

WOMEN'S CONSTITUTIONAL ACTIVISM IN CANADA AND SOUTH AFRICA

*Susan Bazilli and Marilou McPhedran*¹

ABSTRACT

This chapter briefly examines the pre-conditions and results of the widespread constitutional activism of women, in Canada and South Africa, to secure improved articulations of women's rights, with emphasis on equality rights. Women's constitutional activism in these two countries, both populist and legal, emerged from decades of citizen engagement - including the South African liberation struggle and Canadian legal battles - to gain women's citizen rights and equality rights. While not equating the struggles that the women in these two countries faced, it is demonstrated that without women's activism, the South African and Canadian constitutions would not contain such strong equality provisions - even though women's contributions have seldom been treated as more than a 'sidebar' in many accounts of constitution making. It is further argued that understanding the contributions of women's activism to constitutionalism, in the midst of discriminatory conditions, leads to a greater appreciation of the ongoing activism in developing policy, litigation and jurisprudence required to ensure that women's rights become 'lived rights.' Some examples are given of how rights are fragile; demonstrating that equality seekers must remain ever vigilant and engaged - a useful lesson for emerging democracies as they negotiate their way to constitutional democracy.

¹ Susan Bazilli is the director of the International Women's Rights Project, University of Victoria, Canada, and Marilou McPhedran is the principal of Global College and the director of the Institute for International Women's Rights at the University of Winnipeg, Canada. We extend appreciation to our very capable research assistant, Kassia Bonisteel, and, as always, thanks for the ongoing support from our colleague Professor Penelope Andrews.

We now have a Charter which 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)²

.....

Freedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on board, that the objectives of the Reconstruction and Development Programme will not have been realized unless we see in visible and practical terms that the condition of the women of our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals with any other member of society.

- Nelson Mandela (1994)³

² Pierre Elliott Trudeau, REMARKS BY THE PRIME MINISTER AT THE CONSTITUTIONAL PROCLAMATION CEREMONY ON APRIL 17, 1982 (Library and Archives Canada), at: www.lac-bac.gc.ca.

³ Nelson Mandela, STATE OF THE NATION ADDRESS' HOUSES OF PARLIAMENT, CAPE TOWN, 24 MAY 1994 at <http://www.anc.org.za/ancdocs/history/mandela/1994/sp940524.html>.

WOMEN'S CONSTITUTIONAL ACTIVISM FOR EQUALITY

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 "malestream"⁴ political and legal institutions, to impact on constitution-making and constitution-working. In the past 30 years, the world's strongest and clearest articulations of equality-based democratic rights and freedoms have been developed - including Canada's Constitution Act of 1982⁵ and the Constitution of the Republic of South Africa of 1996.⁶ Intensely focused women's activism during negotiations over the equality text yielded substantive amendments to both these constitutions. Yet women's constitutional activism has often been treated as a "sidebar" in mainstream accounts of these formative periods in the evolution of constitutional democracies. Official and academic records say little of women's influential contributions in those intensely political arenas - both about their political advocacy at the drafting stage and their legal advocacy in their country's legal system, affecting national standards and outcomes for justice.⁷

In just over a decade, the crumbling of the Berlin Wall resulted in a flood of newly independent states embarking on constitution-making, South African apartheid was constitutionally terminated and the Canadian constitu-

⁴ Radha Jhappan, *Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship*, 51 *STUDIES IN POLITICAL ECONOMY* (1996) 15, 20.

⁵ *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]

⁶ Act 108 of 1996, adopted on 8 May 1996 and amended on 11 October by the Constitutional Assembly. [hereinafter, the "South African Constitution" or if referenced in a section focused only on South Africa, the "Constitution"].

⁷ Authors Note: The Canadian Broadcasting Corporation (CBC) featured the 20th 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. A review of archival websites for the Government of Canada yielded not a single feature on women's role in constitution-making. There was no mention of the national ad hoc women's constitutional coalition that numbered in the thousands or the native women's rights lobby. Similarly, mention of Doris Anderson, who was a pivotal media presence in the constitutional battles of 1981, included but one radio clip, from 1970, on a different topic. The authors' tour of the Apartheid Museum just after it opened in Johannesburg, noted that there were well documented exhibits of many aspects of the "negotiated revolution", including the 1991 Convention for a Democratic South Africa (CODESA). Here too there was not one write-up on the contributions of activist women, nor was there any detail on the two "Women's Charters," drafted at the grassroots in the 1950s and 1990s. In photographs taken just a decade before - the period described by Nelson Mandela as constitutional transformation - most of the women - standing with the male leaders - were not even identified in the museum exhibits.

tion was “patriated”⁸ from under England’s authority. While Canada’s constitutional changes were hardly on the same scale of human upheaval, South Africa and other newly independent states are all examples of the progression of constitutionalism and constitution-making around the globe, including Afghanistan, Brazil, Eritrea, Nicaragua, Rwanda and Uganda.⁹

Women mobilized on every continent around their vision of women’s constitutional equality rights as a means to access and live their rights. Questions about women’s constitutional activism arise: one aspect relating to women’s impact on constitution-making, and thus on the final constitutional text; the other aspect regarding the impact of constitution-making on women and their social movements. For feminist advocates, implementation strategies may include selective high impact litigation, by using the constitutional text as a transformative tool. Activism is at the core of achieving what some feminist advocates refer to as evidence-based advocacy to translate words in constitutional documents into lived rights. This article is our modest contribution to the rather sparse discourse on women’s activism and constitutional reform, and is prompted by the following questions:

1. What conditions and characteristics influenced the nature of women’s constitutional activism?
2. What were some problems with early draft equality provisions and how did women activists’ respond?
3. What kinds of alliances in each country proved effective in the movement toward the best textual protection possible under challenging political conditions?

To appreciate the roots of women’s constitutional activism, this paper briefly sets out key events from the decades of activism that led to the crucial moments of women’s influence in the drafting of the constitutions of Canada in the 1980s, and of South Africa in the 1990s.

SOUTH AFRICA - PRIOR TO CONSTITUTIONAL NEGOTIATIONS

The imposition of apartheid by the Nationalist Party government in 1948 galvanized women activists of all races to join together on a number of dramatic occasions over the almost fifty years of that regime. Attempts to build a unified women’s movement were undermined, politically and economically, and

⁸ Peter Hogg, *Patriation of the Canadian Constitution*, 8 QUEEN’S LAW JOURNAL (1983), at 123, 126.

⁹ Alexandra Dobrowolsky and Vivien Hart, *Introduction: Women, New Politics and Constitutional Change*, in WOMEN MAKING CONSTITUTIONS – NEW POLITICS AND COMPARATIVE PERSPECTIVES (A. Dobrowolsky and V. Hart eds.2003), at 1.

buttressed by institutionalized racism, authoritarianism, and militarism. Despite these obstacles, South African women's constitutional activism has deep roots, connecting the thousands of women of all races, marching together in the 1950s, to the thousands of women involved in the nation-wide constitutional drafting consultations forty years later.¹⁰ Given the ferocious disincentives perpetrated by the apartheid state against alternative political movements, it is remarkable that women crossed racial and class barriers as often as they did, and perhaps not surprising that "white women tended to engage the state in struggles to improve their rights as citizens and in the family."¹¹ Black women had no rights as citizens, their engagement occurred within the national liberation struggle. Despite some limited interaction with white women, it is arguably not surprising that a feminist notion of 'sisterhood' did not take root in South Africa.

The African National Congress (ANC) was founded in 1912 to unite the African population against white minority rule and to act collectively for the creation of a non-racial and democratic South Africa. The formation of the ANC Women's League (ANCWL) in 1943 was followed by the establishment of another broader South African women's organization called the Federation of South African Women (FEDSAW) in 1954 in Johannesburg. FEDSAW was created as a non-racial organization comprised primarily of the ANCWL, the South African Coloured People's Organisation¹², and the Transvaal and the

¹⁰ South African women's presence in the constitutional transformation has already been documented by several South Africa feminist scholars such as Catherine Albertyn, et al, *ENGENDERING THE POLITICAL AGENDA – A SOUTH AFRICAN CASE STUDY* (1999); *PUTTING FEMINISM ON THE AGENDA* (Susan Bazilli ed. 2008, E-book published at www.iwrrp.org); *THE POST-APARTHEID CONSTITUTIONS – PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* (Penelope Andrews and Stephen Ellmann eds. 2001); Jacqueline Cock, *Women in South Africa's Transition to Democracy*, in *TRANSITIONS, ENVIRONMENTS, TRANSLATIONS: FEMINISM IN INTERNATIONAL POLITICS* (in J. Scott, C. Kaplan, and D. Keates eds. 1997); Shireen Hassim and Amy Goetz, *NO SHORTCUTS TO POWER: AFRICAN WOMEN IN POLITICS AND POLICY-MAKING* (2003); Shireen Hassim, *WOMEN'S ORGANIZATIONS AND DEMOCRACY IN SOUTH AFRICA: CONTESTING AUTHORITY* (2006).

