GIRL TALK:
FEMINIST RIGHTS DISCOURSE
AND THE STRUGGLE FOR EQUALITY

by

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The customs of Western society face increasing pressure as the "postmodern" notion that knowledge and reason are constructs of a discourse that suppresses some aspects of experience and highlights others, gains legitimacy. Feminists have seized this notion of discourse to challenge the way society has marginalized women's existence. Canadian feminists, in particular, have developed a counterdiscourse of rights to challenge the dominant discourse and its formal approach to equality. By lobbying the federal government to entrench a more substantive notion of equality in the Canadian Charter of Rights and Freedoms; by seeking to protect the spirit of the equality guarantees during the discussions on the Meech Lake Accord; and by acting as intervenors before the Supreme Court of Canada in Andrews v. The Law Society of British Columbia, feminists broadened the conception of equality to include the notion of disadvantage. Many feminists question the use of rights discourse to challenge inequality because of the tendency of traditional legal discourse to rely on precedents that are intrinsically androcentric and to frame issues in rational terms that overlook the relative experiences of women. However, rights discourse can challenge the dominant system by exposing unquestioned norms and symbols; redefining women's identity; and developing a body of law sensitive to women's equality issues. In Canada, rights discourse enjoys additional authority because of the practical and symbolic force of the Charter's constitutional guarantees of equality. Canadian feminist rights discourse illustrates the potential of rights language to shift the dominant meaning of equality by introducing a feminist voice into discussions previously carried out by men. Nonetheless, Canadian feminist rights discourse faces a number of challenges. The postmodern scepticism about theory in general also undermines the theoretical basis upon which feminism is built and allows other counterdiscourses to compete with feminist rights discourse to challenge
dominant meanings. As well, feminists must acquire legitimacy for their discourse in the face of institutional structures that give men greater power. The issue of representation must also be addressed to allow feminist rights discourse to speak for the range of women in society. Feminists must work to gain recognition for the idea that society is gendered and that women have suffered oppression as a result. And they must continue to challenge traditional understandings of equality to move us closer to the day when the dominant discourse conceives of equality in substantive terms that incorporate the notions of disadvantage and oppression.
# Table of Contents

**Abstract**

**Chapter I - Introduction** 1-4

**Chapter II - Discourse and Counter Discourse** 5-15
- The Development of Counterdiscourses: Law as Institution and Discursive Tool 11

**Chapter III - Canadian Feminism and the Charter: Developing a Counterdiscourse** 16-56
- Feminism - An Overview 18
- The Evolution of Feminist Rights Discourse in Canada 20
- The Creation of a Feminist Discourse: Lobbying for Reform and Litigating Values 24
  - i) Lobbying for Reform 24
  - The Charter - 1980-81 26
  - Meech Lake - 1987-90 30
  - ii) Litigating Values 41
    - Andrews 47

**Chapter IV - Rights Discourse and the Pursuit of Equality** 57-71
- International Influences on Rights Discourse 58
- Evaluating Rights-based Strategies 62
- Law as Discourse: New Potential for Challenging the Traditional Equality Paradigm 67
Chapter V - Conclusion

- Engendering Social Change: The Case for Feminist Rights Discourse

Bibliography
Chapter I:

Introduction

"Rights are like tools. The purposes they serve depend upon the hands that are placed upon them and the minds that direct those hands ... [T]he contention that Charter rights reflect shared assumptions and values ceases to be credible even at the point of definition."¹

"The problems of speaking the unspeakable, revealing what has been suppressed, questioning the categories of truth, self, justice, and knowledge preoccupy postmodernists..."²

As Western society becomes increasingly multicultural and multiracial, efforts to dismantle and subvert the old authoritative systems have gained both momentum and legitimacy. The "postmodern" recognition that our knowledge of ideas and events is influenced by a social and historical context results in challenges to official institutions that seek to expose objectivity as facade and to reduce truth to the level of opinion. Accordingly, subjectivity, particularism and difference are celebrated and minority perspectives are able to exert tremendous pressure on our Western cultural traditions and assumptions. One does not have to subscribe to the tenets of postmodernism to support the observation that the hegemony of Western culture and Enlightenment beliefs is under attack. In fact, few arenas exist which have not been profoundly affected by the idea that there is no one overriding truth and that knowledge and reason are in fact constructs of a discourse designed to privilege a certain way of viewing the world. This


notion of discourse, central to postmodernism, provides a way to challenge the official meaning of otherwise accepted terms and allows the counterdiscourses of disadvantaged and minority groups to attempt to permeate and transform our discursive world. While this paper finds the postmodern movement interesting and intriguing, it is the postmodern concept of discourse and counterdiscourse rather than any of postmodernism's other elements that will offer a vantage point from which to evaluate feminist activity in Canada.³

The equality guarantees of the Canadian Charter of Rights and Freedoms (the "Charter") have become part of broader societal challenges to accepted norms. The Charter has, at the very least, precipitated conversation and inquiry about some of the central questions of liberal political philosophy and has increased the profile of rights discourse in the political mainstream.

Indeed, the Charter provides another perspective from which to examine such contested ideals and concepts as equality, difference, discrimination, disadvantage and oppression, a perspective that brings the judiciary and a host of new "Charter Canadians" into discussions previously reserved for legislators.⁴ As Alan Cairns notes, the 1982 changes to the constitution have


resulted in the creation of a variety of constitutional discourses, transforming constitutional
discussions into an arena in which social conflicts are played out as the "Charter groups" seek
to identify and define their rights.5

More specifically, the Charter has become a powerful tool for feminists - and others - in the
production of discourse, increasing the importance of the way in which the lived experience and
identity of these players is expressed and given constitutional meaning and legitimacy. In fact,
the Charter has generated a new rights-based vocabulary with which to describe our various
identities and has increased the accessibility of public institutions to rights claims that reflect our
constitutional and legal selves. Thus, women have recourse to a rights-based Charter language -
sections 15 and 28, in particular - that sends messages to politicians, judges and the public.
These messages are part of a rights-based constitutional discourse that now supplements a
broader discourse about who we are as Canadians.

This paper focuses on the way in which feminists in Canada have attempted to challenge the
dominant discourse and to introduce into that discourse a feminist rights language that includes
alternative meanings for previously accepted concepts that were unable to reflect women's lives
and experiences. Although many deny the ability of rights discourse to effect meaningful social
change because it falls comfortably within the traditional formal equality approach to rights, the
use of rights language by feminists in Canada suggests a flexibility that lends itself to the project
of challenging the conventional interpretation of a number of concepts. In fact, the Charter has

5 Ibid., p. 77.
become part of a rights-based strategy for developing a scant but growing body of law sensitive to women's equality rights.\(^6\)

This paper traces the way in which Canadian feminists have used the Charter and rights discourse to alter the dominant discourse and to introduce into that discourse alternative ways of conceiving of the notion of equality, in particular. Chapter II provides a discussion of the role of discourse in contemporary "postmodern" society before moving in Chapter III to a more specific examination of the evolution of feminist rights discourse in Canada.\(^7\) Chapter IV explores the nature of rights discourse in general and presents the arguments for and against its ability to challenge the status quo to produce social change. The final chapter examines the transformative potential of a feminist rights-based strategy and discusses some of the challenges that face Canadian feminists if they are to capitalize on the potential of rights discourse.

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\(^6\) This is despite the fact that men have been more successful than women in gaining access to the courts on gender equality issues and have obtained more favourable results. See the figures provided by Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*, (Ottawa: Canadian Advisory Council on the Status of Women), 1989, p.3. See also Deborah Rhode, *Justice and Gender. Sex Discrimination and the Law*, (New York: Harvard University Press), 1989, p. 91 for a similar observation on the American experience with equality rights.

\(^7\) This will be done by tracing feminist involvement in the Charter and Meech Lake debates as well as in litigation before the Supreme Court of Canada in *Law Society of British Columbia v. Mark Andrews* (1989), 56 D.L.R. (4th) 1 (S.C.C.). (hereafter Andrews). The Meech Lake Accord was negotiated in April 1987 between the federal government and the ten provincial premiers. It sought to address what many saw as the deficiencies of the 1982 constitutional package with respect to Quebec. The Accord included recognition of Quebec as a distinct society, limitation of the federal government's spending power, provincial input on Supreme Court of Canada appointments, provincial involvement in immigration, a provincial veto over changes to federal institutions and the entrenchment of annual First Ministers' Meetings. Unanimous consent of the proposals was not obtained before the 1990 deadline, resulting in the failure of the package.
Chapter II:

Discourse and Counterdiscourse

"One of the main features of imperial oppression is control over language...Language becomes the medium through which a hierarchical structure of power is perpetuated, and the medium through which conceptions of 'truth', 'order' and 'reality' become established."  

As the introduction noted, over the past number of decades, a series of social, cultural and philosophical movements have sprung up to challenge established conventions of modern Western life. Many of these movements seek to "deconstruct" grand theories to expose their objectivity as simply another subjective perspective on reality and then to reconstruct a plurality of realities that correspond to a number of different life experiences rather than a single "universal" one. The attempts to resist the assimilating pressures of the dominant culture by (for example) deconstructionist linguists; postmodern philosophers and postcolonial writers; feminists; people of colour; lesbians and gay men; and other groups that have suffered oppression or colonial rule, form part of broader challenges inherent in a wave of contemporary thought some have labelled "postmodern". Central to these challenges is the notion that overarching norms, theories and philosophies - like imperialism, Enlightenment liberalism and concepts of truth and knowledge - are no longer credible.


Whether or not we live in a truly postmodern age, we do seem to be witnessing a profound shift in the way we understand the world. In the fields of literature, science, architecture, art, culture, philosophy and politics, once-accepted precepts are being questioned, disassembled, criticized and cast aside in favour of a much more contingent and subjective approach to knowledge and theory. At a more practical level, the social movements that originated in the 1950s and 1960s have now gained enough acceptance to feel confident in mounting attacks on the society which they maintain has structured and in fact marginalized their existence.

Language plays a key role in this "postmodern" effort to throw off oppressed or marginalized identities because it is through language that certain groups become stigmatized as "Other". According to postmodernism, far from expressing neutral meanings, words and phrases convey institutionalized ideas that structure the way in which a society thinks and acts based on established judgements and practices. The notion that discourse - verbal and symbolic language - constructs, maintains and modifies social practices, hierarchies and patterns of behaviour provides an intriguing vantage point from which to evaluate current societal trends.

Indeed,

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12 Ibid., p. 3.
"[T]ogether, discourse and force are the chief means whereby social borders, hierarchies, institutional formations and habituated patterns of behaviour are both maintained and modified."\textsuperscript{13}

Philosophers of language were among the first to assert that the assumptions on which the dominant language is based by no means reflect the experiences and understandings of the range of all society's members.\textsuperscript{14} Poststructuralists introduced the concept of language as evolving and dependent upon historical realities to account for the plurality of meaning or changes in meaning over time. Thus, poststructuralism focuses on the importance of subjectivity in understanding knowledge and one's relation to the world. Postmodernism builds on this idea and additionally stresses the importance of discourse in shaping societal norms.\textsuperscript{15} While humanist discourse refers to the unique and universal essence of the individual, postmodern discourse recognizes the subjectivity of language. The meaning of a certain concept is changeable and tentative, rather than universally accepted, and is reformed in discourse every time we think or speak.\textsuperscript{16}

\textsuperscript{13}\textit{Ibid}.

\textsuperscript{14} Early linguists adopted the view that using language involved discovering the meaning behind words or discovering what words stood for. Later structuralists began to see language as a tool for describing ourselves and the world as well as constituting our selves. Ferdinand de Saussure held that language, rather than reflecting a given social reality, in fact constitutes social reality. See Chris Weedon, \textit{Feminist Practice and Poststructuralist Theory}. (Oxford: Basil Blackwell Inc.), 1987, p. 22.

\textsuperscript{15} Those who study linguistics and philosophy discern a difference between poststructuralism and postmodernism. For those who are interested in this distinction, see Andreas Huyssen, "Mapping the Postmodern", in \textit{Feminism/Postmodernism}, op. cit., pp. 234 - 280.

\textsuperscript{16} Weedon, \textit{op.cit.}, p.33.
Michel Foucault suggested that discourse is, in fact, the creation of meaning. He noted that language involves the acceptance of certain rules that suppress some aspects of experience and highlight others. Foucault’s study of the relationship between language, social institutions, subjectivity and power led him to believe that society’s various organizational structures were located in and affected by a discursive field.

"Discursive fields consist of competing ways of giving meaning to the world and of organizing social institutions and processes. They offer the individual a range of modes of subjectivity. Within a discursive field, for instance, that of the law or the family, not all discourses will carry equal weight or power. Some will account for and justify the appropriateness of the status quo. Others will give rise to challenges to existing practices ... Such discourses are likely to be marginal to existing practice and dismissed by the hegemonic system of meanings and practices as irrelevant or bad."

17 Razack, op. cit., p. 19.

18 Raymond Breton expresses a similar relationship between discourse and institutions:

"Institutions constitute systems of opportunities and constraints that vary for different segments of society [...] It is through and in relation to institutions that individuals and groups pursue their symbolic/cultural interests. Institutions are also systems of symbolic opportunities and constraints which, as for material benefits, vary for different social groups. They provide a more or less munificent or limiting context for the shaping of social identities, the search for meaning to one’s existence and for the definition of one’s role in the community and society. They are also environments within which individuals seek recognition of their identity and their historical and contemporary contribution to society."


