

Creating Trialogue

Women's Constitutional Activism in Canada

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Les droits constitutionnels à l'égalité des droits ont évolué depuis une dizaine d'années grâce aux féministes qui militaient dans leur quotidien. Toutefois, ce militantisme constitutionnel des femmes a souvent été traité comme marginal durant ces périodes formatrices de la démocratie. L'auteure décrit l'ardeur déployée par ces femmes pour amender les clauses sur l'égalité des droits dans la Charte canadienne des droits et libertés.

We now have a Charter that defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada. It reinforces the protection offered to French-speaking Canadians outside Quebec, and to English-speaking Canadians in Quebec. It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons.

—Pierre Elliott Trudeau (1982)¹

Women's constitutional equality rights have evolved from decades of women's activism, drawn up from the grass roots of the daily lives of women and children, reaching into the exclusive corridors of malestream² political and legal institutions, to impact on constitution-making and constitution-working. In the past 25 years, the world's strongest, clearest articulations of commitment to equality-based democratic rights and freedoms have been developed—including Canada's *Constitution Act* 1982.³ Intensely focused women's activism during negotiations over text yielded substantive amendments in our much heralded constitution. Yet women's constitutional activism has often been treated as a "sidebar" in mainstream accounts of these formative periods in democratic evolution. Official records have little on Canadian women's influential contributions in those intensely political arenas—at each drafting stage and, as integration of the constitution proceeded, to the country's legal system, thereby affecting national aspirations for this constitutional

democracy.⁴ Before returning to Canada to enter politics, Michael Ignatieff observed how Canadian constitutional development accommodated diversity,

The rights revolution makes society harder to control, more unruly, more contentious. This is because rights equality makes society more inclusive, and rights protection constrains government power.... What makes the Canadian political story so interesting is the way in which women's organizations, Aboriginal groups, and ordinary citizens have forced their way to the table and enlarged both the process of constitutional change and its results.⁵

Women's Activism and Constitutionalism

From the early 1980s through the mid 1990s, the crumbling of the Berlin Wall released a flood of newly independent states embarked on constitution-making, South African apartheid officially ended when the interim constitution was put in place, and the Canadian constitution was "patriated"—following the prime minister's promise to "bring the constitution home"⁶ from under England's authority. While the last mentioned event was hardly on the same scale of human upheaval as the first two, they are all examples of the progression of constitutionalism and constitution-making around the globe, including Afghanistan, Brazil, Eritrea, Nicaragua, Rwanda and Uganda.⁷ Women mobilized on every continent, around their vision of women's constitutional equality rights, as a means to live their rights.

Questions about both sides of women's constitutional activism arise—one side being women's impact on constitution-making and thus on final constitutional text; but the other side being the impact of constitution-making on women and their social movements. In the hope that this article will be a useful contribution to the rather sparse discourse on women's activism and democratic

reform, observations are prompted by the following four practical questions.⁸

1. What conditions generated women's readiness for constitution making; what characteristics influenced the nature of women's constitutional activism?
2. What was wrong with early draft equality provisions; how did women activists succeed in attaining amendments?
3. What kinds of engagement (alliances) proved effective in the social movement toward the best textual protection possible; were strategies time limited, were alliances sustained?
4. What about "results"—what was generated from activism that had a demonstrated impact on the constitutional drafting/amending/follow-up/processes?

Putting Women on the Constitutional Agenda

The following is a brief summary of key events and indicators from the decades of activism that rolled up to the crucial moments of influence when the constitution of Canada was finally constructed as the 1970s slid into the 1980s.

Whenever I don't know whether to fight or not, I fight.
—Emily Murphy⁹

The "Famous Five" Persons

In 1928, five women¹⁰ collectively petitioned the Supreme Court of Canada, to ask: Does the word "person" in Section 24 of The *British North American Act* include female "persons?"

Chief Justice Anglin answered for a unanimously negative Supreme Court of Canada.¹¹ The five petitioners had to choose between strategies, to a) convince the government to legislate in their favour or b) litigate further to the Judicial Committee of the Privy Council of England. The Five opted to appeal, but could not afford to be present.¹² On October 18, 1929, Lord Chancellor Sankey of the Privy Council, provided the English lords' unanimous answer,¹³ "...and to those who would ask why the word [persons] should include female, the obvious answer is, why should it not?"¹⁴

Litigation was a strategic choice that few Canadian women of the time could have made. Long years of women's rights activism, relatively advantaged social positions and political access made such high impact litigation possible for these five activists.¹⁵

Building National Women's Rights Machinery

In 1967, decades after the Persons Case, responding to pressure from disgruntled women's groups, a *Royal Commission on the Status of Women* was mandated to "inquire into the status of women in Canada and to recommend what steps might be taken by the Federal Government

to ensure for women equal opportunities with men in all aspects of Canadian identity."¹⁶

But a year into the Commission's mandate, Pauline Jewitt queried why governments were avoiding the public hearings, "They [commissioners] know that a basic re-examination of the role of men in the status of women problem, while it may terrify the men, does not terrify the women. And they know the hearings, far from being a catharsis, have given women a new determination to ensure that they may yet be treated, in dignity and worth as equals of men."¹⁷

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Dissatisfaction with the Commission's 167 final recommendations culminated in April 1972, when hundreds from across the country gathered to form a new non-governmental, activist umbrella organization—known as NAC—the National Action Committee on the Status of Women.¹⁸ A year later the federal government established the Canadian Advisory Council on the Status of Women (CACSW), then several provinces appointed women to advisory councils, which became crucial in family law reforms that moved to centre-stage in the 1970s, when the Supreme Court of Canada made decisions under the *Canadian Bill of Rights* that spoke volumes to Canadian women about the difference between "justice" and the "law."¹⁹

Readiness—Women Lost Every Bill of Rights Case

Aboriginal Women and Children

With their appeals heard together and rejected by the Supreme Court, Jeanette Lavell and Yvonne Bédard, Aboriginal women who had married non-Aboriginal men, argued that s.12 (1)(b) of the federal *Indian Act* discriminated against women of Indian status making them lose that status upon marriage to a non-Indian, when Indian men could extend status to non-Indian wives, and in turn, their children.²⁰ This loss under the Bill of Rights prompted national concern—and a dramatic activist response by a group of Aboriginal women, who took their small children, fathered by non-status men, to walk in protest from the Tobique reserve to the federal capital of Ottawa. One of their leaders, Sandra Lovelace (appointed to the Senate of Canada in 2005), successfully petitioned the United Nations Human Rights Committee²¹ alleging violations by Canada under the *Optional Protocol to the International Covenant on Civil and Political Rights*.²²



International Women's Day, 2004. Photo: courtesy of Vancouver Rape Relief.