¹¹ Catherine Albertyn, et al, *ENGENDERING THE POLITICAL AGENDA – A SOUTH AFRICAN CASE STUDY*, *Ibid* at 5. For example, white women suffragists in the 1920s won their right to vote, at the expense of the already small number of the racially defined minority voters. See C. Walker, *WOMEN AND RESISTANCE IN SOUTH AFRICA* (1991) at 19-24. See also C. Albertyn, et al, *ENGENDERING*, *Ibid* at 4. Similarly, legislative reform under the Matrimonial Affairs Act 1953 benefited only white women.

¹² The South African Coloured People's Organisation (SACPO) later became the Coloured People Congress (CPC) in 1953. SACPO managed to forge a political cooperation with other liberation movements to form the Congress Alliance, which culminated in the drafting of the Freedom Charter in 1955.

Natal Indian Congress¹³, who came together to form this federation. The FEDSAW¹⁴ founding conference on April 17, 1954 adopted the Women's Charter with the following preamble:

"We, the women of South Africa, wives and mothers, working women and housewives, African, Indians, European and Coloured, hereby declare our aim of striving for the removal of all laws, regulations, conventions and customs that discriminate against us as women, and that deprive us in any way of our inherent right to the advantages, responsibilities and opportunities that society offers to any one section of the population."¹⁵

The key women's political campaigns in the 1950s included the Defiance Campaign of 1952 and the Anti Pass Campaign of 1956.¹⁶ In the 1952 Defiance Campaign women confronted the government of Verwoerd (the Prime Minister of the day) with the Women's Charter. Together with the ANCWL, FEDSAW began to organize scores of demonstrations outside government offices in towns and cities around the country, which mushroomed into the first national protest on October 27, 1955 when an estimated 2,000 women of all races marched on the Union Buildings in Pretoria. Less than a year later, the protest movement had grown.¹⁷ On August 9, 1956,¹⁸ an estimated 20,000 women from all parts of South Africa made their way to Pretoria to converge at the Union Buildings in Pretoria to present anti-pass petitions to the then Prime Minister, J.G. Strijdom. This demonstration took place after the pass laws were extended to all women in the country. They raised their voices in freedom songs to tell President Strijdom to withdraw the new laws that women had to carry passes.¹⁹ As they marched, they

¹³ The Natal Indian Congress (NIC) was started by Mahatma Gandhi in 1894 to fight discrimination against Indians in South Africa. It later allied itself with the African National Congress, and was part of the Congress Alliance.

¹⁴ This organization was conceived by Ray Simons, Helen Joseph, Lillian Ngoyi and Amina Chachalia, who together formed the steering committee of FEDSAW.

¹⁵ PUTTING FEMINISM ON THE AGENDA, *supra* note 10 at 285.

¹⁶ Pass laws in South Africa were designed to segregate the population and restrict the movements of non-whites. This legislation was one of the dominant features of the apartheid system. A version of the pass laws was introduced as early as 1797. The Bantu Women's League (which became the ANC Woman's League in 1948) organized passive resistance in 1919 against the application of pass laws to women. The South African government agreed that women should not be obliged, like all black men over the age of 16 to carry the 'dom pass' (dumb pass). This changed in 1956 and women were covered under the Pass Laws Act.

¹⁷ *FOR A WIDE RANGING HISTORY OF WOMEN'S EARLY ACTIVISM IN SOUTH AFRICA SEE NOMBONISO GASA (ED) WOMEN IN SOUTH AFRICAN HISTORY (BASUS'IMBOKODO, BAWEL'IMILAMBO - MHEY REMOVE BOULDERS AND CROSS RIVERS) (2007).*

¹⁸ The 9th of August has been celebrated as South African Women's Day ever since.

¹⁹ During this time, an average of over 300,000 African men were convicted each year for pass laws violations. If passes were extended to African women, that figure would more than double.

chanted: Wathint` abafazi, Strijdom! Now you have touched the women, Strijdom! Wathint` imbokodo uzo kufa! You have struck a rock!

The Women's Defence of the Constitution League - commonly known as the "Black Sash"²⁰ - was formed in 1955. An organization of white women, Black Sash began much as the Persons Case in Canada (discussed in the next section) had - as a small group of extremely privileged white women discussing issues over tea, particularly their concerns about the abuse of law.²¹ By 1960, the ANC, the ANCWL and all other political parties were officially banned. The broad-based political manifestations of the 1950s virtually disappeared and legalized state suppression took some devastating new forms.²² Activism had to be directed to attempts to hold on to vestiges of income, family and community that were all being destroyed.²³ Throughout the 1960s and 1970s the leadership of women's organized political resistance decreased as the intensity and frequency of suppression increased. Women were being detained, tortured, exiled and, even in exile, hunted and killed, while others were scrambling to eke out support for whole families, often as single parents and or sole support providers.²⁴

By the 1980s, all liberation movements had been banned, except, technically, FEDSAW. The only openly (that is, not illegal) active women's

If mothers were arrested as well as fathers, the women asked, who would care for the children? IMBOKODO: The South African National Oral History Pilot Project (2000) Accessed online March 1, 2010 at http://www.sahistory.org.za/pages/library-resources/articles_papers/women-resistance.htm.

²⁰ The women wore black "sashes" over their clothing to suggest mourning as a protest of the country's unjust laws.

²¹ Between 1955 and 1994, the Black Sash provided widespread and visible proof of white (minority, women led) resistance towards the apartheid system. Its members worked as volunteer advocates to families affected by apartheid laws; held regular street demonstrations; spoke at political meetings; brought cases of injustice to the attention of their Members of Parliament, and kept vigils outside Parliament and government offices. After South Africa became a constitutional democracy in the 1990s, the Black Sash shifted focus from being a protest organization in support of black women to shaping legislation and pressing for policy reform. They are still a contemporary human rights NGO in South Africa, see <http://www.blacksash.org.za>.

²² The Native Law Amendment Act set the stage for forced removals from urban areas to the townships - distant, barren tracts of land with no infrastructure to support community living. The Group Areas Act divided neighbors into tribal groups, and forced them into designated townships.

²³ GERTRUDE NTITI, SHOPE, ANC, MALIBONGWE - CELEBRATING OUR UNSUNG HEROINES (2002), at 61.

²⁴ CRIES OF FREEDOM: WOMEN IN DETENTION IN SOUTH AFRICA, Catholic Institute for International Relations, October 1988. This publication was originally written by Susan Bazilli and published as A WOMAN'S PLACE IS IN THE STRUGGLE, NOT BEHIND BARS, Detainees Parent's Support Committee (DPSC) in February 1988 in Johannesburg but the DPSC was shortly banned so no names were used on either publication.

resistance group was the all-white “Black Sash.” Black and Coloured women in the 1970s and 1980s went underground and quietly built upon the branch structure that the ANCWL had started before it was banned, focusing on women’s self-help initiatives. In the student movement, increasing numbers of young women identified as feminists, and at the community level, women were organizing around issues such as reproductive and family health, including violence against women of all races.²⁵ In January 1990, South African women activists traveled to Amsterdam for the Malibongwe conference, to strategize with long exiled colleagues on integrating women’s emancipation into the national liberation struggle. Not quite a year later, the exiles finally returned home and spoke optimistically at the 1990 “Putting Women on the Agenda” conference, as the ANC was planning South Africa’s transformation into a constitutional democracy.