19 Weedon, op. cit., p. 35.
Foucault's concept of discursive fields offers one way to view the contemporary social and political environment in which various groups compete for recognition within established institutions and rely on language to do so. This recognition may involve the rejection of stigmatizing labels and identities and the creation of new ones; the questioning of the "objectivity" of traditional institutions; the introduction of new "stories" and terms to capture more adequately the lived experiences of groups other than the dominant group; and demands for more rigorous representation within political bodies. In short, society becomes the site of struggle among various competing counterdiscourses that seek to challenge the hegemony of the dominant discourse and to introduce into that discourse language that reflects alternative experiences.

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20 Note, for example, the transformation of labels such as physically or mentally retarded, Indians and Negroes to physically or mentally challenged or differently abled people, aboriginals and Blacks or Afro-Americans respectively.

21 In legal circles, for example, the Critical Legal Studies Movement and feminists have concentrated much effort on exposing the patriarchal and liberal assumptions of the legal system and on pointing out ways in which such assumptions disadvantage certain groups in society.

22 Chapter III offers examples of women introducing their version of constitutional history into the mainstream. See page 33, note 87 below.


24 In his book The Terms of Political Discourse, William Connolly discusses the challenges inherent in attempting to find ways of expressing fundamental political concepts that are meaningful within the context of a complex society. For Connolly, the terms of political discourse include the vocabulary associated with certain political concepts, the criteria that must be met before that vocabulary becomes identified as part of a concept and the commitments and judgements words, phrases or concepts evoke. William Connolly, The Terms of Political Discourse, (Lexington: D.C. Heath and Company), 1974, p. 2.
Iris Young, in her work on group representation in heterogeneous democratic societies, notes that instead of recognizing alternative views, our society tends to express life experiences and identity in universal terms that deny legitimate differences of race, sex, religion and so on. The "liberal" focus on the elimination of group difference - in the name of neutrality, tolerance and the universality of humanity - has resulted in countermovements (like feminism) that attempt to reclaim group specificity. Young believes it is important to recognize group differences and to provide mechanisms for the effective representation of the distinct voices and perspectives of disadvantaged social groups within society. Unfortunately, she does not provide specific examples of ways in which these groups could gain either societal recognition or access to decision making institutions in order to ensure their voices are heard. As well, although she claims that her notion of group representation differs from pluralism, it is somewhat unclear, in the absence of prescriptions for change, how in fact it is different. Nonetheless, Young's attention to group identity and to the need to reject the imperialism of dominant groups in

25 Iris Young, *op. cit.*, pp. 156 - 191.

26 Young distinguishes between natural groups - women, ethnic groups and so on - which are differentiated from other groups by shared cultural practices or ways of life and interest groups - like feminists - which she believes are organized around specific goals.

27 Young's model would restructure democratic institutions to provide opportunities for public discussion that would promote social equality for disadvantaged groups and undermine the cultural imperialism of privileged groups. This type of representation differs from interest group pluralism which, she suggests, acts as an obstacle to public discussion and decision making because each interest group promotes its own specific interests at the possible expense of any other interests. Yet Young notes that few examples exist of democracies or institutions that function to recognize and address group difference and disadvantage within a revitalized public forum. Nor, unfortunately, does she spell out the way in which her representative model would actually function, an omission which reduces the appeal of an otherwise intriguing suggestion.
society provides a valuable "postmodern" approach to issues of justice, equality, difference and oppression. As well, she recognizes the importance of shifting the meaning of certain political concepts and of challenging the dominant political discourse.

The Development of Counterdiscourses: Law as Institution and Discursive Tool

The success of any counterdiscourse in challenging the accepted order depends on its ability to introduce new concepts into the traditional language. Bruce Lincoln suggests that three factors affect the success of a counterdiscourse:

"First, there is the question of whether a disruptive discourse can gain a hearing...; this largely depends on the ability of its propagators to gain access to and exploit the opportunities inherent within varied channels of communication...Second, there is the question of whether the discourse is persuasive...persuasion does not reside within any discourse per se but is, rather, a measure of audiences’ reaction to, and interaction with, the discourse. Persuasion itself also depends on such factors as rhetoric, performance, timing and the positioning of a given discourse vis-a-vis those others with which it is in active or potential competition. Finally, there is the question of whether - and the extent to which - a discourse succeeds in calling forth a following..." (emphasis added).

28 While Iris Young identifies herself as a feminist and socialist, her rejection of the concepts of universality and objectivity as well as of the distributive theory of justice are reminiscent of the postmodern rejection of grand theories of knowledge. Again, the label is not as important as the implications of such an approach.

29 See, in particular, chapters 1 and 2 in Young, op. cit.

30 Ibid., p. 41.

31 Lincoln, op. cit., pp. 8 - 9. See also Murray Edelman, Political Language: Words That Succeed and Policies That Fail, and The Symbolic Uses of Politics, both of which explore the way in which language can influence our political understandings.
Finding ways in which to pursue their interests through institutions and to influence discussions that shape society's understanding of their experiences has been a concern of groups facing disadvantage. Feminists, in particular, have become increasingly aware that existing scholarship and equality theory rely on a discourse that leaves out women’s voices as well as those of other social groups.

Law reform efforts have offered one way to develop a feminist counterdiscourse. At first glance, such an assertion may seem misguided. After all, law "embodies all of the central beliefs of the Enlightenment ... It rests on the myth of objectivity"\textsuperscript{32} that clearly denies the possibility of alternative perspectives. A postmodern approach to law sees legal rules as discourse and provides the possibility of producing more comprehensive and situated legal theory and language to describe women's experiences and identity and to shift the meaning of discursive symbols that in the past have limited and oppressed women.

"When women...call attention to law as discourse, when they demand, for instance, that judges "contextualize" and render decisions that take into account their lived experiences, the enormity and even the absurdity of their demand should not deter us from recognizing its potential to seriously undermine the myths that buttress the law."\textsuperscript{33}

As well as constituting discourse, of course, law is authoritative and enforceable. It represents one of society's paramount institutions. Constitutional law, in particular, provides the fundamental framework within which all other laws are placed and makes a highly symbolic

\textsuperscript{32} Razack, \textit{op. cit.}, p. 20.

\textsuperscript{33} Ibid.
statement about societal values. Law, therefore, holds enormous potential for women. While it may not provide immediate changes in the daily realities of women, it is a necessary precondition for social change. It also provides a legitimate and accepted institutional forum in which women can introduce a counterdiscourse that addresses their disadvantage, as Chapter III illustrates.

The challenge for feminist law and discourse involves shifting the accepted meanings of a number of terms in the dominant discourse. In Canada, feminists have recognized the potential of the constitutionally entrenched Charter to shift the meaning of certain discursive concepts. Constitutions in fact provide a specific and authoritative site for the introduction of counterdiscourses. As mentioned above, constitutions represent symbols of societal values that send messages about the political culture and its priorities. Feminist lawyer and legal theorist Catharine MacKinnon, commenting on the Meech Lake Accord in Canada, has suggested that constitution-building

"works politically to set priorities and agendas, affect resource allocations and provide an edge in close cases. Such a document [the Meech Lake Accord] enters into the atmosphere that surrounds the seriousness of commitment to equality rights on the day-to-day level that is the level on which a constitutional right either becomes meaningful or dies as a piece of paper. On this level, a constitution affects outcomes from family court to rape trials to Human Rights adjudications; it shapes women's fortunes in board rooms and at the bargaining table, in the home and on the street, in places where the Charter itself would seldom formally venture. A political act like the Accord supports or detracts from a climate of concern in a way that affects the results of particular cases,

34 In particular, sections 15 and 28 can be used to press for a more substantive interpretation of equality.

35 Symbolic discourse, as Lincoln has noted, plays a role along with verbal language in constructing societal norms.
shifts the ground beneath legal arguments, determines what becomes persuasive. It gives life to law. On this level, constitutional process begins as politics but ends as law. The status of sex equality itself as a fundamental commitment of society is thus as much constituted by such documents as it is reflected in them."

American legal theorist Robert Cover has also suggested that the constitution can provide a vehicle for introducing alternative norms and values into broader society. For instance, he notes that

"[a]ll Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. And even were we to share some single authoritative account of the framing of the text...we could not share the same account relating each of us as an individual to that history...whichever story the Court chooses, alternative stories still provide normative bases for the growth of distinct constitutional worlds through the persistence of groups who find their respective meanings for the first amendment in ...radically different starting points..."

Cover goes on to describe the way in which various communities within the United States have used distinctive narratives to create legal meanings that challenge conventional constitutional understandings. He suggests that constitutionalism plays a role in legitimizing both the dominant discourse of the state and the alternative visions and discourses of communities and movements. Cover believes it is possible for courts to recognize rather than circumscribe the identities of such communities by accepting the normative precepts of alternative discourses or narratives


rather than seeking to uphold "objective" norms that in fact describe only a certain limited reality.\(^\text{38}\)

In this regard, Cover seems to be moving toward a rejection of the ideal of universally applicable legal principles and norms, recognizing instead the possibility of the existence of a multiplicity of legal meanings that reflect the diverse experiences and identities of various groups and individuals in society. He also appears to suggest that without an institutional forum in which to give voice to alternative discourses, it is difficult for those discourses to gain legitimacy and therefore, to introduce concepts of otherness into the general political discourse.\(^\text{39}\)

This need for an institutional forum may be one reason why feminists have entered legal forums and used rights discourse to challenge dominant concepts of equality and women’s rights.\(^\text{40}\) As well, as this chapter outlined, discourse plays an important role in shaping the meaning of words and values. In Canada, the Charter has, among other things, spurred disadvantaged and minority groups to use the constitution to redefine key terms in our accepted political discourse. This has involved taking traditional rights language and reorienting it to accommodate alternative visions of rights and needs. For feminists and others, the Charter has represented a tool with which to increase our awareness of difference, oppression and disadvantage in society thereby challenging conventional meanings embedded in our political discourse. If those meanings can

\(^{38}\) Ibid., p. 68.

\(^{39}\) See also Breton, note 18, above.

\(^{40}\) Chapter III also suggests that women focused on rights strategies in response to federal government constitutional initiatives.
be changed and entrenched in the constitution or reflected in legislation and common law, they enjoy institutional authority and the backing of the state. Arguably, this increases the appeal of rights-based law reform strategies. An examination of ways in which feminists in Canada have used rights language, especially the Charter, to shape feminist discourse and, by extension, the dominant discourse provides the focus for the next chapter.
Chapter III:

Canadian Feminism and the Charter: Developing a Counterdiscourse

"...discourse can...serve members of subordinate classes...in their attempts to demystify, delegitimate, and deconstruct the established norms, institutions, and discourses that play a role in constructing their subordination."\textsuperscript{41}

Canadian feminists have been successful in changing both the nature and the terms of the rights debate. Feminist rights discourse has provided an alternative way of thinking about the concept of equality, for example, by rejecting the idea of formal equality (treating likes alike and unlikes differently) and by gaining legitimacy for the notion of substantive equality that may involve special rights.

Feminists have used both legislative and legal forums to introduce into the dominant discourse and to gain increasing recognition for the idea that women constitute a group in society that has suffered historic discrimination, oppression and disadvantage. In this way, feminists have broadened the traditional liberal discourse in Canada beyond its sometimes limited boundaries in order to effect social change for women.

The experience of Canadian feminists suggests that the legal system can be moved beyond formalism to recognize and give voice to alternative discourses involving rights claims and to provide a forum for the debate of contested political values. The extraordinary instance of constitutional discussions, in particular, provided a unique opportunity to attempt to shape the

\textsuperscript{41} Lincoln, \textit{op. cit.}, p. 5.
values entrenched by law in the Charter. The efforts and success of Canadian feminists during legislative hearings surrounding the entrenchment of the Charter and the Meech Lake Accord as well as in the Andrews case before the Supreme Court of Canada provide examples of the ability of disadvantaged groups to use rights discourse to challenge the language and values of the dominant discourse. Indeed, the Supreme Court has shown a willingness to accept what some might term a postmodern view of our current political environment by taking seriously the interpretations of different groups in society, by allowing disadvantaged groups to act as intervenors in important equality cases and, further, by endorsing the counterdiscourses of oppressed groups in society.

Canadian feminists have relied heavily on rights discourse to present a conception of women's identity that more adequately captures a range of women's lived experiences. They have long recognized the role of law in institutionalizing inequality and law's potential as a tool for challenging unequal societal structures because of its authority and threat of sanction.42 Elizabeth Schneider maintains that

"[t]he way in which a social movement group uses the rights claim and places it in a broader context affects the ability of rights discourse to aid political struggle.

42 Of course, not all feminists, in Canada or elsewhere, believe that a focus on law reform addresses the main causes of women's oppression. See, for example, Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles", Osgoode Hall Law Journal, Volume 25, No. 3, 1987, 485 - 554, Alison Jaggar, Feminist Politics and Human Nature. Sussex: The Harvester Press, 1983, and Chapter IV of this paper in this regard.
Rights discourse and rights claims...can help to develop political consciousness which can play a useful role in the development of a social movement.43

Because they explain as well as influence the cultural construction of gender, law, legal language and rights discourse inevitably shape women’s experiences.44 As well, both constitutional and common law enjoy an authoritative position among societal institutions. Accordingly, feminists in Canada have had an historical commitment to law reform and policy change and their involvement in lobbying and litigation has aimed to make law reflect the reality of their lives.

