise a broader spectrum of rights and freedoms.

During the preparation of the UDHR, women delegates from across the globe worked to ensure that discrimination on the basis of sex was made impermissible. Women such as Eleanor Roosevelt (United States), Bodil Begtrup (Denmark), Lakshmi

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<sup>4</sup> Margaret E. Galey, “Forerunners in Women’s Quest for Partnership,” in Anne Winslow, ed. *Women, Politics, and the United Nations* (Westport, CT: Greenwood Press, 1995), 8.

<sup>5</sup> Donnelly, *Universal Human Rights in Theory and Practice*, 24.

<sup>6</sup> United Nations, *The Universal Declaration of Human Rights*, Adopted and Proclaimed by General Assembly Resolutions 217 A (III), 10 December 1948, (New York, NY: United Nations, 1948).

<sup>7</sup> Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 2<sup>nd</sup> ed. (Philadelphia, PA: University of Pennsylvania Press, 2003), 228.

Menon (India) and Minerva Bernardino (Dominican Republic) actively participated in the drafting to guarantee that the Declaration elaborated on the principles set out in the Charter.<sup>8</sup> For these women, gender equality was an essential aspect of universal human rights. Similar to the original intentions of the UDHR -- which sought to articulate political and civil liberties as well as economic, social, and cultural rights -- women delegates recognized that both sets of rights were necessary to accomplish lasting equality. In poignant comments concerning the formulation of the UDHR, Arvonne Fraser notes that women participants “never reflected strong distinctions between political and civil rights with economic and social rights.”<sup>9</sup> Given that economic, social, and cultural rights were understood to mean state guarantees to basic necessities like adequate shelter, food, income, health care, and education, women were keen to protect these areas and the positive benefits that were granted therein.

In looking at the language used in the UDHR, non-discrimination and equality were placed at the very heart to asserting dignity and opportunity, recognition and respect. Equality rights became an intrinsic element within the human rights framework. Included was the statement: “all are equal before the law and are entitled without discrimination to equal protection of the law”,<sup>10</sup> along with a list of prohibited grounds of discrimination of which sex was included.<sup>11</sup> Consistent with international law, there

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<sup>8</sup> Boutros Boutros-Ghali, “Securing the legal foundations of equality, 1945-1962,” in United Nations, ed. *The United Nations and the Advancement of Women, 1945-1995* (New York, NY: The United Nations, 1995), 16.

<sup>9</sup> Arvonne S. Fraser, “Becoming Human: The Origins and Development of Women’s Human Rights,” in Marjorie Agosin, ed. *Women, Gender, and Human Rights: A Global Perspective* (Piscataway, NJ: Rutgers University Press, 2001), 47.

<sup>10</sup> United Nations, *The Universal Declaration of Human Rights*, Article 7 referring to legal equality.

<sup>11</sup> *Ibid.*, Article 2. Grounds include: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. The inclusion of “other status” implies the open-endedness of list.

was no formal hurdle relating to the nature of the distinction, but rather an open-ended list of proscribed grounds.

Arguing for the employment of unqualified words such as “everyone,” “all,” and “no one,” female delegates attempted to reduce sex discrimination in the Declaration through the use of un-gendered terms. Unqualified words were applied to the majority of the document but it was not used in all of the articles, and as such not all of the women delegates were pleased with the final language of the UDHR. Women such as Lakshmi Menon and Minerva Bernardino considered an even more specific refinement of the wording used “because in certain countries the term “everyone” did not necessarily mean every individual, as experience has shown that women are not always included in this consideration.”<sup>12</sup> These debates and accomplishments, while possibly perceived by some as minimal, mark the critical beginning of an international recognition of women’s unequal access to fundamental freedoms and liberties. From this, many influential inquiries and reports would later emerge and assist in pressuring countries such as Canada to uphold the principles established within and to advance the ideas governing notions of equality.

More importantly, the UDHR came to be cited in much of the Canadian human rights legislation and was used in the debate around the Charter. Rather than the actual text of the statute, which is rarely used as the recommended language, it is the spirit of the document that drives these references. Done to emphasize the totality of rights – inclusive of political and civil rights, economic, social, and cultural rights, and implementation in both positive and negative respects – the UDHR stands as a

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<sup>12</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999), 118.

commitment to these values. As will be discussed later in more depth, the Canadian Charter, in part, reflected these values and shifted the way human rights were acknowledged and understood throughout Canada. As explained by Bruce Porter, the Charter imposed obligations on the government to not only cease discrimination but also take positive measures to address pre-existing discrimination.<sup>13</sup> Equality seekers, including women, envisaged a positive notion of equality encompassing areas within international law categorized as economic, social, and cultural rights. The UDHR and the broader human rights framework that it represented, by extending the terms of scope of equality rights, entailed a significant step on the long path towards the Canadian Charter.

### **The Canadian Application**

Beginning in the 1940s Canada witnessed slow but growing support for human rights legislation. As Michael Behiels and others have elaborated, Canada's position on implementing the UDHR was highly contested and the process to have Canada endorse the declaration was turbulent. Caused in part by the pressure created from federalism and the ambiguity between federal treaty-making powers and provincial treaty-implementing powers, Canada required consent from the provinces before proceeding.<sup>14</sup> Yet, the provincial governments' enthusiasm for a constitutional human rights regime was minimal. Opposition was most vocal in Quebec, where political leaders opposed substantive equality provisions in principle and sought to check the growth of federal

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<sup>13</sup> Bruce Porter, "Twenty-Years of Equality Rights: Reclaiming Expectations," *Windsor Yearbook of Access to Justice*, vol. 23 (2005), 151.

<sup>14</sup> Michael Behiels, "Canada and Implementation of International Instruments of Human Rights: A Federalist Conundrum, 1919-1982," in Dimitry Anastakis and P.E. Bryden, eds. *Framing Canadian Federalism: Historical Essays in Honour of John T. Saywell* (Toronto, ON: University of Toronto Press, 2009), 151, 157, 178.

power, thus insulating provincial jurisdiction from outside influence. Quebec's political class was not alone in its opposition, but it is less known if other provinces were apprehensive because they were against enforcing human rights or against violation of provincial jurisdiction.<sup>15</sup> In the end, Canada was able to endorse the UDHR but only because it was to be recognized as a non-binding symbolic document containing no legally enforceable mechanisms to ensure the implementation of its principles.<sup>16</sup> Alluding to the intrinsic link between the protection of human rights and the structure of Canadian governance, this episode demonstrates a recurring "conundrum" that Canadians faced in transforming notions of equality rights into action.

It was only in 1960 that Prime Minister John Diefenbaker enacted the *Canadian Bill of Rights*. Prime Minister Diefenbaker, two years prior to the enactment, proclaimed in Parliament Canada's commitment to upholding the values of the UDHR but this was not the focus of the debates that surrounded the framing of Canada's Bill of Rights.<sup>17</sup> Mirroring the UN's *Universal Declaration of Human Rights*, the Canadian Bill proclaimed "the right of the individual to equality before the law and equal protection of the law" as part of the human rights and fundamental freedoms to be enjoyed without discrimination by reason of race, national origin, colour, religion or sex.<sup>18</sup> Omitted from Canada's Bill of Rights statute was any recognition of the economic, cultural, and social rights that were present in the international declaration.

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<sup>15</sup> Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver, BC: UBC Press, 2008), 21-22.

<sup>16</sup> William A. Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights," *McGill Law Journal*, vol.43 (1998), 406.

<sup>17</sup> Canada. Parliament. House of Commons. *Debates*, 24<sup>th</sup> Parliament, 1<sup>st</sup> Session, vol. 4, September 5, 1958. (Hull, QC: Queen's Printer of Canada, 1958), 4639-4640.

<sup>18</sup> Canada, *The Canadian Bill of Rights*, Assented to 10 August 1960 (Ottawa, ON: Department of the Minister of Justice, 1960), Article 1.

Applicable only to political and civil liberties, the emphasis within Canada's Bill of Rights was on formal equality that was largely concerned with procedure. As commented by Prime Minister Diefenbaker, Canada was not concerned with extending rights to include economic, social, and cultural rights, or to including other guiding principles than a formal interpretation. He claimed that Canada already had sufficient protection as the principles of equality were soundly embedded in Canadian legislation and in the supremacy of Parliament.<sup>19</sup> Those who devised the content of the *Canadian Bill of Rights*, including Justice Minister, E. Davie Fulton and members within the Department of Justice, such as Wilbur R. Jackett and E.A. Driedger, expected that this interpretation of formal equality would be applied within the Canadian judicial system with or without explicit guidelines.<sup>20</sup> The Canadian courts were entrusted to see to it that all persons were subject to the law and that it was to be administered impartially to all, regardless of status. Absent from the document was any enforcement machinery. As a result, the Bill of Rights became more a declaration of principles to be used largely as an educational tool to inform the Canadian public of their federally guaranteed rights and freedoms.

Limited by similar obstacles faced a decade earlier, Canada avoided entrenching the Bill of Rights in the Constitution. Convinced that the provinces would not agree to a legally binding document applicable to provincial jurisdictions, the federal government

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<sup>19</sup> Canada. Parliament. House of Commons. *Debates*, 24<sup>th</sup> Parliament, 1<sup>st</sup> Session, vol. 4, September 5, 1958. (Hull, QC: Queen's Printer of Canada, 1958), 4644.

<sup>20</sup> Jordan Birenbaum and Michael Behiels. "A Constitution Similar in Principle to that of the United Kingdom: The Myth of Parliamentary Supremacy in the Rise and Fall of J. G. Diefenbaker's Canadian Bill of Rights." *Canadian Historical Association Annual Meeting 2009*, 27 May 2009, Ottawa, ON, Carleton University.

took no action to impose any powerful implementation mechanisms in the Bill.<sup>21</sup> This decision significantly weakened the effectiveness of the Bill. Enacted as an ordinary statute of the federal parliament, the Bill of Rights was only applicable in federal jurisdictions. Moreover, the Supreme Court of Canada justices read the equality and anti-discrimination clause of the Bill narrowly to provide only impartial application, and also read the anti-discrimination provision deferentially to permit distinctions on prohibited grounds if they served a “legitimate” or “rational” governmental objective.<sup>22</sup> Forced to look elsewhere, advocates for equality rights turned to other legal instruments.

Throughout the 1960s and 1970s Canada witnessed a significant expansion of its human rights movement. The human rights movement of the 1960s and 1970s was considerably more of a grassroots movement than its predecessor, as Canadians began demanding better recognition of human rights regardless of the difficulties this posed for federalism. The development of a broad-based, well-organized, better funded, urban middle-class movement “played a determining role in cajoling recalcitrant premiers into supporting a national instrument of human rights and freedoms, one that reflected while expanding upon the international instruments of human rights.”<sup>23</sup> At the time, many regional-minded politicians and scholars viewed civil and political liberties as falling within the jurisdiction of the provinces and, as such, it is at the provincial level that Canada’s early human rights legislation came into being.

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<sup>21</sup> Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2<sup>nd</sup> ed. (Toronto, ON: Macmillan, 1975), 89; and, Christopher MacLennan, *Toward the Charter: Canadians and the demand for a national bill of rights, 1929-1960* (Montreal, QC: McGill-Queen’s University Press, 2003), 123.

<sup>22</sup> Anne F. Bayefsky, “Defining Equality Rights,” in Bayefsky and Eberts, eds. *Equality Rights and The Canadian Charter of Rights and Freedoms*, 61.

<sup>23</sup> Behiels, “Canada and Implementation of International Instruments of Human Rights: A Federalist Conundrum, 1919-1982,” 179.

Prior to enactment of the *Canadian Bill of Rights Act*, the provinces had already begun to enact human rights legislation. Saskatchewan, under the leadership of Tommy Douglas's CCF government, was the first province to enact a Bill of Rights in 1947. As a traditional bill of rights, Saskatchewan's statute emphasized the protection of fundamental freedoms of political participation.<sup>24</sup> What was unique is that it also provided for equality rights extending into areas of employment and education, marking an early recognition of positive rights.<sup>25</sup> However, prohibiting discrimination only on the basis of race, creed, religion, colour, ethnic or national origin, other discrimination based, for example, on language, age, and sex received no protection.<sup>26</sup> More human rights legislation followed throughout the provinces in the form of "fair practice acts" centering on equality rights and prohibiting discrimination in employment, housing, and public services.

Human rights legislation shifted in the 1960s with the introduction of comprehensive human rights codes in Canada. Different from traditional bills of rights usually concerned with political rights, human rights acts or codes are mainly concerned with prohibiting discrimination in areas of employment and access to public facilities and services. While these areas are often associated with economic, social and cultural rights, human rights codes do not guarantee state provision or protection of any of

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<sup>24</sup> Saskatchewan, *Saskatchewan Bill of Rights Act*. 1947, S.S. Assented to April 1, 1947, c.35. (Section 3: freedom of conscious, opinion, and religion; Section 4: freedom of expression; Section 5: peaceable assembly, and; Section 6: protection against arbitrary arrest and detention.)

<sup>25</sup> *Ibid.*, (Section 8: prohibited discrimination in employment; Section 9: prohibited discrimination in occupation and businesses; Section 10: prohibited discrimination in property; Section 11: prohibited discrimination in accommodation and service; Section 12: prohibited discrimination in professional associations and unions.)

<sup>26</sup> Best explained within the context of its creation, Carmela Patrias argues that the omission of these classifications had more to do with the emphasis on ethnic and religious concerns than gender oppression. Carmela Patrias, "Socialists, Jews, and the 1947 Saskatchewan Bill of Rights," *Canadian Historical Review*, vol. 87, no. 2 (2006), 282.

these.<sup>27</sup> Instead, these codes consolidated and built upon the basic framework of early employment fair practice legislation and more importantly included enforcement machinery in the form of human rights commissions. As independent agencies, these government created bodies have the mandate to investigate, administer, and enforce the law, along with encouraging research and promoting protection, public awareness, and tolerance.<sup>28</sup> By 1979 all the provinces and Ottawa had Human Rights codes and full time human rights commissions.<sup>29</sup> Constituting an undoubted improvement, Canadian Human Rights codes extended the nature and scope of the protection of human rights and created legal mechanisms to robustly protect equality.

Equality rights are the primary focus of Canadian human rights legislation. More specifically, these include rights to equal and non-discriminatory treatment in employment and in the provision of goods and services and accommodation. While these codes follow the UDHR in providing a list of grounds of discrimination, unlike the UDHR whose list is non-exhaustive, provincial Human Rights codes are exhaustive, thus precluding human rights commissions from reading other grounds into the list.

Only five out of the eleven Human Rights codes initially cite sex as a prohibited ground

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<sup>27</sup> However, where the government provides public facilities and services (provincial parks, public schools, public housing) or employment (public sector jobs where the employer is the government) codes apply there too.

<sup>28</sup> Saskatchewan, *Saskatchewan Bill of Rights Act*. 1947, S.S. Assented to April 1, 1947, c.35; Ontario, *Ontario Human Rights Code*. 1961, R.O. Assented to March 30, 1962, c.93; Nova Scotia, *Human Rights Act*. 1963, R.N.S. Assented to March 21, 1963, c.5; Alberta, *Human Rights Act*. 1966, R.A. Assented to April 15, 1966, c. 39; New Brunswick, *Human Rights Act*. 1967, R.N.B. Assented to May 19, 1967, c. 13; British Columbia, *Human Rights Act*, 1969. R.B.C. Assented to April 2, 1969, c. 10; Prince Edward Island, *Human Rights Code*, 1968. R.P.E.I. Assented to April 25, 1968, c. 24; Newfoundland, *The Newfoundland Human Rights Code*, 1969. R.N.L. Assented to May 13, 1969, c. 75; Manitoba, *The Human Rights Acts*, 1970. R.M. Assented to August 13, 1970, c. 104; Québec, *Charte des droits et libertés de la personne*, 1975. R. Q. Sanctionnée le 27 juin 1975, c. 6; and, Canada, *Canadian Human Rights Act*, 1977. R.C. Assented to July 14, 1977, c. 33. For more details see Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82*, 28, f.n.48.

<sup>29</sup> Saskatchewan set up a Human Rights Commission charged with the responsibility of administering the Saskatchewan Bill of Rights, the Fair Accommodation Practices Act, and the Fair Employment and Practices Act. In 1979 the Saskatchewan Human Rights Code was also created.

of discrimination, although by 1979 all but two provinces adjust this language to include sex.<sup>30</sup> Given that sex was included in the UDHR and in the 1960 Bill, the fight for its inclusion during the 1960s and 1970s clearly pushed Canadian women to see the need for explicit and robust protection of equality.

Of all the provinces, only Quebec addressed any form of legal equality for both men and women. As illustrated in its opening preamble, “considèreront que tous les êtres humains sont égaux en valeur et en dignité et ont droit à une égale protection de la loi,” the advancement of this statute marks a striking divergence from corresponding provincial equivalents.<sup>31</sup> Unique from the remaining provinces and federal Human Rights codes, the Quebec *Charte des droits et libertés de la personne*, comprised not only of classical anti-discrimination provisions common in the provincial codes but also an extensive list of political, legal, economic, social, and cultural rights. Furthermore, as William Schabas comments, the Quebec Charter is paramount in respect to other provincial legislation.<sup>32</sup> Significant, as the first human rights statute to substantially provide social assistance schemes and entrench socio-cultural rights, this document also more clearly paralleled the intellectual thinking reflected in the Charter.

In addition to the protection against discrimination that Human Rights codes afforded, the presence of enforcement machinery became a principle component to these codes. Established as Human Rights commissions, these government bodies ensured

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<sup>30</sup> Newfoundland (1969), British Columbia (1969), Manitoba (1970), Quebec (1975), Canada (1977) are the five statutes to initially include sex. Of those to follow New Brunswick (1971), Alberta (1972), Saskatchewan (1979), Nova Scotia (1989) and P.E.I. (post-1989) later amended their Codes to include sex.

<sup>31</sup> Québec, *Charte des droits et libertés de la personne*, preamble, 51. Translation: “whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law.”

<sup>32</sup> By virtue of section 52 any Quebec legislation that conflicts with the Quebec Charter may be declared inoperative. For more see, William Schabas, *International Human Rights Law and the Canadian Charter* 2<sup>nd</sup> ed. (Scarborough, ON: Carswell, 1996), 207.

that the provisions guaranteed in the acts were upheld and implemented properly. The system operates within each jurisdiction on a complaint-basis and therefore requires an individual to lodge a complaint with the affiliate Human Rights commission. If a complaint is determined to be well founded, the Commission attempts to conciliate the difference between the complainant and the respondent. Where conciliation fails, a tribunal may be formed to hear the case and make a binding decision. As women quickly discovered, not only did this place a heavy burden on the individual to bring forward the case, the process could take years, exact significant emotional toll, and not even secure an effective result. Thus, while these instruments provided the appropriate mechanisms to address daily concerns within a limited realm of employment, and social services, they did not address systematic oppression. A more lasting legacy is that these provincial human rights codes contributed to a symbolic ideal and acted as a beacon to the Canadian public illuminating them about the rights and privileges they did hold.

### **Canadian Jurisprudence**

Throughout the 1970s human rights activism was at the forefront of a broad protest movement for social and political change. Advocating for equality rights in human rights legislation, women began to look to the government and the legal system demanding that equality provisions be more adequately extended to women. A synopsis of the cases that appeared before the Supreme Court of Canada in the decade leading up to the Charter clearly show that the existing laws were not interpreted by the Courts in ways that were sufficient to meet the needs of Canadian women.

Following the *Canadian Bill of Rights Act*, the Supreme Court of Canada adjudicated several equality cases. However, the only successful one prior to the 1982

Charter was *R. v. Drybones* (1970). The legislation challenged was section 94(b) of the *Indian Act*, which made it an offence for an Aboriginal to be intoxicated anywhere off a reserve. Arguing that general legislation on the matter punished non-status Indian and non-Indians differently than status Indians convicted of the same crime, the Supreme Court held that section 94(b) violated “equality before the law and equal protection of the law” provisions of the *Bill of Rights*.<sup>33</sup> Upholding the principles of formal equality, *Drybones* demonstrated the Court’s willingness to tackle racial issues; women became hopeful that a similar application would be applied when ruling on cases which discriminated on the basis of sex. However, much to the chagrin and disappointment of women, *Drybones* proved to be an exception not a precedent.

The *Indian Act* is a set of regulations governing Indian life on the reserves. It includes “important rules for determining Indian status and band membership that are different for men and women, and discriminating against Indian women.”<sup>34</sup> This discrimination, oppression and exclusion was most pronounced in the language of the old Section 12(1)(b) of the *Indian Act* that was repealed in 1985. Requiring that native women lose their Indian status upon marrying a non-Aboriginal man or non-status Indian, the same result did not apply to a man with Indian status who married a non-status woman.<sup>35</sup> Challenging this subsection, Jeannette Lavell and Yvonne Bédard

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<sup>33</sup> *R. v. Drybones*, [1970] S.C.R. 282, 10 C.R.N.S. 334, 71 W.W.R. 161, [1970] 3 C.C.C. 355, 9 D.L.R. (3d), 473.

<sup>34</sup> Atcheson, Eberts, Symes, with Stoddart, *Women and Legal Action: Precedents, Resources and Strategies for the Future*, 13.

<sup>35</sup> Canada, *The Indian Act*. R.S.C. (Ottawa, ON: Queen’s Printer for Canada, 1970), section 12 (1)(b). Section 12 (1) The following persons are not entitled to be registered, namely,

- (a) a person who (i) has received or has been allotted half-breed lands or money scrip, (ii) is a descendant of a person described in subparagraph (i), (iii) is enfranchised, or (iv) is a person born of a marriage entered into after the 4<sup>th</sup> day of September 1951 and has attained the age of twenty-one years, whose mother and whose father’s mother are not persons described in paragraph 11(1)(a), (b), or (d), or entitled to be register by virtue of paragraph 11(1)(e),

argued that their subsequent loss of status after marriage was discrimination on the basis of sex, contrary to the Canadian Bill of Rights.<sup>36</sup> The clause was held not to be discriminatory because it was administered and enforced equally to all Indian women who married non-status men.<sup>37</sup> In this result, the Bill's equality guarantees were read to secure only a narrow version of formal equality – equal application of a law to all to whom it applies.

Limiting much of the Canadian Bill of Rights' authority and abandoning the motivating spirit behind *Drybones*, *Lavell* became the standard interpretation for all of the sex discrimination cases that would succeed it. This interpretation has been seen as a visibly narrow and restrictive application of the law.<sup>38</sup> Unsatisfied with this outcome, non-status and status Indian women continued to argue that the *Indian Act* discriminated on the basis of sex, but were all to no avail.<sup>39</sup> In 1977, Sandra Lovelace, another Native woman who married a non-Indian, petitioned with the assistance of the New Brunswick Human Rights Commission to the United Nation's Human Rights Committee. Despite the preliminary focus on the *Lovelace* case as one of gender inequality, the deliberation at the UN found that that the voiding of Lovelace's Indian status infringed on her

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unless, being a women, that person is the wife or widow of a person described in section 11, and

(b) a women who married a person who is not an Indian, unless that women is subsequently the wife or widow of a person described to in section 11.

<sup>36</sup> *Lavell v. Attorney General of Canada*, Re., [1972] 1 O.R. 390, 22 D.L.R. (3d) 182 (Co. Ct.), reversed [1971] F.C. 347, [1972] 1 O.R. 396n, 22 D.L.R. (3d) 188, (sub nom. *Bedard v. Isaac*) 14 Cr.L.Q. 236, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551, reversed [1974] S.C.R. 1349, 11 R.F.L. 333, 23 C.R.N.S. 197, 38 D.L.R. (3d) 481 (sub nom. *A.G. Can. v. Lavell; Isaac v. Bedard*), and; *Atcheson, Eberts, Symes, with Stoddart, Women and Legal Action: Precedents, Resources and Strategies for the Future*, 14.

<sup>37</sup> *Lavell v. Attorney General of Canada*, (1972).

<sup>38</sup> *Sharpe and Roach, The Charter of Rights and Freedoms*, 18, 278.

<sup>39</sup> *Flora Conard* used the argument of discrimination on the basis of sex to argue that the *Indian Act* offended the Canadian Bill of Rights because women but not men were denied the right to be the administrators of a deceased spouse's estate. In 1975 the Supreme Court of Canada held that these actions did not offend the guarantee of equality because all women were denied this right equally.

cultural rights as provided in article 27 of the *International Covenant on Civil and Political Liberties*.<sup>40</sup> On July 31, 1981, in the midst of the constitutional debates, the UN found Canada to be in breach of its human rights obligations and later enacted legislation in 1985 coinciding with the coming into force of section 15 of the Charter which repealed this provision.<sup>41</sup>

Perhaps one of the most popular examples of increased awareness came in the *Bliss* (1979) decision where the courts affirmed that the denial of Unemployment Insurance benefits because of pregnancy did not discriminate on the basis of sex or deny women equality before the law contrary to the Bill of Rights. In delivering the Federal Court of Appeal decision Justice Pratt reasoned,

Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.<sup>42</sup>

In this respect, pregnant women were considered a distinct class of employees subject to distinctive Unemployment Insurance laws. Equality before the law at this time meant treating like alike and allowed for different treatment based on relevant distinctions as

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<sup>40</sup> United Nations, *International Covenant on Civil and Political Rights*. Adopted and proclaimed by General Assembly, 16 December 1966. (New York, NY: United Nations, 1966), Article 27 states: In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other member groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

<sup>41</sup> In 1985, *Bill C-31, An Act to Amend the Indian Act* was passed to bring the Indian Act in line with the *Canadian Charter of Rights and Freedoms*. The *Lovelace* case was used as a reference in the Bill's creation, and while *Lovelace* did not rule on gender inequity, the removal of sex discrimination was an element within this legislation. However, at the detriment to this opportunity the government did not take action to remove all forms of gender discrimination. Only now, in 2010 is the federal government again proposing an amendment to the Indian Act in the form of *Bill C-3, An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada*. Currently this Bill is being debated in the House and the outcome of this amendment has yet to be determined.

<sup>42</sup> *Bliss v. Attorney General of Canada* (1977), 77 D.L.R. (3d) 609 at 613 (F.C.A.).

long as individuals within distinct classes were treated the same. Observers were distinctly aware that this conclusion overlooked the fact that only women can become pregnant. With the support of women's organizations across the country, Stella Bliss took the case to the Supreme Court.<sup>43</sup> On October 31, 1978 Justice Ritchie, in writing for a unanimous court, supported the lower court's definition of "equality before the law" as "equality of treatment in the administration and enforcement of law..."<sup>44</sup> With this clear enforcement of a procedural interpretation of equality, Canadian courts demonstrated unwillingness to address the unequal results that their decisions upheld. Conceding that section 46 had an unequal impact on women and men, Ritchie explained that this was due to "nature" and not the legislation.<sup>45</sup> This reasoning above all else pushed the women's movement into insistent action. Its leaders were terribly concerned that regardless of all the advancements made at the grassroots level, decisions reinforcing discrimination would continue to be made by courts.

Another case to come before the Supreme Court that would have further impact on the women's movement and its drive for better guarantees against sex discrimination was the decision of *Murdoch v. Murdoch*. Here, the Supreme Court of Canada rejected a wife's claim upon marriage dissolution that 25 years of ranching labour entitled her to a proprietary share in the family farm held solely in her husband's name. This judgement was based on the husband's evidence that her contribution was "just about what the ordinary rancher's wife does," including that of, "haying, raking, swapping,

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<sup>43</sup> SORWUC, The British Columbia Federation of Women, Vancouver Status of Women, B.C. Government Employees' Union, and the National Action Committee on the Status of Women all endorsed Stella Bliss's appeal. For more see, Leslie Pal & F.L. Morton, "*Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory*," *Osgood Hall Law Journal*, vol. 24 (1986), 146-7.

<sup>44</sup> *Bliss v. Attorney General of Canada*, (1978) supra, note 1 at S.C.R., 193, D.L.R. 423.

<sup>45</sup> *Ibid.*, at S.C.R. 190, D.L.R. 422.

moving, driving trucks and tractors and teams, quieting horses, taking cattle back and forth to the reserve, dehorning, vaccinating, and branding.”<sup>46</sup> The case rejected Ms. Murdoch’s claim that her joint labour earned her an equal share in the property. Judges reinforced constructed biases by adjudicating cases on the basis of stereotypical assumptions that ran contrary to equality principles.<sup>47</sup> Justifying this decision, her role as a wife and the stereotypical duties of domestic labour therein were not considered as contributions of that as a full partner in developing a business. Although not a Bill of Rights case, this litigation demonstrated that there was not sufficient legislation to protect against the disparity between the ideology of equality and the discriminatory results it produced.

In all of these cases, the courts used a variety of rationales to uphold discriminatory legislation. Consistently, the courts determined that discriminatory exclusions from entitlements to benefits were not covered by the equality guarantee “equality before the law and equal protection of the law.” In this sense, the courts refused in any way to weaken the political principle of legislative supremacy and effectively denied Canadians the benefit of a universally applicable human rights statute. As women began to understand the subtleties of equal rights and human rights frameworks, they quickly realized that as long as the law was applied identically to all persons it covered, it satisfied the Bill of Rights, even if the effect of the law resulted was unfair or unequal treatment for many of them. Moreover, the unsuccessful court cases unequivocally demonstrated that greater attention to the articulation of rights

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<sup>46</sup> *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R.

<sup>47</sup> Kathleen Mahoney & Sheila Martin, eds. *Equality and Judicial Neutrality* (Toronto, ON: Carswell, 1987), 153.

would be needed to ensure substantive effective equality whereby the law was to play a positive role by promoting and mandating greater equality of Canadian women. As the formulation of the Canadian Charter would subsequently demonstrate, contributors looked to create guarantees to political and civil rights as well as economic, social and cultural rights. More importantly, by enshrining equality rights in both a positive and negative sense, framers sought to constitutionally affirm the values of substantive equality in a broader social dimension.

For women, this period vividly demonstrated that existing legislation was not capable of responding to the intense political, economic, and social change that characterized the 1960s and 70s. Not only were women being discriminated against on the basis of sex, but more importantly gender and socially accepted stereotypes were being reinforced through court decisions. As second-wave feminism emerged during this period, the lightning bolt of revelation was the discovery that women's oppression could not easily be relieved by formal changes in legislation. Social and economic pressures increased the burden placed on women and with little or no political clout, public support, and insufficient legal resources it was extremely difficult to effectively challenge for meaningful reforms. In response, women across Canada began to organize to more accurately name their oppression and to define a variety of alternatives to overcome their oppression. In doing so, they conceived new approaches to equality rights, federalism, and systems of governance.

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**CHAPTER 2**  
**Ideological Underpinnings - Canadian Feminism**

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Mounting an impressive attack on the institutions that had long been at the root of their oppression, women began to more actively question their inferior predicament as the 1970s progressed. Women, who were entering the work force at an unprecedented rate were being exposed to unfair working conditions and perceptions that did not put them on equal footing with their male counterparts.<sup>1</sup> Access to education had dramatically improved and as a result not only had the first wave of well educated women started to move into high ranking professional positions, but their knowledge and experience was assisting in the education of other women.<sup>2</sup> By bringing forth their ideas, they helped to establish a new emerging generation of feminists to support the struggle. Yet, as women entered these public spheres they realized the contradictions between the promises of education and the reality of their situation. Women experienced lower pay, weak protection against violence and rape, structural restrictions gaining access to male dominated positions, and rulings which produced unequal results in marital and family law. When coupled with an accelerating need for social services, women across Canada were galvanized into action.

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<sup>1</sup> These elements are addressed in Task Force on Equal Pay, *Equal Pay for Work of Equal Value: Report of the Task Force* (Ottawa, ON: Canadian Human Rights Commission, 1978). Additional reading on the subject includes Meg Luxton and Ester Reiter, "Double, Double, Toil and Trouble...Women's Experience of Work and Family in Canada 1980-1995," in Patricia M. Evans, Gerda R. Wekerle, eds. *Women and the Canadian Welfare State* (Toronto, ON: University of Toronto Press, 1997); and, Marjorie Cohen, "Paid Work," in Ruth Roach Pierson & Marjorie Griffin Cohen, eds. *Canadian Women's Issues: Volume 2 – Bold Visions, Twenty-Five Years of Women's Activism in English-Canada* (Toronto, ON: James Lorimer & Co., 1995).

<sup>2</sup> Ruth Pierson, "Education and Training," in Pierson, Cohen, et al., eds. *Canadian Women's Issues: Volume 2 – Bold Visions, Twenty-Five Years of Women's Activism in English-Canada*; Dorothy MacKeracher, *Roadblocks to Women's Learning: Issues for Advocacy* (Toronto, ON: Canadian Congress of Learning Opportunities for Women, 1978); and, Jane Gaskell, *Issues for Women in Education* (Ottawa, ON: Economic Council of Canada, 1992).

As has been previously discussed, the Canadian jurisprudence surrounding equality rights had consistently demonstrated that a formal, and thereby limited, application of procedural equality would not be sufficient to address equality from the perspective of women. As Canadian women began to come together, they also began to more accurately name their oppression. To do so they drew on their own as well as on international and American experiences to construct the ideas that supported and reinforced the concept of substantive equality. When focusing on the ideological dimensions of the Canadian women's movement, these ideas demonstrate the intellectual contribution made by Canadian women to the formulation of substantive equality.

The constant thread within all feminist ideology is the notion that women are treated differently than men and that this reality above all else must be redressed. However, beyond this general principle, feminists differ on a variety of theoretical frameworks, applications and remedies. Namely, scholars have identified three main currents within feminist ideology – liberal, socialist, and radical. For the purpose and scope of this chapter, these ideologies will be characterized and analyzed based on how they define equality and the role of the state. Contributing to the ideological underpinnings of the women's movement, each stream of thought, while separate in academic descriptions, is often much less distinct in practice. Therefore, although it becomes difficult to map how individuals and even groups integrated feminist ideology into their daily lives, a classification of these thoughts helps demonstrate the nature in which the women's movement, and specifically the ideas of Canadian women,

participated in the formulation of substantive equality rights as these are written in sections 15 and 28 of the Charter.

### **Liberal Feminism**

Surviving as the dominant ideology of first-wave feminism, liberal feminism remained one of the core theories that influenced the Canadian women's movement. Similar to the goals of first-wave liberal feminism, the underlying intentions of this ideology focused on eliminating the obstacles that prevented women from equal political and civil rights. In the liberal feminist view, sex discrimination was unjust primarily because it deprived women of equal rights and access to pursue their own self interest.<sup>3</sup> Thus, the principle of equality of opportunity came to embody the liberal feminist theory of equality. Accordingly, it was argued that men and women should be treated identically in spite of women's disadvantaged past and special responsibilities. Based on the argument that only by claiming "no special treatment" could women gain the full rights of citizenship equal to those of men,<sup>4</sup> liberal feminism sought to grant women the same opportunities as men. As Heather McIvor accurately points out, for a liberal feminist human nature was not gendered.<sup>5</sup> Unwilling to recognize both biological and social differences between the sexes as grounds for discrimination, liberal feminism did not set out to challenge the existing formal principle of equality, only to ensure that it was enforced.

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<sup>3</sup> Lorraine Code, "Feminist Theory," in Sandra Burt, Lorraine Code & Lindsay Dorney, *Changing Patterns: Women in Canada* (Toronto, ON: McClelland & Stewart, 1988), 35.

<sup>4</sup> Mary Ebert "Risks to Equal Litigation," in Martin and Mahoney, eds. *Equality and Judicial Neutrality*, 91.

<sup>5</sup> Heather MacIvor, *Women and Politics in Canada* (Peterborough, ON: Broadview Press, 1996), 44.

Second-wave liberal feminists worked to challenge the socialized presumptions that shaped ideals of the feminine and made it unacceptable to enter the public sphere. American Betty Friedan provides an excellent example of post-1960 liberal feminism. In her book, *The Feminine Mystique*, Friedan's definition of feminism is simply that "women are people in the fullest sense of the word who must be free to move in society with all the privileges and opportunities and responsibilities that are their human right."<sup>6</sup> Challenging women to enter the mainstream of society, Friedan made it acceptable to no longer be satisfied with living isolated or detached from the private world. In the Canadian context, feminine magazines such as *Chatelaine* under the guidance of Doris Anderson reinforced these principles and encouraged women as they enter the public sphere to demand equality of opportunity. Critical that Friedan's message was only applicable to upper-class women, *Chatelaine* broadened its audience to lower and middle-class women publishing articles on areas more likely to affect their lives, such as divorce laws, poverty, and birth control.<sup>7</sup> Maintaining the objectives of their predecessors as well as integrating new contemporary issues, *Chatelaine*, like other feminist publications, looked to spread awareness, bring attention to women's rights, and most importantly motivate women to participate and get involved.