This pre-constitutional conference, organized by Lawyers for Human Rights²⁶, brought together women from exile, women activists inside the country, and women from the SADC region²⁷ who attended the gathering to share their experiences in post-colonial emerging democracies and the role of women in post-liberation struggles.²⁸ The conference was held so as to “empower women to participate in all the crucial aspects of the transformation.”²⁹ However, the constitutional negotiations had not yet begun. Invited to South Africa to reflect on the decade since Canadian women had negotiated constitutional amendments, Canadian feminist legal scholar 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 re-

²⁵ Interview of Mmatshilo Motsei, (Pretoria) July 2004. Her acclaimed autobiography, *MMATSHILO MOTSEI, HEARING VISIONS, SEEING VOICES* (2004) detailed personalized accounts of her community based feminist activism, including as a member of the Women’s National Coalition formed to put women into the constitutional negotiations.

²⁶ The co-author, Susan Bazilli, was the convenor and organizer of the conference. For a personal reflection on the process of organizing this conference, and participating in several of the seminal conferences during this transitional period, see Susan Bazilli, *Feminist Conferencing*, AGENDA No.9 (1991) at 45-52.

²⁷ The Southern African Development Community (SADC) has been in existence since 1980, when it was formed as a loose alliance of nine majority-ruled States in Southern Africa known as the Southern African Development Coordination Conference (SADCC), with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa. The founding Member States are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

²⁸ During the years of the apartheid regime, there was a wide range of boycotts – cultural, academic, sport, etc. – that ranged from the 1960s through the 1980s, until the unbanning of the ANC in 1990. <http://www.anc.org.za/ancdocs/history/boycotts/> accessed Feb 23 2010.

²⁹ Susan Bazilli *Introduction*, in *PUTTING FEMINISM ON THE AGENDA*, *supra* note 10.

sources. Long term struggle lies ahead in fighting off "rights" challenges to women's few and fragile gains..."³⁰

6. CANADA PRIOR TO CONSTITUTIONAL NEGOTIATIONS

With the goal of gaining genuine access and full participation in their democracy, Canadian women engaged in dismantling institutional barriers to equality in many ways – including the strategy of court-based challenges to governments, beginning with the "Persons Case", in 1928, when five women collectively petitioned the Supreme Court of Canada, to ask the following question: Does the word 'person' in Section 24 of the British North America Act include female 'persons'?³¹ Chief Justice Anglin answered for a unanimously negative Supreme Court of Canada.³² In response to this defeat, one of the five petitioners, Emily Murphy, said: Whenever I don't know whether to fight or not, I fight.³³

The five petitioners, who have come to be known in Canada as the "Famous Five" had to choose a strategy, between: a) convincing the government to legislate in their favor; or b) to litigate further to the Judicial Committee of the Privy Council of England. The Five opted to appeal, but could not afford to be present at such appeal.³⁴ Litigation was a strategic choice that few Canadian women of the time could have made. These women were privileged; their years of women's rights activism, relatively advantaged social positions and political access made such high impact litigation possible for them.³⁵

³⁰ Elizabeth A. Sheehy, *Women and Equality Rights in Canada: Sobering Reflections, Impossible Choices*, in PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed. 1990), at 272.

³¹ Emily Murphy, Nellie McClung, Henrietta Muir Edwards, Louise Crummy McKinney and Irene Parlby, now known in Canada, as the "Famous Five" For more information: <http://www.famous5.org>

³² 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."

³³ Nancy Millar, *THE FAMOUS FIVE – EMILY MURPHY AND THE CASE OF THE MISSING PERSONS* (1999), at 9 – 15.

³⁴ *Ibid.* at 45. Describes how the Five lost control over the question that had been put to the Supreme Court of Canada.

³⁵ Nellie L. McClung, *Women are Discontented*, in *THE PROPER SPHERE* (Cook and Mitchison eds. (1976) 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."

On October 18, 1929, Lord Chancellor Sankey of the Privy Council, provided the English Lords' unanimous answer,³⁶ "...and to those who would ask why the word [persons] should include female, the obvious answer is, why should it not?"³⁷ The Persons Case can be seen as the first wave of the Canadian women's movement, but the momentum was not sustained during the severe economic downturns and devastation of two world wars. Decades later, as Canada entered its centennial year in 1967, traditional roles for women were again being questioned. Women's organizations brought pressure on then Prime Minister Pearson to launch a Royal Commission on the Status of Women (RCSW or Royal Commission) - so named because of Canada's continued membership in The British Commonwealth and recognition of the English monarchy. The Royal Commission on the Status of Women (RCSW) was established with a mandate 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."³⁸

This Royal Commission set a new standard in Canadian public discourse on a wide range of topics, not typically considered to be "women's issues", including tax policy, education, Aboriginal women's problems under the *Indian Act*, health care, reproductive rights, child care - most involving civil and criminal law reforms. An activist quality characterized how the commissioners approached their collective task. An unprecedented degree of women's engagement as citizens was reflected in the findings of research that had been commissioned, necessitating questions of Government that had never been asked before.

A year into the Commission's mandate, Member of Parliament, Pauline Jewett, noted that many more women than men were attending the RCSW hearings, being held as part of fulfilling the Commission's terms of reference, but provincial and federal government representatives (most of whom were men) were seldom present at these public hearings,

³⁶ October 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.

³⁷ Reference 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'*, 13 CANADIAN JOURNAL OF LAW AND SOCIETY (1998); K. Lahey, *Legal 'Persons' and the Charter of Rights: Gender, Race and Sexuality in Canada*, 77 CANADIAN BAR REVIEW (1998).

³⁸ CBC Radio and Television Archives, EQUALITY FIRST: THE ROYAL COMMISSION ON THE STATUS OF WOMEN, accessed online Aug.20.06 at www.archives.cbc.ca.

"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."³⁹

After several years, thirty-four research reports and public hearings across the country, the Commission delivered its Final Report, *Equality First*, to considerable media attention in 1970. Many of the 167 recommendations spoke to social and economic rights still unrealized in Canada today, including a national day care program with sliding scale fees based on family income and a federally guaranteed annual income to the heads of all one-parent families with dependent children.⁴⁰

Women's expectations that the forward-looking RCSW recommendations would be embraced by their governments and positive change would begin to materialize were not realized; dissatisfaction culminated in April 1972, when hundreds of women from across the country gathered to form a new activist umbrella non-governmental organization, the National Action Committee on the Status of Women (NAC). Founded to operate as a national federation of women's organizations to maintain momentum toward establishing pro-equality programs and mechanisms, in less than a decade NAC grew to comprise over 150 affiliated organizations, - with several million members - working toward realizing the recommendations outlined in the RCSW *Equality First* report.⁴¹

Not long after NAC was founded in the 1970s, the Government of Canada established an internal agency, Status of Women Canada (SWC), staffed by the federal civil service, as well as an external, quasi-independent body, the Canadian Advisory Council on the Status of Women (CACSW), with its own research and program staff, to which the Government appointed

³⁹ Pauline Jewett, *Where were the MEN when Canada set out to find what makes life tough for its women?*, in MACLEANS MAGAZINE (January 1968) at 12. Jewett became a Member of Parliament who strongly supported the women's constitutional activists during the drafting negotiations in 1981.

⁴⁰ Christopher P. Manfredi. *THE CANADIAN FEMINIST MOVEMENT, CONSTITUTIONAL POLITICS, AND THE STRATEGIC USE OF LEGAL RESOURCES*, (Vancouver: UBC Press, 2000) at 19.