Feminism - An Overview

As a political movement, feminism is usually defined as an active desire to change women’s position in society. Feminists are, thus, faced with the persistent paradox of requiring gender consciousness as a starting point but calling for the elimination of traditional gender roles as a political strategy.45

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44 Rhode, op. cit., p. 2.

45 Juliet Mitchell and Ann Oakley, What is Feminism, A Re-Examination, (New York: Pantheon Books), 1986, p. 2. It is important to emphasize here that feminists call for the elimination of gender roles not necessarily the elimination of gender differences, though some feminists indeed call for the latter.
In her study of feminist social theory and political strategy, Caroline Ramazanoglu asserts that, although feminism comprises a number of approaches, all share certain characteristics. All versions assert that existing relations between men and women are based on women's oppression\textsuperscript{46} and their subordination to men, and should, therefore, be changed.\textsuperscript{47} Feminism challenges much in society that is taken for granted as natural, including the history and future course of society. In addition to providing new ways of thinking about the world, feminism attempts to change the world by transforming the relations between women and men. This makes feminism both a set of ideas and a political practice whose approaches vary from consciousness-raising to organized demands for equality. Finally, feminism always encounters resistance because it implies a critique of reason, science and social theory, rejects an objective view of the relations between women and men and questions our ability to know what "universal truth" is.\textsuperscript{48}

Because feminists seek not to produce an abstracted theory of society, but to change society for the better, feminism becomes a lived experience and political struggle as well as an intellectual activity.\textsuperscript{49} One way in which feminists reflect this duality is through discourse that introduces

\textsuperscript{46} See Young, \textit{op. cit.}, pp. 45 - 64, for a comprehensive discussion of various forms of oppression and their impact on different disempowered groups in society.

\textsuperscript{47} The exception is, of course, conservatism which, as Jaggar notes, is not feminist because it denies that women are oppressed. See Alison M. Jaggar, \textit{Feminist Frameworks: Alternative Theoretical Accounts of the Relations between Women and Men}, (New York: McGraw-Hill Book Company), 1978, p. 81.


\textsuperscript{49} \textit{Ibid.}, p. 45
into the political mainstream a description of women's experiences that challenges the dominant ideology - although to varying degrees - and by trying to understand in a more or less scientific way the societies in which women have lived and continue to live. As noted above, the feminist project is one which attempts to incorporate theory into practice and to devise a practical description of women's identity. Rights discourse plays a key role in this effort.

The Evolution of Feminist Rights Discourse in Canada

It seems obvious that Canadian women - as citizens - have been particularly affected by the common law and the constitution. They have had and continue to have an interest in the arguments of classical federalism concerning the division of powers; in more contemporary discussions of Charter rights and executive federalism; and in litigation on issues that affect their public and private lives. Yet women's involvement in constitutional and legal discussions has a relatively weak history and only recently have their calls for equality met with any degree of success.

In the late nineteenth century, with industrialization increasing the complexity of the economy and society, citizens began looking to legislative means to regulate many aspects of Canadian life. This meant that those interested in changing the way in which society operated needed access to the electoral process both as voters and as elected officials. Women, especially, saw

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access to the vote as a way to change some of the male-dominated structures in society which
they saw as inequitable.  

In the suffrage and educational movements of the 1870s and later, women - primarily privileged
women - saw their goal as achieving for women equal places with men in the existing power
structure. Society was, of course, shaped by a classical liberal legal system that generally has
treated women differently from men, asserting that men represent the norm for legal
personality. As the term suggests, this "sameness-difference" approach is based on the
differences and similarities between women and men and on female-to-male comparisons. It
seeks a common status for men and women using men as the standard against which women's
behaviour is measured. Yet many of women's experiences - like pregnancy and childbirth -
find no counterpart in the life experiences of men making formal equality approaches unable
to address fundamental aspects of women's existence.

Women's early struggles for equal legal treatment underlined the difficulty of relying on the
accepted discourse and its "neutral" language that reflected sameness or difference to protect

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54 Ibid., p. 33.
their rights and to recognize their actual experiences. This was at least partly because the lives of men and women were described as separate, with the male world being "public" and the female world "private" and confined to the family. Legislation incorporating the language of public and private activities that clearly discriminated against women was understood within the dominant political, legal and social institutions as simply recognizing women's differences from men. Following the approach of treating likes alike and unlikes differently, it was asserted that because women were not like men, they should not be treated like them. As a result, legislation that refused women the right to vote, to hold elected or appointed public offices and to enter training for certain occupations was allowed to stand. The language of "public versus private" entailed an understanding of women as legally incapacitated from entering public life because they were "different" from men. Not until 1929 did the Judicial Committee of the Privy Council overrule the decision by the Supreme Court of Canada that women were not "persons".

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56 For an overview of cases involving women's struggles for status as persons and for political rights as such, see Beverley Baines, loc. cit., pp. 29 - 63 and Mary Eberts, "Women and Constitutional Renewal" in the same collection at pp. 3 - 28. Iris Young suggests that a denial of difference contributes to social group oppression and that even when difference is recognized, it often involves notions of deviance. See generally Young, op. cit. and Chapter 4 in particular.

57 The case involved the issue of whether women were legally persons and therefore entitled to be appointed to the Senate pursuant to the appointment process.
From the 1930s on, feminists tried to find ways in which they could shift the terms of equality discourse so that they were seen as equal to men as opposed to different from them and so that they could gain legal access to public life. They relied on traditional liberal understandings of rights and rationality and adopted the mainstream formal equality approach to legal rights in their efforts to be included in public life. In the 1960s and 1970s, their concerns changed from demands for greater involvement in the public world to demands for a new definition of public and private roles. In this new phase, women sought to infuse public life with "private" values rather than to focus on legal rights to equality.

By the end of the 1970s, significant change had taken place regarding men’s and women’s roles. As the slogan "the personal is political" began to have some weight, women pressed governments to act in recognition of the changes that had, in effect, transformed many aspects of society. Women’s groups, which had proliferated over the previous two decades with the encouragement of the federal government, moved beyond Enlightenment liberalism and its strict formal equality focus to embrace a concept of substantive equality that addressed social and economic issues. Feminist rights discourse shifted from seeking equal treatment to

58 Sandra Burt, loc.cit., p. 115.
59 The notion that "the personal is political" has been "central to contemporary feminism...(and) is intimately related to the idea of consciousness-raising, which yields both a theory (of patriarchy) and a programme for action, drawn from the lives of individual women...Rather than imposing a preconceived doctrine on events, a theory was to be constructed out of the fragments of personal histories." Diana Coole, Women in Political Theory: From Ancient Misogyny to Contemporary Feminism. (Sussex: Wheatsheaf Books), 1988, p. 255.

60 Accordingly, women began demanding funding for child care and services for single parents and asking governments to focus on issues of affirmative action, reproductive
demanding equal outcomes. In practice, this involved refusing to limit demands to appeals for equal pay, equal educational opportunities and equal civil rights, for example, or for equal rights rather than special or sex-based rights.\textsuperscript{61}

Rather, many Canadian feminists began to challenge traditional understandings of equality with more radical approaches to rights discourse that stressed subjectivity and particularism. They focused on the unique position of women and on the need for laws and policies that recognized their life experiences.\textsuperscript{62} Personal experience became important in understanding meaning as did the process of contextualizing what were seen as traditional male "truths" to take into account other interpretations of knowledge and reality.

Feminist discourse in the debates preceding entrenchment of the Charter, in later discussions around the Meech Lake Accord and in litigation on equality rights provides an illustration of this shift to broader approaches to equality and to the importance of discourse in changing societal understandings of the disadvantage and oppression women - as a group - have faced.

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\textsuperscript{61} Razack, \textit{op. cit.}, p. 22.

\textsuperscript{62} Burt, \textit{loc. cit.}, p. 113.
The Creation of a Feminist Discourse: Lobbying for Reform and Litigating Values

i) Lobbying for Reform

Women’s lobby activities focusing on the entrenchment of the Charter and the attempted passage of the Meech Lake Accord reflected the recognition that the legal phraseology of the Canadian Bill of Rights (the "Bill of Rights") failed to incorporate language that adequately described women’s experiences and oppression. Moreover, women understood the power of law - especially constitutional law - and the role of legal language in shaping society’s understanding of equality and of women’s place in that society.\(^{63}\) They realized that they needed a voice to express their interests and to influence the way in which society structured their disadvantage.

Feminist demands for a strongly worded charter of rights that guaranteed and protected women’s equality rights in 1980-81, and for wording that did not jeopardize those rights in 1987-90, came in response to federal government initiatives.\(^{64}\) In spite of being in a reactive position vis-a-vis the federal government’s patriation agenda, women mounted an effective lobby aimed at ensuring

\(^{63}\) Brodsky and Day, *op. cit.*, p. 13. Alison Jaggar believes that the fact that women have had to focus so strongly on law and legal reform attests to the inability of liberal feminism and rational argument to effect meaningful social and economic change. See Jaggar, *Feminist Politics and Human Nature*, *op. cit.*, p. 183.

\(^{64}\) Initially, women mobilized to oppose federal government proposals to shift responsibility for divorce to the provincial level in 1979.
that the proposed charter included substantive as well as procedural guarantees of equality.\textsuperscript{65} Post-Charter, feminists continued the push for substantive equality begun in 1980-81, focusing on "Charter-watching" in the courts as litigation developed involving equality rights. And they reacted bitterly to the\textit{fait accompli} of Meech Lake because their hard-won Charter gains seemed to slip away.

\textit{The Charter - 1980-81}

Feminist discourse through the 1980-81 hearings of the Special Joint Committee of the Senate and of the House of Commons on the Constitution sought to shift the established understanding of guaranteed equality rights and women's disadvantage and to fix a new understanding in the constitution, thereby making an authoritative symbolic statement about equality. It presented a subjective, historical view of women's constitutional past from the dual perspective of the "collectivity" of women as well as of individual women and rejected those constitutional symbols of federalism and patriarchy that had led in the past to women's oppression. In particular, the discourse sought to ensure substantive equality before the law as well as equality under the law; equal benefit and protection of the law; an expanded understanding of discrimination as disadvantage as opposed to simply distinction; and guarantees of the rights of women as a group and as individuals to equality with men.\textsuperscript{66}


\textsuperscript{66} Section 28 states that the rights in the Charter are guaranteed equally to men and women.
Feminist lobby efforts were carried out by three groups: the National Action Committee on the Status of Women (NAC), the Canadian Advisory Council on the Status of Women (CACSW) and the National Association of Women and the Law (NAWL). These were the only "equality-rights-focused" groups to appear before the Special Joint Committee.  

NAC offered a subjective, situated discourse mixed with elements of rationality, suggesting that  

"[d]ifferences between the lifestyle patterns of women and men have not been considered by the drafters of the proposed charter. We ask you now to look at the new charter in a different way, from the perspective of over half the population of Canada, to see its deficiencies and to consider amendments to affirm and protect the fundamental rights of equality of women with men."  

In addition, NAC focused on ensuring that, unlike the Bill of Rights, the new charter would guarantee substantive as well as procedural equality. In this regard, women were attempting to shift the dominant notion of equality past the traditional sameness-difference paradigm to an approach that included the concept of more substantive equality:  

"Equality before the law, the wording proposed in the government’s Charter of Rights, and used in the present Canadian Bill of Rights, has been interpreted to mean only that laws, once passed, will be equally applied to all individuals in the category concerned. The law as written could discriminate against women, which  

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67 The Canadian Congress of Learning Opportunities for Women and Campaign Life - Canada also made presentations to the Committee. Both rejected the concept of an entrenched charter and neither maintained a presence on the constitutional scene in subsequent discussions.  

68 Jill Porter, Member of the Executive, National Action Committee on the Status of Women, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, (hereafter, Special Joint Committee, Minutes) Issue 9, November 20, 1980, p. 57.  

69 Lynn McDonald, President, National Action Committee on the Status of Women, Special Joint Committee, Minutes, loc.cit., p. 59.
is neither just nor acceptable. The courts have been concerned with maintaining the just administration of the law, but not with discrimination built into the law itself. Thus the Supreme Court of Canada decided against Lavell and Bedard, two Indian women who lost their status on marriage to non-status men ... NAC recommends amendments to provide for equality in the laws themselves, as well as in the administration of laws.  

In addition to the Lavell and Bedard cases, NAC referred to the Person's Case as well as to the attempts of Stella Bliss and Irene Murdock to have their equality rights recognized under the Bill of Rights.  

In so doing, NAC sought to change the constitutional meaning of equality according to women's view of society. Feminist demands for clear, precise language in the Charter reflected the role of the constitution in guaranteeing a substantive interpretation of equality by the courts. Feminists expected the language to reflect a feminist version of history and society, not what they viewed to be the dominant, ahistoric, patriarchal version.

"The opening section under guarantee of rights and freedoms falls short of the statement of principle we would expect. Imprecise wording in the limitations clause could open the way to a variety of interpretations of permitted exceptions. Indeed, the potential for driving a truck through the clause led our participants at the [October 18, 1980 public] conference [on the constitution] to dub it the "Mack truck clause"."  

70 Ibid., pp. 58 - 59.

71 In the case of Stella Bliss, the Supreme Court ruled that she was not discriminated against in not being deemed eligible for unemployment insurance because she was a woman but because she was pregnant; Irene Murdock, the Court decided, had no claim to a share in the ranch on which she had, for 20 years done most of the work because she had done no more than what a normal farm wife would do. See Special Joint Committee, Ibid., p. 60.