Although not an exclusive characteristic to liberal feminism, participation was reinforced through this ideology and critical to the movement's strategy for change. Operating within traditional establishments liberal feminists often linked themselves with governments, institutions, associations, and other agencies as a means to effect

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<sup>6</sup> Betty Friedan, *The Feminine Mystique* (New York, NY: Dell Publishing Co., 1974), 317.

<sup>7</sup> Valerie J. Korinek, *Roughing it in the Suburbs: Reading Chatelaine Magazine in the fifties and sixties* (Toronto, ON: University of Toronto Press, 2000), 308.

change. Members of liberal feminist organizations perceived the state as an agent for change and promoted the use of coalition groups to pressure the government to make changes on their behalf.<sup>8</sup> Demonstrating the inherent values of liberal feminism, the Canadian Advisory Council (CACSW) and its provincial branches were directly linked with the government and other government affiliated organizations included examples such as the National Association of Women and the Law (NAWL), and NAC. As Monique Bégin identifies, these organizations stressed the primary route of change existing in legal channels, visible amendments of legislation, and the making of jurisprudence.<sup>9</sup> Therefore, by focusing on participative action along with linking women to direct avenues to influential decision makers, liberal feminists were able to develop a key operational feature of this ideology and help establish some of the structural elements later utilized by the women's movement.

Moreover, liberal feminists were not sceptical of the state beyond its willingness or ability to redistribute the power and prospects of men in order to provide equal opportunity to both sexes. As has been noted by scholars, by assuming that the structures of governance themselves were in no need of modification beyond the inclusion of women on an equal basis, liberal feminism recognized social change as an evolutionary process that need not involve conflict.<sup>10</sup> Understanding this as a form of procedural liberalism, liberal feminists believed in the legitimacy of the formal political

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<sup>8</sup> NAWL, "Constitution," (Box: 70; File: National Association of Women and the Law: constitutions, bi-laws, publication lists, pamphlets and other material 1975-1999 (2 of 3); X-10-1 Canadian Women's Movement Fond, University of Ottawa, Special Archives and Collections).

<sup>9</sup> Monique Bégin, "The Royal Commission on the Status of Women in Canada: Twenty-Five Years Later," in Backhouse & Flaherty, *Challenging Times: The Women's Movement in Canada and the United States*, 35.

<sup>10</sup> Code, "Feminist Theory," in Burt, Code & Dorney, eds. *Changing Patterns: Women in Canada*, 35.

process and did not seek action outside of this strategy.<sup>11</sup> As a result, neither their idea of equality nor their strategy for change veered from mainstream opinion traditionally and predominantly held by white, middle-class women.

In analyzing the strengths and weaknesses of liberal feminism in relation to the larger Canadian women's movement and specifically the inclusion of gender equality rights in the Charter, it is the manner through which organizations operated as opposed to their formal, traditional notion of equality that becomes important. Liberal feminists worked within the movement to bring awareness to society, achieve legal and legislative reform, and develop organizations and networks related to the realization of their goals. Above all else, this strategy of structure and organization became a critical feature of liberal feminism. As the movement gained momentum this steered the efforts of other groups and became the vehicle whereby more challenging ideas were discussed and debated during the constitutional negotiations and, later, enshrined in the Charter.

### **Socialist Feminism**

Socialist feminists viewed the roots of sex-discrimination as something very different than liberal feminists did. Rather than arguing that male domination was imposed because of biological differences that ought to be ignored, socialist feminists argued that this oppression was the result of a deeply entrenched power relationship, based on class and gender. Socialist feminists saw the exploitive relations between the sexes as rooted in social and economic factors.<sup>12</sup> In this sense, socialist feminism

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<sup>11</sup> Nancy Adamson, Linda Briskin & Margaret McPhail, eds. *Feminist Organizing for Change: The Contemporary Women's Movement in Canada* (Toronto, ON: Oxford University Press, 1988), 190-191.

<sup>12</sup> Bread and Roses, "Basis for Unity," August 1981 (Box: 5; File: Bread and Roses (Vancouver, BC): minutes and other related material 1980-1982, (2 of 2); X-10-1 Canadian Women's Movement Fond; University of Ottawa, Special Archives and Collections). Further reading on roots of sex discrimination

coupled the ideas of Marxist socialism with notions of gender in an attempt to explain the structured restraints that had historically and traditionally prevented women from exercising the right to equal treatment.

Liberal models that understood human nature to be based on reason were rejected by socialist feminists. Instead human nature was explained through the lens of a socio-economic model.<sup>13</sup> Thus, the explanation for why and how people behaved the way they did was based on social determinants, the primary one being the division of labour. As Lorraine Code elaborates, under the Marxist view, women are oppressed by capitalism through a sexual division of labour that ultimately serves the interest of men.<sup>14</sup> In this sense, women are responsible for all of the domestic work at no cost to men in order to allow men the opportunity to work in the public sphere. More importantly, women were brought up and educated within a society that reinforced this relationship and discouraged them from challenging their assigned roles. However, as scholars have noted, Marxist theory alone did not provide a satisfactory explanation to women for this relationship.<sup>15</sup> Consequently, feminist theorists were left to construct their own ideas, and so, socialist feminism sought to integrate the notion of human nature constructed on the grounds of a social model with understandings of feminine oppression.

Given that capitalism was the driving force behind the political, economic and social relations of power and oppression, according to socialist feminists capitalism was

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can be found in Code, "Feminist Theory," in Burt, Code & Dorney, eds. *Changing Patterns: Women in Canada*, 36-37.

<sup>13</sup> Adamson, Briskin, and McPhail, *Feminists Organizing for Change: The Contemporary Women's Movement in Canada*, 67.

<sup>14</sup> Code, "Feminist Theory," in Burt, Code & Dorney, eds. *Changing Patterns: Women in Canada*, 30.

<sup>15</sup> MacIvor, *Women and Politics in Canada*, 58.

also responsible for perpetuating women's disadvantaged position. As an International Women's Day Committee (IWDC), spokesperson claimed in a speech presented in Toronto,

We find the oppression of women rooted in the patriarchal capitalist system. Our oppression is determined by the mutual interdependence of the capitalist relations of production and the relations of patriarchal dominance, particularly the institutions of family and the sexual division of labour. Male privilege and patriarchal ideas have been incorporated into the structure of capitalism and act to support and legitimize its practices. Thus, the liberation of women in the long run must involve not only an attack on these ideas, but also profound and radical changes in the very structure of society.<sup>16</sup>

Through articulation of the ideas of socialist feminism, groups like IWDC began to understand the disparity of women as deeply rooted in a social model of oppression. These groups then used this relationship to also formulate a conception of equality.

In effect, the product of their efforts established a principle based upon the equality of results. No longer satisfied with the liberal approach to equality through equality of opportunity, socialist feminists sought to reduce the inequalities of women by erasing handicaps in competition and bringing women up to the point where they could take advantage of the same opportunities as men.<sup>17</sup> In this regard, if difference could not be eliminated then it would at least be accounted for. Providing what scholars have noted as the second component to substantive equality, this principle of equal results espoused by socialist feminists looked to the effects of a practice or policy to determine its impact on equality. This notion recognized that in order to be treated equally

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<sup>16</sup> IWDC, "Basis of Unity Statement, 1982," (Box: 43; File: International Women's Day Committee: proposals, statements and other material re: Basis of Unity, 1980-1982 (1 of 2); X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections).

<sup>17</sup> Anne Bayefsky, "Defining Equality Rights Under the Charter," in Martin and Mahoney, eds. *Equality and Judicial Neutrality*, 109-110.

dominant and subordinate groups may need to be treated differently.<sup>18</sup> Diluting the ingrained effects of socially constructed categorization, this concept of equality sought to neutralize socially created and enforced difference and alleviate the inequalities women faced despite outward attempts in policy and law to provide equal treatment.

Sceptical of existing government but convinced of its necessary role once reformed if they were to maintain their principles while still achieving change socialist feminists had to devise a strategy different from liberal feminism. As noted by Sylvia Bashevkin, socialist feminists had to balance the politics of the mainstream with the politics of disengagement to avoid both marginalization and institutionalization.<sup>19</sup> The goal was two-fold; it required the transformation of the relations of power as they were structured by patriarchal capitalism and the building of an alternative set of public and private institutions structured along collective lines.

Accordingly, the practice of socialist feminists was oriented towards women coming together in a collective struggle for social change that would at the same time stress the need for that struggle to be controlled by those who are part of the that struggle, specifically women. Given that the priorities of this ideology were two-fold so also were the routes of organization. Some groups such as International Women's Day Committee of Toronto, Bread and Roses of Vancouver or a feminist trade union such as Service, Office & Retail Workers Union of Canada (SORWUC), chose to remain more removed on everyday issues and instead focused on systemic problems. Disengaging

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<sup>18</sup> Sherene Razack, *Canadian Feminism and the Law, The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto, ON: Second Story Press, 1991), 21-23.

<sup>19</sup> Sylvia Bashevkin, "Building a Political Voice: Women's Participation and Policy Influence in Canada," in Najma Chowdhury and Barbara Nelson, eds. *Women in Politics Worldwide* (New Haven, CT: Yale University Press, 1994) 145-146.

from the mainstream these organizations took feminists outside the structures and views accepted by the majority of people. Highlighting a lack of collective support, this organizing tactic employed alone significantly weakened the strength of these groups. Recognizing the dilemma this created, the mandate of Vancouver based Bread and Roses stated that, “the question of organization is a serious question, not a luxury, for if we remain scattered we will be smashed.”<sup>20</sup>

The alternative route was to enter into and participate in mainstream organizations from the standpoint of a socialist feminist politic. Concentrated in Ontario, Organized Working Women (OWW), founded in 1976, centered on working within and changing traditional union structures. Although OWW restricted its membership to women already in unions, other organizations such as Saskatchewan Working Women provided open membership to unionized, non-unionized, paid or unpaid women, who agreed with the objectives of the organization.<sup>21</sup> Supporting strikes, child care, parental benefits, affirmative action, and equal pay for work of equal value, women’s trade-union activism developed enormously during the 1970s. Moreover, as will be discussed in greater detail, the tactics of organizing and coalition building used by socialist feminism to cultivate support and bargaining power significantly assisted the women’s movement when it came time for the constitutional discussions.

Through the development of significant tools and tactics, socialist feminists greatly impacted the Canadian women’s movement. Standing out as core contributions

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<sup>20</sup> Bread and Roses, “Basis for Unity,” August 1981; and, Adamson, Briskin, and McPhail, *Feminists Organizing for Change: The Contemporary Women’s Movement in Canada*, 251.

<sup>21</sup> SWW, “Constitution – Article III, pg. 1 Membership,” (Box 100; File: SWW: Founding Convention, draft constitution, rules of order; X-10-1 Canadian Women’s Movement Fond; University of Ottawa, Archives and Special Collections).

are the emphasis on collective action and an understanding of the relations of power that exist between the oppressed and positions of authority, along with a concept of equality that uses social constructions of gender to stress the principles of equality of results. As one of the few similarities to liberal feminism, socialist feminists also encouraged participation in the political process. This call to action is an important synchronizing element of the women's movement and cannot be ignored as an element of how substantive equality was conceived and achieved.

### **“Radical” Feminism**

Radical feminism agreed with much of the socialist feminists' analysis of women's oppression. Where they differed was on a fundamental question of the emphasis given to sex discrimination as being at the very core of all other power inequalities in society.<sup>22</sup> Using both a gender analysis and socially constructed power relationships to explain disparity between men and women, radical feminism argued that distinctions between genders were enforced and perpetuated by men for their own benefits.<sup>23</sup> Thus, the radical feminist vision of change looked to restructure gender relations to end not only personal power that men wield over women but also the predominance of male culture.

A position paper circulated by the feminist group Radicalesbians, explained how women's oppression and liberty from that oppression could be understood in relation to this assertion of man's power through control.

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<sup>22</sup> MacIvor, *Women and Politics in Canada*, 45; Code, “Feminist Theory,” Burt, Code, & Dorney, eds. *Changing Patterns: Women in Canada*, 39; and, Ronald Murphy, “Constitutional Rights Discourse: Canadian and South African Feminists Engagements,” in Alexandra Dobrowolsky and Vivien Hart, eds. *Women Making Constitutions: New Politics and Comparative Perspectives* (New York, NY: Palgrave Macmillan, 2003), 24-25.

<sup>23</sup> MacIvor, *Women and Politics in Canada*, 46.

We have internalized the male culture's definition of ourselves. That definition consigns us to sexual and family functions and excludes us from defining and shaping the terms of our lives. As long as we are dependent on the male culture for this definition, for its approval, we cannot be free.<sup>24</sup>

In this view, rather than being grounded in unchangeable and incontestable biological differences, the inequalities felt by women were recognized as social products that had been historically determined and rigidly structured by men.<sup>25</sup> By bringing awareness to women's oppression and its pervasive nature radical feminists sought to deconstruct its authority thereby eliminating inequality.

This understanding of how and why women experience unequal treatment meant that achieving equality would require something deeper than simply gaining equal opportunity. As a radical political party formed during the late 1970s indicated, "we must begin to look at the judgement that causes incidents of oppression not just the incidents themselves. Perhaps it is the judgement that is the true and more harmful violence."<sup>26</sup> Identifying the importance of bringing awareness of women's oppression, the purpose of women's consciousness-raising was also to demonstrate the unequal power relations that governed women's disparity. In her work on equity theory, American feminist and legal expert Catharine MacKinnon states that in order to achieve

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<sup>24</sup> Radicalesbians, "The Women Identified Women," (Box: 94; File: Radicalesbians: position paper "The Women Identified Women," 198?; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections), 3.

<sup>25</sup> The Feminist Party of Canada, "The Time Has Come for the FPC," *June 1979 Pamphlet* (Box: 28; File: Feminist Party of Canada: correspondence, flyers, and other documents including some on the foundation and union of the Party, 1979-1981; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections), 1.

<sup>26</sup> WAVAW, "We're On Our Own," (Box: 131; File: Women Against Violence Against Women, 1977, 1978, 1979, Toronto ON; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections), 2.

equality, this relation of power must be taken into account and eliminated.<sup>27</sup> Embodying this principle, Canadian radical feminism celebrates that men and women are different and that this difference should not be reduced or discriminated against – simply stated, men’s differences from women are equal to women’s difference from men and should be valued as such in society.

Given that political awareness was a central aim for this branch of thought, radical feminists tended to focus on women’s everyday lives to illustrate the infinite ways patriarchy flexed its power. Under the slogan, “the personal is political” radical feminists used personal and individual experiences to highlight the pervasive oppression of women. Awareness of women being raped, beaten, exploited and treated as second-class citizens became more openly discussed as these women encouraged others to share their stories.<sup>28</sup> Radical feminism did not recognize the dichotomy between public and private life, arguing that oppression occurs in both spheres. Criticizing the socially and legally sanctioned control over these constructs, radical feminists sought the elimination of systemic discrimination based on sex.

In past applications, sex was used as a category in the legal definition of the rights of women. However, for radical feminists it was gender biases that prevented women from achieving a results-oriented equality and therefore it was gender that had to become the guiding principle in order to achieve equality.<sup>29</sup> Given that gender was constructed within a male-dominated social model, true equality required the critical

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<sup>27</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge, MA: Harvard University Press, 1987), 45.

<sup>28</sup> MacIvor, *Women and Politics in Canada*, 47.

<sup>29</sup> Naomi Black, “The Canadian Women’s Movement: The Second Wave,” in Burt, Code, & Dorney, eds. *Changing Patterns: Women in Canada*, 94.

examination of unspoken assumptions, traditions, and myths about gender to be redressed. Supported by a socialist feminist perspective of equality, the principle of equality of results was considered a necessary component to substantive equality. Therefore, as Sherene Razack has noted, radical feminists' perceptions of equality require that, instead of a formalistic like-treated-alike approach, an accommodation of difference should be pursued.<sup>30</sup> Only through this application of equality can the damage of gender roles, the origin of all forms of oppression, be reduced and ultimately eliminated.

In order to achieve this sense of equality, radical feminists first began to organize at the grassroots level building an intellectual awareness of women's oppression through consciousness-raising groups and centers. These local centers found traditional structures and processes inadequate and thereby rejected notions of hierarchy and leadership, placing an emphasis on the personal experience, and the belief in the importance of process.<sup>31</sup> However, as pointed out by MacKinnon, while radical feminism had a theory of power, it lacked a theory of state.<sup>32</sup> To this end, the ideology agreed with the concept that oppression of women was carried out by the state, however, it also saw this institution as a protector and provider against domination. As MacKinnon describes this, radical feminism in practice treated the state and thereby the law as the "mind of society."<sup>33</sup> Thus, the state and laws fluctuated as a tool either for reform and betterment or for dominance and repression. Accordingly, it was the role of

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<sup>30</sup> Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund & the Pursuit of Equality*, 21.

<sup>31</sup> Adamson, Adamson, Briskin, and McPhail, *Feminists Organizing for Change: The Contemporary Women's Movement in Canada*, 234.

<sup>32</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), 157.

<sup>33</sup> *Ibid.*, 163.

the state to encourage practices and services to provide and protect women, while at the same time affording legal mechanisms to ensure that governments and institutions reduced and eliminated the application of gender biases when determining equality.

Finding it difficult to strike a balance between supporting or opposing the role of the state, radical feminist organizations were often ill-fitted to manipulate the political system in Canada.<sup>34</sup> As a result, radical feminists turned to supporting cultural organizing, localized women's services and women businesses.<sup>35</sup> Violence against women became a key issue. Beginning with the 1977 National Day of Protest Against Violence Against Women, the radical feminist political organization, Women against Violence against Women (WAVAW) was formed. Part of its mandate stated that, "sex oppression is universal and functions as the model for all other systems of oppression," but it also went on to say that, "class, race and national divisions are all products of masculine ideology."<sup>36</sup> Incorporating both radical and socialist ideals this statement demonstrates the spectrum of feminist approaches to understanding women's oppression and the difficulty with adhering to a strictly radical feminist ideology.

Another radical feminist group, the Toronto Rape Crisis Center (TRCC), focused on violence against women and organized local "Take Back the Night" demonstrations. Coordinating with international initiatives along with other groups across the country,

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<sup>34</sup> Jill Vickers, "Feminist Approaches to Women In Politics," in Kealey & Sangster, eds. *Beyond the Vote: Canadian Women and Politics*, 25.

<sup>35</sup> Adamson, Briskin, and McPhail, *Feminists Organizing for Change: The Contemporary Women's Movement in Canada*, 65.

<sup>36</sup> WAVAW, "Statement of Perspective and Intent," (Box: 131; File: Women Against Violence Against Women, 1977, 1978, 1979, Toronto ON; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections), 1.

this project sought to unite women in their struggle. In a statement released about the demonstration, TRCC declared,

We are protesting the fear that restricts our lives. The so-called “Rape Prevention Tips” serve only to further restrict our freedom, isolate us, and do not protect us against violence in our homes. As women we are all vulnerable to this violence, many of us work late at night, use public transportation or live in housing that does not meet our needs. Call for “law and order” and more police protection will not change these conditions. Let us join together and end the violence that divides us. We need to feel this strength among ourselves. Relying on men (who do not experience this fear) does not solve the problem. Therefore, women must march together without men.<sup>37</sup>

Excluding men as a way of disengaging from male defined response patterns, this prerogative marginalized the effectiveness of the initiative. Nevertheless, “Take Back The Night” demonstrations were still successful in the sense that they dealt with an issue that most women could readily identify with, one that also involved them in political action and brought them together in a collective display of power.

By sharing women’s experiences radical feminism sought to construct alternatives to the existing system of power. As scholars have noted, rather than seeking access to power through traditional models, radical feminist groups often segregated themselves from the mainstream.<sup>38</sup> This feature has been used to explain the lack of wholly radical feminists groups beyond the small number of adherents within Canada. Often refusing to engage on the traditional stage these organizations found it difficult to vocalize and spread their views. However, there were other radical feminists who chose

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<sup>37</sup> Toronto Rape Crisis Center, “Women March in Support of the International Take Back the Night,” (Box: 114; File: Take Back The Night Demonstration, Toronto ON, 1980; X-10-1 Canadian Women’s Movement Fond, University of Ottawa, Archives and Special Collections), 1.

<sup>38</sup> Adamson, Briskin, and McPhail, *Feminists Organizing for Change: The Contemporary Women’s Movement in Canada*, 193; and, Vickers, “Feminist Approaches to Women In Politics,” in Kealey & Sangster, eds. *Beyond the Vote: Canadian Women and Politics*, 26.

to integrate themselves into institutional and traditional women's organizations seeking to share their ideas with other women. As Jill Vickers remarks in her assessment of feminist ideology, by the end of the 1970s, the dominant ideology within the Canadian women's movement could be characterized as "radical liberalism".<sup>39</sup> Merging liberal minded strategies, radical feminism highlighted the private dimension of women's lives and played a key role in making visible these issues and connecting and mobilizing everyday women to take action within the movement.

### **Feminist Ideologies & Substantive Equality**

The significance of feminist ideology in the discussion of the Charter of Rights is critical once the concept of substantive equality is understood. By recognizing the roots of substantive equality existing and being reinforced within the various streams of feminist ideas, it is possible to see elements of all three ideologies when looking at the wording of equality rights as they are written in the *Canadian Charter of Rights and Freedoms*. As the final wording of the Charter, section 15 states that,

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.<sup>40</sup>

Going beyond the original articulation of equality that is recognized in the 1960 *Bill of Rights*, these entrenched equality rights were far more comprehensive and progressive.

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<sup>39</sup> Jill Vickers, "The Intellectual Origins of the Women's Movement in Canada," in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen's University Press, 1992), 40.

<sup>40</sup> Canada. *Canadian Charter of Rights and Freedoms*. Assented to 17 April 1982 (Ottawa, ON: The Department of the Minister of Justice, 1982).

Building on a liberal minded principle of equality of opportunity, as the Explanatory notes which were published along with the proposed amendment to the January 1981 draft of the Charter explain, the addition of the words “and under” the law following “before” ensure that the right to equality would apply in respect to the substance as well as the administration of the law.<sup>41</sup> Standing on its own, “equality before the law” provided all individuals, regardless of status, the freedom to pursue their own ends as far as they were able to, but did not address the difference amongst individuals that created an unequal starting point.<sup>42</sup> Only by coupling it with “equality under and before” did this wording advance substantive equality. However as Bayefsky explains, while adding “before and under the law”, expanded the reach of equality of opportunity, it did not necessitate the reorientation of the libertarian equality of opportunity principle.<sup>43</sup>

Thus, with the inclusion of the second phrase “equal benefit” and “equal protection” section 15 also incorporated a principle of equality of results. These additions to the law warranted that courts go beyond the mere administration of legal practice to ensure that people enjoyed rights by a result-oriented standard because benefits were the result of a given allocation of resources. Suggesting that the intent of this provision was, in part, to introduce into Canada the power of the Fourteenth Amendment, Bayefsky also demonstrates how an American application was adopted and

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<sup>41</sup> Minister of Justice and Attorney General of Canada, *Government Response to Representations for Change to the Proposed Resolutions, January 12, 1981* (684.2; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 4.

<sup>42</sup> Bayefsky, “Defining Equality Rights,” in Bayefsky and Eberts, eds. *Equality Rights and The Canadian Charter of Rights and Freedoms*, 4.

<sup>43</sup> *Ibid.*, 5.

implemented in an attempt to advance the treatment of equality within Canadian law.<sup>44</sup> Section 15 (2) permitting “any law, program or activity that has as its object the amelioration of conditions of disadvantaged groups” clearly aimed to permit state action designed to reduce inequalities by erasing handicaps in competition and bringing individuals up to a point where they could take advantage of the same opportunities as everybody else. Therefore, by protecting programs whose objective was to address the conditions of disadvantaged groups, the general equality clause was not confined to a definition of equality as “sameness” but also potentially recognized the necessity of different treatment. By providing for the legitimacy of affirmative action, section 15 embraced a principle of equality of results, entailing corrective measures on the part of governing bodies to undermine the inhibiting structures of female oppression.

Incorporating two different philosophies within section 15 – equality of opportunity and equality of results – the inherent principles of the women’s movement became ingrained into the Charter. Instead of simply using a formalistic like-treated-alike approach, substantive equality requires that real change is needed to ensure the accommodation of differences. Grounded in the understanding that true equality required a critical examination of the unspoken assumptions, traditions and myths, this concept of rights recognized that in order to further equality policies and practices, governments needed to respond to the historical and socially based differences that exist between the sexes. Thus, in order to be treated equally, dominant and subordinated groups may need to be treated differently. In looking for the roots of these ideals, it becomes obvious that the three feminist ideologies that flourished during second-wave

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<sup>44</sup> Ibid., 13.

feminism helped foster, frame and embed the conception of substantive equality rights in the Charter and Canadian society. Moreover, through their discussion of equality rights Canadian women also came to understand the importance of political participation. No matter how cogently expressed, the Canadian women's movement realized that they could not simply state their demands and ideas for equality requiring them to instead gain direct access to the centers of power and make change from within.

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**CHAPTER 3**  
**Utilizing Structure as a Vehicle – The Canadian Women’s Movement in Action**

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In their attempt to modify gender equality rights, women in Canada began to organize both nationally and in local communities across the country in an attempt to confront and overcome discrimination against women. As discussed, the ideas that would facilitate this change had been percolating in Canada for well over a decade. Combined with a sophisticated growth in structure and organization that occurred simultaneously throughout the 1970s, the women’s movement was able to successfully alter the substance of the Charter’s equality rights. Moreover, this structure allowed a new set of analytical and lobbying skills to be developed whereby a surge in feminist thinking was possible. Once these ideas were refined the structure also provided the leverage Canadian women needed to have their voices heard.

The intellectual wherewithal and the structural capability to politically mobilize for change were critical elements, which only in tandem, produced the articulation of substantive equality in sections 15 and 28 of the Charter. Accordingly, the structure and viability of the women’s movement became inextricably linked to the ideas generated with the feminist currents of thought. Binding together notions of equality and responsibilities of state, the structural organization of the women’s movement was able to mobilize a significant portion of educated, middle-class Canadian women. Housing women of leadership who had internal and direct access to government, national organizations also became the vehicle through which women were able to play an important and determining role in the constitutional negotiations. Significantly, it is this

element of both external and internal pressure that allowed the structure of the women's movement to wield such force during the negotiations.

### **Organizational Structure**

The structural element of the women's movement has been noted as a key feature by many historians and scholars of social change and the constitution. According to Penny Kome's retelling, the structure of the women's movement was one of three deciding factors when examining the success of Canadian women's challenge to the Constitution.<sup>1</sup> Emphasizing the grass-root networks and broad base of middle-class support, coupled with intense lobbying, Kome argues that forces from below galvanized the government to take action. However, as Sherene Razack points out in her account of the debates, equally important were "a small group of legally trained women who began to express public concern over the relevance of proposed charter definitions relating to the equality of women's lives."<sup>2</sup> Although Razack does acknowledge the community of women's organizations that engaged in the political lobbies, she highlights the few individuals who organized these endeavours and their skills in conceptualizing and orchestrating the attack. In fact, as the events of the constitutional debates unfolded, it is the combination of these efforts that determined the outcome as elements from above and below engaged the government in discussion over the shaping of equality rights.

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<sup>1</sup> Penny Kome attributed the success of the 1981 lobby to three factors, 1) solidarity of women, 2) the grassroots nature of their support, and 3) the element of surprise, where as spontaneous and swift action caught opponents off guard. Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto, ON: Women's Educational Press, 1983).

<sup>2</sup> Sherene Razack, *Canadian Feminism and the Law, The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto, ON: Second Story Press, 1991), 27.

Charles Epp also marks the support structure of movements as the determining element for legal mobilization.<sup>3</sup> Using the success of the women's movement in their fight for equality rights during the 1980 constitutional negotiations as one of his case studies, Epp explores the nature of this structure and its preceding elements. Unlike Kome or Razack who focus on features within the structure that make it so effective, Epp centers on uncovering the elements needed to create a viable support structure.

Epp provides an in-depth look at how this political environment was created by identifying three core necessities of support structures and evaluating these in the context that allowed Canadian women's movement to found a new set of analytical and lobbying skills. The first feature noted is the growing availability of resources for rights advocacy organizations.<sup>4</sup> Organizations such as the Canadian Civil Liberties Association and other provincial branches along with interest centered groups oriented on women's rights, aboriginal rights, and rights for the disabled were established during the 1970s. As Epp elaborates, these leading rights-advocacy groups "served as the focal point for growing networks of sympathetic lawyers and organizers," and thereby provided the organizational core for a broader growth in networks of lawyers and of communication and support for rights litigation in general.<sup>5</sup> With this support, national and provincial organizations developed a variety of programs that financed rights and litigation advocacy.

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<sup>3</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, IL: The University of Chicago Press, 1998), 157.

<sup>4</sup> *Ibid.*, 180. On page 157 Epp also explains that this was done in an attempt by the federal government to cultivate a new rights consciousness among the Canadian public as a means of undercutting the centrifugal forces in Canadian federalism. Thus, by aggressively funding various citizens' groups in the 1970s it was a way of developing loyalty for the federal government and Trudeau's Charter of Rights agenda.

<sup>5</sup> *Ibid.*, 181.

Of the women's rights litigation that appeared before the courts in the 1970s there was little financial support available. Female plaintiffs relied primarily on the growing availability of private funded legal aid and assistance to support their cases in the Supreme Court. Of the women's rights cases that came before the court during this period, only *Murdoch* did not rely on some form of legal aid.<sup>6</sup> Support was provided in the *Lavell* case by NAC in the form of organizational endorsement, however, there is no evidence to suggest that a financial contribution was donated.<sup>7</sup> Instead, financial assistance was provided by Aboriginal women's organizations and other forms private contribution. As Leslie Pal and F.L. Morton have shown, the *Bliss* case demonstrated one of the first moments when a broad network of groups came together to strategically orchestrate sex equality litigation.<sup>8</sup> As discussed in Chapter 1, these litigation cases were critical in the development of feminist consciousness surrounding equality rights. As J. Nelligan observed, "in my conversations with Doris Anderson, one time President of the Women's Advisory Council, I was convinced that part of their fervour in obtaining a special place for women's rights arose out of the shock they received in

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<sup>6</sup> Elizabeth M. Atcheson, Mary Eberts, Beth Symes, with Jennifer Stoddart, *Women and Legal Action: Precedents, Resources and Strategies for the Future* (Ottawa, ON: CACSW, 1984), 26, f.n. 66.

<sup>7</sup> NAC, "Resolution 800.2.1/73: That NAC demand an immediate Act of Parliament to repeal section 12 (1)(b) of the Indian Act," *Index of Abridged Resolutions of NAC 1972-1988* (684.13; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 49. Arguably, although no evidence of direct discrimination exists, this lack of support from mainstream women's organizations and right-advocacy groups could be due to a lack of association; whereas white, middle-class women found it difficult to relate to these aboriginal women and therefore were less inclined to readily or financially support them.

<sup>8</sup> Leslie Pal & F.L. Morton, "*Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory*," *Osgood Hall Law Journal*, vol. 24 (1986), 146-7, f.n. 23 & 24. Organizations who contributed included SORWUC, Vancouver Community Legal Assistance Society, Vancouver Status of Women, British Columbia Federation of Women, B.C. Government Employees Union, NAC, Public Interest Advocacy Center, Canadian Civil Liberties Association, Quebec, Ottawa, and Manitoba women's organizations (According to a letter from Vancouver Status of Women to A. MacLean (22 November 1977) as well as union locals (According to letter from Vancouver Status of Women to A. MacLean (22 March 1978)).

reading the *Bliss* case.”<sup>9</sup> Clearly, the impact of these cases set other larger forces in motion, forces that would eventually carry the women’s movement to the constitutional debates. As Epp outlines, it is the funding of these organizations that supported women’s rights litigation that in turn not only galvanized the mentality and determination of the movement but also helped to establish the networks and structure needed to legally and politically mobilize.

The second element of Epp’s recipe for structural success was the creation of government rights-enforcement agencies.<sup>10</sup> Powerful national women’s organizations such as CACSW were forged from the recommendations of the RCSW. Reflected in their mandates, these organizations committed themselves to the full realization of the Commission’s 167 objectives.<sup>11</sup> Moreover, with direct access to critical components of governance such as Ministers, upcoming legislation, and moments of opportunity, these state-affiliated women’s organizations gained the ability to synchronize local and provincial initiatives with a national agenda and created a powerful platform from which they could demand change.

More extensively explored in the work of Leslie Pal, this feature also explains how independent feminist organizations were funded by the government.<sup>12</sup> Based on the recommendations of the RCSW, the Secretary of State established the Women’s

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<sup>9</sup> Letter from J. Nelligan to A. Maclean, (22 June 1981) Ottawa, as found in Pal & Morton, “*Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory*,” 154 f.n. 26.

<sup>10</sup> Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, 185.

<sup>11</sup> “Terms of Reference,” *Statement in the House of Commons By the Honourable John Munro, Minister of Labour, Concerning the Establishment of the Canadian Advisory Council on the Status of Women, 1973* (Box 8; File: CACSW: co-ordination report, news releases and clippings; X-10-1 Women’s Movement Fond; University of Ottawa, Archives and Special Collections); and, “Purpose and Objectives,” *NAC Constitution and Rules of Association* (Box/File: 710.17; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>12</sup> Leslie A. Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada* (Montreal & Kingston, QC/ON: McGill-Queen’s University Press, 1993), 140-143.

Program in 1973 to organize the allocation of funds to women's groups.<sup>13</sup> As Sue

Findlay goes on to explain,

Grants to women's organizations were used strategically in consultation with the organizations themselves, and the organizations themselves, and the program's administrators held themselves accountable to the women's movement rather than to government priorities. All [the employees] were defined as feminist and were largely drawn from feminists groups. Liaison with the women's movement was built into every aspect of the Program's work. A feminist perspective clearly determined the Program's development, and was reflected in project definition, staff recruitment, and the Program's organization and management.<sup>14</sup>

In 1975, for International Women's Year, the Women's Program received approximately \$2.5 million. It used the funds to support feminist organizations, providing every key feminist advocacy organization in the country between 50-80 percent of their annual budgets.<sup>15</sup> Staffed by feminists who decided that the resources of the state could and should be used to support the development of the women's movement, women's groups at local, provincial, and national levels received valuable support from the federal government. Of the groups included in the Canadian Women's Movement Archives at the University of Ottawa, roughly a third were formed between 1970-74, with another 24% emerging between 1975-79, and another 12% between 1980-84.<sup>16</sup> Ranging from regions all across Canada and espousing their own formulas of

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<sup>13</sup> Canada, *Report of the Royal Commission on the Status of Women* (Ottawa, ON: Ministry of Supply and Services Canada, 1970) 387-388, 403. Recommendation 3 called for increased support to women's voluntary associations working in fields of particular interest to women. Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*, 117, f.n.67: Noted that the 1973 objectives of the Women's Program included: to help in establishment of community-based Women's Centers; to provide women's services; to assist in investigation of areas where women's participation was restricted; to assist in formulation of new women's groups; to help mount projects addressing the status of women; and to assist in co-ordinating activities through conferences, workshops, and newsletters.

<sup>14</sup> Sue Findlay, "Facing the State: the Politics of the Women's Movement Reconsidered," in Heather Jon Maroney and Meg Luxton, eds. *Feminism and Political Economy: Women's Work, Women's Struggles* (Toronto, ON: Methuen Publications, 1987), 39- 40.

<sup>15</sup> Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*, 8.

<sup>16</sup> Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, 185.

feminism, the women's movement had transformed into one of the best organized and most powerful interest groups in Canada.

The final element that Epp identifies as necessary for creating an effective support structure for legal mobilization is the importance and autonomy of law schools in Canada as well as the prominence of women within this profession.<sup>17</sup> In this sense, the growth of law schools provided another institutional base for critical scholarship and advocacy on constitutional issues. Moreover, after 1970 the population of Canadian lawyers began to grow. Dramatically diversifying student enrolment allowed students distinguished by language, and sex to integrate themselves into the once white male dominated profession. With reference to a study by David Stager and Harry Arthurs, Epp showcases the rate of growth in the representation of women in the Canadian legal profession, claiming that of all the changes, women's representation was the most dramatic. In 1961, women law students were counted at 309 making up only 3% of all law students, whereas their numbers grew to 780 or 5% in 1971, 5175 or 15% in 1981 and 9410 or 22% in 1986.<sup>18</sup> By spotlighting legal expertise as a necessary element for legal mobilization, Epp demonstrates the manner by which the Canadian women's movement was able to formulate a structure that could respond with vigour, organization, and sophisticated legal analysis to Prime Minister Pierre Elliot Trudeau's charter proposal.