Just a Wife

In dismissal of her lifetime of work in ranching with her husband for more than 25 years, the Supreme Court awarded Irene Murdoch just two hundred dollars a month, agreeing with the trial judge that her “routine” work of “any ranch wife”²³—was insufficient to create a legal claim to the matrimonial property.²⁴ Irene Murdoch’s loss galvanized family law reform in every province and territory for the rest of the 1970s.

No Protection for a “Pregnant Person”

Stella Bliss was fired because she was pregnant. After her baby was born, she sought, but did not find, appropriate employment, but the Unemployment Insurance Commission turned down her application—because she had been pregnant when she lost her job and she did not meet the more stringent criteria applied to pregnancy benefits. Canadian courts found no sex discrimination, because all pregnant women were equally denied regular unemployment benefits, the proper comparator was not men, but rather women—pregnant and non-pregnant persons.²⁵

Thus, the platform for constitutional activism had been framed-in by repeated judicial denial of discrimination rampant in Canadian women’s daily lives. Plus, the federal government had not followed the recommendation that the CACSW should report openly to Parliament. Unwittingly, governmental preference for less accountability set the stage for a political standoff that triggered women’s constitutional activism in the 1980s.²⁶ When the gov-

ernment cancelled the CACSW women’s constitutional conference, the high stakes were widely understood by Canadian women.

The issue—whether women would have a share in the future of the nation—knit up all kinds of raggedy ends.... “A lot of us sensed it and not just in the organized women’s movement. It had been building.... this shoddy treatment of a strong and honest woman [Doris Anderson] at the same time as denying us our rights as citizens.... Boom.”²⁷

Five Years of Constitution-Making, 1981-86: The Shift to Constitution-Focused Women’s Activism

Executive Constitutionalism v. Canadian Women

Dissent in any form, whether it touches on practical governance or not, can appear to herald the withdrawal of consent to legitimate authority; which makes legitimate authority very nervous.... Ordered use of the power to disbelieve, the first power of the weak, begins here, with the refusal to accept the definition of oneself that is put forward by the powerful.²⁸

On the anniversary of the Persons Case in 1980, the federal minister responsible for the status of women in Canada²⁹ gave a dinner speech to women activists, who had just attended a CACSW study day on the proposed

constitutional text,³⁰ learning that it was as weak as the existing *Canadian Bill of Rights* when it came to protecting women,

When carefully coiffed matrons banged their fists on tables in response to Lloyd Axworthy's remarks, and the Ad Hoc Committee on Women and the Constitution was born to fight for women's right to be included in the Constitution, this first step was taken. Once the weak learn to distrust the reality defined by their rulers, Elizabeth Janeway points out

Efficient coordination ensured they would not contradict each other... Most attention was paid to Clause 15, concerning "Non-discrimination Rights." ... Women wanted the section renamed "Equality Rights," to emphasize that equality means more than non-discrimination.³⁶

Amendments suggested by women's groups were incorporated, to a considerable extent, in the next draft of the constitution, released January 1981. As assessed by Manfredi, this success before the special joint committee

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that the way is open for them to bond together, to organize and to act. This is precisely what the Ad Hoc committee did in networking with women's groups across the country.³¹

Only weeks later, some of the women who had surprised themselves by shouting at a cabinet minister that October night were presenting before a hastily convened special joint parliamentary committee reviewing the draft constitution. Representing the largest national women's NGO, the NAC spokeswoman reminded parliamentarians that Canada had just signed the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),³² then she cautioned that,

Women could be worse off if the proposed Charter of Rights and Freedoms is entrenched in Canada's Constitution. Certainly the present wording will do nothing to protect women from discriminatory legislation, nor relieve inequities that have accumulated in judicial decisions.³³

Women's activism shifted into even higher gear when the media reported how the senator co-chairing the special joint committee said, to the NAC spokeswomen after they finished their presentation,

I want to thank you girls for your presentation. We're honoured to have you here. But I wonder why you don't have anything in here for babies or children. All you girls are going to be working and who's going to look after them?^{34, 35}

Kome reviewed women's groups' presentations on the draft constitutional text, finding

represented "only the first stage in the feminist effort to redesign Canadian institutions through constitutional modification."³⁷

For most of 1981—primarily through the new grassroots alliance known as the Ad Hoc Committee of Canadian Women on the Constitution—thousands of women in Canada mobilized to respond to the cancelled women's constitutional conference and to push for amending the equality rights provisions in the draft constitution. Newly minted women lawyers volunteered to lobby federal politicians in Parliament, while crowds of angry women joined government appointed women's advisory council members in confronting political leaders at home, on the steps of their legislative buildings—laying claim to a place in Canadian constitutional history in headlines of the time. Nevertheless, most Canadian historians and mainstream media commentators paid little attention to women's constitutional activism in retrospective accounts.³⁸

But by the end of 1981, Attorneys-General of the national and provincial governments moved back behind closed doors, responding to the Supreme Court of Canada's constitutional reference decision that summer, which encouraged the federal government to redress its unilateral constitutional process.³⁹ However, the amended constitutional text had passed both the House of Commons and the Senate before the Supreme Court reference. This left thousands of women, who had mobilized across Canada, thinking that a significant political and legal victory had been secured by amendments to the Charter, including the last-minute insertion of s.28—an Equal Rights Amendment (ERA) fought for by Canadian women's constitutional activists—heightened by awareness of the American ERA campaign being lost during this time.

