

The Fight for the Charter

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Au courant de l'année 1981, d'abord par le biais de l'alliance des groupes de la base comme le comité ad hoc des Femmes canadiennes pour la Constitution qui a surgi pour organiser la conférence constitutionnelle quand Doris a démissionné,— des milliers de femmes du Canada se sont mobilisées pour réagir et plus de 1 000 femmes se sont rendues sur la colline parlementaire pour demander des garanties plus sûres pour l'égalité des droits dans le brouillon de la Constitution. Quelques jeunes avocates, comme l'auteure, ont accepté d'envahir la colline alors qu'une foule de femmes en colère s'étaient ralliées aux membres du conseil consultatif nommé par le gouvernement. Elles ont confronté les politiciens sur leur terrain, jusque sur les marches de leurs édifices législatifs, exigeant une place dans l'histoire de la Constitution canadienne qui faisait la une à l'époque. Durant cet épisode, Doris a été une présence dirigeante et forte.

It's hard sometimes to remember what a raw deal Canadian women had when they turned to our legal system for justice. Constitutional equality rights for Canadian women and other fundamental rights and freedoms, were first “guaranteed” in the text of the Canadian Charter of Rights and Freedoms,¹ entrenched within the *Constitution Act, 1982* proclaimed on April 17, 1982.²

Without Doris Anderson—and

those she inspired (and sometimes infuriated, goading to action)—law students today might well be learning much the same kind of case law as I did in the 1970s.

Remember what happened to the “ranch wife” Irene Murdoch in the 1970s when she divorced her husband? Mrs. Murdoch had put part of her inheritance into farm land in her husband's name. There was evidence of violence in the marital relationship resulting in Mrs. Murdoch having her jaw broken by her husband. Nonetheless, in dismissal of her lifetime of work with her husband for more than 25 years, the Supreme Court of Canada—with only Justice Bora Laskin dissenting—awarded Irene Murdoch just two hundred dollars a month, agreeing with the trial judge that she had only done the “routine” work of “any ranch wife”—not enough to create a legal claim to the matrimonial property.³ Routine work? When asked to describe the nature of her work at trial, Mrs. Murdoch had replied “Haying, raking, swathing, moving, driving trucks and tractors and teams, quieting horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done.”

Women's fair share of matrimonial property was not a hot topic in the 1970s, except for one—*Chat-*

elaine, edited by Doris Anderson. Women—living ordinary lives in urban, rural, northern or coastal Canada—relied on Doris and her team for information and inspiration. Many identified with Irene Murdoch's humiliating loss—including my irate mother, an avid subscriber to *Chatelaine*, who called me from rural Manitoba to demand to know what her daughter, the Toronto law student, was going to do about it! Women of my mother's generation across the country mobilized to demand their property rights, resulting in a national logroll of family law reform. Thus, at the close of the 1970s, when Doris Anderson had been appointed by the federal government as President of the Canadian Advisory Council on the Status of Women (CACSW), every province and territory had passed family law amendments, which demonstrated the value of citizen engagement to many of the “average” Canadian women who had pressured their governments.

In the fall of 1980, Prime Minister Trudeau surprised many when, just after the Quebec referendum, he proposed an entrenched rights charter as part of his constitutional patriation process. In a personal interview with Doris in 2004, she recounted how she increased the CACSW budgets for research⁴ and public education because she knew



Feb. 14, 2006, 25 years later, back in Room 200 in the West Block on Parliament Hill, Forum on Women's Activism in Constitutional and Democratic Reform. Doris Anderson is in the third row, fourth person from the right; to her right, Shelagh Wilksinson. Front row, third on the left, Flora MacDonald; on her left, Mary Eberts. Photo courtesy of Marilou McPhedran.

Trudeau well enough to trust that he was not bluffing.⁵ So Doris, known and trusted for years as a journalist, built on the family law reform momentum, and travelled as CACSW President to many a local meeting to brief women's organizations on the risks to women's rights of the draft constitution that mimicked the Canadian Bill of Rights⁶—the same law under which Irene Murdoch, and every other woman who tried to use it to gain equality, had already lost. Women listened and understood that not only their futures, but also fairness to generations long after them, were at stake. In a series of rapid events in January 1981, Attorney General of Canada, Jean Chrétien, announced significant changes to section 15 of the Charter—including changing its title to “equality rights”—giving much of the credit to Doris and her legal team from CACSW for having persuaded the Special Joint Committee of the Senate and House of Commons on the Constitution of Can-