From these analyses, it becomes apparent that the stage was set for the Canadian women's movement to acquire a new set of analytical and lobbying tools. What does

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<sup>17</sup> Ibid., 184.

<sup>18</sup> David A.A. Stager & Harry W. Arthurs, *Lawyers in Canada* (Toronto, ON: University of Toronto Press, 1990) 302-303; further discussed in Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, 148-50.

not get so readily discussed in these works is how and when this transformation occurred. Strongly dictated by the development of feminist ideology, women's organizations had different structural strategies and opinions on how best to achieve change. Contributing each in their own way to the overall structure of the movement, the result was a diverse but thriving entity capable of organizing forces from both above and below, allowing for often conflicting ideas to operate in relative peace and solidarity while still taking tangible steps towards reform.

### ***The Impact of the RCSW***

The greatest catalyst for this change occurred with the formulation of the RCSW. In 1966, 32 women's organizations in English-speaking Canada formed the Committee for the Equity of Women (CEW). The CEW subsequently joined forces with the newly formed Fédération des Femmes du Québec (FFQ), whose purpose was to lobby for the establishment of a royal commission on the status of women, to form the RCSW. Before releasing its well known report three years after its establishment in 1967, the RCSW received over 468 briefs, 1000 letters of opinion and heard over 890 witnesses.<sup>19</sup> Upholding the "general principle that everyone is entitled to the rights and freedoms proclaimed in the *Universal Declaration of Human Rights*," the Royal Commission identified the need for a different conception of equality than the one found in the *1960 Canadian Bill of Rights*.<sup>20</sup> From the testimonies, women's groups addressed a broad range of social concerns at the local, provincial and national level. Predominantly reflecting a liberal feminist perspective, the Commission also integrated elements which

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<sup>19</sup> Canada, *Report of the Royal Commission on the Status of Women*, ix -x.

<sup>20</sup> *Ibid.*, xi.

supported both the principles of equality of opportunity as well as equality of results.<sup>21</sup> In addition, as Cerise Moriss notes, the Commission also linked women rights to the popular issue of universal human rights.<sup>22</sup> This concern for human rights provided an ideological framework within which individuals and organizations who did not share the same feminist perspectives could still come together on the issue of women's rights.

As Moriss elaborates, one of the most significant reactions from the women's constituency in Canada was the formation of a united front of women's organizations to press for implementation of the report.<sup>23</sup> In this sense, liberal feminist organizations, which existed prior to the RCSW and had campaigned for its creation, were re-invigorated with determination after the report's publication. Furthermore, many new groups composed of grassroots and issue-oriented centers made up of a younger generation of different minded feminists were integrated into the constituency. Moreover, the recommendations and subsequent by-products provided a new means and terms whereby the women's movement could participate in the formation of social policy and press their claims for equal treatment. These issues were two distinct but interacting systems of influence – the policy system within provincial and federal governments and the organized and external women's movement. Interacting through formal consultations and lobbying, through informal communication, and by influencing through networks and overlapping membership, the RCSW was critical in cultivating to fruition this formal machinery within government. Seeing the advantages to forming

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<sup>21</sup> Ibid., 356, "The Commission does not believe that special consideration should be given to women. Nevertheless we are convinced that for at least an interim period it is necessary to correct the present imbalance between the participation of women and men in public life."

<sup>22</sup> Cerise Moriss, "No More than Simple Justice: The Royal Commission on the Status of Women and Social Change in Canada," (McGill PhD Thesis, 1982), p. 118.

<sup>23</sup> Ibid., 302.

coalitions and sharing information, women's organizations at all levels began to implement the lessons and successes they had learned from this experience.

Allowing a variety of women's organizations to come together as the Commission collected their data, the RCSW also helped the women's movement develop structural tactics to organizing. Known as a consciousness-raising (CR) technique, women shared their experiences with one another in order to unify and collaborate in their efforts. Popular within radical and socialist feminist groups, grass-root centers used this approach as a way of generating and disseminating their own ideological and political competence without directly engaging the state. This CR technique became an integral part of the women's movement. Most often utilized at the local level, sharing women's experiences with one another encouraged women to spread awareness and act out politically to stop the unfair treatment that they were beginning to recognize as being at the core of their oppression.<sup>24</sup> Seen as a prelude to political action, this aspect of the women's movement and the structure which promoted these activities were critical to the strength of its powerful mobilization.

Monique Bégin, Executive Secretary of the RCSW, remarked on the process of the Commission's inquiry. She was amazed at discovering how universal women's experiences were:

Women in rural areas of Canada, women living and working in cities, native or immigrant women, young students as well as older women, francophone and Anglophone women, all said the same things.<sup>25</sup>

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<sup>24</sup> Jill Vickers, "Feminist Approaches to Women In Politics," in Linda Kealey and Joan Sangster, eds. *Beyond the Vote: Canadian Women and Politics* (Toronto, ON: University of Toronto Press, 1989), 27.

<sup>25</sup> Monique Bégin, "The Royal Commission on the Status of Women in Canada: Twenty-Five Years Later," in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen's University Press, 1992), 33.

Bégin also states that “it became clear that during the work of the Commission there was no one integrated approach to engineering orderly social change; all avenues of reform had to be pushed to their limit in a parallel fashion.”<sup>26</sup> Thus while women identified a common thread amongst their experiences – inequality – in determining a strategy for change there was not one approach that was encouraged more than others. Instead a multi-pronged strategy was adopted. Thereby transcending traditional barriers to unity, this structure allowed a variety of perspectives to exist and function simultaneously and often in partnership with one another.

Legitimizing their own oppression through shared experiences, women organized meetings, communicated through newsletters and telephone networks. As Marjorie Cohen notes, for women “a sense of solidarity was reached through identifying common problems and the discovery that the personal had political significance leading some to the realization that collective action was possible.”<sup>27</sup> Even in groups as small as Ontario Howe Sound’s Women’s Center, it becomes apparent that consciousness-raising was essential to all organizational goals.<sup>28</sup> Through these interactions women created a forum where they could theorize about their situation and also establish the roots of a

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Identifying these similarities Bégin notes: “they spoke of their aspirations and their lack of opportunities, the prejudices and stereotypes, the discrimination and injustice, the need to change marriages and families to attain real and equal partnership. They spoke of the children they cared for. They stressed how the current political, economic, and social structures of Canada were an insult to their dignity as women.”

<sup>26</sup> Ibid., 32.

<sup>27</sup> Marjorie Cohen, “The Canadian Women’s Movement,” in Ruth Roach Pierson & Marjorie Griffin Cohen, eds. *Canadian Women’s Issues: Volume 1—Strong Voices, Twenty-Five Years of Women’s Activism in English-Canada* (Toronto, ON: James Lorimer & Co., 1993), 7.

<sup>28</sup> Howe Sound Women’s Center, *Objectives, 1982* (Box: 857; File: Howe Sound Women’s Center; X-10-1 Canadian Women’s Movement Fond; University of Ottawa, Archives and Special Collections). The objectives of Howe Sound Women’s Center were 1) To promote communications among women of varying ages and ethnic backgrounds in this area; 2) To facilitate understanding of the position of women in society at large with the view of promoting social change within this community; 3) Encourage unified action to provide increased education, training and employment; and, 4) To provide mutual support for the common problems of women in a single industry town.

vast and powerful network. Moreover, this CR technique was extremely effective as it not only brought women into the movement but it activated them in a way that intellectual and abstract calls to organize would not have done.

The challenges individual women's centers often encountered were financial and organizational difficulties in sustaining these enterprises. Similar to the tactic of consciousness-raising, women turned to other women's groups for support. Emulating the feelings of many small groups scattered across Canada, local centers recognized the benefits of forming a coalition. As Dorothy Behncke, a member of a local Armstrong Women's Association, admitted in a letter to NAC President Kay Macpherson, her organization was "struggling to find [their] place in the movement."<sup>29</sup> This unity served not only as a support structure for finance and resources, but also provided a framework for sharing ideas and mobilizing provincial and even national actions.

Clearly, the RCSW marked a watershed for the Canadian women's movement. It was the catalyst for the development of policy machinery that established a new and effective framework for action. Marking only the beginning, the RCSW, the 1970 Abortion Caravan, Take Back the Night demonstrations, along with union campaigns for "equal pay for work of equal value" and maternity benefits were instances in this period when the Canadian women's movement learned how to exercise its resources and perfect tactics of mobilization. Using the 1978 Fleck strike as an example, Heather Jon Maroney argues, "for feminist strategy, the lesson that they (socialist feminists) confirmed was that, given the right political conditions, self-organization in struggle will

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<sup>29</sup> Armstrong Women's Association, Correspondence to Kay Macpherson, President of NAC from Dorothy Behncke, member of Armstrong Women's Association, February 28, 1978 (Box: 857; File: Armstrong Women's Association; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections).

radicalize, mobilize, and broaden feminist consciousness and action.”<sup>30</sup> Bringing a variety of women into the folds of the movement, these exercises honed the skills of feminist organizations reinforcing the need and thereby strength of coalitions and combined efforts.

Another pivotal impact of the RCSW was the recommendation that machinery within the government as well as implementation committees be set up to inform and advise the government on all matters that affected women.<sup>31</sup> This prompted the establishment of the CACSW that reported to the Minister Responsible for the Status of Women under the Department of Canadian Heritage. The National Ad Hoc Committee on the Status of Women, which later became the NAC, was also set up and received funding from the federal government. The main purpose of these agencies was to act as lobbying groups to ensure that recommendations of the RCSW were considered and implemented. With common purpose, these organizations also began to integrate new policies that concerned women. By being both autonomous and affiliated to the government, national women’s organizations became important agencies that helped push the women’s agenda matters to the political forefront.

### ***The Importance of NAC***

From its inception until the formulation of the Charter, NAC developed into one of the largest national women’s organizations. At the time of the constitutional negotiations, NAC was comprised of more than 150 non-governmental organizations from across the country – some regional, some Canada-wide, and some local – and was

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<sup>30</sup> Heather Jon Maroney, “Feminism at Work,” in Heather Jon Maroney and Meg Luxton, eds. *Feminism and Political Economy: Women’s Work, Women’s Struggles* (Toronto, ON: Methuen Publications, 1987), 94.

<sup>31</sup> Canada, *Report of the Royal Commission on the Status of Women*, 389-390.

capable of speaking for more than six million women in Canada.<sup>32</sup> Anchored by women from an older generation of institutional organizations of the first wave of feminism in Canada, the founders chose to utilize an umbrella affiliated structure in order to attract as many women as possible to their cause.<sup>33</sup> Experienced in federal politics and drawing from existing institutional organizations, NAC's leadership developed structural resources as well as insightful tactics to generate solidarity within the women's movement and political clout vis-à-vis governments.

During the period leading up to constitutional negotiations, a new element within NAC was the growing myriad of small grass root groups who, while organizing for specific purposes, were integrating themselves into NAC's structural web. As Jill Vickers and others have observed, after 1978-79 a new generation of feminists formed a majority on the NAC executive, and although the structure of the organization remained the driving force, policies and focus shifted.<sup>34</sup> Articles in NAC's communication bulletin, *STATUS*, the articles reveal the extent to which new ideas were being transmitted through the organization. Articles between 1977 and 1982 tended to focus on addressing regional diversity within Canada and incorporating divergent views into

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<sup>32</sup> NAC, *Presentation to the Senate, House of Commons, Special Joint Committee on the Constitution of Canada, November 20, 1980*, (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1; and Jill Porter, *Overlapping Jurisdictions: A Pitfall in Supplying Services to Women, A Paper Prepared for the Women in the Constitution Conference, February 15, 1981* (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections), 1.

<sup>33</sup> Jill Vickers, Pauline Rankin, and Christine Appelle. *Politics As If Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto, ON: University of Toronto Press, 1993), 53. This is discussed in greater detail as early grassroots women's groups realized that the government would only respond to massive public pressure. Requiring the creation of one voice, women organized a network of women, provincially and nationally, integrating into state institutions, especially the cabinet, to advance the movement's projects.

<sup>34</sup> *Ibid.*, 91.

the national image.<sup>35</sup> Moreover, issues that focused on pay equity, education, divorce, and lobbying, while present in previous editions, took on a far different tone in discussions over what equality should mean in these situations, what the responsibility of the state should be, and how women should respond.<sup>36</sup> As these new groups developed an approach to the oppression of women that was distinctly different from procedural liberalism, new ideologies were grafted on to NAC policies.

These new advancements, combined with strong organizational tactics developed in both socialist and liberal feminist organizations, transformed the structure of the women's movement in English-speaking Canada. By perfecting lobbying and public demonstrations, the women's movement was able to gain the necessary experience to launch mass public protests supported by a deep reserve of local, provincial and national organizations. Local groups could be organized along national initiatives but also given the liberty to allow for energetic and unconventional demonstrations at the local and regional levels. This helped entice the media to carry the message and also provided a more advantageous negotiating position when engaging the federal government to make change. In addition, NAC held annual conferences attended by women from all over the country to hear about major issues from key feminist activists. At the conclusion of these weekend conferences, women would move onto Parliament Hill and lobby federal Ministers and MPs for change. Training and education were provided at the conferences

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<sup>35</sup> Kay Macpherson, "North and West! NAC's President Gets Around," *STATUS*, vol. 4, no. 2 (November, 1977), 8; Carole Swan, Chairperson, Manitoba Action Committee on the Status of Women, *Bulletin de la FFQ*, and Mary MacIsaac, Literary Committee, Newfoundland Status of Women Council, "The Provinces," *STATUS*, vol. 4, no. 2 (November, 1977), 20-21; Marcelle Dolment, "Le Quebec et les Femmes," *STATUS*, vol. 7, no. 1 (Fall, 1981), 17-19; and, Jean Wood, "Who Represents Canadian Women?," *STATUS*, vol. 7, no. 1 (Fall, 1981), 4-5.

<sup>36</sup> Jean Wallace, "Missing in Action – Women in Politics," *STATUS*, vol. 4, no. 4 (June, 1978), 3; Linda Fischer, "See Jane Change, Change Jane Change," *STATUS*, vol. 5, no. 5 (Fall, 1979), 11-12; and, Dorothy Gillmeister, "The Equal Opportunity Fantasy: A Hard Look at Voluntary Affirmative Action," *STATUS*, vol. 6, no. 2 (Spring, 1980), 17-19.

and women were then given the opportunity to test their knowledge and gain personal experience by participating in federal lobbying efforts.<sup>37</sup> These practices significantly advanced the movement as members legitimized and perfected their communication and lobbying skills. As a result, legislation pertaining to women's issues dramatically increased during the 1970s and demonstrated the mounting strength of the movement.

### ***Provincial Organizations and Local Grass Root Centers***

Like the national organizations, provincial women's groups had also devised similar structural techniques and approaches to policy changes. Many of the issues that effected women's daily lives, such as housing, criminal law, and social services fell under the jurisdiction of the provinces. Accordingly, throughout the 1970s provincial women's organizations attacked discrimination through efforts that focused on specific issues. Information sharing and multi-membership was common between provincial and federal women's organizations. However, NAC did not possess the resources to support offices and activities at the provincial level and therefore relied on the initiatives of women settled throughout Canada to engage the government on their own. Leslie Pal's analysis of funding, showed that provincial women's organizations received the largest proportion of grants and monies from the Secretary of State Women's Program compared to all other women's organizations.<sup>38</sup> As demonstrated in the administrative papers from provincial organizations, these groups were linking local individuals and

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<sup>37</sup> Illustrated in a letter to NAC, "I want to tell you that I found the workshop, "Women in Politics," most stimulating, I found the panellists very encouraging and I will do my part in learning about the country's politics returning home full of ideas for the new year," quoted in West Island Women's Center, Quebec. Correspondence from Janine Best, Secretary for West Island Women's Center to Kay Macpherson, President of NAC. April 16, 1978 (Box: 858; File: West Island Women's Center, Quebec; X-10-1 Canadian Women's Movement Archive; University of Ottawa, Archives and Special Collections).

<sup>38</sup> Pal, *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*, 217, 222-226.

specific issues together while at the same time integrating nationally tested techniques and approaches.<sup>39</sup> By combining the knowledge generated at national levels and channelling it through local women with passionate determination, provincial women's groups and organizations become a key element within the women's movement.

The importance of participation and experience sharing remained true through the movement down to its smallest components as the organizational structure of the women's movement combined the effective elements of both grassroots and institutional organizations. Uniting under an umbrella structure, local women's centers were able to share their experiences with a large network of women and in so doing, expose generally liberal minded feminists to more radical and socialist ideals. In part, these groups brought young, hopeful, and active women into the folds of the movement which in turn greatly benefited from their invigorating energy. Doris Anderson, in an interview with Marilou McPhedran, admitted that she was "thrilled to know that there were all these really bright young women that were smart and fast and on the ball and they were going to do things."<sup>40</sup> This sharing of ideas at all levels brought the conception of substantive equality to the forefront of the movement. As discussed in the previous chapter, substantive equality combined socialist and radical feminist ideologies pushing beyond procedural liberal feminism. The structure of the women's movement allowed for the easy integration of these ideas and set them within a national agenda.

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<sup>39</sup> SWW, "Proposed Guidelines for Labour Solidarity Committees," and "Links with Working Women's Organizations," (Box 100; File: SWW: 1979-1980 Annual Reports, 1981 AGM Material; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections); Alberta Status of Women Action Committee, "1977-1978 Annual Report – Recommendations, pg. 7," and "Annual Report of the 1981-82 Steering Committee, pg. 17," (2.10; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections).

<sup>40</sup> Quoted from an interview of Doris Anderson by Marilou McPhedran, August 20, 2004. Side B Sanyo Microcassette (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections).

The structure of the women's movement acted as a vehicle for change whereby the ideology generated within could achieve a political voice. Activating a network of groups across the country and providing them with effective knowledge and skills on how to effect change, institutional organizations helped push women's concerns into an arena where real change would be possible. Linking together hundreds of small units, the structure of the movement helped construct an autonomous assembly of women interacting and exchanging ideas with one another and provided the tools necessary to transmit the insights and energies generated within these groups to the traditional political stage. These elements are inextricably linked with one another such that both the ideas and the structure of the women's movement are necessary elements to the success of entrenching substantive equality.

### **Structure as a Platform for Individuals**

Contributing to the overall articulation of substantive equality as written in the Canadian Charter, the structure of the women's movement also granted prominent feminist thinkers and political leaders a voice during the constitutional negotiations. Having their finger on the pulse of the women's movement and all of the bubbling ideologies, these women also possessed a firm grasp on the legal and political aspects pertaining to gender equality rights and the Constitution. Cognisant of both the strengths and weaknesses of past Canadian, American, and International legal attempts to ensure adequate equality rights, the role of these individuals and their ability to straddle multiple fields of authority is a central element to explain how the women's movement was so effective in integrating their substantive equality agenda into the Charter.

Of those directly involved in the constitutional process there were three distinct collections of individuals within the movement. The first group was an older generation of women embedded within the women's movement that was able to orchestrate and mobilize a large network of support among women. The second tier of influential actors emerged from the political sphere. Members of Parliament performed as critical facilitators ensuring that government remained focused on Canadian women's wants and needs. Lastly, there was a group of young female lawyers who emerged in the 1970s and became heavily involved in the women's movement. Able to merge feminist ideology with legal theory, women lawyers participated in constructing and activating a feminist legal theory, one which articulated the need for substantive equality. Women from each group played necessary roles and made significant contributions to the success of the women's movement on Charter matters.

### *Leaders within the Women's Movement*

Women who held prominent positions with the organizations of the movement represented the core element in the mobilization of women across the country during the constitutional debates. Largely from an older generation, these women had long been a part of the movement, and watched the second-wave of feminism take form in Canada. Examples of these women include Laura Sabia, Kay Macpherson, Lynn McDonald, and Doris Anderson. Situated as presidents of national organizations, they had access to a vast number of resources and alliances allowing them to steer mass mobilizations of support and align multiple affiliations and efforts to achieve planned initiatives. Leading these groups, they also became figure heads for the movement by relaying positions and directives between executive members and the more general participants. Their

contribution during the process of constitutional negotiations was critical as it provided access for everyday women to take part and make a contribution.

Doris Anderson was arguably one of the most prominent figures within this grouping of women. While unique in the specific role she played the actions of Doris Anderson characterize those who held similar positions. As past editor of women's magazine *Chatelaine*, and recently appointed President of the CACSW, Anderson was instrumental in many of the movement's incremental successes throughout discussion on the Charter. Editor of *Chatelaine* from 1957-1977, Anderson was a critic of Canadian society during a time when the role and perception of women changed a great deal. By the 1950s women had achieved the vote but their lives had by no means reached equality with men. For example, few women were in the professions or on the Bench; it was illegal to advertise and sell contraceptives; women were a part of the labour force but jobs were segregated by sex and women received less pay, fewer benefits and less job security in relation to men; there was no maternity leave, no day care and women had no legal mechanisms to help them demand and receive equality.

Throughout the two decades Anderson directed the magazine, the articles and editorials published in *Chatelaine* epitomized the ideas embedded in the various ideologies flourishing during the second-wave of Canadian feminism.<sup>41</sup> Vivid with calls to action, blueprints on how to act, and exhortations to continue the push, Anderson shared new ideas with Canadian women. As she observed in her biography *Rebel*

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<sup>41</sup> Doris Anderson, "We've Been "Emerging" Long Enough," *Chatelaine*, vol. 31, no. 10 (October, 1958), 1; Doris Anderson, "Let's stop acting like a minority group," *Chatelaine*, vol. 32, no. 11 (November, 1959), 1; Doris Anderson, "The Report: Making women more equal," *Chatelaine*, vol. 39, no. 7 (July, 1971), 1; and, Doris Anderson, "Now is the time for all good women to come to the aid of themselves," *Chatelaine*, vol. 37, no. 6 (June, 1974), 1.

*Daughter*, Anderson comments that, in part, it was through *Chatelaine* that second-wave feminism was established and promoted.<sup>42</sup> Described by some as the “unofficial leader of Canadian feminism during the 1960s,” Anderson not only educated women on the key issues evoked by a new wave of feminism but also engaged and rallied women to act.<sup>43</sup> In this respect, prominent figures in the women’s movement had a critical role of disseminating ideas to the general mass of participants. This required not only a strong medium needed to share the message but a strong message that would activate a previously docile audience.

As the articles of *Chatelaine* embodied greater calls to action mounting in the 1970s, the message of the content became more political. Realizing that the only way for women’s issues to properly be addressed was through the participation of women themselves, Anderson encouraged women to stand up and get involved.<sup>44</sup> Recounting her career, Mary Eberts remarked that Anderson believed that feminists should not align themselves with any one political party, and sought out multi-party and systematic resolutions that would give women more power to effect change.<sup>45</sup> Upon finishing her term at *Chatelaine*, Anderson, committed to making change, chose to run as a Liberal in a 1978 by-election, but was unsuccessful. Subsequently, her position as President of the CACSW afforded her the necessary resources to continue her efforts alongside the women’s movement.

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<sup>42</sup> Doris Anderson, *Rebel Daughter* (Toronto, ON: Key Porter Books, 1996), 174.

<sup>43</sup> Valerie J. Korinek, *Roughing it in the Suburbs: Reading Chatelaine Magazine in the fifties and sixties* (Toronto, ON: University of Toronto Press, 2000), 308; and, Mary Eberts, “Write it for Women,” *Canadian Women Studies*, vol. 26, no. 2 (Summer/Fall, 2007), 7.

<sup>44</sup> Doris Anderson, “We’ve had all the studies of the problems of women we need. Let’s have Action!” *Chatelaine*, vol. 37, no. 6 (June, 1964), 1; and Doris Anderson, “105 Good Reasons Why Women Should be in Parliament,” *Chatelaine*, vol. 44, no. 10 (October, 1971), 1.

<sup>45</sup> Eberts, “Write it for Women,” 8.

Interviewed shortly after she started at the CACSW, Anderson revealed to Penny Kome that she saw the Council as “a dysfunctional organization and intended to clean it up.”<sup>46</sup> Making adjustments to eliminate patronage appointments and installing bold and dynamic researchers, Anderson actively worked to educate and invigorate women regarding matters that concerned them. As Kome elaborates, Anderson played a key leadership role on the Council by deciding on pertinent topics and using experts to conduct research.<sup>47</sup> These initiatives helped establish a political literacy around significant issues that pertained to women. More importantly, understandings gained and how they applied to the constitutional negotiations were shared with the mass majority of Canadian women thus allowing them to participate in formulating a uniquely feminine position.

In anticipation of the Special Joint Committee of the Senate and the House of Commons on the Constitution, Anderson sought out the expertise of Mary Eberts and Beverly Baines to put together reports on the Charter’s implication for women. Believing that women would be worse off if the Charter in its original draft was entrenched, Anderson activated the CACSW, holding press conferences and blanketing the country with a flyer outlining women’s objections to the draft.<sup>48</sup> Resolved to hold a conference for women regarding the constitution, the CACSW headed by Anderson pushed hard for this as the Special Committee hearings were underway. Sharing research discoveries and opinions, other major women’s groups aligned their recommendations with those proposed by the CACSW. During the Committee hearings

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<sup>46</sup> Penny Kome, “Face Off: Doris Anderson at the Canadian Advisory Council on the Status of Women,” *Canadian Women Studies*, vol. 26, no. 2 (Summer/Fall, 2007), 61.

<sup>47</sup> *Ibid.*, 62.

<sup>48</sup> CACSW, “Leaflet – Women’s Rights and the Constitutional Charter of Rights,” (Box/File: 636.1; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

Anderson led the discussion as she conveyed with rigor the unacceptable weakness the Charter draft of that time posed for women. At this stage, only a select few – typically leaders of large, national organizations – were invited to present to the Committee. Nonetheless, Anderson was not only effective in conveying the executive position of the organization but was equally successful in respecting and speaking on behalf of the broader and more grass root concerns, keeping in mind that the Charter would most undoubtedly affect them.

Early in 1981, the uproar over Lloyd Axworthy's refusal to hold a conference on Women and the Constitution, and Anderson's subsequent resignation from CACSW, resulted in her dramatic transition from Anderson as a feminist executive to that of an outright activist. Bringing wholesale media attention to the issue and mounting participation in the constitutional process, Anderson's stand attracted women to her position. Using this as a momentous opportunity and "riding a cyclone" of publicity with pre-arranged speaking engagements, television, and talk radio show, Anderson galvanized Canadian women.<sup>49</sup> Helping to promote the Ad Hoc Conference that had been established as a replacement for the one refused by Axworthy, Anderson plugged the Conference in all of her media appearances. Along with her attendance at the Conference, Anderson's subsequent actions during the event have been recognized as a significant contribution to the large number of delegates who attended the Conference.<sup>50</sup> Able to spark a mass mobilization that instilled a sense of urgency in Canadian women that unless they themselves participated, the government would most definitely not act

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<sup>49</sup> "Interview with Doris Anderson," *CBC Morningside*, January 21, 1981, 9:45 AM (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections); and, Kome, "Face Off: Doris Anderson at the Canadian Advisory Council on the Status of Women," 65.

<sup>50</sup> Eberts, "Write it for Women," 8.

on their behalf, Anderson connected everyday women with the greater efforts of the movement.

Supported by the broad organizational structure of the women's movement, women such as Anderson who held influence and key roles were able to activate the large networks of women's organizations and grass root centers. With passionate messages and a popular following that commanded respect, these leaders were able to link together the women's movement and more importantly use their clout to communicate their interests to those in positions of power. Significantly, the actions of these women led many others into the folds of the women's movement generating a force that demanded recognition of women's rights in the constitutional negotiations.

### ***Women within Government***

A second group of key individuals were those who operated in the political arena. As Haussman argues, the presence of women in politics, particularly in the federal Parliament, enhances the structure of political opportunity in which women operate.<sup>51</sup> Women politicians, elected officials, Members of Parliament, and Senators, while each having their own party affiliations, supported the women's movement and facilitated their efforts. Sustaining the issues and increasing the visibility of women's concerns within the House of Commons and federal Committees, female politicians relentlessly brought women's concerns to the forefront. Through their involvement, they were able to ensure that once substantive equality was realized women would have

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<sup>51</sup> Melissa H. Haussman, "The Personal is Constitutional: Feminist Struggles for Equality Rights in the United States and Canada," in Jill Bystydzienski, ed. *Women Transforming Politics: Worldwide Strategies for Empowerment* (Bloomington & Indianapolis, IN: Indiana University Press, 1992), 121.

a forum through which they could effectively seek remedy against gender discrimination.

Also part of an older generation, female Parliamentarians had witnessed the expansion of the women's movement while participating and contributing to its success. As an obvious minority, these women had developed the knack for being strong minded and articulate. This was in part a product of necessity as their positions required them to both articulate and defend the position of women who made up 52.4% of the Canadian population.<sup>52</sup> Women such as Flora MacDonald, Margaret Mitchell, and Pauline Jewett are prime examples of the few women who fought for a voice for women. Conscious of their role within the Canadian system of governance, these women connected the movement to the state and its institutions and advocated for women involving them in the constitutional process.

Educated at Queen's University and graduating from Harvard University with a PhD in Political Science in 1949, Pauline Jewett was an unshakable force as a Member of Parliament during the tenuous fourteen months of negotiations over the Charter. Elected MP for the Liberal Party in 1963 Jewett rose to national prominence when she quit the party in 1970 on principle following the implementation of the War Measures Act.<sup>53</sup> In 1974, she became President of Simon Fraser University and was the first women president of a Canadian co-educational University.<sup>54</sup> Returning to Parliament in

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<sup>52</sup> "Women and the Constitution," speech by Pauline Jewett, MP, House of Commons. Thursday, October 23, 1980. (Box/File: 806.5; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>53</sup> Judith McKenzie, *Pauline Jewett: A Passion for Canada* (Montreal, QC: McGill-Queen's University Press, 1999), 110.

<sup>54</sup> *Ibid.*, 111.

1979 as a MP representing the New Democratic Party, Jewett acted as the party's critic on the status of women and gained a seat on the Special Joint Committee.

From her writing and actions it is apparent that Pauline Jewett had long been shaped by a feminist consciousness. In 1958, Jewett wrote an article critical of Diefenbaker's proposed Bill of Rights. Committed to the idea that the BNA Act should be amended to include recognition of fundamental freedoms, she argued that when it came to the proposed 1960 bill, "it would be far better to have no bill at all, than to have a bill that serves only to raise false hopes and false fears."<sup>55</sup> Accordingly, Jewett was well aware of the implication entrenched equality rights in the constitution could have on women. Moreover she was familiar with Trudeau and his enthusiasm for a charter of rights, and was therefore convinced that to oppose the whole package would be unwise. In her mind, women had to demonstrate that they were prepared to be conciliatory, while working to make amendments that would increase the potential of creating a powerful legal instrument for women.<sup>56</sup>

Sharing these insights with the movement, Jewett and politicians like her facilitated the movement's political manoeuvring during the debates. These women used their knowledge of government to ensure that women's concerns were properly addressed. This meant ensuring that questions were brought up in the Commons and that Committee meetings were held to hear presentations prepared by a variety of women's groups. Relationships were built within the movement and information and

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<sup>55</sup> Pauline Jewett, "Mr. Diefenbaker's Proposed Bill of Rights," *Canadian Forum* (December, 1958), 201.

<sup>56</sup> Anderson, *Rebel Daughter*, 244. Describing a panel discussion on a resolution at the Ad Hoc Conference, Anderson wrote, "Towards the end of the afternoon, Maureen McTeer, a Conservative law student and wife of Joe Clark, berated the audience for not condemning the Charter out of hand. Pauline Jewett countered by pointing out that it could be an important tool for women and since the government was hell-bent on getting it through Parliament, it was probably going to be passed."

strategy planning was shared. These women campaigned tirelessly and combined their efforts with the mass support women showed during the negotiations in order for women to embed their ideas into the Charter.

### *Women within the Law*

The last group of individuals who made a substantial contribution to the success of the movement was a collection of female lawyers who actively participated in the executive negotiations with the federal government over the articulation of equality rights in the Charter. These women played very special roles as their experiences, training, and position within the structure of the women's movement afforded them the unique ability to combine and formulate both legal and feminist theory on the wording and substance needed for a greater recognition of equality. By looking closely at their actions throughout the process of constitutional renegotiation, their ability to connect multiple spheres becomes quite evident. This served as a function that not only allowed for a transfer of ideas, as feminist ideology in many ways shaped the principles behind substantive equality, but it also gave these ideas the legitimacy and power, two necessary elements that would be required.

As two of the leading female lawyers consulted during this period, Mary Eberts and Beverley Baines became instrumental in shaping the position of the women's movement. In 1980-81, Mary Eberts was a partner at Tory, Tory, DesLauriers and Binnington a Toronto firm which focused on litigation of equality cases at all levels of courts and in many different jurisdictions. In her practice, Eberts was given first-hand experience of how Canadian governance was falling short of providing adequate measures of equality, especially for those who did not fall in the privileged, white, male

category. Gaining insight into the grass root challenges women faced, she was one of a wave of female lawyers exposed to emerging feminist ideology that explained and attempted to resolve discrimination in the law. Moreover, well positioned within the legal community as current or past professors of law at Queen's University and the University of Toronto, these legal experts were acutely aware of the constitutional and equality rights issues inherent to the Canadian legal context and had considerable understandings of American and other International experience.<sup>57</sup> Recognizing the need for critical and precise wording, female lawyers had the tools to discern if the initially proposed draft would be acceptable for women and more importantly to knowledge to propose the necessary adjustments needed to achieve a greater treatment of equality.

Due to the complex nature of legal interpretation needed to understand the proposed Charter, feminist lawyers were instrumental in creating feminist responses to the proposed amendments. The most influential studies, prepared by Beverley Baines and Mary Eberts under the auspice of the CACSW in the fall of 1980, informed virtually all of the feminist activities around the constitution and presentations before the Special Joint Committee.<sup>58</sup> In their submissions, both women outlined the implications the constitution and specifically the Charter would have on Canadian women.

Providing clear reference to the significance of an entrenched Charter, Eberts compared the language used in both France and the United States to that of the 1960 *Canadian Bill of Rights* and demonstrated the reasons why judicial interpretation of

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<sup>57</sup> Mary Eberts graduated from the University of Western Ontario and Harvard law schools. In 1974, she began her legal teaching career as one of a handful of female law professors at the University of Toronto. Beverley Baines was a professor in the Faculty of Law at Queen's University during the constitutional negotiations period 1980-1981.

<sup>58</sup> Kome, *The Taking of 28: Women Challenge the Constitution*, 31.

equality had to date been hindered.<sup>59</sup> In addition, while highlighting the importance of wording, the submission decisively connected the matter of entrenchment to the possible consequences this decision would have for women. Eberts justified women's inclusion in the constitutional review process by explaining how matters that affected women's lives including education, economic concerns, family law, and provincial/federal jurisdiction were inextricably linked to the constitution.<sup>60</sup> In combining feminist issues with constitutional concerns, Eberts and other female lawyers like her were able to facilitate Canadian women in formulating a concept of substantive equality that fit within the parameters of the law.

Reiterating the inadequacies of the proposed wording of the 1980 Charter draft, in her paper, "Women, Human Rights, and the Constitution," Baines assisted in the articulation of substantive equality. Citing existing Human Rights Codes that applied to Canadian provinces, Baines systematically analyzed each of the various provisions of equality these codes provided.<sup>61</sup> Illustrating the limitations of these provisions, Baines explained the formal and thereby inadequate form of equality which these statutes provide. In addition, Baines dissects the judicial interpretation of the equality cases that came before the Supreme Court after the enactment of the 1960 Bill of Rights. From this, she concluded "given that there is not a simple way to recognize whether equality

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<sup>59</sup> Mary Eberts, *Women and Constitutional Renewal – A Paper Prepared for the Canadian Advisory Council on the Status of Women*. September, 1980. (Box/File: 683.3; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 14 – 15.

<sup>60</sup> *Ibid.*, 52.

<sup>61</sup> Baines makes special reference to the *Quebec Charter of Rights and Freedoms* citing it "as the most innovative." However, in regards to equality Baines commented, "the preamble to the Quebec Charter of Human Rights and Freedoms contains a reference to the "equal protection of the law" but as a preamble it may not have the same protective impact as the other independent statutory provisions, (section 10). Moreover, in the preamble there is no specific reference to sex as a prescribed classification." Beverley Baines, *Women, Human Rights and the Constitution – Prepared for Canadian Advisory Council on the Status of Women*. (Box/File: 683.4; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 32-37.

of legal status has been achieved, equality must be a goal-defining term of which the end product can only be described by words of relativity, such as “evening-up”.<sup>62</sup>

Combining both principles of “equality of opportunity” and “equality of results”, Baines defined the essential function of substantive equality. Whereby a principle of equality of results was to facilitate the process of “evening-up,” substantive equality sought to adjust the legal status of the disadvantaged group, women, relative to the legal status of the advantaged group, men. Demonstrating their ability to transpose the concerns of women into a legal framework, female lawyers like Baines came to operate as the framers of substantive equality.