Section 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.⁴⁰

In those closed federal/provincial negotiations an optional override on certain rights was proffered. Women constitutional activists described the override as surtax on their hard won constitutional rights.⁴¹ The Ad Hoc alliance re-mobilized against the “taking of twenty eight,” the s.33 override was lifted from s.28, but not from s.15.⁴² The grassroots battle for s.28 was validated by legal com-

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mentary of the time, which anticipated it would serve as a protective legal tool for women.⁴³

Section 28 should not be dismissed as being a “mere application” of section 15. The principle of sexual equality is now a legal standard of the highest priority.⁴⁴

But as the 1980s closed, little could be seen of the protective potential in s. 28. Indeed, as South Africa prepared for Mandela’s release from prison and South African women activists were on a cusp, Canadian feminist constitutional experts were becoming more concerned. In November 1990, the University of the Witwatersrand in Johannesburg hosted a South African women’s pre-constitutional conference, organized by Lawyers for Human Rights—entitled “Putting Women on the Agenda,” inviting speakers from other countries—Zimbabwe, Namibia, Botswana, and Canada—so as to “empower women to participate in all the crucial aspects of the transformation....”⁴⁵

Invited to reflect on the decade since Canadian women had negotiated constitutional amendments, Elizabeth Sheehy cautioned her African colleagues, “Lessons from ... Canada may be helpful for the negotiations over women’s equality rights, but women must conserve their energy and resources. Long term struggle lies ahead in fighting of ‘rights’ challenges to women’s few and fragile gains....”⁴⁶

Women’s Global Constitutionalism

Intersectionality

In today’s context, it is difficult to answer—which organization or individual women’s rights leader could legitimately claim to speak for an Aboriginal woman or a woman living with a disability in Canada? All the

executive members of NAC who testified before the joint constitutional committee in November 1980 were white women (including myself as an advisor) who differed in age, socio-economic status and faith, concerned that differences “between the life patterns of women and men have not been considered by the drafters of the proposed Charter” but they made no distinctions among women.⁴⁷ Twenty years later, in her comparison of feminist constitutional rights discourse in Canada and South Africa, Murphy cautioned,

But regardless of the issue, a theory of women’s rights is deployed to protect or challenge measures on the basis of the impact on women’s lives.... I believe that even a cursory study of different women’s movements can serve to warn against any sort of constant narrative about women’s rights that will work wherever women are.⁴⁸

Murphy criticized the Canadian constitutional activists of the ’80s, many of whom went on to found LEAF and other women’s NGOs focussed on systemic change driven by constitutional equality values, and in her judgment,

The continuing insistence in Canada on the theoretical and strategic coherence of women’s rights in the early 1990s had very different effects (overwhelmingly negative) than the same insistence in South Africa at the same period of time (overwhelmingly positive).⁴⁹

Murphy’s criticism is thought-provoking—always a good thing. Indeed, criticism of this nature was encouragement for writing this paper—specifically on activism, informed by 30 years of feminist activist legal and political human rights work. Is there a fundamental incompatibility between reliance on accessing rights through law—one component of constitutionalism—and actually attaining justice that impacts positively on women’s and girls’ lives?

Globally, women’s rights activists are “voting” with their inquiries—and the fact is that inquiries, often followed by international aid agency-funded delegations, now come to LEAF from all over the world. Like the thousands of Canadian Ad Hockers in 1981 and the estimated millions of women in South Africa who mobilized around the *Women’s Charter for Effective Equality* a decade ago, women are not prepared to risk being left out of new legal systems. Concerns have been raised internationally about state-centered law reform, which Stephen Golub has termed “rule of law (ROL) orthodoxy.”⁵⁰ Didi Khayatt, formerly the director of York University’s Centre for Feminist Research, has written of being raised in a privileged Egyptian home and how the relative lightness of her skin and her advantaged upbringing shielded her from “the anguish of discrimination ... or the experience of being silenced”—concluding that she could not therefore assume the label “woman of colour” and the oppression that the term implies.

Rigid definitions of race and ethnicity which do not account for fluidity of the categories are not useful in that they mask the differences of class and location.⁵¹

Women Amid Group Differentiated Rights

Aboriginal Women in Canada

Before South Africa became a constitutional democracy, a cabinet minister from the Apartheid regime held a press conference in Canada to describe the similarities between the *Indian Act* and Apartheid principles, a furor in Canada ensued.⁵² He had a point.

As a definable racial group, Aboriginal women in Canada have the most in common with the oppression lived by colonized and racialized women in South Africa. Aboriginal women activist lawyers have taken different points of view on seeking or relying on constitutional protections for Aboriginal women's equality rights. Before her judicial appointment, Mary Ellen Turpel questioned why non-Aboriginal women would strive to attain a legal form of "equality" when the standard to be achieved was in fact the white woman's equivalent of the lived privileges of white men.

I do not see it as worthwhile and worthy to aspire to, or desire, equal opportunity with White men, or with the system that they have created. We do not want to inherit their objectives and positions or to adopt their world view.⁵³

Constitutional amendment negotiations in Canada continued long after the patriation of 1982. The promised negotiations on Aboriginal rights, to be added to the Constitution, began soon after patriation in 1982. Attempts were made to craft an equality guarantee specifically for Aboriginal women. Spokeswomen for the largest Aboriginal women's organization, Native Women's Association of Canada (NWAC), took the position that white men's model of patriarchy so pervaded Aboriginal communities, on and off-reserve, that Aboriginal women needed to rely on their constitutional rights. But NWAC leaders were acutely disappointed with what was enacted to address their rights in the 1983 amendments—specifically (s.34(4)). Faced with the weak wording in the Constitution, NWAC developed a constitutional litigation strategy, as one means of attempting to secure stronger protections for Aboriginal women. By the '90s, NWAC had sued the prime minister and the federal government over exclusion of Aboriginal women from yet another round of constitutional negotiations.