72 McDonald, Special Joint Committee, Minutes, loc.cit., p. 58.
The importance women placed on recognizing their oppression and disadvantage is revealed in their account of women's constitutional history in which women as a group have suffered under a male-conceived legal and social system.73

For example, NAWL and CACSW asked that section 15, the "non-discrimination" clause, be renamed the "equality" clause to remove any ambiguities that could be used to justify discrimination based on formal equality distinctions between men and women. Here, they referred to former Minister of Justice, Otto Lang's remarks that the addition of the word "equal" to section 15 of the federal government's 1978 constitutional proposal, Bill C-60, would mean that there could be no discrimination unless it was reasonable discrimination. The CACSW, however, claimed that actions that disadvantaged women could never be reasonable74 and suggested that many of women's "natural differences" from men were, in fact, culturally imposed by a gendered, patriarchal discourse.75

Feminists were, in essence, attempting to redefine what it meant to be a woman according to Canada's constitution and to have that definition accepted as part of the dominant discourse. They saw the Charter discussions as an opportunity to add their own perspective to the

73 To give more adequate attention to women's experiences, NAC also called for greater representation of women on the Supreme Court of Canada and for a constitutional process that occurs outside of Parliament, where, at the time, only 5% of members were women. Ibid., p. 62.

74 CACSW also rejected the argument made by Davie Fulton, Minister of Justice when the Canadian Bill of Rights was considered in 1960. Fulton stated that men and women are different and that it is natural to have male-female differences entrenched in law.

75 Mary Eberts, Special Joint Committee, Minutes, loc. cit., p. 126.
discussion of equality rights, thereby challenging the status quo. The identity they sought to present during the consultations reflected both the influence of existing institutional norms and attitudes to women and equality and the desire of women to be treated differently, according to a new, "feminist" discourse created by women, not for them. These included viewing women’s experiences from a perspective that recognized their historic disadvantage as a group and as individuals; rejecting the hegemony of the dominant discourse that structures the institutions of law; and casting aside the sameness-difference approach to equality and discrimination in favour of one that focused on disadvantage and oppression.\textsuperscript{76}

Feminist efforts succeeded in ensuring that the Charter included guarantees of substantive equality and of equal benefit and protection of the law in sections 15 and 28, the "women’s sections":

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

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

\textsuperscript{76} Catherine MacKinnon believes that the sameness/difference paradigm cannot address the main cause of women's inequality which, she states, is oppression and domination by men. Not all feminists believe it is important to move beyond the sameness/difference approach. Many "liberal feminists", for example, demand similar treatment to men regardless of any real or perceived differences between men and women. Accordingly, they do not support special maternity provisions for women. Others, radical and cultural feminists in particular, argue that there are genuine differences between men and women and that policies and laws should both recognize and support the ways in which women are different.
28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

These would become both the foundation of a feminist discourse and the tools with which feminists would subsequently argue for social policies and legal decisions that respected the "spirit of the Charter", hoping, one might guess, that the authority of constitutional language would ensure the recognition of feminist goals.

Meech Lake - 1987-90

As in 1980-81, women mobilized around the constitution in 1987 in response to government activity that could potentially harm their hard-won constitutional safeguards and undermine the very new societal commitment to substantive equality. Not only did they believe their Charter experience had earned them a place in any future constitutional discussions, they thought the Charter reflected a political commitment to equality for women and minority groups. Alan Cairns has noted the extent to which the Charter had reordered the constitutional landscape, elevating the status of citizens and weakening that of governments:

"The Charter is not only a rearrangement of the machinery of government to the advantage of courts and to the detriment of legislatures. It also enhances the status of citizenship and brings the citizenry into the constitutional order."  

77 Women also worried about the potential for decentralization and proposed changes to the federal government's spending power and the implications those might have on the creation of new national shared-cost programs such as child care.

Meech Lake, in both substance and process, somehow overlooked what to many seemed an obvious and fundamental change in the way constitutional change was to take place in a post-Charter Canada. Arguments that attempt to explain the inevitability of the federal government's approach seem unable to address the fundamental concerns of the groups who believed they had gained constitutional status in 1982 as well as the right to be consulted on future changes. Feminists, for example, thought their "voice" had acquired legitimacy as part of constitutional discourse because of sections 15 and 28.

In particular, many women's groups were outraged that the Accord was signed without prior public consultation. They were acutely concerned that the distinct society clause aimed at recognizing Quebec's "special status" would apply to the equality guarantees of the Charter, thus threatening their application in Quebec. As well, they worried about the symbolic statement the Accord might make by not mentioning women's equality rights even though other rights were mentioned. To some, this omission might say

"that women's rights, along with equality rights of other minorities, have secondary status, and that the goal of achieving equality for those groups is secondary to other goals."  


80 See for example Patrick Monahan, After Meech Lake: An Insider's View, (Kingston: Institute of Intergovernmental Relations, Queen's University), 1990.

81 Lynn Smith, loc. cit., p. 52.
Lynn Smith has argued that the symbolic implications of Meech Lake for women were important on a number of counts. First, the very impetus for the Accord stemmed from a desire to "bring Quebec into the constitutional family" at the symbolic level. Second, values other than equality (the protection of denominational schools, for example) were protected in the Accord out of caution. Finally, she notes that the effects of a symbolic statement about women's equality could directly influence not only specific issues of constitutional interpretation but also other areas in which courts must consider public policy and community values. If the courts took the Accord as a signal that women's equality rights had lost some of their value in society, perhaps they would interpret equality cases less generously. This could potentially undermine the impact feminist discourse had enjoyed thus far in terms of changing the accepted meaning of equality and disadvantage. Arguably, much of this impact stemmed from the force of constitutional statements about equality.

As Chapter II noted, constitutions, as law, are symbols of societal values that send messages about the political culture and its priorities. Symbolic discourse, as Lincoln and MacKinnon suggest, plays as vital a role as more obvious verbal language in constructing societal norms. Feminist presentations before the various committees and task forces studying the Accord reflected this. They frequently spoke of their fight for the equality guarantees that ultimately surfaced in the Charter and believed that the process and substance of Meech Lake betrayed the trust forged less than a decade earlier. As well, they were concerned that recognizing Quebec

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82 See Chapter II.
as a distinct society might undermine the progress made during the 1980s in shifting the conception of equality to embrace the substantive notion of equality of results.83

Feminist discourse during the Meech Lake debate focused on many of the same concepts as during the Charter debate. Its overriding goal was to reinforce the concept of substantive equality reflected in the Charter. Yet feminists soon realized that the terms of the dominant discourse on equality had perhaps not shifted as much as they had believed whereas the political landscape had changed dramatically: during Meech Lake, women were competing for constitutional power and recognition of their identity with Quebec, aboriginals, multicultural groups, the federal government and provincial premiers.84

83 Sherene Razack questions the extent to which such a shift really differs from more formal rights orientations. A more traditional rights discourse, she argues, even one that shifts focus away from the dominant group to the opportunities various disadvantaged groups need, still orders perceptions according to the notion of comparison.

"Equality in its liberal roots stresses the equal distribution of resources to which we are entitled on the basis of our common humanity as rational beings. The norm may shift, and we may recognize that other groups are entitled to their fair share, but the problems of evaluating competing equality claims, now between groups, persist."


84 Feminist discourse also had to accommodate the emergence of a number of new groups in the wake of the Charter including the Women's Legal Education and Action Fund (LEAF). These new groups joined with existing groups to object to the content and process of Meech Lake. In addition to NAC, CACSW and NAWL, the Ad Hoc Committee on the Constitution, created in 1981 to organize the constitutional conference the federal government had cancelled, the Canadian Day Care Advocacy Association, the Federation des femmes du Quebec and the Quebec Council on the Status of Women spoke before various government committees on the Accord to address issues related to equality, the distinct society clause, the federal spending power and executive federalism. As well, a number of provincial women's groups and organizations spoke to the task forces and select committees set up in Ontario, Manitoba and New Brunswick and to the Charest Committee which travelled to provincial
Although feminists recognized that the discourse of the status quo was not the only legitimate discourse, they perhaps underestimated the strength of the numerous alternative and resistant discourses, all demanding to have their "otherness" recognized. During the Charter debates, the main obstacle feminists faced was the patriarchal status quo. They sought to privilege their rights over those of only one other group - men. An approach that emphasized the standpoint of women operated effectively because the issues were constructed in such a dichotomous way. As well, there was general acceptance among Joint Committee members of women’s position. But during Meech, the multiplicity of groups and players created a "postmodern" plurality of standpoints, the claims of which all competed for recognition. And whereas in 1980-81, the federal government acted as an ally in terms of encouraging and welcoming women’s views, in 1987-90, women fought their battle alone and had to contend with the demands of several other interests.85

During Meech, as in 1980-81, women’s focus was on establishing the legitimacy of their rights discourse and on fixing in the constitution a substantive meaning of rights that reflected women’s reality as an oppressed group. For example, NAWL, in its presentation before the Special Joint capitals to discuss New Brunswick’s Companion Resolution to the Meech Lake Accord. Aboriginal women’s groups also mobilized during Meech Lake. Theirs is a special case in the sense that their concerns now represent yet another constitutional discourse. This paper focuses more closely on the discourse of women’s groups seeking equality as women rather than as aboriginal women, multicultural women and so on.

85 Some have gone further to argue that women were in fact manipulated by the federal government in 1980 - 81 to gain support for the "people’s package". See Mary Eberts, " A Strategy for Equality Litigation under the Charter", in Weiler and Elliot, Eds., Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, (Toronto: Carswell), 1986, p. 412.
Committee of the Senate and the House of Commons on the 1987 Constitutional Accord\textsuperscript{86},

began:

"We are pleased to be invited here today on the first day of your hearings concerning the Meech Lake Accord as a group dedicated to improving equality rights. It is a recognition that the Constitution is no longer about federal and provincial powers only; it is also about equality rights. It recognizes that those rights must be considered in each round of amendments to the Constitution.

While NAWL welcomes the reintegration of Quebec into the Canadian Constitution as a distinct society, we are concerned that women’s equality rights not be in any way compromised in the process."\textsuperscript{87}

LEAF, CACSW, NAC and the Ad Hoc Committee continued to develop a feminist rights discourse by referring to the "legacy of 1982".\textsuperscript{88} For example, the Ad Hoc Committee, in its presentation before the Joint Committee on Meech Lake began by invoking 1982:

"If I may just for a moment take you back to 1981 [when] the women of Canada came together with a fierce determination to become an impressive and an important part of the constitutional process, and indeed, of Canada’s history.

Six years later, we are back again and we are rallying across Canada to address our growing concerns about equality issues. It would appear that equality is a very fragile thing."\textsuperscript{89}

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\begin{footnote}{\textsuperscript{86} Hereafter referred to both in the text and notes as Special Joint Committee on Meech Lake.}
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\begin{footnote}{\textsuperscript{87} Helena Orton, National Association of Women and the Law, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 2, August 4, 1987, p. 81.}
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\begin{footnote}{\textsuperscript{88} See, for example, Lucie Lamarche, Women’s Legal Education and Action Fund, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 5, August 5, 1987, p. 111; Marilou McPhedran, LEAF, \textit{ibid.}, p. 112; Sylvia Gold, President, Canadian Advisory Council on the Status of Women, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 10, August 20, 1987, p. 97; Louise Dulude, President, National Action Committee on the Status of Women, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 13, August 26, 1987, p. 38.}
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\begin{footnote}{\textsuperscript{89} Pat Hacker, Ad Hoc Committee of Women on the Constitution, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 15, August 31, 1987, p. 128.}
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Women were concerned that the provisions of the Accord would allow a hierarchy of rights to be built up through the levels of the court system to the detriment of women's equality rights.\textsuperscript{90}

As noted above, by 1987, a number of additional feminist groups had come onto the political scene. The increased number of women's groups active in the Meech Lake discussions naturally increased the volume of rights discourse presenting a feminist version of equality. Moreover, the actual quality of the discourse had changed and, perhaps surprisingly, the focus had lost some of its radical tone. In 1980-81, NAWL alone had relied upon a more traditional liberal rights-oriented approach in arguing for legislative certainty in drafting the Charter and had presented a series of well-reasoned, tightly drafted proposals for modifying and "fixing" the wording of the proposed text. NAC and CACSW had offered more radical approaches. By 1987, all women's groups chose to use at least some of the tools of the dominant discourse in making their case against the Accord, particularly in terms of its tendency to create a hierarchy of rights. Yet feminists were criticized for pursuing "technical" legal points when they attempted to gain explicit protection for equality rights and argued over whether section 16 of the Accord was a substantive or interpretive clause. Moreover, the validity of their opinions was questioned.\textsuperscript{91}

\begin{footnotesize}
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\item \textsuperscript{90} Marsden, \textit{loc.cit.}, p. 5.
\item \textsuperscript{91} See, for example, the interchange between Chris Speyer and Sylvia Gold, CACSW President, Special Joint Committee on Meech Lake, \textit{Minutes}, Issue 10, August 20, 1987, p. 105.
\end{itemize}
\end{footnotesize}
For example, the Ad Hoc Committee of Women on the Constitution referred in its presentation to a legal opinion commissioned from the law firm of Tory, Tory, DesLauriers and Binnington. The opinion concluded that one could not say that Meech Lake represented no risk to women’s equality rights. A number of Committee members questioned the strength of the legal opinion and contrasted its conclusions to the opinions received from other law firms. For example, David Daubney, in response to NAC’s concerns that Meech Lake undermined the supremacy of the Charter, cited the testimony of Yves Fortier, former President of the Canadian Bar Association, to counter the women’s view:

"[Mr. Fortier] disagreed with your position and with those others who felt that reference to section 25, aboriginal rights, and section 27, multicultural heritage, in section 16 poses any threat to other provisions of the Charter, particularly section 15 and 28 ... I think there is a legal flaw in your interpretation ... because I can tell you that the legal opinions we have received from experts who have appeared before us, as well as the independent legal advice we have obtained from a prominent Toronto law firm and that of two leading constitutional lawyers there, do not concur with your view ... I think you are going to have to give us something less remote and more realistic than [your examples of Quebec violations of rights in the Duplessis era] or otherwise, quite frankly, the case you are trying to put forward [that the distinct society clause may also threaten women’s equality rights] is not going to be successful."  

