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FEMINISTS IN UNCHARTERED WATER: THE LEGAL PURSUIT OF REPRODUCTIVE AUTONOMY IN THE SUPREME COURT OF CANADA IN THE 1990S

by

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ABSTRACT

Canadian women continue to be subject to discrimination on the basis of their reproductive capabilities. The primacy given to their roles as mothers and bearers of children by society and the state has resulted in limiting women's ability to participate fully in society. The proposal to entrench a Charter of Rights and Freedoms within the Canadian Constitution generated excitement among women's organizations. For example, organizations such as the National Action Committee on the Status of Women (NAC) expected that the entrenchment of the Charter would provide women with a constitutional foundation as well as the arena--the judicial system--to claim the protection and the acquisition of their rights

The Charter has not been a useful tool in the advancement of women's reproductive autonomy--the right to make important personal decisions, as well as the right and ability to control their own bodies. Parliament bestowed upon the judiciary the role of guardian over the Charter and, therefore, over the protection of the rights found in it. In turn, the Supreme Court, as the nation's final court of appeal, is now responsible for guiding the rest of the judiciary in litigating Charter cases. However, as this thesis demonstrates, the Supreme Court has been reluctant to apply the document to cases coming before the Court dealing with reproductive autonomy.

The gendered nature of society, the state, and its institutions limit women's capacity to seek the protection of their rights. Some women's organizations, like NAC and the Women's Legal Education and Action Fund (LEAF), have played a role in attempts to advance women's right to reproductive autonomy; however, federal funding cutbacks to these organizations have hindered their ability to represent women's interests effectively. The gendered stereotypes and biases which form the foundation of Canadian society also extend into the judiciary, where the hidden gender of law influences the decision making of judges.

A comparison is offered of the definition of reproductive autonomy as provided by: 1) the Women's Legal Education and Action Fund--a national women's organization that uses traditional legal channels and section 15 of the Charter to promote women's equality--in their intervener facta; and that provided by 2) the Supreme Court in four cases. The inconsistencies found between the two definitions demonstrate that the Charter has not been a key factor in Supreme Court judgements dealing with reproductive autonomy. This thesis has established that the Supreme Court has not applied the Charter to advance and protect women's right to reproductive autonomy.

In examining the Canadian legal system at its highest level, one can say that the Supreme Court appears to reflect the gendered values and assumptions of society. Society, as is discussed in this thesis, appears sexist and in turn, those sexist values and assumptions come to be reflected in the state and its institutions; and hence, the Supreme Court. It will not be until societal attitudes and values change in respect to women's roles as mothers and bearers of children that women can expect positive social, legal, and political change. It will be at this time that women will receive the right to reproductive autonomy over their bodies, and, therefore, be able to participate more fully in society.

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For my family and Ryan.

CHAPTER ONE:
REPRODUCTIVE AUTONOMY IN AN ANDROCENTRIC SOCIETY

"Reproductive autonomy - the ability and right to control fertility . . ."
Rona Achilles, "Artificial Reproduction"[1]

Introduction

Canadian women have been subject to discrimination on the basis of their reproductive capabilities. They, like other women around the world, have been subject to patriarchy both in and outside their homes, their traditional roles defined through their reproductive capabilities. Defined by their roles as mothers and bearers of children, women have been limited in their attempts to enter the public sphere--paid employment and political life--leaving them with a minimal voice in both employment and social affairs. Control over women by their employers has been possible through the inadequacies of legislation and is reflected in the employers' discrimination in hiring, promotion and equal pay, differential treatment on the grounds of hazards to women's reproductive system, and the failure to give women access to pregnancy leave and benefits.[2] Given the importance reproduction plays in society, the state in Canada has been a central actor in defining and controlling women's reproductive rights; such control and intervention over women's bodies have been possible through the use of legislation. Furthermore, developments since the late 1970s[3] in

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[1] Rona Achilles, "Artificial Reproduction," Changing Patterns: Women in Canada, eds. Sandra Burt, Lorraine Code, and Linsay Dorney (Toronto: McClelland and Stewart, 1988) 291.

[2] Women tend to make up the majority of part-time workers; this also has an impact on their ability to claim benefits. See Appendix A.

[3] Wendy Mitchinson, "The Medical Treatment of Women," Changing Patterns: Women in Canada, ed. Sandra Burt, Lorraine Code, and Linsay Dorney (Toronto: McClelland and Stewart, 1988) 237.

reproductive technologies, such as artificial insemination, *in vitro* fertilization, and surrogate motherhood, have extended reproductive possibilities and introduced new forms of medical control over women's reproductive choice. Given the disadvantages experienced by women as a result of state and medical control over their bodies, some Canadian women's organizations--such as the Women's Legal Education and Action Fund (LEAF) and the Canadian Abortion Rights Action League (CARAL)--have taken it upon themselves to advocate for women, to legitimize and strengthen their voices in the court system.

In the 1970s numerous women joined together to challenge the status quo, to limit state control over their reproductive choices and to abolish and prevent the subordination and oppression women experienced in every aspect of their lives. Women who joined the movement hoped not only to advance their personal claims, but also the claims of all Canadian women, advocating for, and with, them in hopes of bettering women's position in society. Lorraine Code suggests these women's involvement in the women's movement put them "...in a position of having a capacity - and arguably also a responsibility - to advocate for, and ideally *with*, people for whom such knowledge [made] a vital difference, who [were] not in a position to gain acknowledgement by their own unaided efforts."[4] The emergence of women's organizations served to enhance the public credibility of women's claims; they were responsible for the changes that took place in the last two decades.[5] In the late 1970s,

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[4] Lorraine Code, "How Do We Know? Questions of Method in Feminist Practice," Changing Methods: Feminist Transforming Practice, eds. Burt, Sandra, and Lorraine Code (Peterborough: Broadview Press, 1995) 33.

[5] It is important to note here that women as a group are not homogenous, and as a result of this, several women's groups have merged together in order to advance their claims. However, the groups at this time sought to have all women's rights protected by having their rights placed within the Constitution.

women's organizations, such as the Canadian Action Committee on the Status of Women (CACSW–a body of the federal government) and the National Action Committee on the Status of Women (NAC--the national umbrella organization of the Canadian women's movement), worked towards the same goals: to ensure that women's rights were included in Prime Minister Trudeau's proposed Charter of Rights and Freedoms. That action gave them input into the wording of the document: "women insisted on the use of the word "person," fearing that the use of the word "everyone" would result in women's claims being weighed against those of a foetus in cases involving reproductive rights."[6] They also played a significant role in the inclusion and drafting of the equality clause (section 15) and the sexual equality clause (section 28) within the Charter. The involvement of women's organizations in the drafting of the Charter has been beneficial in the advancement of women's rights; the entrenchment of the Charter of Rights and Freedoms into the Canadian Constitution offered women a new avenue through which to seek the protection of their right to autonomy over their bodies. Prior to the adoption of the Charter, women's organizations, such as NAC, were critical in ensuring the advancement and protection of women's rights. Other organizations, like the Women's Legal Education and Action Fund (LEAF), a national women's organization which uses existing legal tools to advance women's equality, have been crucial in the development of Charter jurisprudence for the advancement and protection of women's rights.

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[6] Sherene Razack, Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991) 34.

The entrenchment of the Canadian Charter of Rights and Freedoms within the Canadian Constitution in 1982 was expected to provide women with the arena and the instrument to challenge the infringement of their rights. Some women's organizations, such as LEAF, saw the Charter as providing a foundation, a set of constitutionally established guidelines, from which women would be able to legitimize their claims for the protection of their rights. From the perspective of moderate radical feminism,[7] this thesis demonstrates that although the means are in place for the advancement of women's rights through the judicial system, there have been, and continue to be, barriers within society which impede women's efforts to better their lives and claim their constitutionally protected rights. In turn, this analysis will demonstrate that the Charter has not been a key factor in the protection and advancement of women's right to autonomy over their bodies. While there are various avenues that can be used by women's organizations to advance women's rights, such as lobbying and fundraising, the Charter was envisioned to provide the foundation from which women would be able to legitimize their claims and, therefore, slowly break down the restrictions that have kept them from the full realization of their rights, in this case, reproductive choice; however, the underlying androcentric[8] norms, ideas, and values upon

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[7] While there are various degrees of radical feminism--from moderate to separatist--in general, radical feminists see patriarchy as the root of women's oppression, and "...the oppression of women as the most fundamental form of oppression, one that cuts across boundaries of race, culture, and economic class." See "Definitions." Feminist Utopia. http://www.amazoncastle.com/feminism/ecocult.htm (01 September 1999). Furthermore, it is also argued that the cause of women's oppression is a result of the biological differences that exist between men and women; however, as Elaine Storkey argues in What's Right with Feminism, it is not necessarily this biological difference that is the problem, but the gender stereotypes which are "culturally conditioned and *socially constructed*" See Elaine Storkey, What's Right with Feminism (Grand Rapids: William B. Eerdmans Publishing Company, 1985) 101.

[8] Androcentric refers to "...the characteristic of being derived from, based upon, and relevant principally to the experiences of men." See Code 15.

which Canadian society is based serve to limit women's attempts to improve their lives. While women's collective action strengthens the force with which women can tackle the state institutions, including the federal cabinet and the judiciary, cuts in federal funding to those organizations have hindered their ability to mobilize and voice their demands for the protection of women's rights. Furthermore, the 'hidden gender of law' found within the Canadian judiciary impedes the extent of change that can be achieved with the Charter; the gendered stereotypes and biases held by the judges influence their ability to make decisions and, in turn, to interpret the Charter. To demonstrate that the Charter has not been used by the Supreme Court as an effective tool to advance women's rights and specifically, the right to reproductive autonomy, this analysis will focus on the comparison of the definition of reproductive autonomy as provided by the Women's Legal Education and Action Fund (LEAF) and the legal definition provided by the Supreme Court of Canada to determine whether there is continuity between what is advanced by LEAF and what is advanced by the Court. Given that women's traditional roles have been defined through their reproductive capabilities, the lack of application of the Charter in reproductive autonomy litigation has had, and will continue to have, a profound effect upon women's lives.

Overview

Prior to the entrenchment of the Charter of Rights and Freedoms in 1982, women faced many obstacles in their pursuit of reproductive autonomy. From the mid-nineteenth century onward, state and medical control over women's reproductive abilities was centered on women's control over their right to choose not to reproduce. The gradual medicalization of the birth process slowly abolished the use of midwives during birth, taking away a

woman's choice for "home birth."[9] Moreover, state control over a woman's right to choose not to reproduce was evident in legislation dealing with contraceptives, as it was not until 1969 that access to safe and effective birth control was legalized. Until then contraceptives were promoted, Mitchinson notes, as "...immoral, unnatural, and therefore, unhealthy."[10] Prior to its legalization, state control over women's reproduction and the use of contraceptives was possible with the help of the medical profession. The increase in medical influence over women's reproductive choices permitted physicians to impose their expertise and authority upon women; that is, they were able to influence women's decisions by promoting the "need" for medical help. The opposition to birth control by physicians was based on social concerns; birth control was seen as denying a woman's maternal role.[11] Consequently, given that the social implications of providing safe and effective contraceptives were great--it threatened women's traditional roles as bearers of children--physicians were able to use their medical expertise to keep women from gaining access to birth control. Moreover, state control over contraceptive use through legislation was also grounded, although not admitted, in the fear of "racial suicide," commonly held in industrialized nations in the early twentieth century.[12] Mitchinson suggests that in Canada this fear increased with the growing number of non-

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[9] Christine Overall, "Feminist Philosophical Reflections on Reproductive Rights in Canada," Challenging Times: The Women's Movement in Canada and the United States, ed. Constance Backhouse and David H. Flaherty (Montreal: McGill-Queen's University Press, 1992) 247.

[10] Mitchinson 251.

[11] Ibid., 251.

[12] Jane Ursel, Private Lives, Public Policy: 100 Years of State Intervention (Toronto: Women's Press, 1992) 36.

English speaking immigrants; the state used legislation to discourage the decreasing birthrate of the English speaking population; in turn, the state discouraged the use of contraceptives to promote a higher birth rate.[13] In spite of resistance to birth control use, contraceptives were legalized in 1969, the same year changes were made to the abortion provision of the Criminal Code. Abortions were legalized under s. 251; however, legal abortions were only available to women who had received approval from a therapeutic abortion committee in an accredited hospital, as was required by the new amendments to the provision. Those cases that were not approved were punishable through the Criminal Code, and therefore, women's right to choose not to reproduce was limited and, for some, was even abolished. By placing women's maternal role central to social interests, the state's restrictions of women's reproductive autonomy was inevitable.

As mentioned above, women have faced many barriers in the realization of their reproductive autonomy. The last two decades of the twentieth century, however, have brought Canadian women, through the use of the legal system, more control over their reproductive abilities. Mary Jane Mossman notes that women have often relied on the legal system to advance their claims to gender equality, occasionally succeeding in their attempts; however, she argues that women have also come face-to-face with the limits of law through the courts' unwillingness to stray from their role as interpreters of law. She suggests that "traditionally, legislatures have been the 'makers' of laws and courts have merely 'interpreted' them."[14] In turn, while women have had some victories through the courts, the legal system

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[13] Mitchinson 251.

[14] Mary Jane Mossman, "The Paradox of Feminist Engagement With Law," Feminist Issues: Race, Class, and Sexuality, ed. Nancy Mandell (Scarborough: Prentice-Hall Canada, Inc., 1995) 215.

has also failed to respond actively in implementing major social changes, leaving the legislature to respond to them.[15] She refers to this as the "paradox of law;" that is, law's ability to both facilitate and impede change in the interests of women.[16] Moreover, women often find themselves being judged and defined by existing gendered stereotypes that serve to hinder their ability to succeed in the judicial system.

To understand the legal climate that has emerged with the adoption of the Charter, it is useful to look at the social context climate before the Charter using Catharine MacKinnon's analogy of the "hall of mirrors."[17] According to MacKinnon, society as a whole can be explained as a hall of mirrors, each part reflecting the other part, reinforcing and legitimizing the [gendered] social dominance that is found in all sectors of society. Radical feminists argue that the root of women's oppression and subordination is due to patriarchy, in that it creates and reinforces the gender inequalities that exist at the societal level. It is not based on "individual actions, but about structures: economic, biological, social and familial."[18] Gender inequality becomes embedded (and therefore invisible) within the societal structure because those who are in positions of power and influence--men, that is--are able to maintain and legitimize power relations between men and women through their ability to frame institutions, make law, and therefore, to establish social norms. In turn, dominant interests

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[15] Mossman 211.

[16] Ibid., 211.

[17] Catherine A. MacKinnon, Toward a Feminist Theory of the State (Cambridge: Harvard University Press, 1989) 164.

[18] Storkey 95.

come to make up the underlying principles which form the foundation of society, government, and politics. Lorraine Code suggests that this androcentric view, "...the characteristic of being derived from, based upon, and relevant principally to the experiences of men,"[19] becomes the objective and universal standard from which law is made. In the hall of mirrors the power structure is reflected at each level of society; those who hold power at the societal level also possess it within the state. Consequently, "...the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law."[20] Because society views the state as being neutral and, therefore, representative of all interests, then the state is also assumed to be gender neutral.[21] Changes and challenges to the [male] status quo threaten the power structure; in turn, women's demands for legal equality are met with resistance, and their demands ignored. In such a system, women only come to be recognized if they shape their behaviour and demands to reflect those of men; only when they dress themselves up like those in power (accepting the status quo and taking acceptable roles within that power structure) do women become visible within the power structure. Consequently, through their 'sameness' with men, women's experiences as women are devalued and ignored, and gender is assumed to be interchangeable. Thus, change that emerges in this manner is minimal and does not challenge the underlying foundation of women's oppression--patriarchy.

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[19] Code 15.

[20] MacKinnon 169.

[21] Jill Vickers, Reinventing Political Science: A Feminist Approach (Halifax: Fernwood Publishing, 1997) 34.

Theoretically, the laws that emerge under what is seen as a universal and objective standard are made in the citizens' interests; however, they are really a reflection of what men want, failing to recognize that women's experiences and, therefore, needs are sometimes different from those of men.[22] What results is a "...centuries-long history...of propertied white men speaking for, thinking for, voting for, and making decisions for 'their' women, as well as claiming to know women better than women can know themselves. These situations count among the principal features of women's cognitive disempowerment."[23] This "... 'myth of the neutral man,' who is presumed to be able to represent everyone's interests with detached objectivity, in his universally motivated and applicable projects of inquiry,"[24] is evident even in what is assumed to be the most neutral and impartial element of the state--the judicial system. Experts of the Canadian judicial system, like Peter McCormick and Ian Greene, recognize that judges are "expected to be as impartial as possible" in their decision making.[25] However, Bertha Wilson maintains that "...many have criticized as totally unreal the concept that judges are somehow super-human, neutral, above politics and unbiased, and are able to

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[22] Since white, middle aged, middle class men are typically those who hold position of power, not only are women not represented, but also those "others" who, because of socio-economic status, ethnicity, level of education, etc., have been unable to gain power and are, therefore, invisible.

[23] Code 27.

[24] Ibid., 17.

[25] Peter McCormick and Ian Greene, Judges and Judging (Toronto: James Lorimer & Company, Publishers, 1990) 13. Others, like F. L. Morton and acknowledge the basis of judicial authority: impartiality. Morton suggests that "...we believe that they [the courts] provide an unbiased and reasoned application of the laws...we expect a judge to be independent of our adversary." See F. L. Morton, "Judicial Independence, Ethics, and Discipline," Law, Politics and the Judicial Process in Canada, 2nd ed., Ed. F. L. Morton (Calgary University Press, 1992) 123. See also Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada," Law, Politics and the Judicial Process in Canada, 2nd ed., Ed. F. L. Morton (Calgary University Press, 1992) 62.

completely separate themselves from their personal opinions and pre-dispositions when exercising their judicial function..."[26] One of these is Andrew D. Heard, who argues "...judicial decision-making often involves such wide discretion that the personal value judgements of the [judges]...may play as large a role as the arguments made by the counsel in the case."[27] The personal biases and stereotypes of judges at any level of the judicial system can, and often do, have an impact on the outcome of each case. Consequently, given that the power dynamics of society are reflected within the state, change is unlikely unless women's claims are supported, reinforced, and legitimized by those in power. It is not enough to pass "woman-friendly" and "woman-focussed laws"[28] and to have the judiciary interpret them in favour of women. This does not guarantee change because the underlying androcentric assumptions and attitudes continue to exist in society; the laws simply hide the problem. The re-structuring of society must take place at all levels, not just in the courts or at the state level. That is, society itself must go through substantial change for anything good to come to women. How autonomous can women really be in this hall of mirrors?

It has been evident for decades that simple changes in legislation will do little to change women's position, as was evident in the 1983 changes to the old rape law.[29] However,

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[26] Bertha Wilson, "Will Women Judges Really make a difference?" Law, Politics and the Judicial Process in Canada, 2nd ed., Ed. F. L. Morton, (Calgary, University of Calgary Press, 1992) 92.

[27] Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal," The Canadian Journal of Political Science, XXIV: 2 (June 1991), 290.

[28] Vickers 172.

[29] The old rape law defined rape as penetration without consent, which had the effect of making the crime sexual in nature. In 1983, due to demands for changes in the old rape law, changes in the Criminal Code had the effect of redefining rape as a form of assault--sexual assault. Unlike the previous law, penetration was not necessary for assault to have take place, which made the new law more appealing. However, the new law "... established the legal and social expectations that the woman must be injured to be a 'legitimate' victim." See

the significance of the Charter is its constitutionality. Unlike other legislation, the Charter has been entrenched within the Canadian Constitution and is therefore part of the supreme law of Canada. As Sheila Louise Martin argues, "it is essential to recognize that an important purpose of the Charter, especially from women's perspective, was to bring women into the constitutional fold of legally enforceable rights."[30] The new role of the courts, especially the Supreme Court "...is perhaps best thought of not as policing boundaries to prevent infractions but as falling somewhere between teaching and preaching in order to mould the future behaviour of those with whom they share the task of fulfilling the Charter's mandate."[31] Given that the courts have been given the constitutional role as interpreters of the Charter, the issue of who sits on the bench (who is represented) and how they are appointed becomes central to any Charter analysis. Andrew D. Heard concludes that since "...individual judges exhibit different patterns of reactions to issues decided in their courts, it may be crucially relevant to the outcome of a Charter case which particular judge hears it."[32] Since the Supreme Court has the responsibility of setting the tone for the rest of the judiciary, this analysis will focus on the Supreme Court's role as final court of appeal and, most importantly, its ability to provide a national standard in the interpretation of the Charter to alleviate the

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K. Edward Renner and Kathaleen A. Yurchesyn, "Sexual Robbery: Missing Concept in the Search for an Appropriate Legal Metaphor For Sexual Aggression," Canadian Journal of Behavioural Science, v. 26(1) (January 1994): 41-51. CBCA Full Text Reference 1993-1994, http://luxor.acadiau.ca/cgi-bin/webspirs.cgi (16 Jul 1999).

[30] Sheila Louise Martin, "Legal Controls on Human Reproduction in Canada: A History of Gender Biased Laws and the Promise of the Charter," diss., University of Toronto, 6.13.

[31] Alan Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform, (Montreal: McGill-Queen's University Press, 1992) 84.

[32] Heard 290.

powerlessness and vulnerability that women Canadian women have experienced throughout their reproductive lives.

Thesis Layout

Prior to the entrenchment of the Charter of Rights and Freedoms in the Constitution, women faced many obstacles in their search for reproductive autonomy. Time and time again throughout history women have been reduced to "...a foetus container, upon which the doctor can act at her or his discretion in her or his interest or in the interest of the foetus, not of the mother."[33] Women have had a lack of control over their own bodies, both as a result of the increased support for intervention by the medical profession in the birthing process, as well as state interests in the reproduction of the population. Chapter Two examines the historical development of Canadian women's reproductive autonomy from the abolition of the midwife birth to the development and rise of the new reproductive technologies. It explores the primacy given to the role of motherhood, the role played by physicians in increasing their power over women by necessitating medical involvement and assistance throughout the pregnancy and, with new developments in the new reproductive technologies (NRT), before conception. Furthermore, given the significance reproductive autonomy plays in women's ability to participate fully in society, the emergence of women's organizations throughout the 1970s to challenge the status quo is also examined in this context. The chapter examines women's organizations and their roles in providing a voice for women's diverse demands for the protection of their rights, especially in Canada's multicultural society. In a thesis that focuses on women's reproductive autonomy, an

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[33] Mitchinson 255.

exploration of the different definitions of reproductive autonomy is essential in order to come to an understanding of what autonomy means to women at the end of the twentieth century.

The fight for women's rights highlights the existence of the various roots of discontent among women themselves and, therefore, reflects the differences that influence their lives. In turn, this analysis must be sensitive to the different 'categories of experience'[34] within women's organizations (and society) and their perceptions of what reproductive autonomy entails. Linda Archibald and Mary Crnkovich suggest that "for a researcher, part of developing a double-consciousness is being able to look at one's own historical and cultural biases and not presume that what one takes for granted - for example, the high value placed on formal education or access to medical technology - is universally accepted."[35] This analysis must consider and recognize that each woman has her own hall of mirrors--her own experience of the world around her; therefore, how each woman defines her reproductive autonomy varies according to her life experiences. Given the difficulty in determining how Canadian women define their reproductive autonomy, the analysis in Chapter Five will use LEAF as a case study and, therefore, its definition of reproductive autonomy, because of its involvement in the promotion of women's interests with the aid of the Charter.

Chapter Three will focus on the emergence of the National Action Committee on the Status of Women (NAC), the national umbrella organization of the women's movement, and the

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[34] See Nancy Adamson, Linda Briskin, and Margaret McPhail, Feminist Organizing for Change: The Contemporary Women's Movement in Canada (Toronto: Oxford University Press, 1988) 171.

[35] Linda Archibald and Mary Crnkovich, "Intimate Outsiders: Feminist Research in a Cross-Cultural Environment," Changing Methods: Feminist Transforming Practice, eds. Burt, Sandra, and Lorraine Code (Peterborough: Broadview Press, 1995) 116.

Women's Legal Education and Action Fund (LEAF), a national organization which uses traditional legal channels to promote women's equality. The Women's Legal Education and Action Fund will serve as a case study not only because it uses the legal system to promote women's equality and has therefore been involved in the judicial process, but rather, because its arguments to the court under intervener status are based on section 15 of the Charter of Rights and Freedoms. While LEAF serves as the case study, this chapter will also examine NAC not only because both organizations' extensive involvement in Charter-related lobbying efforts, the funding of women's litigation, as well as the intervener status roles they take within the courtroom, but also because NAC is useful in the examination of the socio-political context in which women's organizations have emerged in the last two decades. Their inclusion within my study is essential, given that both groups have primarily relied on institutionalized feminism- which works by using the existing system to promote change - to advance women's demands for equality; both organizations assume change is possible within the existing political and legal system and both have also suffered from serious governmental financial cutbacks from the system they trusted. Part of this chapter will be devoted to an account of the evolution of NAC and LEAF, their roles in the representation of women, and their own struggles to survive and represent women in a period of extensive funding cutbacks. Given that this analysis centers mainly on LEAF's role in the advancement of women's reproductive autonomy through the judicial system, the type of methodology used in gathering data from LEAF will be of a legal nature. This will be examined in Chapter Five.

In a thesis that assesses the Charter's usefulness and effectiveness in the advancement of women's reproductive autonomy it is also important to devote part of this thesis to the

examination of the Supreme Court. Since the Supreme Court is the final court of appeal and because its decisions will impact the lives of women throughout Canada, Chapter Four will focus on the constitutional development of the Court, with a focus on the gender gap and the "hidden gender"[36] of law that is found in the Canadian judiciary. Reference will be made in regards to the *Ewanchuk* case[37]--a sexual assault case decided in 1999 in which the Court unanimously ruled against the defence of implied consent--as it reveals the sexism within, not only the lower courts, but also within the Supreme Court.

Once the societal and institutional contexts have been established, Chapter Five demonstrates that there is a discontinuity between the legal definition of reproductive autonomy as provided by the Supreme Court in its Court decisions, and the definition provided by LEAF. In realization of the difficulty that can be encountered in attempting to find definitions of autonomy as defined by women in general, I have chosen to limit my examination of women's reproductive autonomy to the definitions offered by LEAF; it will serve as a case study because it uses legal channels to promote women's interests. Given the differences that exist between reproductive autonomy litigation in the 1980s and 1990s, along with rapid changes in the reproductive technologies, this thesis provides a definition for reproductive autonomy as a starting point to provide some guidance in the examination. Consequently, for the purposes of this study,

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[36] Phrase coined by Regina Graycar and Jenny Morgan, The Hidden Gender of Law (Annandale: Federation Press, 1990).

[37] "R. v. Ewanchuk," *Supreme Court of Canada* (25 February 1999) http://www.droit.umontreal.ca/doc/ csc-cc/en/rec/html/ewanchuk.en.html (11 April 1999).

reproductive autonomy is defined as a woman's "...right to make fundamental personal decisions without interference from the state,"[38] including the right and ability to control her own body.

