The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles

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THE PUBLIC/PRIVATE DISTINCTION:
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FEMINIST STRUGGLES

BY JUDY FUDGE **

The public and the private worlds are inseparably connected... The tyrannies and
servilities of the one are the tyrannies and servilities of the other.

Virginia Woolf, To the Lighthouse

The constitutional entrenchment of sex equality rights in the
Canadian Charter of Rights and Freedoms1 was a resounding political
victory for feminists in Canada, particularly in light of the failure of
American feminists to obtain an Equal Rights Amendment to the

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1 Copyright, Judy Fudge, 1988. I would like to thank Shelley Gavigan, Harry Glasbeek and
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1 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 being
schedule B of the Canada Act 1982 (U.K., 1982, c.11.) [Hereinafter cited as the Charter.]
S.15 (1) Every individual is equal before and under the law and has the right to the
equal protection and 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 no 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.
S.28 Notwithstanding anything in this Charter, the rights and freedoms referred to
in it are guaranteed equally to male and female persons.
American Constitution.\textsuperscript{2} Not only was the legislative override of the equality guarantees defeated, but the feminist organizations involved in lobbying the provincial and federal governments obtained constitutional language which avoided most of the linguistic pitfalls contained in the earlier \textit{Canadian Bill of Rights}.\textsuperscript{3}

Paradoxically, the entrenchment of equality rights in the Canadian \textit{Charter} says more about the openness of the Canadian political process to equality claims when contrasted with the United States, than it does about the value of such rights as part of the legal process. Whilst the struggle around the issue of sexual equality was both a mobilizing and radicalizing process for many Canadian feminists, the same cannot be said about the outcomes of the implementation of that political victory. Once translated into legal rights, the demand for substantive equality for women has become truncated and divorced from broader political demands. This is true despite the fact that the \textit{Charter} provided a lead in time of three years before the equality rights provisions were operative, thus giving the courts ample opportunity to digest the appeals of academic commentators and legal activists for the adoption of an interpretive approach more sensitive to the claims of systemic discrimination than the approach previously adopted by the courts.\textsuperscript{4} Because of the slow pace of governmental action proactively to remedy legislation


activists formed the Women's Legal Action and Education Fund (LEAF) in April 1985. LEAF's objective is to assist women with important test cases and to ensure that equality rights litigation is undertaken in a planned, responsible and expert manner.\textsuperscript{6} However, it appears that the combined efforts of academic exhortation and repeated litigation have had little effect in persuading lower courts to adopt a radical new stance to equality rights in order to alleviate women's subordinate position in society. In fact, commentators who initially hailed the \textit{Charter} as an unqualified victory are now having second thoughts regarding its efficacy in the struggle to end the oppression of historically disadvantaged groups, women included.\textsuperscript{7}

Thus, once again Canadian feminists are confronted with the gulf between formal, and often merely symbolic, legal equality and substantive, material inequality for women.

Rather than examining the efficacy of constitutionally entrenched rights in general for furthering the struggle for women's substantive equality, what I shall do is concentrate on the public/private distinction in an attempt to discern how it has been played out in the constitutional adjudication of equality cases and how it contributes to, either by reinforcing or ameliorating, women's subordination. I have selected this distinction as the focus for my analysis of the impact of the \textit{Charter} on women's rights both because feminist theory has identified this distinction as crucial for understanding how women's oppression is constituted both materially and ideologically and because it figures prominently within liberal and legal thought.\textsuperscript{8} Although the private and public spheres have been identified by many feminists with the family and market


\textsuperscript{8} C. MacKinnon, "Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence" (1983) 8 Signs 635.
respectively,\textsuperscript{9} liberal political theory defines the market as private activity while the public sphere is seen as comprising political activity.\textsuperscript{10} Thus, what is defined as public or private depends upon the theoretical stance taken and the purpose for which the distinction is made.