Jill Vickers has explained the relative ease with which the traditional discourse of equality rights dismisses arguments in defence of equality goals of the new equality seekers - women - because the new arguments are underdeveloped.

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92 Mary Eberts, Ad Hoc Committee, Special Joint Committee on Meech Lake, Minutes, Issue 15, loc.cit., p.129.

93 David Daubney, Special Joint Committee on Meech Lake, Minutes, Issue 13, loc.cit., pp. 33 - 36. See also Leo Duguay, Issue 13, loc.cit., pp. 140 - 144.
"By contrast, the strategies of resistance or arguments in opposition to the goals of these new equality seekers are well developed and cast in analyses which "fit" the general ideological frame, making them easily absorbed and harder to refute." 94

In adopting the more traditional approach, women abandoned a focus on their historic oppression and disadvantage in political and legal contexts. During Meech, the discourses of the provinces and particularly of those arguing for Quebec’s special status enjoyed stronger traditions and greater immediate political appeal than feminist equality discourse. As well, women’s groups themselves were fragmented into factions of Quebec women, aboriginal women and so on, leaving NAC, NAWL and CACSW, for example, open to criticism for lacking both representational legitimacy, sincerity and validity. 95 Even though the feminist lobby from outside Quebec had conceded that it recognized the demands of other groups, especially Quebeckers, it was not successful in convincing the decision makers that women were not simply arguing for recognition at the "expense" of Quebec. 96

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95 See Robert Kaplan, Special Joint Committee on Meech Lake, Minutes, loc. cit., p. 88. Kaplan went on:

‘Lysiane Gagnon wrote:

"Would this perhaps be a veiled method and, let us be frank, a nicely hypocritical one, of trying to block recognition of the distinct society that is Quebec simply because the proposers are against this recognition, because they want a homogeneous country but are afraid to say so clearly?"

Chris Speyer and Yvette Rousseau also questioned the ability of women’s groups from outside Quebec to speak with legitimacy.

96 Women’s discourse was received with more generosity of spirit during the hearings of the various provincial committees and the Charest Committee between 1989 and 1990. The
Later, as the Meech debate moved to provincial legislatures, women's groups focused on the way in which the process of Meech Lake - a process which exemplified executive federalism and which was characterized as a private meeting of "11, white, able-bodied men" - excluded women from participating in any meaningful constitutional change. They denied the ability of men to speak on behalf of women or to reflect elements of women's experiences. Chaviva Hosek, in commenting on the participation of women in the Charter process, offers observations that are almost more applicable to the Meech Lake experience:

"The political history of the development of the Charter of Rights and Freedoms shows women's groups addressing a steadily narrower range of issues as it becomes clear that fewer and fewer of their concerns will be met. It was necessary to choose the very few rock-bottom issues to address, without which the Charter would be wholly unacceptable on the issue of women's equality with men. This is also a story of the progressive exclusion of women from the process of constitutional change, and of the elaborate strategies required for them to break into the process."97

Hosek also notes that the fact that women were reduced to functioning as an "interest" group rather than as a natural and legitimate societal group shows how our national institutions have failed to address concerns of women in any meaningful way.98

The inability of feminists to break the dominance of traditional discourse during Meech might suggest that a rights-based discourse is doomed to fail, perhaps for the reasons Vickers notes. approach women's groups used in presenting their views and perspectives differed very little - if at all - from the discourse during the Special Joint Committee on Meech Lake. The very nature of the three provincial forums and the fact that the Charest Committee travelled to provincial capitals meant that, in addition to hearing from the national women's groups, those bodies also heard from provincial women's organizations outside Quebec.

97 Chaviva Hosek, loc. cit., p. 296.

98 Ibid.
As well, feminists face a continual challenge in terms of being seen as a group representing all women rather than as a narrowly focused interest group. However, the Charter has proven valuable in the struggle to implement equality guarantees through litigation, a struggle which naturally complements law reform activities. Rights discourse holds tremendous potential. As Deborah Rhode notes,

"[b]ecause claims about rights proceed within established discourse, they are less readily dismissed than other progressive demands. By insisting that the rule of law make good on its own aspirations, rights-oriented strategies offer a possibility of internal challenge that critical theorists have recognized as empowering in other contexts...[F]or subordinate groups, rights-based frameworks have supported demands not only for individual entitlements but also for collective selfhood."  

The paper now turns to an examination of the experience of feminist litigators in the struggle over the meaning of equality.

ii) Litigating Values

The discourse of pre-Charter court decisions followed conventional legal doctrine and tended to focus on gender differences as opposed to gender disadvantages. A broad mandate of formal equality often masked substantive inequality. This left little scope for those pushing for substantive women's equality rights to question dominant legal ideology.

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100 Rhode, op. cit., pp. 344 - 345.
Unlike the Bill of Rights, the Charter is entrenched in the Constitution and applies to both federal and provincial governments. As well, early on, the courts showed a willingness to interpret the equality guarantees of the Charter more generously than the equality provisions in the Bill of Rights.  

Further, both the lack of progress that legislatures made during the three-year moratorium in terms of amending legislation to conform with the equality guarantees, and the majoritarian predisposition of legislative reform suggested to many that litigation efforts would be more likely to result in enlightened application of the equality sections.

Mary Eberts, one of the LEAF members who appeared before both Charter and Meech committees and the Supreme Court in Andrews, believes that the political process has disempowered women and that our democratic pluralist system which has recognized certain groups as distinct and insular minorities advantages those groups at the expense of women. Because women comprise a diverse group that includes women of different racial, ethnic and religious backgrounds as well as lesbians, physically challenged women and so on, it is more difficult for them to organize politically around concrete goals. Groups that stress a single


102 Section 28 came into force on April 17, 1982 with the other provision of the Constitution. Because of a three-year moratorium, section 15 did not come into effect until April 17, 1985. The moratorium was designed to give governments an opportunity to amend legislation that would have contravened the equality guarantees.

103 Eberts, loc. cit., p. 415.

104 Ibid.
aspect of their identity, such as multicultural or aboriginal groups, may be more successful in a pluralist system that recognizes interest groups. This suggests to some that the democratic process is skewed against women's interests and that the courts may provide a more useful vehicle for addressing equality considerations, at least in the short term.

Early Charter cases suggested a willingness on the part of the courts to put force into guarantees of fundamental freedoms and legal rights. But the first equality cases were disappointing from the perspective of women. Few cases were initiated by women. As well, men have been using the Charter to undermine women's protections and benefits. Observers of the Supreme Court of Canada generally agree that the activism of early Charter decisions is now giving way to a more cautious approach. Moreover, recent Courts have often been deeply divided over issues of interpretation. These divisions were perhaps not as obvious in early cases in which the Court sought to respond to concerns that the Charter would not be interpreted as narrowly as the Bill of Rights. Now, as the Court grapples with "basic questions of liberal constitutional theory involving the meaning and value of constitutional rights," differences in perspectives become more apparent.

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105 Iris Young, referred to above, would disagree. Young calls for a revitalized democratic process that seeks the input of natural groups rather than interest groups because of the tendency of pluralism to encourage groups to focus solely on their concerns at the expense of all others. See note 27 above.

106 For a statistical overview, see Brodsky and Day, op. cit., p. 3.

Sherene Razack, in her study of LEAF and feminist legal activity in Canada, notes that feminist litigation must, by definition, challenge the liberal legal paradigm. This makes it inherently contradictory: feminist litigation involves telling women’s stories in a language and setting that by their very nature deny the relevance of women’s lived experiences and the reality of their oppression. This oppression is the result of a patriarchal, hierarchical society in which the power of the dominant group leads to disadvantage for others. Yet the legal system, Razack suggests, is designed to evaluate individual claims for rights, not questions of power or claims that seek to privilege groups over individuals. Feminists speaking about power and oppression in the courtroom will break those legal rules that demand the presentation of rights in individual rather than group terms and that focus on those rights in an ahistoric, universal way. Feminist litigation must find ways to emphasize the social context of facts rather than the narrow legal issues at play using a new discourse or "truth" that threatens the status quo and the realities of judges. This is a major challenge as courts continue to operate within a framework that tends to recognize individual claims to equality to the detriment of group claims.

108 Razack, op. cit., p.51.

109 Rhode stresses the importance of moving from a differences or dominance conception of inequality to one that focuses on disadvantage in terms of the impact certain practices have on quality of life, for example. In particular, she criticizes MacKinnon’s focus on dominance for presenting too crude and general an understanding of power. Disadvantage, Rhode claims, can capture various manifestations of power relations and is a more politically useful way of approaching inequality or to apply contextual judgements to procedural values. See Rhode, op. cit., pp. 56 - 57 and pp. 82 - 86.

110 Razack, op. cit., p. 71.

111 Re Blainey and Ontario Hockey Association (1986), 54, O.R. (2d) 513 (C.A.) rev’g (1985), 52 O.R. (2d) 225 (H.C.) and the Quebec sign law are two examples of instances in which the court decided in favour of an individual’s rights regardless of what that individual’s actions would mean for the group or community of which he or she was a
The Women's Legal Education and Action Fund (LEAF) has as one of its goals to address that very challenge. LEAF was formed shortly after the Charter's equality sections came into effect in 1985 and was modeled after similar litigation funds in the U.S. It focused on creating a national fund, on sponsoring test cases and on educational and lobby activities.

"‘Occupying the field’ on equality issues in court, doing proactive litigation, influencing the influencers, were components of LEAF’s vision...Cases taken had to concern equality rights; arise under the Charter of Rights and Freedoms or under Quebec’s Charter; present strong facts; and be of importance to women."113

Critics of using litigation to advance feminism's political agenda often argue that the legal system's more stringent institutional rules construct a bias in favour of a discourse of abstract and objective truths that cannot reflect women's concrete experiences.114 Yet women's Meech experience suggests that equal reluctance may exist in the legislative forum in terms of introducing policies to address women's persistent inequality. Conversely, in court, the issues of a particular case may offer a concrete opportunity to introduce stories of women's realities that challenge the status quo more directly than can be done in a legislative arena.

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114 See generally Smart, loc. cit., and Fudge, loc. cit.
In any case, because of the role law plays in shaping institutions, discourse and public understanding of issues and because of the authority of constitutional and common law, feminists cannot ignore the contribution to equality that lobbying and litigation might be able to make nor the interplay between legislation, litigation and discourse. As well, a number of successes in the litigation area suggest that rights discourse has the potential to yield positive practical results and to contribute significantly to the acceptance of feminist definitions for key terms in our collective discourse.

American legal scholar Martha Fineman, studying child custody cases in the courts, has illustrated how litigation can change the way rights are understood. She examined the discourse used by social workers and mediators and concluded that it has resulted in a substantive shift in understanding the concepts and issues involved in the modern custody debate. She suggests that custodial mothers as a group have been disadvantaged in the political process and notes that "their voices cannot be expressed through existing and accepted discourses or rhetorical concepts." Fineman's work explores the competing discourses of law and social work and concludes that,

115 Sheila McIntyre, LEAF member and Professor of Law, Queen's University Law School, stressed the necessity of pursuing litigation for this reason during a telephone conversation, April 4, 1992.


117 Ibid., p. 730. This observation causes Fineman, like Young, to wonder about the viability of the pluralist model in modern political society.
"in order to become dominant, a discourse must compete with other potentially dominant discourses - it must exert control over the concepts and ideas that are understood to be the foundation of the area..."\textsuperscript{118}

She goes on to describe how social workers have challenged the central aspects of legal ideology by asserting what was "really" happening in the divorce context. By presenting their arguments in the form of "stories" that contained powerful images and by presenting images that intersect with the interests of significant societal groups, they created a new reality that succeeded in displacing the formerly dominant adversarial approach to divorce and custody. They were able to shift the terms of discourse surrounding child custody.

The intervention of LEAF in equality litigation suggests that feminist rights discourse may be able to succeed in a similar venture, focused as it has been on presenting substantive alternatives to various legal interpretations of rights, on telling women's stories that challenge the traditional conception of equality and on consciousness-raising in general. In addition, by evoking images that are familiar if somewhat unsettling, feminist litigation seems to have redefined some aspects of the equality debate and to have departed more dramatically, at least in some cases, from the traditional liberal feminist discourse than did discourse pressing for legislative change during the Charter and Meech debates. These efforts have resulted in a number of substantive changes in the interpretation of equality guarantees. The \textit{Andrews} case, in particular, appears to support these observations.