As mentioned above, LEAF is an organization which uses traditional legal channels by funding litigation to promote gender equality. It does so by acquiring intervener status in cases dealing with women's equality. Most important, LEAF utilizes section 15 of the Charter of Rights and Freedoms--the equality clause--to make its arguments in cases which will "...affect the greatest possible number and range of women."[39] Therefore, it does not have one definition of reproductive autonomy, but instead places emphasis on the facts of each case, as they are brought before the courts. In turn, my examination will focus on LEAF's intervener facta[40] of Charter cases dealing with reproductive autonomy. The facts of the case will be taken into consideration; the analysis will examine on whose behalf the case is being argued, what arguments are made by LEAF, and what are the patterns found within the Court decisions in each of the cases.

In order to determine whether there is continuity between the legal definition of reproductive autonomy and the social definition as promoted by these two women's groups, Chapter Five also examines four cases that have come before the Supreme Court in relation to women's reproductive autonomy. The first and most significant case is the *Morgentaler* case

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[38] Madame Bertha Wilson in R. v. Morgentaler," *The Supreme Court of Canada* (28 January 1988) http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (23 July 1999) 166.

[39] Carissima Mathen, "Introduction," Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada, ed. Words Worth Communications (Toronto: Emond Montgomery Publications Limited, 1996) xxii.

[40] Facta are "briefs used in legal appeals." See Mathen xv.

which was decided upon in 1988.[41] In this case the Supreme Court established precedent for all other cases dealing with abortion as it legalized abortion by striking down section 251 of the Criminal Code as unconstitutional. The *Daigle* case which came before the Supreme Court in 1989 is also significant because it brought forward the question of whether the courts could issue preliminary injunctions to a third party in order to prevent a pregnant woman from seeking an abortion.[42] Although the Court had previously struck down the abortion law, the *Daigle* decision threatened the autonomy women had achieved through the legal system. It also showed the continued desire by third parties to interfere in a woman's reproductive choices. The third case, which took place in 1997 and is known as the *G. Case*,[43] questioned the Court's jurisdiction to order the confinement of pregnant women who, as a result of their activities, place their foetuses in possible danger. In this case the woman's autonomy was threatened by the Winnipeg Child and Family Services agency's intervention to protect the life of the foetus. These three landmark cases are pivotal in this examination of the legal definition of a woman's right to autonomy over her body. The most recent case before the Supreme Court was *Dobson v. Dobson*,[44] a legal battle between a woman and her four year old son who suffered injuries during a car accident while in

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[41] R. v. Morgentaler," *The Supreme Court of Canada* (28 January 1988) http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (23 July 1999).

[42] "Tremblay v. Daigle," *The Supreme Court of Canada* (08 August 1989) http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1989/vol2/html/1989scr2_0530.html (23 July 1999).

[43] "Winnipeg Child and Family Services v. D.F.G.," *The Supreme Court of Canada* (31 October 1997)) http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1997/vol3/html/1997scr3_0925.html(23 July 1999).

[44] "Dobson (Litigation Guardian of) v. Dobson," *Supreme Court of Canada* (09 July 1999) http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/dobson.en.html (23 July 1999).

his mother's womb. Recently decided by the Supreme Court, the outcome of the case had a great potential of hindering women's autonomy over their bodies.

Language is central in the deliberation of judgements, therefore, it should also be central to any case analysis. "The process that invests linguistic forms with sense or meaning is socially conditioned, often involving sexist (and racist) beliefs and values that are prevalent and pervasive in culture..."[45] and therefore the language that is used reflects dominant views. Furthermore, in light of the hall of mirrors, "language...becomes a site of contestation: the dominant ideology is reflected, challenged, and reproduced through the linguistic practices of institutional interactions."[46] Careful attention will also be taken to determine how litigation in the 1990s differs from that of the 1980s in the area of reproductive autonomy: what kind of arguments are made? Where is the emphasis placed? Was the Charter a key component of the Court's final decision? The type of language--how the Court expresses its views--and how it supports its decision must be examined carefully in order to come to an understanding of what reproductive autonomy means in the eyes of the law.

Women have been limited in their attempts to exercise autonomy over their bodies. With the adoption of the Charter of Rights and Freedoms into the Constitution, women have become constitutional stakeholders. However, in the late 1990s, their claims to autonomy have not yet been legitimized by the Charter because of the androcentric values of Canadian society. Women's groups, like NAC and LEAF, were impelled to mobilize to ensure the proper

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[45] Susan Ehrlich, "Critical Linguistics as Feminist Methodology," Changing Methods: Feminist Transforming Practice, ed. Burt, Sandra, and Lorraine Code (Peterborough: Broadview Press, 1995) 49.

[46] Ibid., 60.

interpretation and application of the Charter. They hoped the Charter, once interpreted by the judiciary, would break down societal barriers to the advancement of women's interests. The Charter could have been a powerful tool; however, with almost twenty years behind it, it has not been broadly interpreted by the courts to advance women's reproductive autonomy. The following chapters explore this matter, challenging the gendered foundation of Canadian society.

CHAPTER TWO
A WOMAN'S CHOICE: THE RIGHT TO REPRODUCTIVE AUTONOMY

> The history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (81-82). It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce...is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.
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> Madame Justice Bertha Wilson, *R. v. Morgentaler*[47]

Introduction

Women have been limited in their attempts to control their own reproductive capabilities. As mothers and bearers of children, women have lost control over their own bodies; powerless to prevent state and medical intervention into their reproductive choices, women have been subject to discrimination because of the primacy that is given to what are deemed to be women's traditional and proper roles. The medicalization of the birthing processes has further increased women's powerlessness by creating a dependency upon the expertise of physicians. The over-medicalization of reproduction has not only increased this dependency, but it has also facilitated control over women and their bodies.[48] Furthermore, the gendered reality of the medical

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[47] "R. v. Morgentaler." *The Supreme Court of Canada.* http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (21 April 1999) at 172.

[48] Canada. Status of Women Canada. Setting the Stage for the Next Century: The Federal Plan for Gender Equality. (Ottawa: Status of Women Canada, 1995) 35.

profession--that until recently most physicians have been men[49]--has had a dramatic impact on how women have been perceived by the medical establishment and how their reproductive abilities have been defined.[50] The principal role given to reproduction in the medical profession has served to emphasize women's function as child bearers, impacting their public and private lives considerably.

The importance placed on women's ability to bear children is longstanding and it continues to play a major role in women's ability to choose for themselves how to exercise control over their own bodies. Given that "... reproductive autonomy is essential to women's freedom in modern society,"[51] any restriction placed on a woman's reproductive choice has a negative impact on her life, both privately and publicly; in order for women to have full enjoyment of rights and freedoms they must have reproductive autonomy. Furthermore, " ...for women to participate fully and freely in society...each woman must be able to control her own life. A woman must be free to decide for herself, with or without a partner, when and how she will or will not have children."[52] In turn, the pursuit of reproductive freedom has been a central objective of the Canadian women's movement. This struggle for women's reproductive autonomy, also

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[49] According to Human Resources Development Canada, between 1994 and 1995, forty-six per cent of those graduating in medicine were women. See "After Graduation," *Human Resources Development Canada* (06 March 1999) http://www.hrdc-drhc.gc.ca/JobFutures/english/ volume2/underst.htm#graphwomen (31 July 1999).

[50] Mitchinson 395.

[51] Julie S. O'Connor, Ann Shola Orloff, and Sheila Shaver, States, Markets, and Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the United States (Cambridge: Cambridge University Press, 1999) 158.

[52] United States. Committee for Abortion Rights and Against Sterilization Abuse. Susan E. Davis, ed. Women Under Attack: Victories, Backlash and the Fight for Reproductive Freedom. (Boston: South End Press, 1988).

referred to here as "reproductive freedom," has often focussed on a woman's access to safe and effective birth control, most specifically equal access to abortion; however, the search for reproductive autonomy has now broadened into the realm of the new reproductive technologies (NRT).[53] Furthermore, different socio-economic factors, such as financial and marital status, affect women differently; consequently, how each woman defines her personal reproductive autonomy varies because of the differences that exist between each woman's lived experiences.

Reproductive autonomy not only entails a woman's right to choose not to reproduce, but also includes the exercise of full control over her reproductive capabilities. Thus, reproductive autonomy, for the purposes of this analysis, refers to a woman's right and ability to have control over her body, including "the right to make fundamental personal decisions without interference from the state."[54] Women's lack of control over their bodies is a result of the fundamental importance given to their role as mothers and bearers of children by the state, the medical profession and, as a result, society; women's right to reproductive autonomy is hindered and limited because it conflicts with the rights (and interests) of others--the foetus, the male partner, or the parents of a minor pregnant woman--which are often deemed to be more important than those of the woman.[55] Furthermore, for an issue that has become central to the women's movement, national women's organizations in Canada, such as the National Action Committee

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[53] Christine Overall, "Feminist Philosophical Reflections on Reproductive Rights in Canada," Challenging Times: The Movement in Canada and the United States, ed. Constance Backhouse and David H. Flaherty (Montreal: McGill-Queen's University Press, 1992) 241.

[54] Madame Justice Bertha Wilson in "R. v. Morgentaler." *The Supreme Court of Canada*. http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (21 April 1999) 166.

[55] O'Connor, Orloff, and Shaver 159.

on the Status of Women (NAC) and the Women's Legal Education and Action Fund (LEAF), must be sensitive to the differences that exist in perceptions of what reproductive autonomy entails, not for women as a whole, but for each individual woman in Canada. Regardless of these differences, however, barriers met by women are not naturally set; in other words, they are not solely a result of biology, but of socially ascribed roles.

Women have faced many barriers in their attempts to exercise their reproductive autonomy. Their "... reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization...it is the result of the socially ascribed primacy of motherhood in women's lives."[56] Control over women's reproductive autonomy is socially constructed and is supported by the idea that "because women... [are] capable of bearing children, the assumption... [is] that they *should* bear children and that the maternal role... [is] primary for them."[57] Therefore, women's biological capabilities have been, and continue to be, central in defining who women are socially and what roles they ought to take in society. Furthermore, given that more men than women hold positions of power within society and the state [see APPENDIX B], then women's experiences as women and their proper roles in society are a result of "' ... a male-dominated system in which women's appropriate roles are defined by men for their own purposes'"[58]–women's traditional roles are decided through their reproductive capabilities. In turn, what ought to be a woman's right is often in competition with the rights of others, whose rights

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[56] Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom (Boston: Northeastern University Press, 1985) 6.

[57] Mitchinson, 397.

[58] Susan McDaniel quoted in Sandra Burt, "The Several Worlds of Policy Analysis: Traditional Approaches and Feminist Critiques," Changing Methods: Feminist Transforming Practice, eds. Sandra Burt and Lorraine Code (Peterborough: Broadview Press, 1995) 373.

are deemed to be more important than those of the woman. This powerlessness women have experienced in their ability to choose freely, for themselves, how to exercise control over their own bodies has been facilitated by the medicalization of the birthing process. Given the importance that Canadian society places on expertise, the medical profession has been a major player in increasing the gap between a woman and the exercise of her reproductive freedom.

Development of Reproductive Autonomy

The gradual medicalization of the birthing permitted the medical profession to interfere with reproduction and, at the same time, facilitated state control over women's bodies. Dependency was created by the profession, which, by using its expertise and authority, denied the role of midwives during childbirth; furthermore, the placing of restrictions on the location women were able to give birth also resulted in compromising the right to autonomy. The medical profession was also able to use its expertise to extend its control over women's reproductive choices. It encouraged women to seek medical assistance in giving birth, which was demonstrated in the rise of hospital births and a decrease in home births. Wendy Mitchinson notes that in the mid-nineteenth century, while the majority of women continued to give birth in their homes attended by someone other than a physician,[59] the medicalization of the birthing process slowly abolished women's right to choose home birth.[60] In the late 1990s, "midwives have been replaced by physicians, from general practitioners to obstetricians, hospitals have replaced the home, and medical innovations from fetal monitoring, amniotomy, and forceps deliveries to anaesthesia and

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[59] Mitchinson 409.

[60] Overall 247.

Caesarean sections have made birthing into a health crisis."[61] Doctor intervention during child birth has resulted in about one third of all births being carried out through Caesarean section.[62] From the mid-nineteenth century onward, control over a woman's right to choose not to reproduce became possible through the law with the help of the medical profession. This was evident in the area of birth control use. Its use was not only restricted by the profession; access to safe and effective methods of controlling fertility was further restricted by the law. The distribution and dissemination of information related to contraceptives became illegal in 1869; with the enactment of Canada's first Criminal Code in 1892, it became a criminal offence to provide anyone with any service related to birth control.[63] Those who advocated for the use of birth control and who went as far as to provide information for those who requested it were punishable by the law. This was the fate for Dorothea Palmer, who was arrested in 1936 and charged under the Criminal Code for the dissemination of information on birth control; however, even with resistance to the law, the duration and success of this law was plausible with the help of the medical profession.

Birth Control

There has been a tendency by the medical profession to also focus on women's primary function as child bearers and mothers to support their opposition to birth control. "If maternity was woman's natural role, then any interference with that role had to be resisted."[64] This view,

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[61] Ibid., 247.

[62] Mitchinson 412.

[63] "History of Abortion in Canada." *Pro-Choice Action Network.* http://www.prochoiceconnection.com/pro-can/history.html (15 Jun 1999).

[64] Mitchinson 398.

however, was not based on medical, but rather, social reasons. Wendy Mitchinson argues that the profession's "hostility to birth control was not medical but social... [because it] negated woman's proper role."[65] Using their expertise and authority, physicians were able to control not only access to effective contraceptives, but also the dissemination of information on birth control. Moreover, state control over contraceptive use through legislation was not only a result of the importance placed on maternity. It was also grounded, although not admitted, in the fear of "racial suicide," commonly held in industrialized nations in the early twentieth century;[66] women's demands for birth control were "... viewed as a 'crime against society' and 'the interests of the state.'"[67] Mitchinson suggests that in Canada this fear increased with the growing number of non-English speaking immigrants; it was maintained that the non-English speaking immigrants were reproducing faster than those of British descent. In turn, the state discouraged the use of contraceptives to promote the higher birth rate of the Anglo-Saxon population.[68] Placing reproduction at the heart of state and medical interests, the legal and medical violation of women's bodies was possible and certain. Consequently, women were not given the choice of maternity, but were instead forced to accept the role by the prohibition of contraceptives. Brenda Margaret Appleby suggests, however, that by the 1960s the birth control law no longer reflected the attitudes held by the majority of Canadians.[69] Nevertheless, it was not until 1969 with

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[65] Ibid., 405.

[66] Jane Ursel, Private Lives, Public Policy: 100 Years of State Intervention (Toronto: Women's Press, 1992) 36.

[67] Mitchinson 398.

[68] Ibid., 406.

[69] Brenda Margaret Appleby, Responsible Parenthood (Toronto: University of Toronto Press, 1999) 4.

amendments made to the Criminal Code that the use and distribution of contraceptives became legal. Demands for change came from both the public and organized groups who "...expressed concern about global population pressures and the contributions of birth control to family stability, family prosperity, and infant and maternal health."[70] In turn, it was not decriminalization that changed social attitudes but rather, social attitudes had a big impact on the changes made to the criminal code in 1969.[71] While the law prior to 1969 suggested that couples were not using contraceptives, the demand for birth control was out there; it is estimated that while thirty years ago only ten per cent of Canadian couples used birth control, at the end of the 1990s that number has risen to fifty-five percent.[72] There was a demand and, as will be noted below, even in the case of illegality, women were still able to gain access. This was also the case with abortion.

Abortion

Canadian history documents the restrictions placed on women's ability to exercise choice in maternity. However, "... throughout history, women have practiced forms of birth control and abortion; recurrent moral or legal prohibitions against such practices merely 'forced women underground in their search for reproductive control.'"[73] According to Appleby, instruction and access to birth control devices was possible prior to 1969; clinics, doctors, and nurses provided

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[70] Appleby 201.

[71] Ibid., 6.

[72] "Contraception." *Pro-Choice Action Network.* http://www.prochoiceconnection.com/pro-can/civilize.html#contra (15 Jun 1999).

[73] Observation made by Linda Gordon. See Petchesky 1.

people with the service even under the threat of criminal sanction.[74] For example, while section 251 of the Criminal Code made most abortions illegal prior to 1969, an astounding 35,000 to 120, 000 illegal abortions were being performed each year in the late 1960s (the averages were determined in 1967).[75] Abortions were legalized in 1969 under s. 251 of the Criminal Code, however, before the mid-nineteenth century they were in fact legal in Canada. Following British precedent, abortions were permitted by law if they took place before 'quickening': " ... the first perceptible movement of the foetus at about the sixteenth to eighteenth week of pregnancy."[76] F. L. Morton suggests that 'quickening' was often assumed to mean the foetus had "come to life"[77]; however, Mitchinson notes that even when pregnant women entered into the stages of quickening and aborted their foetuses thereafter, they rarely suffered any legal consequences.[78] The lenient abortion law disappeared with the adoption of England's Offences Against a Person Act,[79] resulting in the enactment of Canada's first Criminal Code in 1892. The new Criminal Code made abortions illegal both before and after quickening; it made it a criminal offence to abort a foetus during any stage of a pregnancy, except when the life of the mother was jeopardized.[80]

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[74] Appleby 244.

[75] "History of Abortion in Canada." *Pro-Choice Action Network.* http://www.prochoiceconnection.com/pro-can/history.html (15 Jun 1999).

[76] Mitchinson 407.

[77] F. L. Morton, Morgentaler v. Borowski: Abortion, the Charter, and the Courts (Toronto: McClelland & Stewart Inc., 1992) 17.

[78] Mitchinson 407.

[79] "Abortion: Everything You Didn't Want to Know." *M.B. Herald: Vol. 36, No. 21* (Nov. 7, 1997). http:// www.cdnmbconf.ca/mb/mbh3621/abortion.htm (20 Jun 1999).

[80] Morton, Morgentaler 17.

This too was a result of changes which took place in British law thirty years before. The abortion provision of the criminal code remained virtually unchanged until 1969, when the Trudeau government amended the abortion law to permit abortions when certain conditions were met by the woman. In turn, section 251 of the Criminal Code had the effect of legalizing some abortions.

Under section 251 abortions were legalized only when approved by a designated therapeutic abortion committee. Furthermore, when an abortion was permitted, it had to be performed in an accredited hospital, and only when the mother's health or life was in danger. The provision did not provide any guidelines to be used by the committees to determine the "health of the mother"; without guidelines, the provision was applied unequally throughout Canada. The abortion provision of the Criminal Code "in effect...said that some women - directly, those who were rejected by therapeutic abortion committees and, indirectly, those who had no opportunity to bring their request to an abortion committee - had a legal obligation to procreate; it sentenced them to forced reproductive labour."[81] As stated previously, a woman's right to reproductive autonomy is often in conflict with the rights of the foetus. Christine Overall suggests that section 251 of the Criminal Code gave the foetus right to occupy the woman's body. Furthermore, she notes that "the woman's body was simply a container, with various utilities, that the foetus happened to need for nine months."[82] Lorraine Code contends that section 251 of the Criminal Code brought about several injustices for women.[83] For example, she notes hospitals were not obligated to set up therapeutic abortion committees and, therefore, not all women had

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[81] Overall 242.

[82] Ibid., 243.

[83] Ibid., 242.

equal access to abortions. One can argue that women who resided in urban areas had more access to an accredited hospital which had a therapeutic committee than women who lived in rural areas. Furthermore, hospitals that did set up therapeutic abortion committees did not necessarily have women's interests in mind, as several had quotas as to how many abortions could be performed; others limited abortions to women whose spouses or partners (in the case of a pregnant minor--parents) agreed to the procedure. In this case the rights of a partner or parents of an unwed mother could, and often did take precedence over a woman's choice to abort the foetus. In other cases women faced lengthy waits, waits that sometimes, even with a positive response from the committee, threatened their health by pushing the procedure into late pregnancy. Moreover, the "health of the mother" was often defined differently by each hospital, further reducing women's ability to receive equal access to abortion services. Perhaps these difficulties shed some light on the future decision of the Supreme Court in the *Morgentaler* case. While this case will be discussed in Chapter Five, it is important to say here that it was in this case that the Supreme Court of Canada struck down section 251 of the Criminal Code--the abortion law--and consequently, made abortion legal in Canada.

The possibility does exist, however, that the government will draft a new law which could restrict access to abortion. But where does the abortion question stand as Canadians enter into the new millennium? Abortion is now legal in Canada, but the pro-choice and pro-life groups continue to struggle in their attempts to influence the abortion situation in Canada. Nevertheless, as Canada enters the new millennium, abortion is not the only issue on the reproductive autonomy agenda. In the late 1990s, the new reproductive technologies (NRT) are not only enhancing

women's (and men's) fertility, but are also bringing forth questions of the effects these new technologies have on a woman's autonomy.

The New Reproductive Technologies

Developments in reproductive technologies, such as artificial insemination, *in vitro* fertilization, and surrogate motherhood, since the late 1970s[84] have also brought new forms of not only enhancement of reproduction but also state and medical control over women's reproductive choice. While the focus of the women's movement throughout the 1970s and 1980s was centered on "...ensuring women's right to avoid unwanted pregnancies and the right to plan and space pregnancies..."[85] the movement in the 1990s has adapted to include a greater scope of issues related to reproductive autonomy. Rona Achilles notes that with advancements in the new reproductive technologies, especially those concerned with the creation of new life, activism has now expanded to include the new reproductive technologies. She asserts that "reproductive choice, once limited to concerns about avoiding or planning pregnancies, is an issue that takes on new meaning through the use of assisted reproduction procedures."[86] In turn, women's organizations now find themselves advocating for women's right *to* reproduce, a change from their previous calls for women's right to choose *not* to reproduce. These new reproductive technologies have the ability to enhance the reproductive capabilities of some women and men; however, they also have the potential of hindering the autonomy of others. Some technological changes jeopardize women's reproductive autonomy; medical developments, like foetal surgery, limit a

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[84] Mitchinson 391.

[85] Achilles 489.

[86] Ibid., 490.

woman's reproductive autonomy because the foetus is given the status of a human person. Consequently, a woman's autonomy is compromised because her rights come into conflict with those of the foetus. The possibility now exists that the foetus, medically considered a "person," can hinder a woman's ability to choose when to reproduce or how to care for her body. Given that women's right to reproductive freedom tends to be shared with others' rights, once a foetus is considered a person women's autonomy is necessarily shared with the autonomy of the foetus. "Foetal surgery...creates a situation where, potentially, the foetus still in a woman's body can be defined as a patient separate from the carrying mother."[87] Therefore, the accomplishments gained (ie. safe and effective birth control, legal access to abortion, etc.) are also jeopardized; "...the stage is set, potentially, for a continuation of major conflict between women's right not to reproduce, [as exercised through abortion] and the alleged rights of the fetus."[88] The new reproductive technologies have opened a new realm of services that while they provide new possibilities for some couples, have the effect of hindering the autonomy of others.

The availability of services, such as surrogate mother services and donor banks, not only open new doors for those who would not otherwise enjoy natural reproduction, but brings forth difficulty in the creation of a new definition of parenthood. To whom does reproductive autonomy belong? These new developments provide new avenues for reproduction, but they also result in complicating the reproduction process and, therefore, the order of rights. In increasing the number of players and possible combination of players,[89] it also becomes difficult to determine

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[87] Achilles 488.

[88] Overall 245.

[89] New developments in reproductive technologies are having the effect of creating new categories of parenthood. For example, there is now the possibility for there to be a genetic mother/father, birth

whom reproductive autonomy belongs to. Furthermore, developments in the new reproductive technologies also bring to question access to these services. While a number of women enjoy the results of the NRT, many are not able to enjoy them because of restrictions placed upon them due to marital status, sexual orientation, economic status, etc. For others, already established services, like abortions, are readily available; however, given that health falls under provincial jurisdiction, there is no national financing standard [See Appendix C]. Consequently, for many women who cannot pay for the procedure, abortion is simply not an option. But does access to these new developments enhance one's reproductive autonomy? As it has already been stated above, the new reproductive technologies do in fact create new opportunities for single women as well as couples--those who can afford it–for others they are not an option. Rona Achilles suggests that "...assisted reproduction technologies as practised in clinical settings move conception out of the private and into the public realm. Members of the medical profession...are now deciding who will or will not become parents."[90] She goes further to suggest that these developments bring to question whether there is a fundamental right to procreate and whether access to these new services is included in that right.[91] If to procreate is a fundamental right, then certainly so is access to these services and, therefore, part of one's reproductive autonomy. Any limitations placed on access to these then limit the reproductive autonomy of anyone who chooses to make use of the new services. Women's reproductive autonomy, however, is not only hindered by the emerging

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mother/father, donor mother/father, adoptive mother/father, etc.

[90] Achilles 504.

[91] Ibid., 504.

results, but most important, their powerlessness results from the power dynamics created by the medical profession.

The medical profession has been successful in controlling reproduction by using the expert knowledge that has come to be accepted and expected in Canadian society. With the recent advancements in the new reproductive technologies medical intervention is at an all time high, reducing the amount of autonomy women have in the area of reproduction. Moreover, the dominance of medicine by male physicians, as stated above, has also been a factor contributing to women's powerlessness in their reproductive choices.[92] Research in the area of the new reproductive technologies is also dominated by men. Linda S. Williams notes that...

> ...it is amazing and frightening to contemplate the fact that most of the scientists who deal with women's reproduction belong to that half of the human race that does not menstruate, experience pregnancy, give birth, or go through menopause. In short, they are men. Since the vast majority of reproductive scientists are men, it stands to reason that they are not going to view medical research on women's reproduction in the same way as women themselves. Consequently, medical research on women's reproduction emerges out of a predominately male consciousness, and the implications of this fact on women are profound.[93]

The further medicalization of reproduction, in this case through the development of technology, can have a negative impact on women. It brings forth the question of whose interests are being looked at and for what purposes? Petchesky contends that "control over fertility is a matter not

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[92] Human Resources Canada reported in March of 1999 that forty-six per cent of medical school graduates are women. See "After Graduation," *Human Resources Development Canada* (06 March 1999) http://www.hrdc-drhc.gc.ca/JobFutures/english/volume2/underst.htm#graphwomen (31 July 1999).

[93] Linda S. Williams, Feminist Perspectives: But What Will They Mean For Women? Feminist Concerns About the New Reproductive Technologies (Ottawa: Canadian Research Institute For the Advancement of Women, 1986) 5.

only of technology but of the total arrangement of power in society."[94] Therefore, if fertility research continues to be dominated by men, then one has to wonder whether it is being done in the interests of women. Furthermore, the development of new technologies to enhance reproduction also increases medical intervention in the birthing process. Given that medical involvement has come to be widely accepted, giving physicians the power to provide or withdraw assistance takes autonomy away from the woman.[95] Moreover, the development of reproductive technologies that aid in the creation of new life further emphasize the fundamental social importance that has been given to the role of bearing children. However, the issue becomes even more complicated when one takes into account recent medical developments which make it possible for a man to carry a foetus to full term.[96] As stated before, rapid changes in the development of reproductive autonomy do not only enhance women's reproductive abilities, but also set new limits on women's ability to exercise control over their bodies. In turn, with the technological advancements being made in the area of reproduction, reproductive autonomy has become a complex right, being defined differently depending on who defines it. With all these recent changes and the different socio-economic factors that affect one's experiences, how, then, is reproductive autonomy defined?

Reproductive Autonomy and Women's Diversity

The rapidly changing field of reproduction brings forth different kinds of questions making it more difficult to determine what reproductive autonomy really is. Considering the

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[94] Petchesky 25.

[95] Mitchinson 413.