In addition to the older generation of female lawyers, there were also a group of young, recently graduated, activist lawyers who also participated in the movement and throughout the Charter negotiations. As part of the first big batch of women law students to graduate during the 1970s, Marilou McPhedran is an excellent example of the type of spirited women who dedicated themselves to seeing women gain a seat at the negotiating table. The efforts and actions of these women in many ways orchestrated the final stages of the lobby against the constitutional renewal process. Combining all facets and resources of the movement, these women were able to tap into and access the force, strength, and support of women from across Canada while maintaining a legitimate and technically sound position that would argue for women’s legal and equal recognition.

Graduating from the Osgoode Law School in Toronto in 1974, in her first year McPhedran was one of the founders of a rape crisis center and later helped a group of

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<sup>62</sup> Ibid., 58.

welfare mothers form a mother-led union.<sup>63</sup> Founding women's caucuses, battling in Faculty Council over appointments for women, and lobbying for change to the law school curriculum, McPhedran was given an early opportunity to learn and hone valuable skills that would later be applied in the fight for women's equality. Taught by professors such as Peter Hogg, Judy LaMarsh, and Mary Jane Mossman, and encouraged and supported by senior law students such as Constance Backhouse and Barbara Betcherman, McPhedran was one of many female law students that not only received an outstanding education but also learned how to engage in rigorous debate.<sup>64</sup> After graduation McPhedran became involved in litigation. Securing contract work for clients such as United Nations, Ombudsman, and Advocacy Resource Center for the Handicapped, along with starting a newspaper called *The Canadian Human Rights Reporter* it was obvious that McPhedran was committed to helping disadvantaged groups. Nor was this attitude uncommon, as many of the female lawyers that came to be engaged in the women's movement were known as fierce advocates in their respective fields of interest.

In the fall of 1980, McPhedran along with Beverley Baines and Mary Eberts was present at the Special Joint Committee hearings. Acting as a legal expert for NAC, she made submissions that followed arguments similar to those made by her colleagues who were working with CACSW. During the debate McPhedran realized that the women's movement had to act quickly,

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<sup>63</sup> Anne Collins, "Which Way to Ottawa?" *City Women Magazine* (Holiday Edition, 1981-1982), 30.

<sup>64</sup> Dave Blaikie, "Network began after political mistake," *Brandon Sun* (Thursday, March 25, 1982), 13.

We weren't working on our own agenda. There was every likelihood that the Charter of Rights would just be shoved down our throats and if we didn't speak up now our chance would be lost.<sup>65</sup>

Not complacent about women's predicament, McPhedran was one of the first women to reject Axworthy's cancellation of the conference on Women and the Constitution.

Joining forces with other like-minded individuals, McPhedran and the Ad Hoc Committee worked around the clock to organize a replacement conference. Operating as the liaison between the Toronto and the Ottawa teams, McPhedran acted as a critical link in facilitating and unifying the Ad Hoc Committee's efforts. Familiar with the Charter's short-comings, she was an ideal candidate to orchestrate the conference, plan its objectives, and ensure that resolutions were achieved. Realizing the significance of using the language of the law to present their concerns to the government, the conference focused on passing resolutions that would support a legal position that could be lobbied for.

The efforts of these Ad Hockers, predominantly lawyers, significantly advanced women's position within the constitutional debates. In her editorial review of the lobby, Anne Collins notes that the Ad Hoc Committee had been written off by some as a "group of young female lawyers, heady with power, nitpicking, and playing lawyer head-games with their male counterparts."<sup>66</sup> However, in the end it was this group of lawyers who received a phone call from the Department of Justice informing them of the government's willingness to talk.<sup>67</sup> Out of these negotiations, section 28 was composed

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<sup>65</sup> Collins, "Which Way to Ottawa?" 24.

<sup>66</sup> *Ibid.*, 26.

<sup>67</sup> Ad Hoc Committee of Canadian Women, *Women and the Constitution – A Chronology of Events, January. To April 1981* (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 2.

and the language of section 15 expanded. The actions of these female lawyers showcase that they were of the few female activists who could unlock the complexities of legal language and draw conclusions over critical matters of judicial interpretation. Able to recognize what was acceptable and what was not they knew not only when to oppose a recommendation but also how to counter it. As Pauline Jewett later commented, “they did our political process a big favour.”<sup>68</sup> Women such as Mary Eberts, Beverley Baines and Marilou McPhedran taught women lobbyists a vocabulary that gave the movement’s arguments power. This was fundamental in convincing the federal government on how equality rights needed to be framed. The role these individuals played was instrumental in formulating and entrenching substantive equality in the Charter.

As Charles Epp elaborated, one of the core elements needed for a judicial rights revolution is the growth of support structures for legal mobilization.<sup>69</sup> In the case of the efforts of Canadian women to achieve greater equality, the structure of the women’s movement and all its facets becomes a principle requirement for the success of the movement. The structure of the Canadian women’s movement provided both executive and grass root women’s groups the ability to interact and engage with one another over priorities and guiding ideology. Operating as an umbrella, elements from both above and below were able to negotiate and share ideas. Moreover, national organizations and provincial and local bodies were able to link the movement as information and techniques were channelled up through as well as funnel down through the network.

The structure also provided for unique individuals to link various elements of the movement and synchronizing initiatives. Providing network contacts, public support,

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<sup>68</sup> Collins, “Which Way to Ottawa?” 26.

<sup>69</sup> Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, 25.

political voice, or legal literacy various individuals contributed at different stages of the process and ensuring the success of the movement. Finally, as a structure the women's movement and the agencies that represented it were both elastic and permeable enough to allow for a variety of positions. Each group had its own priorities and operated independently while still uniting under a general consensus behind the winning of substantive equality. Of all critical features of the structure of the movement, this dynamic helps to explain how Canadian women were able to achieve such a pivotal gain. In looking at the specific events that unfolded during the tumultuous fourteen months between 1980 and 1981, the structure of the women's movement was severely tested and the eventual outcome clearly demonstrates its strength and dynamics as it was able to achieve its stated constitutional goals.

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**CHAPTER 4**  
**The Dynamics of Priority: Transcending Barriers to Unity within the Canadian Women's Movement**

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By the end of the 1970s the strength of the women's movement was impressive. Women knew the goal they wanted to achieve and they were quickly gaining access to means through which they could realize it. Substantive equality was articulated for the first time in Canadian law through sections 15 and 28 and is a direct result of the intellectual and structural strengths forged by the women's movement. The manner in which these ideas came to fruition developed out of a complex and effective structure through which Canadian women were able to mount an offensive for change. However, the women's movement was not a single homogenous entity. As multiple ideologies and perspectives converged, the women's movement laboured to find a balance between priorities that traditionally divided the various groups and ideologies of the movement with the solidarity that existed in the shared oppression of Canadian women.

There is disagreement among scholars regarding the character of the women's movement. Jill Vickers describes NAC as a "Parliament of Women," and argues that even with recognition of difference, diverse ideological interests, and linguistic composition, the movement operated as a unified coalition.<sup>1</sup> Others debate the degree of unity that existed. As shown in Judy Rebick's collection of testimonies, the women's movement in English-speaking Canada was not as inclusive as some scholars have

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<sup>1</sup> Jill Vickers, Pauline Rankin and Christine Appelle, eds. *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (Toronto, ON: University of Toronto Press, 1993), 52.

observed.<sup>2</sup> Here, women of colour, lesbians, and those of physical disability struggled to have their voices heard and were often marginalized in the process. This theory of division has been expanded as scholars interested in Franco-Quebec and Aboriginal women argue that distinct and separate movements were also developing parallel to the English-speaking women's movement. The dynamics that existed within the pan-Canadian women's movement reveal both tensions of unity and division. It is critical to make the distinction between these parallel movements and to recognize the contribution of each. In this way it is possible to decipher the streams that flowed into the national women's movement and where they remained divided.

The term "dynamics of priority" refers to the varying goals, mandates, and objectives within various women's organizations and the women's movement as a whole. Within the various ideologies and groups of the movement, certain goals, concepts, mandates, or objectives take priority over conflicting alternatives. It is this struggle for hierarchical position to which the dynamics of priority refer. One repercussion of this dynamic is a perception that certain goals must succeed at the expense of those considered less important. This hierarchy is not static and therefore must be explored within the context of the 1980-1982 constitutional negotiations. It will be argued that while the dynamics of priority sowed dissension within the women's movement in English-speaking Canada and separated the Aboriginal and Quebec women's movements from the national current, what united them was their consensus on the goal of substantive equality. The positions of marginalized groups within the English-Canadian movement as well as those in the First Nations and Québécoise

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<sup>2</sup> Judy Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution* (Toronto, ON: Penguin Group, 2005), xi-xv.

movements demonstrates the influence of substantive equality on the dynamics of priority and explains how this unique moment of unity was possible.

### **Women of English-speaking Canada**

Originating as an institutional organization, the initial membership of NAC mostly encompassed white, middle- to upper- class professional women. While still difficult for regional and marginalized members to participate in policy construction, NAC began undergoing a transition that saw the broadening of group support. Jill Vickers reveals that in the discussions between 1979 -1982, smaller groups were better able to integrate their experiences and ideas into a national arena.<sup>3</sup> However, the presence of smaller groups did not necessarily mean more inclusiveness. When analyzed from another perspective, 83 of the organizations were from Ontario, 18 were from Quebec and only 4 were from other provinces and territories.<sup>4</sup> From another viewpoint, of the attending groups only 3 explicitly represented unions, 5 spoke on behalf of Aboriginal women, 3 represented ethnic minorities and immigrants, 4 represented religious denominations, and none represented lesbian groups.<sup>5</sup> Thus, it becomes critical to explore the position of regional and other disenfranchised groups that national organizations claimed to represent.

A series of reports from the regions became a regular feature of the NAC executive meetings after 1979. The minutes of these meetings reveal that regional

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<sup>3</sup> Vickers, et al., *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women*, 94. Using the 1979 AGM minutes which recorded 133 organizations present for the meeting, Vickers bases her argument on the fact that of the 133 groups present 18 were other national organizations, 11 were Status of Women provincial branches, and the remaining 104 were small groups.

<sup>4</sup> NAC, "Organization/Affiliation/City/Delegates/ Observers by Province," *Annual Meeting and Conference of the National Action Committee on the Status of Women – Ottawa, March 23-26, 1979* (634.26; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1-6.

<sup>5</sup> *Ibid.*, 1-6.

concerns tended to focus on matters that fell under provincial jurisdiction as well as the status of regional organizations within the national movement and its agenda.<sup>6</sup> Parallel to provincial governments' concerns with the nature of Canadian federalism, regional representatives within the Canadian women's movement, specifically those in the West and Atlantic provinces, were often frustrated with not having their voices heard. As Pat Preston from Alberta has remarked, "NAC does not always allow for equal participation incorporating the views of all regions."<sup>7</sup> As NAC member group's views were in many ways shaped by regional and provincial features, the concerns of women were not uniform across Canada. Nevertheless, underlying all of these differences was the commitment to find a greater recognition of equality. Subtle and very rarely openly expressed, this unity in the goal for substantive equality is identified in the mandates through which regional women's groups fought for practical issues.<sup>8</sup> Using tangible concerns and matters of provincial jurisdiction, regional perspectives reinforced and supported a priority of substantive equality.

Politically active lesbians were a core group within the women's movement.

While women's groups existed whose primary concern was addressing lesbian issues throughout Canada, their affiliation with national organizations was not as prominent.

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<sup>6</sup> NAC, "Regional Reports," *Minutes from Executive Committee Meeting, May 24, 1980* (699.19; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 5; NAC, "Regional Reports," *Minutes from Executive Committee Meeting, October 19, 1980* (699.19; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 10; and, NAC, "Regional Reports," *Minutes from Executive Committee Meeting, December 6, 1980* (699.19; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 7.

<sup>7</sup> NAC, "Regional Reports," *Minutes from Executive Committee Meeting, September 13, 1980* (Box/File: 699.19; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 7.

<sup>8</sup> British Columbia Federation of Women, "Constitution and Policy Handbook, vol. 2 – Human Rights, pg. 10-14," (Box: 6; File: BCFW: constitution, policies, reports and other material (1of3); ; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections); and, SWW, "Statement of Purpose for Saskatchewan Working Women's Association – Discussion Paper, pg. 3," (Box 100; File: SWW: Founding Convention, draft constitution, rules of order; X-10-1 Canadian Women's Movement Fond; University of Ottawa, Archives and Special Collections).

As the minutes from the NAC 1979 AGM illustrate, there were no groups present who explicitly represented lesbian women. This was also true of the 1981 Ad Hoc Conference of Women and the Constitution in which lesbian issues were not endorsed by any of conference endorsing groups. Describing these years as “difficult,” Ellen Woodsworth revealed the fear that many lesbians had with participating in the women’s movement and the anger with not having their rights adequately respected.<sup>9</sup> Excluded from the national organizations or unable to contribute openly as lesbians, gay women found it extremely difficult to vocalize their concerns and have these concerns sufficiently addressed by both the women’s movement and the federal and provincial governments. While only somewhat successful in penetrating the women’s movement, lesbians did secure the support from the Ad Hoc Conference indicative of the inclusion of sexual orientation as part of the list for unacceptable grounds for discrimination enumerated in section 15 of the Charter. This demonstrates the Ad Hockers’ commitment for substantive equality not only as women but as lesbians as well.

### **Women of Canada’s First Nations**

The challenge of reconciling multiple identities was also felt by women of Canada’s First Nations. The experiences of these women were inherently unique to their heritage and history. Scholars including Marlene Pierre-Aggamaway and Kathleen Jamieson argue that a distinct Aboriginal women’s movement existed in Canada.<sup>10</sup> Established in 1968 by Mary Two-Axe Early, a Mohawk from a reserve in Quebec who

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<sup>9</sup> Interview with Ellen Woodsworth as cited in Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution*, 103-105.

<sup>10</sup> Marlene Pierre-Aggamaway, “Native Women and the State,” in J. Turner and L. Emery, eds. *Perspectives on Women* (Winnipeg, MA: University of Manitoba Press, 1989), 66; and Kathleen Jamieson, “Multiple Jeopardy: The Evolution of the Native Women’s Movement,” *Atlantis*, vol. 4, no. 2 (Spring, 1979), 168-178.

lost her Indian status subsequent to marrying a non-status man, Indian Rights for Indian Women (IRIW) became one of the earliest Indian women's groups to openly challenge sex discrimination in federal legislation. Emphasizing the legal deficiencies of the *Indian Act* regarding its treatment of women, and the lack of legal mechanisms within the Canadian state to correct the situation, women like Early equated their discrimination to being "raped."<sup>11</sup> Committed to challenging the *Indian Act*, IRIW supported any and all legal action taken against the statute. Yet as each case was brought before the Supreme Court of Canada, failed to rule in favour of Indian women.<sup>12</sup> As a result, Indian women who had lost their status were endlessly reminded that their hardships would continue if a substantive notion of equality was not applied to women's rights. For these women, although supportive of Indian self-government, their most prominent priority was the need for legal equality.

From early on, IRIW was associated with the English-Canadian women's movement. In 1972, President Mary Two-Axe Early attended the founding NAC meeting where she made an appeal for support for native women's struggles.<sup>13</sup> NAC pledged that it would encourage this priority and throughout the years continued to spread awareness on the issue. During the 1980-82 constitutional negotiations, discrimination cases that applied to Indian women including *Lavell* were used extensively by women's organizations to pressure and convince government politicians, Parliamentary Committee members, and the Canadian public that the Charter's proposed

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<sup>11</sup> Mary Two-Axe Early, *Equal Rights for Indian Women, Mary Two-Axe Early Speaks to the NAC Annual Meeting, March 1980* (Box : 712 (1 of 2); File: Native Indian Women: general; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>12</sup> Sandra Lovelace was successful with her claim to the United Nations in 1981.

<sup>13</sup> NAC, "Resolution 800.2.1/73: That NAC demand an immediate Act of Parliament to repeal section 12 (1)(b) of the Indian Act," *Index of Abridged Resolutions of NAC 1972-1988* (684.13; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 49.

wording was not adequate. Moreover, women Members of Parliament from all three parties and Senators joined together to request that, “Parliament urge to finalize immediately the negotiations with all Indian organizations and with the Indian Bands throughout Canada to amend the *Indian Act* to grant Indian women and their children their full status and rights in Canada.”<sup>14</sup> To this end, IRIW was fully supportive of the alterations the women’s movement desired for legal equality and was well integrated into the English-speaking movement. Correspondence flowed between IRIW and NAC as each group reinforced and assisted the others’ initiatives.<sup>15</sup> Based less on an ability to vocalize their concerns autonomously and more on the close alignment of objectives within the national agenda, it becomes essential to recognize that IRIW played a participatory role in constructing the constitutional position of the women’s movement in English-speaking Canada.

Adopting many of the arguments put forward by the IRIW, English-speaking women’s organizations demanded the need for entrenched gender equality rights. However, while the position of Aboriginal women was used to highlight the need for a more comprehensive Charter, they were often done at the discretion and for the benefit of English-speaking women. Accused of being token and sometimes abstract, NAC was not always effective at reconciling priorities. Caroline Lachapelle argues the lack of

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<sup>14</sup> Canada, House of Commons, *Declaration of Solidarity of Canadian Women Parliamentarians to Recognize Equal Rights for Indian Women*, July 25, 1980 (Box 712, 1 of 2; File: Native Indian Women: government meetings/correspondence; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>15</sup> IRIW, Correspondence from Mary Two-Axe Early, President IRIW, to Lorna Marsden, President NAC, July 14, 1976 (713.18; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); NAC, Correspondence from Lorna Marsden, President NAC, to Hon. Pierre Elliot Trudeau, Prime Minister of Canada, May 21, 1976 (713.18; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); and, NAC, Correspondence from Lorna Marsden, President NAC, to Hon. Judd Buchanan, Minister of Indian Affairs and Northern Development, May 25, 1976 (713.18; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

participation by Aboriginal women's groups was based on four primary factors: class difference, lack of awareness/knowledge about the women's movement, white racism, and fear of dividing the native community.<sup>16</sup> As a result, Native women's concerns were taken up by English-speaking national organizations but not in a substantial way. As Gail Stacey Moore from Quebec Native Women's Association reported, "NAC was incredibly supportive to Mary (Two-Axe Early) and her group," but "even people who I thought were advanced in their thinking unintentionally said hurtful things."<sup>17</sup> These statements by Moore reveal the difficulty marginalized groups like Aboriginal women had in situating themselves within the national movement and the extent to which their concerns were addressed.

Less willing to integrate into the dominant thread of the Canadian women's movement, organizations such as the Native Women's Association of Canada (NWAC) emerged as an agency more closely aligned with national aboriginal organizations. Made up predominantly of Indian status women, NWAC was founded in 1974 by an aggregate of thirteen Native women's organizations from across Canada with the collective goal to enhance, promote, and foster the social, economic, cultural, and political well-being of First Nations and Métis women within First Nations, Métis, and Canadian societies. Focused on defining the nature of Aboriginal self-government within a constitutional provision, NWAC established close ties with the National Indian Brotherhood, (NIB), later known as the Assembly of First Nations (AFN). These male dominated groups advocated for the establishment of self-government arguing that only

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<sup>16</sup> Caroline Lachapelle, "Beyond Barriers: Native Women and the Women's Movement," in Maureen Fitzgerald, Connie Guberman, and Margie Wolfe, eds. *Still Ain't Satisfied! Canadian Feminism Today* (Toronto, ON: The Women's Press, 1982), 261.

<sup>17</sup> Interview with Gail Stacey Moore as cited in Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution*, 110-111.

after its accomplishment would equality to all Aboriginal peoples be achieved.<sup>18</sup> Their collectivist approach did not emphasize individual rights, including equality rights for status and non-status Indian women.

In response, NWAC declared that a principle of sexual equality between aboriginal men and women must clearly and constitutionally stand above and permeate all aspects of aboriginal rights including self-government.<sup>19</sup> As expressed in NWAC's mandate, their organizational goals consisted of promoting the interest of aboriginal women and changing their image amongst Canadian society at large and amongst aboriginal men.<sup>20</sup> Balancing the identities of both First Nation and woman, these native women's organizations had to situate themselves within two categories of priority. As Michael Behiels has exposed, the strategy to reconcile Native feminism with a more traditional Aboriginal nationalism was not easily attainable.<sup>21</sup>

Aggravating the problem was the stature of the *Indian Act*, which in addition to treaties, operated as one of the few pieces of legislation that conferred rights upon status Indians. As touched on earlier, the rights conferred by the *Indian Act* discriminated on

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<sup>18</sup> NIB, *Statement by Noel V. Starblanket, President of National Indian Brotherhood on the Rights of Indian Women and Children under the Indian Act*, July 18, 1979, (Box: 713, File: Native Indian Women: constitutional representation, National Indian Brotherhood, 1970's; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 2.

<sup>19</sup> NWAC, "Statement by Native Women's Association of Canada on Native Women's Rights," in Audrey Doerr and Micheline Carrier, eds. *Women and the Constitution* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1981), 64; and, Lilianne E. Krosenbrink-Gelissen, "The Canadian constitution, the Charter and Aboriginal women's rights," *International Journal of Canadian Studies*, vol. 2, no. 7-8, (Spring-Fall 1993), 210-211.

<sup>20</sup> NWAC, "1974 Objectives," *Native Women: A voice of many nations: recognizing our own* (Box: 73; File: Native Women's Association of Canada / Association des femmes autochtones du Canada (Ottawa, ON): book on the Association's history, annual assembly and other material, 1981-1988; X10-1 Women's Movement Archive, University of Ottawa, Archives and Special Collections), 4.

<sup>21</sup> Michael Behiels, "Native Feminism versus Aboriginal Nationalism: The Native Women's Association of Canada's Quest for Gender Equality, 1983-1994," in Michael Behiels and Marcel Martel, eds. *Nation, Ideas, Identities: Essays in Honour of Ramsay Cook*, (Don Mills, ON: Oxford University Press, 2000), 215.

the basis of sex, the SCC had held these sex-based distinctions did not violate the Bill of Rights. Yet, as the one legal instrument that acknowledged the rights of Indians, particularly on reserves, many First Nation communities believed that the elimination of the *Indian Act* would remove all rights from Indian people.<sup>22</sup> The *Indian Act* was seen as a basis whereby generations of Native bands had built their identity and existence and therefore it was not something that was easily tampered with. Male dominated Indian organizations asserted that membership rights should be the prerogative of First Nations and opposed piecemeal changes to the *Indian Act* in the absence of constitutional reform.<sup>23</sup> Thus, when Native women took issue with the *Indian Act* they were perceived by their community to be resisting self-government and jeopardizing the benefits of all status Indians in Canada.<sup>24</sup> Intensifying the stakes, Native women were required to make a serious sacrifice. Either they could remain a part of their community subject to the discriminatory provisions of the *Indian Act*, or they could challenge sex discrimination.

Status and non-status women's groups felt uneasy trying to reconcile their culture with their gender. This was clearly expressed by one woman in the statement, "I cannot take the Mohawk out of the women or the women out of the Mohawk. My experience is discrimination within discrimination."<sup>25</sup> Unable to compartmentalize priorities, Lillian Krosenbrink-Gelissen elaborates that this tension created a serious

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<sup>22</sup> Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution*, 108.

<sup>23</sup> Kathleen Jamieson, *Indian Women and the Law in Canada: Citizens Minus* (Ottawa, ON: Advisory Council on the Status of Women, 1978), 89.

<sup>24</sup> Judith F. Sayers and Kelly A. MacDonald, "A Strong and Meaningful Role for First Nations Women in Governance," in Status of Women Canada, ed. *First Nations Women, Governance, and the Indian Act: A Collection of Policy Research Reports*, (Ottawa, ON: Status of Women Canada, 2001), 12.

<sup>25</sup> Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax, NS: Fernwood Publishing, 1995), 137.

dilemma for Indian women. In her words, “if they give priority to women’s rights, they might endanger the collective rights of Indian; and should they give up priority to the collective rights of Indian, they risked sexual discrimination by their own people.”<sup>26</sup>

Clearly, there was considerable tension between NWAC and the AFN over individual and collective rights.

In the end, NWAC temporarily set aside its goal of gender equality until recognition of Indian rights was achieved.<sup>27</sup> As President Marlene Pierre-Aggamaway explains, “a stand was taken to remove section 12(1)(b) from the Indian Act, but there was something more integral to our survival, and that was the entrenchment of aboriginal and treaty rights in the constitution.”<sup>28</sup> The consequence of this position meant that section 15 received only weak endorsement from NWAC women. Trumping equality rights were sections 25 and 35 of the Charter, the two clauses that focused on the collective rights of Aboriginal peoples and the possibility of self-government. Recognizing that to disengage from the Aboriginal movement would have seriously compromised its goal of self-government, the only avenue open was to formulate its aspirations within the context of Aboriginal nationalism.<sup>29</sup> As a repercussion, NWAC

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<sup>26</sup> Krosenbrink-Gelissen, “The Canadian Constitution, the Charter, and Aboriginal women’s rights,” 214,

<sup>27</sup> As Michael Behiels notes, this decision was only temporary. After 1982 NWAC shifted back to a focus on gender rights. Behiels, “Native Feminism versus Aboriginal Nationalism: The Native Women’s Association of Canada’s Quest for Gender Equality, 1983-1994,” 217. Moreover, the events of the later constitutional debates of Meech and Charlottetown further reiterate the commitment of aboriginal women’s organizations to the concept of substantive gender equality.

<sup>28</sup> Pierre-Aggamaway, “Native Women and the State,” 68; and NWAC, Correspondence from Marlene Pierre-Aggamaway, President NWAC to Jean Wood, President NAC, May 28, 1981 (Box: 73; File: Native Women’s Association of Canada / Association des femmes autochtones du Canada (Ottawa, ON): book on the Association’s history, annual assembly and other material, 1981-1988; X10-1 Women’s Movement Archive, University of Ottawa, Archives and Special Collections), 1-3.

<sup>29</sup> Krosenbrink-Gelissen, “The Canadian Constitution, the Charter, and Aboriginal women’s rights,” 216, 219.

would attempt to integrate women's rights into Aboriginal rights using a strategy that was dissociated from the English-speaking Canadian women's movement.

While ambitions of self-government took precedence throughout the initial phases of constitutional negotiations, First Nations women at no point objected to the kind of substantive equality that the mainstream Canadian women's movement was proposing. First Nations women knew, perhaps most intimately, the limitations and weaknesses of the equality rights provided in the 1960 Bill of Rights. Because section 28 asserted the primacy of sexual equality rights over all other rights, it was a provision that both members from NWAC and IRIW could and did support. It was important to Indian women as it would restrict loopholes for existing and forthcoming legislation to disregard the recognition of women's equality. Thus, although some Aboriginal women's groups would not sacrifice their priority of self-government, they still supported the underlying principles of equality that the women's movement of English-speaking Canada worked rigorously to achieve. By endorsing section 28, NWAC and IRIW further legitimized the movement and gave strength to the mobilization efforts that in the final stages ensured that section 28 remain insulated from the section 33 override within the Charter.

### **Women of Francophone Quebec**

As Micheline de Sève describes it, "the women's movement in Quebec and English-Canada are separated with the context of "two solitudes," developed and organized through two separate entities, which followed two distinct dynamics, within

the context of two distinct histories.”<sup>30</sup> Similar to English-speaking Canadians’ and First Nations’ thinking, Quebec feminists came to the conclusion that procedural equality as it existed in Canada was not enough. However, as many scholars have argued, the greatest defining feature of the Québécois women’s movement was the priority of Québécois nationalism.<sup>31</sup> Accordingly, Québécois women were forced to reconcile the priorities of two different identities.

Oriented primarily toward the Quebec state, the Quiet Revolution ushered in a cascade of social, political, and economic reforms. However, instead of incorporating the priorities of women’s liberation, few Québécois political and intellectual leaders paid heed to women’s concerns. As a result, Québécois women organized independently at grass root levels and through broad provincial consultation. In 1966, Thérèse Casgrain established la Fédération des Femmes du Québec (FFQ). The objectives of the organization were:

La FFQ veut être un agent de sensibilisation et de changement dans la société québécoise. La FFQ doit donc mettre tout en œuvre pour que soient entreprises les études et les actions qui assureront aux femmes un statut de citoyenne à part entière. Pour ce faire, elle désire mobiliser les énergies féminines afin de :

- a) permettre aux femmes de s’exprimer avec plus poids
- b) modifier les conditions sociales qui régissent le statut de la femme
- c) coordonner le travail accompli

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<sup>30</sup> Micheline de Sève, “The Perspectives of Quebec Feminists,” in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women’s Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen’s University Press, 1992), 116.

<sup>31</sup> Micheline Dumont, “The Origins of the Women’s Movement in Quebec,” in Backhouse & Flaherty, *Challenging Times: The Women’s Movement in Canada and the United States*, 89; Chantal Maille, “Quebec Women and the Constitutional Issue: A Scattered Group,” *The Journal of Canadian Studies*, vol. 35, no. 2 (Summer, 2000), 98; and, Diane Lamoureux, “Nationalism and Feminism in Quebec: An Impossible Attraction,” in Heather Jon Maroney and Meg Luxton, eds. *Feminism and Political Economy: Women’s Work, Women’s Struggles* (Toronto, ON: Methuen Publications, 1987), 51.

d) permettre une meilleure unité d'action.<sup>32</sup>

Shortly after its inception, the FFQ was soon represented regularly on parliamentary committees and it joined forces with English-speaking Canadian women to petition for the creation of the RCSW and also the provincial Conseil du statut de la femme.

Predominantly focused on provincial reforms, FFQ also connected with the national women's movement. By joining NAC's coalition and participating as a provincial branch within the English- and French-speaking Advisory Council, many Quebec women's groups were participatory in the early stages leading to the constitutional talks. Quebec women were also actively plugged into the political arena. Members of Parliament such as Monique Bégin, Albanie Morin and Jeanne Sauvé participated at the federal level in initiatives to improve the status of women.<sup>33</sup> Demonstrating the approach of many Quebec federalists, these women sought to integrate into the national sphere while maintaining their affiliation to the francophone province.

During the 1970s, the atmosphere in Quebec became highly politicized. Québécois nationalism and separatism were critical components during this period and played a central role in Quebec politics with the rise to power in 1976 of the Parti Québécois. This emerging secessionist movement and P.Q. government influenced

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<sup>32</sup> FFQ, "Objectifs généraux," *Mission, 1980* (Box 27; File: Fédération des Femmes du Québec; X-10-1 Women's Movement Fond; University of Ottawa, Archives and Special Collections), 3. Translation: "The FFQ wishes to be an organization whose hope is to stimulate sensation and change in the Quebec society. Therefore, it must launch certain campaigns such as studies to secure the full citizenship for all women. To achieve this goal, it wishes to mobilize women to a) allow women to express themselves with more weight; b) change the social conditions governing the status of women; c) co-ordinate all of these efforts; and, d) allow these actions to be conducted under a unified front.

<sup>33</sup> Micheline Dumont, "Women of Quebec and the Contemporary Constitutional Issue," François-Pierre Gingras, ed. *Gender and Politics in Contemporary Canada* (Don Mills, ON: Oxford University Press, 1995), 159.

feminism and the defining features of the Quebec women's movement. As Diane Lamoureux discusses,

On the one hand, nationalism provided women with a political vocabulary with which they could analyze their oppression. On the other hand, nationalism contained a misogynous view of women. There was thus, a constant tension in the relationship between the two movements and their corresponding ideologies.<sup>34</sup>

Alluding to the tension between national liberation and women's liberation, Québécois women began to formulate another response whereby both objectives could be met. Having to organize their priorities in a similar fashion as Aboriginal women, Québécois women's groups had to align themselves within two movements.

As the nationalist movement in Quebec began to radicalize, there emerged a militant faction within the Québécois women's groups. Identified by Dumont as something distinct and quite different when compared to English-speaking Canadian counterparts, these radical groups integrated themselves significantly into the Québécois nationalist and separatist movements.<sup>35</sup> In 1971, the Front de libération des femmes (FLF) issued its *Manifeste des femmes québécoises*. Closely mirroring the rhetoric of Quebec's extremist Front de libération du Québec (FLQ), the FLF called for "pas de Québec libre sans libération des femmes! Pas des femmes libres sans libération de Québec!"<sup>36</sup> By marrying the two agendas Québécois women were able to formulate a position that would allow them to achieve both of their feminist and nationalist objectives simultaneously. In addition, the manifesto also gave voice to the situation of

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<sup>34</sup> Lamoureux, "Nationalism and Feminism in Quebec: An Impossible Attraction," in Maroney & Luxton, eds. *Feminism and Political Economy: Women's Work, Women's Struggles*, 51-52.

<sup>35</sup> Dumont, "The Origins of the Women's Movement in Quebec," in Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States*, 155.

<sup>36</sup> Front de libération des femmes québécoises, *Manifeste des femmes québécoises* (Montréal, QC: La Maison Réédition-Québec, 1971), Translation: No liberation of Quebec without the liberation of women! No liberation of women without the liberation of Quebec!

women and the purpose of the movement explaining that, “nous entendons, dès maintenant, lutter pour nos revendications et faire en sorte que toutes les femmes se sentent concernées par la libération nationale et sociale parce que là sont leurs intérêts.”<sup>37</sup> With this, radical feminists addressed the feminine predicament, recognizing the need for equality and more specifically the need to have all women’s participation in its formulation and articulation.

With a unique range of feminist ideals, the Quebec women’s movement was indeed distinct from English-speaking Canada. However, like their Canadian counterparts, they also employed various strategies to ensure change. Effective protests, lobbying, and consciousness-raising were all part of a Québécois feminist’s repertoire. These efforts predominantly centered on provincial legislation, as issues that directly affected women’s lives often fell within provincial jurisdiction along with the fact that Québécois women felt the Quebec state was more suited to address their needs, regardless of jurisdiction.

One of the most significant gains for gender equality was achieved in the 1975 *Charte des droits et libertés de la personne*. Unique among Canadian Human Rights Codes, the charter included fundamental political and civil liberties as well as economic and social rights.<sup>38</sup> In this respect, the Quebec charter combined the protection of individual rights usually seen in a bill of rights with the anti-discrimination provisions commonly found in human rights codes. Since there remained some confusion

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<sup>37</sup> Ibid., 53-54. Translation: We mean, from now on, to struggle for our demands, making sure that in the process, all women feel involved in the national and social liberation movement, because their interests lie within it.

<sup>38</sup> Quebec, *Charte des droits et libertés de la personne*, 1975. Most of the traditional political freedoms are mentioned in the first nine sections of the charter.

regarding jurisdiction in the field of individual rights, most provinces limited their human rights legislation to areas that were clearly in their sphere of interest including employment, accommodation, and provincial services.<sup>39</sup> On account of its growing desire to assert its special status coupled with intense pressure from rights advocacy groups, including women's organizations, Quebec produced a document that extended equality beyond its traditional formal approach.

When promulgated, the Quebec *Charte des droits et libertés de la personne* sought to be the most robust human rights legislation in Canada at the time and was the only provincial Canadian anti-discrimination statute to include a definition of equality.<sup>40</sup> Compared with the final version of the Canadian Charter, Quebec's Charter enumerated equality right guarantees more generously for equality seekers, providing more express grounds for complaints of discrimination.<sup>41</sup> Moreover, provision for affirmative action programs legalized within the Quebec Charter afforded the opportunity to tackle systemic inequality and provide a more substantive interpretation of equality. Although many Quebec feminists were satisfied with these gains, there were still criticisms of the interpretation and application of the Charter's provisions.<sup>42</sup> More importantly, the

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<sup>39</sup> Dominique Clément, *Canada's Rights Revolution: Social Movements and Social Change, 1937-82* (Vancouver, BC: UBC Press, 2008), 102.

<sup>40</sup> Quebec, *Charte des droits et libertés de la personne*, most of the traditional political freedoms are mentioned in the first nine sections of the charter. Section 10: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

<sup>41</sup> Grounds to be highlighted include sexual orientation, pregnancy, and social condition.