\textit{Andrews}

\textsuperscript{118} \textit{Ibid.}, p. 736.
Mark Andrews was a British citizen whose attempt to practice law in British Columbia was blocked by a section in the Barrister’s and Solicitor’s Act that required practising lawyers to be Canadian citizens. In Andrews, the Law Society of British Columbia, in support of the statute, argued for a distinction between the rights of citizens and non-citizens to practice law. The Law Society maintained that a citizenship requirement ensured familiarity with Canadian institutions and customs and a commitment to Canadian society. It followed, the Society argued, that lawyers, who play a fundamental role in the Canadian system of government, must be citizens. In any event, it suggested, because individuals like Andrews only had to wait three years before applying for citizenship, the restriction was reasonable. Andrews sought to have the courts declare the distinction both irrelevant to the practice of law and a denial of his right to equal treatment, as guaranteed by section 15(1).

Andrews marked the first time LEAF outlined its approach to equality which involved reflecting the socio-political realities facing women as well as rejecting formal equality theory. LEAF sought to influence the Court’s interpretation of equality and discrimination and was interested in intervening in the case on a number of grounds when it reached the Supreme Court of Canada. First, Madam Justice McLachlin of the B.C. Court of Appeal (as she then was) had decided the case by testing the validity and the reasonableness of the Law Society’s distinction under section 15, rather than by moving to section 1 for the reasonableness test. Moreover, she relied on the similarly situated test in order to assess such distinctions. LEAF believed that undertaking the reasonableness test under section 15 gave the evidentiary burden to the person

whose rights were allegedly infringed. They maintained that, having determined that discrimination existed, the court should move to a section 1 analysis, thus shifting the burden onto the party making the distinction.  

Second, and more importantly from a feminist perspective, LEAF emphasized the danger of the similarly situated rule in terms of its impact on women and other disadvantaged groups. Because men and women are often not similarly situated, relying on this standard would have an unfair impact on women because their experiences could not fit the rule. According to the similarly situated test, the disadvantaged can only obtain the social interests that the advantaged have enjoyed. Thus the test will not contribute to the reorganization of social institutions to meet the needs of the disadvantaged if their needs are different from the advantaged. LEAF therefore advised the court to take a substantive "rights-balancing" approach that recognized both the group nature of women's individual situations and the historical oppression of women and minority groups. In this way, LEAF sought to shift the accepted understanding of discrimination from a distinction based on individual characteristics to one that incorporated the concept of disadvantage based on characteristics attributed to an individual as a member of an historically oppressed and powerless group.

LEAF also advocated interpreting section 15 in light of the values the equality guarantees seek to protect. LEAF believes that

"[t]he legislative purpose of section 15 can be discerned from both its language and history, which make clear that section 15 was intended to continue the guarantees of equal access to justice found in the Canadian Bill of Rights (equality before the law and equal protection of the law), and importantly, go further to provide for substantive equality (equality under the law and equal benefit of the law). In particular, the history of the Charter’s guarantees of substantive equality demonstrates that section 15 was intended to benefit individuals and groups which historically have had unequal access to social and economic resources, either because of direct discrimination or because of the adverse effects of apparently "neutral" forms of social organization."

LEAF used Andrews as a vehicle to argue that the legislative purpose of section 15’s guarantee of substantive equality is to promote a society in which the "hitherto powerless, excluded and disadvantaged enjoy the valued social interests" available to the powerful and advantaged and to alleviate disadvantage and subordination by dominant social groups."

In arguing their case, LEAF counsel employed discourse that relied on a mixture of techniques including traditional legal reasoning, more radical consciousness-raising and, in a court setting, the more subversive approach of telling women’s stories of domination and oppression within a patriarchal system that leaves them powerless and disadvantaged. Using traditional legal reasoning, LEAF focused first on the procedural approach the court should take in analyzing section 15. It cited cases in which the court had taken a purposive approach to the Charter’s equality guarantees and had held that the interest of true equality may require differentiation in


122 These include dignity, respect, access to resources, physical security, membership in community and power.

123 Orton, loc. cit., p. 4.
treatment. In this way, LEAF hoped to discredit the similarly situated test used by Madam Justice McLachlin in the lower court.

In advising the court on the substantive interpretation it should give to rights, LEAF employed consciousness-raising to reject the formal "sameness-difference" equality approach in favour of a framework that stressed women's membership in a group that has been powerless, excluded and disadvantaged. Moreover, LEAF challenged the legal system and urged the court to recognize the Charter's commitment to addressing the subordination of certain groups and the dominance of others. It went on to suggest that,

"[w]hile not categorically ruling out the equality claims of members of a dominant group, a purposive approach would lead a court to interpret section 15 in such a way that these claims would be viewed with caution."

This approach questioned the validity of the status quo and the groups it traditionally privileges. Rather than frame the argument in terms of simple access to equal rights, LEAF argued for women's rights to dignity and respect.

Finally, counsel developed a feminist discourse that presented stories of men using the Charter to attack legislation affording benefits and protection to single mothers, sexually abused wives,

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125 Ibid.


127 Ibid, p. 29.
pregnant workers and prostitutes. They discussed the indices of second-class citizenship that have led to the recognition that women are a disadvantaged group and that include women’s unequal pay, allocation to "disrespected work, demeaned physical characteristics, targeting for rape, domestic battery ... depersonalization, use in denigrating entertainment and forced prostitution." 

LEAF described discrimination for women as more than a mere distinction or difference. It stated that discrimination is not about sameness and difference, but about the distribution of burdens and benefits in society. LEAF suggested that discrimination based on membership in a category or group recognized by or akin to an enumerated ground in the Charter, raises concerns of substantive inequality. Specifically, LEAF proposed that the court ask whether the category was institutionalized so as to affect dignity, respect and access to resources and power and whether its social history was one of disempowerment, exploitation, and subordination to and by dominant interests. The similarly situated test advocated by McLachlin, J.A. emphasized mere distinctions and could facilitate attacks on legislation aimed at removing disadvantage. Moreover, the test required reference to "underlying criteria which the rule itself does not articulate and it thus often imports sub silentio the values of an unequal society into its equality standard".

128 In the case of laws regulating prostitution, LEAF suggested that prostitutes as a class are denied equality on the basis of their sex.


130 Ibid., p. 22.

131 Ibid., p. 30.
LEAF's factum in Andrews questioned the values of society embodied in the formal equality approach of traditional legal doctrines, and argued for the recognition of women as disadvantaged and disempowered. In preparing its factum, LEAF relied heavily on Catharine MacKinnon's notion of dominance and disadvantage.\(^{132}\) MacKinnon suggests that the way the law traditionally works "misses the fact that hierarchy of power produces real as well as fantasied differences, differences that are also inequalities".\(^{133}\) She further states that the equality question is a question of the distribution of power, of male supremacy and female subordination.\(^{134}\) Her "dominance" approach seeks to expose power and women's disadvantage within the existing system.

LEAF's perspective naturally met with resistance.\(^{135}\) Counsel for Andrews espoused the dominant understanding of discrimination, defining it as encompassing "unwarranted stereotyping and stigmatizing"\(^{136}\) of individuals and groups. Andrews' counsel suggested that the fundamental concept of section 15 is that all persons - as individuals - should whenever possible be treated equally by the law. Moreover, they endorsed the similarly situated rule stating that,

\(^{132}\) Interview with Sheila McIntyre, April 4, 1992.


\(^{134}\) Ibid., p. 40.

\(^{135}\) William Connolly discusses the fact that elites will invariably resist the efforts of activists to redefine the terms of political discourse and suggests that persistence on the part of disadvantaged groups can result in a shift in accepted meaning. See Connolly, The Terms of Political Discourse, (Lexington: D.C. Heath and Company), 1974.

\(^{136}\) Factum of the Respondent, op. cit., p. 10.
"Since equality is necessarily a relational or comparative concept, the central issue in equality rights cases will therefore be whether individuals who are similar in relevant respects are treated similarly by the law."

In terms of a rights orientation, the focus was clearly on individual rather than group rights and on stressing difference rather than disadvantage. In fact, Andrews’ counsel specifically opposed the idea of considering how membership in a group might affect an individual:

"The modern history of the evolution of equality rights shows the necessity of requiring an objective analysis of the use of a categorical distinction in the light of an individual’s right to be treated as an individual and not merely as a member of an arbitrary group or class (emphasis added)."

Thus, LEAF faced resistance from a discourse more firmly rooted in the liberal legal tradition and which was not at all accepting of a conception of rights that saw discrimination as anything more than an arbitrary distinction imposed on certain individuals. This dominant discourse rejected the validity of a subjective, historical account of disadvantage and instead, endorsed a strongly traditional approach that sought equal rights in a narrow, formal sense.

LEAF was extremely successful in shifting the court’s understanding of equality, discrimination, disadvantage and women’s position in society and in gaining acceptance for a feminist discourse. Both Madam Justice Wilson writing for the majority and Mr. Justice McIntyre in his dissent, recognized LEAF’s major arguments. The court rejected McLachlin J.A.’s reasonableness test in favour of LEAF’s approach of keeping section 15 distinct from section 1. Equally

137 Ibid., pp. 7 - 8.

138 Ibid., p. 17.

139 As well, the court accepted LEAF’s argument that section 15’s protection is open-ended and that non-enumerated, akin grounds fall within its purview.
important was the court's acknowledgement that disadvantage is a concept relevant to section 15. The section, McIntyre, J. suggested, (though in the minority, speaking for the Court on this issue) refers to

"a distinction, intentional or otherwise, based on grounds relating to personal characteristics of the individual or group, that has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or that withholds or limits access to opportunities, benefits and advantages available to other members of society...Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."¹⁴⁰

Wilson, J. also recognized that, while legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals. Section 15, she said, is designed to protect those groups who suffer social, political and legal disadvantage. In this way, the court adopted LEAF's rights-balancing approach and recognized the systemic and historic nature of the inequality experienced by women and other groups.¹⁴¹

Finally, the court rejected the concept of formal equality and the similarly situated/sameness-difference rule in favour of more substantive equality and a test that considers the content and impact of the law rather than simply its intent.¹⁴² It pointed to the Lavell and Bliss decisions, noting that the Charter demanded a more substantive guarantee of equality than did the Bill of

¹⁴⁰ Andrews, op.cit., p. 18.

¹⁴¹ Ibid., p. 32 - 33.

¹⁴² For a discussion of the progressive willingness of courts to consider the impact rather than only the intent of legislation, see Beatrice Vizkelety, Proving Discrimination in Canada, (Toronto: Carswell), 1987, pp. 1 - 58.
Rights. The discourse used by feminist litigators in Andrews relied on the language of the Charter and examples of women's real life experiences with the law to challenge more traditional conceptions grounded in liberal legal theory.

Andrews is significant because it represented the first time the court had been presented with such a radical conception of equality rights and with a definition of discrimination that moved beyond merely recognizing distinction and difference. More importantly, the court accepted the key discursive terms put forward by LEAF. In agreeing to consider women as a historically oppressed and disadvantaged group that suffered not because of differences from men but because of powerlessness with respect to them, the court's decision constituted a major departure from accepted doctrine and offers evidence of the potential of rights discourse to influence societal norms. Nonetheless, the ability of rights-based strategies to challenge terms of the dominant discourse remains a topic of debate and provides the focus for the next chapter.
Chapter IV:

Rights Discourse and the Pursuit of Equality

"Feminist scholars are beginning to take the view that, as discourse, law is an important site for discursive resistance."\textsuperscript{143}

This paper characterizes the strategy of Canadian feminists as one that has used rights discourse to redefine dominant notions of equality in legal terms as opposed to focusing on first redressing social barriers to equality that many women experience in their daily lives. As Chapter III outlined, this approach seems to have developed initially in reaction to federal government initiatives to introduce a charter of rights rather than as a result of a more pro-active decision to adopt a rights-based strategy on the part of feminists. In fact, until the late 1970s, feminists may have focused more on social rights than legal ones. But when the opportunity presented itself to make some gains by focusing on legal rights, feminists naturally seized the chance.

This approach has not been uncontroversial. As a form of "transformative feminist politics,"\textsuperscript{144} rights-based strategies receive mixed reviews. Some argue that rights discourse channels political struggles into legal disputes which are costly, complex and, therefore, inaccessible to the very people who experience inequality.\textsuperscript{145} Moreover, neither the elitism

\textsuperscript{143} Currie, \textit{loc. cit.}, p. 73.


\textsuperscript{145} Rhode, "Feminist Critical Theories", \textit{Feminist Legal Theory: Readings in Law and Gender}, \textit{op. cit.}, p. 342.
of the legal structure nor the law's reliance on traditional forms of reasoning ensures equality
gains in the actual lives of many disadvantaged individuals and groups. As well, the ability of
some to use rights discourse to undermine the arguments of equality seekers is held to limit its
actual potential for affecting progressive change.