[96] Robert Mason Lee, "Your Placenta or Mine?" The Globe and Mail 04 March 1999: D5.

significant technological changes which have taken place in the area of reproduction (i.e. surrogate motherhood, *in vitro* fertilization, etc.), reproductive autonomy does not mean the same for all women, and with new advances making it possible for men to carry a foetus to full term,[97] the answers are further complicated. For example, Heather MacIvor notes that while in Canada the freedom to choose refers to a woman's ability to choose whether or not to reproduce (directly linked to women's access to equal, safe and effective abortions), for women in India and China reproductive autonomy entails the freedom from compulsory abortions after the first or second child[98]; it is the forced sterilization of women in Bangladesh, or of mentally challenged women (and men) in Alberta and British Columbia, as was done between the 1920s and 1950s.[99] In turn, how a woman defines her reproductive autonomy varies, not only from country to country, but from woman to woman, and therefore, one must be sensitive to these differences, especially in a country as culturally diverse as Canada. Furthermore, reproductive autonomy defined in female terms may in fact be too narrowly defined, given recent medical developments in the probability of male pregnancies. While the women's movement has largely focussed on a woman's right to choose *not* to reproduce, or access to safe and effective birth control and abortions, reproductive freedom also includes the right to choose home birth over hospital birth, the assistance of a midwife rather than an obstetrician, etc. Moreover, as was mentioned above, the new reproductive technologies have added yet another dimension to reproductive freedom--the right

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[97] Lee D5.

[98] Heather MacIvor, Women and Politics in Canada (Peterborough: Broadview Press, 1996) 313.

[99] Sterilization was used in both Alberta and British Columbia as a means of controlling the reproductive abilities of people with mental disabilities and of certain racial minorities (i.e. Native people). While sterilization was forced upon both men and women, Wendy Mitchinson notes that the rate of sterilization of women was much higher than that of men. See Mitchinson 412.

to choose these technologies and to equal access to these technologies. Given the complexity of defining reproductive autonomy, women's organizations in representing women's demands must be sensitive to the differences in experiences and perceptions. In turn, in order for real representation to occur, national groups must be willing and able to advocate not only their position, but those of all Canadian women, regardless of marital status, sexual orientation, and economic status.

The Women's Movement and Reproductive Autonomy

The women's movement in Canada has been involved in advocating women's demands for reproductive autonomy. Throughout the second wave of the women's movement, "access to birth control and abortion...mobilized thousands of women...to challenge government legal prohibitions and male-dominated medical circles."[100] In their demands they claimed "... that such rights are essential preconditions for women's full participation in paid employment and public life, and that the lack of... [it] is a source of unchosen dependence on husbands."[101] Consequently, the push for the full realization of women's reproductive autonomy has been a central issue dealt with by women's groups in their organizing and lobbying efforts. Given that how a woman defines her personal reproductive autonomy varies from woman to woman, the women's movement has had to be sensitive to the differences between women's experiences; national women's organizations, like NAC and LEAF, must therefore be aware of the varying voices of all Canadian women. In turn, to be representative of all women, these organizations must

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[100] Constance Backhouse, "The Contemporary Women's Movement in Canada and the United States: An Introduction," Challenging Times: The Women's Movement in Canada and the United States, ed. Constance Backhouse (Montreal: McGill-Queen's University Press, 1992) 13.

[101] O'Connor, Orloff, and Shaver 159.

exercise a double consciousness: "the development of double-consciousness, or the process of being able to observe oneself from the outside . . ."[102] Furthermore, Linda Archibald and Mary Crnkovich note that...

> ...white middle-class women [have] dominate[d] the feminist movement in Canada. Double-consciousness could be a useful tool for women within the feminist movement, because it provides a way for them to stand back and assess their relative power and privilege in relation to and *with* women of different economic backgrounds, cultures, races, abilities, and ages.[103]

The focus on the right to choose *not* to reproduce--decriminalization of birth control and the legalization of abortion--by the women's movement in the last thirty years demonstrates the limitations that arise when looking at the issue of reproductive autonomy from one vantage point. While "the demand for reproductive freedom runs through all strains of contemporary feminist thought and practice, as either central or a necessary part of women's quest for greater understanding of their past and an engagement of their future,"[104] it is essential for women's organizations, especially national organizations like NAC to adapt to the many demands of Canadian women. By assuming a double consciousness, women at the forefront of the movement cannot only better represent, but also better understand the diversity that exists in this area. Most important, however, only then will the countless voices often left unheard finally be heard and their demands advanced. In the late 1990s, women's groups continue to organize and lobby to protect their victories in the realm of reproductive freedom. However, reproductive autonomy continues to be challenged. Unlike earlier struggles, however, some women and women's groups

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[102] Archibald and Crnkovich 115.

[103] Ibid., 123.

[104] Burt 372.

are now using the legal system not only to challenge the status quo, but to make sure that their right to autonomy over their own bodies is protected and secured by the courts.

In the courts women have sought to make their claims to equality, however, they have often met resistance, finding themselves being defined by societal stereotypes and traditional roles (as mothers and bearers of children). The entrenchment of the Canadian Charter of Rights and Freedoms into the Canadian Constitution in 1982 offered women a new avenue through which to seek the protection of their rights by the law, and not just any law, but the supreme law of Canada. Sheila Martin suggests:

> A Charter-based challenge to inappropriate government action widens the scope of judicial review and increases the range and efficacy of available remedies. A Charter action is a powerful tool to effect social change and stipulate public awareness...the Charter, therefore, is an important instrument which should be used to overcome the historical and systemic discrimination against women, address women's material inequality, and accommodate their biological capabilities.[105]

However, while women's initial advances in achieving reproductive autonomy were a due to Charter interpretation by the courts, recent advances in the 1990s have not been a result of the Charter. To date, public and medical control over women's reproductive freedom has been reduced through the judicial system, specifically when it comes to a woman's right to choose not to reproduce as exercised through abortion (this was the result of the Supreme Court's decision to strike down the abortion provision of the Criminal Code in the *Morgentaler* case). Even with these advances, however, along with the complexity of what reproductive autonomy means for each woman, the new developments in reproductive technologies not only complicate the issue

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[105] Sheila L. Martin, Women's Reproductive Health, The Canadian Charter of Rights and Freedoms, and the Canada Health Act, (Ottawa: Canadian Advisory Council on the Status of Women, 1989) i.

of reproductive autonomy, but leave an air of uncertainty as to what the future may bring in this area.

Conclusion

The pursuit of reproductive autonomy is not a new quest; however, only now is one beginning to see the complexity that lies in this area. Whatever the differences between experiences and definition of reproductive autonomy, as Patricia Fernández Kelly suggests, "the availability of reproductive alternatives, including abortion, levels sexual disparities by giving women what men always had: control over their own bodies."[106] Therefore, the pursuit of reproductive autonomy will not only make women sole owners of their own bodies, but will give them the control and, therefore, power to act freely and publicly in society. Moreover, Adrienne Rich asserts that...

> ...the repossession by women of our bodies will bring far more essential change to human society that the seizing of the means of production by workers. The female body has been both territory and machine, virgin wilderness to be exploited and assembly-line turning out life. We need to imagine a world in which every woman is the presiding genius of her own body. In such a world, women will truly create life, bring forth not only children (if and as we choose) but the visions, and the thinking, necessary to sustain, console and alter human existence - a new relationship to the universe. Sexuality, politics, intelligence, power, motherhood, work, community, intimacy will develop new meanings. Thinking itself will be transformed. This is where we have to begin.[107]

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[106] M. Patricia Fernández Kelly, "Class, Ideology, and the Reproductive Dilemma," Challenging Times: The Women's Movement in Canada and the United States, ed. Constance Backhouse (Montreal: McGill-Queen's University Press, 1992) 255.

[107] Adrienne Rich quoted in MacKinnon 153.

Women as a whole, with the help of women's organizations, have made several advances in their pursuit for reproductive autonomy--from the legalization of contraceptives to the decriminalization of abortion. However, with new developments in the reproductive technologies and increases in medical intervention both in conception and the birthing process, the quest is only likely to become more difficult. Uncertainty lies ahead as to what new developments in reproduction will mean for women and their bodies. However, one thing is certain: it will not be until societal attitudes change in the primacy that is given to motherhood, that women's right to autonomy will come before those of the foetus, and those of the male partner. It will not be until society sheds its attitudes about women's traditional roles that women will gain control over their bodies; when women attain full control over their bodies they will be able to participate more freely and fully in society. With the coming of the new millennium, it is important for women to gain control over their bodies. The Charter has opened new doors for groups to advance their claims. In turn, women's collective action is essential in order to put an end to restrictions in women's choices over their bodies; only when women to gain control over their bodies will they achieve full equality in Canadian society.

CHAPTER THREE:
GETTING NOTICED: INSTITUTIONALIZED FEMINISM IN CANADA

> Central to feminist debate is the notion of sexual inequality in which female members of a particular social formation are dominated in a variety of ways by the male members. Sometimes this domination is material, sometimes social, sometimes economic, sometimes physical. Despite disagreement concerning how male domination of women originates and is perpetuated, most feminists agree that the subordinate position of women is a social fact and not a biological one, and that the institutions of society have arisen both as a result of and as agents in the reproduction of unequal social relations on the basis of sex.
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> -Dawn H. Currie et. al., "Three Traditions of Critical Justice Inquiry"[108]

Introduction

The National Action Committee on the Status of Women (NAC) and the Women's Legal Education and Action Fund (LEAF), two organizations committed to the promotion of women's interests, have enjoyed some successes within Canadian society because of their willingness to work within the existing political process in their advancement of the feminist agenda. Known publicly for their role in the representation of women, these organizations have been able to develop into institutions that are now "...more or less features of the political system."[109] Feminism, popularly labelled radical (out of touch with reality) because of the challenges it poses upon the status quo,[110] has weathered time and changes in government. However, in the late 1990s feminism is no longer a popular ideology bringing

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[108] Dawn Currie, Brian D. MacLean, and Dragan Milovanovic, "Three Traditions of Critical Justice Inquiry: Class, Gender, and Discourse," Re-thinking the Administration of Justice, ed. Currie, Dawn H., and Brian MacLean (Halifax: Fernwood Publishing, 1992) 12.

[109] Jill Vickers, Pauline Rankin, and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto: University of Toronto Press, 1993) i.

[110] State refers to all political institutions.

women closer to the abolishment of their longstanding oppression. It has been because of organizations like NAC and LEAF that feminism has been brought into political discourse, bringing to light the endless social and political issues concerning women, including reproductive autonomy. Never straying too far from the longstanding and, therefore, legitimate state institutions, NAC and LEAF's engagement within the existing political process allowed them to become central in advocating women's demands for the protection of women's rights.

This chapter focusses on NAC and LEAF's ability to become institutions in Canadian society parallel to political institutions.[111] In light of Catharine MacKinnon's "hall of mirrors," which was discussed in Chapter One, institutionalized feminism[112] has been effective because it has set itself within mainstream politics, not straying too far from the existing institutions, but pushing to create a place for women within them; however, institutionalized feminism is only successful if feminist demands for change are unthreatening to the status quo (power structure). That is, women's organizations must work within the existing institutional frameworks in order to be unthreatening to the power structure, while maintaining a sense of credibility. Jill Vickers et. al. assert that the "...traditional view of politics admit[s] that politics functions through elite accommodation and the exclusion of non-elites, including most women."[113] In turn, the state and its institutions can be defined as

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[111] Vickers, Rankin, and Appelle 4.

[112] Institutional feminism operates within traditional institutions. See Nancy Adamson, Linda Briskin, and Margaret McPhail, Feminist Organizing for Change: The Contemporary Women's Movement in Canada (Toronto: Oxford University Press, 1988) 12.

[113] Vickers, Rankin, and Appelle xi.

the product of the dominant interests of society or the interests of those who have power and influence; therefore, women's organizations which have been willing to become integrated within the existing political system have been able to influence, even if by a small fraction, Canadian politics. NAC and LEAF are examples of institutionalized feminist organizations which have sought a place in an environment that is otherwise hostile to a feminist agenda. By dressing themselves up like those who are in power--using traditional channels and processes, acting like those with power--and adapting to existing institutions, NAC and LEAF demonstrated a commitment to the status quo and to slowly, within the system, advance women's interests, an essential component of the liberal feminist agenda.

The Hall of Mirrors

To understand the political environment in which women's organizations emerged and developed, it is useful to use Catharine MacKinnon's analogy of the "hall of mirrors."[114] According to MacKinnon, society as a whole can be explained as a hall of mirrors, where power relations at the societal level are reflected in the state, reinforcing and legitimizing the existing power structure. Deeply embedded within societal norms, institutions, and the law, gender inequality becomes invisible and therefore, it is difficult to bring about change unless that change is itself legitimized. Radical feminists argue that the fundamental root of women's oppression and subordination is due to patriarchy, which serves to reinforce the gender inequalities that exist at the societal level [See Appendix D].[115] What results is "...the

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[114] MacKinnon 164.

[115] "Patriarchy is the power structure at work, in the home, at school, in the Church and in the government." See Storkey 96.

'woman' problem, and the sexism that 'makes women into cultural, social, and economic non-persons and robs them of their histories and names.'"[116] Consequently, MacKinnon suggests that "so long as power enforced by law reflects and corresponds - in form and in substance - to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are."[117] In turn, the dominant ideology and dominant culture that emerge become the foundation of government and politics.

Within this hall of mirrors there is also the perception of neutrality and objectivity at each level of society. There is a sense that all decisions and actions taken within the political realm apply equally to all individuals; the state's actions are made in the public good. Lorraine Code suggests that this androcentric view becomes the objective and universal standard from which law is made. This universal lens, or "...male standpoint dominates civil society in the form of the objective standard - that standpoint which, because it dominates the world, does not appear to function as a standpoint at all . . . the state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate. And social dominance becomes invisible."[118] Because the state is seen as objective and acting in the general good, therefore, representative of all interests, then the state is also assumed to be gender neutral. Changes and challenges to the [male] status quo which threaten the power

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[116] Cheris Kramarae and Paula A. Treichler quoted in Lorraine Code, "How Do We Know? Questions of Method in Feminist Practice." Changing Methods: Feminist Transforming Practice, eds. Burt, Sandra, and Lorraine Code (Peterborough: Broadview Press, 1995) 25.

[117] MacKinnon 239.

[118] Ibid., 237.

structure are looked at negatively; therefore, women's demands for equality have tended to be ignored. For women,

> [m]ale dominance in the institutions of collective decision-making means that men enjoy a monopoly on making societal decisions about what is 'right', 'for the best' or 'the most efficient' and what ought to be 'on the agenda', 'top priority', 'trivial' or 'marginal'. The consequence for women is that the operational norms of collective decision-making reflect men's experiences, especially the experiences of affluent men, mainly from...[the] country's majority race and culture, who dominate judiciaries, governments and bureaucracies.[119]

In such a system of patriarchal dominance, women only come to be recognized as equal to men through their 'sameness' with men; they become visible only when they behave like "good men."[120] In other words, women are noticed only when they dismiss their [different] experiences and accept politics as defined by men. Consequently, the assumption of gender neutrality in politics serves to devalue women's voices and experiences, taking away their ability to influence changes within the status quo.

The Myth of the Neutral Court: The Supreme Court in the Hall of Mirrors

Theoretically, the laws that emerge under this objective standard are made in the citizens' interests. However, they are really a reflection of what men want, failing to recognize that women's experiences and, therefore, needs are sometimes different from men's.[121] Moreover, the illusion of gender neutrality extends into what is often seen as the

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[119] Vickers 156.

[120] Women behave like "good men" when they accept politics as defined by men. See Burt 361.

[121] Since white, middle aged, middle class men are typically those who hold position of power in society, not only are women not under-represented, but also those "others" who, because of socio-economic status, ethnicity, level of education, etc., have been unable to gain power and are, therefore, themselves invisible. Professor Griffith in Wilson 92.

most neutral and impartial element of the state--the judicial system. Bertha Wilson suggests that when it comes to the reinforcement of the dominant culture, the courts serve to enhance the disempowerment of women. She notes that "...studies show overwhelming evidence that gender-myth, biases and stereotypes are deeply embedded in the attitudes of many male judges as well as the law itself..." and that "...gender difference has been a significant factor in judicial decision-making."[122] Radical feminists have come to "...challenge traditional assertions about the law's neutrality and objectivity, suggesting instead that legal decision-making is normative and all too frequently informed by a male perspective of lived experiences."[123] The Supreme Court's most recent sexual assault decision in the Ewanchuk case exposes this "hidden gender of law."[124] In this case Ewanchuk was charged on the count that he had sexually assaulted a teen during a job interview; the accused was acquitted by the Alberta Court of Appeal on the grounds that the plaintiff "did not present herself in a bonnet and crinolines,"[125] and that Ewanchuk's advances were more "hormonal than criminal."[126] The stereotypical and gender biased comments made by Justice John McClung of the Alberta Court of Appeal are indicators of the attitudes and beliefs that prevail in society, attitudes that

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[122] Wilson 92.

[123] Mary Jane Mossman, "Gender Bias and the Legal Profession: Challenges and Choices," Investigating Gender Bias: Law, Courts, and the Legal Profession ed. Joan Brockman and Dorothy Chun (Toronto: Thompson Educational Publishing, Inc., 1993) 152.

[124] Phrase coined by Regina Graycar and Jenny Morgan, The Hidden Gender of Law (Annandale: Federation Press, 1990).

[125] Justice John McClung in R. v. Ewanchuk, 245.

[126] Ibid., 250.

result in the exclusion and disadvantage of women. While his decision was unanimously overturned by the Supreme Court, it was a result of three different reasons. Although they agreed with the majority decision written by Justice Major, Madame Justice Beverley McLachlin and Madame Justice Claire L'Heureux-Dubé each wrote an additional set of reasons (Justice Gonthier signed on with Justice L'Heureux-Dubé), criticizing Justice McClung's arguments in the Alberta Court of Appeal. Even so, however, there were still those who were harsher on L'Heureux-Dubé's judgement for reprimanding McClung's stereotypical statements. In turn, this demonstrates that change is unlikely unless women's claims are supported, reinforced, and legitimized by those in power, in this case, the judiciary; women's attempts at challenging the power structure have either failed completely or have marginally succeeded because of this.[127] Their successes have emerged in the passing of "woman-focussed" laws, designed specifically for women such as the old abortion law, and "woman-friendly," laws that are not necessarily made for or by women, but which have a positive impact on them such as the provincial health acts.[128] However, these have no effect unless the judiciary interprets them to the benefit of women. Consequently, woman-focussed and woman-friendly laws do not necessarily guarantee change because the underlying androcentric assumptions and attitudes continue to exist in society; these laws simply conceal the underlying power structure.

Uneven Representation

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[127] Individual women have been successful in climbing the ranks and gaining positions of power; however, these women tend to possess the same values and interests as those of the status quo.

[128] Vickers, Rankin, and Appelle 172.

The hall of mirrors has reflected a myth of neutrality in the political system, one that serves to exclude the voices of women with the justification that their views are represented by those in power. The separation between public and private spheres has meant that women's involvement in the public realm has been, until recently, minimal. In turn, this public/private split creates a gender gap in politics, giving the perception that women have not wanted to be involved in the political domain. In the late 1990s, out of three hundred and one seats in the House of Commons, only sixty are filled by women; the Senate, generally comprised of one hundred and four senators, only sits thirty-one women [See Appendix B].[129] Furthermore, this gender gap extends into the judiciary, where out of nine possible appointments to the Supreme Court, only three of those are women judges.[130] Bertha Wilson, the first woman judge to sit on the Supreme Court was not appointed until 1982 by Prime Minister Pierre Trudeau. Because women have failed to be included in public activities and because what is inclusive in politics is narrowly defined (by the standard of male political behaviour), women's marginalization in society has been increased, and their activities in society (i.e. organizing, protesting, etc.) have not been considered mainstream in politics by those in power. Isabella Bakker notes that "changes to social programs and measures which place limits on a government's capacity to perform its stabilization function, such as balanced budget initiatives, have a direct and serious impact on how different groups of women

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[129] "Women -- Federal Political Representation." *Library of Parliament* (02 February 1999). http://www.parl.gc.ca/36/refmat/library/womenrep-e.htm (11 April 1999)..

[130] This includes the recent appointment of Louise Arbour to the Supreme Court, which will take effect on September 15, 1999. "About the Court." *Supreme Court of Canada*. http://www.scc-sc.gc.ca/brochure/english/html/ Contents.htm (11 April 1999).

contend with social and economic inequality."[131] The results vary: women earn sixty-four cents for every dollar that a man makes[132]; on average, male lone parent families make $15, 000 more in income than female lone parent families[133]; about sixty-four per cent of women participate in the workforce as part-time workers[134]; in turn, changes in unemployment insurance will disproportionately affect women (and youth) because they hold most of the part-time jobs in Canada.[135] Being defined by their roles as mothers and bearers of children, women have been confined to the private sphere; however, "...most feminists agree that the subordinate position of women is a social fact and not a biological one, and that the institutions of society have arisen both as a result of and as agents of it in the reproduction of unequal social relations on the basis of sex."[136] Stemming from women's marginalization from mainstream politics, women's 'political' actions have centred around the community--close to home. However, whereas politics is considered to include state actions, government and the relationships that exist between states, civil society and therefore, women's activism,

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[131] Isabella Bakker, "Unpaid Work and Macroeconomics: New Discussions, New Tools for Action." *Status of Women Canada.* http://www.swc-cfc.gc.ca/publish/research/uwork-e.html#CONCLUSIONS (11 April 1999).

[132] "Pay Equity." *BC Federation of Labour.* http://www.bcfed.com/STAND/payeqpol.html (11 April 1999). See Appendix A.

[133] "Average Annual Income." *Statistics Canada* (22 December 1997). http://www.statcan.ca/english/Pgdb/People/Families/famil05.htm (11 April 1999). See Appendix A.

[134] "Statistics on Women in Canada." *Status of Women Canada.* http://www.swc-cfc.gc.ca/statse. html (11 April 1999).

[135] "Govt's Own Figures Prove UI Cuts Discriminate Against Women and Youth." *Canada Newswire.* (18 March 1999) http://www.newswire.ca/releases/March1999/18/c5520.html (11 April 1999).

[136] Dawn H. Currie, Brian D. MacLean, and Dragan Milovanovic, "The Three Traditions of Critical Justice Inquiry: Class, Gender, and Discourse," Rethinking the Administration of Justice, ed. Dawn H. Currie and Brian D. MacLean (Halifax: Fernwood Publishing, 1992) 12.

falls outside the scope of what is considered political. Consequently, through "selective exclusion"[137] the women's movement, the emergence of women's organizations, and feminist activism have not been considered political.[138] However, as Vickers et. al. contend, "politics as re-conceptualized in woman-centred terms means far more than participation in social governance"[139]; it includes "...all actions aimed at changing or maintaining the established order"[140]; therefore, women's activism is political, especially when one considers the advancements the women's movement has brought in women's lives. With consideration of the hall of mirrors, then, how have feminist activists been able to, if at all, produce change while challenging the [male] status quo?

Tilting the Mirror

It was noted earlier that women's organizations like NAC and LEAF can attribute their successes to the institutional feminist organizational patterns and the tactics they have chosen. Since the state is a reflection of the dominant interests in society, then these two organizations have used this knowledge to advance their claims and legitimize their stance. Because "those who have power have a vested interest in keeping it and therefore tend to defend the status quo...,"[141] feminist activists have dressed up to look like those in power, using the system to justify their actions. What this has meant for NAC and LEAF is that they have conformed to

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[137] Burt 364.

[138] Vickers 33.

[139] Vickers, Rankin, and Appelle xi.

[140] Linda Christiansen-Ruffman in Ibid., 32.

[141] Adamson, Briskin, and McPhail 137.

the existing political process, tilting the hall of mirrors enough to be included and accounted for. This tilting appeared to work for both organizations, including women, although not fully, while they operated within the boundaries of the hall of mirrors. As will be discussed below, women's claims found a place within official politics under the face of institutional feminism (through organizations like NAC and LEAF) because the demands being made were modest and unthreatening. Women activists found a place within the political process,

> ...insist[ing] on the right to participate fully in existing political institutions, while at the same time challenging their character and underlying principles . . . [maintaining] they must build autonomous, women-centred institutions in which to develop alternative ways of doing politics and they must be present, to whatever extent, within existing political institutions, to participate as women and thereby to challenge the logic of those structures.[142]

In turn, the experiences of NAC and LEAF expose the reality of the hall of mirrors - that reflections are but a replica of the power dynamics within society.

The National Action Committee on the Status of Women and LEAF have also demonstrated the impact women's organizations have made by taking roles as women's organizations (networking within and between organizations) as well as players within mainstream politics. In turn, "from a women-centred perspective, it is essential to maintain a capacity for double vision that views politics within movements for change and within the official politics of the state as equally important."[143] By taking part in the already established political process, feminists are able to show their support for those institutions, while at the

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[142] Angela Miles quoted in Vickers, Rankin, and Appelle, 24.

[143] Ibid., 67.

same time making a place for women within those very institutions. In this sense, NAC and LEAF have been influential and have been able to gain legitimacy within official politics because they have maintained a position within institutionalized feminism, which functions within the system.[144] Institutionalization "...refers to the way feminist demands for change are reconstructed and couched in terms of the existing institutions and ideologies."[145] Mary Douglas suggests that "...'a pattern of given complexity, once established, uses less energy than was required to bring it into being.' Institutions...permit the perpetuation of social groupings, and of their 'legitimizing' ideas, over time and space with a minimum expenditure of energy. In their stability and seeming permanence, they become 'naturalized.'"[146] These principles of permanence and stability are supported by longstanding institutions. Since "male political culture is lodged in formal political institutions, which perpetuate themselves and their values through the law and longevity,"[147] NAC and LEAF adopted this idea of institutionalization in order to be included within society. By using the existing processes, they have shown a commitment both to women and to Canadian society. For example, NAC, along with the Canadian Advisory Council on the Status of Women (CACSW), were successful in their lobbying efforts to have Sections 15 and 28 included in the Charter. LEAF, on the other hand, has played a significant role under intervener status and in funding

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[144] Adamson, Briskin, and McPhail 12.

[145] Ibid., 181.

[146] Vickers, Rankin, and Appelle 134.

[147] Ibid., 32.

legal cases dealing with women's equality.[148] In turn, both, at least initially, appeared to receive public and political recognition as advocates for women.

How a group approaches change also plays a big role in the creation of legitimacy. Adamson et. al. argue that if...

> ...feminist practice operates exclusively out of a politic of mainstreaming - that is, without offering a substantive critique of the system and in the context of existing institutions - it is unable to challenge these limits. Such an orientation lacks the necessary critical dimension that would enable it to develop and maintain a larger vision of social transformation, and thus frame demands for change that confront and reveal these limits.[149]

Most liberal feminists argue, however, that the "...most impact comes from influence on institutional authorities challenged in a quiet, straightforward way - not from populist protest."[150] In comparison to grassroots groups which separate themselves from the political system and which rely on protest rather than working with the system, NAC and LEAF were able to establish themselves as stable institutions, providing continuity in an uncertain political environment. This was important to their attainment of legitimacy. Vickers et. al. suggest women's needs and demands are not easily met in one generation,[151] and therefore, it was important for women's groups to build strong relationships with those in power. Through mimicking political institutions, becoming political entities themselves, women's

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[148] LEAF has played a significant role in the development of equality jurisprudence. It has had intervener status in landmark cases such as *Andrews v. Law Society of British Columbia.* See Mathen 3.