ada.⁷ Yet, barely a week later, Doris had resigned in a widely publicized protest, alleging that government insiders had cancelled the CACSW women's constitutional conference. For most of 1981—primarily through the new grassroots alliance known as the Ad Hoc Committee of Canadian Women on the Constitution that sprang up to organize a women's constitutional conference when Doris resigned—thousands of women in Canada mobilized to respond and over a thousand came to Parliament Hill to push for even stronger equality rights provisions in the draft constitution.⁸ Newly-minted women lawyers like me volunteered to lobby on Parliament Hill, while crowds of angry women joined government-appointed women's Advisory Council members in confronting political leaders at home, right up to the steps of their legislative buildings—laying claim to a place in Canadian constitutional history in headlines of the time.⁹ Throughout this period,

Doris was a strong guiding presence. Having quit CACSW, she had agreed to become the president of the National Action Committee on the Status of Women (NAC)—then the largest federation of women's organizations, representing millions of Canadian women.

But by the end of 1981, the national and provincial governments had responded to the Supreme Court of Canada's constitutional reference decision by agreeing on a new *non obstante* (notwithstanding) override clause—destined to become s.33.¹⁰ Thousands of women, who had mobilized across Canada through Ad Hoc lobbying, were shocked when what they thought was their significant political and legal victory came up for grabs. Back in April, amendments to the Charter, including a last-minute, unanimously approved insertion of the s.28 “Equal Rights Amendment” (ERA), passed the House of Commons and the Senate.¹¹ When the Prime Minister announced that it was only logical

for s.33 to override *both* s.15 and s.28, women constitutional activists described the override as a “surtax” on their hard won constitutional rights—and re-mobilized.¹² Section 28—also a *non obstante* clause that was expected to go up against the proposed s.33 override on s.15 equality rights—states: “Notwithstanding anything in this Charter, the rights and freedoms referred to

mark legal victories for women on a wide range of issues from violence against women, sexual harassment, pregnancy discrimination, sex bias in employment standards, spousal support, and reproductive freedoms.¹⁵

In 2005, 20 years after s.15 and s.28 equality rights were activated, Doris and I spoke on the same panel at an anniversary conference.

proportional representation. Most countries with proportional representation have Parliaments with one-third to one-half women.¹⁶

More than 60 years ago Charlotte Whitton was less gracious than Doris about women not appreciating the power of their vote:

Canadian women got the vote as a gift rather than a reward. ...

In her speech on the Charter’s twenty-fifth anniversary, Doris told us that the vision of equality rights in the Charter would never be realized without electoral reform that brought proportional representation of women.

in it are guaranteed equally to male and female persons.”

The Ad Hoc alliance stopped the “taking of twenty eight.” The s.33 override was lifted from s.28, but not from s.15. The grassroots battle for s.28 was validated by legal commentary of the time, which anticipated it would serve as a protective legal tool for women. Perhaps, but the full potential of s.28 has yet to materialize in court decisions. Numerous articles have been written on this, but it will suffice to note that, of the five sex equality appeals litigated by women to the Supreme Court of Canada under the Charter, all have been lost.¹³ Even so, both Beverly Baines and Mary Eberts, two of the principal legal advisors to Doris back in 1980, share in my guarded optimism that s.28 will prove useful in cases to come, and was worth the fight.¹⁴ It seems to me that the fight was worth the fight. The constitutional activism of a wide range of Canadian women morphed into numerous rights-based organizations. As a primary example, LEAF (the Women’s Legal Education and Action Fund), the organization many of us founded to turn rights on paper into lived rights, has intervened in over 140 cases and has helped establish land-

I apologized to Doris that day. Not because I regretted the years of my life dedicated to the most effective possible implementation of the constitutional equality rights, for which we both fought so hard, along with thousands of other Canadian women. But because I had not listened closely enough when she first urged us to make electoral reform an equal priority for altering the rights landscape in Canada. Doris never demanded an “either/or” choice, but she acted on her analysis, dedicating much of her time to the co-founding of Equal Voice. And, in her speech on the Charter’s twentieth anniversary, she told us that the vision of equality rights in the Charter would never be realized without electoral reform that brought proportional representation of women.