<sup>42</sup> Discussion on the limitations of the Quebec Charter can be found in: David Schneiderman, "Dual(ing) Charters: The Harmonics of Rights in Canada and Quebec," *Ottawa Law Review*, vol. 24 (1992), 235-264; Lucie Lamarche, "Perspective Féministe d'une certain Société Distincte: Les Québécoises et l'Accord du Lac Meech," in K.E. Swinton and C.J. Rogerson, eds. *Competing Constitutional Visions: The Meech Lake Accord* (Toronto, ON: Carswell, 1988), 21-34; Dominique Clément, "I Believe in Human Rights, Not Women's Rights': Women and the Human Rights State, 1969-1984." *Radical History Review*, vol. 101

Quebec Charter symbolized an affiliation to the Quebec state and the promotion of its distinct character. Therefore, during the deliberations over an entrenched federal Charter, there was no significant debate over the need to guarantee non-discrimination on the basis of sex and the affirmation of substantive equality within the province, but instead over the appropriate instruments and institutions to secure this equality effectively.

At the beginning of the 1980-1981 constitutional negotiations, it was unclear how Quebec women's groups were going to respond. As feminist and nationalist thought became more closely entwined in Quebec, amendments to the drafted equality guarantees in the constitution were not automatically supported by women's groups in Quebec. Québécois nationalists promoted greater sovereignty for Quebec and with, to one degree or another, a growing majority favouring secession from Canada. This opposition to entrenching a federal charter and repatriating the constitution underscored these deeper nationalist and secessionist goals present in Quebec's women's movement. Divisions on the dramatic issues of secession and entrenchment meant that not all feminists were on the same side, and tensions were high regarding the relationship within Quebec as well as between the Québécois women's movement and women's movement outside of Quebec. As de Sève has noted, official feminist organizations like FFQ, which had fifty thousand members at the time, and the Association féminine

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(Spring, 2008), 107-129; Fédération des Femmes du Québec, "Women need the greatest possible political autonomy for Quebec," in Richard Fidler, trans. and ed., *Canada, Adieu? Quebec Debates its Future* (Lantzville, BC: Oolichan Books/Halifax, NS: The Institute for Research in Public Policy, 1991), 159-164; and, Conseil du statut de la femme, "Women in Quebec and English-Canada – Two different conceptions of the state," in Richard Fidler, trans. and ed., *Canada, Adieu? Quebec Debates its Future* (Lantzville, BC: Oolichan Books/Halifax, NS: The Institute for Research in Public Policy, 1991), 165-179. Criticisms included vague provisions that were difficult to enforce, a human rights commission that by remaining neutral arguably perpetuated inequality reinforcing the powerlessness of minorities and allowing employers to retain the advantage in terms of time, prestige, money, legal advice, and resources to defend themselves, and delays in dealing with inquiries.

d'éducation et d'action sociale (AFEAS) with thirty-five thousand members, stayed neutral, letting their members decide for themselves where they stood on the issue of secession.<sup>43</sup> Torn over priorities and unable to put the goal of substantive equality ahead of issues of federalism, Quebec women based their position on the Charter on their allegiance to either the federal or Quebec state.

The central importance of Québécois nationalism meant that most Québécois women's groups did not openly participate at any stage of the constitutional negotiations. At the Special Joint Committee of the Senate and the House of Commons on the Constitution, Québécois women's groups chose not come forward as witnesses. Later, divisions between the Québécois and English-speaking Canadian women's movements were exacerbated by the Axworthy Affair. Miscommunication, lack of adequate representation, and even replacement of Anglophone Doris Anderson by Lucie Pépin, a Quebec Francophone, as president of CACSW pushed these two sides further apart. Coupled with the linguistic difficulties that had been bubbling within NAC, FFQ and, eventually, other Québécois women's groups decided to drop their association with the English-speaking women's organizations.

Although Québécois women were in disagreement over the means through which substantive equality should be recognized, they did not dispute the concept. In the final phase of constitutional negotiations, women across Canada were forced to lobby their provincial governments in order for section 28 to receive superior status over the notwithstanding clause. As a section that exclusively provided equality to both men and women, section 28 directly embodied the priority of equality. When the federal

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<sup>43</sup> de Sève, "The Perspectives of Quebec Feminists," in Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States*, 113.

government announced in the final days of the constitutional negotiations that the override provided in section 33 would apply to both sections 15 and 28 among Anglophone and Francophone women's groups, divisions were dropped and the women's movement in Quebec immediately took action. As Chaviva Hošek reported, protests included a network of women lawyers in Quebec City and the Conseil de Statut de la Femme who were able to convince PQ Quebec Premier, René Lévesque, to support the removal of section 28 from the notwithstanding clause in section 33.<sup>44</sup> Aware that the federal Charter would be more pervasive than the Quebec statute, Québécois feminists began to recognize the need to protect section 28 regardless of their position on entrenchment. This endorsement, while seemingly minimal, suggests that while the method by which equality was to be achieved was highly contested in Quebec, in these crucial final moments the priority of substantive equality subsumed all others and allowed for adequate pressure to be applied at the appropriate times.

By exploring the dynamics of priority within the women's movements of English-speaking Canada, Québécois women and Canada's First Nations, the complexity of the movement towards gender equality in the Charter is exposed. Not always governed by a single priority, women of Canada had to establish a system of objectives that sometimes operated in opposition to one another. This contest led to the division of opinion, which created multiple women's movements within Canada. In this respect, identifying the differences reveals some fascinating correlations between these movements suggesting the tensions that arise when reconciling multiple attachments, identities, and interests. For women in English-speaking Canada, divisions on the

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<sup>44</sup> Chaviva Hošek, "Women and Constitutional Process," in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto, ON: Methuen, 1983), 293.

grounds of regionalism, ethnicity, class, or sexual orientation were set aside in order to support the drive for greater equality rights in the constitution. Canada's First Nations women were divided as some organizations chose to align themselves with the women's movement while others made common cause with Aboriginal nationalist groups. Francophones outside Quebec supported the Charter and sections 15 and 28. However, very few Québécois women's groups chose to participate or support the constitutional debates as allegiance to a nationalist agenda remained at the forefront of their priorities.

Although unable to be fully addressed in the scope of this study, these broad characteristics are important to the dynamics of the constitutional negotiations and the ability to which women were able to unite, vocalize, and participate in these debates. Unfortunately, on some matters and issues voices were often ignored, lost, or misrepresented when predominantly white, middle-class women's groups from English-speaking Canada participated in the constitutional negotiations. What remained consistent was the demand women made for greater equality, equality not just in words but substantive equality that would carry real meaning and change to women's lives

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**CHAPTER 5**  
**American Influences: Integrating the American Experience into the Canadian Context**

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In June of 1982, the same year that Canadian women successfully entrenched sections 15 and 28 into the Charter, the Equal Rights Amendment (ERA) failed to gain ratification in the U.S. Constitution. The examination of why the U.S. movement failed while the Canadian experience succeeded has been studied by many other scholars.<sup>1</sup> The purpose of this project is not to comprehensively compare the two countries. Instead, this chapter explores some of the central elements of the American experience that influenced the Canadian context. From the dialogue and actions brought forward by the Canadian women's movement during the constitutional negotiations it is apparent that American feminists positively influenced Canadian theories of equality. The jurisprudence of equality rights in American courts demonstrated possible threats and weaknesses Canadian female lawyers sought to avoid rather than adopt. Also, the struggle by the American women's movement for gender equality rights in the United States influenced Canadian women's organizations ideologies and structural strategies as they fought to include substantive equality into the *Charter of Rights and Freedoms*.

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<sup>1</sup> Naomi Black, "Ripples in Second Wave: Comparing the Contemporary Women's Movement in Canada and the United States," in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen's University Press, 1992), 102; and, Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, IL: The University of Chicago Press, 1998), 52-70, 190-196. For additional reading on the failure of the ERA look to: Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights and the Amending Process of the Constitution* (Bloomington, IN: Indiana University Press, 1986); and, Jane J. Mansbridge, *Why We Lost the ERA* (Chicago, IL: University Chicago Press, 1979).

### American Feminist Ideology

As was the case in Canada, a multiplicity of ideas existed within the American women's movement regarding how to understand discrimination and how to define equality. Early responses saw feminists challenge women's difference in relation to men. Arguing for "equal treatment," gender equality was seen as requiring identical treatment of the sexes without regard for biological differences, such as pregnancy. As Wendy Williams asserts, instead of a unique condition justifying special treatment, equal treatment advocated that pregnant women should be treated no differently from individuals similarly situated with other disabilities.<sup>2</sup> To this end, the intent was not to say that men and women were the same, but rather that, in relation to the legal context, these biological differences were no longer relevant. By making women the same in a legal context despite biological differences, the formal same/different framework was maintained and only women's place within it was challenged.

In opposition to the position of equal treatment, another feminist position known as "special treatment," emerged, which rejected a formal equality model in favour of an equality of opportunity model. Arguing that equal treatment of the sexes actually results in inequality for women, Linda Krieger and Patricia Cooney contend that the only way to ensure true equality was through positive action to change male dominated institutions.<sup>3</sup> In this respect, positive sex-specific benefits were required to guarantee equality, despite biological differences, as affirmative action facilitated substantive

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<sup>2</sup> Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," in D. Kelly Weisberg, ed. *Feminist Legal Theory: Foundations* (Philadelphia, PA: Temple University Press, 1993), 143.

<sup>3</sup> Linda Krieger and Patricia Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality," in Weisberg, ed. *Feminist Legal Theory: Foundations*, 157 and 177.

equality between men and women. Nonetheless, this strategy, while celebrating the difference of women, did not demand the redefinition of equality.

Another more radical feminist perspective was unsatisfied with both the alternative feminist positions and the deeper systemic nature of women's oppression, and more aggressively challenged the same/different dichotomy, the similarly situated test, and the notion of formal equality. In this perspective, women were cognisant that the Court's interpretation of difference was based more on rigid and inaccurate pre-existing expectations about the social capabilities of males and females than biological differences.<sup>4</sup> For these women, sex differences were not actually correlated with biological sex and hence they could not justify sex-based classification. Within this reasoning, the similarly situated test centered on the same/different dichotomy was rejected and a new theory of equality was required. Going far beyond previous alternatives, Catharine MacKinnon, one of the foremost feminist legal theorists in the United States, abandoned these prevailing standards to devise a new one. For MacKinnon the sameness standard misses the fact that social inequalities are imposed by male supremacy whereby women will always remain unequal and negated of the power needed to alleviate their oppression.<sup>5</sup>

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<sup>4</sup> Ann Freedman, "Sex Equality, Sex Differences and the Supreme Court," *Yale Law Journal*, vol. 92, no. 5 (May, 1983), 943.

<sup>5</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Cambridge, MA: Harvard University Press, 1987), 33. In this sense, biological differences between sexes are given meaning by social practices, of which the majority are controlled and dictated by men, including the law. As MacKinnon relates, it is in the context of the law that the values and qualities of equality have been subjugated by men (Catharine MacKinnon, "Excerpts from MacKinnon / Schlafly Debate," *Law and Inequality: A Journal of Theory and Practice*, vol. 1, no. 2 (November, 1983), 346). Reinforcing this idea is the recognition that men dominated courts, constructed the social norms that dictate rulings, conceived of the judicial standards, and have most often been the equality claimants in sex discrimination proceedings. See David Cole, "Strategies of Difference: Litigating for Women's Rights in a Man's World," *Law and Inequality: A Journal of Theory and Practice*, vol. 2, no. 1 (1984), 37.

By redefining the nature of the debate, sex discrimination stopped being a question of sameness or difference and started being a question of politics, specifically the power relationships that exist in areas of governance. Here, the new goal of equality demands equal access to power through an end to subordination. In support of this theory MacKinnon states, “we (women) seek not only to be valued as who we are, but to have access to the process of the definition of value itself.”<sup>6</sup> Accordingly, radical American feminists demanded women’s perspectives, rooted in the material experiences of inequality, be addressed women themselves as they participate in and challenge institutions of power.

Bridging elements of the movement, for the majority of feminists the law remained one of the most prominent mechanisms for change. Recognized as a double edged sword, American law both reflected and reinforced discrimination against women. However, if manipulated correctly, American feminists knew law also had the capacity to alter social perceptions and gendered inequality.<sup>7</sup> Thus, it was through challenges to the law that women could access the state and thereby take possession of the power that oppressed them. Language was identified by these feminists as critical to shaping the way the world was analyzed and perceived.<sup>8</sup> Addressing alternatives for both new definitions of equality along with strategies for change, the American women’s movement housed a valuable collection of resources for Canadian feminists to integrate.

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<sup>6</sup> MacKinnon, “Excerpts from MacKinnon / Schlafly Debate,” 343; and, Catharine MacKinnon, *Toward a Feminist Theory of the State*, (Cambridge, MA: Harvard University Press, 1989), 168.

<sup>7</sup> For further discussions concerning the importance of law and specifically the use of language in law refer to: Cynthia Fuchs Epstein, *Women in Law* (New York, NY: Basic Books, 1981), 5; Kenneth Karst, “Women’s Constitution,” *Duke Law Journal*, no. 3 (June, 1984), 460; and, Joan Scott, “Deconstructing Equality-versus-Difference: Or, The Uses of Post-structuralist Theory for Feminism,” *Feminist Studies*, vol. 14, no. 1 (Spring, 1988), 35-37.

<sup>8</sup> Karst, “Women’s Constitution,” 503.

By outlining just a few of the broad ideas that were generated within the American women's movement, it is easy to identify the parallels with Canadian feminism. Drawing heavily on the work of Catharine MacKinnon, radical Canadian women confidently adopted her critique of the same/different dichotomy. Moreover, as MacKinnon altered the nature of the debate, arguing that it was restricted access to power that determined women's inability to experience equality, so too did Canadian women take a more active role in defining alternatives in the Canadian context. In this sense, while Canadian women were directly responsible for the alternatives they created, it was the structural framework provided by female American thinkers that guided their ambitions.

### **Legal Jurisprudence in the United States**

To understand how American jurisprudence influenced Canadian women in the legal context a brief survey of equality rights will elucidate some of the most striking lessons learned. In contrast to the Canadian Constitution, which did not see the entrenchment of a bill of rights until the 1982 Charter, the *American Bill of Rights* was one of the initial and essential elements signed into the Constitution in 1791. However, equality was not mentioned in the first ten amendments to the *Bill of Rights* nor were the words 'equal' or 'equally' included in the Constitution. This void remained for close to one hundred years until immediately following the Civil War in 1866. As such, the Fourteenth Amendment was one of the three constitutional provisions enacted as part of the 1866 Reconstruction Amendments. Within its contents procedural equality was first

provided with the wording: “equal protection of the laws.”<sup>9</sup> Here, the operative language is an all-inclusive guarantee for legal rights, so that denials of equal protection on any basis would be prohibited.

More importantly, as part of an era of reconstruction, these provisions sought to restructure the country that was, in Abraham Lincoln’s words, “half slave and half free.”<sup>10</sup> Thus, when interpreting these clauses, in the minds of the ruling judges the crux remained centered on race and racial equality. In terms of gender equality, sex-based denials of legal rights were not covered. According to Catharine MacKinnon, prominent feminists active in the debates on the ratification of the Fourteenth Amendment centered on women’s democratic right to vote and in so doing did not ensure that legal equality was applied to other areas of civil liberties such as legal equality.<sup>11</sup> This, in part, was due to the wording of section 2 of the amendment, which

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<sup>9</sup> U.S. Const. amend. XIII, 1866, s. 1, provides: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

U.S. Const. amend. XIV, 1868, s. 1, provides, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.”

U. S. Const. amend. XV, 1871, s. 1, provides, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

<sup>10</sup> Hendrick Hortog, “The Constitution of Aspiration and “The Rights that Belong to Us All”,” *Journal of American History*, vol. 74, no. 3, The Constitution and American Life: A Special Issue (Dec., 1987), 1014.

<sup>11</sup> Catharine MacKinnon, “Reflections on Sex Equality under Law,” *The Yale Law Journal* vol. 100, no. 5, Centennial Issue (Mar., 1991), 1283. MacKinnon finds argument for her case in Cong. Globe 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2767 (1866); and, Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1064 (1866). She also goes on to report that the Senate Committee on the Right of Women to Vote reported to the Senate that the right of female suffrage is inferentially denied by the second section of the Fourteenth Amendment . . . It is evident, from this provision, that females are not regarded as belonging to the voting population of a State.” S. Rep. No. 21, 42<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. 4 (1872), reprinted in *The Reconstruction Amendments’ Debates* 571, 572 (A. Avins 2<sup>nd</sup> ed., 1974)

included the word “male” in relation to the voting rights of citizens.<sup>12</sup> As such, the focus for much of the women’s movement remained centered on female suffrage.

When applying the Fourteenth Amendment, the courts relied on a “rational basis test” whereby differential treatment was permissible when justified by a reason that had nothing to do with discrimination.<sup>13</sup> However, the courts also held that if differential treatment was applied on the basis of race, national-origin, and citizenship it was immediately placed under “strict judicial scrutiny” save a compelling state objection. Sex-based discrimination is not one of the classifications requiring strict scrutiny and therefore relies on a rational basis test. Given the context and purpose in which the Fourteenth Amendment was written it is understandable that sex was not included as one of the three specific classifications. However, the impact of this hierarchy or tier of categorization would have significant and long-term effects on American women.

The ERA, a proposed amendment to the U.S. Constitution, was intended to guarantee that equal rights under any federal, state, or local law could not be denied on account of sex. This attempt to place sex within the “strict judicial scrutiny” category first began in 1923.<sup>14</sup> Although introduced in every Congressional session between

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<sup>12</sup> U.S. Const. amend. XIV, 1868, s. 2, provides, “Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislative thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

<sup>13</sup> Further discussion of the *rational basis* test in Walter S. Tarnopolsky, “The Equality Rights,” in Walter S. Tarnopolsky and Gérald-A. Beaudoin, eds. *The Canadian Charter of Rights and Freedoms, Commentary* (Toronto, ON: The Carswell Co., 1982), 405; and, Rex E. Lee, *A Lawyer Looks at the Equal Rights Amendment* (Provo, UT: Brigham Young University Press, 1980) 9 – 14.

<sup>14</sup> The National Women’s Party took the ERA to Congress in the 1920s, where Senator Charles Curtis and Representative Daniel R. Anthony, Jr. – both of the Republican Party and both from Kansas – introduced

1923 and 1970, it almost never reached the floor of either the Senate or the House of Representatives and ultimately was never successful.<sup>15</sup> Instead, American women were elected to move the fight down what they considered the only effective path to improved equality and that was by coupling it with racial equality.

In 1964, the *Civil Rights Act* was intended to prohibit discrimination in employment on the basis of race, color, religion, national origin and sex. In addition to a comprehensive prohibition of private acts it also included a clause allowing for affirmative action.<sup>16</sup> Reinforcing the mounting belief that discrimination often persisted in the absence of conscious prejudice, the U.S. government concluded that temporary results-driven recourse for minority preferences was necessary for the realization of equal treatment.<sup>17</sup> Because it incorporated the principle of equality of results, women were supportive of this change but remained unsatisfied because sex as a classification still remained an ill-defined category, one that did not automatically evoke “strict judicial scrutiny”. The inclusion of the word *sex* in Title VII of the *1964 Civil Rights*

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it for the first time as the Senate Joint Resolution No. 21 on December 10, 1923, and as House Joint Resolution No. 75 on December 13, 1923.

<sup>15</sup> This was because it was usually bottled up in Committee. Exceptions occurred in 1946, when it was defeated in the Senate by a vote of 38 to 35 and in 1950 when it was passed by the Senate in a modified form unacceptable to its supporters.

<sup>16</sup> The principle antidiscrimination provisions of Title VII are found in Section 703, 42 U.S.C. Section 703(a) forbids employers:

...(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or,  
 (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or other adversely affect his status as an employee, because of such individual’s race, color, religion, sex or national origin.

Section 703(e) provides an exception from the above prohibition. It allows

...an employer to hire and employ employees...on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...

<sup>17</sup> Hugh Davis Graham, “The Origins of Affirmative Action: Civil Rights and the Regulatory State,” *Annals of the American Academy of Political and Social Science*, vol. 523, *Affirmative Action Revisited* (Sept., 1992), 57-58.

*Act* meant that this legislation would become the legal basis for gender discrimination policy in the U.S. thereafter. Galvanized by this achievement of sexual recognition, American women began an even more vigorous pursuit to secure sex as a category of differentiation by the state deserving of strict scrutiny.<sup>18</sup>

During the 1970s, a variety of cases before the courts demonstrated that a shift in the approach by which judges were considering sex discrimination was underway. In *Reed v. Reed*, the Court considered the constitutionality of an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrators of an estate, the male applicant must be preferred to above the female.<sup>19</sup> In their reasoning, the Justices stated that when a statute accorded different treatment on the basis of sex alone, it “establishes a classification subject to strict scrutiny under the equal protection clause.”<sup>20</sup> As a result, the Court ruled in favour of Mrs. Reed. More importantly, its ruling regarding sex-based classification marked the first instance of departure from the traditional “rational basis” test.

Just short of an ideal classification, this case set the stage for a middle tier, or intermediate level, of scrutiny for women instead of the strict scrutiny traditionally applied in racial discrimination. In a ruling five years after the *Reed* case, the opinions outlined in the decision in *Craig v. Boren* illustrated this intermediate scrutiny test. In commenting on the outcome, Justice Powell explained that,

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<sup>18</sup> Cynthia Deitch, “Gender, Race, and Class Politics in the Inclusion of Women in Title VII of the 1964 Civil Rights Act,” *Gender and Society*, vol. 7, no. 2 (June, 1993), 199.

<sup>19</sup> *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2<sup>nd</sup> 225 (1971).

<sup>20</sup> Sylvia A. Law, “Rethinking Sex and the Constitution,” *University of Pennsylvania Law Review*, vol. 132, no. 5 (Jun., 1984), 974-975.

the Court had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the “two-tier” approach that has been prominent in the Court’s decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis that approach – with its narrowly limited upper-tier” – now has substantial precedential support.<sup>21</sup>

By providing a new test whereby sex discrimination was more systematically deconstructed, injustices caused by the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women and the manner in which they are classified were readdressed.

While *Craig* and *Reed* demonstrated an intermediate level of scrutiny, women achieved a high-water mark in favour of a strict scrutiny approach in the case *Frontiero v. Richardson*.<sup>22</sup> In this case, Sharron Frontiero, a lieutenant in the U.S. Air Force, was married to a full-time college student and attempted to claim her spouse as a dependent in order to obtain the increased quarters allowance and other housing and medical benefits. Unfortunately, unlike servicemen, servicewomen were not entitled to claim their husbands as dependents. The judges ruled that sex should be subject to close judicial scrutiny, accepting the principle that classifications based on sex, like those based on race, alienage, and national origin, are suspect categories.<sup>23</sup> The court’s decision in favour led many members of the American women’s movement to hope that this interpretation would be permanently ingrained in gender equality rights jurisprudence.

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<sup>21</sup> *Craig v. Boren*, 429 U.S. 190 at 210, footnote \*, (1976), as cited in Anne Bayefsky, “Defining Equality Rights,” in Anne Bayefsky and Mary Eberts, eds. *Equality Rights and The Canadian Charter of Rights and Freedom* (Toronto, ON: Carswell, 1985), 57 -58.

<sup>22</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>23</sup> *Ibid.*; and, Barbara Allen Babcock, et al., *Sex Discrimination and the Law: Causes and Remedies*, (Boston, MA: Little, Brown and Co., 1975), 123.

While these gains appeared promising to women's struggle to achieve equality, sex-based classification was at times still considered by the courts to be justifiable merely by showing that it was reasonable. In both *Kahn v. Shevin*, 1974 and *Shanton v. Shanton*, 1975, the Court reverted back to the rational basis test and applied only a minimum level of scrutiny.<sup>24</sup> As Barbra Babcock points out, in these instances, the facts were not convincing enough to bring the majority of Justices to see sex-based discrimination as a fundamental injustice.<sup>25</sup> As a result, the American rationale for drawing lines between justified and unjustified distinctions became somewhat confused. This inability to reach a clear understanding of how *sex* as a basis of classification should be constitutionally regarded has not only blurred judicial methodology but its outcomes have also placed serious limitations on American women. As a result, support for an organizing principle that irrevocably viewed sex as a classification that would invoke a strict scrutiny test continued to dominate the priorities of the American women's movement.

As an amendment to the U.S. Constitution Bill of Rights, the ERA would take precedence over any other federal, provincial, or local law. In section 1, the ERA requested that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."<sup>26</sup> Firmly placing sex in the category of strict scrutiny, the idea behind the ERA was to solve the vague demarcation of grounds that the Fourteenth Amendment had created. Integrating this knowledge into the formulation of the Charter, concerned parties, including women, worked to ensure that a

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<sup>24</sup> *Kahn v. Shevin*, 416 U.S. 351 (1974); and, *Stanton v. Stanton*, 421 U.S. 7 (1975).

<sup>25</sup> Babcock, et al., *Sex Discrimination and the Law: Causes and Remedies*, 123.

<sup>26</sup> U.S. Commission on Civil Rights, *The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution*, (Washington, DC: U.S. Government Printing Office, June 1981).

similar problem was not adopted into the Canadian context. Building on both the strengths and weakness of the American judicial experience, Canadian women, most particularly the female lawyers, were quite cognisant of the subtleties of legal articulation and their application.

### **The American Women's Movement**

In 1971, as a result of hard work and perseverance, the ERA was introduced into Congress. In a short period between 1971 and 1972 the ERA was approved in both the House of Representatives and the Senate.<sup>27</sup> For ratification, a seven-year deadline was given to acquire the approval of three-fourths majority of all state legislators. During the first half of the decade it appeared as though the ERA would pass easily. By the end of 1973, thirty of the thirty-eight state legislatures required had ratified the Amendment scarcely pausing for debate. Three more followed in 1974, but only one was ratified in 1975, none in 1976 and Indiana accepted the ERA by the margin of a single legislator's vote in 1977.<sup>28</sup> Even with a three-year extension until 1982, the ERA was unsuccessful in gaining the three remaining states and failed to be ratified.

As Melissa Haussman argues, the successes of feminists in Canada in comparison to those in the United States were determined less by the strength of ideas and more by the political, structural and cultural framework within each struggle.<sup>29</sup> Like the relationship between Ottawa and the provinces, many American states viewed

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<sup>27</sup> Requiring a 2/3rds vote the House of Representatives voted 354-23 in favour on October, 1971 and the Senate voted 84-8 in favour on March 1972.

<sup>28</sup> Janet K. Boles, *The Politics of the Equal Rights Amendment: Conflict and the Decision Process* (New York, NY: Longman, 1979), 35.

<sup>29</sup> Melissa H. Haussman, "The Personal is Constitutional: Feminist Struggles for Equality Rights in the United States and Canada," in Jill Bystydzienski, ed. *Women Transforming Politics: Worldwide Strategies for Empowerment* (Bloomington & Indianapolis, IN: Indiana University Press, 1992), 112, 121.

federal legislation on social issues as impeding upon their jurisdiction. As Janet Boles remarks, while the national framework of the American women's movement was established early, largely as a carryover from the group that spearheaded the congressional passage, proponents did not set up coalitions in un-ratified states until 1974.<sup>30</sup> Unable to recognize the necessity for locally active and state targeted groups, along with an established network of communication and resource links, the women's movement in the U.S. suffered from a lack structural and organizational decentralization.

Moreover, internally the American women's movement was far more divided over definition of equality and support for substantive equality. The coalition of conservative citizens who were against the ERA included men and women, homemakers from the suburbs, working women from offices and factories, politicians, members of fundamentalist religious groups, some lawyers, and members of special groups opposed to progressive ideas and legislation.<sup>31</sup> At the helm of the "Stop-ERA" campaign was the founder and pivotal figure, Phyllis Schlafly who opposed the ERA based on her pro-family stance. Recognized as a key leader responsible for the failure of the ERA, Schlafly also represented the stark ideological opposition women had with the ERA.<sup>32</sup> Unable to construct an idea that was flexible enough for multiple and sometimes opposing groups to consent to, cleavages within the American women's movement severely weakened the strength of their efforts and their ability to convince state legislators to ratify the Amendment.

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<sup>30</sup> Janet K. Boles, "Building Support for the ERA: A Case of "Too Much, Too Late," *PS*, vol. 15, no. 4 (Autumn, 1982), 575-576. Additional reading on the nature of the ERA campaign in Boles, *The Politics of the Equal Rights Amendment: Conflict and the Decision Process*.

<sup>31</sup> Berry, *Why ERA Failed: Politics, Women's Rights and the Amending Process of the Constitution*, 66,

<sup>32</sup> MacKinnon, "Excerpts from MacKinnon /Schlafly Debate," 352.

In looking at the American experience in relation to the role that Canadian women played in formulating sections 15 and 28 of the Charter, it is apparent that the the ideas behind the ERA as well as the structural tools and limitations of the U.S. women's movement did not go unnoticed. Contributing intellectually and politically, both the legal jurisprudence and the political manoeuvring that characterized the struggle for gender equality in the United States were integrated into the Canadian context. From this, a unique, diverse, and complex response was formulated within the Canadian women's movement as women in Canada began their own struggle for recognition and entrenchment of substantive equality. Adding another layer to the complexion of the Canadian women's movement, the U.S. experience helped equip Canadian women with powerful and informed ideas. Supported by a vast, well-organized, and determined army of women, the Canadian women's movement was exceptionally well prepared when the Canadian Liberal government announced its intentions to review the Canadian constitution and entrench a comprehensive Charter of Rights and Freedoms.

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**CHAPTER 6**  
**Winning Gender Equality Rights: Canadian Women and Mega-Constitutional Negotiations**

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On October 6<sup>th</sup>, 1980 Prime Minister Pierre Elliot Trudeau introduced a constitutional package in the House of Commons that would recognize a truly Canadian constitution free from any British governance and with an entrenched Charter of Rights of Freedoms.<sup>1</sup> This announcement presented a possibility for serious political change as the Charter would be a powerful constitutional instrument to enforce and protect individual and minority rights at both the federal and provincial levels. The strength and comprehensiveness of this proposed Charter also provided an excellent opportunity to redress the way civil rights and equality rights had previously been defined.

Trudeau's announcement of constitutional reform was exceptional in that the federal government intended to shift away from the traditional process of executive federalism that had previously characterized Canada's constitutional negotiations. As previous First Minister's Conferences had failed to obtain the agreement of the provincial Premiers on constitutional reforms, including a Charter of Rights, the federal government embarked upon a process of unilateral action. As Alan Cairns argues, this created a rupture in the traditional course of constitutional events and as such it uniquely opened up a political space for special interest groups to participate.<sup>2</sup> Without requesting the consent of the provinces, Ottawa instead sought out the feedback and

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<sup>1</sup> Canada. Parliament. House of Commons. *Debates*, 32<sup>nd</sup> Parliament, 1<sup>st</sup> Session, vol. 3, October 6, 1980 (Hull, QC: Queen's Printer of Canada, 1980-1981), 3274.

<sup>2</sup> Alan Cairns, "The Politics of Constitutional Conservatism." in Douglas Williams, ed. *Constitution, Government and Society in Canada: Selected Essays by Alan Cairns* (Toronto, ON: McClelland and Stewart, 1988), 208.

support of the Canadian public. As Lise Gotell poignantly suggests, the Charter initiative sparked public awareness and debate that allowed the mobilization of women around the question of constitutional rights to take effect.<sup>3</sup> Using this ideal opportunity, the Canadian women's movement sought to integrate their quest to improve women's status into the context of the debates surrounding constitutional reform, including patriation, the amending formula, and Charter rights.

Four events within this short fourteen-month period of negotiations mark the critical stages during which Canadian women and their organizations were able to influence the development of sections 15 and 28 and secure the concept of substantive equality in the Charter. These events were: the 1980 Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, the Axworthy Affair, the 1981 Ad Hoc Conference on Women and the Constitution, and the concluding negotiations prior to the finalized Charter in November of 1981. These four stages demonstrate how and why Canadian women were able to position themselves and their ideas into the Charter negotiations and contribute to the articulation of substantive equality rights within sections 15 and 28 of the present *Charter of Rights and Freedoms*. Aware of the previous challenges facing equality in applications of the law and armed with a feminist driven conception of substantive equality, women used not only their structural and political strength as a movement but also their evolving intellectual engagement to combine law and feminism into words that would articulate substantive equality. Both this awareness and these capacities were influential components relied on by women to adapt to and influence these four events.

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<sup>3</sup> Lise Gotell, *The Canadian Women's Movement, Equality Rights and the Charter* (Ottawa, ON: Canadian Research Institute for the Advancement of Women, 1990), 9.

### Special Joint Committee on the Constitution

On October 18, 1980 at a NAC bi-annual meeting in Toronto, the Minister Responsible for the Status of Women, Lloyd Axworthy, asked women to take a “leap of faith” and trust that the federal government would act with women’s best interest in mind when drafting a Charter of Rights and Freedoms. Women in the crowd were severely alarmed as the initial drafting of the Charter’s equality guarantee used the exact wording of the *1960 Canadian Bill of Rights*, ensuring only “equality before the law and protection of the law” without discrimination based on, inter alia, sex.<sup>4</sup> In his address, Axworthy vocalized his opposition to further changes in the 1980 draft, stating that “the Charter would protect women’s rights without further amendments.”<sup>5</sup> Those familiar with the jurisprudence of the women’s equality cases under the *1960 Bill of Rights* immediately recognized that entrenching the equality language under the 1980 draft Charter without changes would only reinforce the interpretation that had previously prevented women from receiving true equality and would in no way advance their cause. The sentiments of the Minister Responsible for the Status of Women only increased women’s frustration with the government and solidified the belief that their interests were not being recognized in the public sphere.

The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada was established the same day that Trudeau’s proposal was tabled. This Committee, initiated by the Liberal government was a response to pressure from the opposition parties and the public. Jointly headed by Senator Harry Hays and

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<sup>4</sup> Canada, *Proposed Resolutions for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada*, (Ottawa, ON: Queen’s Printer for Canada, October 2, 1980).

<sup>5</sup> Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto, ON: Women’s Educational Press, 1983), 34.

M.P. Serge Joyal, the Committee invited public consultation regarding the Trudeau's "people's package".<sup>6</sup> It was initially scheduled to sit for one month but ended up sitting for a duration of five months, with a total of 20 women's groups including CACSW, NAC, NAWL, NWAC and IRIW submitting briefs and making presentations to the Committee. Representatives from Franco-Quebec women's groups did not make presentations to the Special Joint Committee. Trudeau's proposed constitutional amendments denied Quebec special constitutional status, most Franco-Quebec women's groups viewed the process with suspicion, especially Trudeau's decision to patriate the constitution unilaterally. These groups therefore refused to endorse his actions with their participation.

Although women's organizations had not been able to meet collectively to specifically address their position on the Charter prior to the Committee hearings, many of the Anglophone organizations appearing before the Committee made a concerted effort to ensure their recommendations were consistent. Moreover, their presentations did not emphasize the tensions that federalism placed on the negotiations and instead remained focused on expressing their goals. All of the groups who participated agreed that the interests of Canadian women were not properly reflected in the federal Resolution. Deborah Acheson, member of NAWL's Steering Committee, stated in her opening address to the Special Joint Committee, "coming from western Canada, the

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<sup>6</sup> Trudeau's intention was to proceed unilaterally with patriation and constitutional change that included the 1971 Victoria Charter amending formula, a Charter of Rights and Freedoms, and new Canadianized language for what would become the Constitution Act, 1867 and the Constitution Act, 1982. For more see Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3<sup>rd</sup> ed. (Toronto, ON: University of Toronto Press, 2004), 111.

Premier of my province does not speak for me as a Canadian.”<sup>7</sup> This passage reflects the opinion of most English-speaking Canadian women who were first and foremost concerned about their status. Elaborating on the lack of women’s inclusion in the constitutional negotiations, the submission from the Saskatchewan Advisory Council on the Status of Women articulated that from a feminist perspective, the Charter did not correct the systemic and even superficial reasons for the inequality that Canadian women experienced.<sup>8</sup> Thus, in order for the Charter to have real social meaning and legal clout for the women of Canada, it would need to categorically accord them the right of equality with men in all relevant aspects of their lives.

The main criticism of the Charter was the wording of the document and the fundamental nature and intent of equality that this wording proposed.<sup>9</sup> Jill Porter opened with the statement to the Committee that, “women could be worse off if the proposed Charter of Rights and Freedoms is entrenched in Canada’s constitution”<sup>10</sup> Lynn McDonald elaborated that:

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<sup>7</sup> Canada. Parliament. Special Joint Committee on the Constitution of Canada (1980-1981). *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 22, Tuesday, December 9, 1980 (Ottawa, ON: Queen’s Printer for Canada, 1980-1981), 22:66.