[149] Adamson, Briskin, and McPhail 180.

[150] Lorna Marsden quoted in Vickers, Rankin, and Appelle 99.

[151] Ibid., 1.

organizations like NAC and LEAF became accepted as part of mainstream politics. Their reliance on governmental intervention and support gave them a place within official politics. As mentioned earlier, the histories of NAC and LEAF have revealed that institutionalized feminism is effective as long as the demands and challenges made to the state fit within the boundaries of the hall of mirrors. The discussion below will demonstrate NAC's early ability to be 'included' in official politics. Through its participation in mainstream politics NAC was able to establish itself as a political entity due to its commitment as a stable and continual institution within the Canadian society.

The National Action Committee on the Status of Women

The National Action Committee on the Status of Women--NAC--is the national women's umbrella organization of Canada. "An umbrella organization, or coalition, is an organization of groups...various groups agree on a basis of unity for the coalition, but each member group remains independent."[152] With just over 700 affiliate organizations, NAC has been referred to as a 'Parliament of Women'[153] due to its ability to provide a voice for its ideologically and organizationally diverse members. The National Action Committee on the Status of Women acts as a forum for the sharing of ideas and concerns, allowing for the expression, but also the understanding of differences between women, their issues, and demands. Founded in 1972 to press for the implementation of the recommendations emerging from the Royal Commission on the Status of Women, NAC has grown both in size

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[152] Adamson, Briskin, and McPhail 245.

[153] Vickers, Rankin, and Appelle 27.

and ideological breadth. While its founders were mainly liberal feminists[154] who had had previous connections with federal government officials and who had often relied on mainstream politics, the organization today is a representative of all strands of feminist groups, including radical feminism. Furthermore, with the emergence of new women's groups in the late 1970s and 1980s, NAC has also become a voice for women of diverse backgrounds--such as immigrant women, and women of colour groups--and different regional bases. "The growth and increased regional, racial, and class diversity of NAC's membership; its effective lobbying; its visibility as the main target of anti- feminist attacks all led it 'to be identified as the voice of feminist women in Canada.'"[155] In turn, "NAC uses as its founding rationale the idea that it is a democratic organization of many women's groups and that it represents women's interests better than any other political organization or institution; in other words, NAC claims to be the legitimate parliament of women."[156] In fact, Adamson et. al. note that "recognizing and validating the different categories of experience within feminism has obviously added an important dimension to ... [their] understanding of the differences within feminist practice and resulted in a more diverse, responsive, and complex practice."[157] Consequently, NAC's ability to accommodate and integrate the diversity of the women's movement gave NAC a legitimate stance within Canadian society and politics. However, the

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[154] Liberal feminists are those who believe change can come about through the existing political system consistent with Canada's political culture. See MacIvor 44.

[155] NAC Organizational Review Document quoted in Vickers, et. al., ibid., 148.

[156] Vickers, Rankin, and Appelle 68.

[157] Adamson, Briskin, and McPhail 171.

diversity that permitted NAC to ground itself as a legitimate representative body for women throughout Canada has also been one the causes of tension within the organization.

Conflict and tension began to trouble NAC as the number of member groups increased, bringing with them new ideological conceptions of women's oppression, and therefore, new tactical ideas for change. Many of the new women[158] criticized NAC for referring to itself as an umbrella organization operating under the rhetoric of "sisterhood."[159] They questioned the ability of the organization to represent its members when its creators and prominent voices were mainly "...educated, articulate, well-dressed, heterosexual, and not-too-forceful white women, who are not too young or too old or too "pretty," have by far the best chances of being heard in consulting rooms, classrooms, courtrooms, and the offices of various bureaucracies throughout the affluent Western world."[160] In turn, the new women, including lesbians, disabled and immigrant women, demanded to be included in the organization and to have their issues addressed and represented.[161] These grassroots groups also came to criticize the tactics used by NAC; they believed change would come about by creating a confrontational presence through militant protest--from outside of government--rather than through lobbying. These groups claimed the government was able to control NAC's mandate and activities through core funding as well as through the co-optation of

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[158] These were women who were marginalized not only because they were women, but also because of their sexual orientation, race, ethnicity, disabilities, immigrant status, etc. See Vickers, Rankin, and Appelle 10.

[159] Sisterhood was the basis under which women united, with the assumption that all women shared similar experiences and therefore, a special bond. See Adamson, et. al., ibid., 217.

[160] Code 34.

[161] Adamson, Briskin, and McPhail 57.

women into the status quo. The tensions continued; however, member organizations were able to work together, and as a group enjoyed some successes due to their activities within mainstream politics.

One of NAC's first lobbying successes was the establishment of the Canadian Action Committee on the Status of Women (CACSW) in 1973 by the federal government. A body of the federal government, the CACSW[162] was summoned under the recommendations of the Royal Commission on the Status of Women and was given the mandate to act as advisor to the Minister responsible for the Status of Women. The same year brought about the establishment of the Women's Program of the Department of the Secretary of State, a body created to fund women's organizations.[163] While the government had previously been giving minimal funds to women's groups, the Royal Commission called for more government funding of women's voluntary organizations which were "engaged in projects of public interest" or "fields of special concern for women."[164] The Women's Program was a success because it gave NAC the financial ability to increase representation of women throughout Canada. Three years later in 1976, the federal government founded Status of Women Canada, a department of the federal government. Unlike the other bodies, Status of Women Canada "...was to play a major coordinating role, acting as a policy secretariat and providing

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[162] The CACSW had the mandate to: "to advise the minister [responsible for the Status of Women] in respect of such matters relating to the Status of Women as the Minister may refer to the Council for its consideration, or the council considers appropriate." See Vickers, Rankin, and Appelle 78.

[163] Ibid., 80.

[164] Ibid., 80.

advise internally."[165] It was to act as a link between the government, both federal and provincial, women's organizations, and advisory councils. Sue Findlay argues that during this period "... the state demonstrated a commitment to consult with the women of Canada, and in doing so not only validated the faith of liberal feminists in the strategy of reform by the state, but constructed a relationship with them that established liberal feminism as the 'public face' of the women's movement."[166] Therefore, "...NAC envisioned the federal government as the primary vehicle for the changes it desired, believing that one national standard was preferable to a ten-province patchwork quilt."[167] In turn, institutionalized feminism appeared to be successful in the first ten years of NAC's existence. The 1980s, however, although initially successful, brought NAC into confrontation with the government and a loss of faith in institutionalized feminism.

In the late 1970s some women's organizations, including member groups of the National Action Committee on the Status of Women (NAC), merged together; together they undertook massive lobbying efforts to ensure that women's rights were included in the proposed Charter. The Canadian Advisory Council on the Status of Women (CACSW) also played a significant role in the advancement of women's demands prior and during the drafting of the Charter. Although not initially concerned with the patriation of the Constitution, NAC came to realize that changes proposed for the Constitution did not reflect

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[165] Ibid., 81.

[166] Sue Findlay quoted in ibid., 55.

[167] Sylvia Bashevkin, Living Through Conservative Times: Women on the Defensive (Toronto: University of Toronto Press, 1998) 39.

women's claims for equality. Recognizing that women's demands would not be considered unless it pushed the government, NAC became involved in lobbying for constitutional change. Consequently, NAC became a key player in mobilizing activists throughout Canada via use of its networks. The number of women involved in the Constitutional struggle increased with the recruitment of various women from different organizations.[168] Lobbying and voicing their concerns with the Special Joint Committee of the Senate and the House of Commons, women's groups fought to have section 15 and section 28 included within the Charter. Their determination and hard work paid off, for the year 1982 brought Canadians an entrenched Charter of Rights and Freedoms, and for women, it carried the constitutional guarantee of equality before and under the law. Their "constitutional lobbying served the function of enabling women to articulate precisely their vision of equality."[169] Government agencies like the Canadian Advisory Council on the Status of Women (CACSW) and organizations like NAC, prior to, as well as after, the adoption of the Charter were critical in ensuring the advancement and protection of women's equality. Women's involvement in the drafting of the Charter has been beneficial in the advancement of their rights; the entrenchment of the Charter of Rights and Freedoms offered women a new avenue through which to seek gender equality. The stage had been set for the creation of LEAF.

The Women's Legal Education and Action Fund

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[168] Charter activists came from networks of various women's organizations which included the Canadian Research institute for the Advancement of Women (CRIAW), NAC, the National Association of Women and the Law (NAWL), and the Canadian Federation of University Women. See Razack 33.

[169] Ibid., 35.

The Women's Legal Education and Action Fund (LEAF), a member organization of NAC, was founded in 1985, three years after the entrenchment of the Charter of Rights and Freedoms into the Canadian Constitution. As stated above, women were successful in the inclusion of section 15 and 28 within the Charter; however, section 15 was not to come into effect until 1985 in order to allow the federal and provincial governments to bring legislation up to date with the new equality provision. Section 15 "...guarantee[d] women not only equality before the law and equal protection of the law, but also equality under the law and equal benefit of the law. Ensuring inclusive language and establishing the principle of equality in law was an outstanding achievement; however, many women realized this was just the beginning."[170] Given that the judiciary was given responsibility over the interpretation of the Charter, a group of legally trained women, along with other activists previously involved in the lobbying activities of women's organizations, became active to ensure that section 15 was properly interpreted. Sherene Razack refers to these women as the "charterwatchers."[171] In their role of...

> ...charterwatching, it became evident that a disagreeable theme running through the organizing efforts around Section 15 was the sharp difference in opinions between male experts on the Charter and women with a knowledge of the Charter. This gender gap began with the betrayal of women during the November 1981 lobby over the issue of who could opt out of the equality clauses ... at times, the male experts' point of view on the Charter seemed to have ignored the entire history of the

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[170] "Why LEAF?" *LEAF*. http://www.leaf.ca/index.htm (11 April 1999).

[171] Razack, 36.

> women's constitutional lobby, or, at the very least, missed some of the finer legal points it expressed.[172]

In turn, these women took it upon themselves to ensure that section 15 was properly interpreted to the benefit of women. Preparations took place for three years before section 15 came into effect.

The Canadian Advisory Council on the Status of Women funded a research project called *Women and Legal Action* in order to determine what "...agency would enable women to both develop expertise on equality rights and influence the application and interpretation of those rights."[173] With the release of the study in October of 1984, it was determined that a legal action fund was necessary to promote gender equality, and so LEAF founders set out to collect funds for the organization. Finally, on April 17, 1985, section 15 of the Charter came into effect, and LEAF was formally created.[174] LEAF, "...a national [non-profit] organization which promotes equality for women, primarily using the sex equality provisions of the Canadian Charter of Rights and Freedoms."[175] The organization's vision was the establishment of "...a single national fund, the direct sponsorship of (preferably winnable) cases, and a complementary strategy of education and lobbying."[176] Its main purpose "...was to play a main role in advocating for women's equality to ensure the courts uphold women's

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[172] Ibid., 36.

[173] Mathen xvii.

[174] Ibid., xvi.

[175] "What is LEAF"? *LEAF*. http://www.leaf.ca/index.htm (11 April 1999).

[176] Razack 46.

equality. Perhaps one of the most important cases LEAF has participated in was the Andrews case. It was in this decision that the Supreme Court ruled the purpose of the equality clause was to benefit those who had "historically been disadvantaged."[177] On a case-by case basis, LEAF continues to play an important role in advocating that the courts adopt an approach to equality which addresses the roots of the social inequalities women experience.[178] Its ability to gain granting of intervener status for "over one hundred equality rights cases covering a wide range of issues including: sexual harassment, pregnancy, employment and reproductive freedom,"[179] is an indication that LEAF has been successful in establishing itself as an advocate for women's interests.[180] In general, its victories in advancing women's equality since the adoption of the Charter can be attributed to the liberal judges sitting on the bench during the time the Charter was adopted, especially on the Supreme Court. Pierre Trudeau's appointments to the Supreme Court proved to take their role as interpreters of the Charter seriously, a fact different from their Bill of Rights counterparts. These pro-equality judges practised judicial activism, showing their willingness to take their new role seriously. However, like NAC, LEAF has been criticized as failing to represent women's diversity and failing to challenge the patriarchal basis for women's inequality. Carissima Mathen notes that the environment and circumstances which are a part of the legal process have made it

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[177] "Why LEAF"? *LEAF*. http://www.leaf.ca/index.htm (11 April 1999).

[178] Ibid.

[179] "LEAF." *LEAF*. http://www.leaf.ca/index.htm (11 April 1999).

[180] Razack 128.

difficult for LEAF to maintain the level of representation that is desired.[181] One of the main ways LEAF has ensured a greater scope of representation is through its case selection, "...litigating cases that will involve and affect the greatest possible number and range of women."[182] In turn, LEAF has been able to establish itself as a reliable and legitimate women's organization, seeking to further women's equality though the use of the existing political system. Consequently, LEAF has received government funding through the Women's Program and the Federal Court Challenges Program. However, as will be discussed below, the 1980s brought about major changes in Canadian politics and the economy. Institutionalized feminism had worked until this point, at least to some extent; however, with the election of Brian Mulroney as Prime Minister, the times of governmental support for organized feminism had begun to weaken.

Opposition under Prime Minister Brian Mulroney's Administration (1984-1993)

The opposition experienced by women's organizations throughout the 1980s was the state's attempts to undermine feminists and their organizations, thereby reducing their legitimacy in the eyes of the public. Unlike state support women's organizations received from the federal government throughout the 1970s, women's organizations were faced with the politics of backlash throughout the 1980s as a result of clashing ideas between them and the new government;[183] women's organizations "...shared a common threat, a common wall

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[181] Mathen also refers to the founding mothers of LEAF, commenting that, as in the case of NAC, they were "...white, middle class professional women..." She notes that this is a struggle not only for LEAF, but for the entire feminist movement. See Mathen xxi.

[182] Ibid., xxii.

[183] The term 'politics of backlash' is coined by Susan Faludi. See Bashevkin, Living 5. Throughout the 1980s and up to 1993, the relations that existed between the federal elite and feminist activists deteriorated and

of opposition."[184] When the Conservatives came into power under Brian Mulroney in 1984, they adopted a neo-conservative ideology; they "...advanced a pro-achievement, pro-individualist position that ceded little room to competing traditions of collective action, protest, and progressive political engagement."[185] This conflicted with NAC's mandate since it had often relied on the federal government as the primary vehicle for change. Furthermore, the neo-conservative policies advanced by Mulroney undermined not only collective action, but his reduction in government intervention also contradicted NAC's promotion for a more active government for the betterment of women's lives. Cutbacks made in the areas of social services also affected women. Unsatisfied with the small advancements being made under traditional mechanisms, NAC made a decision to protest against the government in order to have their demands heard and answered; "overtime...NAC and many constituent groups shifted their energies toward a variety of anti-government issue coalitions, rather than attempting to communicate directly with what was seen as a hostile federal elite."[186] However, by demanding more funding and governmental attention, NAC was marginalized, and therefore, so was feminism. In turn, as a result of his political agenda, and against NAC's protests, Brian Mulroney devoted his time and energy, as well as Canadian funds, to trade negotiations with the United States and Constitutional negotiations rather than social

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became increasingly conflictual." See Sylvia Bashevkin, "Losing Common Ground: Feminists, Conservatives and Public Policy During the Mulroney Years," Canadian Journal of Political Science XXIX:2 (June 1996) 213.

[184] Bashevkin, Living 5.

[185] Ibid., 14.

[186] Bashevkin, "Losing" 234.

issues.[187] Adamson et al suggest that the Conservative government viewed organized feminism as a "radical fringe"[188]; furthermore, "NAC vehemently opposed two of the most significant initiatives of the Conservative years, free trade and constitutional change. As a result, the women's movement in English Canada incurred the personal wrath of the Prime Minister from the time NAC criticized free trade in the mid-1980s until Mulroney resigned in 1993."[189] Women's organizations suffered most from Mulroney's "advocacy crunch."[190] That is...

> ...once English Canadian women's groups opposed the government on free trade, NAC's federal allocation was chopped. When arguments against the Meech Lake and Charlottetown Accords became too vocal for the government's liking, the entire Court Challenges Program was eliminated... Mulroney...worked to limit feminist protest by stepping on those that carried federal funding.[191]

The plan was simple and "the motive was obvious: to make governing easier and protesting more difficult..."[192] The emergence of opposing organizations like REAL Women[193] and the government's willingness to fund their activities further undermined NAC's legitimacy and place in official politics; "feminists viewed this decision to grant funds to REAL Women

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[187] Bashevkin, Living 49.

[188] Adamson, Briskin, and McPhail 85.

[189] Bashevkin 123.

[190] Ibid., 93.

[191] Ibid., 127.

[192] Ibid., 168.

[193] REAL Women stands for Realistic, Equal, Active, for Life.

[Realistic, Equal, Active, for Life] as part of a thinly veiled threat: NAC had to behave or else the Conservative government would shift support dollars to the other side."[194] The more NAC pushed, the more marginalized it became.

Mulroney's attacks on organized feminism did not end financially; his administration also "exploited the lines of division" that existed in NAC by creating greater gaps in the differences (diversity, ideology) between women within the organization, as well as between organized feminism and women in politics.[195] "Both the Women's Legal Education and Action Fund (LEAF), which conducted much of its Charter litigation with the support of federal grants and the Women's Program, and NAC, which relied on the Secretary of State Women's Program and other agencies for about two-thirds of its annual budget, saw their public funding sharply reduced."[196] Interestingly, while LEAF continued to use the traditional mechanism to advance women's equality, it too suffered under the conservative agenda. Given the increase in protests and disapproval with government policy, organized feminism came to be regarded as radical and inconsistent with previous tactics; consequently, all organized feminism was castigated. Furthermore, LEAF also suffered from the appointment of more conservative judges as those appointed by Trudeau to the Supreme Court came of retirement age. LEAF had depended on pro-equality judges to make an impact on the interpretation of the Charter. The actions taken by Mulroney and his government served to undermine the feminist agenda.

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[194] Bashevkin 191.

[195] Ibid., 166.

[196] Ibid., 94.

Referring to feminists as "racists" and "enemies of Canada" for opposing and protesting the Meech Lake and Charlottetown constitutional negotiations, the Mulroney government was able to reinforce the status quo by weakening the legitimacy of those groups which had been able to gain public recognition within society.[197] Even with the resistance that was met by these organizations, feminism did not wither away during Mulroney's time as Prime Minister; however, internal divisions were accentuated and cuts in funding made it more difficult for NAC to act as an umbrella organization. "These cuts in government support hit particularly hard because Canada's roughly twenty-six million residents were spread out over a vast geographical area. The costs of operating a national organization were virtually prohibitive."[198] The survival of groups like NAC and LEAF, therefore, demonstrate their ability to withstand strong societal forces and the existence of deeply embedded institutional foundations. Their survival was due to their institutional nature and their existence as features of the political system, with or without government support; that is, by establishing themselves as representative bodies with a constant presence over a long period of time, both of these organizations demonstrated a commitment and determination that served to shield them from complete elimination. However, the hall of mirrors analogy helps to explain how power is held, how it is maintained and strengthened. Without state support, women's organizations experienced a weakening of their ties with average women, women in government positions, as well women within the women's movement.[199] Consequently,

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[197] Ibid., 126.

[198] Ibid., 95.

[199] Ibid., 195.

the average woman no longer wants to associate herself with feminism. Newspaper headlines read: "The End of the Women's Movement;"[200] public figures denounce it: "Feminism? I hate the word."[201] Some women within government do not associate with the movement at all, failing to come to the defence of funding cuts to organizations like NAC and LEAF, perhaps as a result of the stigma created by those in power against feminism. For example, on 8 June, 1999, Lobby Day, female MPs, embarrassed by NAC's demands and behaviour, were said to have apologized to their colleagues after NAC demanded more operational funds from the government.[202] Ties between women in the movement were not only weakened by the lack of funds to facilitate communication and interactions, but the results of mobilization result in feelings of hopelessness among activists. Furthermore, the "de-integrative" face of neo-conservatism led to the fragmentation of the movement's common identity.[203] Government had tilted the mirrors as far as they were willing to and met with resistance any demands that went beyond those boundaries. In turn, there was a warped image of gender equality, where equality was granted only when it did not threaten the power dynamics of society. However, with the election of the federal Liberals in 1993, women's organizations grew hopeful for more government intervention, as had been the case in the 1970s. To their surprise, the advocacy crunch continued.

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[200] Luiza Chwialkowska. "The End of the Women's Movement." National Post, 28 November 1998: B5.

[201] Rebecca Rankin, videographer and host of Much Music's FAX, ibid, B5.

[202] Joe Woodard, "Weaning NACSOW From the Federal Trough: Ottawa's Love Affair with Organized Feminism Sours, Amid Bitter Recriminations," British Columbia Report v. 9(44) (13 July 1998) 50 (CBCA Full Text Reference).

[203] Bashevkin 6.

Opposition Under Prime Minister Chrétien's Administration (1993 –)

The resignation of Brian Mulroney in 1993 and the election of the federal Liberals back to power gave NAC hope for not only increases in federal funding to the organization, but also for the improvement of the weakened social welfare state. However, while "the new leaders entered office with a greater tolerance for the concepts of society and community than their predecessors...they made sure to keep collectivist ideas couched in cautious, middle-of-the-road terms."[204] Taking power from the Conservatives, Chrétien and his party were left with a large federal debt of 500 billion dollars,[205] resulting in their adoption of a more conservative mandate than the party had previously advanced. The Liberals who had supported women's organizations and their mandate for the advancement of the status of women were different from those in the 1970s. Failing to live up to women's groups' expectations and their political promises, Liberals came to be seen as "...wolves in sheep's clothing."[206] Consequently, women's organizations continued to be the target for governmental cutbacks. With the 1995 budget the Liberals continued to cutback on federal spending, closing down the Canadian Advisory Council on the Status of Women and planning for a reduction in the Women's Program of five per cent for the three years to follow.[207] Major spending cuts were also made in welfare, higher education, and health--cutbacks that would inevitably affect a large percentage of women. The Liberal government

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[204] Ibid., 201.

[205] Ibid., 222.

[206] Ibid., 201.

[207] Ibid., 224.

hid behind the economy, using the federal debt as an excuse for the loss of governmental support to women's organizations; the government could not afford activism, and legitimized its lack of support on the dwindling economy. On the other hand, Chrétien reinstated the Court Challenges Program; however, with the retirement of pro-equality judges (i.e. Madame Justice Bertha Wilson) appointed to the Supreme Court by Trudeau LEAF was faced with Brian Mulroney's conservative appointees on the bench. "The ability of women's organizations to respond to these developments remained in question. Although Canadian feminism was far from demobilized in social movement terms by the mid-1990s, it seemed more politically distant and demoralized than during the previous decade."[208] The women's movement was far from over, but it suffered from a weakened financial state and from the damaged face of feminism.

The hardship felt by NAC and LEAF throughout the 1980s and 1990s has continued into the late 1990s. Federal funding cuts to NAC's (and other women's organizations) core operational funding have resulted in diminishing the organizations' ability to advocate for women. In 1998, NAC was forced to lay-off four of its employees due to government funding cutbacks, leaving a staff of seven to manage the country's largest lobby.[209] Joan Grant-Cummings, president of NAC said in an interview with Ann Decter that "Women's Program funding is essential...[it] is the way in which women participate politically in the

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[208] Ibid., 229.

[209] Robert Fife, "Feminists Ask Liberals ro Pay for the 'Revolution," *National Post* (07 June 1999) http://www.nationalpost.com/home.asp?f=990607/2692071.html (16 July 1999).

Canadian political scene."[210] The Women's Program, initially set at $13 million to fund women's organizations has now been slashed by forty per cent; instead of going directly to operational costs, the money is being spent on a "project-by-project basis."[211] Joan Grant-Cummings asserts that "the government doesn't like dissent" and that funding changes are "a deliberate attempt to freeze us [NAC] out. It's the government's way of saying to us, 'Get out of our faces.' . . . It's not a popular message we're delivering and the more we say it, the more we have felt a resistance and an intolerance from the government."[212] Public awareness of the organization's loss of core funding, the negative face of feminism that is painted by the media, as well as strong opposition from groups like REAL Women,[213] which stands for Realistic, Equal, Active, for Life, have all served to discredit NAC, the women's movement, and feminism all together. "Funding has been cut, membership has dropped and public interest has waned to an all-time low."[214] According to media reports, women in the 1990s no longer associate themselves with feminism. Protests by activists are often portrayed in a negative light by the media; they are referred to as "stomping, flailing their arms, yelling and

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[210] Joan Grant-Cummings quoted in Ann Decter, "Working From the Ground Up: An Interview With Joan Grant-Cummings," Herizons v. 12(1) (1998) 17-19 (CBCA Full Text Reference).

[211] Rebecca Rankin, videographer and host of Much Music's FAX, quoted in Chwialkowska B5.

[212] Joan Grant-Cummings quoted in Anne Marie Owens, "Cuts 'Sinister': NAC," The National Post, 28 November 1998: B5.

[213] REAL Women is a conservative women's group which negates feminism.

[214] Tasha Kheiriddin, "What Women Want," *National Post* (09 June 1999) http://www.nationalpost.com/commentary.asp?f=990609/2699829 (16 July 1999).

hissing,"[215] "aging radicals,"[216] and "'rough handling' feminist advocates."[217] The question, however, remains: what went wrong with institutionalized feminism?

Conclusion

The struggle for federal funding is far from over; these organizations continue to fight daily for government and public support. Women do have a long way to go towards the legitimization of their demands. The establishment of organizations such as the National Action Committee on the Status of Women and the Women's Legal Education and Action Fund certainly provided an entrance to the inside of the political world. NAC and LEAF dressed themselves up like those in power, adapted to their institutions and made use of them to their advantage; however, the state and society were only willing to tilt the mirrors to a certain degree and any demands beyond those boundaries have been met with resistance. Did NAC's involvement outside of mainstream politics, in protesting against the governmental agenda, result in its, and therefore other organizations, marginalization? Or were other factors at play? Perhaps changes in the state of the economy played a role, or the rise of the Reform Party, or perhaps it was globalization that acted to marginalize organized feminism. Or was it a product of all these economic, political, and societal forces? Whatever the factors, as Canadians enter the new millennium the future of organizations like NAC is uncertain. For others like LEAF, which believe in "...law's utility as a tool for egalitarian social change

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[215] Reform MP Paul Forseth quoted in Joe Woodard, "Weaning NACSOW From the Federal Trough: Ottawa's Love Affair with Organized Feminism Sours, Amid Bitter Recriminations," British Columbia Report v. 9(44) (13 July 1998) 50 (CBCA Full Text Reference).

[216] Reform MP Paul Forseth, ibid., 50.

[217] Ibid., 50.

...," the use of existing institutions and traditional legal channels has had the effect of legitimizing their efforts, especially when the courts, and in particular, the Supreme Court, integrate their arguments in judicial decisions. Furthermore, with its ability to gain intervener status time and time again, LEAF has established itself as a respected part of the judicial process.[218] However, organized feminism does face a challenge. Its continued alliance with official politics, now in question, exposes what appears to be their lack of support from the state. Furthermore, the extent of successes enjoyed by women's organizations in the last two decades brings to question the liberal feminist agenda and its capacity make a place for women in society. However, "feminists must continue to organize both themselves and others so their ideas are transformed into realities: the need to ensure that visions are actually implemented is still implicit in the task of change."[219] The government's vision of gender equality is distorted and therefore it is up to organizations like NAC and LEAF to continue the fight for women's rights. Society may be unwilling to recognize the importance of such organizations, and yet women in general will enjoy the fruits of their accomplishments.