⁴¹ THE CANADIAN ENCYCLOPEDIA, (2010 Historica-Dominion) accessed online March 13, 2010 www.the.canadianencyclopedia.com/index.cfm?PgNm=A1ARTA0005604 Note: At the 40th anniversary of the RCSW recommendations, on Parliament Hill on January 27, 2010, co-author Susan Bazilli presented and witnessed how feminist scholars and academics lamented the loss of NAC and other Canadian feminist organizations, largely due to funding cuts by successive federal governments since 1995, but in particular, by the Harper Conservative government between 2006-2009.

women leaders from regions of Canada. For many, these initiatives were heralded as evidence of the Government conceding the existence of significant inequality between men and women that had been documented by the Royal Commission. Establishing and staffing these mechanisms required the greatest financial commitment that any Canadian government had ever made in improving the status of women. Both of these bodies proved to be critical to galvanizing the largest constitutional mobilization in Canadian history, during the patriation of the Canadian constitution from England to Canada in the 1980s, when waves of women insisted on having women's lack of rights in the public and private spheres put on the constitutional agenda. But it was losses in women's rights cases in the 1970s that primed the Canadian women's movement to advocate for participation parity as the constitution-building politics of the late 1970s and early 1980s intensified.⁴²

NO RIGHTS FOR WOMEN UNDER THE CANADIAN BILL OF RIGHTS

During the 1970s, every woman seeking equality protections under the *Canadian Bill of Rights*⁴³ failed. What was missing from the jurisprudence at that time was a gender based analysis of sex equality "under and before the law". In the cases that women lost that are briefly discussed in the following section, the judicial decisions demonstrated a failure to appreciate the disparate impact of laws on women and girls and they exemplify the diverse aspects of women's equality that were denied. Moreover, these cases illustrate how women challenged institutions that were mechanisms created by governments with the stated goal of providing assistance on crucial areas of federal responsibility to Canadians, such as divorce, unemployment insurance, and protection for Canada's indigenous First Nations. These lost cases contributed to disillusionment with achieving equality within the existing legal framework. Widespread public knowledge of these cases and their losses fueled the fires for constitutional change.⁴⁴

1. ABORIGINAL WOMEN AND CHILDREN DENIED STATUS

With their appeals heard together, Jeanette Lavell and Yvonne Bédard, Aboriginal women who had married non-Aboriginal men, argued that Section 12 (1)(b) of the federal *Indian Act* discriminated against women of Indian status, by making them lose their Indian status upon marriage to a non-Indian, and denying Indian status to any children of those marriages, but enabled Indian men to extend Indian status to non-Indian wives, and in turn, to

⁴² Marilou McPhedran, *A truer story: constitutional trialogue*, 36 SUPREME COURT LAW REVIEW (2007), at 114.

⁴³ *Canadian Bill of Rights*, S.C. 1960 c.44 [still in force as a statute of Canada, now subject to the Constitution Act, 1982]

⁴⁴ Doris Anderson, *The Supreme Court and Women's Rights*, 1 SUPREME COURT LAW REVIEW 1980 at 457.

their children.⁴⁵ In contradiction to many Aboriginal traditions in Canada, the *Indian Act* was designed by non-Aboriginal legislators to be patrilineal. Although the concept of Indian status was originally imposed on Aboriginal people by the federal government, it developed into a powerful source of cultural identity for individuals of Aboriginal descent and often determined leadership status within Aboriginal communities. Under the 1876 *Indian Act*, and subsequent iterations, women who married a non-Indian lost their status as 'Indians' – as did their children. Section 12(1) (b) of the *Indian Act* perpetuated the discrimination: women were legally defined as Indians if their fathers were Indians or if they married Indians, but were not defined as Indians if their mothers were Indians. When this law was challenged by Jeanette Lavell and Yvonne Bédard, the Court defined "equality before the law" as formal equality of same treatment, holding that all Indian women were treated the same by the law and finding that any denial of Indian status on the basis of their sex was not an injustice that could be redressed by the *Canadian Bill of Rights*. This loss under the Bill of Rights prompted national concern, including a determined response by a group of Aboriginal women of the Maliseet tribe, who took their small children, fathered by non-status men, to walk in protest from the Tobique reserve on the eastern coast of Canada to the federal capital city of Ottawa. One of their leaders, Sandra Lovelace (appointed to the Senate of Canada in 2005), alleged that Canada violated section 27 of the International Covenant on Civil and Political Rights of the United Nations.⁴⁶ Lovelace and her volunteer team successfully petitioned the United Nations Human Rights Committee using the Optional Protocol to the ICCPR.⁴⁷

2. JUST A WIFE

In parting ways with her husband of more than 25 years, Irene Murdoch considered herself entitled to a fair share of his property and assets. She reasoned that her contributions of money and labour to these properties in the course of the marriage should translate into shared ownership. At that time in Canada, matrimonial property was not defined in law to support Mrs. Murdoch's reasoning and she brought an action against Mr. Murdoch alleging partnership for an undivided one-half interest in land and assets in his name. She lost at trial and on appeal, then used the *Canadian Bill of Rights* on final

⁴⁵ *A.G. Canada v. Lavell*, [1974] SCR 1349. [hereinafter Lavell]

⁴⁶ (1966) G.A. Res. 2200 (XXI), 21 UN 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 - see <http://www.nwac-hq.org/billc31.htm>

⁴⁷ *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.

appeal to challenge those judicial interpretations and to assert her equitable claim by way of a resulting or constructive trust. In dismissing her lifetime of work in ranching with her husband, a majority of the Supreme Court of Canada acknowledged that Irene Murdoch had been hospitalized after an altercation with her husband over division of assets and accepted the description of the trial judge that her “routine” work of “any ranch wife” was insufficient to create a legal claim to the matrimonial property. When asked to describe the nature of her work, Mrs. Murdoch had 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.”⁴⁸ In the sole dissent among the Supreme Court judges, Justice Bora Laskin supported Mrs. Murdoch’s claim,

Insofar as the trial judge’s holding against the appellant [Mrs. Murdoch] rests on his view that she discharged a role that was not beyond what is normally expected of a wife, I disagree with it and approach her claim on a different footing.⁴⁹

But the rest of the Supreme Court supported the reasoning of the trial judge and Irene Murdoch’s loss galvanized family law reform in every province and territory of Canada for the rest of the 1970s.⁵⁰

3. NO PROTECTION FOR A “PREGNANT PERSON”

Stella Bliss was fired from her job, just a few days before giving birth. At that time in Canada, there were no protections in human rights statutes that prohibited employers discriminating on that basis. After her baby was born, Stella Bliss sought, but did not find, appropriate employment. According to the rules at that time, she had worked long enough to qualify for regular unemployment benefits, and so she applied for unemployment insurance on the basis of being fired from her job. In turning down her application, the federal Unemployment Insurance Commission reasoned that she had been pregnant when she lost her job and so she could not be considered under the regular provisions for job loss, requiring her to meet the more stringent criteria ap-

⁴⁸ *Murdoch v. Murdoch*, [1975] 1 SCR 423, at 443.

⁴⁹ *Ibid.*, at 439

⁵⁰ M. Elizabeth Atcheson, Mary Eberts, and Beth Symes, *WOMEN AND LEGAL ACTION: PRECEDENTS, RESOURCES AND STRATEGIES FOR THE FUTURE*, (1984) noted that Ernest Shymka of Calgary represented Mrs. Murdoch on a contingency basis, but in the end was not paid fees or disbursements. See also Mysty S. Clapton, *Murdoch v. Murdoch: The Organizing Narrative of Matrimonial Property Law Reform*, *CANADIAN JOURNAL OF WOMEN AND THE LAW*, Volume 20, Number 2, (University of Toronto Press, 2008) 197-230

plied to workers claiming unemployment insurance maternity benefits under sections 30 and 46 of the Unemployment Insurance Act, 1971.⁵¹

Stella Bliss challenged the decision to deny her benefits through the higher eligibility threshold applied to "unemployment caused by pregnancy" in section 30(1). The Umpire accepted the assertion of Ms. Bliss, ruling that s.46 was rendered inoperative by s. 1(b) of the *Canadian Bill of Rights* in that s.46 discriminated on the basis of sex and, as a consequence, abridged the right of equality of the claimant. The federal government appealed and in reasons for judgment, the Federal Court of Appeal concluded that, "[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."⁵² Stella Bliss then appealed to the Supreme Court of Canada and lost one last time. The Supreme Court found that, "[S]ections 30 and 46 constitute a complete code dealing exclusively with the entitlement of women ... Any inequality between the sexes in this area is not created by legislation but by nature."⁵³

Mary Jane Mossman, the Canadian feminist scholar has observed:

The Court's characterization deftly defined equality so as to exclude any aspect of women's experiences that differ from those of men. In other words, if being pregnant is something that happens only to one sex, then differential treatment (including less favourable treatment) cannot offend legal guarantees of equality in the *Canadian Bill of Rights*. In this way, men are the norm, and women are entitled to equality when they are the same as men, but not when they are different from them.⁵⁴

Repeated judicial denial of the discrimination rampant in Canadian women's daily lives, plus governmental preference for less accountability,⁵⁵ set the stage for a political standoff that triggered women's constitutional activism in the 1980s.⁵⁶

⁵¹ 1970-71-72 (Can.), c.48

⁵² Pratte, J., *The Attorney General of Canada v. Stella Bliss*, Federal Court of Appeal

⁵³ *Bliss v. A.-G. Canada*, [1979] 1 SCR 183.

