The Political Impact of the Charter

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I want to focus my remarks on the political impact of the Charter. It would be foolish to dispute the legal opinion of my panel colleagues who are among the top Constitutional experts in the country. But before I begin I wanted to correct an impression left by Minister Cotler about the Charter. It is true that Pierre Elliott Trudeau was responsible for repatriating the constitution and proposing a Charter of Rights and Freedoms. But since we are examining section 15 today, it is important to note that it was the women’s movement and the burgeoning disability rights movement that fought to strengthen the language of section 15 against some considerable resistance on the part of the Liberal government of the day. Credit, where credit is due, and the strong equality rights language of section 15 is due to the creativity, mobilization and persistence of the women’s movement.

When Prime Minister Trudeau began the discussion to repatriate the Constitution, Doris Anderson was the President of the Canadian Advisory Council on the Status of Women. The Advisory Council was a government appointed body that reported to the Minister Responsible for the Status of Women. While it was at arms length from the government, most of its appointees were loyal Liberals unlikely to cause any waves. Up until this point, the Advisory Council had put out some excellent research particularly on violence against women but it was mistrusted within the women’s movement as a whole. No one else in the women’s movement was paying much attention to the Constitutional discussions but Anderson thought there were important feminist issues involved. Women realized the relevance of constitutional issues in 1978 when Trudeau gave power over divorce to the provinces. Prairie feminists who had fought for equality in marital property laws led a women’s rebellion in English Canada and convinced Trudeau to turn back the
changes. The Council published a primer on Women and the Constitution just as the debate on repatriating the constitution was getting going.

The National Action Committee (NAC) on the Status of Women was the obvious place for the women’s movement to have this discussion. During the NAC mid-year meeting in October 1980, Anderson and then Parti Québécois Vice-President Louise Harel led a seminar on Trudeau’s proposed Constitutional changes in front of an audience of 200 women. “By the end of the day, women were exhausted and thoroughly alarmed: The Charter of Rights, as it stood, seemed to jeopardize women’s legal rights rather than protect them.”

Feminist lawyers were troubled by section 1 of the Charter that limited the rights contained thereafter. Section 1 guaranteed rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

A month later NAC’s president Lynn MacDonald made a presentation to a special joint committee on the constitution. NAC recommended changes to the Constitution including changes to what was then called the anti-discrimination clause, section 15. In January Justice Minister Jean Chrétien announced changes that met some of the women’s concerns. The title of section 15 was changed to the Equality Clause; and most importantly now offered four kinds of protection: “equality before and under the law,” and “equal benefit and protection of the law,” which provided for an interpretation of substantive equality rather than formal equality. However, equality rights were still subject to section 1 and women wanted them to be absolute.

Then the Minister Responsible for the Status of Women Lloyd Axworthy (yes, in those days even the women’s minister was a man) cancelled the women’s conference that the Advisory Council had been planning on the Constitution. The explosion that followed is legend in the movement. Doris Anderson resigned and in a spontaneous rebellion women organized the conference anyway. NAC was divided on the constitution primarily because women in Quebec did not support Trudeau’s unilateral (without provincial support) repatriation of the Constitution. In addition, Conservative and some NDP women, including NAC President Lynn MacDonald, were concerned that an entrenched Charter would give too much power to unelected judges and Americanize the

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Canadian system. So an ad hoc Committee on the constitution formed to push for the changes women wanted and to push NAC to take their positions on the Constitution.

In a few short weeks, 1,500 women came on their own coin from every corner of the country to meet together and demand that the new Constitution protect women’s rights. By that time, section 15 had already been strengthened so the conference insisted on stronger guarantees for women and section 28 was the result. That section 28 has rarely been used in the Supreme Court does not take away from the legal and political victory of a Charter with some of the strongest equality rights language in the world.

At that time, I was among those who believed that a legal strategy for the women’s movement would demobilize the movement and place too much confidence in the hands of judges, among the most elite groups in society. I thought the political arena was the right place for the struggle for women’s rights and that it was a mistake to put too many resources into the legal battle. It was one thing when we had to break a law to further women’s rights, like in the case of the Morgentaler clinics but it was quite another to try and litigate equal rights. But the women’s movement did not get derailed into a legal strategy. What happened in the typically pluralistic manner of the Canadian women’s movement was that we did both. The National Action Committee on the Status of Women focused on the political side and the Women’s Legal Education Action Fund on the legal side.