On the other hand, rights discourse can be used to mobilize social movements, influence the
general terms of political debate, change a law or legal doctrine and introduce into the courts
perspectives that historically have been excluded.\footnote{Fudge, "Evaluating Rights Litigation", \textit{loc. cit.}, p. 153.} In addition, some feminist scholars are
beginning to look at law as "the site of discursive struggles...[to explore] how symbols, language
and power operate through liberal law in the West to construct sexual difference and notions of
equality."\footnote{Currie, \textit{loc. cit.}, pp. 73 - 74.}

\textbf{International Influences on Rights Discourse}

Before plunging into the debate over the reform potential of rights discourse, it may be useful
to note that the reliance of feminists on rights discourse as an instrument of social change can
be situated within a more general international trend to recognizing citizen rights. Human rights
issues soared to the forefront of political and popular attention in the period following World
War II as people became aware of the widespread violations to human life and dignity that
characterized the Nazi regime. The establishment of the United Nations in 1945 and the 1948
UN Universal Declaration of Human Rights provided major incentives to recognizing individual freedom and human rights worldwide.\textsuperscript{148}

In Canada, this international rights consciousness as well as an active civil liberties lobby and a new confidence as an independent nation produced a sustained push for constitutionally recognized citizen rights from the 1940s on.\textsuperscript{149} Over this period, the federal government responded to a number of additional domestic rights-oriented developments\textsuperscript{150} with a series of initiatives that demonstrated a commitment to both cultural pluralism and expanded notions of citizenship and equality.\textsuperscript{151} These efforts opened the policy and law-making process to groups and individuals who had previously lacked a voice in political decision making. In effect, they made voice and discourse important and signalled a recognition that, if institutions were to be

\begin{quote}
\textsuperscript{148} Ibid., p. 102.
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\begin{quote}
\textsuperscript{149} See Williams, loc. cit., for a more detailed account of international and domestic pressures for a review of constitutionally protected citizen rights in the postwar period. See also Alan Cairns, \textit{Charter versus Federalism. The Dilemmas of Constitutional Reform.} (McGill-Queen’s University Press), 1992, pp. 11 - 32.
\end{quote}

\begin{quote}
\textsuperscript{150} These included Quebec nationalism, an increase in immigration and multicultural awareness and the rights-based claims of aboriginals.
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\textsuperscript{151} The development of a general rights discourse began in 1950 with the work of the Special Senate Committee on Human Rights and Fundamental Freedoms and built with the 1960 Bill of Rights; the establishment of human rights commissions in the provinces; the proposed Charter of Rights in 1971; the Special Joint Committee on the Constitution in 1972; and the hearings of the Special Joint Committee on the Constitution in 1980-81. Williams, loc. cit., p. 100.
\end{quote}
effective and responsive to society's needs, they had to reflect the aspirations and identities of its members.\textsuperscript{152}

Cynthia Williams notes that, along with the development of a language of constitutional citizen rights, a popular language of rights has become commonplace in Canadian political rhetoric since World War II.\textsuperscript{153} For example, witnesses before the 1972 Special Joint Committee on the Constitution (the Molgat-MacGuigan Committee) relied on rights discourse to advance a wide range of claims and interests made by women, disabled persons, environmentalists and anti-poverty groups.\textsuperscript{154}

"[...By] providing an opportunity for these groups and individuals to come forward, the committee did much to bring these issues onto the public agenda and to develop rights consciousness among members of special interest groups. The committee proceedings clearly indicated that the language of rights had been adopted in the rhetoric of interest-group politics in Canada."\textsuperscript{155}

\textsuperscript{152} According to Breton,

"...the enjoyment of a satisfactory symbolic/cultural condition requires not only appropriate actions and the absence of barriers, but also an institutional system that offers possibilities for the discovery of identity, for meaningful participation, and for the attainment of social recognition.

These possibilities consist of the system of values, beliefs and items of cultural identity embedded in public institutions....They are expressed, for instance, in the Constitution and the Charter of Rights..."

Breton, "Multiculturalism and Canadian Nation-Building", \textit{loc. cit.}, p. 28.

\textsuperscript{153} Williams, \textit{loc. cit.}, p. 99.

\textsuperscript{154} \textit{Ibid.}, pp. 113 - 114.

\textsuperscript{155} \textit{Ibid.}, p. 114.
At the same time as this popular human rights orientation was developing, the concept of cultural rights gained ground and incorporated the notions of linguistic and ethnic equality. This gave Quebecers, multicultural Canadians and aboriginal peoples, for example, an opportunity to participate in public discussions regarding their identity and to use rights discourse to shape more actively the meaning of their experiences. A major focal point for all of these groups was the constitutional status quo which they sought to transform to include more substantial notions of their respective collective identities.

As well as the development of human and cultural rights, the post-war period was also one in which the idea of the social rights of citizenship gained support and became institutionalized through universal social programs. T.H. Marshall was among the first to study the development of citizenship rights and their impact on social inequality. According to Marshall, these rights consist of three elements: civil rights to individual liberty and equality before the law; political rights of enfranchisement; and social rights to economic welfare and security. But whereas the nature and content of civil and political rights are fairly straightforward and uncontroversial, the essence of social rights is by no means self-evident. For example, it is relatively easy to agree that we all share the same civil and political rights as members of a certain community. But social rights are concerned with the distribution of a social product that

156 In this regard, see Raymond Breton, "The Concepts of "Distinct Society" and "Identity" in the Meech Lake Accord", in Swinton and Rogerson, op. cit., pp. 3 - 10.


is often associated with stigma. This makes them less likely to find universal acceptance and may explain why feminists have been relatively successful focusing on civil and political rights as opposed to social rights in Canada. As well, the distribution of social goods generally involves developing spending programs, something governments in industrialized countries are less and less eager to do, because of rising deficits and increasingly conservative political climates. The extension of political and civil rights, in contrast, is costless in terms of dollars. This does not reduce their contentiousness altogether, though it does make the focus on legislative changes involving rights more appealing than the introduction of new programs.

Evaluating Rights-based Strategies

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160 Mishra has studied the policies of social welfare retrenchment in Britain, Canada, Australia and the United States, in particular. See The Welfare State in Capitalist Society, op. cit., in this regard.

161 For example, in Canada, the inclusion in the federal human rights code of explicit rights for gay men and lesbians has provoked debate and disagreement within the federal Conservative caucus. Before becoming Justice Minister, Kim Campbell promised to revise the code to include protection against discrimination on the grounds of sexual orientation. She recently announced she will leave it to provinces to amend their codes instead.

162 For example, West Coast LEAF has approached the British Columbia provincial government and asked them to consider changing a number of pieces of legislation to address aspects of sex discrimination - relating to pregnancy, in particular - rather than to spend money on, for instance, programs for battered women.
Arguably, the entrenchment of the Charter in 1982 amplified the trend in Canada to speaking in terms of rights. For feminists, the inclusion of sections 15 and 28 has provided an obvious focal point for political activity, thus reinforcing more general tendencies to think in terms of rights rather than social needs. Yet as the first part of this chapter suggested, the language of law, as an institution and as part of societal discourse, has both helped and hindered feminist efforts to overcome stereotypes and disadvantage.

The law's guarantee of equality has enabled feminists to articulate differences in the law's treatment of men and women and has provided a structure through which feminists could pursue legal change. Its authoritative statement about societal values, particularly in the case of the constitution, lends important legitimacy to many aspects of the social contract. In examining the theoretical foundations of law, however, some feminists have suggested that the mechanisms


164 J.B. White has discussed at length the way in which various societal institutions - the law (both the common law and constitutions), universities, business corporations and so on - define and express the character of individuals and groups. He suggests that, in a pluralist society such as ours, we belong to many institutions at once and thus, are able to resist to a certain extent the claims of any one institution over our lives. At the same time, however, he does not dismiss the tremendous influence of law and legal discourse on the creation and legitimation of social expectations and labels that shape the identity of society's members. See J.B. White, The Legal Imagination, Studies in the Nature of Legal Thought and Expression, (Boston: Little, Brown and Company), 1973.
of legal reform are self-limiting, allowing change only to a point and even strengthening the roots of gender hierarchy that feminists seek to challenge.\textsuperscript{165}

Many feminists hold that law, like other social institutions, is gendered: both the legal system and the substance of laws are products of a society that has set men as the norm and women as "different" and "Other". As well, it is suggested that traditional legal education instills the values and reinforces "the interests of patriarchal capitalism in legal practitioners"\textsuperscript{166} thereby neglecting to focus on the process by which the legal system and jurisprudential philosophy become confirmed as right and just.\textsuperscript{167}

In this regard, according to many feminists, law can constrain women's equality project by relying on precedents that are often intrinsically androcentric and that privilege accepted doctrine over alternative forms of argument.\textsuperscript{168} Traditional legal discourse and formal equality theory focus on rationality and coherence and respond to issues framed in dichotomous terms rather than the ambiguity that often characterizes women's accounts of experiences of discrimination.\textsuperscript{169} They leave little room for courts to consider and evaluate the relative

\footnotesize{\textsuperscript{165} Katharine T. Bartlett and Roseanne Kennedy, "Introduction", in Katharine T. Bartlett and Roseanne Kennedy, Eds., \textit{Feminist Legal Theory: Readings in Law and Gender}, op. cit., p. 2.}

\footnotesize{\textsuperscript{166} Mary O'Brien and Sheila McIntyre, "Patriarchal Hegemony and Legal Education", \textit{Canadian Journal of Women and the Law}, Volume 2, No. 1, 1986, p. 69.}

\footnotesize{\textsuperscript{167} Ibid., p. 70.}

\footnotesize{\textsuperscript{168} See generally Razack, op. cit., in this regard.}

\footnotesize{\textsuperscript{169} Ibid., p. 3.}
position and experiences of women. Sherene Razack also argues that rights discourse, even if it attempts to shift the focus away from the dominant group to the opportunities various disadvantaged groups need, still orders perceptions according to the notion of comparison.

"Equality in its liberal roots stresses the equal distribution of resources to which we are entitled on the basis of our common humanity as rational beings. The norm may shift, and we may recognize that other groups are entitled to their fair share, but the problems of evaluating competing equality claims, now between groups, persist." Razack

In addition, equality law provides another route by which those who feel threatened by the extension of rights to women can work to entrench the status quo or even deny women special rights to, say, pregnancy leave. This is particularly problematic in cases where equality language is used - some feminists would say manipulated - to limit a purposive interpretation of sections 15 and 28. Some even question the extent to which equality language "properly interpreted" can address oppression and thicker concepts of discrimination and disadvantage, bound as it is within a framework of liberal individualism.

170 Brodsky and Day, op. cit, p. 76.

171 Razack, op. cit., pp. 49 - 50

172 See O'Brien and McIntyre, loc. cit., note 50, p. 86, in this regard.

173 See Brodsky and Day, op. cit., p. 137.

174 See Razack op. cit., p. 50 and Young, op. cit., p. 39 in this regard. For an interesting discussion of the problem of conceptualizing social struggles in terms of rights, see Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis", Feminist Legal Theory, op. cit., pp. 305 - 317. Olsen argues that rights discourse cannot affect the value changes necessary to have an impact on true equality within the traditional liberal legal paradigm. For a discussion of the shortcomings of rights language in the United States, see Mary Ann Glendon, Rights Talk, The Impoverishment of Political Discourse, (New York: The Free Press), 1991. Interestingly, Glendon believes rights talk has been more successful in resisting individualizing tendencies in Canada than in the U.S.
Of course, there is no guarantee that the courts will continue to interpret equality cases as generously as the Supreme Court did in Andrews. And even when the courts do give substantive and purposive interpretations to the equality sections, it is unclear whether governments will consistently support such an approach. In this regard, critics of rights-based equality strategies point to the growing number of decisions that suggest that non-government discrimination is immune from Charter review. This is problematic given that governments are increasing the size of the private sphere by privatizing social services. Finally, the accessibility of the legal process to women seeking to claim their equality rights is also raised by many as a very practical barrier to the realization of equality.

On the other hand, however, the focus on law, justice and rights to redress inequality is not "strategically naive":

"Legal struggles for rights are progressive in a dialectical way: they may achieve some concrete improvements at the same time that they demonstrate experientially the partiality of law, its costs and delays, its mystified procedures..."

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175 For example, Brodsky and Day note that in some instances, governments have sought to appeal purposive decisions of the court. Brodsky and Day, op. cit., p. 92.


177 See Brodsky and Day, op. cit., Chapter 6, for a discussion of the limited accessibility of courts and the legal system to women and other disadvantaged groups.

178 O’Brien and McIntyre, loc. cit., p. 75.

179 Ibid.
Indeed, law may provide an example of a hegemonic system that claims to be impartial but that reinforces male bias and "feed[s] cultural imperialism by allowing the particular experience and perspective of privileged groups to parade as universal". But by exposing unquestioned norms, habits and symbols, rights discourse can challenge the dominant system.

**Law as Discourse: New Potential for Challenging the Traditional Equality Paradigm**

Catharine MacKinnon has criticized the law for making male dominance invisible and legitimate yet she recognizes its potential for "pointing a way out of the infinity of reflections in law-and-society’s hall of mirrors where sex equality law remains otherwise trapped." MacKinnon believes that a feminist jurisprudence is possible and that it could introduce into otherwise male discourse concepts that respond to women’s lived reality. She suggests that,

"[e]quality understood substantively rather than abstractly, defined on women’s own terms and in terms of women’s concrete experience, is what women in society most need and most do not have...To the extent feminist law embodies women’s point of view, it will be said that its law is not neutral. But existing law is not neutral...It will be said that feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage the world."

Attempts to develop feminist law and to focus on law as discourse may allow women’s voices and concerns to be heard in an accepted public forum - the courts - and to thereby gain

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180 Young, *op. cit.*, p. 10.


legitimacy and recognition. Moreover, rights claims can define women's individual and collective selves as well as shape public discourse and society's understanding of women's disadvantage. By extension, rights discourse can be used to mobilize social movements, as the experience of NAC, CACSW and LEAF shows in Canada.