⁵⁴ Mary Jane Mossman, FEMINISM AND THE LAW: CHALLENGES AND CHOICES, accessed online March 12, 2010 www.lawsite.ca/docs/Edited%20Mossman%20BlissBrookesSymes.doc

⁵⁵ The federal government had not followed the recommendation that the CACSW should report openly to Parliament.

⁵⁶ Authors note: When constitutional reform re-surfaced on the government agenda in 1979, the CACSW, largely due to the initiative of its president, Doris Anderson, engaged in a national

7. CANADA – CONSTITUTION FOCUSED ACTIVISM IN THE 1980s

As the 1980s opened, the Canadian federal government of Prime Minister Pierre Trudeau demonstrated its preference for executive style federalism as the means of bringing in a new constitution, releasing wording of a proposed constitutionally entrenched anti-discrimination clause that echoed the empty guarantees in the *Canadian Bill of Rights* that had failed Canadian women. Public pressure conveyed by opposition parties in Parliament eventually convinced the government to name a Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (“Special Joint Committee”), with members drawn from all the parties of both houses of Parliament to hold public hearings on the proposed new constitution. For the first time in Canada, a parliamentary committee was televised and millions of Canadians tuned in to witness what was happening at the hearings, which had to be extended in response to the high demand for appointments to make presentations. When it was time for the National Action Committee on the Status of Women (NAC) to present to the Special Joint Committee, 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).⁵⁷ She cautioned the parliamentarians,

“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.”⁵⁸

Due to the comparatively high degree of public interest and scrutiny facilitated by television coverage, the co-chair of the Special Joint Committee, Senator Harry Hays, made national news in November of 1980, when he said to the NAC executives:

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

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.

⁵⁷ G.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.

⁵⁸ The NAC analysis focussed on the proposed wording for s.15 of the Charter, which at that time, was as weak as the text in the Canadian bill of Rights, under which women had lost every case. The NAC criticism was consistent with what the Special Joint Committee had heard from the CACSW.

babies or children. All you girls are going to be working and who's going to look after them? ⁵⁹

Such media coverage heightened public awareness, resulting in increased public responsiveness to the constitutional negotiations, and as 1980 came to a close, changes to the constitutional text were being discussed. Penney Kome reviewed the record on non-governmental organizations that made presentations to the Special Joint Committee and found: Most attention was paid to Clause 15 ... Women wanted the section renamed "Equality Rights," to emphasize that equality means more than non-discrimination. ⁶⁰

1981 opened with a response from Attorney General Jean Chrétien when he announced in Parliament that there would be major changes to section 15 of the proposed Charter of Rights and Freedoms, slated for entrenchment in the new constitution. One of the major concerns arising from the string of women's losses under the *Canadian Bill of Rights* in the 1970s was that the new Charter had to contain language that would signal to judges that they had the authority to order results-based remedies – clearly beyond the notion of formal equality attributed by judges to the words “before the law.” The wording in s.15 of the proposed Charter of Rights became: 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... [emphasis added]

In January of 1981, after months of presentations by concerned citizens and their organizations to the Special Joint Committee, the Government's changes to the proposed section 15 included altering the title to "Equality Rights", creating an opening for non- enumerated or analogous grounds of discrimination (which made it possible for Canadian judges to “read in” a ground, for example, reading in “citizenship” in the *Andrews* decision in 1989 and sexual orientation in the *Vriend* decision in 1998)⁶¹, reversing the order of “age” and “sex”, as well as adding another enumerated ground – “mental or physical disability.”⁶²

⁵⁹ Co-author McPhedran was present as a NAC legal advisor. This exchange was filmed and forms part of a segment of a documentary series hosted by Canadian journalist Patrick Watson (1988), “The Last Citizens” in *The Struggle for Democracy* (1988) and in the educational film produced by co-author Susan Bazilli, *Constitute* (2010). See also P. Watson and B. Barber, *THE STRUGGLE FOR DEMOCRACY* (1988) at 141-69.

⁶⁰ Penney Kome, *TAKING OF TWENTY-EIGHT: WOMEN CHALLENGE THE CONSTITUTION* (1983) at 35

⁶¹ *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143; *Vriend v. Alberta (Attorney General)*, [1998] 1 S.C.J. No. 29, [1998] 1 S.C.R. 493

⁶² M. Dawson, *The Making of Section 15 of the Charter*, (2006) 5 JOURNAL OF LAW AND EQUALITY 25, at 31; M.D.Lepofsky, *The Charter's Guarantee of Equality to People with Disabilities: How Well Is It Working?* (1998) 16 WINDSOR Y.B. ACCESS JUSTICE 155, at 156

In his explanatory remarks on the Government's revision of the proposed s. 15 text, the attorney general credited the title change - from "Non-discrimination Rights" to "Equality Rights" - primarily to the Canadian Advisory Council on the Status of Women (CACSW, now defunct) then chaired by the late Doris Anderson, with Mary Eberts acting as her legal counsel.⁶³ The CACSW had addressed the Special Joint Committee in the fall of 1980, and Eberts brought to the attention of the Joint Committee a rising sense of exclusion about the "executive federalism" model for constitution-building, predicting the intensification of women's constitutional engagement that did in fact arise a few months later, in early 1981.

The Ad Hoc Committee of Canadian Women on the Constitution, 1981

Canadian women's constitutional activism was sparked by the abrupt resignation of the government-appointed chair of the CACSW in January of 1981, in public protest against what she considered to be government interference in the women's constitutional conference being organized by the CACSW. Bruised by such attitudes and their major losses under the *Canadian Bill of Rights*, thousands of women arrived in Ottawa, Canada's capital city, for their own unauthorized constitutional *ad hoc* conference thereby launching an unprecedented grassroots constitutional campaign, led by the Ad Hoc Committee of Canadian Women on the Constitution.⁶⁴ A single priority emerged for thousands of Canadian women: to amend the proposed constitution's entrenched charter of rights - before it was patriated - to strengthen women's equality rights. To reach this goal, seasoned women's rights activists joined newly minted women lawyers as unpaid women's rights lobbyists in the federal government headquarters on Parliament Hill, in Ottawa.⁶⁵ The populist constitution-building movement grew beyond the nation's capital to

⁶³ Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32nd Parliament, 1st Sess., issue no. 1 (January 12, 1981)

⁶⁴ The awareness and readiness that bolstered the determination of thousands of Canadian women to seek participation parity in constitution-building was due in large part to the leadership of the late Doris Anderson. At the close of the 1970s, Doris Anderson, the popular long-serving editor of Canada's largest women's magazine, was appointed by the federal government as president of the Canadian Advisory Council on the Status of Women (CACSW). She traversed the country raising awareness, funded the only constitutional research to focus on women - such as the formative feminist constitutional analysis in Audrey Doerr and Micheline Carrier, (eds.) *WOMEN AND THE CONSTITUTION IN CANADA* (1981) and sparked national media attention and a massive mobilization when she resigned suddenly, citing governmental interference. Recorded personal interview August 20, 2004, York University Library - Clara Thomas Archives and Special Collections, Toronto, Canada (Marilou McPhedran fonds)

⁶⁵ The Canadian women's Ad Hoc constitutional lobby of 1981 was the principal occupation of the co-author Marilou McPhedran.

provincial legislatures. The women's constitutional lobby in the capital ebbed and surged throughout 1981, as elected federal and provincial representatives were besieged by concerned women voters in their home ridings, and crowds of angry women confronted provincial government leaders (premiers) inside and outside their legislative buildings, until the tide turned, thereby laying claim for a place in Canadian legal history for women's constitutional activism – a claim that has yet to be fully realised.