<sup>8</sup> Saskatchewan Advisory Council on the Status of Women, *Submission to the Joint Commons-Senate Committee on the Constitution, December 1980* (683.25; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 5.

<sup>9</sup> Canada, *Proposed Resolutions for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada* (Ottawa, ON: Queen’s Printer for Canada, October 2, 1980).

Non-discrimination Rights:

- 15(1). Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age, or sex.
- 15(2). This section does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

<sup>10</sup> Spoken by Jill Porter, member of the executive, National Action Committee on the Status of Women. Canada. Parliament. Special Joint Committee on the Constitution of Canada (1980-1981). *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 57.

From our point of view, the problems are insidious. It looks on the surface that women are being given rights in this charter, and it is only when you read between the lines and you find what the Supreme Court's decisions are, what the words actually mean, that you find that women are not being given rights.<sup>11</sup>

Recognized as part of the Constitution, the Charter would necessitate judicial review.

Given the results previous court rulings had produced, women's organizations were well aware of the Charter's legal and political repercussions. To this end, these presentations made to the Committee indicated the willingness of women's organizations to support the concept of an entrenched charter but only on the condition that it protect women from discriminatory legislation and overcome the inequalities that had been perpetuated by previous judicial decisions.

In regard to entrenchment, the issue was equally as contentious amongst women as it was for the rest of Canadians. Québécois feminists were firmly against entrenchment. However, so were English-speaking women such as Judy Fudge, a self-identified socialist feminist concerned with working class women and extremely sceptical of the state.<sup>12</sup> These views were not expressed during the hearings of the Special Joint Committee because those opposed simply choose to reserve their support. To this end, representatives from NAWL recognized that an entrenched charter would bind both the provincial and federal government to a uniform standard, a standard that they viewed as "exceptionally important."<sup>13</sup> This position to support entrenchment was reinforced by many of the other women's organizations such as CACSW, NAC, and the

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<sup>11</sup> Ibid., 9:62

<sup>12</sup> Judy Fudge, "Litigating our Way to Gender Neutrality," in Judy Fudge and Patricia McDermott, eds. *Just Wages: A Feminist Assessment of Pay Equity*, (Toronto, ON: University of Toronto Press, 1991), 65, 74-75.

<sup>13</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 22, Tuesday, December 9, 1980, 22:50.

Ontario Action Committee on the Status of Women which all submitted briefs describing their desire for an equality guarantee that would not suffer legislative curtailment or interference.<sup>14</sup> Intellectually aware of the weak legal language embedded in the 1960 Canadian Bill of Rights as well as the lack of enforcement mechanisms, women understood that properly written equality rights, binding on every provincial and territorial legislature as well as Parliament, needed to be entrenched in any new Charter of Rights and Freedoms.

Doris Anderson, president of the Canadian Advisory Council on the Status of Women, equated entrenching the Charter to playing a game of Russian roulette but she also argued that to do nothing would be comparable to execution.<sup>15</sup> For her, regardless of how the Charter was drafted, it needed to be entrenched. Yet not all organizations were fully committed to entrenchment. Members from the Saskatchewan Advisory Council (SACSW) feared that Canadians might get locked into a Charter of Rights that was too vague and far too open to judicial interpretation. They worried that if it was subsequently found lacking, it would be extraordinarily difficult to alter regardless of which amending formula was adopted.<sup>16</sup> Reflecting the Saskatchewan NDP government's position, the SACSW supported the province's hesitancy to support an entrenched Charter by citing the improving success minorities had experienced in the previous years with lobbying the government to obtain legislative recognition.

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<sup>14</sup> CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution, November 18, 1980* (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 2; and, Ontario Committee on the Status of Women, *Women and the Charter of Rights and Freedoms – Submission to the Special Joint Committee on the Constitution, November, 1980* (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1.

<sup>15</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 133.

<sup>16</sup> Saskatchewan Advisory Council on the Status of Women, *Submission to the Joint Commons-Senate Committee on the Constitution, December 1980*, 2.

Unconvinced that the traditional method of legislative change should be dismissed, they were hesitant to place all their faith in one legislative document interpreted by courts. Yet, when pressured for a definitive answer even this group endorsed an entrenched Charter as long as it met the main needs of Canadian women.<sup>17</sup>

Cognisant that enshrining the Charter into the constitution would shift more power to the courts via judicial review, concerned women's groups stressed to the Committee the need to tighten the language used throughout the Charter. In their view, providing clear direction to the judges and avoiding any possible misinterpretation concerning the intended content or meaning of the language used was essential. Speaking not only as members of a women's organization, women like Deborah Acheson and Beverley Baines also spoke as lawyers and conveyed their faith in the judicial system while maintaining the argument that strong and clear guidelines should be provided.<sup>18</sup>

The majority of the women organizations' submissions focused on section 1 and section 15 of the proposed Charter. As identified by the lawyers and witnesses that appeared before the Committee, the concern with section 1 was the imprecise wording in the limitations clause that opened the possibility for a variety of permitted exceptions to occur.<sup>19</sup> In the 1980 text, section 1 provided that all the guarantees of the Charter, including section 15 were subject to "such reasonable limits as are generally accepted in

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<sup>17</sup> *Ibid.*, 5,

<sup>18</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 22, Tuesday, December 9, 1980, 22:65; and, CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution*, November 18, 1980, 4.

<sup>19</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 58.

a free and democratic society with a parliamentary system of government.”<sup>20</sup> The fear was that “generally accepted in a free and democratic society” could be interpreted as majority will and could justify any rights-limiting measure enacted by a legislature.

Providing an avenue whereby Charter guarantees could be subject to limitation, this left ample room for legislative majorities to continue to discriminate against minorities and individuals and therefore curb fundamental individual rights and freedoms to broader public interest. Commenting on section 1, women argued that “if left in its present form there is no point in having the rest of the Charter.”<sup>21</sup>

To remedy this, many of the witnesses from both women’s organizations and other interest groups, including the Canadian Human Rights Commission, suggested that the charter begin with a ‘purpose clause’ that would explain what it intended to accomplish.<sup>22</sup> Recommendations from NAC, CACSW, NAWL, the Canadian Federation of Business and Professional Women (BPW), and the Canadian Human Rights Commission all referenced wording from international law in their submissions.<sup>23</sup> In this light, these groups intended, by incorporating language similar to International

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<sup>20</sup> Canada, *Proposed Resolutions for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada* (Ottawa, ON: Queen’s Printer for Canada, October 2, 1980).

<sup>21</sup> CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution, November 18, 1980*, 25.

<sup>22</sup> NAWL, *Women’s Human Right to Equality: A Promise Unfulfilled – Submitted to the Special Joint Committee on the Constitution, November 1980* (683.25; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 7; and, Canadian Human Rights Commission, *Presentation to the Special Joint Committee on the Constitution of Canada, November, 1980* (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1, 3, 4.

<sup>23</sup> NAC, *Presentation to the Senate, House of Commons, Special Joint Committee on the Constitution of Canada, November 20, 1980*, (862.80; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution, November 18, 1980*, 29; NAWL, *Women’s Human Right to Equality: A Promise Unfulfilled – Submitted to the Special Joint Committee on the Constitution, November 1980*, 7; CFBPW, *Women and the Charter of Rights – Submission of the Canadian Federation of Business and Professional Women to the Special Joint Committee on the Constitution, November 25, 1980* (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections); and, Canadian Human Rights Commission, *Presentation to the Special Joint Committee on the Constitution of Canada, November, 1980*, 3.

covenants and documents, to influence courts to interpret the Charter with a similar spirit and purpose. Providing an overriding principle to be used in its interpretation, such a clause would undertake to guarantee the equal rights of men and women to the enjoyment of all civil, political, and economic rights set forth in the Charter.

In addition, women's groups were concerned with the standard of scrutiny which the clause provided. Aware of the three tiers of scrutiny and rational basis test applied in the American context, women wanted to avoid a scenario that allowed courts to decide if the category of sex would be subjugated to secondary status if left unarticulated. Achieving a statement that explicitly granted equality to both men and women would send a clear message to the courts that sex was to be placed on the highest tier of scrutiny alongside other traditionally held categories of race, national-origin, and citizenship that received an inherently suspect standard.

While section 1 was considered dangerously broad, section 15 was interpreted by all of the women's organizations as enforcing a narrow and restrictive principle of equality and as lacking the guidelines necessary for the court to secure appropriate standards. Initially worded as "equality before the law and protection of the law," this version of the Charter failed to move beyond the limits of the 1960 Bill of Rights. The phrase "equality before the law" had been interpreted to mean only that laws would be equally applied to all individuals in the category concerned and did not provide an equality of results, let alone an equality of opportunity. "Like pouring concrete over an unjust situation," entrenching equality rights in a way that did not provide substantive or formal equality in the law itself was viewed by women's organizations as giving a clear message to the courts and to the legislatures that the same limited and ineffective

interpretation courts applied to the Bill of Rights would be applied section 15.<sup>24</sup> As women's groups such as NAC pointed out to the Committee, the courts were only concerned with the administration of the law and not if there was discrimination built into the law itself.<sup>25</sup> Therefore, clarity in this wording was essential.

The American ERA had proposed "equality under the law" but with its fate still undetermined at the time of these hearings, Canadian women's groups unanimously pushed for the wording "equality in the law." In this sense, women were collectively attempting to move beyond the American model or the procedural liberal equality that had been recognized in Canada by replacing it with a concept of substantive equality that was results based. The second stanza of the original passage called for "protection of the law." This language was noted by women's organizations as reflective of similar wording to that found in the American 14<sup>th</sup> Amendment. It was understood by these organizations that this would have the effect of Canadian courts adopting American jurisprudence on equal protection.<sup>26</sup> Due to the fact that the American jurisprudence did not have a clear tier of scrutiny with regards to sex discrimination, Canadian women stressed that this example should not be applied to the Canadian context. Instead, the additional words "equal protection and benefit of the law" were added so as to move beyond the American interpretation. Advancing the intent of equality, this wording would thereby provide more effective recognition of the equal rights of Canadian women.

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<sup>24</sup> Ibid., 9:67.

<sup>25</sup> Ibid., 9: 58; and, NAC, *Presentation to the Senate, House of Commons, Special Joint Committee on the Constitution of Canada, November 20, 1980*, 3.

<sup>26</sup> CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution, November 18, 1980*, 8.

The language of section 15 to advance “equality before and under the law and in protection and benefit of the law” was believed by many women’s and other human rights’ groups as creating a dramatic shift in the idea of equality. As has been previously discussed, section 15 married principles of equality of opportunity with equality of results to create a vision of substantive equality that resonated within the Canadian women’s movement. Moreover, as Bruce Porter argues, the positive measures inherent to international law and the universal rights framework were embedded with the addition of “in the protection and benefit of the law.”<sup>27</sup> Although the added wording of section 15(1) and the inclusion of section 15(2) affirmative action schemes did not explicitly provide economic, social, and cultural rights, it did not deny the eventual possibility of Canadian legislators adding these rights through affirmative action programs. To this end, these additions added much more potential meaning in terms of the substance, scope, and application of equality rights.

Some of the briefs women’s groups presented to the Committee proposed that the title of section 15 be changed. Arguing that a more effective legal interpretation would be achieved if the title were changed from ‘Non-Discrimination Rights’ to ‘Equality Rights’, witnesses advanced the need to eliminate the use of negative terms.<sup>28</sup> While seemingly innocuous, this recommendation sought to place positive equality rights on the same level as “negative” political and civil liberties and thereby expanded the underlying principles of equality to encompass a greater set of principles. Consistent

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<sup>27</sup> Bruce Porter, “Twenty-Years if Equality Rights: Reclaiming Expectations,” *Windsor Yearbook of Access to Justice*, vol. 23 (2005), 152.

<sup>28</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 22, Tuesday, December 9, 1980, 22:65; and, Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 131.

with a substantive notion of equality, the more expansive and positive wording of section 15 was intended to re-orient the concept of equality to reflect these new ideals.

As well, the use of the word “everyone” throughout the proposed Charter concerned women. Instead, the phrase “every person” was recommended as a replacement to allow the definition of the phrase “person” as it was used in the BNA Act and clearly defined by the Courts in the *Persons Case* to be applied.<sup>29</sup> The term had special significance for women, as it connected the struggles of first-wave feminist to current issues, and they did not want the precedents it had established to be tossed away. Concerned with the social message that these rights conferred and the powerful ability of words to portray the kind of positive and active equality that women sought, Canadian women were intellectually aware of their legal position along with both the hindrances and possibilities that the Charter posed to achieving a more equal status.

Although none of the English-speaking women’s organizations addressed the issue of Quebec’s constitutional status in Confederation or Aboriginal self-government, many other groups argued that Aboriginal women’s equality rights should be protected under the Charter.<sup>30</sup> The NWAC presentation to the Joint Committee illustrates that they supported substantive equality rights for women; however, they were careful to balance these concerns with their demands for Aboriginal self-government.<sup>31</sup> In this

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<sup>29</sup> Ibid., 9: 61.

<sup>30</sup> NAC, *Presentation to the Senate, House of Commons, Special Joint Committee on the Constitution of Canada, November 20, 1980*, 5; CACSW, *Women, Human Rights and the Constitution – Submission to the Special Joint Committee on the Constitution, November 18, 1980*, 21; and, NAWL, *Women’s Human Right to Equality: A Promise Unfulfilled – Submitted to the Special Joint Committee on the Constitution, November 1980*, 7.

<sup>31</sup> Their constitutional concerns included: 1) inherent right of Aboriginal people to self determination and self-government, 2) the right to have treaty rights recognized in the Constitution, 3) the right of Aboriginal communities to define their own membership, 4) the right to retain their culture and language, 5) the protection of rights of Aboriginal women and children, 6) and the right of Aboriginal women to be

sense, they supported both the entrenchment of the Charter and the entrenchment of the right to self-government.

Representatives for IRIW also made a presentation to the Committee. They declared their support for an entrenched Charter that was conditional upon the acceptance of their recommendations. Differing slightly from NWAC, the IRIW indicated that it was more willing to work with the federal state to ensure Charter guarantees than was the NWAC.<sup>32</sup> IRIW representatives focused on the frustration that many “non-status” women had faced trying to regain Indian status after marrying outside of the reserve. Maintaining that this situation had originated from the discriminatory aspects of the *Indian Act*, as a condition of their support IRIW witnesses requested that sexual equality be extended to all Aboriginal women and that the Charter have the power to override ordinary laws such as the *Indian Act*.

Organizations such as CACSW, NAC, and NAWL brought with them representatives from across the country, including Quebec to represent a variety of perspectives. Women responded and conducted parts of the Committee discussions in French depending on the MP’s maternal language. While the Committee and the witnesses refrained from discussing issues that touched on the sensitive question of Québécois nationalism, such as unilateral patriation, references to these concerns were not entirely glossed over. In discussing the amending formula, NAC representative,

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participants in the political decision making process. Spoken by Marlene Pierre-Aggamaway, President, NWAC. Canada. Parliament. Special Joint Committee on the Constitution of Canada (1980-1981). *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*. Issue No. 17, Tuesday, December 2, 1980 (Ottawa, ON: Queen’s Printer for Canada, 1980-1981), 17:64.

<sup>32</sup> IRIW, *Presentation to: The Special Joint Committee on the Constitution of Canada, December 2, 1980* (683.25; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 2.

Lynn McDonald, commented that “women, will be divided as men are divided on many other issues that might be brought to a referendum.”<sup>33</sup> Although not explicitly referring to Quebec or to the divisions within the women’s movement regarding these issues, this answer alluded to the fact that while all women endorsed a certain standard of equality that went beyond what the federal government was proposing, dynamics of priority meant that not everyone was in accordance regarding how this should be achieved for Québécois women.

As Penny Kome has noted, this initial phase of constitutional negotiations was characterized by the participation of elite and legally knowledgeable women who operated within women’s organizations.<sup>34</sup> Of the list of witnesses who presented on behalf of women’s groups, the vast majority were female lawyers, including Marilou McPhedran, Mary Eberts, Nicole Duplé, and Beverly Baines. These women were highly trained and had a clear understanding of the specific areas of the law that could remedy women’s situation. Furthermore, these women participated and were heavily integrated into the women’s movement and thus had the ability to translate the ideology of substantive equality rights into something that could be properly interpreted within the judicial system. They saw the constitution as a crucial opportunity both to improve the status of women and to ensure that existing gains were not lost. Throughout the briefs and presentations, their arguments for altering the wording of the charter remained clearly legal. Citing legal cases and jurisprudence in Canadian, American, and International contexts, women’s organization did not employ feminist rhetoric to drive

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<sup>33</sup> Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 70.

<sup>34</sup> Billings, “Introduction,” in Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 17.

their point home. Instead, they focused on the law and demonstrated where it had failed women rather than trying to elaborate on the systematic oppression that resulted from established social conventions.

In addition, the viewpoints of the women's organizations were supported by other Committee witnesses such as Gordon Fairweather from the Canadian Human Rights Commission, Maxwell Cohen for the Canadian Jewish Congress, and Walter Tarnopolsky from the Canadian Civil Liberties Association, all of whom heartily endorsed a clear statement about women's equality.<sup>35</sup> While their recommended wording differed slightly from that put forward by women's groups, the criticisms regarding the language of both section 1 and section 15 were consistent.

On January 12, 1981 the government, represented by the Minister of Justice, Jean Chrétien, responded to representations made for change to the proposed Charter resolutions. Accordingly, section 1 now read:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in its subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.<sup>36</sup>

By replacing the "generally accepted" limitations clause with this, the amendment considerably narrowed the limits that could be placed on rights and freedoms, but it did not explicitly place the equal rights of men and women outside that level of scrutiny.

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<sup>35</sup> Canada. Parliament. Special Joint Committee on the Constitution of Canada (1980-1981). *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*. Issue No. 5, Friday, November 14, 1980 (Ottawa, ON: Queen's Printer for Canada, 1980-1981), 5: 70; and, Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 9, Thursday, November 20, 1980, 9: 125.

<sup>36</sup> Minister of Justice and Attorney General of Canada, *Statement by the Honourable Jean Chrétien Minister of Justice to the Special Joint Committee on the Constitution, January 12, 1981* (684.2; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 3.

In regards to section 15, women's organizations were delighted to find that most of their recommendations were adopted. The proposal made by the CACSW and NAWL to title the section "Equality Rights" was implemented to stress the section's positive intent.<sup>37</sup> Moreover, "to ensure that equality relates to the substance and administration of the law," Justice Minister Chrétien agreed to an amended section 15 that read:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex or age.

(2) Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals, or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age.<sup>38</sup>

Added to section 15(1) were the words "under" and "benefit". Acting in unison, these amendments would ensure that the right to equality would apply in respect to the substance as well as the administration of the law, and that this would extend equality to ensure that people enjoyed equally the benefit and protection of the law.

In addition, similar to the open-ended list of prohibited grounds found in the UDHR, the Charter while particularly naming grounds did not imply that this was exhaustive. Section 15(2) was also slightly amended to include its own list of grounds and by referring to the above sub-section this attempted to prohibit affirmative action being denied based on difference. While the precise wording proposed by women's organizations was not adopted, the positive intent of their wording was incorporated. In addition, the word "everyone" was replaced by the words "every individual", a term

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<sup>37</sup> Ibid., 7.

<sup>38</sup> Ibid., 7-9.

used in the Bill of Rights, to make it clear that this right would apply to natural persons only.<sup>39</sup> What had not significantly changed was section 1, the purpose clause.

Therefore, at the end of the initial phase of constitutional negotiations, women had effectively made their voices heard. As women's organizations and their allies were successful in placing their conception of equality into the Charter, they moved into the next phases to take action to ensure that this conception remained intact throughout the negotiations.

### **The Axworthy Affair**

As a government body accountable to the Minister Responsible for the Status of Women, the CACSW held an influential position within both the women's movement and the federal government. In April, 1979, Doris Anderson, former editor of *Chatelaine* Magazine and unsuccessful federal Liberal candidate, became President of the CACSW and wasted no time in turning out important reports pertaining to the status of women.<sup>40</sup> Another change was that CACSW vice-president of the Ottawa office, Hellie Wilson, was moved from her position of five years, in charge of the PM's correspondence, to the Advisory Council. In tune with the government's upcoming initiatives, at Wilson's request in August 1980, the Council began to work on constitutional issues and was involved in planning a national women's constitutional conference. The conference was originally scheduled for September 1980, with a view

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<sup>39</sup> Minister of Justice and Attorney General of Canada, *Government Response to Representations for Change to the Proposed Resolutions*, January 12, 1981, 4.

<sup>40</sup> CACSW, *Background notes on birth planning and conception control*, 1979; *Problems of immigrant women in the Canadian labour force*, 1979; *The second time around: a study of women returning to the workforce*, 1979; "Women caring and curing, 1980; *Women in Prison, expanding their options*," 1980; "Position Paper: reproductive health hazards in the workplace, 1980; *Not how many but how few: women appointed to boards, commissions, committees and crown corporations within the federal government*, 1980 (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1979-1980).

that the resolutions achieved at this juncture would be used to coincide with the hearings by the Joint Committee on the Constitution. As the initiator of this effort, the CACSW immediately blanketed the country with informational flyers and asked for women to mail in attached coupons proclaiming their support for the proposed language changes. Unfortunately for the Conference, the union representing the federal government translators went on strike. Given that women of the union's main demand was maternity leave, the Canadian Advisory Council decided to support the union and did not proceed with the original conference.<sup>41</sup> Busy organizing and coordinating their brief and presentation to the Joint Special Committee, the Council resolved to reschedule the conference on women and the constitution for February 14-15, 1981.

In the interim, the Advisory Council worked diligently to ensure that the submission they presented to the Committee was something that the Ministry of Justice could tangibly use and that adequately met the needs of Canadians. It was felt that the rescheduled February conference would be an optimal time as it and subsequent lobbying would overlap with the deliberations of the Special Joint Committee.<sup>42</sup> On January 6, 1981, Doris Anderson received word in a memo from Hellie Wilson, that the Minister Responsible for the Status of Women, Lloyd Axworthy wanted the Council to cancel the national conference and hold regional meetings instead.<sup>43</sup> On January 12, 1981, Justice Minister Jean Chrétien announced the major revisions to the constitutional package that included the recommendations made by women's organizations regarding section 15 but did not include a sufficient purpose clause. Subsequent to this and

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<sup>41</sup> NAC, "Women and the Constitution," *NAC Memo* (October, 1980), 1; (699.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>42</sup> Anne Collins, "Which Way to Ottawa?" *City Women Magazine* (Holiday Edition, 1981-1982), 16.

<sup>43</sup> Doris Anderson, "The Axworthy Affair," *Ottawa Magazine* (April, 1981), 22-24. It is uncertain how and why Axworthy chose to regionalize the conference

consistent with his earlier position, Axworthy maintained that the Joint Committee had already made important concessions to women and stated that a conference might harm the constitutional process.<sup>44</sup> Evidence to indicate why Axworthy chose to regionalize the conference and of whether in fact this decision was backed by Trudeau and the Cabinet is uncertain; however the outcome was a serious miscalculation. Although the Minister's actions were intended to avoid dramatic conflict regarding the tenuous subject of entrenchment, cancelling the conference was equally as debilitating. Anderson was unwilling to bow to government pressure and this decision eventually led to internal polarization within the Council and ultimately Anderson's resignation on January 20, 1981.

Some activists in the Liberal party felt betrayed by Anderson's public challenge to cabinet control while others less associated or in complete opposition to the party felt that Anderson was a victim of governmental manipulations.<sup>45</sup> Resulting anger and frustration sent women who had never been active in the movement before into a frenzy. Many sent in letters, telegrams, and phoned in support of Anderson's decision.<sup>46</sup> In the

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<sup>44</sup> Sandra Burt, "The Charter of Rights and the Ad Hoc Lobby: The Limits of Success," *Atlantis*, vol. 14, no. 1. (Fall 1988), 77.

<sup>45</sup> Yves Lavigne, "Axworthy is Defended by PM in his Role with Women's Group," *Globe and Mail* (January 22, 1981), A1; and, Yves Lavigne, "MPs Rake Axworthy over coals for turmoil in women's groups," *Globe and Mail* (January 23, 1981), A1.

<sup>46</sup> Communist Party of Canada. Correspondence from Nan McDonald, Women's Director for Communist Party of Canada to Honourable Lloyd Axworthy, Minister Responsible for the Status of Women, January 14, 1981 (683.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); Status of Women Group, Kitchener-Waterloo, Telegram from Alida Burrett, Chair for Status of Women Group, Kitchener-Waterloo to The Prime Minister's Office, Thursday January 22, 1981 (683.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); Peterborough Women's Committee and Women's Resource Center, Correspondence from Kim Naish and Karen Hill, Co-Presidents of Peterborough Women's Committee and Women's Resource Center to Honourable Lloyd Axworthy, Minister Responsible for the Status of Women, January 23, 1981 (683.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); and, University Women's Club, Peterborough, Ontario. Correspondence from Ellen Robinson, President of Peterborough University Women's Club, to Honourable Lloyd Axworthy, Minister Responsible for the Status of Women, February 2, 1981 (683.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

House of Commons, only four days after the cancellation of CACSW conference, NDP MP Pauline Jewett cited the receipt of 100 correspondences condemning the Liberal government's resistance to constitutional equality.<sup>47</sup> Many women viewed this as an attempt by the federal government to force Canadian women out of the political process and deny them access to the power which could eliminate their oppression.

Anderson's stand convinced large numbers of Canadian women that the Council had been threatened by political interference. As Doris Anderson admitted, "I decided to go to the press, quit as president, and tell them why. It was marvellous. The story was on the front page for a week."<sup>48</sup> Both Lise Gotell and Katherine de Jong have noted that the Axworthy Affair heightened Canadian women's awareness of the importance surrounding the struggle for constitutional sex equality.<sup>49</sup> The government's opposition to the conference acted to sharpen Canadian women's consciousness of the precariousness of their constitutional position and therefore broaden the base of popular support for women's constitutional struggle.

Marking a clear shift in the relationship between the government and women's groups, the trust and easy partnership that had once characterized the affiliation now saw women's organizations much more apprehensive about government inaction. Deep seeded perceptions of betrayal and manipulation spilled over into other women's groups involved in the constitutional process. At NAC's annual meeting a motion was passed

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<sup>47</sup> Canada. Parliament. House of Commons. *Debates*, 32<sup>nd</sup> Parliament, 1<sup>st</sup> Session, vol. 6, January 22, 1981 (Hull, QC: Queen's Printer of Canada, 1980-1981), 6463.

<sup>48</sup> Interview with Doris Anderson as cited in Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution*, 145.

<sup>49</sup> Gotell, *The Canadian Women's Movement, Equality Rights and the Charter*, 12; and, Kathleen J. de Jong, "Sexual Equality: Interpretation Section 28," in Bayefsky & Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms*, 505.

demanding Axworthy's resignation as federal Minister Responsible for the Status of Women as well as the resignation of the members on the federal Advisory Council who did not support Anderson.<sup>50</sup> Adding to the complexity of the situation, there was confusion after the NAC announced its public support for an entrenched Charter in both content and principle without the consent of the entire executive or the affiliate groups.<sup>51</sup> The actions taken by NAC were strongly opposed by Quebec members associated with La Fédération des Femmes du Québec and these delegates walked out of the meeting.<sup>52</sup> In a letter dated June 16, 1981, President Huguette Lapointe-Roy, announced that at FFQ's annual meeting in April that members had resolved that the FFQ would "retire temporairement son adhesion au CNA pour faire connaître sa désapprobation devant les irrégularités commises récemment au Conseil d'administration de cet organisme."<sup>53</sup> While NAC attempted to mend relations with this division, other Quebec francophone organizations such as l'Association Féminine d'Éducation et d'Action Sociale also broke ties with the national organization.<sup>54</sup> Clearly acting with nationalist priorities in

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<sup>50</sup> Cathe Campbell, Gazette Staff, "Women label minister as "axe-worthy," *The Gazette* (Friday, March 20, 1981), 3.

<sup>51</sup> NAC, *Minutes of Executive Committee Meeting, June 21, 1981* (699.19; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 3-4; and, Lynn McDonald, "The Charter of Rights and the Subjection of Women," *The Canadian Forum* vol. 61, no. 710 (June/July, 1981), 18.

<sup>52</sup> Jim Robb, Citizen Staff Writer, "Quebec women split as Axworthy defended," *The Citizen* (March 17, 1981), 15.

<sup>53</sup> FFQ, "Resolutions adopted by the Conseil d'Administration of the Fédération des Femmes du Québec at their annual meeting, April 1981," as attached in a Correspondence from Huguette Lapointe-Roy, President FFQ, to Jean Wood, President NAC, Montréal, le 16 juin 1981 (Box: 636; File: Withdrawal of Special Meeting Requests/Request for Special Meetings/Letters Against Special Meetings; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections) Translation: "That FFQ temporarily withdraw its membership in NAC to show its disapproval of the irregularities perpetrated recently at the level of administration board of this organization."

<sup>54</sup> NAC, Correspondence from Jean Wood, President NAC, to Huguette Lapointe-Roy, President FFQ, Toronto, le 28 juillet 1981 (Box: 636; File: Withdrawal of Special Meeting Requests/Request for Special Meetings/Letters Against Special Meetings; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); NAC, Correspondence from Jean Wood, President NAC, to Huguette Lapointe-Roy, President FFQ, Toronto, le 31 juillet 1981 (Box: 636; File: Withdrawal of Special Meeting Requests/Request for Special Meetings/Letters Against Special Meetings; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections); and, L'AFEAS, Correspondence from Lise

mind, many Québécois women were unwilling to endorse the conduct of English-speaking women's organizations.

With the majority of English-speaking women's organizations weary to rely on government agencies to protect their interests, the action generated within the CACSW became less effective. Furthermore, contentions within NAC that threatened to divide the organization prevented them from taking decisive action and left them unable to fill the gap left by CACSW. As Sandra Burt identified, these variables generated a vacuum of leadership for women regarding matters of the constitution.<sup>55</sup> Creating an opening, this void eventually encouraged a group of organizers in Toronto and Ottawa to come together to address the need for a constitutional conference. It was this eventuality that led women to begin the positive transition from the Axworthy Affair. Significant for two reasons, this phase demonstrated how the women's movement responded to the pressure of divisive priorities and also motivated large numbers of English-speaking Canadian women to take action.

### **Ad Hoc Committee and the Women's Constitutional Conference**

Less than a week after Anderson resigned, feminists started gathering under Toronto and Ottawa organizers with the view that a national conference on women and the constitution must take place. Increasingly obvious to all, NAC was experiencing

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Leduc, secrétaire générale of l'AFEAS, to Jean Wood, President NAC, Montréal, le 11 septembre 1981 (Box: 636; File: Withdrawal of Special Meeting Requests/Request for Special Meetings/Letters Against Special Meetings; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), stipulated in this letter, L'AFEAS broke with NAC for the following reasons: 1) NAC's structure did not allow for adequate representation and control was centered in Ontario, 2) NAC took decisions with which L'AFEAS did not agree (resignation of Minister Axworthy and abolition of CACSW), 3) language correspondence and exchanges done only in English, 2-3.

<sup>55</sup> Burt, "The Charter of Rights and the Ad Hoc Lobby: The Limits of Success," 77

internal conflict due to its fragile inter-party, regional, and diverse composition.<sup>56</sup> In order to recover the support of Québécois organizations and to keep as many factions as possible within the folds of the movement, the NAC could not take an official position on issues of entrenchment without causing further alienation. Additionally, in order to maintain federal funding, the group was unable to assume formal responsibility for organizing the conference. As Marilou McPhedran explained,

the leaders of NAC at the time did not support an entrenched charter of rights. In an ideal situation, the Ad Hoc Committee might not have chosen an entrenched charter either but there was going to be one, and if we sat out of the process of amending it, we were going to get screwed, the same way we'd been screwed by Diefenbaker's Bill of Rights, under which we'd lost every single legal challenge on the basis of either women or Aboriginal equality. The Ad Hoc Committee came into being in order to address these issues and these issues alone – women's equality in the constitution.<sup>57</sup>

From an initial meeting, two Ad Hoc Committees were hastily formed in Ottawa and Toronto.<sup>58</sup> In the following weeks, a relatively small group of women were somehow able to organize one of the largest and most effective women's political conferences and lobby organizations in Canadian history.

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<sup>56</sup> Lynn McDonald, "The Charter of Rights and the Subjection of Women," *Canadian Forum*, vol. 61, no. 710 (June/July, 1981), 18.

<sup>57</sup> Interview with Marilou McPhedran as cited in Rebick, *Ten Thousand Roses: The Making of a Feminist Revolution*, 148.

<sup>58</sup> In Kome's, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 43 - 44, lists the participants at the first "Cow Cafe" meeting where the Ad Hoc Committee was assembled. Members included Kay McPherson, past NAC president, peace activist, and former independent and NDP candidate; Laura Sabia, former conservative candidate and past president of numerous unions, women's groups including NAC; archivist and NAC exec member Moria Armour; Linda Ryan-Nye and Margaret Pryce, co-chairs of Women for Political Action; Ada Hill, executive director of the Federation of Women's Teacher's Association of Ontario; Illa Driever, from the Women's Halton Action Movement; Mary Corkery and Susan VanderVoet, from the Canadian Congress on Learning Opportunities for Women; Shelagh Wilkinson, co-founder of Canadian Women's Studies, Janka Seydegart and Nancy Jackman.

Ottawa organizers to join the Ottawa team subsequent to the first meeting included Pat Hacker, coordinator of Women's Career Counselling Services; Pat Webb; Vaughn Joliffe; Rosemary Billings; NAC exec member and writer Heather Menzies; law student Tamra Thomson; NAC Constitutional Committee Chair Jill Porter; Gail Anthony; Janice Tait; Jane Pope of the Ottawa Women's Credit Union; Cris Furlough; Susan Phillips; Jan Mears; Carol Armatage; Lisa Nemetz; and Marilou McPhedran acting as the liaison between the two groups.

The Advisory Council had originally planned to have its first public conference held in the House of Commons. An extremely strategic location, Ad Hockers hoped that they could still use it as their venue.<sup>59</sup> In support, MPs Flora MacDonald and Pauline Jewett lobbied for the West Block facilities, the same location that had been used for the hearings of the Special Joint Committee on the Constitution.<sup>60</sup> This was approved and the conference was scheduled for February 14<sup>th</sup> and 15<sup>th</sup>, 1981 giving the Ad Hoc Committee less than three weeks to plan. The Committee immediately set about alerting Canadian women of their plans and began attending to the “millions and millions of details that all required separate phone calls.”<sup>61</sup> The telephone campaign asked for petitions and letters protesting the actions of Advisory Council, Lloyd Axworthy, and Justice Minister Chrétien. In addition, twenty-one questions about the Advisory Council and the cancellation of the initial conference had been raised in Parliament between January 12 and February 10, 1981. Hundreds of women’s organizations were contacted around the clock asking them to support by attending and endorsing the conference.<sup>62</sup> The media actively covered all of these events.

The program of the new conference was seen as a critical factor in the success of the conference. The Ad Hoc Committee wanted to present as many of the issues surrounding women and the constitution as possible. Papers had been produced by the CACSW for its conference prior to the cancellation. These works, although not presented, were later published in a collection titled, *Women and the Constitution in*

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<sup>59</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 45.

<sup>60</sup> Anne-Marie Smith, “Women and the Constitutional Conference,” *Women’s Magazine* (March 20, 1981), 3.

<sup>61</sup> Pat Hacker, Ottawa co-ordinator quoted in Collins, “Which Way to Ottawa?” *City Women Magazine*, 22.

<sup>62</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 49.

*Canada*.<sup>63</sup> This compilation was important as it brought together the opinions from a variety of perspectives, including Aboriginal women and la Fédération des Femmes du Québec, something that the Ad Hoc conference was not able to do. Wanting to maintain a variety of perspectives along with the expertise that the original CACSW conference initiated, the Ad Hoc Program Committee sought out some of the top feminist minds in Canada. Beverley Baines agreed to participate. However, Mary Eberts declined to take part publically on account of her Liberal affiliations.<sup>64</sup> Others who chose to not attend included BC Family Court Judge Nancy Morrison, Human Rights Commission vice-chairperson Rita Cadieux, and Quebec lawyer Nicole Benard.<sup>65</sup> Nevertheless, the Ad Hoc Committee was able to put together a list of 20 acknowledged presenters and chairpersons that would adequately represent varying viewpoints.<sup>66</sup>

In the final stages of organization, it was decided that the conference would focus on the content and precise wording of the Charter rather than on the issue of

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<sup>63</sup> Audrey Doerr and Micheline Carrier, eds. *Women and the Constitution* (Ottawa, ON: Canadian Advisory Council on the Status of Women, 1981).