Aboriginal women have been legally, politically and socially subordinated by the federal government and by Aboriginal governments.... We have been shut out from our communities because they do not want to bear the costs of programs and services to which

we are entitled as Indians.... Under sections 15, 28 and 35 (4) of the *Constitution Act, 1982*, women are entitled to substantive equality rights.⁵⁴

The "Double Whammy" of Women's Constitutional Activism

Women's activism changed final constitutional text on equality—and vice versa. Commentators differ; a "plus" from one perspective is sometimes assessed as a "minus" from another.

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Of a number of early thought-provoking observations made by Canadian commentators, in addition to those already mentioned earlier, Andrew Petter,⁵⁵ was representative of the sceptical—at best, guardedly optimistic—predictors about the impact of the *Charter* for women. Petter, like Turpel, raised the question of using men as the equality standard, pointing out that the "LEAF victory" in the girl-gets-to-play-hockey case only applied to a very limited number of girls and did not really celebrate girls' hockey skills or approach to the sport. Perhaps best known is the Gwen Brodsky and Shelagh Day finding (based on only the first three years of *Charter* litigation) that sex equality cases accounted for a mere ten percent of the equality cases.⁵⁶ Sherene Razack questioned channelling resources into high impact constitutional equality litigation and raised concerns about the exclusionary nature in the founding of the chief women's equality litigant, LEAF, in its early years of operation.⁵⁷

But another perspective as to the value of Canadian women's constitutional activism can be seen in the writing of South African lawyer, Beth Goldblatt,

[In the United States] [s]ince women and men both benefited where there was temporary disability, pregnancy was not regarded as a ground of sex-based discrimination as there was no male comparator. Women were expected to bear the costs of their pregnancy. This approach to pregnancy could not occur under our [South African] anti-discrimination clause since pregnancy is specifically listed as a ground of discrimination. Nevertheless, a similarly conservative approach might be taken towards childcare unless our anti-discrimination jurisprudence is clearly defined. The more progressive approach is to be found in the European Court case of *Dekker v Stichting Vorm-*

ingscentrum voor Jong Volwassenen (VJV Centrum Plus) [1992 ICR 325] and the Canadian Supreme Court case of *Brooks v Canada Safeway Ltd.* [1989] 1 S.C.R. 1219] The court in *Brooks* recognised that “since pregnancy and childbearing are fundamental social needs... it was discriminatory to place the whole burden on only part of the population.” It is this argument which needs to inform the use of s 9(3) [of the South African Constitution] in advocating a right to child care.⁵⁸

Conclusion

Much of this paper has looked at the “what” and “how” of women’s constitutional activism. In conclusion, let’s glimpse briefly toward “what next” and “what if”—as courts deliver decisions interpreting constitutional equality that surprise, confuse, please and disappoint. There is no doubt that academic discourse on the detriments and benefits generated by women’s constitutional activism will only expand, particularly as the many constitutions forged over the past decade—in diverse countries such as Ukraine, Afghanistan, and Rwanda—mature and retrospectives elongate.

Academic Criticism of Activism

Frankly, I am concerned that much of academic discourse may not be helpful in supporting and nourishing the women who bend to the much messier task of constitutional activism and democratic reform. Hindsight is a luxury activists seldom have and academics can be helpful in bringing perspectives forward that help to hone strategies. Participatory action research can be a powerful tool for women’s rights, fought for by ordinary women who want to be able to live their rights, and, as is so often the primary driver for women, to build a place for their children and grandchildren to live their rights. But resources to compensate for inadequacies of communication or production can seldom be accessed by activists. In Canada, after exhausting months of political battle all through 1981, described earlier, women were faced with the s. 28 sex equality ERA disappearing under the s.33 override, so activists fought for it—substantially and symbolically.

[T]he battle began all over again.... Said Gerry Rogers, one of the Newfoundland activists—in a phrase that applies to so much of the work of democracy—“It’s sort of like doing dishes—they’re never done. There’s *always* another dirty dish.”⁵⁹

Writing more than 20 years later, the value of the activism on s.28 has been disappeared. Diana Majury was not optimistic, “There has been no engagement in the decisions of the Supreme Court of Canada with the question of what, if anything, section 28 adds in terms of equality

protection for women (or for men).”⁶⁰

In contrast to Majury, Beverley Baines⁶¹ wrote in 2005, that s.28

... may yet prove multifunctional, capable of working strategically against, or substantively with, section 15. Thus I’m hoping for another defining moment in which scholarship and jurisprudence collude to recognize a purposive interpretation of section 28 that will sustain the intentions of its feminist drafters.⁶²

At the time of writing this article, such a purposive interpretation for s.28, the Canadian “ERA” remains to be seen, and, of the five sex equality appeals litigated by women to the Supreme Court of Canada, all have been lost.⁶³

The LEAF model, while respectful of the Rule of Law, grew directly from women’s constitutional activism—interdisciplinary, intergenerational, evidence-based advocacy, incorporating high impact litigation and other strategies to attain lived rights. Golub takes a similar approach to legal empowerment, against “Rule of Law orthodoxy.”