1. MORE CHANGES TO THE CHARTER: S. 28 EQUAL RIGHTS AMENDMENT AND THE S.33 OVERRIDE

Throughout 1981, while Canadian women were mobilizing to strengthen constitutional equality rights, proximity to the American media raised awareness of the intense political battle being waged by American women facing their June 30, 1982 deadline for an Equal Rights Amendment (ERA) to the American constitution – which seemed unlikely to succeed.⁶⁶ The fact that the ERA had been introduced into every American Congress since 1923, without success, served to reinforce the shared sense of urgency among many Canadian women to secure their equivalent ERA in the immediate patriation process. By April 1981, the Trudeau government had introduced another constitutional package that included a last-minute, unanimous all-party approved insertion of s.28 as the equal rights amendment, which passed the House of Commons and the Senate. Section 28 was designed as a guarantee in the form of a *non obstante*, or override, clause:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.⁶⁷

Divisions among the federal and provincial leaders had prompted some of the provinces to challenge the federal government's approach to constitutional reform by a request (reference) to the Supreme Court of Canada to rule on the constitutionality of the process. The Court announced its reference

⁶⁶The ERA was written in 1923 by suffragette Alice Paul, seen as the next necessary step after the 19th Amendment (affirming women's right to vote) in guaranteeing "equal justice under law" to all citizens. The ERA was introduced into every session of Congress between 1923 and 1972, when it was passed and sent to the states for ratification. By the June 30, 1982 deadline, the ERA had been ratified by only 35 states, leaving it three states short of the 38 required for ratification. In the 110th Congress (2007 - 2008), the Equal Rights Amendment was introduced as S.J. Res. 10 (Sen. Edward Kennedy, MA, lead sponsor) and H.J. Res. 40 (Rep. Carolyn Maloney, NY, lead sponsor) – with no deadlines on the ratification process in their proposing clauses. <http://www.equalrightsamendment.org/overview.htm> Accessed on line March 12 2010.

⁶⁷ The co-author McPhedran contributed to the lobbying for, and drafting of, s. 28.

decision in late September of 1981, via television to the Canadian public.⁶⁸ Manfredi observed,

...the one thing that was clear was that nobody had won, and the euphoria of victory could neither be felt nor communicated to a waiting public.

... What we do know is that the Supreme Court's decision produced conditions under which the governments of Canada were forced to continue once again their long search for constitutional agreement.⁶⁹

In November of 1981, the prime minister had responded to the Supreme Court of Canada's constitutional reference decision by calling together the premiers to try to reach broader consensus in support of his constitutional patriation package.⁷⁰ Thousands of women, who had mobilized across Canada through Ad Hoc lobbying, were shocked when, what they thought was their significant participatory victory as embodied in the s. 15 and 28 equality rights adopted by Parliament just months before, had been undermined in the backroom deal announced by federal and provincial leaders on November 5, 1981, that included a new s. 33 of the Charter that could override certain specified rights and freedoms in the Charter – in effect “untrenchment” of freedoms in s.2, right to life and liberty in s.7. Equality rights were also listed as being subject to the new s.33 override, but no sections were specified. When questioned in the House of Commons about the vagueness of the new override, the prime minister announced that it was only logical for the proposed s.33 to override both of the equality rights provisions - sections 15 and s.28. Women constitutional activists immediately spoke out against the override as a “surtax” on their hard won constitutional rights and the women's lobby re-mobilized to try to convince the politicians to lift the s.33 override.⁷¹

In the third mobilization in less than a year, the third wave of the Ad Hoc women's constitutional lobby stopped the “taking of twenty eight” – but the lobby could not stop the taking of section 15 - s.33 could still override

⁶⁸ *Re Resolution to Amend the Constitution*, [1981] S.C.J. No. 58 (S.C.C.) (Q.L.), [1981] 1 S.C.R. 753.

⁶⁹ C. P. Manfredi, *FEMINIST ACTIVISM IN THE SUPREME COURT: LEGAL MOBILIZATION AND THE WOMEN'S LEGAL EDUCATION AND ACTION FUND* (2004) at 184-185

⁷⁰ In *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, which resulted in the insertion of the s.33 *non obstante* clause.

⁷¹ For a more detailed account, see PENNEY KOME, *THE TAKING OF TWENTY-EIGHT – WOMEN CHALLENGE THE CONSTITUTION* (1983)

s.15.⁷² The new override produced considerable concern; the s. 28 equal rights guarantee was designed to work with the equality rights articulated in s.15. To compound the challenge, when the Queen of England came to Canada to sign the constitutional proclamation on April 17, 1982, s. 15 was the only rights-bearing section in the *Charter* that was not activated with the rest of the constitution, due to a moratorium placed on it by s.32 of the Charter.⁷³

THE QUEST FOR SUBSTANTIVE EQUALITY IN A POST-CHARTER CANADA: HIGH IMPACT LITIGATION AS A STRATEGY⁷⁴

The Ad Hoc women's constitutional rights leaders and their advisors assessed the longstanding Canadian judicial penchant for making decisions limited to formal equality, the demonstrated political resistance to equality rights encountered in the constitutional patriation process, and concluded that an independent constitutional defence fund for high impact litigation was a crucial mechanism for ensuring that the rights language of the *Charter* could be turned into "lived rights." They understood that the earliest cases to be decided under the Charter would set the precedents for generations to come,

⁷² Concerns about s. 33 and potential tension between s. 33, s. 28 and s.1 are not the focus of this chapter, but it is relevant to note that s.1 simply requires the rights and freedoms identified in the Charter to be balanced against the needs and values of a free and democratic society, while still supporting and maintaining the existence of the enumerated rights and freedoms "subject only" to reasonable limits. In contrast, section 33 enables governments to circumvent any restrictions imposed on government action by the rights and freedoms listed in the Charter. S. 33 allows for the total avoidance of Charter protections- except perhaps if blocked by the sex equality guarantee in S. 28 – something yet to be determined. Although the Supreme Court of Canada has yet to give definitive meaning to s. 28, the Court did conclude in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 that the function of s.28 is interpretive - a more limited role than if the Court had concluded that s. 28 is rights-bearing. This in turn weakens s.28 in the face of the s.33 override, because s.33 can be applied to the equality rights-bearing s.15.

⁷³ Section 32 of the Charter states: (1) This Charter applies (a) to the Parliament and government of Canada in respect of 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 in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

⁷⁴ Section 15 states: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (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.

and started to plan a women's legal defence fund, but the model to be used had not been developed.

2. 1982: CHARTER OF RIGHTS EDUCATION FUND

During the forced hiatus of the moratorium on s.15, from 1982-1985, the Charter of Rights Education Fund was founded to encourage women constitutional activists to conduct volunteer independent statute audits at the provincial and federal levels. The statute audits revealed that governments were prepared to make alarmingly modest efforts at reform, limited mostly to *prima facie* discrimination, rather than less visible forms of systemic discrimination.⁷⁵

3. 1985: LEAF – THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

But what if social life is unequal? Legal equality then becomes a formula for reinforcing, magnifying, and rigidifying the social inequalities it purports to be equalizing and might have rectified.⁷⁶

This growing realization reinforced the decision to build a women's legal defence fund and the period of the moratorium on s.15 was used to create LEAF – the Women's Legal Education and Action Fund – as an independent non-governmental organization with the capacity to conduct litigation selected for its potential high impact in effecting systemic changes to promote gender equality.⁷⁷ Many of the “founding mothers” of LEAF had been active in the Ad Hoc constitutional social mobilization for women's rights, and they knew that true equality in Canadian society could not be achieved through the words of constitutional amendments alone.⁷⁸ The “LEAF mothers” saw gender democracy as encompassing evidence and arguments grounded in women's daily realities being presented in the courts where decisions on equality were made. In Christopher Manfredi's study of feminist legal activism, he charac-

⁷⁵ Including founders of LEAF, members in the National Association of Women and the Law chapters in several provinces and the Charter of Rights Education Fund, of which the co-author Marilou McPhedran was also a founder.

⁷⁶ Catherine MacKinnon, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (2006) at 107.

⁷⁷ The Canadian Advisory Council on the Status of Women commissioned a study of possible models for a constitutional legal defence fund for women. The authors, Atcheson, Eberts and Symes, recommended the model of the National Association for the Advancement of Colored People – NAACP – that had been developed by Thurgood Marshall (before he was named to the United States Supreme Court). On a parallel path to the CACSW researchers, the “LEAF mothers” determined that an independent litigation fund supported by volunteers and staff with specialized litigation and education skills would be essential to actually obtaining any of the equal protections and benefits promised by the new constitution.