The ad hoc Committee won many of its demands, but Quebec never signed the Constitution. In 1984, Conservative Prime Minister Brian Mulroney began the process of persuading Quebec to sign. His 1987 amendment, the Meech Lake Accord, divided both the country and the women’s movement over its proposed “distinct society” clause for Quebec. The ad hoc Committee opposed Meech Lake, concerned that the distinct society clause would jeopardize what they had worked so hard to achieve and had thought were iron-clad equality rights in the Constitution. So the women’s movement in English Canada mobilized against the Meech Lake Accord. And when Mulroney initiated the so-called Canada Round of constitutional negotiations in 1992, NAC took a highly controversial position against the proposed Charlottetown Accord, working alongside Aboriginal women from across the country to orchestrate its defeat. Protecting the equality rights won in the 1982 Constitution became a central focus of the Canadian women’s movement; one could even say a defining feature.
Yet in preparation for this panel I consulted with some of the women who were responsible for this extraordinary constitutional campaign, including Bev Bains from Queen’s University and Mary Lou McPhedran. Both of them concur with the rather negative balance sheet we have heard from Professor Hogg on the panel today of the Court’s interpretation of equality rights. Everyone I talked to said that the Court has rarely been willing to go beyond formal equality and where women are concerned there are almost no positive decisions on sex discrimination. Bains thought the NAPE decision on pay equity was actually the most progressive decision of the Court in quite a while because at least they found there was sex discrimination even if they later found that it was justified under section 1.

In fact, the most important legal decision for women’s equality was decided before section 15 came into effect and that is the Morgentaler decision striking down the abortion law. Morgentaler used a section 7 argument since the equality rights provisions of the Charter had not yet been proclaimed.

The proclamation of the Charter did, of course, have great significance for women’s equality. Governments took the time between the proclamation of the 1982 Constitution Act and the 1985 proclamation of the Charter to change their discriminatory laws and practices. Perhaps most significant among these was the granting of equal rights to Indian women who had waged a 20-year struggle to retain their Indian status when they married a white man. In 1971, Mary Two-Axe Early, a Mohawk woman from Kahnawake, founded a group called Indian Rights for Indian Women to fight discrimination in Canada’s Indian Act. That same year, the Supreme Court of Canada had narrowly ruled in the Jeannette Lavell case that section 121B of the Indian Act did not discriminate against women, despite that Indian women who married non-status men lost their Indian status, while Indian men conferred their status on non-status wives. The United Nations Human Rights Committee agreed in 1978 to hear the case of Sandra Lovelace, an Aboriginal woman from the Tobique Reserve in New Brunswick who charged that the Indian Act was discriminatory. In 1981 the U.N. committee found Canada in breach of the Covenant on Civil and Political Rights but

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Indian women were not finally victorious until the *Charter of Rights and Freedoms* was proclaimed in 1985. Mary Two-Axe Early was the first woman to regain her status.

As someone who operates in the political realm and has not followed the legal cases too closely over the last few years, I confess to being surprised by these negative assessments. I find myself unusually in the middle of the assessment between Donna Greschner’s positive view and Peter Hogg’s negative one. Whatever the legal impact of the Charter the political impact has been overwhelmingly positive.

Whether or not women have actually won rights under section 15, women believe that they have the right to equality and that is incredibly important. In fact, Canadians believe deeply in the equality rights of the Charter and this belief has helped to fuel equality rights movements in Canada that have been mobilizing over the last decades up to and including the most recent example of gays and lesbians in the same sex marriage struggle. Moreover as Donna Greschner has said the values of the Charter have been so strongly accepted by Canadians that they serve as an important marker as to how we differ from the United States.