<sup>64</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 51.

<sup>65</sup> CACSW, "Guest Speaker List," (899.1; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>66</sup> Ad Hoc Committee of Canadian Women. "Capsule biographies of panellists and chairpersons," *Constitutional Conference, February 14-15, 1981, Ottawa* (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections). Presenters included Deborah Acheson, lawyer, Victoria, BC; Beverley Baines, professor, faculty of law, Queen's University; Sylvaine Borenstein, lawyer, Montreal, QC; Mary Corkery, co-ordinator, Canadian Congress for Learning Opportunities for Women; Edith Deleury, lawyer, Université de Laval; Robin Diamond, lawyer, Winnipeg, MA; Margaret Fern, president, Saskatchewan Advisory Council on the Status of Women; Karen Hill, program director, Canadian Council on Social Development; Madeline LeBlanc, president New Brunswick Advisory Council on the Status of Women; Marilou McPhedran, lawyer, Toronto, ON; Marlene Pierre-Aggamaway, president, Native Women's Association of Canada; Jill Porter, executive-member, National Action Committee on the Status of Women; Linda Ryan-Nye, co-chairperson, Women for Political Action; Tamra Thomson, lawyer, Ottawa, ON; Lynn McDonald, sociologist, Toronto, ON; Doris Anderson, author, journalist, former president of the Canadian Advisory Council on the Status of Women Suzanne Boivin, lawyer, Montreal, QC; Kay Macpherson, immediate past president, National Action Committee; Jill Vickers, professor, political science, Carleton University.

whether or not to support entrenchment.<sup>67</sup> Wanting to avoid fracturing the conference into its regional and political component parts before concrete work on the Charter had begun, McPhedran arranged for the opening panel to work on amending the Charter while the afternoon session would explore issues of entrenchment.<sup>68</sup> Busy working tirelessly to organize the conference, no one on the Committee anticipated that attendance for this “Women in the Constitution” Conference would have such an enthusiastic response.

At the first session held at 10:00 on the morning of February 14, 1981, 1300 delegates showed up on Parliament Hill. Unable to accommodate such a large number, a second and third room had to be set up in the West Block and linked for video conference.<sup>69</sup> The women who attended were mostly from the 90 major women’s groups that had endorsed the conference and the majority of the women’s groups originated from English-speaking Canada.<sup>70</sup> A positive new development was that while most of these women had taken part in movement activities, many had not participated in the previous constitutional lobbies nor were they familiar with women’s constitutional concerns.<sup>71</sup> There were also many women who came on their own volition. It became apparent by this body of delegates that a growing number of women were taking interest in their rights and in the governance of these freedoms.

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<sup>67</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 55.

<sup>68</sup> Collins, “Which Way to Ottawa?,” 24.

<sup>69</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 57.

<sup>70</sup> Ad Hoc Committee of Canadian Women, *Women and the Constitution, Conference Endorsements* (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections), 3.

<sup>71</sup> Toronto Business and Professional Women’s Club. *Pauline Green’s Account of the February 14, 1981 Women and the Constitution Conference*, author unknown (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections). 1.

Regional representation at the Conference was for the most part achieved as women from all ten provinces and one territory, NWT, were present. Many francophone women from Quebec did not attend, but Resource d'action et d'information pour les femmes-Quebec, RAIF and Ligue des femmes du Quebec did endorse the conference and sent delegates.<sup>72</sup> On the other hand, Acadian and Ontario francophone women's groups did participate and endorsed the conference and its eventual resolutions.<sup>73</sup> Representation at the Conference was also spread across the political spectrum as members of the Conservative, New Democratic, Liberal and Communist Parties were present. However, there were fewer Liberals given their affiliation to the Advisory Council and to the federal government.<sup>74</sup> Delegates predominantly represented middle and upper class women, but there were some middle-class women who spoke on behalf of "working class" viewpoints. In terms of race, only two women of colour were present, a fact highlighted by Dr. Carrie Best, who attended as a representative of the Visible Minority Women's Society of Nova Scotia.<sup>75</sup> A number of Aboriginal women from a variety of Aboriginal nations across Canada attended the Conference, including representatives from NWAC and IRIW. Although unable to discern, observed from the recorded proceedings, there were no women with self-identified disabilities at the conference. Additionally, it is undeterminable from the representation how many lesbian and bi-sexual women were at the conference.<sup>76</sup> Consequently, while the broad collection of these 1300 participants was a testament to the strength of the movement

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<sup>72</sup> Ad Hoc Committee of Canadian Women. *Women and the Constitution Conference Endorsements*, 2.

<sup>73</sup> Smith, "Women and the Constitutional Conference," 4.

<sup>74</sup> Collins, "Which Way to Ottawa?," 24; and Lise Gotell, *The Canadian Women's Movement, Equality Rights and the Charter*, 15.

<sup>75</sup> Laura Bennett, "Toward a more inclusive concept of citizenship; women and the 1981 Ad Hoc Constitutional Conference," (M.A. Thesis, Carleton University, 1997), 67.

<sup>76</sup> *Ibid.*, 67-68.

and its national network, the Conference attendance also highlighted some areas of proportional disparity.

For the minorities at the Conference, the implication was that they had less of a chance of having their individual interests represented unless acknowledged by the majority. Moreover, the majority of presenters and members of the Ad Hoc Committee were from a legal background and therefore the main thrust of the Conference was centered on legal issues. Yet, even with these potential points of division the events of the conference illustrate how the dynamics of the women's movement were at this time subsumed by the priority of substantive equality.

The first meeting opened with welcoming speeches by Hon. Flora MacDonald and MP Pauline Jewett. Marilou McPhedran moderated the panel on the amendment process and delegates heard from panellists, Tamra Thomson, Beverley Baines, Deborah Acheson and Sheila Murray.<sup>77</sup> Critical of section 1, the limitation clause, these women were not satisfied with the recent draft put forward by the Special Joint Committee. The new draft did not include guidelines for judicial interpretation of section 15 and limitations could be acceptable as long as they were "prescribed by law." Given that jurisprudence held only an interpretive force and did not extend to federal legislators, women did not believe that the Charter, specifically section 1 in conjuncture with section 15, was adequate to the task of providing a remedy against legislated sex discrimination.<sup>78</sup> All experts in constitutional law, these key speakers shared, in a way

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<sup>77</sup> Ad Hoc Committee of Canadian Women, *Program for the Women's Constitutional Conference*, February 14, 1981, Ottawa (Unprocessed material; Marilou McPhedran Fond; York University, Archives and Special Collections), 3.

<sup>78</sup> Beverly Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation," *Canadian Journal of Women and the Law*, vol. 17, no. 1 (2005), 48.

that everyday women would understand, the ways in which the Charter did not adequately match their concept of equality. By connecting this broad base of women with the complex legal aspects of the Charter, they were able to give these women new understandings and tools to respond in their own way to this legal document.

During the morning session three resolutions were discussed. Submitted by Deborah Acheson and Tamra Thomson, one resolution proposed specific recommendations concerning the Charter of Rights. Resolved that the Charter would not be entrenched in the constitution until such time as the following clauses were amended, the recommendations included:

- 1) Clause 1 be a statement of purpose that rights and freedoms under the Charter are guaranteed equally to men and women with no limitations;
- 2) The word "person" be used throughout the Charter in lieu of any other word denoting human being;
- 3) Clause 15 was to contain a two-tiered test to ensure that a compelling reason must be given for a distinction in law on the basis of sex, race, national or ethnic origin, colour or religion;
- 4) Affirmative action programs under Clause 15(2) should apply only to disadvantaged groups, not individuals; and,
- 5) Clause 26, dealing with multicultural heritage must clearly show that it is subordinate to Clause 15 and 1.<sup>79</sup>

This broad resolution stressed the need that for substantive equality and a principle of equality was needed that would be able to not only recognize the difference of women but value it equally in accordance with men.

Clearly women were still unsatisfied with the drafting of the Charter. Women were fearful that they would get locked into a Charter of Rights that was too vague and far too open to judicial interpretation. Finally, if the Charter subsequently was found

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<sup>79</sup> "Proposed Resolutions for Discussion," Submitted by Deborah Acheson and Tamra Thomson in Ad Hoc Committee of Canadian Women, *Program for the Women's Constitutional Conference*, February 14, 1981, Ottawa, 5.

wanting it would be extraordinarily difficult to amend regardless of which amending formula was used.<sup>80</sup> Indicative of these fears, some women proposed that attempts should be made to lobby the government to hold off on the Charter in order to engage more debate. Still, other women felt that the Charter would go through whether women were on board or not and significant changes were still needed to secure an effective guarantee for gender equality that went beyond the very weak Diefenbaker Bill of Rights. What was certain was that women attending the Conference were faced with a difficult challenge and gaining consensus on the topic would not be easy.

A second resolution requested the revocation of Section 12 (1)(b) of the Indian Act. Submitted by the NWAC, it was proposed that the Conference would support NAWL in its struggles on behalf of all native women.<sup>81</sup> As this resolution was explained with reference to court cases such as *Lavell* and others, delegates became familiar with the inherent discrimination that the Indian Act embodied, denying women any form of real equality. However, when President Marlene Pierre-Aggamaway made her presentation, she moved beyond her advanced submission and added a bit of excitement to these early proceedings by calling for the endorsement of Native self-government.<sup>82</sup> This unscheduled announcement put the Conference into a temporary state of chaos; however, she did not receive the requested endorsement. While women were able to acknowledge the cultural and legal issues Aboriginal women had with gender equality, this was not the focus of the Conference. Most delegates were hesitant

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<sup>80</sup> Margaret Fern, Chairperson Sask. Advisory Council, *Notes for a Speech to the Conference on "Women and the Constitution" Ottawa, February 14, 1981* (Unprocessed material; Marilou McPhedran fonds; York University, Archives and Special Collections) 3.

<sup>81</sup> "Proposed Resolutions for Discussion," Submitted by Native Women's Association of Canada in Ad Hoc Committee of Canadian Women, *Program for the Women's Constitutional Conference*, February 14, 1981, Ottawa, 4.

<sup>82</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 58.

in supporting the concept of Aboriginal self-governance at the cost of jeopardizing improvements to the full range of equality rights provisions embedded in the proposed Charter.

Moving beyond the scope of the constitutional negotiations, the third recommendation called for the appointment of more women to all government boards, commissions, and to the bench.<sup>83</sup> Pauline Jewett was one of the advocates who supported this resolution, commenting that women could use the power of law to their own advantage if women had a hand in shaping it. Endorsing an amendment that would, “explicitly state in so many words, very clear words, that what we want is not simply equality in the administration of the law, but equality in the very substance of the law itself,” Jewett provided insight as to why substantive equality was so critical to women.<sup>84</sup> Calling for a specific kind of equality, these women strongly believed that if they could participate in defining their legal rights, they would be able to change the way in which laws applied to women.

During the afternoon session, the issue of entrenchment was explored along with discussions surrounding federal-provincial jurisdictions.<sup>85</sup> Positions regarding entrenchment varied significantly. The socialist feminist critiques of the Charter made by Saskatchewan Margaret Fern echoed the concerns of the Saskatchewan NDP provincial government and premier Alan Blakeney, who felt that entrenchment would

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<sup>83</sup> “Proposed Resolutions for Discussion,” Submitted by Lynn McDonald in Ad Hoc Committee of Canadian Women, *Program for the Women’s Constitutional Conference*, February 14, 1981, Ottawa, 4.

<sup>84</sup> Pauline Jewett, as quoted in the conference film reel cited by Bennett, “Toward a more inclusive concept of citizenship; women and the 1981 Ad Hoc Constitutional Conference,” 78.

<sup>85</sup> Ad Hoc Committee of Canadian Women, *Program for the Women’s Constitutional Conference*, February 14, 1981, Ottawa, 6.

encroach too much into provincial jurisdiction.<sup>86</sup> Moreover, opponents of entrenchment such as Lynn McDonald argued that the resulting shift to judicial review, which the Charter would bring, might endanger the tradition of parliamentary supremacy.<sup>87</sup> This criticism was based more on perceptions of the state and how or if the system of governance would support and adhere to the kind of equality women were fighting for. Feeling the heat of the debate, Maureen McTeer tried to convince the delegates of her husband Joe Clark's position, asking women to reject the Charter and wait until the constitution was home before devising a substantial gender equality rights guarantee.<sup>88</sup> Various factions of the women's movement had strong and highly divergent ideological perspectives on the sort of legal regime necessary to achieve substantive equality, which made it very difficult to compromise on entrenchment of gender rights.

Debates over entrenchment escalated as the afternoon progressed. As tensions rose, the Ad Hoc members grew more concerned about the likelihood of achieving a consensus on the resolutions. Speaking on behalf of Western women, Shelagh Wilkinson expressed frustration over not having a chance to discuss "their" opinion on the principle of entrenchment.<sup>89</sup> In the midst of this dissent and committed to remaining united and providing a forum whereby all women present could have a say in the constitutional process, Ad Hoc organizers made a decision. Laura Sabia explained that:

the Women at the conference showed a moral and political sophistication, far above anyone's expectations. When the conference seemed bogged

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<sup>86</sup> Fern, *Notes for a Speech to the Conference on "Women and the Constitution" Ottawa, February 14, 1981*, 3.

<sup>87</sup> Bennett, "Toward a more inclusive concept of citizenship; women and the 1981 Ad Hoc Constitutional Conference," 70.

<sup>88</sup> Greg Weston, Citizen Staff Writer, "Tearful McTeer silenced," *The Citizen* (Monday, February 16, 1981), 8.

<sup>89</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 60.

down on technicalities, and divided into political fractions, the women themselves recognized the danger, cancelled the evening entertainment and worked together into the night to finish the job.<sup>90</sup>

By-passing a planned evening celebration, delegates stayed behind to voice their opinions and come to a consensus regarding the proposed resolutions. By the next morning a motion was carried whereby the conference supported entrenchment subsequent to the adoption of the amendments agreed to at the conclusion of the Conference.<sup>91</sup> Unless appropriately adjusted, delegates decided that the Charter should not be submitted to Westminster.

The resolutions passed on the *Canadian Charter of Rights and Freedoms* reflected the tenuous perspectives on entrenchment along with the core criticisms this draft posed for women. Unwilling to support the Canada Resolution unless the Charter came to reflect the amendments of the Conference, women were adamant that their concerns be addressed. Section 1 was of the utmost importance as it directed how all of the rights and freedoms in the Charter should be interpreted. Indeed, the summary of the resolutions passed at the Ad Hoc Conference noted the following,

....prohibited ground of discrimination - race - has already been treated seriously under the Canadian Bill of Rights, as the Drybones case illustrates. The Purpose clause will ensure that the ground of "sex" is treated equally seriously. In fact, it should have the effect of requiring the highest level of scrutiny in assessing any sex-based distinctions in laws even without spelling this out in clause 15.<sup>92</sup>

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<sup>90</sup> Laura Sabia, "Editorial," *Toronto Sun* (February 17, 1981), 11.

<sup>91</sup> Ad Hoc Committee of Canadian Women, "Resolutions Adopted at the Conference on Canadian Women and the Constitution," *Conference on Canadian Women and the Constitution February 14 and 15, 1981* (683.24; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections; and, Box 1; File: Ad Hoc Committee of Canadian Women (Toronto, ON): material of the conference on Canadian Women and the Constitution, and a protest of antiabortion forces, 1979-1981; X10-1 Women's Movement Archive, University of Ottawa, Archives and Special Collections), 1-2.

<sup>92</sup> *Ibid.*, 1.

Furthermore, this proposed wording would overcome a possible interpretation of section 27 (the multicultural clause) that could limit the right to equality set out in section 15. From past judicial rulings women were aware of the possible interpretations courts could use to diminish their rights and they were determined to eliminate most if not all infringements in their guarantee to equality. The fundamental concern was that even with section 15 the present limitations clause did not provide that certain rights, including the right to equality regardless of sex, would be afforded.

Additional grounds, such as marital status, sexual orientation, and political beliefs, were included in proposed amendments to section 15 to provide a clearly expressed statement to the courts and society that such discrimination would not be tolerated. The resolution calling for a two-tier test in section 15 was also passed at the Conference demanding that section 15 require a “compelling” reason for any distinction. To this end, women understood that no guarantee of gender equality rights was absolute. As Gordon Fairweather pointed out, some grounds, such as sex and race will almost never justify distinction in law because they will rarely, if ever, relate to a real difference in capacity or ability; other grounds may result in the applying a vague standard of “reasonableness” to sex discrimination.<sup>93</sup> As a result, it was argued that a two-tier test along with the tightened purpose clause would avoid possible infringement on gender equality. Unsatisfied with section 15(2), the resolved amendment provided affirmative action programs to apply to disadvantaged groups as listed under section 15(1) and not

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<sup>93</sup> Gordon Fairweather, *Notes for An Address by R.G.L. Fairweather, Chief Commissioner, Canadian Human Rights Commission to the Special Joint Committee on the Constitution of Canada, Ottawa, Ontario, November 1980* (683.1; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

individuals.<sup>94</sup> While significant as these amendments reinforced judicial interpretation, compared with section 1 they did not carry the heavy change that the purpose clause proposed.

The Ad Hoc constitutional conference went beyond the inclusivity of the Special Joint Committee by allowing for a variety of both everyday as well as politically and legally active women to come forward and voice their opinion on the Charter and constitutional issues. As a result, a consensus on the Charter was achieved between women's organizations that informed thousands of other women of the concept of substantive equality and helped bring them into the folds of the women's movement. In addition, these resolutions reflected some of the different perspectives that existed within the movement and added to the list of prohibited grounds for discrimination marital status, sexual orientation, and political beliefs.<sup>95</sup> Further recommendations were also made to other areas of the Charter including sections 7, 27, and 31. Clause 7 affected reproductive freedom and the right to equal economic opportunity and was amended to specifically address some of the more prominent concerns of women. It was also suggested that clause 27 regarding multiculturalism be changed and included as part of the purpose clause.<sup>96</sup> This resolution illustrates an attempt to resolve tensions

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<sup>94</sup> This amendment was viewed as a technical one to better carry out the intent of the sub-section. However, it also suggests that women were critical to ensure that they were not unjustifiably excluded from programs designed to overcome disadvantages other than sex but which would also clearly affect women, and further, that programs aimed at overcoming sex-based disadvantages would not necessarily be jeopardized due to challenges from disadvantaged individuals. For more see Ad Hoc Committee of Canadian Women, "Resolutions Adopted at the Conference on Canadian Women and the Constitution," *Conference on Canadian Women and the Constitution February 14 and 15, 1981*, 6-8.

<sup>95</sup> Ibid.

<sup>96</sup> Considered a possible threat to gender equality, by placing multicultural rights along with gender rights in the introductory purpose clause it was assumed that this would secure the superiority of both with detriment to each other. For more information see Ad Hoc Committee of Canadian Women. *Summary of those Resolutions Passed at the Ad Conference on Women and the Constitution which deal with required amendments to the proposed Charter of Rights and Freedoms, together with commentary on significance*

between the French- and English-speaking groups as well as the overriding regard women had for substantive gender equality rights.

Given that the Special Joint Committee had concluded its hearings and the revised resolution had already been released, it was uncertain how much impact these resolutions would have. Nonetheless, the conference had brought together a variety of women from across Canada and its proceedings had inspired hope and invigorated women to not let up their fight. Regardless of whether some these resolutions were only incorporated to assist in achieving consensus or done to reunite internal divisions, the Ad Hoc constitutional conference was successful in that it engaged thousands of women to politically participate in defining equality.

While marking a distinct moment when support from a wide cross section of women mushroomed, this event also demonstrated a political awakening. Drawing on support from the structure of the women's movement, the newly formulated Ad Hoc Committee was able to assemble a historic Conference, which brought women from all across Canada together to discuss their role in the constitution. In this instance the umbrella structure of women's organizations that were already in place easily pushed this issue to the forefront as a wave of support came from the local areas. Although, still dependent on the more knowledgeable Ad Hockers, this conference marked the infusion of everyday women into the debate thereby expanding political involvement beyond the elite members of Canada's major women's groups. By attending the conference, these women were able to gain a new understanding of their position within the constitution

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*of the amendments for women and the proposed wording of the Charter, as amended.* February 14<sup>th</sup> – 15<sup>th</sup>, 1981 (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections).

and take the resolutions established at the conference and effectively carry that message back home with them. As the next ten-month final phase would soon demonstrate, the fight was far from over.

### **The Fight for Section 28**

The Ad hoc constitutional conference did not simply end that Sunday. While most of the 1300 attendees returned to their respective homes, women more closely affiliated with the activist and lobbying elements of the women's movement immediately pushed on to make their political clout felt immediately on Parliament Hill. On February 16, 1981, the Monday following the conference, Marilou McPhedran and Linda Ryan-Nye attended appointments with all three House leaders, leaders of both opposition parties, and the Justice Minister Jean Chrétien.<sup>97</sup> Simultaneously, lawyers Tamra Thomson, Deborah Acheson and Suzanne Boivin joined lobby teams while Pat Hacker and Doris Anderson helped keep the pressure on government leaders through press conferences and news releases.<sup>98</sup> Women wanted to ensure that the government at the very least considered their position and were determined that all of the resolutions passed at the conference would become reality.

That same Monday, Lloyd Axworthy met with 14 leaders of women's groups and agreed to set up a task force to review effectiveness of the Advisory Council on the Status of Women.<sup>99</sup> The sincerity of his words did not resonate strongly to these leaders and that night people from all three parties along with Ad Hoc Committee members met

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<sup>97</sup> Marilou McPhedran, *Summary of the Lobbying Following the Women's Constitutional Conference, February 16, 1981 to April 24, 1981* (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 1.

<sup>98</sup> Penny Kome, "Anatomy of Lobby," *Saturday Night* (January, 1983), 10.

<sup>99</sup> Ad Hoc Committee of Canadian Women, *Women and the Constitution – A Chronology of Events, Jan. To April 1981*, 2.

to plan the next phase of lobbying. Recounting the night that characterize this final phase, Marilou McPhedran described how the group formulated a coherent and realistic strategy that would concentrate on lobbying politicians in and around the House of Commons and Senate and push women to go beyond their party lines.<sup>100</sup> After all, galvanized by the recent conference, these women were inspired by the possibility of what they could achieve and were resolved not to give up.

As decided that evening, women continued to lobby in the days to follow ensuring their issues remain in the media limelight. Visibility was critical in order to pressure a formal response from the Minister Responsible for the Status of Women.<sup>101</sup> The Axworthy Affair was already one issue that the media had followed intensely and women's issues continued to receive attention. By keeping attention focused on Axworthy, the movement was able to bring many additional everyday women into the movement and use them to sway the government. The movement applied lessons from previous lobbying strategies by engaging in press releases and conferences and activating the extensive telephone networks that had brought 1300 delegates to Ottawa. Movement organizers urged women across the country to contact their MPs and demand that the conference's resolutions be incorporated into the constitutional package.<sup>102</sup>

On Wednesday, February 18, 1981, Linda Ryan-Nye and Marilou McPhedran met with Lloyd Axworthy again. At this meeting, he made promises to talk to his cabinet colleagues to see if amendments to the Charter could be made and if women's

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<sup>100</sup> McPhedran, *Summary of the Lobbying Following the Women's Constitutional Conference, February 16, 1981 to April 24, 1981*, 1.

<sup>101</sup> *Ibid.*, 2.

<sup>102</sup> Ad Hoc Committee of Canadian Women, *Final Report of the Ad Hoc Committee of Canadian Women of the Constitution* (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 8.

resolutions could be presented.<sup>103</sup> Because Axworthy again seemed to be only paying lip-service to women's demands, women from across the country continued to mobilize. That weekend NAWL met for their annual conference in Halifax. It was at this point that the first clear and firm directive was given that NAWL would support all of the resolutions passed at the Ad Hoc Conference and that a coordinated lobbying effort would begin.<sup>104</sup>

Returning from the NAWL conference, Ad Hoc lobbyists continued to pressure Axworthy in his role as the Minister Responsible for the Status of Women demanding that the government consider the additional amendments to the Charter that had been resolved at the Ad Hoc Conference. Ryan-Nye and McPhedran sent follow-up letters and phone calls, but to no avail. At this point, it was decided by the Ad Hoc Committee that it would no longer recognize the Minister. In a letter dated March 3, 1981, signed by Marilou McPhedran, this decision was hand delivered to Axworthy.<sup>105</sup> Responding, Axworthy indicated that he was getting pretty tired with women's demands, stating frankly that "whatever they say at this point, I couldn't care less."<sup>106</sup> Compelled to find another avenue to the government, the movement also began to lobby the Minister of Justice and other Ministers and MPs. Full lobbying kits were sent out so that women could directly contact their federal representatives.<sup>107</sup> For International Women's Day,

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<sup>103</sup> Ad Hoc Committee of Canadian Women, *Women and the Constitution – A Chronology of Events, Jan. To April, 3.*

<sup>104</sup> McPhedran, *Summary of the Lobbying Following the Women's Constitutional Conference, February 16, 1981 to April 24, 1981*, 3-4.

<sup>105</sup> Collins, "Which Way to Ottawa?," 26. The contents of the letter were quoted as saying, "We have not heard from you," "We therefore feel compelled to seek representation through other means and will no longer be approaching you."

<sup>106</sup> Don Butler, Citizen staff writer, "Women reject minister as cabinet spokesman," *The Citizen*, Ottawa, Thursday March 5, 1981, 8.

<sup>107</sup> McPhedran, *Summary of the Lobbying Following the Women's Constitutional Conference, February 16, 1981 to April 24, 1981*, 6.

the Feminist Party of Canada organized a celebration where Ad Hoc members distributed lobbying information and packages.<sup>108</sup> After NAC's March AGM, the national organization agreed to endorse all of the Ad Hoc Conference's resolutions, called for the resignation of Axworthy, and joined the lobbying efforts.<sup>109</sup> It was at this point, faced with an insistent pressuring, including a snowball letter writing campaign and endorsements for national women's organizations, that all three national parties moved to support women's demands for equality. The end result produced a meeting between officials from the Department of Justice and Ad Hoc representatives to discuss further amendments to Charter.<sup>110</sup>

In the hopes of working out a compromise, Ad Hoc representatives, feminist activists, and lawyers Beverley Baines, Jill Vickers, Suzanne Boivin, Marilou McPhedran, and Tamra Thomson met with Ministry of Justice Officials Fred Jordan and Edythe MacDonald on March 18, 1981.<sup>111</sup> Armed with the resolutions reached at the Ad Hoc Conference, delegates were determined to strengthen the gender rights outlined in the Charter. At a minimum, Ad Hoc members were resolved to get a purpose clause added to section 1. In particular, the women were determined to have the words "notwithstanding anything in this Charter" appear in such a guarantee.<sup>112</sup> The justification for this wording had come from a discussion held between Ad Hocker

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<sup>108</sup> Ibid., 8.

<sup>109</sup> NAC. Telegram from Jean Wood, President NAC, to Right Honourable Pierre Trudeau, Prime Minister of Canada, March 17, 1981 (683.6; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections)

<sup>110</sup> Ad Hoc Committee of Canadian Women, *Final Report of the Ad Hoc Committee of Canadian Women of the Constitution*, 9.

<sup>111</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 75.

<sup>112</sup> de Jong, "Sexual Equality: Interpretation Section 28," in Bayefsky & Eberts, eds. *Equality Rights and the Canadian Charter of Rights and Freedoms*, 508.

Marilou McPhedran and Morris Manning a fellow lawyer. After asking Manning what single most important word was needed, he responded:

notwithstanding, you can do a lot with wording, but you've got to come out of there with notwithstanding as the first word in the amendment. If you don't do that, then it will just be words. But if you get notwithstanding then you will create something that is potentially a tool that can be used in litigation, might not be elegant wording, but that is the critical word.<sup>113</sup>

After hours of bargaining, the parties reached an agreement. Although the purpose clause on sexual equality was not embedded into section 1, women succeeded in placing a statement of purpose in the Charter. Section 28 declared, "notwithstanding anything else in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."<sup>114</sup> Omitted from the draft were the remaining resolutions reached at the Conference. According to the notes taken by McPhedran during the meeting, all of the Ad Hoc resolutions were discussed. However, unwilling to consider any new proposals that significantly altered the language of the Charter, Justice officials simply rejected these other resolutions.<sup>115</sup> Not wanting to give the premiers more opportunities to reject the Charter or leeway to demand additional changes, section 28, while providing explicit gender equality was left out of section 1 and no other recommendations were incorporated into the draft. The final Parliamentary debate on the proposed constitutional Resolution was held April 21-23, 1981 and on the final day it was unanimously approved by the House of Commons.

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<sup>113</sup> Interview with Marilou McPhedran as cited in Rebeck, *Ten Thousand Roses: The Making of a Feminist Revolution*, 149.

<sup>114</sup> Canada. *Canadian Charter of Rights and Freedoms*. Assented to 17 April 1982 (Ottawa, ON: The Department of the Minister of Justice, 1982).

<sup>115</sup> Marilou McPhedran, *Notebook II – Ad Hoc Committee of Canadian Women March 5, 1981 – March 22, 1981* (unprocessed material; Marilou McPhedran fonds; York University, Archives and Special Collections), 66-77.

While section 28 substantially strengthened sexual equality rights – no other section of the Charter began with such powerful and sweeping words – it was unclear if section 1 would limit the scope of 28. According to Beverly Baines, “this clause was understood by all who were present as having the same effect as if the provision had appeared in section 1.”<sup>116</sup> Nevertheless, these women were confident that they had obtained the proper wording to protect women’s equality rights from a potential limitations clause. As admitted by the Department of Justice, section 28 was a “significant provision, since it ensures that all rights are guaranteed equally to both sexes, and thus removes any possible doubt as to the equality in law of persons, regardless of sex.”<sup>117</sup> With this reasoning, these feminist lawyers had successfully situated women’s concerns within a legal context and effectively created a path to substantive equality rights for women.

Five days after the proposed resolution was passed by parliament, the Supreme Court of Canada began hearing the Trudeau government’s Constitutional Reference case, a consolidation of actions that had been launched in the courts of three provinces challenging the federal government’s unilateral attempt to amend the BNA. The Supreme Court’s decision on September 28, 1981, held that the federal government’s unilateral Resolution was legal, but not in conformity with a constitutional convention – one that the justices constructed - that required a “substantial majority” of provincial consent.<sup>118</sup> However, the Supreme Court also ruled that unanimity was not required.<sup>119</sup>

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<sup>116</sup> Baines, “Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation,” 51.

<sup>117</sup> Office of the Minister of Justice and Attorney General of Canada, Correspondence from Jacques A. Demers, Special Advisor to Jean Wood, President NAC, May 15, 1981 (808.3; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1.

<sup>118</sup> *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* “The Patriation Reference”, [1981] 1 S.C.R. 753.

Although the ruling stymied Trudeau's ability to act unilaterally, it also provided him with significant flexibility due to the vagueness of the term "substantial consent".<sup>120</sup> In essence, although the court set broad boundaries, it lent great legitimacy to any politically negotiated agreement. As a result, the decision forced the Trudeau government to convene a final federal-provincial constitutional conference in order to elicit support from several provinces.

In an attempt to come to a consensus, another federal-provincial conference was announced for November 2-4, 1981. Preconference briefs from the premiers began to surface in which they demanded control over some of the civil liberties in the Charter.<sup>121</sup> When the premiers threatened the strength of equality rights articulated in sections 15 and 28, women feared that the gains they had made would be sacrificed. Throughout the First Minister's meeting, Ad Hockers continued to send telegrams to all the premiers, hoping that all of their hard work would not be dismissed. Warnings were sent out to women's groups across Canada and women prepared for action, unwilling to lose all that they had accomplished.

In the first two days of the conference, premier after premier argued vociferously for exclusive provincial jurisdiction over equality rights, claiming that the provincial human rights codes provided greater protection than the proposed Charter.<sup>122</sup> It appeared that the conference was going to fail and that the Trudeau government would have to risk going to London all alone. The Kitchen Deal, put together by Justice Minister Jean

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<sup>119</sup> Ibid.

<sup>120</sup> More importantly, it gave considerable legitimacy to patriate the constitution without the consent of Quebec that would not have existed without the courts imprimatur.

<sup>121</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 85.

<sup>122</sup> Ibid., 83.

Chrétien and provincial attorneys-general Roy McMurtry of Ontario and Roy Romanow of Saskatchewan, occurred in the late afternoon of November 4, 1981 in the National Congress Centre where the conference was being held. Several premiers were brought into the ongoing negotiations during the evening and throughout the night and the Kitchen Deal was amended and finalized without the presence of Quebec's Premier René Lévesque who, along with his staff, had gone back to their hotel for the night. The final deal, a compromise agreement, granted provincial legislatures and Parliament, via a 'Notwithstanding clause' renewable every five years, the power to "override" the Charter's legal, fundamental, and equality rights.<sup>123</sup> With control back in the hands of the premiers, Trudeau had the substantial support of the premiers required to proceed to London with his government's patriation resolution. Women's organizations, however, did not participate in these last minute negotiations and were very dissatisfied with the "override" clause that could easily be used to undermine gender equality rights.

Over the weekend of November 7, 1981, government drafters began the task of developing a revised Resolution, including revisions to the Charter of Rights based on Trudeau's reluctant deal with all the premiers except Lévesque who could not and would not sign on.<sup>124</sup> The most important aspect of the amendments to the Resolution for the women's organizations was the addition of the "notwithstanding" clause, one that would

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<sup>123</sup> The Kitchen Deal included an amending formula advanced by the premiers along with changes made to the Charter. The amendments to the Charter were: 1) an affirmative action rider to mobility rights (done so that above average unemployment provinces could protect jobs from out-of-province job-seekers); 2) section 33 was added as a "notwithstanding"/ "override" clause to allow provinces ability to violate certain Charter rights. Restrictions to this override clause were that it could not be used against democratic rights and that it expired after five years unless re-enacted by the legislature. For more see, Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 120-121.

<sup>124</sup> This final draft incorporated a change to the amending formula to better accommodate Quebec and two amendments to the Charter. The first was that section 28, in addition to section 15, would fall under the authority of section 33; and constitutional recognition of Aboriginal rights was deleted from the Charter. For more see, *Ibid.*, 122.

and could jeopardize all their hard won gains with sections 15 and 28. Underlying their concern with section 33, the notwithstanding clause, was that it allowed legislatures and Parliament to pass laws that contravened Charter rights simply by prefacing the new law with an opting out phrase.<sup>125</sup> As agreed upon, equality rights were included in the list of rights that could be overridden. On November 9, 1981 when asked if section 28 would also be subject to the override, Prime Minister Trudeau could not answer, but four days later he affirmed that it would.<sup>126</sup>

Feminists and women across the country were propelled into action. As articulated by NAC, “this weakening of clause 28 means that Canadian laws do not have to apply equally to men and women. By this action our leaders have told the Canadian people that equality is not a rock-bottom principle in this society.”<sup>127</sup> Already sceptical of the state and aware that neither it nor the judicial system had sided with women in the past, women justifiably feared that all they had thus far achieved would fall victim to the notwithstanding clause. In order to ensure that this did not happen, women were forced back into the lobbying arena.

This time their full attention was directed at the premiers as consent from them and their cabinets was now needed to secure women’s rights. When Trudeau announced that section 28 would fall under the override he did so with the understanding that the clause was recognized as part of equality rights. Arguing that the original accord reached by the premiers and prime minister only provided for the override to effect

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<sup>125</sup> Mary Dawson, “The Making of Section 15 of the Charter,” *The Journal of Law and Equality*, vol. 5, no. 1 (2006), 34.

<sup>126</sup> Canada. Parliament. House of Commons. *Debates*, 32<sup>nd</sup> Parliament, 1<sup>st</sup> Session, vol. 11, November 9, 1981 (Hull, QC: Queen’s Printer of Canada, 1981), 12635.

<sup>127</sup> NAC, “The Constitution in Crisis: Equality Disappears Step by Step!!!,” *NAC Memo*, November, 1981, (683.15; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections), 1.

fundamental freedoms, legal rights, and equality rights, women demanded that since section 28 fell outside the titled heading “Equality Rights” that it be free from infringement.<sup>128</sup> Justifying this statement was that fact that although section 28 was associated with equality rights it fell under the “General” section of the Charter and thus should remain outside of the override application. Using this argument and stressing to the public that these actions were a blatant and targeted attack on women’s rights, a final wave of lobbying began.