⁷⁸ The co-author McPhedran was a *pro bono* counsel to the Ad Hoc Committee of Canadian Women on the Constitution from 1981 through 1992 and a founding mother of LEAF in 1985.

terized the launch of LEAF as the women's "microconstitutional campaign for substantive equality."⁷⁹

The third anniversary of the new Canadian constitution, April 17, 1985, was also the first day on which it was possible to use both equality provisions of the Charter (ss.15 and 28). At this first opportunity, LEAF launched constitutional challenges to laws that governments had left unchanged during the three years of the moratorium.⁸⁰ The LEAF model was not limited to cases explicitly on women's rights, and it included making application to the court to be accepted as an Intervener – often a more cost efficient way to convey analysis and evidence than representing a party to the litigation.

In the same time period as LEAF was founded, other non-governmental mechanisms for raising awareness and expertise in women's rights were launched, including: The first national conference for prominent jurists and academics to focus on equality rights, after passage of the Charter; the launch of the two-pronged (research and litigation) LEAF model of evidence based advocacy; the National Association of Women and the Law (NAWL) founding of the *Canadian Journal of Women and the Law*; and the first textbook on equality rights, published in the same year that LEAF was launched.⁸¹

Aboriginal Women in Canada

Aboriginal women in Canada are the most oppressed and marginalized. Although often supported by non-Aboriginal women in their struggle for constitutional rights, Aboriginal women have made a different path, which merits this separate section. Aboriginal women in Canada did not even get the vote until 1960, almost a half-century after many other Canadian women. 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, and a furor in Canada ensued.⁸² But he had a point.⁸³ 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.

A composite of Aboriginal women's constitutional rights is made up of sections inside the Charter of Rights and Freedoms (s.15 and 28) and in the rest of the Constitution Act, 1982 - s. 35(4) – directed to Aboriginal women -

⁷⁹ C.P. Manfredi, C.P. FEMINIST ACTIVISM IN THE SUPREME COURT, *supra* note 69, at 49.

⁸⁰ The Women's Legal Education and Action Fund, <http://www.leaf.ca>. Accessed January 19, 2010.

⁸¹ Anne Bayefsky and Mary Eberts (eds) EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (1985).

⁸² CBC Archives. www.cbc.ca

⁸³ The Canadian reservation system is seen as the model for the South African apartheid Bantustan system.

placed outside the Charter as part of a set of constitutional amendments on Aboriginal rights made in the *Constitution Amendment Proclamation* of 1983.⁸⁴ 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-Lafond questioned why 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. As Turpel-Lafond noted:

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.⁸⁵

Aboriginal women's rights activists were deeply involved in attempts to craft an equality guarantee specifically for Aboriginal women, as part of the promised negotiations on Aboriginal rights, to be added to the Constitution, which began soon after patriation in 1982. Spokeswomen for the largest Aboriginal women's organization, the 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, and thus Aboriginal women needed to rely on their constitutional rights. The Indian Act was amended in an attempt to bring it into compliance with the Charter, but NWAC leaders were acutely disappointed with what was enacted to address their rights in the 1983 Charter amendments. Since the 1983 constitutional Aboriginal gender equality amendments have been so limited, Aboriginal women's activism has increasingly turned elsewhere, developing a domestic legislative response to matrimonial property injustices on Indian reserves,⁸⁶ mobilizing a national and international campaign on violence against Aboriginal women⁸⁷ and linking it to the UN Declaration on the Rights of Indigenous Peoples.⁸⁸

Faced with the weakly worded constitutional amendments, NWAC developed a constitutional litigation strategy and increased participation in rights fora outside Canada, to secure stronger protections for Aboriginal

⁸⁴ *Constitution Amendment Proclamation, 1983*, now s. 35(4) of the *Constitution Act, 1982*

⁸⁵ Mary Ellen Turpel-Lafond, *Patriarchy and Paternalism: the Legacy of the Canadian State for First Nations Women*, 18 CANADIAN JOURNAL OF WOMEN AND THE LAW (1997), at 180.

⁸⁶ <http://www.nwac-hq.org/news.htm>

⁸⁷ <http://www.sistersinspirit.ca> and

http://www.amnesty.ca/take_action/actions/canada_stolensisters_2005.php

⁸⁸ Although the Declaration is a non-binding aspirational statement, only Canada and two other Council members voted against it. This fact is seen with great shame by many Canadians, these authors included.

women. By the end of the 1990s, NWAC had sued the prime minister and the federal government over exclusion of Aboriginal women from yet another round of constitutional negotiations where all the national male aboriginal groups were funded to participate, and not the women. NWAC lost every time.

"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."⁸⁹

THE INTRACTABILITY OF SECTION 12 (1) (B) OF THE INDIAN ACT

As April 17, 1985, the date for ending the moratorium on s.15 equality rights in the *Canadian Charter*, approached, the Canadian Parliament amended the *Indian Act* in Bill C-31, in what has proven to be an unsuccessful attempt to eliminate sex discrimination from the criteria for determining registration status. Perpetuation of discrimination under the 1985 amendments became more evident, and in 1989, s. 12(1) (b) was again challenged - this time by Sharon McIvor and her son, Jacob Grismer, arguing that the only effective remedy would place all descendants of status Indian women, that is matrilineal descendants, on the same footing as descendants of status Indian men, that is, patrilineal descendants. As in the *Lovelace* challenge under the UN *ICCPR*, McIvor argued that it is a basic expectation to acquire the cultural identity of one's parents; and that parents should be able to transmit cultural identity to their children, as well as the tangible benefits of registration status, including access to non-insured health benefits, financial assistance with post-secondary education, and exemptions from certain taxes.⁹⁰

In 2007, McIvor won at trial, but the subsequent decision of the BC Court of Appeal had the effect of continuing the sex discrimination against women in her position.⁹¹ McIvor sought leave from the Supreme Court of Canada to appeal, but was denied leave to appeal in November, 2009. The Supreme Court not only refused to hear McIvor's appeal, it ordered her to pay the Government of Canada costs in the action. In response to this harsh judgment, Jeanette Corbière Lavell, now president of the Native Women's Associa-

⁸⁹ Address by Gail Stacey-Moore, ABORIGINAL WOMEN, SELF GOVERNMENT, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE 1991 CANADA PACKAGE ON THE CONSTITUTION, (Ottawa) December 1991.

⁹⁰ Sharon McIvor's Response to the August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 Indian Act, October 6, 2009; For further information, please contact: Sharon McIvor hearclaw@shaw.ca / <http://www.nwac-hq.org/en/documents/SharonMcIvorResponsetoINACProposal.pdf>

⁹¹ *Sharon Donna McIvor v. Canada* (Registrar, Indian and Northern Affairs), 2009 BCCA 153.

tion of Canada (and the claimant on this same issue in the *Lavell* loss under the Canadian Bill of Rights in 1973, discussed earlier in this chapter), described the Supreme Court decision as,

... an opportunity for the highest court of the land to redress historic and ongoing discrimination against Aboriginal women under the *Indian Act*. I am especially disappointed that the court has dismissed the appeal with costs. This punishes the litigant for bringing an action.⁹²

8. SOUTH AFRICA – CONSTITUTION FOCUSED ACTIVISM

South African constitution making was fraught with implicit and explicit demands on women to place racial equality and cultural traditions at the pinnacle of priorities, described, as a “patchwork quilt of patriarchies”.⁹³ The transition to democracy in South Africa did not lead to the marginalization of women’s equality issues, at least on paper, as has happened in so many other countries. Women’s activism ensured that equality was protected in the constitution. The creation of the Women’s National Coalition (WNC) in 1992, like NAC in Canada, provided a broad based organizational vehicle for women to articulate constitutional representation, in addition to the ANC.⁹⁴ While substantive equality provisions for the Constitution were negotiated by women within the ANC, the WNC’s purpose was to consult widely with grassroots women across the country to draft the Women’s Charter of Equality.⁹⁵ Women were mobilizing across South Africa to challenge any attempt to marginalize them, their determination feeding into processes across political party and racial lines. ANC delegates demanded that more women be put into the Convention for a Democratic South Africa (CODESA)⁹⁶ process, the commissions that were the negotiating bodies for the constitution.

CODESA I began with a plenary session on December 20 1991, almost two years after the unbanning of political parties and the release of Nelson Mandela. The first session lasted a few days, and working groups were

⁹² <http://www.nwac-hq.org/en/documents/PressReleasereMclvorDecisionNov6-09.pdf>
Accessed March 12 2010. [emphasis added]

⁹³ B. Bozzoli, *Marxism, feminism and South African Studies*, 9 JOURNAL OF SOUTH AFRICAN STUDIES, in ENGENDERING THE POLITICAL AGENDA – A SOUTH AFRICAN CASE STUDY, *supra* at 3.