Numerous studies by academics and development organizations highlight the importance of building the capacities, organization, or political influence of civil society—all of which legal empowerment contributes to—in improving the lives of the disadvantaged. A growing array of qualitative and quantitative research more specifically suggests that legal empowerment has helped advance poverty alleviation, good governance, and other development goals.⁶⁴

For all the differences and disappointments that are woven within the small and not-so-small victories that strengthen good governance in the constitutional venues inhabited by women—in South Africa, Canada, and so many other countries, such as Afghanistan and Rwanda, where women’s activism has also changed constitutional text and machinery—let’s acknowledge the imperfect, courageous work of ordinary women and adopt the invocation of South African women activists:

Malibongwe Igama Lamakhosikazi

Let the name of the women be thanked.⁶⁵

Aspects of this article can be found in the forthcoming book, Comparative Constitutionalism and Rights (Cambridge University Press), edited by Penelope E. Andrews and Susan Bazilli, as well as in my article, “The Impact of s.15 on Canadian Society: Beacon or Laser?” in volume 19 of the National Journal of Constitutional Law, 2006 (Thomson Carswell).

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Appreciation is expressed to my activist colleagues and to my LL.M. advisor, Professor Bruce Ryder of York University's Osgoode Hall Law School for his encouragement to share my reflections as a feminist activist lawyer, based largely on the model I now teach—"evidence-based advocacy"—grounded in skills learned as a lawyer and strategist doing considerable pro bono work, including co-founding several grassroots non-governmental organizations with missions to address root causes of women's inequality, including LEAF—the Women's Legal Education and Action Fund (www.leaf.ca)—an internationally recognized pioneer in high impact litigation strategies for women's rights.

¹Pierre Elliott Trudeau, "Remarks by the Prime Minister at the Constitutional Proclamation Ceremony on April 17, 1982" (Library and Archives Canada: 1982), Online <www.lac-bac.gc.ca>.

²Radha Jhappan, "Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship," *Studies in Political Economy*, Fall 1996, 15 at 20.

³*Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), c.11 [hereinafter, the "Canadian Constitution" or if referenced in a section focused only on Canada, the "Constitution"].

⁴Author's note: The Canadian Broadcasting Corporation (CBC) featured the twentieth anniversary of the Charter of Rights and Freedoms in 2002, quoting only experts who happened to also be white men, making no mention of how the social movement of women shaped Canadian constitutional principles of equality. My review of archival websites for the Government of Canada yielded not a single feature on women's role in constitution-making—no mention of the national ad hoc women's constitutional coalition that numbered in the thousands, no mention of the Native women's rights lobby and, for Doris Anderson, who was a pivotal and prominent media presence in the constitutional battles of 1981—there was one radio clip, from 1970, on a different topic.

⁵Michael Ignatieff, *The Rights Revolution*, (House of Anansi Press Ltd., 2000) at 6-7.

⁶Peter Hogg, "Patriation of the Canadian Constitution" (1983), 8 *Queen's L.J.* 123 at 126.

⁷Alexandra Dobrowolsky and Vivien Hart, "Introduction: Women, New Politics and Constitutional Change," in Alexandra Dobrowolsky and Vivien Hart, eds., *Women Making Constitutions—New Politics and Comparative Perspectives* (Palgrave Macmillan, 2003) at 1,2.

⁸A few notable exceptions in Canada being Penney Kome, Katherine de Jong, Chaviva Hôsek in the 1980s and, more recently, Alexandra Dobrowolsky.

⁹Nancy Millar, *The Famous Five—Emily Murphy and the Case of the Missing Persons*, (Western Heritage Centre, 1999) at 9-15. In 1916, Emily Murphy (not a lawyer) presided over the new Women's Police Court as the first women police magistrate in the British Empire, was widely read under her popular pen name "Janey Canuck"

but was less popular under her own name—Judge Emily Murphy—as the author of *Black Candle* in 1922, about addiction to opium and cocaine in Canada. Judge Murphy was indisputably the leader in the "Persons Case," who called the other four together to have tea on her verandah and to sign the petition to the Supreme Court of Canada in August 27, 1927. Judge Murphy paid legal costs that the other women did not, and was principally responsible for navigating the lawsuit through the courts. In 1907, as a young pastor's wife in Edmonton, who had grown up protected by the customs of privilege in Ontario, she was shocked to hear poor women describe how they were not protected by custom or by law and so she went to the legislative library to find out for herself that property laws did not protect a wife's interest in the family home. These inquiries led to her connection with Henrietta Muir Edwards (whose name became the lead citation for the Persons Case, of Fort McLeod, Alberta, the "convener of laws" for the National Council of Women, then Canada's largest women's NGO. The *Supreme Court of Canada Act* provided for government funding of significant questions of constitutional law. The Famous Five petitioned for an interpretation of section 24 of the *British North America Act*, renamed the *Constitution Act 1867*, when the constitution was patriated and the *Constitution Act 1982* was enacted.

¹⁰Emily Murphy, Nellie McClung, Henrietta Muir Edwards, Louise Crummy McKinney and Irene Parlby, now known in Canada, as the "Famous Five" For more information: <www.famous5.org>.

¹¹*Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276. "...women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not 'qualified persons' within the meaning of that section."

¹²Millar, above, p. 45, describes how the Five lost control over the question that had been put to the Supreme Court of Canada. The *Supreme Court Act* allowed costs of the petition and appeal to be covered by the government if the issue was considered by the government to be of sufficient national importance, but it also gave the Attorney General and his government lawyers' *de facto* control over the case. Never presented to the court, the two questions drafted by the Five, in which they purposely omitted use of the word "persons," were: "Is power vested in the Governor General of Canada or the Parliament of Canada, or either of them, to appoint a female to the Senate of Canada?" and "is it constitutionally possible for the Parliament of Canada, under the provisions of the BNA Act, or otherwise, to make provision for the appointment of a female to the Senate of Canada?" Their government funded lawyer, Newton Rowell, travelled to London in July of 1929 to argue their appeal, paid by the Government of Canada.

¹³October 18th is now officially celebrated in Canada as

“Persons Day” commemorated by the annual awarding of a Governor General’s medal to five long-time activist women, and one young woman leader.