Women's organizations did experience some victories in their earlier years. Adamson et al contend that "the women's movement has not made the breakthroughs...[it] sought. It has not transformed society in fundamental structural ways, although it may have changed the rhetoric, the ideology, and perhaps even the expectations of society - changes not to be underestimated but also not to be confused with a more far-reaching vision of women's

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[218] Madame Justice Bertha Wilson refers to LEAF as making "...such an impressive contributions to the decisions in many of the leading Charter cases that came before the Supreme Court of Canada..." during her tenure. See Mathen ix.

[219] Adamson, Briskin, and McPhail 165.

liberation."[220] Their successes lie in their ability to bring women's oppression to the political arena, although the results have been limited and constricted by the hall of mirrors; their ability to represent Canadian women have been undermined by funding cuts and the portrayal of feminism by the media. In the beginning they facilitated communication between the groups and government, and had some influence on the law as it is made and the law as it is interpreted in the judicial system. These early successes can be attributed to their integration within the existing institutions, their acceptance of mainstream politics rather than militant protest. In turn, they created a sense of legitimacy of women's demands and brought women forward in their legal quest for equality. However, given the androcentric context in which these organizations exist, their efforts have not been as fruitful as they might have been. Has LEAF been able to influence how the Supreme Court has come to define reproductive autonomy? Given that LEAF's role in the advancement of women's autonomy had been mainly through the courts, the following chapter examines the Supreme Court, its composition and its constitutional mandate, as these are central to the decision-making function of the court. It explores the evolution of the Supreme Court and its constitutional mandate. More importantly, however, it examines the Court with a critical eye, suggesting that sexism has an impact on its decision-making function, and therefore, on its definition of reproductive autonomy.

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[220] Ibid., 6.

CHAPTER FOUR
SEXISM IN THE SUPREME COURT?

> Law, in liberal jurisprudence, objectifies social life. The legal process reflects itself in its own image, makes be there what it puts there, while presenting itself as passive and neutral in the process...when it is most ruthlessly neutral it is most male; when it is most sex-blind, it is most blind to the sex of the standard being applied. When it most closely conforms to precedent, to "facts," to legislative intent, it most closely enforces socially male norms and most thoroughly precludes questioning their content as having a point of view at all.
>
> Catharine A. MacKinnon, Towards a Feminist Theory of the State[221]

Introduction

Canadian women have sought to advance and promote gender equality through law. Their efforts have been hindered by the hidden gender of law; that is, the legal system is embedded with biases and stereotypes that have served to extend the marginalization of their claims to equality and to further legitimize gender inequality. The Canadian judiciary, while based on the notion of neutrality, impartiality, and rationality, has shown throughout its history that these principles are virtually non-existent. Given the significant constitutional role that has been transferred upon the courts by the Charter, the perception of gender neutrality can only hinder their ability to apply the Charter equally and fairly. Although the entire judiciary appears to be impaired by this myth of gender objectivity, this chapter will focus on the Supreme Court of Canada because of the responsibility it has in setting the tone for the rest of the judiciary. The Supreme Court of Canada, with its Constitutional mandate, is impaired by this myth of gender neutrality, affecting its ability to make equal and unbiased judicial decisions. Sitting at the apex of the court system, the Supreme Court is affected by the hidden gender of law, hindering its

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[221] MacKinnon 248.

ability to fulfill its duty as interpreter of the law and, by virtue of the Charter, as policy-maker. Consequently, this can have an impact on the way in which the Court has come to define reproductive autonomy. Reference will be made to recent developments within the judiciary, most specifically the events surrounding the Ewanchuk case, in order to expose the existence of gender assumptions and stereotypes in law. With the ultimate power to interpret and, as has been shown since the adoption of the Charter, to make policy in areas otherwise in the hands of the legislature, the Supreme Court is in a position to advance women's rights.

History: The Evolution of the Supreme Court

The Supreme Court of Canada was not established in the British colonies at the time of Confederation and was not set up by the Constitution Act, 1867, unlike the rest of the Canadian courts, which were established at the time of Confederation.[222] The Supreme Court was created eight years later by an ordinary federal statute under authority of section 101 of the Constitution Act, 1867 which empowers the federal government to "...provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada...for the better Administration of the Laws of Canada."[223] The enacting legislation was the Supreme Court Act, which set out the "court's composition, authority, functions and jurisdictions."[224] Section 101 gave the federal government sole authority to create, amend, and even abolish the appeal Court. Peter McCormick and Ian Greene suggest that while the Court was to act as the "referee of Canadian

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[222] This excludes the Federal Court and the Exchequer Court, which were also created by federal statute under the authority of section 101 of the Constitution Act, 1867.

[223] See Constitution Act, 1867.

[224] Bernard W. Funston and Eugene Meehan, Canada's Constitutional Law in a Nutshell (Scarborough: Thomson Professional Publishing, 1994) 38.

federalism," the provinces did not play a role in its creation, making its establishment a "product of unilateral federal initiative."[225] The lack of provincial involvement led to tensions between the two levels of government. The Court was seen as an instrument of a strong central government rather than the co-operation between the two levels of government; consequently, the provinces were suspicious of the Court that was created, and maintained by the federal government. In conjunction with the absence of Constitutional status, the result was a national Court that held little esteem in the eyes of the nation. Although not constitutionally enacted nor protected, the Supreme Court was given competence over appeals from the lower courts; however, the lack of a constitutional foundation reinforced the inferior status the Court held for its first seventy-four years of existence. Yet another significant factor affecting the Court's initial inferior status was the continuation of appeals from the provincial courts to the Judicial Committee of the Privy Council (JCPC) in London. Consequently, the Court's authoritative role as the country's final court of appeal was non-existent upon the establishment of the Supreme Court, and was not embraced until 1949, with the abolishment of all appeals to the JCPC.

The enactment of the Supreme Court Act did not impede appeals to the Privy Council. The Constitution Act, 1867 provided for the right to appeal from the provincial courts to the Privy Council in London under section 129. Peter Hogg notes that the statute establishing the Supreme Court did not affect the ability of appeals to go beyond the Court, and sometimes, even to by-pass the Court altogether.[226] Consequently, the provinces often chose to send their appeals to London.

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[225] Peter McCormick and Ian Greene, Inside the Canadian Judicial System: Judges and Judging (Toronto: James Lorimer & Company, Publishers, 1990) 190.

[226] Peter W. Hogg, Constitutional Law of Canada, 4th ed. (Scarborough: Thomson Professional Publishing, 1998) 211.

The implication of this action was to reduce the Supreme Court status to another appeal court, whose decisions could be, and often were, contested in London, serving to diminish its role in developing Canadian law and Constitutional law.[227] It was not until 1949, through an amendment to the Supreme Court Act, that the Supreme Court became the country's final court of appeal, finally giving it recognition as a national institution; appeals emerging from criminal cases were abolished in 1935. However, those cases that had been appealed to the Privy Council prior to 1949 could still be decided in London; the last appeal was heard in London in 1959.

The next important date for the Supreme Court was 1975, when further amendments to the Act provided for the abolishment of appeals by right and gave the Court the ability to control its own docket. Appeals by right are those that required the Court to grant them leave for appeal.[228] This was an important amendment for the Court, as it allowed it to give more time and energy to those cases that were granted leave by reducing the number of cases coming before the court. The Supreme Court became its own gatekeeper and, as Russell notes, this amendment gave the Court its discretionary power; that is, the Court gained the ability to decide which appeals would be granted leave, a function that became essential in its role as policy-maker.[229] Then Chief Justice Bora Laskin suggested:

> ...now, even more in its supervisory role than in its heretofore more traditional appellate role, the Supreme Court's main function is to oversee the development of the law in the courts of

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[227] Hogg 211.

[228] McCormick and Greene note that prior to this amendment the appeals by right included all criminal cases and any civil suit involving more than $10,000. See McCormick and Greene 193.

[229] Peter H. Russell, The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson Limited, 1987) 346.

> Canada, to give guidance in articulate reasons and, indeed, direction to the provincial courts and to the Federal Court of Canada on issues of national concern or of common concern to several provinces, issues that may obtrude even though arising under different legislative regimes in different provinces.[230]

The 1975 amendments made the Court a national institution with authority as the country's final court of appeal. Amendments to the Constitution Act, 1867 further enhanced the Court's role as a national institution.

Perhaps the most important year in the life of the Supreme Court was 1982, which brought about the most significant change in the role of the Court, granting it, as some argue, its long overdue constitutional standing. This year experienced the patriation of the Constitution and the entrenchment of the Charter of Rights and Freedoms within the Canadian Constitution, dramatically altering the role of the Canadian judiciary, especially that of the Supreme Court of Canada. This role can be found in section 24 of the Charter and in section 52 of the Constitution Act, 1982. Section 24 provides: "anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in circumstances."[231] As a result, anyone whose rights have been violated can apply to the courts for a remedy. Section 24 does not only refer to the Supreme Court, but also to the lower courts, as any case must enter the judicial system via the lower courts. The Supreme Court, however, gained a more important role than the lower

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[230] Bora Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada," Law, Politics and the Judicial Process in Canada, 2nd ed. ed. F. L. Morton (Calgary: University of Calgary Press, 1992) 57.

[231] See Constitution Act, 1982, Charter of Rights and Freedoms.

courts"...since this body dictates the law for every court in the country."[232] Section 52 states: "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[233] This section points towards judicial supremacy since the courts, more specifically, the Supreme Court, has the final say in the constitutionality of any given law brought before the Court; "the Charter...qualified the doctrine of parliamentary supremacy with that of constitutional supremacy."[234] But what significance do these sections have together? They augment the role of the courts, especially that of the Supreme Court. The importance of these two sections in regards to the Supreme Court is that the Charter is granted Constitutional status, part of the "supreme law of Canada;" infringements of any rights and freedoms found therein are subject to the arbitration of the courts. In turn, the Supreme Court becomes the final voice in the constitutionality of any law that is challenged in the judicial system; "because the courts have been authorized by the constitution to declare legislation invalid when it is inconsistent with the *Charter* guarantees, the courts now have a more assertive role than previously."[235] Furthermore, the Court receives a form of policy-making function in addition to its traditional role as interpreter of law. The Court's functions now extend beyond the resolution of disputes dealing with the division of power and its role as appeal court. The Charter has also opened the Courts' doors to "...individuals and groups that are indifferent to federalism..." It allows them to...

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[232] Heard 290.

[233] See Constitution Act, 1982.

[234] F. L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms," Canadian Journal of Political Science, XX:1 (March 1987) 32.

[235] Russell cited in Mossman, "The Paradox" 229.

> ...take issues directly to the courts, where the 'crosscutting ideological formulation of such issues will be emphasized at the expense of any territorial dimension they may have.' Thus the Charter allows such issues as abortion, the death penalty, and numerous equality issues to be confronted as matters of constitutional principle in the judicial arena...now the court will serve as a national supervisor of legislative action with regard to these controversial subjects."[236]

The Charter not only succeeded in giving the Supreme Court a national image and brought it to the forefront of the Canadian state as a national institution, but it also changed the playing field for constitutional stakeholders - groups and individuals alike.

A Proposed Charter of Rights: Women Mobilizing for Change

News that the federal government planned on entrenching a bill of rights within the Constitution sparked interest within interest groups, especially aboriginal and women's groups. First drafts to the proposed Charter failed to consider these groups which held, and continue to hold, a disadvantaged position in Canadian society. "As in other western traditions, civil liberties in Canada did not include concerns about women's inferior status...to the degree that civil libertarians were concerned about discrimination against people based on their membership in a particular group...there was a tendency to overlook women as constituting such a group."[237] Women have often relied on law to make their claims, seeking the legitimization and reinforcement of their equality through the voice of wisdom- the courts. However, as will be discussed below, women who sought law's protection often found themselves being defined through traditional roles and stereotypes, such as mothers, child bearers, sex objects, etc.,

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[236] Cairns, 84.

[237] Lynn Smith and Eleanor Wachtel, A Feminist Guide to the Canadian Constitution (Ottawa: Canadian Advisory Council on the Status of Women, 1992) 49.

minimizing their voices and taking away any ability to share the personal experiences of women. In turn, while some women were successful in their uses of the law, others were not as lucky and failed in their attempts.[238] Supreme Court decisions failing to acknowledge women's claims of gender based injustice "...were countered by legislatures...other factors, such as lobbying, law reform reports, the growth of women's groups, and general shifts in public opinion, led to these legislative responses, and even then not in a straightforward manner. Furthermore, the responses were often imperfect and obtained only after lengthy battles."[239] Snell and Vaughan suggest that the pre-Charter Court practised judicial conservatism and endorsed parliamentary supremacy.[240] It would be evident some years later, with the adoption of the Charter, that the Charter would not be enough. In addition to the document, the advancement of gender equality would require the willingness of judges, especially in the Supreme Court, to interpret the document with a greater sense of authority and activism. "The constitutional status of the Charter combined with the explicit authorization of judicial interpretation and enforcement in section 24 meant that the Canadian courts would play a more active and influential role in defining the meaning of enumerated rights."[241] Realizing the limited legal resources available to them, women's groups in the late 1970s and early 1980s saw the proposed

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[238] Mary Jane Mossman suggests law can provide opportunities for the advancement of some women's claims, while at the same time serving as a barrier to others. She refers to this as "paradox of law." See Mossman, 211.

[239] W. A. Bogart, Courts and Country: The Limits of Litigation and the Social and Political Life of Canada, (Toronto: Oxford University Press, 1994) 137.

[240] James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto: University of Toronto Press, 1985) preface.

[241] Morton, "The Political" 32.

Charter as an opportunity to have women's rights recognized by law, and not just any law, but the supreme law of Canada--the Constitution.

Throughout the late 1970s and early 1980s women's organizations, such as member groups of NAC, joined together in their lobbying efforts to articulate their concerns for gender equality. The number of women involved in the constitutional struggle increased with the recruitment of various women from different organizations.[242] Lobbying and voicing their concerns with the Special Joint Committee of the Senate and the House of Commons, women's groups fought to have section 15 and section 28 included within the Charter. Their determination and hard work paid off, for the year 1982 brought Canadians an entrenched Charter of Rights and Freedoms, and for women, it carried the constitutional guarantee of equality before and under the law. Women's accomplishments were marked in the inclusion of section 15 (equality clause) and section 28 (sexual equality clause). Their "constitutional lobbying served the function of enabling women to articulate precisely their vision of equality."[243] The "...important purpose of the Charter, especially from women's perspective, was to bring women into the constitutional fold of legally enforceable rights."[244] As constitutional stakeholders and strong believers in the state, women's groups believed the Charter would serve to protect them from the ill-founded injustices of society; however, even with the inclusion of sections 15 and 28, women's struggles were not over, as section 24 of the Charter also carried with it further implications.

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[242] Charter activists came from networks of various women's organizations which included the Canadian Research institute for the Advancement of Women (CRIAW), NAC, the National Association of Women and the Law (NAWL), and the Canadian Federation of University Women. See Razack 33.

[243] Razack 35.

[244] Martin, "Legal Controls" 6.13.

A New Role for the Court: Does it Matter Who Sits on the Bench?

As stated above, the Charter's enforcement clause gives interpretative authority to the courts and therefore, "...the judges, particularly those who sit on the Supreme Court of Canada...will tell Canadians whether the Charter will have a lasting and significant impact. It is the judges who give concrete form to the abstract phrases."[245] Razack argues that "rights on paper mean nothing unless the courts correctly interpret their scope and applications."[246] In turn, without gender sensitive courts women's issues and the protection of their rights, may continue to be ignored as they were prior to the adoption of the Charter. Sylvia Bashevkin contends that the "...pro-equality judges on the Supreme Court after 1985 - combined with the presence of the Charter...had put feminist litigation over the top. Without those judges, Canadian women were perhaps not much better off than they were during the pre-Charter period. Canada's constitution had changed, but this language had limited effect unless sympathetic judges breathed life into it."[247] In other words, women's battles were far from over with the adoption of the Charter. The stage for their future battles had been set; that is, the Charter provided women with the instrument and the arena through which to make their claims. The controversy now rests upon the judges, their backgrounds, and what prejudices and biases they bring into the Court, for these can have a tremendous impact on Court decisions relating to women's legal pursuit of equality.

Parliament has given the courts the constitutional role as interpreter of the Charter. Because of this responsibility, who sits on the bench becomes just as important as the

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[245] Clare F. Beckton and A. Wayne MacKay, The Courts and the Charter (Toronto: University of Toronto Press, 1985) 42.

[246] Razack 36.

[247] Bashevkin 228.

establishment and maintenance of the courts. Who can become a Supreme Court justice? How do their backgrounds affect their decision-making? How do they become judges? Earlier it was noted that the federal government has authority under section 101 of the Constitution Act, 1867 to create, maintain, and abolish the Supreme Court of Canada. Therefore, appointments to the Supreme Court are made by the federal government. More specifically, these appointments are made by cabinet, under direct authority of the Prime Minister and the Minister of Justice. There are, however, some restrictions. The Court at the end of the twentieth century is made up of nine justices; it was originally composed of six judges until 1927, when one judge was added, and then seven with the amendments made to the Supreme Court Act in 1949. By statutory requirement three of those justices must be appointed from the Bar in Quebec; of the remaining six three are traditionally from Ontario, two from the western provinces, and one from Atlantic Canada (representative appointments). In addition, these are often patronage appointments, through which the government in power makes "...use of judicial appointments as rewards for service to the governing political party"[248]--appointing the party faithful. Clara F. Beckton and A. Wayne MacKay suggest that there is constant tension between the principle of merit, regional representation, and party affiliation; in turn, representation of the region and the political links of the candidate are given greater priority than how good a judge the candidate will make.[249] There are further problems with which to contend. Critics like Bertha Wilson and Sherene Razack argue that judges as a group come from similar backgrounds, having similar socio-economic status. The

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[248] Beckton and MacKay 79.

[249] Ibid., 78.

typical judge is white, middle aged, and wealthy, representing only a small portion of the population. If this is the case, how are differences in gender, economic status, or ethnicity accounted for? Law's underlying principles of neutrality, impartiality and rationality suggest a judge's background is unimportant because in the end judges apply these principles without biases;[250] "judges are expected to be as impartial as possible."[251] However, a judge cannot fully shed his or her personal qualities, biases, and stereotypes when he or she enters the courtroom and therefore, the decisions he or she makes are likely to be unconsciously influenced by them.

The Hidden Gender of Law

It is irrational to assume the complete impartiality of judges. "Many have criticized as totally unreal the concept that judges are somehow super-human, neutral, above politics and unbiased, and are able to completely separate themselves from their personal opinions and pre-dispositions when exercising their judicial function."[252] One of these critics is Professor Griffith, who suggests that "impartiality is an ideal incapable of realization."[253] He also suggests that a judge's legal education and training create a set of attitudes and beliefs, an acceptance of legal principles which are taken as universal, representative of public

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[250] Legal Experts like Peter McCormick and Ian Green recognize the underlying principles of impartiality that make up the foundation of judicial authority and independence. See McCormick and Greene, 13.

[251] Ibid., 13.

[252] Bertha Wilson, "Will Women Judges Really Make a Difference?" Law, Politics and the Judicial Process in Canada, 2nd ed. ed. F. L. Morton (Calgary: University of Calgary Press, 1992) 92.

[253] Paraphrased in Wilson 92.

interests and, therefore, applicable to everyone.[254] Furthermore, personal attitudes and beliefs are also likely to play a role in a judge's style and decision-making. Sherene Razack contends that "...judges bring their race, sex, and class derived 'intellectual baggage' to court."[255] In fact, a study conducted by Andrew D. Heard on Charter cases between 1983 to 1989 revealed that the outcome of a given case depends, to a great extent, on which judges hear the appeal.[256] He notes that...

> ...the importance in the way judges cast their vote is paramount because of the wide discretion available to individual judges in making that choice...in exercising that discretion, individual judges come to exhibit distinct patterns of behaviour which reflect their personal preferences and grundnorms.[257]

Neutrality, therefore, is an ideal and not the reality. Women have encountered this perception of gender neutrality within law in their attempts to be protected by law. The law, however, tends to be androcentric.[258] Men have had the ability to shape and make law, legitimizing and reinforcing the status quo. Sheila Martin suggests that...

> ...there is a direct link between gender bias in law and the exclusion of women from lawmaking functions. If women did not help make, apply or interpret the law, it should come as less of a surprise that many laws do not represent their perspectives or adequately protect their interests. Existing legal principles, procedures and norms are essentially

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[254] Professor Griffith in Wilson 92.

[255] Razack 70.

[256] Heard 305.

[257] Ibid., 290.

[258] Code 15.

> exclusionary because, being defined largely by men, they largely overlook the injustices to women. The profound implications of women's historical exclusion from public office, political participation and legal protection form the bedrock of gender bias in law and the legal system.[259]

Patriarchal notions of power reflect the existence of gender inequalities manifested in personal relationships, employment, childbearing, etc. Such inequalities are reinforced and legitimized as neutral principles of the law because the law itself is a reflection of a society in which these inequalities are generated and perpetuated. Given that throughout history women have been limited to the private sphere, they have played little, if any, part in the creation of law, their experiences and their different perspectives[260] on life have been left out. In turn, "so long as power enforced by law reflects and corresponds - in form and in substance - to power enforced by men over women in society, law is objective, appears principled, becomes just the way things are."[261] Law hides social dominance by assuming a position of neutrality when it is in fact re-creating the power structures found within society. "Thus, for many feminists the administration of justice...is...a process in which male superiority in society is both legitimated and reproduced."[262] What appears to be the equal application and

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[259] Sheilah L. Martin, "Proving Gender Bias in the Law and the Legal System," Investigating Gender Bias: Law, Courts, and the Legal Profession, ed. Joan Brockman and Dorothy Chun (Toronto: Thompson Educational Publishing, Inc., 1993) 23.

[260] Carol Gilligan argues that men and women have different perspectives on life. Whereas women define themselves through their relationships and attachments with others, men tend to be more autonomous and independent. She argues that these differences can have a positive impact on judicial decision-making. Cited in Wilson 96.

[261] MacKinnon 239.

[262] Dawn H. Currie, Brian D. MacLean, and Dragan Milovanovic, "The Three Traditions of Critical Justice Inquiry: Class, Gender, and Discourse," Rethinking the Administration of Justice, ed. Dawn H. Currie and Brian D. MacLean (Halifax: Fernwood Publishing, 1992) 12.

interpretation of law creates a gender gap that goes unnoticed and, therefore, creates the appearance of justice.

Law reinforces and legitimizes social dominance, creating the perception of the equal and fair application of law. What emerges is the "hidden gender of law," or sexism that is found in the Canadian judiciary. Sexism refers to "...the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences."[263] The law's...

> ...gender bias includes the exclusion of women because they are women, the improper use of incorrect and unchosen stereotypes, the use of double standards, the use of male defined norm, the failure to incorporate or be sensitive to the perspectives of women, not recognizing or valorizing women's harms because they are done to women, being gender blind to gender specific realities, and using sexist language.[264]

Therefore, a woman's weakness is her womanhood; her only remedy is to seek refuge within the system that not only supports, but also objectifies the male point of view about power and power relations. Recent developments in the Canadian judicial system have exposed stereotypes which are existent in the court system.

Madame Justice Bertha Wilson suggests that perhaps the addition of more women judges into the judiciary can make a difference in reducing the stereotypes and biases that currently exist at all levels of the judiciary. She states that "if women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they *will* make a difference. Perhaps they will succeed in

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[263] John Johnston and Charles Knapp, Wilson 93.

[264] Martin, "Proving" 24.

infusing the law with an understanding of what it means to be fully human."[265] But will the representation of women on the bench really bring forth the female perspective in decision-making? And if so, what kind of an influence will they have in legal decision-making? While it is irrational to assume an increase in the number of women in the judiciary will bring about changes in the sexist foundation of the law, in the very least, it will increase the visibility of women in positions of authority, increasing representation, which will hopefully have an impact on changing societal attitudes. To date the Supreme Court has two female justices, Madame Justice Claire L'Heureux-Dubé and Madame Justice Beverley McLachlin; however, with the retirement of Justice Peter Cory and an Ontario seat vacancy, Justice Louise Arbour has been appointed to the Supreme Court, and will assume her position on September 15, 1999. Many are applauding the appointment of Arbour to the Court because it not only "restores the gender balance of the court,"[266] but also because her appointment will augment the Court's representativeness; "this shows the benefit of our multi-lingual, multi-judicial system that a French-speaking lawyer from Quebec can become bilingual and rise to a seat on the top court."[267] Arbour has also been said to be a strong defender of the Charter

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[265] Wilson 97.

[266] Justice Louise Arbour will increase the representativeness of the Court because she is a woman, bilingual, and is experienced in English common-law, Quebec's Civil Code, and international criminal law. See Marina Jimenez, "Arbour Takes More Than Star Status to the Supreme Court: Experienced Jurist is not Afraid to Use the Law to Lead," *National Post* (11 June 1999) http://www.nationalpost.com/news.asp?f=990611/2710146 (16 July 1999).

[267] Janice Tibbetts and Marina Jimenez, "Arbour Named to Supreme Court: Ontario Judge to Leave War Crimes Tribunal," *National Post* (11 June 1999) http://www.nationalpost.com/home.asp?f=990611/2710079 (11 June 1999).

of Rights and Freedoms, willing to apply the law to lead.[268] However, the inclusion of female judges to the Supreme Court does not guarantee a gender neutral judiciary. The Court's unanimous decision in what has come to be know as the "no means no" case--the Ewanchuk case--has sparked public attention and has brought the judicial system and the Supreme Court, especially Madame Justice Claire L'Heureux-Dubé to the forefront of public scrutiny.

Sexism Exposed: The Ewanchuk Case

Events arising from this case and the resulting Supreme Court decision bring to question the hidden gender of law, as well as the public exposure of impartiality within the judicial system. Sheila Martin suggests that "sexism can be a defining characteristic of society without being ever present and ever visible."[269] This case is an example of visible and invisible sexism; while gender stereotypes were the basis for the Appeal Court decision, the Supreme Court is also influenced by sexism because they are, and have been since the adoption of the Charter, in the public eye. The Ewanchuk case also shows the backlash that is inevitable in cases that challenge the status quo, especially with the public exposure of the Court of Appeal's judgement and Judge McClung's public attack on Madame Justice L'Heureux-Dubé for her judgement in the case. Furthermore, this decision shows the difficulty encountered by L'Heureux-Dubé in exposing and denouncing the biased and stereotypical comments of Justice John McClung of the Alberta Court of Appeal. Beliefs and attitudes held in the lower court can damage the credibility and legitimacy of the Supreme Court or its judges, as it has in this case.

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[268] Jimenez, "Arbour Takes"

[269] Martin, "Proving" 22.