In retrospect, although the Charter has helped Canadian women, women were right to have doubts about it. A far more effective avenue for change might have been to amend our electoral system. In countries where there are more women in Parliament, many of the laws we had to fight for in the courts were changed through legislation, costing far less both in time and money.... Over 75 countries use some form of

The most momentous months of western civilization are upon us but Canadian women will have no effective part in their molding. It is their own doing—the fruit of the easy compliance of the collaborationists; the disillusionment, disgust and sense of futility of others; the disinterest of the rest. It is a sad memorial to the dreams and aspirations of 1916 [when Manitoba women obtained the right to vote].¹⁷

Thank you Doris. We couldn’t have come this far without you, nor should we doubt your preferred strategy for us now.

Marilou McPhedran chaired the Forum on Women’s Constitutional Activism and Democratic Reform in 2006, and held the 2007 Sallows Chair in Human Rights, College of Law, University of Saskatchewan. She co-founded several grassroots NGOs with missions to address root causes of women’s inequality, including LEAF—the Women’s Legal Education and Action Fund and founded the International Women’s Rights Project, now at the Centre for Global Studies, University of Victoria. She is the Chief Commissioner of the Saskatchewan Human Rights Commission.

¹Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.), c.1 (hereinafter the “Charter”).

²*Murdoch v. Murdoch* [1975] 1 S.C.R. 423, at 443 Note: the monthly \$200 stipend was supplanted later by a “lump sum” settlement of \$65,000 without the monthly payments.

³This claim is largely unrealized. Much of the women’s constitutional activism reported on in 1981 disappeared from official records.

⁴See formative feminist constitutional analysis in Audrey Doerr and Micheline Carrier, eds., *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981).

⁵Personal interview August 20, 2004—recording in the author’s archives, York University Library

⁶Canadian Bill of Rights, S.C. 1960 c.44 (still in force, but subject to the Constitution Act 1982).

⁷Minutes of Proceedings and Evidence of the special joint committee of the Senate and of the House of Commons on the Constitution of Canada (12 January 1981).

⁸For a more detailed account of this period, please see McPhedran, “Creating Trialogue: Women’s Constitutional activism in Canada” *Canadian Woman Studies/les cahiers de la femme*, Vol.26, No.1, Summer/Fall 2006, at 6. For years I’ve used spiral wire bound “steno pads.” On January 28, 1981—shortly after Doris Anderson quit as the CACSW president, I jotted down directions for getting to a last-minute meeting in Ottawa, given to me by Kay Macpherson, a living feminist legend I had met only briefly. The next three weeks were gobbled up in preparations for the historic “Valentine” also known as “Butterfly” or “Ad Hoc” women’s constitutional conference on February 14, 1981 on Parliament Hill. I had no inkling that three of these notepads would be crammed with lobbying notes by June, 1982—after the Queen had come to sign our new constitution,

and just as some of us Ad Hockers started to search for money to host the first national legal conference on constitutional equality rights, which took place in 1984, and to start the Women’s Legal Education and Action Fund (LEAF), which took place in 1985. These steno pads can be accessed in the Archives of York University.

⁹This claim is largely unrealized. Much of the women’s constitutional activism reported on in 1981 disappeared from official records. For example, by the time the *Globe and Mail* issued a special educational supplement on the Charter a year later, the impact of the women’s lobby was not acknowledged.

¹⁰In Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3) [1981] 1 S.C.R. 753 the Supreme Court encouraged the federal government to redress its unilateral constitutional process, prompting Prime Minister Trudeau to convene another federal provincial negotiation from Nov. 2-5, 1981.

¹¹During this period, our sense of the importance of an Equal Rights Amendment (ERA) was heightened by concern that American women were fighting for, but seemed likely to lose (and did), their years-long campaign for an ERA to the American Constitution.

¹²For a much more detailed account, please see Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: The Women’s Press, 1983).

¹³Beverly Baines, “Equality, Comparison, Discrimination, Status” in F. Faraday, M. Denike, M. K. Stephenson (eds.), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Books, 2006) p.78. As of September 2006, the five Canadian appeals lost were: *Symes v. Canada* [1993] 4 S.C.R. 695; *Native Women’s Association of Canada v. Canada* [1994] 3 S.C.R. 627; *Thibaudeau v. Canada* [1995] 2 S.C.R. 627; *Vancouver Society of Immigrant and Visible Minority Women v. Canada*

[1999] 1 S.C.R. 10; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)* [2004] 3 S.C.R. 381.

¹⁴Personal communications in April 2007.

¹⁵See www.leaf.ca.