Moreover, feminist writers have recently begun to identify the limitations in the initial feminist distinction between public and private spheres. There has been a growing recognition of the interconnectedness between family forms and the relations of production.\textsuperscript{11} The family and the market do not constitute autonomous spheres with discrete forms of regulation, but rather reproduction and production are interrelated in complicated and contradictory ways which change over time.\textsuperscript{12} While the public/private distinction has been a central feature of liberal legal thought, and has historically been used as a rationale to justify the refusal of the government and the judiciary to intervene in certain areas, critical analyses of this distinction have a long pedigree — the thrust of the critique being that the distinction has no determinate content.\textsuperscript{13} Rather than demonstrating the falseness of the dichotomy, what I shall attempt to do is chart how the distinction has been used in different areas and in different ways to create barriers for the feminist struggle for substantive equality.\textsuperscript{14} I shall


\textsuperscript{10}\textit{M. McIntosh}, "The Family, Regulation and the Public Sphere" in \textit{G. McLennan et al., eds, State and Society in Contemporary Britain} (Cambridge: Polity Press, 1984) 204 at 204.


\textsuperscript{13}\textit{N. Rose}, "Beyond the Public/Private Division: Law, Power and the Family" (1987) 14 J. of Law and Soc. 1.

\textsuperscript{14}Rose offers an insightful critique of how the public/private debate has been employed as critique both by feminists and critical legal theorists to delegitimate the view that law has a determinate content. Rose argues that this analytic strategy fails to grasp the ways in which the private family has been linked to new forms of political rationality and has been central to transformations in subjective realities and desires. Thus, he recommends jettisoning the public/private distinction for purposes of analysis and adopting instead Foucault's method of genealogy.
not endeavour to provide a synopsis of the impressive feminist literature on the public and private distinction, rather I shall employ a feminist analysis in order to uncover the assumptions implicit in many of the decisions concerning equality rights under the Charter. Thus, I will begin my examination of how the public/private distinction emerges in relation to the possibilities for Charter litigation to further the feminist struggle for substantive equality with a discussion of the public/private distinction as it has developed with respect to Canadian constitutional adjudication.

I. THE PUBLIC/PRIVATE DISTINCTION AND CHARTER ADJUDICATION

The distinction between the private and the public realms arises in relation to Charter litigation in two important ways. First, it is used by the courts to determine the scope of the rights and freedoms guaranteed in the Charter. Secondly, once the hurdle of the Charter's application is surmounted the distinction arises, albeit covertly, in the formal approach to equality rights which has typically characterized liberal constitutional jurisprudence. Thus, the public/private distinction may be used in the first instance to explicitly deny the Charter's application, and in the second it may be used to foster a concept of formal legal equality which by denying the relevance of the history of women's subordinate status perpetuates it. Consequently, it is crucial that the public/private split be overcome (or at least eroded) if Charter litigation is to be used to further feminist struggles.

Initially, the question of whether or not the Charter applies to private action or is limited exclusively to public action generated

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a great deal of academic debate. But the courts, by contrast with the academics, evinced a great deal of unanimity as to the scope of the Charter's reach. In Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery the Supreme Court of Canada authoritatively stated that for the Charter to apply an element of governmental action must be implicated in the litigation. Moreover, the Court distinguished judicial action from legislative, administrative or executive action in terms of the Charter's reach. While admitting that from a political science standpoint the courts are unquestionably one of the three fundamental branches of government (legislative, executive and judicial), MacIntyre, on behalf of a unanimous Court, concluded that to "regard a court order as an element of governmental intervention necessary to invoke the


This holding followed from the Court's premise that the Charter applied exclusively to public as opposed to private action. At issue in Dolphin was whether the Charter applied to an injunction issued by a court to give effect to a common law rule prohibiting picketing by a union against a secondary employer. The question MacIntyre posed was whether the Charter applied to private litigation divorced completely from any connection with governmental action? Acknowledging that the Charter itself is ambiguous regarding the scope of its application and that the academic commentators are divided over the issue, MacIntyre answered the question negatively. But this did not resolve the issue for there was another question: did the fact that an injunction had been issued by a court create a sufficient connection with the government for the Charter to apply? Again, MacIntyre answered in the negative.
Charter would, it seems to me, widen the scope of charter application to virtually all private litigation. The Court was not prepared to allow Charter litigation to intrude upon the private sphere.

Although this decision has evoked a great deal of academic criticism on a number of grounds, lower courts have embraced the decision as a useful corrective to those "errant commentators" who "initially preached the message that the Charter applied to "all law" and therefore to all litigation whether or not it involved public or private litigation." Thus, the common law rules of contract, property and tort which are devised and developed by the judiciary and enforced by other arms of the state are outside the scope of Charter scrutiny.