The Ewanchuk case was granted leave for appeal by the Supreme Court after the Alberta Court of Appeal upheld Ewanchuk's acquittal on charges of sexual assault. The accused was brought before the Court on the charge that he sexually assaulted a teen during a job interview. Ewanchuk made several sexual advances; each time the complainant said "no," asking him to stop, but he continued to touch her against her wishes. The Alberta Court of Appeal's Justice McClung, who wrote the decision for the court, upheld the lower court decision and acquitted Ewanchuk, under the principle of "implied consent," on the grounds that the teen "did not present herself in a bonnet and crinolines."[270] He placed emphasis on the fact that the complainant "...told Ewanchuk that she was the mother of a six-month-old baby and that, along with her boyfriend, she shared an apartment with another couple."[271] Furthermore, he asserted that "...the sum of the evidence indicates that Ewanchuk's advances to the complainant were far less criminal than hormonal."[272] Judge McClung upheld the traditional attitude that how a woman dresses and behaves encourages the arousal of men. It was his view that the teen was responsible for the actions taken by Ewanchuk during her interview. This is sexism at its worst.

Instead of sending the case back to Alberta for retrial, the Supreme Court unanimously overturned the Alberta trial and appeal courts' decision, convicting Ewanchuk of sexual assault on the grounds that the defence of implied consent was non-existent in

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[270] Justice John McClung in "R. v. Ewanchuk." *Supreme Court of Canada* (25 February 1999). http://www.droit. umontreal.ca/doc/csc-cc/en/rec/html/ewanchuk.en.html (11 April 1999) 245.

[271] Ibid., 245.

[272] Ibid., 250.

Canadian law. The Court clarified any doubts the legal profession and the public may have had regarding sexual consent by making it impossible to use the defence of "implied consent." On this the court agreed. However, while the comments made by McClung were openly sexist, six of the seven male judges on the Supreme Court made no reference to his stereotypical statements in regards to the complainant. Through their silence "...the judges' response to such questions sheds significant light on how our courts have functioned historically and how they are grappling with a movement whose ideas are challenging the premises of our social and political life."[273] The Supreme Court, as Canada's final court of appeal, has the ability and the duty to set the tone for the lower courts; certainly these judges had a responsibility to the legal profession and to the public to define appropriate behaviour. Why, then, did the majority of the Court remain silent on McClung's stereotypical statements? Some may argue this is a result of judicial restraint in the Court's decision-making role, however, the Court did respond by striking down the law. The Court did recognize the inadequacy of the precedent being set by the lower courts, but "...even if one acknowledges the political role of law and the social inequality of women [as expressed in the lower appeal court's decision], gender bias in law is still more than a problem that is not supposed to exist; its existence is actually contrary to the core values of the legal system itself - concepts like equality, fairness, impartiality and objectivity...[therefore]...the presence of gender bias in law raises a troubling and fundamental dissonance; the gap between the ideal of justice and the reality of unfairness."[274] The silence of the Supreme Court justices further

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[273] Bogart 135.

[274] Martin, "Proving" 26.

enhances the gender reality within the judicial system. The two women judges in the Court, Madame Justice Claire L'Heureux-Dubé and Madame Justice Beverley McLachlin, however, wrote separate opinions in order to critique Judge McClung; Judge Charles Gonthier signed onto L'Heureux-Dubé's judgement. Madame Justice L'Heureux-Dubé's separate judgement sparked both positive and negative responses in the public and the legal profession. It has brought to light the sexist stereotypes that still exist within the Canadian judiciary.

As stated above, the majority of the Court was silent on the stereotypical comments made by McClung. Madame Justice Beverley McLauchlin, in hopes of challenging the lower court's sexist beliefs stated in her judgement that...

> ...stereotypical assumptions lie at the heart of what went wrong in this case...On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law.[275]

While McLachlin did make an effort to express displeasure with McClung's gender biased comments, L'Heureux-Dubé was the only justice on the Supreme Court to delve deeply into McClung's judgement; it is her opinion that it is the Court's duty to comment on, and to correct, the inappropriate stereotypical statements made by lower courts. She contended that "...part of the role of this Court [is] to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law."[276] In condemning his various sexist comments (including

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[275] Madame Justice Beverley McLachlin in "R. v. Ewanchuk," 103.

[276] Madame Justice Claire L'Heureux-Dubé in "R v. Ewanchuk" 95.

"bonnet and crinolines, referring to Ewanchuk's actions as nothing more that "clumsy passes," and dismissing his urges as simply "hormonal," L'Heureux-Dubé argued that the...

> ...comments...help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. 'Inviting' sexual assault, according to those myths, lessens the guilt of the accused.[277]

The statements made by McClung, an excellent example of sexism, called for disapproval on the part of the Supreme Court. However, only L'Heureux-Dubé reproached him, marginalizing her comments and therefore, minimizing their force and legitimacy. Furthermore, the verbal attacks made by McClung on L'Heureux-Dubé expose the impact judges' beliefs and attitudes have on their ability to make decisions; in turn, "...the basic assumption should be that language is the tip of the iceberg of a person's world view."[278] Bertha Wilson suggests that "...gender-myth, biases and stereotypes are deeply embedded in the attitudes of many male judges as well as the law itself...gender difference has been a significant factor in judicial decision-making."[279] In turn, McClung's statements are based on personal as well as traditional assumptions and stereotypes about men and women. These challenge the underlying assumptions of judicial impartiality.

McClung v. L'Heureux-Dubé: A Public Debate

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[277] Ibid., 89.

[278] Martin, "Proving" 34.

[279] Wilson 92.

The battle of words between Judge McClung and Madame Justice L'Heureux-Dubé aroused public scrutiny; most who witnessed the Canadian judiciary at its worst saw it as a battle between the liberal principles of the law and feminism. With the publication of McClung's deliberately insensitive remarks[280] towards L'Heureux-Dubé, some women's organizations came to her defence, claiming that stereotypes like the ones held by McClung are no longer acceptable in Canadian society. Supporters were not only from women's organizations, but also public figures. Professor Ted Morton in response to McClung's attack on L'Heureux-Dubé said "...he [McClung] obviously has stereotypical views of relations between the sexes."[281] Support also came from the United States; Alex Kozinski, a Federal Court of Appeal Judge in California, agreed with L'Heureux-Dubé that it is the duty of the high court to set the tone for the lower courts. He asserted that "...most conscientious judges would not let pass without comment sexist, racist, anti-Semitic or similar statements in a lower court judgement."[282] At the same time, however, others came to McClung's defence, voicing their concerns in the promotion of the feminist agenda on the Supreme Court.

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[280] Judge McClung wrote in a letter to the National Post: "The personal convictions of the judge, delivered again from her judicial chair, could provide a plausible explanation for the disparate (and growing) number of male suicides being reported in the province of Quebec." Madame Justice L'Heureux-Dubé's husband committed suicide in the 1970s. See Alanna Mitchell, Jill Mahoney, and Sean Fine. "Legal Experts Outraged By Personal Attack on Supreme Court Judge." *Globe and Mail* (27 February 1999). http://theglobeandmail.com/gam/National/19990227/USUPRN.html (06 March 1999).

[281] Professor Ted Morton regarding McClung's comments in the Ewanchuk case. Shawn Ahler, "'Best, Worst' of British Legal Tradition Seen in Judge McClung's Decisions." *National Post*, (27 February 1999) *http://www.nationalpost.com/newsasp?s2=national&3=reporter&f=990227/231961.html* (25 March 1999).

[282] Alex Kozinski, "An Unfair Attack on a Decent Judgement." *National Post* (08 March 1999). http://www.nationalpost.com/commentary.asp?f=990308/2349945.*html* (25 March 1999).

One of those in opposition to Madame Justice L'Heureux-Dubé's judgement was REAL women, a conservative anti-feminist national women's group which launched a complaint, calling for the dismissal of Madame Justice L'Heureux-Dubé for failing to treat Justice McClung with "dignity and respect" and for imposing her radical feminist viewpoints on the rest of the Court and society.[283] Another critic was criminal defence lawyer Edward L. Greenspan, who claims "the feminist perspective has hijacked the Supreme Court of Canada and now feminists want to throw off the bench anyone who disagrees with them...Madame Justice L'Heureux-Dubé has shown an astounding insensitivity and inability to conceive of any concepts outside her own terms of reference and has thereby disgraced the Supreme Court."[284] Barbara Amiel from the *National Post* referred to Madame Justice L'Heureux-Dubé as the "feminist of the court," comparing feminism to fascism and communism, challenging and threatening the very foundations upon which the country and therefore, its institutions have emerged from.[285] Those who opposed L'Heureux-Dubé served to demonstrate the resistance that is found within society to challenges to the existing power structure and therefore, social dominance. This is further demonstrated in the exclusion of Justice Gonthier's association with L'Heureux-Dubé's decision from the criticisms. Because

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[283] Shawn Ohler, "Women's Group Turns Tables on L'Heureux-Dubé." *National Post* (04 March 1999). http://www.nationalpost.com/home.asp?f=990304/2336320 (25 March 1999).

[284] Criminal defence lawyer Edward L. Greenspan commenting to Madame Justice L'Heureux-Dube's criticisms against McClung's decision. See Edward L. Greenspam. "Judges Have No Right to be Bullies." *National Post* (02 March 1999). http://www.nationalpost.com/commentary.asp?s2=guestcolumn &f=990302/2328230.html (25 March 1999).

[285] Barbara Amiel. "Feminists, Fascists, and Other Radicals." *National Post* (06 March 1999). http://www.nationalpost.com/commentary.asp?s2=columnists&s3=amiel&f=990306/2344420.html (25 March 1999).

of the resistance found in the area of gender equality jurisprudence, which will inevitably alter the status quo, Supreme Court judges are reluctant to practice activism in their decision-making in fear of public scrutiny.

Furthermore, there have also been criticisms regarding the politicization of the judiciary and the absence of impartiality in the courts. The validity and legitimacy of court decisions, especially the Supreme Court, are reduced when personal attacks are made within the institution. Several groups and individuals claimed that Judge McClung should be placed under review; groups like the National Action Committee on the Status of Women (NAC) and the National Association of Women and the Law (NAWL) planned on filing complaints with the Canadian Judicial Council to have McClung removed from his position in the Court of Appeal. Nelson Riis, NDP deputy leader, commented in the *National Post* that in order "to maintain the integrity of the Canadian justice system we simply can't turn a blind eye to these judges that ought not to be in the position that they are, and making these kind of outlandish public statements."[286] Others, like Peter Russell, use simple words: "Judges are not politicians..."[287]; however, one must recognize that Parliament conferred upon the courts not only the responsibility, but also the duty to interpret and apply the Charter to laws that are challenged in the courts. Consequently, the politicization of the judicial process is a reality that must be accepted and welcomed to ensure the adoption and application of the

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[286] Robert Fife. "MPs Split Over Censuring McClung." *National Post* (27 February 1999). http://www.nationalpost.com/news.asp?f=990227/2319640&s2=national&*3=reporter* (25 March 1999).

[287] Peter Russell cited in Shawn Ohler. "McClung's Letter Outrageous, Legal Experts Say." *National Post* (27 February 1999). http://www.nationalpost.com/news.asp?s2=national&3=reporter&f=9 90227/2319623.html (25 March 1999).

principles found within the Charter. Perhaps cases like the Ewanchuk case bring forth questions about the judiciary's roles in policy making, especially in dealing with those cases that are difficult to adjudicate because of the extent of social concern. Cases like Ewanchuk also bring forth questions of judicial appointment and call for a more transparent appointment process because who sits on the Court does matter.

It is true that when women come before the courts seeking a remedy from gender inequality, they come face-to-face with a system that has denied them that very equality. In challenging the system women challenge the ideas and attitudes that are deeply embedded within society. Therefore,

> ...the realities that feminists name in court force a showdown between the discourse that denied women's context and the oppression of women by men and the world view of feminism that is built upon the integrity and necessary integration of women's experiences, however diverse and historically constructed those are.[288]

This challenge is necessary, but if it is delayed until women make up a critical mass within the judiciary, then the gains are not meaningful. Bertha Wilson contends that "it will be a Pyrrhic victory for women and for the justice system as a whole if changes in law come only through the efforts of women lawyers and women judges."[289] Already this has served as a barrier to the advancement of women's equality before the law, and is manifested in the Ewanchuk case and the social barriers, such as the media and anti-feminist groups, encountered by Justice L'Heureux-Dubé.

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[288] Razack 137.

[289] Wilson 95.

Conclusion

The Charter conferred upon the courts the role of constitutional guardians, giving them the responsibility of not only interpreting the sections of the Charter to ensure the protection of rights and freedoms from government action, but also the ability to strike down any law that violates the document. However, as it has been shown in this chapter, the judges who sit in the courts bring with them their personal biases and stereotypes which influence the way they make decisions. Therefore, their personal beliefs affect how they interpret the Charter and, as a result, how it will affect those coming before the Court. In the place of women, the courts have shown a reluctance to interpret the document in a liberal manner, practicing judicial restraint. How does this impact women as constitutional stakeholders, and in turn, their right to reproductive autonomy? As Sherene Razack suggests, the rights included in the Charter mean nothing until judges give meaning to the words.[290] In turn, women will not be able have the advantages of the Charter as long as sexism exists in the law and within the judicial system. Amendments must be made within the judiciary to include the experiences of women--their context--in judicial decision making. The judiciary as it stands in the late 1990s has a very limited effect on women's lives in regards to their claims to reproductive autonomy; their claims have an air of illegitimacy because they threaten the status quo with their legal challenges to gender inequality. If women fight for the breakdown of sexism, for the acceptance and integration of women's difference, then their attempts are met head on by criticism, disgust, and resistance. If they choose to do nothing they are weak beings limited by gender inequalities. Until the Supreme Court as a whole stands up for

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[290] Razack 36.

women as constitutional stakeholders, women will continue to be discriminated against by the institutions that have, for now, the ability to change the gendered myths and stereotypes that have worked against women for centuries. Until then, women will continue to be second class citizens in the eyes of the law. Perhaps the new appointment of Justice Louise Arbour will have a positive impact on how the Supreme Court deals with gender issues as a whole. One can at least speculate that the increased visibility of women within the country's higher Court will not only increase the legitimacy of women's claims, but also raise the stature of Canadian women within the judicial system. What does all this say about women's pursuit for their rights through the Charter and, therefore, the courts? This chapter suggests that women's demands have not been fully realized in the courts, including the Supreme Court. As will be discussed in the following chapter, women are a disadvantaged group because they are women. In exploring the legal evolution of women's reproductive autonomy in Canada it will be demonstrated that control over women is longstanding and based on stereotypical assumptions of womanhood. The Supreme Court case analysis in the following Chapter will demonstrate that the demands made by women, through women's organizations, like LEAF, in the judicial system, have not been fully met through the use of law. Has LEAF been successful in their advancement and of women's claims to autonomy? Has the hidden gender of law had an impact on the legal definition of reproductive autonomy?

CHAPTER FIVE:
LEGAL TUG-A-WAR: LEAF IN THE SUPREME COURT OF CANADA. DEFINING REPRODUCTIVE AUTONOMY IN THE 1990s

> The issue of foetal rights versus maternal rights can be fought without reference to group rights. What is at issue is clearly an individual's right to security of the person. It should, therefore, pose few problems for a court *unless* one is able to isolate the foetus from the womb that sustains it and somehow ignore that its existence is within a specific female body. If the foetus can be analytically separated from the mother, the way is clear for a balancing of their respective rights.
>
> Sherene Razack, Canadian Feminism and the Law[291]

Introduction

This chapter provides a comparison of how LEAF, on the one hand, and the Supreme Court, on the other, have come to define reproductive autonomy. This analysis will be based on a compare/contrast model of cases reaching the Supreme Court in which LEAF has had intervener status.[292] While this study explores what legal developments have emerged in this area in the 1990s--this is because extensive research has taken place on landmark cases which took place throughout the 1980s--a brief look will be taken at cases like *Morgentaler* and *Daigle* because they have been significant in the development of women's right to bodily autonomy. On the other hand, a more detailed analysis will take place on more recent cases of *G* and *Dobson* which were decided in the late 1990s. This comparison will seek to answers questions like: How did LEAF and the Supreme Court's arguments compare or

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[291] Razack 122.

[292] Intervention is a "... procedure whereby third parties can make presentations to the court to ensure that their legitimate arguments, legal or otherwise, are not overlooked...They involve an application...for intervener status, which is usually but not invariably granted." See Peter McCormick, Canada's Courts: A Social Scientists Ground-Breaking Account of the Canadian Judicial System (Toronto: James Lorimer & Company, Publishers, 1994) 52.

contrast in the 1980s and the 1990s? Was the Charter a key element in the legal advancement of women's reproductive autonomy in the 1980s and 1990s? To determine how reproductive autonomy has come to be defined, this analysis outlines the Charter arguments set forth by LEAF in its intervener factum, and the significant portions of the judgement handed down by the Supreme Court. Furthermore, this analysis will serve to determine what patterns, if any, exist not only between the intervener and the Supreme Court, but also between 1980s and 1990s jurisprudence. A brief summary of the facts of each case is given in order to tell the stories of these women, the women whose autonomy was challenged and who used the judicial system to seek justice. In doing so an important piece of testimony that is so often silenced is included in this study. LEAF, as was in these cases, is often the vehicle for the expression of these women's voices in the judicial system.

Chapter One discussed the importance of the Women's Legal Education and Action Fund in a study like this. As was stated before, its significance in this analysis is threefold. First, LEAF is a national women's organization which promotes gender equality. Although it has been criticized for failing to fulfill its responsibility as representative of women's diversity, LEAF attempts to minimize this problem faced by the women's movement by "selecting and litigating cases that will involve and affect the greatest possible number and range of women."[293] Second, LEAF does not reject the existing political system, but seeks to make a place for women within the system. Consequently, in promoting women's equality, LEAF makes use of traditional legal channels to promote change. As was discussed in Chapter Three, this has lead to the legitimation of LEAF within the Canadian legal

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[293] Mathen xxii.

community and its respected position as an intervener within the judicial system. Finally, in its role as intervener, LEAF grounds its arguments on section 15 of the Canadian Charter of Rights and Freedoms--the equality clause. Because it places significance upon the Charter, its inclusion within this study is fundamental.

R. v. Morgentaler (1988)[294]

The Morgentaler decision has been discussed in great detail by academics like Rainer Knopff, F. L. Morton, and Janine Brodie et. al., however, the judgement deserves some mention here not only because it resulted in the Supreme Court striking down the restrictive abortion law--section 251 of the Criminal Code--but also because it was the first significant Charter case to come before the Court bringing forth the question of reproductive autonomy.[295] The appellants, Dr. Henry Morgentaler and two other physicians (Drs. Smoling and Scott) were charged on the grounds that they had set up abortion clinics and, in doing so, had violated section 251 of the Criminal Code. Expressing the opinion that women had a right to choose whether or not to have an abortion, Morgentaler, along with his colleges had been performing abortions on women who had not yet received approval from a therapeutic abortion committee from an accredited hospital, as was required by the abortion provision. In turn, he, along with the two other physicians, were charged and arrested for performing abortions against section 251 of the Criminal Code. On appeal to the Supreme Court, Morgentaler claimed that section 251 of the Criminal Code violated a woman's right to life,

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[294] "R. v. Morgentaler," *The Supreme Court of Canada* (28 January 1988) http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (23 July 1999).

[295] The Charter refers to the Canadian Charter of Rights and Freedoms, adopted in 1982 with the patriation of the Constitution.

liberty, and security of the person (as outlined in section 7 of the Charter). Claims were also made that the section violated ss. 2(a), 12, 15, 27, and 28 of the Charter. Furthermore, he claimed that the infringement of section 7 could not be saved under section 1. In its ruling, the majority of the Supreme Court ruled in favour of Morgentaler; however, in its 5-2 decision, the majority decision had three separate sets of reasons.

Chief Justice Dickson and Justice Lamer had a concurring decision in which they argued the case could be decided on procedural grounds without a need to go into a substantive review.[296] Together they claimed the purpose of section 7 of the Charter was to "prevent 'state interference with bodily integrity and serious state imposed psychological stress.'"[297] Furthermore, both justices ruled that the delays emerging from the therapeutic abortion committees' decisions also violated security of the person. Their argument went further to suggest that the unavailability of accredited hospitals also violated security of the person. The infringement of section 7 under section 251 of the criminal code was not saved under section 1 of the Charter (it failed the three prongs in the proportionality test). In his judgement, the Chief Justice wrote:

> the case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either

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[296] Chief Justice Dickson a(with Justice Lamer) in "R. v. Morgentaler" 56.

[297] Chief Justice Dickson and Justice Lamer in *R. v. Morgentaler* quoted in Ian Greene, The Charter of Rights (Toronto: James Lorimer & Company, Publishers, 1989) 153.

> interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.[298]

Justice Beetz and Justice Estey also had a concurring decision, although different from that of Dickson and Lamer. Beetz and Estey agreed with the Chief Justice that s. 251 violated a woman's right to security of the person. However, while Dickson had taken the legislation's objective as protecting the life and health of women, Beetz claimed the provision was there to protect the life of the foetus; the life and health of women came second[299]:

> the primary objective of s. 251 of the Criminal Code is the protection of the foetus. The protection of the life and health of the pregnant woman is an ancillary objective...the objective of protecting the foetus would not justify the severity of the breach of pregnant women's right to security of the person which would result if the exculpatory provision of section 251 was completely removed from the Criminal Code.[300]

Consequently, the challenged law passed the first part of the Oakes test, in which the government must show the restriction of the right is justified by the objective of the legislation. However, the unnecessary delays in the therapeutic committees' decision-making, he argued, were not rationally connected to the objectives of the legislation--to protect the life and health of the foetus and, secondly, that of the mother. The last set of reasons was written by Madame Justice Bertha Wilson. Wilson maintained that s. 251 of the Criminal Code violated a woman's right to security of the person because it took a woman's reproductive control away from her and placed it in the hands of the state. She argued that the provision

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[298] Chief Justice Dickson in "R. v. Morgentaler" 56.

[299] Greene 156.

[300] Justice Beetz (with Justice Estey) in "R..v. Morgentaler" 82.

in question treated women as a "...means to an end which she does not desire but over which she has no control."[301] Agreeing with Beetz that the legislative objective was the protection of the foetus, Wilson found the limitation resulting from s. 251 of the Criminal Code passed the first part of the Oakes test. However, it failed the second part of the test--the proportionality test--because it interfered with a woman's conscience during the first trimester.[302]

The Morgentaler decision resulted in three different sets of reasons within one majority decision: 1) Chief Dickson and Justice Lamer; 2) Justice Beetz and Justice Estey; and 3) Madame Justice Bertha Wilson. What were the implications of this decision, and what makes it significant enough to have a long lasting impact on Canadian society? While the Court's decision in favour of Morgentaler had obvious effects on the parties involved, the decision has a greater significance in Canadian society. The *Morgentaler* decision had and will have a significant impact on women's access to safe abortions. However, Janine Brodie's argument is compelling; she asserts the Supreme Court failed to address the question of reproductive autonomy. Was abortion, in fact, a woman's right? In its 5-2 decision, the Supreme Court struck down the abortion law, but the Court as a whole did not openly endorse it.[303] The Supreme Court ruled the abortion provision of the Criminal Code did in fact violate a woman's right to security of the person as provided by section 7 of the Canadian Charter of Rights and Freedoms; in turn, by striking down the abortion law the Court legalized

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[301] Madame Justice Bertha Wilson in *R. v. Morgentaler*, quoted in Greene, 157.

[302] Wilson did note that the government does have a responsibility to regulate abortions after the first trimester.

[303] Day and Persky 206.

abortion, however, this was mainly done due to "procedural unfairness"[304] in the legislation. It was only Madame Bertha Wilson who made a declaration of women's right to liberty (as included within section 7 of the Charter) and to abortion, at least in early pregnancy.[305] Unlike the others, Wilson defined the issue in a broader manner than her fellow judges: "It seems to me, therefore, that to commence the analysis with the premise that the s. 7 right encompassing only a right to physical and psychological security and to fail to deal with the right to liberty in the context of 'life, liberty and security of the person' begs the case."[306] Later, she asserts that "...an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state."[307] In light of section 7, Wilson clearly conveyed autonomy. Like the others, however, she expressed the need for government to legislate in reference to the protection of the foetus in the later stages of pregnancy. The reasons behind the Court's decision left a vague picture as to what the abortion law should be; consequently, the government has not received a clear message as to what the guidelines should be in the drafting of a new abortion law. However, all judges claimed it was up to the government to make the appropriate changes to the law, including possible legislation on foetal rights. With the striking down of section 251 of the Criminal Code, a case pending appeal in the Supreme Court in 1988--*Borowski v. Canada*

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[304] Janine Brodie, "Choice and No Choice in the House," The Politics of Abortion (Don Mills: Oxford University Press, 1992) 125.

[305] Brodie 59.

[306] Madame Bertha Wilson in "R. v. Morgentaler" 163.

[307] Ibid., 166.

(Attorney General)[308]–was dismissed on the grounds that the original basis of his argument, which gave him standing before the Court, no longer existed.[309] Only six years after the adoption of the Charter, the Supreme Court demonstrated its willingness to apply the Charter. Was this an indication of what was to come?

Tremblay v. Daigle (1989)[310]

Chantal Daigle, the appellant, and the respondent, Jean-Guy Tremblay, had been living together as a common-law couple for five months before their relationship began to deteriorate when the respondent became abusive. Daigle decided to separate from Tremblay, however, she had become pregnant during her cohabitation with the respondent. In light of the separation she decided it was best if she terminated her pregnancy and made arrangements to have an abortion. She was eighteen weeks pregnant at the time. As father of the unborn foetus, Tremblay sought an interlocutory injunction from the Quebec Superior Court to prevent his ex-girlfriend from going ahead with the abortion. The injunction was granted, prohibiting Daigle from following through with her choice to abort the foetus. Both the trial court and the majority of the Appeal Court ruled in favour of Tremblay, on the basis that a foetus is a human being with a right to life, as protected by the Quebec Charter of Rights and

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[308] "Borowski v. Canada (Attorney General)," *The Supreme Court of Canada* (03 October 1988) http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1989/vol1/html/1989scr1_0342.html (23 July 1999).

[309] Borowski challenged section 251(4), (5) and (6) of the Criminal Code infringed the rights of the foetus as protected by sections 7 (security of the person) and section 15 (equality rights) of the Canadian Charter of Rights and Freedoms. He had was allowed standing because the issue of whether the legislation was valid was a pressing concern. The Superior Court of Saskatchewan did not find any violation of foetal rights, as sections 7 and 15 of the Charter did not protect the foetus. The Court of Appeal upheld the lower court decision. With the striking down of section 251 in Morgentaler, Borowski lost the basis of his case and the Supreme Court dismissed the appeal. Ibid.

[310] "Tremblay v. Daigle," *The Supreme Court of Canada* (08 August 1989) http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1989/vol2/html/1989scr2_0530.html (23 July 1999).

Freedoms and, therefore, enjoys legal rights. The courts also agreed with Tremblay that he had a vested interest in protecting the life of his unborn child, thus having a right to request the injunction, in full considerations of Daigle's section 7 rights (life, liberty, and security of the person) as provided by the Charter of Rights and Freedoms. Daigle, twenty-one weeks pregnant, appealed to the Supreme Court of Canada. Because of the urgency behind the appeal, the appellant was granted leave for appeal, and seven days later the appeal was heard by the Supreme Court. During the preceding it came to be known that Daigle had undergone an abortion. In light of the situation, a request was put forward to the Court by the appellant's council that the appeal continue because the outcome of the decision would have a significant impact on women throughout Quebec and Canada who found themselves in a similar situation as Daigle. The hearing was allowed and on August 8, 1989, the Women's Action and Education Fund, along with eight other parties were granted intervener status, presenting their arguments to the Court during the hearing.