¹⁴Reference as to the Meaning of the Word “Persons” in Section 24 of the British North America Act, 1967, [1928] S.C.R. 276, rev’d *Edwards v. Canada* (A.G.), [1930] A.C. 124 (P.C) For different perspectives on this historic case, see also: D. Bright, “The Other Woman: Lizzie Cyr and the Origins of the “Persons Case” (1998) 13(2) *Can. J. of Law & Soc.* 99; and K. Lahey, “Legal ‘Persons’ and the Charter of Rights: Gender, Race and Sexuality in Canada” (1998) 77(3) *Canadian Bar Rev.* 402.

¹⁵Nellie L. McClung, “Women are Discontented,” *The New Citizenship*, as reprinted in Cook and Mitchison, *The Proper Sphere*, at 288-289. As Nellie McClung, one of the Famous Five, and a life-long activist author, noted, “The women who are making the disturbance are women who have time of their own.... Custom and conventionality recommend amusements, social functions intermixed with kindly deeds of charity... while women do these things they are thinking, they wonder about the causes, the underlying conditions—must they always be.”

¹⁶CBC Radio and Television Archives, “Equality First: the Royal Commission the Status of Women” Accessed online Aug.20.04 <www.archives.cbc.ca>. Author’s note: Based on the account of Laura Sabia, a Toronto city councillor, president of the Canadian Federation of University Women, the first president of the National Action Committee on the Status of Women (NAC) and a chair of the Ontario Advisory Council on the Status of Women. Laura Sabia convened the first meeting, to which she invited “young” feminist lawyers (myself among them), to discuss litigation strategies using the constitution.

¹⁷Pauline Jewitt, “Where were the MEN when Canada set out to find what makes life tough for its women?” *Maclean’s Magazine*, January 1968, p.12. Jewitt became a Member of Parliament who strongly supported the women’s constitutional activists during the drafting negotiations in 1981.

¹⁸Lorna Marsden, “The Role of the National Action Committee on the Status of Women in Facilitating Equal Pay Policy in Canada” in R.S. Ratner, ed., *Equal Employment Policy for Women* (Temple University Press, 1980) 242 at 244; *Status of Women News*, Vol. 6 no. 2, Spring 1980 [the now defunct quarterly newsletter from NAC].

¹⁹*Canadian Bill of Rights*, S.C. 1960 c.44 [still in force, but subject to the Constitution Act 1982]

²⁰*A.G. Canada v. Lavell* [1974] SCR1349 [hereinafter *Lavell*].

²¹*Lovelace v. Canada* (1981) Report of the Human Rights Committee, GAOR 36th Sess., Supp. No.40 (AQ/36/40), Annex XVIII, 166. The UN Human Rights Committee held that Canada had violated Article 27 of the *International Covenant on Civil and Political Rights*.

²²(1966) G.A. Res. 2200 (XXI) , 21 U.N. GAOR, Supp. (no.16) at 59, U.N. DOC.A/6316 (1966). In force for Canada 23 March 1976. As the constitutional activism

of the 1980s started to roll—almost ten years after the march from Tobique—the Government announced partial redress, giving discretion to band councils to ask the government to exempt them from s.12 (1) (b)—a change that perpetuated inequity and division among many Aboriginal communities, to this day.

²³*Murdoch v. Murdoch* [1975] 1 S.C.R. 423. Beth Atcheson *et al.* noted that Ernest Shymka of Calgary represented Mrs. Murdoch on a contingency basis, but in the end was not paid fees or disbursements. When asked to describe the nature of her work, Mrs. Murdoch replied “Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done.” When asked if her husband was ever away from their properties, she replied, “Yes, for five months every year” at 443.

²⁴*Murdoch supra*. Note: the monthly \$200 stipend was supplanted later by a “lump sum” settlement of \$65,000 without the monthly payments.

²⁵*Bliss v. A.-G. Canada*, [1979] 1 SCR 183.

²⁶Author’s note: When constitutional reform re-surfaced on the government agenda in 1979, the CACSW, largely due to the initiative of its new president, Doris Anderson, engaged in a national public education campaign on women’s constitutional rights. In the 1970s, there was only one widely circulated Canadian women’s magazine, *Chatelaine*, which had a women’s rights editorial policy, largely due to Anderson’s years as editor, making her a trusted and credible spokeswoman for women all over the country. It was the very public dispute between Anderson and the federal Cabinet’s Minister Responsible for the Status of Women, when she resigned over government cancellation of the CACSW women’s constitutional conference, that triggered formation of the grass roots ad hoc women’s constitutional coalition.

²⁷Anne Collins, “Which Way to Ottawa? A Special Report on the Women’s Conference on the Constitution,” *Homemaker’s Magazine*, Holiday 1981 11 at 22. Author’s note: the comment is attributed to Linda Nye, who co-chaired the women’s constitutional conference in 1981 and was a leader in the Ad Hoc Committee of Canadian Women on the Constitution.

²⁸Elizabeth Janeway, *Powers of the Weak* (New York: Alfred A. Knopf, 1980) at 166-7. Just as Parliament confirmed in Canada’s national anthem that “true patriot love” would “in all our *sons* command,” Elizabeth Janeway described women’s unused political potential as power of the weak.

²⁹The Hon. Lloyd Axworthy, who in later years proved often to be a strong ally on human security and international women’s rights, particular when the Taliban regime was oppressing women in Afghanistan in the 1990s.

³⁰The October 1980 wording on “equality rights” (not a term being used at that time by the government) was: “The Canadian Charter of Rights and Freedoms guaran-

tees the rights and 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.

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.”

³¹Elizabeth Janeway, *Powers of the Weak* (Random House of Canada Ltd., 1980) in Judith Finlayson “Women and Power: Part 5—Power in the Public Sphere,” *Homemaker’s Magazine*, November 1982, 50 at 59. See also Anne Collins account of the dinner in Appendix.

³²G.A. Res. 34/180, U.N. GAOR, 34th Session, Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980) Canada acceded in 1981; South Africa in 1995.