Resorting to the tactics that had been effective in the past, women bombarded provincial and federal governments were bombarded with visits, phone calls, telegrams, and letters. Women’s organizations stressed at every opportunity that section 28 should remain outside the application of the override. As many of the scholars that discuss this event have noted, this last phase of negotiations differed greatly from the ones that preceded it.<sup>129</sup> Reaching far beyond the active members of the movement, women from across the country responded with immediate action. Furthermore, more radical pressure tactics were utilized from within the movement directly activating personal and influential networks.

In a telegram sent to Judy Erola, the new Minister Responsible for the Status of Women, president of NAC Jean Wood petitioned her to help women “fight this injustice.”<sup>130</sup> Erola provided assistance, opening the Council’s resources and telephone

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<sup>128</sup> Ibid., 2.

<sup>129</sup> Burt, “The Charter of Rights and the Ad Hoc Lobby: The Limits of Success,” 78; Billings, “Introduction,” in Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 18; and, Gotell, *The Canadian Women’s Movement, Equality Rights and the Charter*, 17.

<sup>130</sup> NAC. Telegram from Jean Wood, President NAC, to Judy Erola, Minister Responsible for the Status of Women, November 14, 1981 (699.11; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

lines to the Ad Hoc Committee.<sup>131</sup> In a lengthy telegram sent to all premiers, attorneys-general, and the prime minister, women explained their position as reflected by the Ad Hoc resolutions and demanded a response.<sup>132</sup> When the women did not hear from the premiers, a more exhausted and forceful form of pressure tactics was initiated.<sup>133</sup> Launching a last resort public campaign, women's groups worked to throw everything into acquiring provincial support.

Effective provincial lobbying had long been an element of the women's movement, as early gains in human rights legislation had been specifically directed at provincial legislations. However, taken aback by the intensified strength of a synchronized and determined national effort, premiers were quick to acquiesce to women's demands for substantive equality. The fight was over in little more than a week, with the final stage of negotiations characterized by an intensely charged atmosphere. A whole new range of variables had increased the difficulty of women's task. As Kome summarizes

Manitoba was in the middle of a general election; PEI was in the midst of changing premiers as the Conservative leadership changed; Nova Scotia's John Buchanan was in New York City; Saskatchewan's premier Alan Blakeney refused to "re-open" the accord unless Native rights were reinstated; and BC's Bill Bennett refused to reinstate the Native people's clause.<sup>134</sup>

Thus, women were forced to use any and all available avenues to ensure that their demands did not go unheard.

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<sup>131</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 87.

<sup>132</sup> Ad Hoc Committee of Canadian Women. Telegram sent to all premiers, attorneys-general, and the prime minister from Ad Hoc Committee, November 15, 1981 (699.11; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>133</sup> Ad Hoc Committee of Canadian Women. *Press Release – Women Demand to know Which Premiers are Denying Us Equality*, Ottawa, November 17, 1981 (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 1.

<sup>134</sup> Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 89.

Alberta, Ontario and New Brunswick quickly agreed to reinstate the superiority of section 28 as their premiers, Lougheed, Davis, and Hatfield, were besieged by Senators, MPs, powerful politicians, and influential women's activists. By November 18, 1981 all but the Nova Scotia and Saskatchewan premiers had acquiesced to the pressure of the women's movement. While late to consent, after being personally contacted by close family friend Lynn McDonald, Nova Scotia premier John Buchanan "saw her point immediately," and the province acquiesced.<sup>135</sup> Even the Quebec premier René Lévesque felt compelled by Québécois women's organization to make a public announcement that Quebec would have never consented to an override on section 28.<sup>136</sup> The agreement of these premiers, especially Quebec's premier, demonstrated the full strength the women's movement had at this time. While obviously not in accordance with unilateral patriation or entrenchment, agreement by groups supporting these positions of the superior status for section 28 suggests that the women's movement was not an entity that could be easily ignored. This was a testament to its political strength and tenacity.

Saskatchewan premier Alan Blakeney was the last holdout. The argument for his position was that guarantees for sexual equality would actually hurt women by hampering affirmative action programs. As Judy Erola elaborated on in a CBO radio interview on November 20, 1981, "he apparently has some sort of legal problem that this particular section 28, without override, will prevent affirmative action programs in

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<sup>135</sup> Ibid., 93.

<sup>136</sup> Ibid., 91.

Saskatchewan.”<sup>137</sup> In response, women argued that allowing section 33 to override 28 would not solve Mr. Blakeney’s concerns. A letter to Mr. Blakeney from the Ad Hoc Committee stated that,

Section 28 is not a guarantee of equal treatment, but rather ensures that all rights in the Charter are guaranteed equally to men and women. Section 28 does not preclude effective operation of 15(2). As we have been suggesting for the last year, the proper resolution to your concern is simply amending 15(2) by deleting reference to “individuals” and thereby ensuring that affirmative action programs for members of disadvantaged groups, such as women, are upheld.<sup>138</sup>

A telegram dated November 18, 1981 from Roy Romanow, Minister of Intergovernmental Affairs for Saskatchewan, to the Minister of Justice, stated that if the accord was to be re-opened and provisions for section 28 were made, then consent to include section 34 for Native Peoples of Canada should also be made.<sup>139</sup> This opinion had been previously expressed, but given BC premier Bill Bennett’s opposition to Native rights it had not been considered. However, on Friday November 20, 1981 the House of Commons passed a unanimous Resolution stating that Aboriginal rights, section 35, should be restored in the constitution and that section 28 would remain outside the reach of the override clause.<sup>140</sup> Thus, on Tuesday November 24, 1981 the Canadian Charter of Rights and Freedoms was passed. At long last, the Women’s

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<sup>137</sup> CBO 920, “Interview with Mrs. Billings and Hon. Judy Erola,” *CBO Morning*, November 20, 1981 – 8:22 AM. (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 3.

<sup>138</sup> Ad Hoc Committee of Canadian Women. Letter to Alan Blakeney, premier of Saskatchewan from Ad Hoc Committee, no date (unprocessed material, Marilou McPhedran Fond; York University, Archives and Special Collections), 2

<sup>139</sup> Telegram from Roy Romanow, Minister of Intergovernmental Affairs, Saskatchewan to Jean Chrétien, Minister of Justice, November 18, 1981 (899.10; X-10-24 N.A.C. Fond; University of Ottawa, Archives and Special Collections).

<sup>140</sup> Canada. Parliament. House of Commons. *Debates*, 32<sup>nd</sup> Parliament, 1<sup>st</sup> Session, vol. 12, November 20, 1981 (Hull, QC: Queen’s Printer of Canada, 1981), 13045-13046; and, Canada. Parliament. House of Commons. *Debates*, 32<sup>nd</sup> Parliament, 1<sup>st</sup> Session, vol. 12, November 24, 1981 (Hull, QC: Queen’s Printer of Canada, 1981), 13196.

organizations, presenting hundreds of thousands of Canadian women, had won the right to substantive equality through the inclusion of sections 15 and 28 in a constitutionally enshrined Charter of Rights and Freedoms.

These final constitutional negotiations mark the last of a series of critical moments in the women's organizations participation in the prolonged and often bitter process. Women deeply involved in feminist organizations, activist groups, and the legal profession had worked directly with government officials and politicians to ensure that a purpose statement was secured. Their expertise on the law, constitutional practices, and traditional legal conventions allowed them to formulate a section that they hoped would stand up legally to any possible threat. However, it must not be forgotten or minimized that in order to ensure that their demands were heard and some of them accepted, they had to rely upon the mass mobilization and broad support of Canadian women and men from all social classes, ethno-cultural communities, and in all regions of Canada.

Women from all across Canada participated in the necessary lobbying. Those who had been critical of the national organizations such as unionists, lesbian-feminists, and those segregated by regional differences all participated in this final stage. Women politicians, senators, and MPs broke party rank and acted first as women. Even the Parti Québécois government, which opposed the entire constitutional process and was ultimately the only province to not sign the package, agreed in principle to the superior status of section 28. Afraid to lose the support of the Québécois women's organizations, the Parti Québécois government and all provincial governments were subject to the demands of Canadian women. This moment, more than anything else, was an

illustration of the unity behind the kind of equality that women were trying to enshrine.

This moment, more so than any other, reflected the strength and perseverance of the pan-Canadian women's movement. This moment, more so than any other, demonstrated women in their finest hour.

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## CONCLUSION

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In the short span of fourteen months the Canadian women's movement and Canadian women transformed the way Canadians would understand equality as expressed through the *Canadian Charter of Rights and Freedoms*. Unwilling to accept the existing formal definition of legal equality rights, women fought to introduce a new concept of equality – one based on the principles of equality of opportunity and equality of results – that went beyond a simple application of the law and addressed the substance of the law and its outcomes. Canadian women were not simply passive commentators. They played both an intellectual and political role in achieving substantive equality rights. The role women played during the constitutional negotiations of 1980-1981 is now recognized as one of the hallmark accomplishments of second-wave Canadian feminism. In discussing the intellectual and structural strength of the women's movement in Canada, very little of existing literature combines both these characteristics, or effectively links them to the success of women's Charter entrenchment efforts.

This thesis demonstrates three key points: first, that women were aware of and influenced by legal interpretation and application of equality rights in Canadian, American, and International contexts; second, that Canadian women's conception of equality was shaped by various streams of feminist ideology, which when combined with increasing legal awareness formulated the notion of substantive equality; third, that the idea of substantive equality was then transplanted into the Charter through the complex and dynamic structure of the women's movement. While explaining these

points, this thesis attempts to demonstrate that women were both intellectual and physical actors during the constitutional negotiations and explore their role in the formulation and articulation of the Charter of Rights and Freedoms. Critically, it is this theory and action in conjunction with one another that explain the success of women during these mega-constitutional negotiations. Core ideas were articulated to decision makers and to elements of the movement, while the structural organization of the Canadian women's movement was used to facilitate an increasingly effective lobbying network.

To guarantee rights and freedoms that went beyond formal liberties and that affected and assisted in day-to-day living, the women involved knew that real equality needed to be more substantial in relation to previous interpretations. They understood that real equality required meaningful access to rights that could not be rejected on the grounds of sex discrimination. Part of this belief stemmed from international statutes that prescribed equality rights to include both political and civil liberties as well as economic, cultural and social rights. The 1960 *Canadian Bill of Rights* demonstrates that this expansion of rights was not initially adopted by Canada. From the subsequent cases that referenced this Bill and came before the Supreme Court, Canadian women also realized that it did not provide any real measure of gender equality. Limited in both wording and jurisdictional application, this Bill only offered a very weak formal application of equality. Moreover, this scaled down version of equality rights provided the courts with the legitimacy to consistently rule in favour of acts that discriminated on the basis of sex. Provincial human rights codes and eventually a federal Human Rights Act instead became the legal mechanisms for Canadian women to address gender

discrimination. The legislated codes of rights that existed within each province were not standardized in a way that allowed for equal access to equality rights. While these codes had Human Rights Commissions to enforce them, these were not very effective in ensuring that systemic discrimination was eliminated.

The Canadian systems of law and governance were neither able nor willing to alleviate the systemic inequalities women faced and as a result, women were forced to seek out and formulate their own alternatives to equality. Influenced by the politics of federalism, it became apparent to feminist lawyers and activists that the realization of substantive equality would depend on how effectively women could manoeuvre themselves and could work to situate substantive equality within the Canadian state and its myriad of institutions. Mobilization and extensive promotion of substantive equality became trademarks of actions taken by the women's movement during the 1980-1981 constitutional negotiations. The major court cases that dealt very poorly with sex discrimination were used throughout the constitutional campaign to attract women to the movement, to vamp up media attention, to persuade politicians, and, as evidence, to convince legal experts that formal equality would not be enough for Canadian women. Recognition by women that the means through which change was to be best achieved was the law became a key underpinning of the movement. While challenged by having to work within a framework that brought with it a list of conflicting priorities, the end result was that Canadian women were able to effectively embed substantive equality into the fabric of the law and the Canadian state.

The Canadian women's movement was generated from the ideological streams that emerged with the birth of second-wave feminism. Marrying the two principles of

equality, equality of opportunity and equality of results, the idea of substantive equality was created through a shared effort linking ideas from multiple ideologies. By combining aspects of liberal, socialist, and radical feminism, the Canadian women's movement succeeded in creating a formula of equality that all women across the country would be able to support. This unity in the face of diverse ideology demonstrates the pervasive value women placed on equal treatment and represented one example of the effect that the concept of substantive equality had on the dynamics of priority. Acting as a galvanizing force, the fight for substantive equality brought thousands of otherwise unconnected women out in protest. The articulation of substantive equality, as written into section 15 and 28, not only reflects the values of second-wave feminism but it also illustrates how and why women acted and became constitutional framers during the negotiations.

The process through which Canadian women were able to effectively and successfully participate in an intellectual as well as political capacity becomes critical to understanding the roots and articulation of substantive equality. This accomplishment has been well treated in existing literature. As discussed, some authors have placed emphasis on the 'elitist' and 'closed' aspects of the Canadian women's movement, which was able to gain access to the executive negotiations and thereby impose their position.<sup>1</sup> A clear example of this is the phone call made to Nova Scotia premier by Lynn McDonald in the final phase of events. Others have centered on the grass root

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<sup>1</sup> Sherene Razack, *Canadian Feminism and the Law, The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto, ON: Second Story Press, 1991), Naomi Black, "Ripples in Second Wave: Comparing the Contemporary Women's Movement in Canada and the United States," in Constance Backhouse & David Flaherty, eds. *Challenging Times: The Women's Movement in Canada and the United States* (Montreal & Kingston: McGill-Queen's University Press, 1992); and, Sandra Burt, "The Charter of Rights and the Ad Hoc Lobby: The Limits of Success," *Atlantis*, vol. 14, no. 1. (Fall 1988).

initiatives of the campaign underscoring the strength of mass mobilization.<sup>2</sup> The organization of the Conference on Women in the Constitution is one of the many examples touched on. In both interpretations, the focus is on the structure of the movement and to this end this study has attempted to amalgamate these viewpoints.

It was the structure of the Canadian women's movement that allowed for and benefited from the tandem efforts of a broad base support structure in conjunction with the efforts of critical individuals who had both the intellect and the political agency to bring women's position to the male dominated negotiating table. Various outreach initiatives were undertaken to build a coalition of women. Through these efforts along with research, education, and media attention feminist organizations made constitutional politics accessible to the masses. They encouraged women to familiarize themselves with the issues at stake and to become involved in the constitutional process. These efforts brought "everyday" women into the folds of the movement. Coupled with the contribution of strategic female lawyer activists and political figures, Canadian women were able to bridge themselves into totally new spheres, thereby fostering a deeper view of participatory governance and altering political and legal discourses in Canada.

It must also be noted that, despite all of these efforts, not all members of the Canadian women's movement were heard equally. A more heterogeneous collection of viewpoints consisting of Aboriginal, francophone and other marginalized women's groups had difficulty in participating in the process to the same extent as English-speaking women's groups. This was not to say that their position on equality was

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<sup>2</sup> Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto, ON: Women's Educational Press, 1983); and, Lise Gotell, *The Canadian Women's Movement, Equality Rights and the Charter* (Ottawa, ON: Canadian Research Institute for the Advancement of Women, 1990).

fundamentally different from that being advocated by women's national groups, rather than their outside priorities did not allow them to integrate or contribute to the movement in the same degree. This is called the dynamics of priority and it is critical to understanding the women's movement as it explains the reconciliation of many of the divisions within the Canadian women's movement. It is also important in explaining how organizations within the women's movement were able to exist independently while at the same time linked together by a mutual conception of substantive equality.

Beyond ideology and structure, Canadian women also learned from their counterparts to the south. Parallel to the women's movement in Canada, American women also engaged in their own challenge for a constitutional amendment that would more adequately address the equality rights of women. The American experience showed the limitations that intermediate scrutiny versus strict scrutiny imposed on gender equality cases. American feminist literature introduced Canadian women to a feminist theory that emphasized equality of difference and encouraged access to the political process. Significantly influencing both feminist and legal aspects of equality, these ideas helped Canadian women shape their own response to constitutional gender equality. Furthermore, the American experience influenced the structure and organizational strategy of the Canadian women's movement. Learning from the failure of the ERA, women inside the Canadian women's movement recognized that both avenues to federal and provincial bodies would be critical. The movement in Canada was able to retain its federal structure and was capable of launching a provincial lobby while still exerting considerable pressure on the federal government. Thus, the impact that the American experience has on shaping the ideas, positions, and tactics of the

Canadian women's movement was relevant as it helped to explain how and from where Canadian women were able to formulate new conceptions of equality that would then be embedded into the Charter.

As rumours of a Charter began to surface, women began to organize. Women understood that any negotiations would be more than just lobbying and more than one single issue was at stake. Grounded in the framework of the law, women set out in 1980 to articulate a kind of equality that would reach them in their day-to-day lives. However, even with united organizations, powerful individual allies, and an understanding of their priorities, the movement's efforts were not free of obstacles, conflict, and controversy. Women's movement organizations had to scramble quickly to make credible presentations to the government's Joint Committee, to find a solution to the government's decision to cancel the February 1981 Conference, and to react to a last minute decision to allow section 33 to override both sections 15 and 28. Faced with all of these challenges women had to continuously remobilize into action and became bigger and more effective at each instance.

The first phase of negotiations began with the Special Joint Committee, which allowed a few of the major feminist organizations to present their arguments regarding the fundamental weaknesses the Charter presented for gender equality. Well researched and consistent in their recommendations, women were able to secure wording for section 15 that they found acceptable. Although not identical to that made in their proposals, this new articulation of section 15 reflected the underlying principle of "equality of opportunity" and "equality of result" that women believed would provide them far more substantive rights. Not all of their amendments were included in the revised draft and an

ambivalent section 1 remained that failed to define the purpose of the Charter and thereby potentially diminishing the scope and power of section 15. Threatened by the paucity without a purpose clause and disturbed by the cancellation of a conference for women and the constitution, women were forced to undertake forceful alternative lobbying measures. This led to the challenges of the Axworthy Affair and the successes of the Ad Hoc Conference.

The aftermath of the Axworthy Affair and the attention brought to the movement by the Ad Hoc Conference, inextricably shifted the participation of the women's movement in the constitutional negotiations. Pressured to locate other methods of involving themselves in the government discussions, representatives of women's organizations became increasingly aware that conventional approaches alone could not be relied upon. As such, media, networking, along with any and all available resources were used to build broad base attention and support for inclusion of women in the constitutional process. The response exceeded all expectations. The women's lobby following the February Ad hoc conference has been recognized as one of the largest government lobbies in Canadian history. This intense effort resulted in direct and private discussions with the Department of Justice officials that brought about the second equality clause, section 28. Addressing only discrimination on the basis of sex and embedding the title of "person" within the Charter, section 28 secured the status of gender equality by locking recognition of substantive equality for women into the Canadian constitution.

Contested for a third time by the premiers, women's organizations were forced back into battle when section 28 was threatened to fall under the application of section

33. This change would have allowed the federal and provincial governments to override both sections 15 and 28 voiding all recognition of gender equality at their discretion. This last stage required utilization of every element, aspect, tool, and type of member at the disposal of the women's movement. Not only mobilizing the grass root and local centers to bombard provincial governments, influential female individuals pulled out all stops as personal phone calls and letters were sent out petitioning for the support of their personal contacts. In these last heady weeks the resolve of women's organizations was tested considerably. Women pursued several avenues to ensure that they would ultimately achieve their goal.

These events are a testament to the structural and intellectual strength of the Canadian women's movement. When looking back, the relevance of these accomplishments has also spilt over into broader discussions of constitutional negotiations. In terms of general impacts, Knopff and Morton conclude, "the Charter of Rights and Freedoms truly transformed the Canadian political landscape since its enactment in 1982."<sup>3</sup> Alan Cairns describes how in a few short years, "the Charter generated a vast, qualitatively impressive discourse organized around 'rights'".<sup>4</sup> Elevating citizens' rights as the focus of constitutional discussion, the Charter brought about an explosion of attention to rights in the 1980s and 1990s. This change can, in part, be explained by the public consultation that Ottawa initiated in the early stages of the negotiations. In terms of equality rights, this constitution was significantly influenced by the Canadian women's movement. Women not only changed the legal

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<sup>3</sup> Rainer Knopff & F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992), 19-34.

<sup>4</sup> Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reforms* (Montreal & Kingston, ON/QC: McGill-Queen's University Press, 1992), 7.

articulation of equality rights but transformed the entire language that went into the debates on equality rights. Concerned with power and access to the process, women demanded that their perspective be heard. Influencing the future strategies and ideas of women, the articulation of substantive equality impacted not only their approach but also how they would be treated.

In exploring the aftermath of the Charter, it is apparent that while the language to interpret substantive equality was in place it was not always adopted. In 1982 when the Charter was ratified, it was unclear how people, the government, and the courts would react to its entrenchment. The equality rights guarantees of the Canadian Charter far surpassed those included in the 1960 Bill of Rights. The debates generated by their formulation became the foundational understanding of how equality should be defined. Just as the law was a critical factor in articulating substantive equality, the reaction of the courts and its interpretation became even more important. To the Canadian public, the Charter had come to symbolize their part of the Constitution and Canadians would later, to the surprise of its framers, vehemently stand by the Charter and reject all attempts to change or override its provisions. Shifting the way government and politicians viewed women's issues, the Charter, and more so the strength of the movement which brought about substantive equality, led those in the political sphere to rethink their outmoded conceptions of women and their rights.

In addition to shifting the consciousness surrounding equality, the women's movement, forged a new path to social change. As Knopff and Morton recognize, the Charter and its legislative powers changed the strategy whereby women gained a new

access point in the decision-making process.<sup>5</sup> Women were now able to utilize the courts as a vehicle to meet policy objectives and target other powerful institutions. As exemplified in the many Commissions focused on rights that followed the enactment of the Charter, equal rights awareness reached a high.<sup>6</sup> Moreover, in 1985 as the three year moratorium on when the Charter would come into effect was reached, the Legal Education and Action Fund (LEAF) was established, “to assist women with important test cases and to ensure that equality rights litigation for women was undertaken in a planned, responsible, and expert manner.”<sup>7</sup> Building on the achievements of the Charter, women had prepared for the end of the moratorium.

In the interim, LEAF and organizations such as NAWL established both a structurally and intellectually sound approach. Epp notes that equality rights litigation increased after the Charter, and although women and women’s rights claims remained underrepresented, initial rulings provided women with encouragement.<sup>8</sup> Taking what they had learned during Charter negotiations and applying it to future legal mobilization, women continued to demand participation in the decision-making process, including the amending of discriminatory legislation and the preparation of new legislation.

One of the greatest equality rights litigation successes that LEAF and Canadian women’s organizations experienced was the ruling on *Andrews v. Law Society of British Columbia*. In his decision, Justice McIntyre made it clear that section 15 guarantee of

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<sup>5</sup> Rainer Knopff & F.L. Morton, *Charter Politics* (Scarborough, ON: Nelson Canada, 1992), 26.

<sup>6</sup> The Special Committee on the Disabled and the Handicapped, 1981; The Parliamentary Special Committee on Participation of Visible Minorities in Canadian Society, 1982; The Commission on Equality in Employment (chaired by Justice Rosalie Abella), 1984.

<sup>7</sup> Elizabeth M. Atcheson, Mary Eberts, Beth Symes, with Jennifer Stoddart, *Women and Legal Action: Precedents, Resources and Strategies for the Future* (Ottawa, ON: CACSW, 1984), 163.

<sup>8</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, IL: The University of Chicago Press, 1998), 193.

equality encompass not simply formal guidelines for the administration and application of the law but also a set of substantial values to which the law must conform.<sup>9</sup> Giving hope that systemic change was on the horizon, the cases that followed, namely *Eldridge*, and *Vriend*, demonstrated that the Court recognized the need for positive measures to ensure substantive equality.<sup>10</sup> As intended, the Charter was used as a substantive remedy against entrenched systemic discrimination. However, as prominent feminist lawyers such as Sheila McIntyre and Mary Eberts argue, there has been a strong retreat from the initial rulings made after the Charter. Subsequent decisions resemble to some a “pre-Andrews formalism, an abstraction of Bliss, and a retreat to a deferential posture reminiscent of the Canadian Bill of Rights case law and characteristic of the U.S. 14<sup>th</sup> Amendment jurisprudence.”<sup>11</sup> In the *Andrews* case, the court had soundly rejected exclusive reliance on formal equality and the similarly situated test, the Courts did not provide a clear alternative approach to section 15.<sup>12</sup> Therefore, although the Supreme Court of Canada’s early decisions indicated that the court had an understanding of the purpose of section 15, these subsequent rulings point at a troubling shift

In an attempt to resolve its differences, the Supreme Court of Canada in the 1999 decision in *Law v. Canada*, held that discrimination was decided on whether the

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<sup>9</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>10</sup> *Eldridge v. B.C. (Attorney-General)*, 1997 S.C.J. 86, [1997] 3, S.C.R. 624; and, *Vriend v. Alberta*, [1998] S.C.J. No. 29 [1998] 1 S.C.R. 493. In both cases the Court unanimously rejected a Court of Appeal majority dismissal of the section 15 claim by formal equality logic, noted rather for the positive remedy ordered. For more details see, Bruce Porter, “Expectations of Equality,” in Sheila McIntyre and Sanda Rodgers, eds. *Diminishing return : inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Butterworths, 2006), 9.

<sup>11</sup> Sheila McIntyre, “Deference and Dominance: Equality Without Substance,” in McIntyre and Rodgers, eds. *Diminishing returns: inequality and the Canadian Charter of Rights and Freedoms*, 113; and, Mary Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here,” in McIntyre and Rodgers, eds. *Diminishing returns: inequality and the Canadian Charter of Rights and Freedoms*, 299.

<sup>12</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

legislative distinction violated the “essential human dignity” of the Charter claimant.<sup>13</sup> Substituting a “contextual factors” approach in lieu of the “similarly situated test”, an open-ended list of factors including whether there was a pre-existing disadvantage and whether the government attempted to ameliorate that disadvantage is applied to determine if discrimination occurred. However, as McIntyre identifies,

when the Courts injected reasonableness considerations into section 15 determination, it shifted, heightened, and confused the evidentiary onus on equality claimants, effectively freeing governments from justifying laws that distinguish on suspect grounds with inequality reinforcing effects.<sup>14</sup>

Today, there is little doubt amongst the champions of sections 15 and 28 that the Charter has fallen well short of its original promise. Although beyond the scope of this project, *Law* and the more recent women’s cases that have failed are important to this conclusion. They highlight the magnitude of what women faced when working to entrench substantive equality rights. The difficulty in achieving substantive equality is that not only does the struggle involve having the correct equality language implemented but it also needs to be applied. As Mary Eberts argues, it is necessary to return to the purpose of this section in order to rehabilitate section 15 as a substantive remedy for systemic inequality.<sup>15</sup>

Currently, as substantive equality struggles to remain the guiding principle of sections 15 and 28, it remains vital to remember from where it originated along with the

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<sup>13</sup> *Law v. Canada* (Minister of Employment and Immigration) [1999] S.C.J. No. 12 [1999] 1 S.C.R. 497. sub para. 88.

<sup>14</sup> McIntyre, “Deference and Dominance: Equality Without Substance,” in McIntyre and Rodgers, eds. *Diminishing returns: inequality and the Canadian Charter of Rights and Freedoms*, 113.

<sup>15</sup> Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here,” in McIntyre and Rodgers, eds. *Diminishing returns: inequality and the Canadian Charter of Rights and Freedoms*, 410.

means through which it was enshrined. Regardless of the current state of the debate, women through both their intellectual and political agency changed not only the language through which equality rights were defined in the Charter, but more importantly, the entire discourse on which they are founded. By changing the nature of the debate and gaining access to the process, women were able to transform their ideas into action. Reflecting the hopes and dreams of those involved in framing substantive equality, the formulation of sections 15 and 28 and the role that women played throughout the mega-constitutional debates deserve to be recognized.

So why was this Canadian women's finest hour? Made up of decades of the efforts by individuals, women gained access to positions of power such as MPs in government, professors, or editors of magazines and to previously limited professions such as law. This access provided keys to knowledge, and this knowledge and experience were then shared with other women. Common experiences resulted in collections of women forming organizations. Contributing in some fashion to the conception of substantive equality differing streams of feminist ideology developed out of these organizations that lent themselves to one overriding idea. This conception of substantive equality was strong enough to supersede other potential distracting priorities. Alliances led to shared lobbying and resources. Increased lobbying and resources expanded women's access to influential decision makers. These successes guided increased members of women into the fold of the movement behind one universal idea. The totality of this progression, led to the previously seen as impossible accomplishment of entrenchment of the concept of substantive equality in the Charter - leading to a moment that can only be described as women's finest hour.

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## APPENDICIES

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### Appendix I

#### Constitution Act, 1982

##### *Charter of Rights and Freedoms*

##### Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

##### Equality Rights

- 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- 15(2). Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

##### General Rights

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
- 33(1). Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- 33(2). An Act or a provision of an Act in respect of which is a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- 33(3). A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- 33(4). Parliament or a legislature of a province may re-enact a declaration made under subsection (1).
- 33(5). Subsection (3) applies in respect of a re-enactment made under subsection (4).

## Appendix II

### Canadian Bill of Rights, 1960

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
  - a. The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of the law;
  - b. The right of the individual to equality before the law and in the protection of the law;
  - c. Freedom of religion;
  - d. Freedom of speech;
  - e. Freedom of assembly and association; and
  - f. Freedom of press.
2. Every law of Canada, shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
  - a. Authorize or effect the arbitrary detention, imprisonment or exile of any person;
  - b. Impose or authorize the imposition of cruel and unusual treatment or punishment;
  - c. Deprive a person who has been arrested or detained
    - i. Of the right to be informed promptly of the reason for his arrest or detention,
    - ii. Of the right to retain and instruct counsel without delay, or
    - iii. Of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;
  - d. Authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitutional safeguards;
  - e. Deprive a person of the right to a fair hearing accordance with the principles of fundamental justice for the determination of his rights and obligations;
  - f. Deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or
  - g. Deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

### Appendix III

#### The Universal Declaration of Human Rights, 1948

1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
2. Everyone is entitled to the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.  
  
Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory in which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
3. Everyone has the right to life, liberty and security of person.
4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
6. Everyone has the right to recognition everywhere as a person before the law.
7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
9. No one shall be subjected to arbitrary arrest, detention or exile.
10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
11. Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international

law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

13. Everyone has the right to freedom of movement and residence within the borders of each State.

Everyone has the right to leave any country, including his own, and to return to his country.

14. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

15. Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

16. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

17. Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.

18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

20. Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.

21. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. Everyone has the right to equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

22. Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

23. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family the existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

24. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

25. Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

26. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

Parents have a prior right to choose the kind of education that shall be given to their children.

27. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement of its benefits.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

28. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.
29. Everyone has duties to the community in which alone the free and full development of his personality is possible

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

30. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

## Appendix IV

### **The United States Equal Rights Amendment, 1973**

1. Equality Rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
2. The Congress shall have the power to enforce, by appropriate legislation, the provision of this article.
3. This amendment shall take effect two years after the date of ratification.

## Appendix V

### Proposed Resolutions for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada, October 2, 1980

#### Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and the freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

#### Non-discrimination Rights

- 15(1). Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age, or sex.
- 15(2). This section does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

#### Application of the Charter

28. Nothing in this Charter extends the legislative powers of any body or authority.
- 29(1). This Charter applies
  - a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
  - b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.
- 29(2). Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.

## Appendix VI

### **Proposed Resolutions for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, February 13, 1981**

#### Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and the freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

#### Equality Rights

- 15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, or age.
- 15(2). Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age.

#### Application of the Charter

28. Nothing in this Charter extends the legislative powers of any body or authority.
- 29(1). This Charter applies
  - a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
  - b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.
- 29(2). Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.

## Appendix VII

### Resolutions Adopted at the Conference on Canadian Women and the Constitution, February 14<sup>th</sup> and 15<sup>th</sup>, 1981

#### I. Resolutions Passed on the Charter of Rights and Freedoms

Be it resolved:

that this Conference endorse in principle the concept of an entrenched Charter of Rights as per the recommendations passed February 14, 1981 and that unless the Charter reflects the amendments made here today, that it not be included in the submission to the British Government in order to provide time to incorporate these amendments,

that failing the full adoption of our amendments, incorporation of a Charter of Rights be accomplished by a constituent assembly 50% women.

that the women of the Conference support bringing home the Constitution with an amending formula

that the Women's Conference on the Constitution insist on a full and fair debate in Parliament on the Constitutional package before it, and oppose any closure on that debate

that this meeting approves the principle of equitable representation of women throughout the political system. In the case of appointments to the Upper House, Boards, Commission and the Bench, women should have equal access to appointments and positions and hold at least half the positions at all levels

List of Required Amendments to the Charter as Agreed by the Ad-Hoc Conference:

Clause 1. a statement of purpose should be added providing that the rights and freedoms under the Charter are guaranteed equally to men and women with no limitations

any limitation to clause (1) should follow the format and content of article 4 of the U.N. International Covenant on Civil and Political Rights

the word "person" should be used throughout the Charter, in lieu of any other word denoting human being.

Clause 7. that clause 7 be amended to include the right to reproductive freedom  
 that clause 7 be amended to include the right to equality of economic opportunity

Clause 15. that the list of prohibited grounds of discrimination in clause 15(1) be amended to include: (1) marital status (2) sexual orientation (3) political belief

that clause 15 contain a two-tiered test recognizing that there shall be no discrimination on the basis of sex, race, religion, colour, national or ethnic origin, mental or physical disability, age, marital status, sexual orientation, and political belief, and that there be a compelling reason for any distinction on the basis of sex, race, religion, colour, or national or ethnic origin, sexual orientation, or political belief

affirmative action programs under clause 15(2) should apply only to disadvantaged groups as listed under clause 15(1) and not to individuals.

Clause 27. clause 26 on multiculturalism be dealt with in the preamble

Clause 31. the three-year moratorium for the implementation of clause 15 be deleted from the Charter

## II. Resolution Passed on the Constitution

Be It Resolved:

That the women of this conference support bringing home the Constitution

## III. Process of Creating the Constitution

Whereas the process of creating our Constitution has been done in great haste and does not adequately reflect the needs of women

Be It Resolved

That the Women's Conference on the Constitution insist on a full and fair debate in Parliament on the Constitutional package before it, and oppose any closure on that debate.

## Appendix VIII

### Women on the Constitution – Conference Endorsements

Alberta Status of Women Action Committee  
 Association des fermières de l'Ontario  
 B.C. Association of University and College Employees  
 Canadian Abortion Rights Action League  
 Canadian Association for Adult Education  
 Canadian Association of Canadian Unions  
 Canadian Congress for Learning Opportunities for Women  
 Canadian Research Institute for the Advancement  
 Canadian Textile and Chemical Workers Union  
 Canadian Union of Educational Workers  
 Clark, Eileen, - President, Canadian Federation of University Women  
 Federation of Business and Profession Women's Association  
 Fédération des femmes Canadiennes françaises  
 Federation of Women Teacher's Association of Ontario  
 Feminist Party of Canada  
 Gradenwitz Management Services  
 Hospitality Toronto (Member of Canadian Association of Women Executives)  
 International Women's Day Committee, Toronto  
 Lyon Association Inc.  
 National Action Committee on the Status of Women  
 New Brunswick Advisory Council on the Status of Women  
 Newfoundland-Labrador Advisory Council on the Status of Women  
 Newfoundland Status of Women Council

North Shore Women's Centers, B.C.  
Ottawa Women's Lobby  
Peterborough Women's Committee  
Planned Parenthood Federation of Canada  
Prince Edward Island Advisory Council on the Status of Women  
Provincial Nurse Educators, Ontario  
Rape Crisis Center, Ottawa  
Rape Crisis Center, Winnipeg  
Registered Nurse's Association of Ontario  
Resource d'action et d'information pour les femmes-Québec  
Saskatchewan Action Committee on the Status of Women  
Saskatchewan Advisory Council on the Status of Women  
Seeley-Butler, Joanne  
Toronto Association of Women and the Law  
Union Culturelle des Franco-Ontariennes  
University Women's Club of North Toronto  
Vancouver Status of Women  
Voice of Women  
Women's Career Counselling  
Women's Counselling, Education and Referral Center, Toronto  
Women's Employment Counselling Service Outreach  
Women's Inter-Church Council of Canada  
Women for Political Action  
Women's Research Center, B.C.  
Women's Resource Center, Whitehorse

Women's Rights Committee of B.C., N.D.P.

Women Teacher's Association of Huron County

Women Teacher's Association of Espanola

Women Teacher's Association of Temiskaming

Women Teacher's Association of Kenora

Women's University Professors of Queen's University

YWCA, Metro Toronto

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