But while Dolphin clearly establishes, on the one hand, that common law rules escape Charter scrutiny and, on the other, that government action in the form of legislation is subject to review, between these two endpoints a large spectrum of uncertainty exists. For example, when considering labour relations law is grievance arbitration, the government in its role as employer, a collective

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21Ibid. at 600.

22However, MacIntyre did conclude by suggesting that it might be appropriate to develop the common law in light of fundamental principles under the Charter.


24Re Tomen et.al. and Federation of Women Teachers'Associations of Ontario et.al. (1988) 61 O.R. (2d) 489 at 505 per Ewaschuk.

25Russo v. The Ontario Jockey Club (1988) 43 C.C.L.T. 1 (Ont.H.C.); For a discussion of the impact of the Charter on labour law, see J. Fudge, "Labour, the Constitution and Old Style Liberalism" (1988) 13 Queen's L. J.

26The question of whether or not the Charter applies to grievance resolution is far from being resolved. The issue of whether or not the Charter applies to public sector grievance arbitration has been decided both ways. Here are some cases holding that it does: Re Simon Frazer University and College Employees(1985),18 L.A.C. (3d) 42 (B.C.Arb.Bd.); Re Douglas
agreement, or the internal affairs of a trade union subject to Charter scrutiny? In deciding each of these questions the judiciary has unlimited discretion, for it is the judges who decide what constitutes public and what constitutes private action, and they will answer these questions in terms of their evaluation of the particular interests at stake. Moreover, it is important to recognize that in deciding that the Charter does not apply in a particular case the court has made a positive decision, a policy choice, that the particular action in question will not be scrutinized in terms of its


Arbitrators and labour boards have held that the Charter does not apply to grievance arbitration in the private sector; see Re Lomax Mining Corp. Ltd., and U.S.W.A., Local 7619 (1983), 14 L.A.C. (3d) 169 (B.C.L.R.B.); Re Algoma Steel Corp. and U.S.W.A., Local 2251 (1984), 14 L.A.C. (3d) 172.

Re Lavigne and O.P.S.E.U. (1986), (1986) 55 O.R. 2d 449, 86 C.L.L.C. 14, 039 [additional reasons] (1987) 60 O.R. (2d) 486, 29 D.L.R. (4th) 321 (Ont. S.C.), where the Court held that a community college was a governmental actor when entering into a collective agreement. In Stoffman and Vancouver General Hospital (1987), 87 C.L.L.C. 17, 004, 30 D.L.R. (4th) 700, the B.C. Supreme Court held that the Charter applies to hospitals as they are government agencies which serve the public. But in McKinney v. The Board of Governors of Guelph et al. (1987), 87 C.L.L.C. 17,009, (1986), 14 C.C.R. 1 the Supreme Court of Ontario held that the Charter did not apply to a university, even though the university was a creature of statute and received public funding. In O.E.C.T.E.A. v. Essex (County) Roman Catholic Separate School Board, (1987), 18 O.A.C. 271 the Ontario Divisional Court held that the Roman Catholic Separate School Board, which was a creature of legislation, was not a government actor in its role as employer.

Bhindi, supra, note 18.

Baldwin v. B.C. Government Employees Union (1986), 2 C.C.R. 312, 3 B.C.L.R. (2d) 242(B.C.S.C.) holding that what a union does with compulsory dues is private and, thus, the Charter does not apply. However, in Cromer v. B.C. Government Teachers' Federation and A.G. of B.C., [1986] 5 W.W.R. 638, (1986) 4 B.C.L.R. (2d) 273 the B.C. Court of Appeal did not even address the issue of whether the Charter applied to the union's code of ethics. In Tomen v. F.W.T.O., supra, note 24, Ewasjak of the Ontario Supreme Court held that a union constitution was private, and thus the Charter did not apply.

possible infringement of rights and freedoms.\textsuperscript{31}

To date, the courts have generally held that collective agreements\textsuperscript{32} and union constitutions\textsuperscript{33} are private and thus beyond Charter review. Consequently, seniority, productivity, overtime and premium shift provisions contained in collective agreements cannot be challenged on the ground that they violate equality protection in the Charter, even though research has indicated that such provisions frequently result in large wage differentials between male and female employees.\textsuperscript{34}