³³The October 1980 wording on “equality rights” (not a term being used at that time by the government) was: The Canadian Charter of Rights and Freedoms guarantees the rights and 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.

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. [emphasis added].”

Also of significance to what transpired, the precursor to s.25 on Aboriginal rights and s.24 on what is now attacked under the final version of the Charter as the anti-democratic “activist” judicial power to order remedies such as “reading in” was worded in 1980 as follows:

“Undeclared Rights and Freedoms.

The guarantee in this Charter of certain rights and freedoms are not to be construed as denying the existence of rights or freedoms that exist in Canada, including or freedoms that pertain to the native peoples of Canada.”

³⁴Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 1983 (Toronto: Women’s Educational Press). Available now online <http://tinyurl.com/yfww5x> p. 36.

³⁵During the negotiations on constitutional text, unguarded comments by male authority figures (in this case, Sen. Hays) acted as a catalyst because the media treated it as “news” and thus the information spread across the country—at no cost of time or money to the women activists, other than interviews. The special joint committee was composed of Members of Parliament and Senators, co-chaired by MP Serge Joyal from Quebec and Senator Harry Hays from Alberta. With increasing corporate concentration of media ownership seldom held by socially progressive owners, my observation is that neither of these responses to women occur much anymore—officials are very careful with public statements and women’s issues in Canada are generally not considered “news” plus neo-conservative

women columnists are now the most widely read.

³⁶Kome, p. 35.

³⁷Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: UBC Press, 2004) at 48.

³⁸Some exceptions being Ramsay Cook, The Proper Sphere, Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada: The Start of Liberation* (2nd ed.) (Toronto: University of Toronto Press, 1978), Patrick Watson and Benjamin Barber, *The Struggle for Democracy* (Lester & Orpen Dennys Ltd, 1988) 141-169. Penney Kome entitled a chapter of her book on Canadian women’s constitutional activism, “The Invisible Woman” and documented examples of exclusionary reporting. Kome gave as an example, that Canada’s “national” newspaper, *The Globe and Mail*, devoted 453 column inches to the “Native lobby” compared to 143 column inches to the women’s rights lobby. This comparison does not come out of a constitutional rivalry between Native leaders and women, though some journalists erroneously reported that, and Premier Blakeney of Saskatchewan did make support for both a condition of his endorsement of the women’s position. Author’s note: the broader-based women’s lobby argued for “Indian rights for Indian women.” In 1982, when *The Globe and Mail* published a special supplement on the constitutional negotiations and final text, women’s activism was not listed among the major influences of outcome. In Michael Valpy and Robert Sheppard’s book, *The National Deal: The Fight for a Canadian Constitution*, 1982 (Toronto: Macmillan Of Canada) the Ad Hoc constitutional conference was omitted from the authors’ appended chronology of significant events shaping the constitution.

³⁹At this point, the author must become narrator. Steno pad notation [with my added explanations for the purpose of this paper written 25 years later, in square brackets]: “Mon. 9 Nov/81 Laura Sabia: jumping the gun on [holding a women’s protest] public forum. Flora [McDonald—then the senior Progressive Conservative women MP, having been in Joe Clark’s cabinet] says 0 in writing yet & not till the 20th. [Referring to the Nov.5.81 Accord to which premiers agreed “in principle” but the drafting was done by officials, after the politicians had gone home] Advises MP lobbying as best tactic.”

⁴⁰Canadian Charter of Rights and Freedoms, part I of the Constitution Act 1982, being Schedule B of the Canada Act 1982 (UK), c.1.

⁴¹Kome, in *Taking of Twenty-Eight*, p.90, noted that Alberta’s Premier Lougheed was the first to agree to lifting the s.33 override from s.28, referencing the Alberta women who won the “Persons Case” in 1929.

⁴²Kome, p.90.

⁴³N. Colleen Sheppard, “Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*” (1986) 10 *Dal. L. J.* 195 at 222. Mary Eberts, “Sex-based Discrimination and the Charter” in Anne F.

Bayefsky & Mary Eberts, eds., *Equality and The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 183; Catharine A. MacKinnon "Making Sex Equality Real" in Lynn Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 37 at 41, in Majury at 307-8. "Colleen Sheppard saw this in relation to the enhancement of section 7 rights for women: "The radical potential of this section [28] becomes apparent if we contemplate the notion of equal liberty or security of the person for women and men." Mary Eberts argued that s.28 "should ... lead a court to require a high level of justification [under section 1] for any sex-based distinction." Rosalie Abella postulated that section 28 "means that in interpreting the onus on a respondent to justify the reasonableness of a limit to an otherwise guaranteed right, gender equality is an immutable right." According to Catharine MacKinnon, "Anti-subordination could be the distinctive guiding interpretive principle of section 28."

⁴⁴Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Bayefsky & Eberts, at 528

⁴⁵Bazilli, Preface, *Putting*.

⁴⁶Elizabeth A. Sheehy, "Women and Equality Rights in Canada: Sobering Reflections, Impossible Choices" in Susan Bazilli ed., *Putting Women on the Agenda*, (Johannesburg: Ravan Press, 1991) 262 at 272.

⁴⁷Author's personal copy, National Action Committee Archives, Toronto, Ontario, Canada.

⁴⁸Ronnda Murphy, *supra* note at 23.

⁴⁹Murphy, *supra* note 136 at 34.

⁵⁰Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," *Rule of Law Series Working Paper 41*, Washington, D.C.: Carnegie Endowment 2003). <<http://www.ceip.org/files/pdf/wp41.pdf>>.

⁵¹Didi Khayatt, "The Boundaries of Identity at the Intersection of Race, Class and Gender" *Canadian Woman Studies*, 1994, Vol.14, No. 2, at 8.

⁵²CBC Radio and Television Archives <www.archives.cbc.ca>.

⁵³Mary Ellen Turpel, "Patriarchy and Paternalism: the Legacy of the Canadian State for First Nations Women" (1997) *Can. J. of Women and the Law*, 180.