"[Rights discourse can be] a means to articulate new values and political vision...it can be a way for individuals to develop a sense of self and for a group to develop a collective identity." Many feminists also believe it is important to develop a body of law sensitive to women's equality issues that can challenge and in fact change existing equality doctrine. Rights-based strategies permit a distinctly feminist rights discourse to attempt to depart from traditional legal approaches and to reject the norms of objectivity and universality to incorporate specifically female perspectives on the law and on women's experiences in society. The Andrews case seems to support such a belief. The case appears to represent a break in legal tradition with its adoption of a more substantive and purposive approach to both the process and content of equality law. Why was the court so receptive to LEAF's arguments in Andrews? Does the court's decision justify the focus on rights-based strategies by Canadian feminists?

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183 Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement", loc. cit., p. 323.

184 Ibid., p. 322.

185 See Razack, op. cit., p. 51 and Chapters III and IV generally.

186 A reason unrelated to equality jurisprudence would also be that the court could have found it relatively easy to deny the legitimacy of discrimination on the grounds of citizenship given Canada's somewhat weak attachment to citizenship, particularly compared to the United States.
A number of possible explanations for the decision might support this approach. The language of the Charter itself could have guided the court. Specifically, the affirmative action guarantees of section 15(2) direct courts to interpret certain legislative actions in light of their attempts to ameliorate the conditions of certain groups in society. This would suggest that rights-based strategies are indeed likely to be successful, but only if courts interpret cases with section 15(2) in mind. LEAF maintains that the legislative history of the Charter as well as the past decisions encourages courts to do just this. Relatedly, and also in support of a rights focus, the court could have been reflecting what it believed to be the view of the public generally regarding a purposive approach to equality rights.

Alternatively, the court could have been responding to particular aspects of the case itself. For example, the court could have found the quality of legal argument and the use of rights discourse put forward by LEAF counsel impressive and compelling. The composition of the court may have been the most important factor in recognizing a feminist version of equality rights. Both Dickson, C.J.C. (as he then was) and Wilson, J. (as she then was) were among the more progressive members of the bench. Both were committed to breathing life into the Charter and

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189 For example, Mary Eberts, LEAF counsel in the *Andrews* case, is a skilled litigator who is highly respected in the legal community and among the judiciary. The court could have found her presentation particularly persuasive. Interview with Sheila McIntyre.
to interpreting it in a purposive way. In fact, with the departure of both these justices, feminists have begun to worry that the court's grasp on the reasoning in Andrews may be very fragile. The court, they believe, is now less open to more radical approaches to rights that challenge the status quo and dominant understandings of concepts like equality.

This possibility is a gloomy one for feminists and others seeking to introduce alternative discourses into legal and political discussions. It would suggest that using the language of rights to develop a counterdiscourse will be a productive strategy only if decision makers - in this case judges - are open to the claims of disadvantaged groups. Yet the very reason many are sceptical of rights litigation is because it channels political disputes into legal forums where conventional approaches to rights limit the potential for change.

Whether one supports rights-based strategies or believes they cannot lead to true social change, the fact remains that courts remain one of the forums in which approaches to equality are considered and shaped. Some focus on legislative definitions of equality and on litigation thus seems practical if not unavoidable. Moreover, constitutional guarantees of equality carry tremendous symbolic and practical weight. It is important that court decisions reflect the language of equality to address the actual impact of laws. Feminists must continue to attempt

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to occupy the field on equality cases and to push the reasoning in *Andrews* to its limits in subsequent cases if they wish to ensure that future decisions support an understanding of equality that reflects feminist concepts of disadvantage and oppression.

Unfortunately, the disappearance of the Court Challenges Program as a result of the 1992 federal budget does not bode well for either LEAF or women seeking federal assistance for equality litigation. The cut will undoubtedly limit access to the courts for women and other equality seekers. Sadly, the general experience in both political and legal forums has shown that when feminists do not have the opportunity to add their perspective to the broader discourse, their concerns are most often not considered.¹⁹²

If feminists are to build on the gains made in *Andrews* in terms of shaping and introducing a feminist discourse into the mainstream and in addressing socio-political realities, they will need continued and sustained access as a legitimate social group to the appropriate arenas. Whether this will be possible remains unclear.

¹⁹² Indeed, as Chapter III noted, Meech Lake provided an example of the ease with which the interests of non-elites can be overlooked, as well as of an instance in which feminist rights discourse was unsuccessful in mounting an effective challenge to the dominant discourse. Nonetheless, Meech Lake was defeated, in part because of the efforts of feminists to highlight inadequacies of the Accord.
Chapter V:

Conclusion

"Surpassing the male norm... makes it possible to take women's struggle for legal reform and equality beyond the strategy of assimilation to reflect alternative human values and affirm a new society."193

Engendering Social Change: The Case for Feminist Rights Discourse

The previous chapter recognized some of the limits of a political strategy that relies on rights discourse to ensure social change. In the Canadian context, Judy Fudge has focused on the example of rights litigation to question the transformative power of rights discourse and its ability to challenge hegemonic understandings of equality. Specifically, Fudge wonders how a "change in legal discourse is transmitted into the broader political debate, or, even more importantly, how it contributes to social change."194 She does not comment on the interplay between litigation, legislation and social change or on the potential of broader rights strategies that include lobbying activities. Nor does she comment on the work of feminists to entrench in the constitution a more substantive notion of equality. Yet in terms of the symbolic statement the constitution now makes about society's commitment to equality and the practical impact such constitutional guarantees have on other laws, their entrenchment seems worthy of recognition. Fudge seems to underestimate the extent to which law shapes our existence. Admittedly, law can only go so far and the equality sections of the Charter have been interpreted in such a way


that they do not apply to a wide range of private activities. But recognizing the limits of rights discourse should not lead inexorably to a refusal to pull what levers law makes available to the pursuit of greater social equality.

This paper, in fact, suggests that the entrenchment of substantive notions of equality in the Charter and subsequent efforts to ensure a progressive interpretation of those understandings have made a significant contribution to the equality gains of women in Canada. It further holds that changing the meaning of equality is a necessary precondition to social change and that rights discourse is an effective tool for influencing that meaning. Constitutional and common law as well as ordinary legislation set the terms by which we live together as members of a community. Unlike the U.S., in Canada, the constitution has, since 1982, included guarantees of equality and nondiscrimination for women and others. As the supreme law of the land, these guarantees hold tremendous force. Legislation and court decisions, in reflecting the values sections 15 and 28 seek to promote, provide authoritative and enforceable statements about the way we interpret key concepts in our society.

By participating in government consultations in 1980-81 and 1987-90, feminists seized crucial opportunities first, to ensure that the proposed Charter reflected a particular notion of equality and later, to remind governments of the commitment the Charter represented in terms of recognizing disadvantage and oppression. When the equality sections came before the Supreme Court in Andrews, feminists quite naturally acted to ensure that the courts' understanding of equality was the same broad, substantive understanding that had been developed and expressed during their lobby efforts. As an intervenor in Andrews, LEAF sought to complement feminists
lobby efforts with a litigation strategy that emphasized the interplay between law reform and litigation. Specifically, LEAF maintains that the primary inequalities women face stem from systemic substantive inequality in society at large and that section 15 of the Charter was designed to alleviate disadvantage and social subordination. If the section is also seen to require a re-examination of existing standards and social institutions by courts and legislatures, the equality guarantees can promote for women the equal enjoyment of social interests by rejecting current standards for entitlement to social benefits. This rejection involves challenging the largely "male" assumptions on which society is based and attaining for alternative models some degree of authority either by ensuring the constitutional recognition of equality, as sections 15 and 28 of the Charter do or by engaging in lobbying and litigation to develop laws that address the social disadvantage women face.

This paper suggests that, in addition to providing an authoritative and enforceable statement about society's values, law can also be approached as discourse. Viewing law as discourse allows feminists to attempt to influence dominant understandings of key concepts and values by introducing a feminist voice into discussions previously carried out by men. In this way, rights discourse can become a vehicle for social change. In fact, this paper goes further to assert that feminists should continue to lobby and litigate to capitalize on the potential of rights

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195 Orton, *loc. cit.*, p. 3.


197 Christine Littleton asserts that the terms of social discourse have been set by men who have, actively or passively, ignored women's voices, to the point where the possibility of women having a voice has become questionable. See Christine A. Littleton, "Reconstructing Sexual Equality", *Feminist Legal Theory*, *op. cit.*, pp. 35 - 56.
discourse to challenge existing practices that disadvantage women. The introduction of "women's stories" into mainstream political and legal forums represents an important step in gaining recognition for alternative perspectives on equality.

Despite the potential of rights-based strategies to address disadvantage, this paper also concedes that lobbying and litigation are costly, time-consuming and complex. As well, they demand a certain level of expertise that often makes their pursuit possible only for an elite group with the necessary education and background.

Nonetheless, rights discourse plays a vital role in shifting dominant conceptions of equality because of the way law shapes women's experiences and structures their disadvantage. Rights talk can be even more persuasive if it enjoys constitutional status, as it does in Canada. The examples presented in this paper support the view that the Charter's equality guarantees can be used to build a rights discourse aimed at reminding legislators of the constitutional commitment to substantive equality and to give voice to oppression in court. More specifically, rights-based legislative or litigation efforts can work to address systemic inequality if they result in laws that reject male norms and the "androcentric undervaluation of female-associated activities," thereby working to shift our liberal equality paradigm to embrace more impact-oriented conceptions of equality.

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198 For a discussion of these practices, see Miles, loc. cit., p. 65.

199 Rhode, Justice and Gender, op. cit., p. 2.

200 Ibid., p. 66.
The success of feminist rights discourse in leading to such a shift is far from certain, however. Recent currents in social theory, like postmodernism, make theorizing increasingly difficult. Such trends deny the possibility of any universal foundations for critique and underscore the linguistic and cultural construction of human identity and experience. Thus, while providing feminists with an opening for introducing into the mainstream a feminist rights discourse that questions male-dominated perspectives on reality, scepticism about theory in general also undermines the basis upon which feminism is built. Relatedly, feminists' Meech Lake experience demonstrated that once the dominant discourse recognizes the existence of other perspectives and opens itself up to challenges by one counterdiscourse, an endless number of other counterdiscourses may attempt to occupy the field, increasing the difficulty involved in gaining recognition for feminist theories and perspectives.

Another challenge involves acquiring legitimacy for feminist discourse and for women as a natural and legitimate social group, rather than just another "interest" group. Even though women represent 52% of the population and despite the Charter's guarantees of equality, current societal structures cannot ensure the equal enjoyment of power by men and women. Addressing the power imbalance between men and women in society seems to be an area worthy of future study. Chapter II noted Iris Young's recognition of this problem and referred to her call for revitalized democratic institutions committed to recognizing and giving voice to diversity rather than to seeking to universalize the experiences of disadvantaged and minority groups. As mentioned earlier, while Young clearly believes that women constitute a disadvantaged and

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oppressed group, it is less clear how she would ensure the representation of the concerns of women - as a group - in her democratic model. As it now stands, decision makers rarely have the opportunity to consider the alternative standpoint feminists present on behalf of many women. And when feminists are afforded the opportunity to present their experiences of disadvantage, there is no guarantee that judges or legislators will commit to addressing the causes of that disadvantage.

Feminists also face the troublesome issue of representation. Often, groups like NAC and LEAF are criticized for being unrepresentative, not only of women in general, but also of the range of women within the feminist movement. For example, when feminists talk about equality rights, are they speaking from the standpoint of lesbian women, women of colour, middle class women, working women, physically challenged women? Is gender a more fundamental characteristic than race or class? The question of identity and of whether one feels defined by gender, race, class, sexual orientation or physical ability - or a combination of these resulting in overlapping oppression - demands more systematic treatment on the part of feminists.

Before being able to address instances of overlapping oppression, support must be secured for the idea that all women share "Oppression" in a general sense. Feminists must continue to focus on changing laws and institutional arrangements that structure women's disadvantage by rejecting the male norm and reclaiming women's specificity.  

\[202\] The notion of a specific women's perspective is a topic of hot debate within the feminist movement. This paper recognizes the controversy surrounding the claim that women have a specific view, yet supports the notion nonetheless.
Society is slowly recognizing that the terms of discourse that fashion our institutions and our relationships, far from following "neutral" standards, in fact privilege a particular view of the world. Historically, this view has resulted in disadvantage and oppression for a wide range of groups and individuals. Many would go further to say that society is, quite simply, gendered. Feminists seeking to shift the meaning of equality to reflect their experience of disadvantage must gain acceptance within the dominant discourse for a notion of equality that includes an understanding both of this gendered existence and that women can bring a valuable perspective to public discussions.203

The Charter has lent to the language of rights a new degree of authority and legitimacy. Feminist rights discourse, relying on these constitutional guarantees, has helped to develop a far more substantive meaning for equality than existed a decade ago. Feminists must continue to find and capitalize on opportunities for their rights discourse to challenge traditional understandings of equality, moving us ever closer to the day when the meaning of equality in the dominant discourse involves the notion of being treated with equal dignity and respect, free from oppression and disadvantage.

203 Miles believes that feminist research has shown convincingly that the world looks different from a women's point of view and that women perceive and study the world in ways different from men in the sense that women are less dualistic, competitive, individualistic, separative and hierarchical. See Miles, loc. cit., pp. 58 - 59 and generally Carol Gilligan, In a Different Voice, (New York: Harvard University Press), 1982.
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