I first realized the political potency of section 15 when I was working with the Canadian Hearing Society as part of a coalition of disabled people for employment equity. The disabled community in Canada first mobilized themselves in the fight to include people with physical and mental disabilities in the Charter. In the course of that struggle, the idea of an unprecedented coalition among equality seeking groups formed. Later when Rosie Abella identified four “target” groups for her employment equity legislation, women, visible minorities, people with disabilities and Aboriginal people, it was natural that the groups would form an alliance in the fight for employment equity. People with disabilities led that fight at both the federal and provincial level and I have little doubt that we would not have seen that kind of mobilization without the Charter.

Moreover, the coalition among equality seeking groups that began with the constitutional battles of the early 1980s, continued into the eighties through the fight for employment equity at the federal and provincial levels. This coalition was unique in Canada and in part based on the language of section 15 with a nod of thanks to Madame Justice Abella.

Others have pointed out the remarkable achievements of gays and lesbians under section 15. While they were not strong enough in 1982 for sexual orientation to be included as an articulated ground of discrim-
ination, they have successfully fought to be written in. It was unimaginable 20 years ago that same sex marriage would be on the legislative agenda today.

As Donna Greschner has pointed out the struggle for section 15 and section 28 took place at a time when both England and the United States were taking sharp right turns. The Mulroney government was anxious to follow in the footsteps of their conservative allies. While they succeeded in imposing free trade on the country, they were not able to carry out the kind of neo-liberal revolution that occurred in Britain and the U.S. and I would argue a major reason for this was the strength of the women’s movement and the increasing identification of Canadians with equality rights.

By the early 1980s the American women’s movement was in decline. The Canadian women’s movement, on the other hand, was at full tilt. The Constitutional mobilizations of the early 1980s and the abortion struggle throughout the 1980s mobilized women from coast to coast in struggles that were fought in the courts as well as in the halls of Parliament and in the case of abortion in the streets. The women’s movement in Canada was so strong by 1985 that the federal political parties agreed to a Leaders debate on women’s issues. John Turner, Brian Mulroney and Ed Broadbent participated in a televised debate organized by NAC in front of a feminist audience. It was an extraordinary achievement that reflected the power of feminism in Canada.

And as I have said the women’s movement in English Canada viewed the gains achieved in the Charter of such importance that it mobilized again in the late 1980s to oppose the Meech Lake Accord and in 1992 to oppose the Charlottetown Accord.

The women’s movement continued to be a powerful voice for equality throughout the 1980s and into the 1990s. Second wave feminism declined much earlier in every other developed country. One of the reasons it maintained in Canada, in my view, was the political impact of the Charter.

Before I conclude, I do want to raise one legal question and that concerns section 28. As I have said, the women’s movement considers the inclusion of section 28 a major victory for equality rights in Canada, our Equal Rights Amendment. Yet in the history of Charter litigation and despite the dismal record of litigation on gender equality for women, section 28 has rarely been used. I was particularly astonished the litigators did not use section 28 in the NAPE case to counter the government’s section 1 argument. Donna Greschner has explored some of
the reasons why she thinks section 28 has not been used even by LEAF. But in interviews for my book *Ten Thousand Roses: The Making of a Feminist Revolution*, Mary Lou McPhedran explains that section 28 was created precisely to trump section 1. That is why it says, “Notwithstanding anything in this Charter,” including section 1. When I asked one of the lawyers in the case why they did not use section 28, I was told that they had already won the section 15 argument so they did not need section 28. So it seems to me that lawyers are seeing section 28 as a back up to section 15 rather than as a counter to section 1 and perhaps some discussion on section 28 would be a useful way to improve the court record on women’s equality.

Finally, a word on judges. There is no question that the brilliance and feminism of both Bertha Wilson and Claire L’Heureux Dubé contributed to the Court’s early progressive interpretation of equality rights. And I believe that Madam Justice Rosie Abella’s presence on the Court will have a similar impact.

And my final point concerns racial minority rights. No one in these discussions has raised any cases concerning race as a grounds of discrimination. It would seem that if the Court has been poor on women’s rights, it has been silent on racism and the rights of racial and ethnic minorities. Moreover, for some reason that I do not fully understand the political impact of the Charter on women, people with disabilities, and gays and lesbians has not worked in the same way with people of colour. I think this would be a topic of considerable interest for a future discussion.