⁵⁴National Speaker of NWAC, Gail Stacey-Moore, "Aboriginal Women, Self Government, The Canadian Charter of Rights and Freedoms, and the 1991 Canada Package on the Constitution," an address to the Canadian Labour Congress, December 3, 1991.

⁵⁵Andrew Petter, "Canada's Charter Flight: Soaring Backwards into the Future," *J. of Law & Society*, 16(2), 1989, 51.

⁵⁶Nine of the 52 claims were made by women, with about a 50 percent rate of success, but this was before the *Andrews* decision in 1989. In *Canadian Charter Rights for Women: One Step Forward or Two Steps Back?* Published in 1989 by the CACSW, authors Gwen Brodsky and Shelagh Day did not dismiss the Charter outright but they certainly

sounded the alert, pgs.118-119.

⁵⁷Sherene Razack, *Canadian Feminism and the Law: the Women's Legal Education Fund and the Pursuit of Equality*, 1991 (Toronto: Sumach Press).

⁵⁸Beth Goldblatt, "Litigating Equality—The Example Of Child Care" in Saras Jagwanth and Evance Kalula (eds.), *Equality Law—Reflections from South Africa and Elsewhere* (Juta Law, 2001) 8 at 20.

⁵⁹Patrick Watson and Benjamin Barber, *The Struggle for Democracy*, (Lester & Orpen Dennys Ltd, 1988) at 166.

⁶⁰Diana Majury, "The Charter, Equality Rights, and Women" (2002) 40 *Osgoode Hall Law Journal* 3&4, 298-335, at 307-309. "It is interesting to speculate why this happened—whether section 28 was seldom invoked and accordingly has languished forgotten and untested; whether groups were unable to come up with a distinctive section 28 argument; whether it was eclipsed and made redundant by stronger section 15 jurisprudence than was anticipated; whether judicial discomfort and/or uncertainty about section 28 led to its abandonment; or whether women's groups developed discomfort about the apparent privileging of sex discrimination claims over other forms of discrimination."

⁶¹Author's note: Professor Baines was the principal academic advisor to the Ad Hoc Committee of Canadian Women on the Constitution during the drafting negotiations in 1981.

⁶²Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation," 2005, Vol.17 *Canadian Journal of Women and the Law*, 1, 2005, 45-70. "However, time has yet to reward section 28's promise. In fact, section 28 is seriously compromised by arguments that relegate it to impractical strategic domains, or worse, fail to address its substantive interpretation."

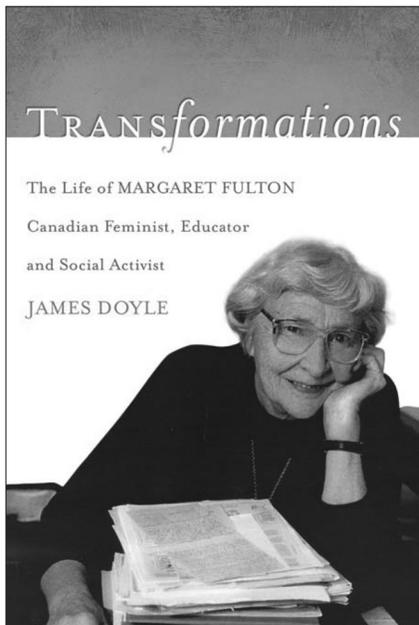
⁶³Beverley Baines, "Equality, Comparison, Discrimination, Status," in F. Faraday, M. Denike, M.K. Stephenson (eds.), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Books, 2006) p.78. As of September 2006, the five Canadian appeals lost are: *Symes v. Canada* [1993] 4 SCR. 695; *Native Women's Association of Canada v. Canada* [1994] 3 SCR. 627; *Thibaudeau v. Canada* [1995] 2 SCR 627; *Vancouver Society of Immigrant and Visible Minority Women v. Canada* [1999] 1 SCR. 10; *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees* (NAPE)[2004] 3 SCR. 381.

⁶⁴Golub, Rule of Law Orthodoxy, above, Legal empowerment differs from Rule of Law [ROL] orthodoxy in at least four ways: (1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; (3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; (4) even more broadly, the use of law is often just part of

integrated strategies that include other development activities. Numerous studies by academics and development organizations highlight the importance of building the capacities, organization, or political influence of civil society—all of which legal empowerment contributes to—in improving the lives of the disadvantaged. A growing array of qualitative and quantitative research more specifically suggests that legal empowerment has helped advance poverty alleviation, good governance, and other development goals.

⁶⁵Albertina Sisulu, "Preface" in Gertrude Ntiti Shope, ANC, *Malibongwe, Celebrating Our Unsung Heroines* (Jet Park South Africa: Teamwork Printers, 2002), p.6.

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CAROL A. ADAMS

You're Still the One

She's still the one who takes a shine
to furniture and floors
Each tiny scratch upon the bathroom
door draws her eye, She thinks in terms
of a thick red rope across each doorway

He's still the man she married
the one with the cheerful edge
who now and then leaves
the toilet seat in the upright position,
who likes her means and ends, sees
the larger picture,
who likes to cook, yes, really likes it

Between them now, not so much
of that easy chemistry
Sunday finds her brooding behind her book
He can see her crossing them off
regretting their loss
As her mother said
she deserved better

Sometimes at the table
she sighs to think of what they were
and what they might have been
Then, he'll give her that look
the stock-in-trade of husbands
the one that says
"Now, just a minute. We've
still got something"

But when their defences are down,
like juices from the Sunday roast
love seeps out unguarded
They speak in larger gestures
hold nothing back
And she still commits those random
acts of kindness
and doesn't notice that in the morning
She is happy

Carol A. Adams's poetry has appeared in a number of literary journals and anthologies. She is currently teaching English in Toronto, as well as writing and conducting poetry workshops.