The Women's Legal Education and Action Fund gained an interest in the present case because of the seriousness of the possible outcome emerging from judicial and third party interference with a woman's choice, challenging both the respondent and the lower courts for their use of an injunction to restrict a woman's reproductive choice. While various arguments were put forward by LEAF, for the purposes of this analysis it is only necessary to refer to those arguments which refer to women's rights. In support of the appellant, Chantal Daigle, LEAF claimed the lower courts failed to take the following into account in making their decision: 1) The injunction was not supported by the new rights created by the lower court (i.e. rights of the foetus and right of the father) because these rights do not exist in law; 2)

rights of women as protected by the Quebec and Canadian Charters; and 3) the injunction is not a recourse and it violates women's fundamental rights. These served as a guide as they addressed the Court. Council for LEAF argued that the creation of foetal rights (by virtue of including the foetus as a human being for the purposes of the Quebec Charter of Rights and Freedoms) and father's rights were in conflict with the rights of the woman, as protected by the Quebec Charter of Rights and Freedoms as outlined in sections 1, 3, 4, 5, and 10, and in sections 7 and 15 of the Canadian Charter of Rights and Freedoms.[311] They argued that the woman's constitutionally guaranteed rights under the Canadian Charter of Rights and Freedoms were being weighed against non-rights, rights that did not exist in law (they had no basis in law). Furthermore, it was argued that the lower courts were mistaken in their creation of foetal and father's rights because, given the vagueness of the term 'human being' as well as the lack of evidence in the evolution of the law in regards to the inclusion of the foetus in the term 'human being, there was not clear intention of this extension of meaning. The creation of these rights, LEAF claimed, infringed already existing and constitutionally protected rights of women by weighing the rights of the foetus and those of the pregnant women as if both were constitutionally protected; however, Charter rights cannot be limited unless by the exercise of other Charter rights.[312]

In defending women's Canadian Charter rights, LEAF based its argument on section 15 of the Charter, referring to previously made statements by the organization which claim

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[311] See argument 25 in "Factum of the Women's Legal Education and Action Fund : Daigle v. Tremblay," Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada ed. WordsWorth Communications (Toronto: Emond Montgomery Publications Limited, 1996) 107.

[312] Arguments 12 and 27, Equality and the Charter 105, 107.

women's socially disadvantaged position in society, "...having been subjected to a distinctive second-class social and legal status including...deprivation of reproductive control."[313] Relying on Madame Justice Bertha Wilson's reasoning in *Morgentaler*, which situated legal reproductive issues in the context of section 15, under sexual equality, LEAF argued that reproductive autonomy should be advanced and examined under the scope of the equality clause in order to address discrimination of women as mothers.[314] As outlined in argument 36, "in sex equality terms, this case presents an attempt by a man to control the life of a woman by forcing her, through government intervention, to become a mother."[315] Given that woman and foetus are one, by controlling the fate of the foetus, the respondent "...controls her...It is a conflict between a woman and a man over that woman's body, life, and relation to her foetus."[316] Therefore, discrimination on terms of sex equality is promoted by the state (in this case judicially "imposed maternity"[317]) through its endorsement of the injunction. Moreover, women's fundamental rights are breached by an injunction because it not only causes unnecessary delays in a woman's access to abortion, but also restricts access if women are to contest an injunction in court (financial burden and obstacle for many women).[318] In turn, the lower courts failed to follow the precedent set up in Morgentaler, in which the

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[313] As was outlined in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR. See argument 31, ibid., 108.

[314] Argument 32, ibid., 108.

[315] Ibid., 109.

[316] Argument 37, ibid., 109.

[317] Phrase borrowed from argument 44, ibid., 111.

[318] Arguments 48 and 50, ibid., 111.

Supreme Court struck down section 251 of the Criminal Code because it subjected women to unnecessary delays which violated security of the person as protected by section 7 of the Canadian Charter of Rights and Freedoms. By allowing the injunction, therefore, the Supreme Court would be setting up limits on an already disadvantaged group in society. This action, LEAF argued, could not be supported by virtue of the Charter of Rights and Freedoms. After hearing arguments from council and interveners of both sides of the issue, the Supreme Court unanimously allowed the appeal and on November 16, 1989 handed down its decision in an anonymous Judgement of the Court.

Regardless of arguments provided by interveners for the appellant, the Supreme Court ruled unanimously in a Judgment of the Court[319] to drop the injunction not on constitutional grounds as was advanced by LEAF, but rather, on the grounds that the rights of the foetus and father on which the injunction was based were non-existent. The purpose of this approach was to allow the Court to determine whose rights might be breached if the Court allowed or not allowed the appellant to go through with the abortion. Furthermore, by addressing the question of foetal and father's rights, the Court would clarify the judiciary's position in this area, providing guidance for the lower courts and abolishing the possibility that other women could be subjected to similar adversity. Given that the lower courts relied on their interpretation of 'human being,' as provided by the Quebec Charter of Rights and Freedoms, the Supreme Court approached this question by focussing on the Quebec Charter and whether this phrase indeed included the foetus.

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[319] Present were Chief Justice Dickson, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, and McLachlin JJ.

In its examination of the Quebec Charter, the Supreme Court found that the vagueness of the phrase 'human being' resulting from the failure to define it indicated there was not clear intention by the framers of the document to include the foetus in its definition, nor its intention of protecting foetal rights.[320] It found that "if the legislature has wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance."[321] Furthermore, in examining the Civil Code, the Court found that while several of the articles did refer to the foetus, they did so under the born alive principle, which requires the foetus to be born before it can acquire any legal status and therefore, rights: "the recognition of the foetus' juridical personality has always been, as this Court stated in Montréal Tramways Co. v. Léveillé, [1993] SCR 456, a 'fiction of the civil law' which is utilized in order to protect the future interests of the foetus."[322] Therefore, unless that foetus is born alive, the protection of its interests, as outline in articles of the Civil Code, are irrelevant as if the "...foetus did not exist at all."[323] In turn, the Court found "...that the articles of the Civil Code referred to by the respondent do not generally recognize that a foetus is a juridical person. A foetus is treated as a person only where it is necessary to do so in order to protect its interests after it is born."[324] In examining Anglo-Canadian law, the Court found consistency in defining the foetus as a person with legal rights until born alive.

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[320] Judgement of the Court in "Tremblay v. Daigle."

[321] Ibid.

[322] Ibid.

[323] Ibid.

[324] Ibid.

In turn, to interpret the Quebec Charter as containing foetal rights would deviate from existing Canadian law. But most importantly, given that "...there is not yet any person to be governed,"[325] then there was no person for whom the respondent could seek an injunction, and therefore, the father's rights did not exist. On the question of the Canadian Charter of Rights and Freedoms, the Supreme Court found that the action before the Court was one between two private parties and did not involve state action. Thus, the Canadian Charter could not be invoked.

While there were several ways in which the Supreme Court could have approached the given question, as provided by the interveners, the Court chose to base its argument, not on a woman's right to autonomy, security of the person, or gender equality, but rather, on the argument which questioned the existence of the fundamental rights on which the injunction was funded – foetal and rights of the father. By focussing of the existence of foetal and father rights the Court left the question of reproductive autonomy unanswered, as it did in Morgentaler.

Winnipeg Child and Family Services v. D.F.G. (1997)[326]

In August 1996, a 22 year old aboriginal woman was five months pregnant. The appellant, Winnipeg Child and Family Services sought for a court order to take G. into custody for treatment of a glue sniffing addiction until the birth of her child. The agency feared her fourth child would suffer mental disabilities because of her addiction; two of her three children had already been taken from her care due to disabilities incurred as a result of

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[325] Ibid.

[326] "Winnipeg Child and Family Services v. D.F.G.," *The Supreme Court of Canada* (31 October 1997)) http://www.droit.umontreal.ca/doc/csc-scc/en/pub/1997/vol3/html/1997scr3_0925.html(23 July 1999).

her addiction. Thus, the court order would allow for the protection of the developing foetus. The Manitoba Superior Court Judge provided the order under the legal principle of *parens patriae*; "that is, the power of the court to act in the stead of a parent for the protection of the child."[327] Although this principle had, until this moment, applied only to children already born, the trial judge did not see why the court could not extend its powers to make orders under *parens patriae* to include unborn children. The Manitoba Court of Appeal overturned the lower court decision, claiming that existing law--*parens patriae* and tort law--could not support the order for confinement as provided by the Superior Court. Because of the magnitude of the change necessary in the law to allow the order, legislature would be better suited to deal with the appropriate changes. G. stayed at the health centre in spite of the Court of Appeal's judgement. The agency, unhappy with the result and the implications the decision would bring for the agency in future attempts to protect the life of unborn children, appealed to the Supreme Court of Canada in hopes of reinstating the order and, in turn, making it possible for agencies, in the interest of the state, to detain a pregnant mother, whose actions harmed the foetus, against her wishes in order to protect the foetus. Given the implications the judgement would have on the lives of Canadian women, LEAF sought intervener status and, on June 18th, 1997, presented its factum to the Court.

The facts in the present case illustrate the state's ability to dictate how pregnant women ought to behave,[328] another example of the state's willingness to control women's

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[327] Justice McLachlin, ibid., paragraph 6.

[328] Argument 7 in Canada. The Women's Legal Education and Action Fund, "Factum of the Intervener Women's Legal and Education Fund: *Winnipeg Child and Family Services v. D.F.G.*," Solicitors for the Intervener, 3.

sexual lives.[329] Given the implication such an order would undoubtedly have upon a woman's constitutionally protected rights to equality and equal right to life, liberty, and security of the person, LEAF provided arguments, submitting that "...there is no period in any woman's life when she is outside the protection of the *Charter*'s entrenched guarantees."[330] In its factum to the Supreme Court of Canada, LEAF put forth the claim that the issue at hand necessitated an historical and social analysis of the continuing inequality that is suffered by aboriginal women. In doing so LEAF argued that the action in question was not done only to a pregnant woman, but also to an aboriginal woman. Aboriginal women have been labelled "bad mothers" and, as historical accounts reveal, have often been punished because their action do not conform to "western social constructions and norms."[331] Not only have aboriginal women been disadvantaged because they are women, but also because of their ethnicity; thus, state intervention as dictated by the facts of this case, while will affect the behaviour of all Canadian women, will undoubtedly affect those women who are already disadvantaged.[332] Solicitors for LEAF claimed that to allow state intervention into women's lives under the Court's *parens patriae* jurisdiction would not only require the Court to make radical changes in law, but, as stated in argument 24, extending legal personhood to the foetus would also infringe a woman's right to equality before the law.[333] To allow the court to

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[329] Argument 14, ibid., 5.

[330] Argument 7, ibid., 3.

[331] Argument 11, ibid., 4.

[332] Ibid., 6.

[333] Argument 21 and 24, ibid., 8and 9.

exercise its *parens patriae* over the foetus result in unprecedented Court jurisdiction over the woman.

In reference to Charter rights, LEAF argued that at no time in her life is a woman outside the scope of Charter protection; this includes "...aboriginal women who suffer poverty and addiction."[334] In turn, subjecting pregnant women to state intervention would lead to the violation of their equality rights (as protected by section 15 and 28 of the Charter) by creating sex-specific burdens, burdens that would more than likely be utilized upon already disadvantaged women. Furthermore, as advanced in *Daigle v. Tremblay*, LEAF argued that women rarely control the conditions under which they become pregnant (because of social traditions and expectations, lack of access to information and contraceptives, etc);[335] the extension of the courts' *parens patriae* jurisdiction would result in a further erosion of women's control over their bodies. Finally, in reference to section 28 of the Charter, which requires Charter sections to be applied equally to both men and women, to control a woman's reproductive choices leads to the unequal application of section 7, which guarantees a woman's right to life liberty, and security of the person. Referring to *R. v. Swain*: "...in cases where a common law, judge made rule is challenged under the *Charter*, there is no room for judicial deference."[336] In turn, LEAF argued that the Court does not have the power to override a Charter right. Thus, judicial orders for the confinement of pregnant women, who through their action may be harming their foetus, under *parens patriae* jurisdiction cannot

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[334] Argument 33, ibid., 12.

[335] Argument 38, ibid., 13.

[336] *R v. Swain* quoted in Argument 61, ibid., 21.

be allowed by virtue of the Charter. The Supreme Court handed down a 7-2 decision in favour of G. after hearing arguments from both sides.

The Supreme Court of Canada, in its majority decision written by Madame Justice Beverely McLachlin,[337] dismissed the appeal primarily on the grounds that the foetus is not a legal person with the enjoyment of rights and, therefore, the appellant--Winnipeg Child and Family Services--could not act in the interest of a non-existent person. Extending the Court's *parens patriae* jurisdiction to include the foetus would require drastic changes in existing law and, therefore, such amendments would be better left to the legislature.[338] In reference to the first argument, it was noted by Justice McLachlin that Canadian Law does not recognize the foetus as a person with rights. However, once a child is born alive, the law recognizes his legal status prior to being born for certain purposes (i.e. a foetus, once born alive, can sue a third party for damages incurred while still in his mothers womb). Reference was made to arguments made in *Daigle v. Tremblay* to support the non-existence of foetal rights in Quebec's Civil Code and Canadian common law; that is, until born alive. Given the circumstance, however, the agency requested the Court to decide whether Tort Law could be extended to include the foetus.

When approached with this question, the Court found that in order to extend tort law to protect the foetus, it would have to recognize the unborn child as a person with legal rights. Given that the evolution of the common law shows no evidence of the legal status of the

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[337] The majority decision was supported by Lamer C.J., La forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, and Iacobucci, written by Madame Justice Beverely McLachlin. Dissenting were Sopinka and Major JJ.

[338] Madame Justice Beverely McLachlin in "Winnipeg Child and Family Services" paragraph 4.

foetus, to recognize it as such in the given case would mean a deviation from the existing law to such an degree that a change of this magnitude would be better left to the legislature, which is better equipped to deal with such matters. Furthermore, McLachlin stated, the physical situation of a pregnant mother carrying a child unquestionably leads to the conclusion that mother and child are one for legal purposes; "for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth."[339] Given that a woman's "...liberty is intimately and inescapably bound to her unborn child,"[340] holding a woman accountable for her negligent behaviour would lead to difficulties in defining what characterizes as such, and could result in punishing women for their lifestyle choices. Furthermore, such an action would result in a conflict of rights--that of the mother "...as an autonomous decision-maker" and the foetus.[341] Control over a woman's choices, including reproductive choices, would also be increased by outside players, such as the partner, family, etc.[342] Madame Justice McLachlin noted that

> [r]ecognizing a duty of care in relation to the lifestyle of the pregnant woman would also increase the level of outside scrutiny that she would be subject to. Partners, parents, friends, and neighbours are among the potential classes of people who might monitor the pregnant woman's actions to ensure that they remained within the legal parameters.[343]

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[339] Ibid., paragraph 29.

[340] Ibid., paragraph 34.

[341] Ibid., paragraph 37.

[342] Ibid., paragraph 42.

[343] Ibid., paragraph 42.

The Court recognized this, and noted that "the order at issue on this appeal can be upheld only by a radical extension of civil remedies into the most sacred sphere of personal liberty--the right of very person to live and move in freedom."[344] It was also recognized that, because, as mentioned above, the mother and child are inseparable, "...the court cannot make decisions for the unborn child without inevitably making decisions for the mother herself...any choice concerning her child inevitably affects her."[345] Justice McLachlin noted that the

> [e]xtension of the parens patriae jurisdiction of the court to unborn children has the potential to affect a much broader range of liberty interests. The court cannot make decisions for the unborn without inevitably making decisions for the mother herself. The intrusion is therefore far greater than simply limiting the mother's choices concerning her child. Any choice concerning her child inevitably affects her.[346]

The Court also recognized that those most affected by this decision would be women with a lower socio-economic status:

> [t]he pregnant women most likely to be affected...would be those in lower socio-economic groups. Minority women, illiterate women, and women of limited education will be the most likely to fall afoul of the law and the new duty it imposes and to suffer the consequences of injunctive relief and potential damage.[347]

In doing so the Court took into account arguments presented by LEAF.

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[344] Ibid., paragraph 46.

[345] Ibid., paragraph 56.

[346] Ibid., paragraph 55.

[347] Ibid., paragraph 40.

On the constitutional issue, the Court found that given that neither tort law nor the court's *parens patriae* jurisdiction justified the mandatory confinement of women whose actions were thought to affect their unborn children, then the constitutionality of these need not be examined. However, since the legislature has been given jurisdiction to make law in relation to this, they must, in turn, follow the principles and values as set out by the Charter of Rights and Freedoms.

Dobson (Litigation Guardian of) v. Dobson (1999)[348]

The appellant, Cynthia Dobson, was twenty-seven weeks pregnant when she hit a car while driving during a snowstorm. The impact of the accident not only left her in a coma, but also caused injuries to the foetus she was carrying, resulting in the delivery of Ryan, her son, by Caesarian section. The injuries suffered by Ryan during the accident left him with disabilities, both mental and physical, so severe that he will depend on his parents assistance for the rest of his life. Ryan sued his mother in tort law, claiming, through his grandfather (and litigation guardian), that his mother was driving negligently and caused his injuries while in the womb. The trial court found Mrs. Dobson liable for her actions. The New Brunswick Court of Appeal ruled that just as Ryan's mother owed a duty of care to other drivers on the road, as well as passengers in her vehicle, so too, that duty of care was owed to the foetus she was carrying. Therefore, the court ruled a child born alive can sue his/her mother for injuries suffered while in the womb. The suit was appealed to the Supreme Court, asking for a judgement whether a child can sue his/her mother in tort law for actions that injured the child while still in the womb. LEAF was not an intervener in this case; however,

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[348] "Dobson (Litigation Guardian of) v. Dobson," *Supreme Court of Canada* (09 July 1999) http://www.droit.umontreal.ca/doc/csc-scc/en/rec/html/dobson.en.html (23 July 1999).

its significance lies in the fact that this will be the last case dealing with women's reproductive autonomy to come before the Supreme Court this century. The Court heard the appeal and on July 9, 1999, handed down its first judgement dealing with maternal tort liability for prenatal negligence,[349] and the last judgement of this century in the area of reproductive rights.

In its decision for *Dobson v. Dobson,*[350] the Court handed down 3 separate sets of reasons for the outcome, one of which was a dissent by Justices Major and Bastarache. The majority decision was written by Justice Cory.[351] Unlike the *G. Case*, which dealt with the legal rights of an unborn child, *Dobson* was based on a child already born, who suffered injuries while in the womb due to his mother's negligent behaviour. Thus, the rights of the foetus were not in question, but whether a child can sue his/her mother for her behaviour while she was pregnant. In general, the majority of the Court found that the magnitude and effect of imposing a duty of care upon a woman for damages incurred by her foetus are so great that the legislature is better suited for dealing with such an issue.[352] If the Court conferred upon the mother such duty of care then all pregnant women would be greatly affected by the decision. As was mentioned in *Winnipeg Child and Family Services v. D.F.G.*, pregnancy is a biological reality for women--"only women can become pregnant."[353]

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[349] Justice Cory in "Dobson (Litigation Guardian of) v. Dobson" at paragraph 76.

[350] Present were Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Icobucci, Major, Bastarache and Binnie JJ. Dissenting were Major and Bastarache.

[351] In agreement were Lamer, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, and Binnie.

[352] Cory in "Dobson (Litigation Guardian of) v. Dobson" paragraph 76.

[353] Ibid., paragraph 77.

Therefore, the Court found it necessary to recognize that imposing a duty of care upon a mother for her foetus would undoubtedly give rise to additional burdens upon the woman. Furthermore, in following precedent, the majority of the Court also found that mother and unborn child make a union, and are therefore one, both biologically and legally (although the Court is only concerned with the legal reality). Justice Cory wrote: "...the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself."[354] Thus, while a child that is born alive is able to sue a third party for damages suffered while in the womb, a child cannot sue his/her mother because the two are inseparable while the mother is pregnant. Moreover, "the unique relationship between a pregnant woman and her foetus is so very different from the relationship with third parties. Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her foetus. [Her]...every waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may practically harm"[355] Therefore, a mother's only duty to her foetus should be a moral one, one that already exists between most mothers and their children.[356] Allowing this child, Ryan, to sue his mother for her negligent driving would give his family access to insurance monies, and therefore, to better care for Ryan in the future; however, for women as a whole, imposing a duty of care on women towards their foetuses would have tremendous

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[354] Ibid., paragraph 25.

[355] Ibid., paragraph 27.

[356] Ibid., paragraph 78.

implications for all Canadian women, limiting the amount of control they have in making day to day choices:

> [d]espite the important legal distinctions between a foetus and a child born alive, as a matter of social policy and pragmatic reality, both situations involve the imposition of a duty of care upon a pregnant woman towards either her foetus or her subsequently born child. To impose either duty of care would require judicial scrutiny into every aspect of that woman's behaviour during pregnancy...Both would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman.[357]

This in turn would have significant effects on the family unit and society as a whole.[358] Finally, the Court recognized that a woman is also an individual who has a right to "bodily integrity, privacy, and autonomy rights."[359] No mention was made to constitutionally protected guarantees in this case.

The second set of reasons were written by Madame Justice Beverely McLachlin, and were co-signed by Madame Justice Claire L'Heureux-Dubé. While both were in agreement with the reasons handed down by Justice Cory, the concurring opinion reflected their concerns for the constitutionality of the issue before the Court. More specifically, they wished to discuss the "...constitutional values underpinning the autonomy interest of women and the difficulty with using tort to restrict that interest."[360] According to McLachlin and L'Heureux-Dubé, the common law must reflect the values and principles that are found

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[357] Ibid., paragraph 31.

[358] Ibid., paragraph 24.

[359] Ibid., paragraph 24.

[360] Madame Justice Beverely McLachlin in "Dobson (Litigation Guardian of) v. Dobson" at paragraph 83.

within the Charter of Rights and Freedoms. To allow a child to sue his/her mother would contradict two of the most fundamental values of Canadian society--liberty and equality.[361] Agreeing with Cory, McLachlin noted that such an action would restrict a woman's behaviour and actions while pregnant, taking away her control over her body. She recognized that

> virtually every action of a pregnant woman–down to how much sleep she gets, what she eats and drinks, how much she works and where she works–is capable of affecting the health and well-being of her unborn child, and hence carries the potential for legal action against the pregnant woman...This...has the potential to jeopardize the pregnant woman's fundamental right to control her body and make decisions in her own interest: R. v. Morgentaler, [1988] 1 S.C.R. 30, per Wilson J.[362]

In terms of equality, McLachlin argued that while the average person can isolate himself from others in order to avoid harming them, a pregnant woman does not have this ability in relation to her unborn child; her every action affects that foetus. Since "it is an inexorable and essential fact of human history that women and only women become pregnant,"[363] then to penalize women for any injury suffered by their foetuses necessarily implies unequal application of the law, and imposes a gender specific burden upon pregnant women. However, given that the legislature, in framing new laws can justify an infringement of a Charter guarantee, it can legislate in this area, making it possible for a child to recover damages with minimal intrusion into the mother's life.

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[361] Ibid., paragraph 84.

[362] Ibid., paragraph 85.

[363] Ibid., paragraph 87.

In the case of Ryan, while he met the conditions outlined in *Daigle* and *G.*--that a child born alive has foetal rights for certain purposes, such as to recover damages from a third party for damages incurred while in the womb--he was unable to sue his mother, through a third party, for damages incurred in the womb. Why? The Supreme Court ruled that mother and child have a special bond and that mother and child are inseparable. However, as in the above cases, the Court left the door open for government to legislate in this area, as long as its actions do not ignore the values found within the Charter. With this in mind, has the Supreme Court been pro-active in its definition of reproductive autonomy? Where is jurisprudence headed in the area of reproductive autonomy as Canadians enter the new millennium?

Conclusions

An examination of the various cases dealing with a woman's reproductive autonomy coming before the Supreme Court since the adoption of the Charter, reveals that there has been a slow evolution in precedent. There has been a change in the types of cases which are being heard by Canadian courts; this difference in issues, while still revolving around reproductive autonomy, demonstrate not only the scope of the issue, but also the various ways such an issue can reach the Supreme Court. From reviewing the cases outlined in this analysis, one can see that while they dealt with control over a woman's body, the 1980s were mostly concerned with access to abortion, as was noted in *Morgentaler* and *Daigle*; the 1990s, on the other hand, have focussed on less specific issues that could, if decided against women, restrict control over women's bodies in the largest sense--by controlling the actions of pregnant mothers through legislation.

Morgentaler was a landmark case because the abortion law was struck down by the Supreme Court, because, through its procedural shortcomings, it violated women's right to security of the person as outlined in the Canadian Charter of Rights and Freedoms. *Morgentaler* in a sense opened the door for women's legal claim to reproductive autonomy, in this case, the right to choose not to reproduce by exercising the right to choose abortion. The Court also failed to provide any concrete answers, even in the case of abortion. The abortion provision of the Criminal Code was struck down on procedural grounds, not because it believed a woman's right to abortion was protected by the Charter. Only Madame Justice Bertha Wilson was vocal about a woman's inherent right to choose whether or not to have an abortion. It was a false victory for women; yes, Canadian women now have a right to abortions, however, the Court gave the legislature the power to enact another abortion provision as long as they conform with the Charter. This means that although women's have access to abortion, they do not necessarily have a *right* to choose abortion--it can be taken away by legislation. *Daigle*, on the other hand, can be seen as a more significant case in the evolution of reproductive autonomy jurisprudence because the Court, in recognizing the absence of foetal rights in Canadian law, defined reproductive autonomy in relation to the absence of foetal rights in Canadian law; however, in doing so it failed to give any indication as to what reproductive autonomy meant for women. By failing to provide "guidance" as it chose not to do in *Daigle*, the chances that many more women will come before the Supreme Court with violations to their reproductive autonomy are high. Why? Because by failing to define women's autonomy as a Charter protected right, but instead recognizing a woman's autonomy due to the absence of fetal rights, the Supreme Court has not given women's

autonomy protection. Without legal protection, women will continue to have their rights violated. Moreover, if government chooses to enact legislation granting foetuses legal status, what accomplishments women have made in the area of reproductive autonomy will be lost. This is evident in the pattern that is visible in all cases since *Morgentaler.*

A striking similarity was found throughout this analysis: women's autonomy is vested in the rights of the unborn child, or the lack thereof. In both cases in the 1990s, as well as *Daigle* (1989), the Supreme Court acknowledged that Canadian law does not recognize the unborn child as a person; in turn, it is not accorded legal rights until "born alive," a common law principle which awards rights to a foetus for certain purposes once it is born alive. In doing so the Court has been able to provide guidance to all the courts by providing a definition of what fetal rights are--that they are nonexistent. However, given that reproductive autonomy was defined as a woman's right and ability to have control over her body, including "the right to make fundamental personal decisions without interference from the state,"[364] the Court has failed to define what reproductive autonomy is for women. By failing to recognize a woman's right to not security of the person or privacy, but right to autonomy over her own body--the Court has left it open for cases to come before the judiciary dealing with violations of women's autonomy. Even cases dealing with reproductive technologies could hinder a woman's autonomy, since, with the coming of the new millennium, there does not exist a legal definition for reproductive autonomy. Another pattern: the Supreme Court is reluctant to make a judgement in this area because to do so

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[364] Madame Justice Bertha Wilson in "R. v. Morgentaler." *The Supreme Court of Canada.* http://www.droit.umontreal.ca/doc/csc-scs/en/publies/1988/vol1/html/1988scr1_0030.html (21 April 1999) 166.

would imply a change of such magnitude that it is better left to the legislature. A pattern found within all decisions is that it should be up to the legislature to make law in the area of foetal rights; that is, it is more a political issue than a legal one. However, the legislature is also reluctant to make law dealing with issues considered 'hot potatoes' and, therefore the issues revolving around women's reproductive autonomy continue to pose a threat to women's reproductive autonomy.