¹⁶Doris Anderson, “The Adoption of Section 15: Origins and Aspirations,” *University of Toronto Journal of Law and Equality*, Vol.5, No.1, Spring 2006, at 44. About 1/5 of the Members of Parliament in Canada are women. For more information, see the Equal Voice website, <http://www.equalvoice.ca>.

¹⁷Charlotte Whitton, “Is the Canadian Woman a Flop in Politics?” *Saturday Night*, 26 Jan. 1946. Reprinted by permission of the Estate of Charlotte Whitton in Ramsay Cook and Wendy Mitchison, eds., *The Proper Sphere: Woman’s Place in Canadian Society*. (Toronto: University of Toronto Press, 1976), at 328.

WOMEN AND THE GIFT ECONOMY

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Axworthy Sulked While Women Fought

Michele Landsberg

Toronto Star, February 27, 1981

“Let them eat cake.”

“Fuddle duddle.”

“I’m not a crook.”

And now, from Lloyd Axworthy: “It might embarrass the government.”

It lacks snap, but Lloyd’s little phrase now must join the list of famous boomerang remarks that come back to bonk the speaker on the head.

With that phrase, Axworthy unleashed a force that cast his tame Status of Women Council into the outer darkness of public scorn, smirched his own shining prospects and galvanized 1,300 women to converge on Ottawa where they changed the course of the Charter of Rights.

There’s absolutely no doubt that the Ad Hoc Committee’s Feb. 14 conference on women and the constitution was a brilliant and heady triumph.

The timing was perfect. At the very moment when Parliament is debating the constitution, and before the Charter of Rights undergoes clause-by-clause analysis in committee—a moment when there’s one last real possibility for amendments—Canadian women have met, pored over the charter, come up with detailed and sensible proposals for change and set in motion a powerful lobby.

The sense of purpose, drive and camaraderie was, by all accounts, exhilarating. I’ve come back from vacation to hear the excited stories about Ottawa being ready to receive 200 women and then the astonishment when 1,300 women streamed into the capital from every province and from as far away as the Yukon and Northwest Territories.

Lloyd Axworthy—the Minister Not Responsible for the Status of Women, the man who sparked it all by persuading his Council on the Status of Women to postpone its conference on the constitution—sulked.

Not since Jean Harris shot Dr. Herman Tarnower has there been such a sore loser. Axworthy called the Ad Hoc Committee a bunch of “Cadillac feminists,” a ludicrous inversion of the truth.

He tried leaden condescension (“I’m happy to see the women getting together”) and members of his staff were heard to remark that all the women who attended the conference were “over 50, anyhow.”

The press was ho-hum: *Maclean’s* magazine didn’t even bother to run a story, though you can imagine the front-page hoo-ha there would have been if 1,300 Indians or starlets had spontaneously swarmed to Ottawa. No matter. The momentum was with the women at the conference.

“We were serious about pinpointing weaknesses in the charter,” said Linda Ryan Nye, a conference leader. “It was fabulous to have so much expertise among women.”

“We’d be sitting in small groups studying some clause, and we’d say ‘Hey, we need a lawyer. And a constitutional lawyer would come over, settle our questions, and we’d say ‘Okay, that’s all.’”

The conference was democratic and flexible (some male reporters said it was “chaotic”) and the women joked that they had invented Roberta’s rules of procedure, less cumbersome and more down-to-earth than Robert’s rules.

The best part, though, came afterward, when a core of women stayed on in Ottawa to lobby all three parties with their proposed amendments.

Cabinet ministers and leading members of all parties gave a respectful hearing to the women’s proposals for strengthening women’s rights in the charter. “Jean Chrétien said he himself hadn’t realized some of the flaws we were pointing out,” Ryan-Nye told me.

...The 24 Ad Hoc lobbyists in Ottawa are keeping up the pressure on all three parties and are refusing to be tucked into anyone’s pocket. Across the country, a telephone lobby of MPs is being organized.

Just a few weeks ago, prominent Liberal women were telling us that women should wait until May to discuss the constitution. If Canadian women had listened to that advice, we would not now have a fighting chance at winning amendments to the Charter of Rights. Some of the proposals clearly are not going to be considered ... but a specific guarantee of equality rights would be an excellent change.

If you want to be part of the battle for equality, leave your name and number with the Ad Hoc message line.... One of the women will call you back, explain the proposed amendments and ask you to phone five friends, each of whom should call five more, to pass on the information.