⁹⁴ Shireen Hassim, NEGOTIATING SPACES: WOMEN IN SOUTH AFRICA’S TRANSITION TO DEMOCRACY (2002), at 3. FEDSAW disbanded at this time and the members focused activities on the WNC.

⁹⁵ *Ibid.* See also generally Shireen Hassim, WOMEN’S ORGANIZATIONS AND DEMOCRACY IN SOUTH AFRICA: CONTESTING AUTHORITY (2006).

⁹⁶ For a useful resource on the chronology of the South African constitutional events and negotiations see <http://www.constitutionalcourt.org.za/text/constitution/history.html>.
Accessed at March 10, 2010.

appointed to deal with specific issues. CODESA II took place in May 1992. There was massive violence around the country during this phase and the CODESA process failed⁹⁷.

On September 26 1992 the government and the ANC agreed on a Record of Understanding. This dealt with a constituent assembly, an interim government, political prisoners, dangerous weapons and mass action and restarted the negotiation process after the failure of CODESA. On April 1 1993 the Multiparty Negotiating Forum (MPNF) gathered for the first time. In contrast to CODESA, which was mainly the ANC and the government, the white right wing (the Conservative Party and the Afrikaner Volksunie), the Pan Africanist Congress, the KwaZulu homeland government and delegations of "traditional leaders" initially participated in the Multiparty Negotiating Forum.⁹⁸ A period of brinkmanship followed right up within days of the election on 27 April 1994.

During this time, women were still organizing to have their voices heard. There was discussion that the Women's Charter be attached to the Constitution as a bill of rights for women. The Charter Campaign was only one prong – the WNC also engaged in lobbying for women's inclusion in all the negotiating teams, the inclusion of non-sexism in the Constitutional Principles, and the inclusion of an equality clause that would supersede the right to custom and tradition.⁹⁹ Conservative forces such as the Congress of Traditional Leaders of South Africa (CONTRALESA) were a threat to women's notions of equality and democracy, but women managed through strategic multi-party organization to ensure that this did not happen.¹⁰⁰

The South African Constitution now provides a positive framework for the achievement of gender equality, arguably the best in the world. These successes reflect the effort by women to win constitutional recognition for their rights, as well as protecting traditional African culture.¹⁰¹ Equality is a fundamental principle. The entrenchment of a justiciable Bill of Rights, as with the Canadian Charter of Rights and Freedoms, establishes government accountability. The provision for social and economic rights, which Canada does not have, also provides a basis for advancing equality and justice for women.

⁹⁷ See also S Friedman and D Atkinson (eds), *THE SMALL MIRACLE, SOUTH AFRICANS NEGOTIATED SETTLEMENT* (1994).

⁹⁸ Ibid.

⁹⁹ Shireen Hassim, *NEGOTIATING SPACES: WOMEN IN SOUTH AFRICA'S TRANSITION TO DEMOCRACY* (2002), at 34.

¹⁰⁰ Sheila Meintjes, *The Women's Struggle for Equality During South Africa's Transition to Democracy*, 30 *TRANSFORMATION* (1996), at 48.

¹⁰¹ Penelope Andrews, *Women and Rights*, in *THE POST-APARTHEID CONSTITUTIONS – PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW* (Penelope Andrews and Stephen Ellmann eds. 2001) at 335.

The largely ad hoc, unfunded women's constitutional activism in Canada does not compare to the South African investment in consultations, conferences and coalition building among women activists, integrating women's emancipation with the liberation struggle and the resulting interim and final constitutions of 1994 and 1996.¹⁰²

9. CONCLUSION

"Lived rights" can be described as the intersection of race, class and gender in the context of a new constitutional democracy. This can only be achieved where the women's movement had a demonstrably influential impact on creating constitutional text, constitutionally entrenched national gender equality machinery, and unprecedented opportunities for women. Millions of women in South Africa mobilized around the Women's Charter for Effective Equality fifteen ago; thousands of Canadian women were similarly galvanized almost thirty years ago. Women are not prepared to risk being left out of new legal or political systems and constitution making is a principal means of inclusion.

This article does not explore beyond how women's activism changed the final constitutional text on equality – in both South Africa and Canada. Examples of how these constitutional provisions have been used to achieve women's equality, or just as likely, not, through high impact litigation, jurisprudence, political activism, merit much more thorough discussion elsewhere.¹⁰³

¹⁰² The engendering of the ANC platform can be seen in May 1990 changes to the ANC Constitutional Guidelines and the campaign vision for a Women's Charter in the ANC Statement on the Emancipation of Women in South Africa, "We call upon the ANC Women's League to initiate a campaign for the Charter involving all other structures of our organization, the membership and supporters throughout South Africa. The campaign should involve millions of women directly in the process of determining how their rights would be protected in a new legal and constitutional order. Such an initiative will provide the opportunity to set an example of democracy in practice, and be a major agency for stimulating women to break the silence imposed on them." PUTTING FEMINISM ON THE AGENDA, *supra* at 277.

¹⁰³ See: FEMINIST ACTIVISM IN THE SUPREME COURT: LEGAL MOBILIZATION AND THE WOMEN'S LEGAL EDUCATION AND ACTION FUND, *supra*; MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER (F. Faraday, M. Denike, M.K. Stephenson eds. 2006); Marilou McPhedran, THE IMPACT OF S. 15 ON CANADIAN SOCIETY EQUALITY RIGHTS: BEACON OR LASER? (2005). See also Marilou McPhedran, *A truer story: constitutional dialogue*, 36 SUPREME COURT LAW REVIEW (2007), at 100-136; Marilou McPhedran, *Creating Dialogue: Women's Constitutional Activism in Canada*, 25 CANADIAN WOMAN STUDIES (2006), at 6-17. Sheila McIntyre and Sanda Rodgers, DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (2006). Penelope Andrews, *Democracy Stops at My Front Door: Obstacles to Gender Equality in South Africa*, CHICAGO INTERNATIONAL LAW REVIEW Vol 5 No 1 (2007). Also see the collection of chapters in Susan Bazilli, PUTTING FEMINISM ON THE AGENDA, *supra* note 10.

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 Afghanistan and Rwanda. The impact of constitutional equality text on women needs to be examined in a global context. As a former feminist Justice of the Canadian Supreme Court has noted:

“Our ability to articulate a vision of equality that resonates domestically and internationally to enable full participation and membership of citizens in all societies is particularly pressing in our interconnected global community. National appellate courts throughout the world are increasingly looking to the judgments of other jurisdictions, particularly when making decisions about human rights issues such as equality, to guide their decisions.”¹⁰⁴

Describing the involvement of, primarily black South African women, in the struggle for liberation and equality, one of the leaders of the ANCWL, Albertina Sisulu, said “These women started life as ordinary women, but were made extraordinary by their refusal to put up with unacceptable life conditions.”¹⁰⁵

The South African Women's Charter process demonstrated that astute, broad based political activism coupled with grassroots participatory action can be a powerful tool for women's rights, fought for by ordinary women who want to be able to live their rights, and those of their children and grandchildren. In Canada, after exhausting months of political battle all through 1981, women were faced with the their hard won sex equality clause disappearing under the override clause, rendering it potentially useless, so activists fought for it – substantially and symbolically.¹⁰⁶

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 - where women's activism has changed constitutional text and machinery - let's say:

Malibongwe Igama Lamakhosikazi

¹⁰⁴ The Honourable Claire L'Heureux-Dubé, (2006) *Preface*, in MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER (F. Faraday, M. Denike, M.K. Stephenson eds. 2006), at 3.

¹⁰⁵ Albertina Sisulu, *Preface* in SHOPE, ANC, MALIBONGWE – CELEBRATING OUR UNSUNG HEROINES (2002), at 6.

¹⁰⁶ THE STRUGGLE FOR DEMOCRACY, *supra* at 166. [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.’” *Ibid.*

Let the name of the women be thanked.¹⁰⁷

¹⁰⁷ *Preface* in SHOPE, ANC, MALIBONGWE – CELEBRATING OUR UNSUNG HEROINES, *supra* at 7.