It was mentioned in the previous chapter that women's reproductive rights, specifically, reproductive autonomy, are often in conflict with the rights of others. As is often the case, debate about a woman's right to autonomy over her body often develops into a debate about women's versus foetal rights. This has been the case with cases reaching the Supreme Court. While the Court has not recognized the existence of foetal rights, it has ruled in favour of women's reproductive autonomy due to the absence of foetal rights in law. The Court has not recognized foetal rights, but leaves room for the legislature to legislate in this area, stating that the public policy implication of such a decision made by the Court would be too extensive.[365] If government decides to legislate in this area, what will happen to a woman's ability to make choices over her body?

In light of the jurisprudence that has emerged in the area of reproductive autonomy, the involvement of women's organizations, like the Women's Legal Action and Education Fund, has had a dramatic impact on its development. LEAF's position throughout the last decade, while based on the facts of each give case, has in some sense emerged in the Supreme Court decisions. In general, LEAF's arguments in these cases revolved around women's right

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[365] "Winnipeg Child and Family Services v. D.F.G." and "Dobson v. Dobson."

to equality (as outlined in section 15 of the Charter). Its arguments have been based on women's biological reality--that only women can become pregnant. Thus, LEAF has asserted that any law which has a negative effect upon women because of their pregnancy violates their right to equality. These laws, creating gender-specific burdens, leave women without a choice, given their biological reality. While the Supreme Court holds LEAF in great esteem when it comes to its role as an intervener, its decision in the mentioned cases rarely supported LEAF's arguments. What could have led to such developments, given the respect LEAF holds in the eyes of the Court?

In determining what factors may have been significant in the outcomes of these cases, it is difficult to speculate because judges tend to hide behind the cloak of their institution by providing legal reasoning for their decisions. In doing so, their biases and stereotypes are themselves concealed. However, how much discretion is there in the Court room? It is difficult to say whether gender played a significant role in the reasons handed down in each of these cases. In both cases which came before the Supreme Court in the 1990s Justice Major dissented. Madame Justice McLachlin wrote two opinions for both cases during this decade, one showing her commitment to the Charter, both to women's fundamental rights--equality and liberty. However, given the turnover of the Supreme Court throughout the last decade, along with the few cases that have actually been decided in this area, it is difficult to speculate what the factors have been; the cases are too few in number to allow an accurate examination of the hidden gender of law and to determine whether any patterns exist in gendered language and gendered attitudes of the judges within the Court decisions. However, one thing is certain: as Canadians enter the new millennium the Supreme Court's composition

will include three women. The new addition, Louise Arbour, has been known to actively apply the law, willing to apply the Charter where necessary. Given the complexity of issues arising under reproductive, it is obvious the Court has not seen the last of this nature. How will the Court respond in the future? If the judges are willing to invoke the Charter, defining its boundaries in a broad manner, then women will thrive in their reproductive choices. If they do not, however, the state will continue to hold undue power over women's capabilities. Given that the Supreme Court has come to recognize women's reproductive autonomy as a result of the absence of foetal rights, one can only hope that Supreme Court action in defining the boundaries of women's autonomy in Charter language will lead to their willingness to develop jurisprudence in terms of women's rights, rather than foetal rights. Until then, women's reproductive autonomy is jeopardized by the very children they bear.

CHAPTER 6: CONCLUSION
THE HALL OF MIRRORS IN THE NEW MILLENNIUM: REFLECTIONS OF THE PAST?

> "The social context of gender inequality denies women control over the reproductive uses of their bodies and places that control in the hands of men."
>
> Catharine MacKinnon, Toward a Feminist Theory of the State[366]

The entrenchment of the Canadian Charter of Rights and Freedoms within the Canadian Constitution was expected to provide women with a foundation on which to base their demands for the protection of their rights. Some women's groups, like the Women's Legal Education and Action Fund (LEAF), hoped that it would offer women a tool to legitimize their claims and to break down the societal barriers which have hindered the full enjoyment of their rights. The nature of the document was intended to bring women a chance to legitimize their claims as constitutional stakeholders, to have constitutionally recognized rights and guarantees, including autonomy over their bodies. However, while the Charter has been beneficial in some areas, this has not been the case with reproductive autonomy. This study has demonstrated that the Canadian Charter of Rights and Freedoms has had little to do with the advancement of women's reproductive autonomy, as outlined in Chapter Five. Parliament conferred upon the judiciary the ability and duty to interpret the Charter for the protection of rights under section 24 of the Charter. Nevertheless, as has been observed since its adoption, the courts, especially the Supreme Court, have displayed a reluctance to apply the document actively in its decisions on reproductive autonomy; the exception was

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[366] MacKinnon 246.

Morgentaler, although the Court did not support reproductive autonomy as a protected right under the Charter.

The comparison in this thesis between LEAF's facta and the Supreme Court judgements revealed an inconsistency, not only between the way each defines reproductive autonomy, but also between the foundation of such definitions. Women's right to reproductive autonomy has come to be defined in terms of foetal rights by the Supreme Court. The Court, in dealing with these cases, has relied heavily on the absence of foetal rights, rather than the entitlement of women to autonomy over their bodies as a protected right under the Charter. In questioning its own authority in the framing of jurisprudence in this area, the Court has shown a reluctance to delve too deeply into Charter waters, instead leaving it up to the legislature to make law in the area of foetal rights and, therefore, reproductive autonomy. In turn, while the Court appears to support women's claims by deciding in their favour, the Supreme Court has in fact handed down false victories for women; that is, while the judgements of these cases were in favour of women, delving into the actual judgments reveals a set of reasons different than what would be desired by women. For example, in decisions like *Morgentaler*, *Daigle*, G., and *Dobson* the Court ruled in favour of women, giving the impression that the judges support women's right to autonomy; however, when one reads the actual reasons behind the judgement, it is clear that women's fundamental right to autonomy over their bodies was not the driving force behind the decisions,[367] thus, a false victory for women. In its judgements the Supreme Court Justices

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[367] This was the case in the *Morgentaler* decision. While the Court made abortion legal by striking down section 251 of the Criminal Code, only one of the judges, Madame Justice Bertha Wilson, acknowledged women's right to choose an abortion.

have failed to address women's claims to reproductive autonomy by way of the Charter, in turn, diminishing the force of women's claims to their constitutionally protected right to autonomy over their bodies. That is, the Supreme Court *has* addressed the issue, but without fundamental expression of a constitutionally protected right to reproductive autonomy. Defining woman's autonomy in terms of the non-existent legal person inside her, the Supreme Court has downplayed women's reproductive freedom. Furthermore, through its practice of judicial restraint, the Court has left it up to the legislature to decide what foetal rights are, and therefore, bringing forth the question of women's versus foetal rights. Given that the government can legislate in this area, with the creation of foetal rights, women's autonomy is jeopardized, or at least has the capacity of having her autonomy restricted in favour of the foetus; to exercise her right to autonomy, a woman would undeniably infringe the rights of the foetus. It is difficult to say whose rights would prevail--the rights of the woman's or the foetus'--or when someone's rights can trump someone else's rights. However, in defining reproductive autonomy this way, the Court decided that: "whoever controls the destiny of the fetus controls the destiny of the woman. Whatever the conditions of conception, if reproductive control of a fetus is exercised by anyone but the woman, reproductive control is taken only from women, as women."[368] As stated earlier, there has been consistency in this type of ruling in regards to reproductive autonomy from 1980s jurisprudence into the 1990s; the Court continues to be divided on the issue, especially on the arguments provided in each of the opinions. Still, the Supreme Court has rarely based its majority decision on the Charter. The Women's Legal Education and Action Fund, on the

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[368] McKinnon 246.

other hand, has solidified and, in its opinion, legitimized its arguments for women's right to reproductive autonomy on section 15 of the Charter.

The Women's Legal Education and Action Fund, a national women's organization which uses traditional legal channels to promote women's equality, has grounded its arguments for women's right to autonomy under section 15 of the Charter, claiming that any violations of a woman's right to exercise autonomy over her body results in a sex-specific burden which violates women's right to equality--"as women." Interestingly, while LEAF's position as an intervener is of great esteem and respect,[369] the Supreme Court has been reluctant to accept LEAF's arguments in its decisions. For example, while the Supreme Court consistently adopted LEAF's argument that foetal rights are non-existent in Canadian law, it failed to extend its agreement with LEAF's Charter arguments. Therefore, while one can agree LEAF's role in the adjudication process of cases dealing with reproductive autonomy is fundamental to the advancement of women's autonomy over their bodies, and while they have been successful in other areas affecting women, LEAF has not been as influential in Supreme Court decisions dealing with reproductive autonomy. What are the reasons behind the discontinuity in the way reproductive autonomy is defined by the Supreme Court and LEAF, in its role as representing women's interests in the judicial system? This analysis has demonstrated that although the mechanisms are in place for the advancement of women's claims, there continue to be social barriers which impede the betterment of women's

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[369] As was stated in Chapter Three, LEAF's role as an intervener is respected by the Supreme Court. Madame Justice Bertha Wilson notes that LEAF has "...made such an impressive contribution to the decisions in many of the leading Charter cases that came before the Supreme Court during...[her] tenure...They represented a real effort on the part of a very diligent and dedicated group of counsel to discharge the role of intervener at its highest and most challenging level." See Mathen x.

lives in Canadian society, even within what some Canadians consider to be the most neutral and the least biased institution in Canada--the Supreme Court.

This analysis, which focussed on the discontinuity found in the legal definition of reproductive autonomy, has demonstrated the complexity of what Catharine MacKinnon refers to as the 'hall of mirrors' and the difficulties encountered by those who seek to change its power dynamics. The Charter of Rights and Freedoms does not exist in a vacuum. The Charter offers an avenue through which women are able to promote the protection of their rights; it provides a foundation from which women can obtain legitimacy and acts as a vehicle for social acceptance and changing of attitudes in society. However, there continue to be restrictions within Canadian society which not only impede the advancement of women's demands, but also the just and equitable application of the Charter. This study has focussed on the androcentric nature of Canadian society as the main force acting against women's efforts in the Canadian political system. In this male-based 'hall of mirrors', the power structure is reinforced and mimicked at each level of society and the state. In turn, power and influence remain in the hands of a few who are able to frame the norms, institutions, and to create the law upon which Canadian society is based. Given this 'hall of mirrors' in which the law appears to be neutral and in the interests of the public, women have tended to be the dominated, rather than the influential. This too is reflected throughout society and the state; this social reality fails to account for the voices and experiences of countless women. The androcentric nature of society has resulted in the isolation of women from positions of power (unless they behave like men) and the disqualification of their claims to equality. Liberal feminists in the women's movement have come to be key players in attempts to change the

power dynamics in society, striving to tilt the mirrors, seeking to make a place for women in the existing political system; however, their attempts have not been as successful as they should have been because they have fail to challenge the patriarchal foundation of society. By mimicking those who have power–by taking their roles, acting and looking like them, engaging within their institutions--that they have sought a place and a voice within the hall of mirrors, making little difference in the re-structuring of society and in the changing of societal attitudes.

Institutionalized women's organizations have found that in order to have some power in politics they must conform to the existing political system. As was discussed in Chapter Three, women's organizations, like LEAF, have been recognized as legitimate institutions because of their willingness to work within the standing political structure, making a place for women within that system. However, an organization that is unwilling to conform and at the same time willing to protest against the government will be met with resistance because it serves as a threat to the status quo and power dynamics of society. The National Action Committee on the Status of Women is an example of an organization that has lost its credibility in politics and society, in part, as a result of its criticisms towards government; it has struggled with its inability to represent Canadian women's diversity because of government cutbacks to women's groups. Furthermore, internal clashes and external criticism of feminist activities have also resulted in portraying feminism as radical and non-representative of Canadian women's interests; this has led to a decrease in supporters, both within and outside the organizations. This analysis explored this reality and demonstrated that those who hold power and influence within society have the capacity to discredit those

who pose a challenge to the status quo, taking from them their legitimacy within society and in politics. On the other hand, organizations which choose to use traditional vehicles and which favour the politics of mainstreaming instead of disengagement have appear to have a more successful existence within politics and a greater sense of influence as respected legitimate players in political life. LEAF is one of these groups which has benefited from its reliance on the traditional legal process, receiving funds from the Courts Challenges Program and the Women's Program; the federal government's plan to reduce the Women's Program by five per cent during a three year span after the 1995 federal election affected LEAF, given its reliance on the program for funding. LEAF depends largely on federal funding and the Women's Program in litigating court challenges. In 1994, Prime Minister Chrétien reinstated the Court Challenges Program. However, even with its successful integration within the political system and its acceptance as an viable organization, LEAF too has suffered from government cutbacks and conservative and changes to the make up of the Supreme Court.[370] The Women's Legal Education and Action Fund's experience demonstrates that organizations willing to use the existing institutions to advance women's interests can only make a certain degree of difference. Faced with male-defined and defended institutions the degree of possible change to emerge is limited, given that the underlying foundations are in conflict with women's demands for the protection of their rights.

The appointment of conservative judges to the Supreme Court during Prime Minister Mulroney's tenure, between 1984 to 1993, made it more difficult for LEAF to bear some influence upon the judiciary. The appointment of two more women on the bench in the late

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[370] See Bashevkin 228.

1980s did not improve LEAF's ability to influence judicial decisions. LEAF's arguments were not always referred to, as was the case with reproductive autonomy. Why? The judiciary reflects the power dynamics that are found within Canadian society. This hidden gender of law impedes the advancement of women's claims through the judiciary.

The analysis of reproductive autonomy undertaken in this thesis suggests that the Supreme Court of Canada appears to be impaired by sexism--a hidden gender in law based on gendered stereotypes and biases, and which punishes women by reinforcing the gender gap that marginalizes women further. The judiciary is perceived by society to be neutral and objective; however, this thesis revealed what appeared to be a Court--the Supreme Court–that is affected by each judge's stereotypes and biases, which in turn influence their decision making abilities.[371] With the adoption of the Charter, who sits on the bench and who hears a particular case matters a great deal. The appointment process, especially with its reliance on patronage and regional representation, assumes neutrality, rationality, and objectivity of each judge; merit, on the other hand, plays a role in the appointment process, although not as significant as patronage and regional representation. Law itself, as applied and interpreted by the judiciary, legitimizes social dominance and reinforces the power dynamics of society. Given this importance, the appointment process of the Supreme Court judges can be a significant factor in the reduction and elimination of sexism. If what appears to be sexism continues to exist in the Supreme Court, then women cannot expect to advance their claims

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[371] It is important to note that given the limited number of cases dealing with reproductive autonomy to reach the Supreme Court since the adoption of the Charter make it difficult to determine whether decision-making in the Court was affected by sexism. However, one can speculate that, given Catharine MacKinnon's Hall of Mirrors, sexism played a role in the decision-making process of the Supreme Court in cases dealing with reproductive autonomy.

as constitutional stakeholders; until the Court recognizes the gender gap in law, until judges uphold gender equity, only then will women's claims be recognized and advanced within the judiciary. Given that the Supreme Court establishes the tone for the judicial system, the Court must have an active role in abolishing sexism in law. Representation is essential and amendments to the appointment process are essential to ensure gender equality in the law. Until then, women's claims will be blocked by the androcentric reality in which they live.

The Charter has opened new doors for the advancement of women's interests by providing the arena--the judiciary--through which they can challenge infringements of their constitutionally protected rights. Based on the assumption that the human agent is rule governed, that is, rule follower, women's Charter claims are not only legitimized but also gain acceptance at the societal level. These in turn serve as a foundation or starting point from which women's organizations, can introduce change and therefore, the re-structuring of society. The Charter offers a way to do this--to promote change, to legitimize it, and to reinforce it. However, as this analysis has demonstrated, the Court needs to be willing to apply and interpret the Charter to protect women's interests. Until it does, the androcentric foundation of society will only continue to hold women back and keep them from enjoying their constitutionally protected rights. Thus, this thesis demonstrates that a fundamental restructuring of society, as opposed to the incremental legal and education reforms which liberal feminism defends, needs to take place before women will gain their fundamental rights and freedoms, as provided in the Charter. When the Court takes an active role in the advancement and protection of women's constitutionally protected rights, only then will it play a role in the legitimization of women's claims, tilting the hall of mirrors in favour of

women. But is it the role of the Supreme Court to "make law" in the area of reproductive autonomy? The legislature, an elected body, will likely continue to resist, as with other controversial social issues, making law in the area of reproductive autonomy, especially now that the Supreme Court has based its judgements on the absence of foetal rights. However, as Chief Justice Antonio Lamer stated in a recent interview, "...if they [legislators] choose not to legislate, that's their doing. If they prefer to leave it up to the court that's their choice. But a problem isn't going to go away because legislators aren't dealing with it...With the introduction of the Charter it fundamentally changed our judicial system."[372] In turn, one can conclude that while government should legislate, even in matters of great controversy, the Charter has bestowed upon the courts the responsibility of interpreting the rights found within the Charter of Rights and Freedoms. Therefore, it is the Supreme Court's duty to act as guardian of the Charter, to ensure that elected officials respect and comply with rights, as outlined in the Charter of Rights and Freedoms. With this new responsibility (at twenty years old, the Charter is still in infancy), the Court can have a profound bearing on how society comes to define women's reproductive autonomy.

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[372] Chief Justice Antonio Lamer quoted in Janice Tibbets, "Politicians Duck Divisive Issues, Chief Justice Says," *National Post* (12 July 1999) http://www.nationalpost.com/home.asp?f=990712/26543 (12 July 1999).

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APPENDIX A

FULL-TIME AND PART-TIME EMPLOYMENT[1]

	In Thousands			
- Full-time	**6,613.2**	**6,678.2**	**6,846.7**	**6,984.5**
15-24 years	645.7	646.1	658.2	670.8
25-44 years	3,836.4	3,832.9	3,900.4	3,957.7
45 years and over	2,131.1	2,199.2	2,288.1	2,355.9
- Part-time	**783.4**	**800.7**	**802.1**	**818.1**
15-24 years	418.6	406.3	396.8	407.1
25-44 years	188.7	206.4	206.0	204.8
45 years and over	176.1	188.1	199.2	206.2
- Full-time	**4,383.6**	**4,409.0**	**4,444.6**	**4,657.9**
15-24 years	494.3	464.4	447.9	480.6
25-44 years	2,642.0	2,662.4	2,666.5	2,746.1
45 years and over	1,247.3	1,282.2	1,330.2	1,431.2
- Part-time	**1,725.4**	**1,788.2**	**1,847.2**	**1,865.9**
15-24 years	513.8	522.8	522.5	543.3
25-44 years	770.4	794.2	827.2	805.3

[1] "Full-time and Part-time Employment." *Statistics Canada.* http://www.statcan.ca/english/reference/copyright.htm (30 July 1999).

45 years and over	441.1	471.2	497.5	517.3

Adapted from: Statistics Canada Internet Site, http://www.statcan.ca/english/reference/copyright.htm, 30 July 1999.

APPENDIX B

WOMEN--FEDERAL POLITICAL REPRESENTATION[2]

HOUSE OF COMMONS

POLITICAL PARTY	NUMBER OF WOMEN	%
Liberal	36	11.96
Bloc Québécois	11	3.654
Reform Party	3	0.997
New Democratic Party	8	2.66
Progressive Conservative	2	0.664
TOTAL	60	19.93

SENATE

POLITICAL PARTY	NUMBER OF WOMEN	%
Liberal	19	18.27
Progressive Conservative	11	10.58
Independent	1	0.962
TOTAL	31	29.81

HOUSE OF COMMONS AND SENATE

POLITICAL PARTY	NUMBER OF WOMEN	%
Liberal	55	13.58
Bloc Québécois	11	2.716
Reform Party	3	0.7407
New Democratic Party	8	1.975
Progressive Conservative	13	3.21
Independent	1	0.2469
TOTAL	91	22.47

- **Senate:** The Upper House of the Canadian Parliament currently made up of 104 members.
- **House of Commons:** The Lower House of Parliament, currently made up of 301 Members.

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[2] "Women -- Federal Political Representation." *Library of Parliament* (02 February 1999). http://www.parl.gc.ca/36/refmat/library/womenrep-e.htm (11 April 1999).

APPENDIX C

ABORTION COST--BY PROVINCE[3]

PROVINCE	COST WITH PROVINCIAL HEALTH PLAN COVERAGE	COST WITHOUT PROVINCIAL HEALTH PLAN COVERAGE	COMMENTS
British Columbia[4]	Free	$400 to $500	2-3 week wait at clinics due to hospital cutbacks
Alberta	Free	$375 to $675; $125 extra charge for those who do not want to use provincial plan.[5]	1 week wait in Edmonton; 2 weeks plus wait in Calgary
Saskatchewan	Free hospital abortion	unavailable	Government opposed to free standing clinics; parental consent required for under 18 years of age
Manitoba	--	$500 to $550; $50 surcharge for those w/o coverage or who waive using number.[6]	3 to 4 weeks waiting period.
Ontario	Free	$500 to $900 for uninsured and visitors[7]	Out-of-province residents pay from $300 to $800, depending on province of residence.
Quebec	Free if in hospital or C.L.S.C.; $144 covered by plan if in a clinic	$200 (with coverage) if performed at a clinic	Access is a problem for areas outside Montreal

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[3] Numbers for all provinces, unless specified, taken from "Abortion in Canada Today: The situation province by province," CARAL (19 April 1999) ttp://www.caral.ca/situation1.html# situation 1.html#mb (31 July 1999).

[4] Numbers for British Columbia taken from "Abortion Costs," CARAL (09 April 1999) http://www.prochoiceconnection.com/pro-can/BC.html (31 July 1999).

[5] "The Morgentaler Clinic." (09 April 1999) http://www.morgentaler.ca/edmonton.htm (31 July 1999).

[6] "The Morgentaler clinic." (09 April 1999) http://www.morgentaler.ca/winnipeg.htm (31 July 1999).

[7] "Morgentaler Clinic." (09 April 1999) http://www.morgentaler.ca/toronto.htm (31 July 1999).

PROVINCE	COST WITH PROVINCIAL HEALTH PLAN COVERAGE	COST WITHOUT PROVINCIAL HEALTH PLAN COVERAGE	COMMENTS
New Brunswick	Free if approved by 2 doctors and performed by a gynecologist	$450 +	Access to abortion outside of Fredericton and Moncton is difficult-many women forced to travel to other provinces.
Nova Scotia	Free if performed in a hospital; covers doctors fee if in a clinic	$300 to $500	Many physicians unwilling to provide referral-access is limited.
Newfoundland/Labrador	Free to residents	$400 to $775 for out-of-province residents[8]	Four week waiting period
Prince Edward Island	--	minimum total cost with travel $600, including	No abortion facilities; travel to NS, NB if at 6-16 weeks; Toronto, Montreal, and Boston at 16+ weeks.
North West Territories	Free, including travel expenses	--	Access restricted to major centres
Yukon[9]	Free, including travel expenses	unavailable	Abortions only performed at Whitehorse General Hospital
Nunavut	unavailable	unavailable	unavailable

[8] "Morgentaler Clinic." (09 April 1999) http://www.morgentaler.ca/stjohns.htm (31 July 1999).

[9] Numbers for Yukon taken from "Abortion Services in the Yukon." CARAL (09 April 1999) http://www.caral.ca/yukon.html (31 July 1999).

APPENDIX D

AVERAGE EARNINGS BY SEX[10]

	$ constant 1996		%
1971	30,013	14,067	46.9
1972	31,116	14,348	46.1
1973	31,684	14,658	46.3
1974	32,415	15,370	47.4
1975	33,184	15,956	48.1
1976	35,358	16,509	46.7
1977	33,547	17,030	50.8
1978	33,405	16,971	50.8
1979	33,258	17,149	51.6
1980	33,299	17,207	51.7
1981	32,500	17,431	53.6
1982	30,969	17,051	55.1
1983	31,160	17,207	55.2
1984	30,581	17,596	57.5
1985	31,311	17,637	56.3
1986	31,746	18,248	57.5
1987	32,037	18,523	57.8
1988	32,842	18,884	57.5
1989	32,913	19,445	59.1
1990	32,517	19,459	59.8
1991	31,619	19,458	61.5
1992	31,516	20,133	63.9
1993	30,872	19,865	64.3
1994	32,255	20,086	62.3
1995	31,527	20,528	65.1
1996	32,248	20,902	64.8

Source: Statistics Canada's Internet Site, http://www.statcan.ca:80/english/Pgdb/People/Labour/labor01a.htm, 11 April 1999.

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[10] "Average Earnings by Sex (All Workers)." *Statistics Canada* (23 March 1998) http://www.statcan.ca:80/english/Pgdb/People/Labour/labor01a.htm (11 April 1999).

AVERAGE ANNUAL INCOME[11]

	1991	1992	1993	1994	1995	1996
	$ constant 1996					
Economic families[1]	56 623	56 312	55 154	56 188	56 091	56 629
Elderly families[2]						
Married couples only	38,328	37,696	38,867	38,773	39,454	39,588
All other elderly families	53,205	50,179	49,540	49,208	54,237	51,745
Non-elderly families[3]						
Married couples only	**56,990**	**59,098**	**56,122**	**56,176**	**56,496**	**56,674**
One earner	43,806	44,886	45,763	45,319	44,668	47,026
Two earners	64,590	67,038	63,561	63,799	64,339	64,369
Two-parent families with children[4]	**63,121**	**63,562**	**62,047**	**63,400**	**63,030**	**63,981**
One earner	46,029	46,080	45,046	47,298	44,924	45,322
Two earners	64,027	65,359	63,542	65,483	65,532	66,241
Three or more earners	80,325	79,249	80,191	80,314	80,147	82,762
Married couples with other relatives[5]	**78,718**	**78,176**	**78,176**	**79,447**	**77,507**	**81,183**
Lone-parent families[4]	**25,801**	**27,155**	**25,731**	**26,546**	**27,138**	**26,147**
Male lone-parent families	39,673	41,906	36,121	36,179	37,041	39,428
Female lone-parent families	23,761	25,145	24,015	24,961	25,469	24,044
No earner	14,156	14,456	15,163	14,781	15,227	13,726
One earner	25,993	28,143	26,522	27,766	27,995	27,706
All other non-elderly families	**46,954**	**42,805**	**44,872**	**46,557**	**45,588**	**48,814**
Unattached individuals	24 522	24 871	24 428	24 638	24 536	24 433
Elderly						
Male	21,990	23,276	21,657	24,676	24,126	25,020

[11] "Average Annual Income." *Statistics Canada.* (22 December 1997). http://www. statcan.ca/english/ Pgdb/People/Families/famil05.htm (11 April 1999).

Female	18,771	18,508	17,523	17,749	19,027	18,139
Male	28,270	28,516	28,217	28,914	27,784	28,158
Female	23,764	24,138	24,316	23,142	23,775	23,432

Adapted from: Statistics Canada's Internet Site, http://www.statcan.ca/english/Pgdb/People /Families/famil05.htm, April 11, 1999.