It is important to draw out some of the implications of the courts’ private/public distinction for evaluating the use of Charter-litigation to further feminist struggles in the employment sphere. The wage relationship is central to women’s subordination. Many feminists have recognized that women’s specific oppression is related to their articulation between the family and wage systems.\textsuperscript{35} According to a survey of the impact of the Charter on labour relations law to October 1987, the cumulative effect of the decisions is to reinforce the legitimacy of legal relations and categories (contract and property, public and private) essential to a liberal political economy.\textsuperscript{36} Private ordering, even when sanctioned by the

\textsuperscript{31}According to Rodell, "...wherever the power to govern, to make decisions on policy, indubitably exists, it is used every bit as effectively by a deliberate refusal to use it as by its firm and forthright use." F. Rodell, \textit{Nine Men: A Political History of the Supreme Court from 1790 to 1955} (N.Y.: Random House, 1955) at 18-19.

\textsuperscript{32}Bhindi, supra, note 18.

\textsuperscript{33}Tonmen, supra, note 24.

\textsuperscript{34}R.E. Williams and L.L. Kessler, \textit{A Closer Look at Comparable Worth} (Washington, D.C.: National Foundation for the Study of Equal Employment Policy) at 20 and E.R. Livernash, ed., \textit{Comparable Worth: Issues and Alternatives} (Washington, D.C.: Equal Opportunity Advisory Council, 1980) at 124-6, 153, 157, 193. Moreover, differentials attributed to such provisions are permitted under the vast majority of equal pay and pay equity legislation. Possibly the Charter will be of some use in tightening remedial legislation implemented to ameliorate pay differentials resulting from the ghettoization of women into low paying, dead-end jobs. However, the success of such challenges will depend upon the approach the courts adopt to the equality provisions contained in the Charter and the type of remedies they see fit to devise.


\textsuperscript{36}Fudge, supra, note 25.
state, is privileged beyond the scope of the Charter in the name of individual freedom. This has wide-ranging ramifications for women workers who tend, for a number of reasons, including their segregation into the secondary labour market, their childcare obligations and the historic inability or unwillingness of the labour movement to organize unions composed primarily of women workers, to be particularly poorly situated to challenge the employer's superior bargaining power which is given state sanction through the common law relations of contract and property. Because the courts have opted for a liberal approach to the scope of rights and freedoms guaranteed by the Charter, the coercion of privacy remains intact in the employment relation.

But while the Charter will not redress women's (and other workers') subordination through the wage relation as it is constituted by the common law of property and contract, the Charter might be used to redress other areas of women's subordination where state action, as identified by the court, is directly involved. State action, typically in the form of legislation or administrative action, is directly involved in either constituting or ameliorating women's subordinate position in the following four areas:

1. Protective or remedial labour legislation;
2. The legal recognition and regulation of a specific type of family;
3. Legislation designed to protect women from sexual violence or victimization; and
4. The legal regulation of reproduction.

The first three areas raise equality issues. The significant question for feminists here is what approach to the equality rights

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37 Baldwin v. B. C. Government Employees Union, supra, note 29; Bhindi, supra, note 18.


40 This list or categorization is not meant to be exhaustive, but rather is offered as a useful heuristic for analyzing the problem.
under the Charter will best alleviate women's subordinate position. In the United States the debate has centred around whether women should seek equal treatment with men, or whether women should seek to have their differences from men, whether it be their biological capacity to bear children, their childrearing responsibilities, or their economic dependency upon men, recognized as legitimate grounds for different treatment. In general, the similarity approach has won out, with the difference approach being seen as a necessary corollary for those areas where women are in fact different from men, which has typically been limited to women's reproductive capacities. The dominant tendency adopted both in Canadian feminist legal writing and by Canadian feminist activists is to reject the formal legal equality approach as insufficient for attaining substantive equality. Drawing upon the work of MacKinnon, Lessard argues that formal equality rests upon the "fictive option" of equal access to the protection of neutral laws, which she describes as a device which removes the private experience of the oppressed as members of a discriminated class from legal relevance. So long as the oppressors and the oppressed are treated equally by the laws, the patterns of actual choices exercised by oppressors are constitutionally irreproachable because they are private. Thus formal equality assumes an ideal world where discrimination consists of isolated deviations from the norm rather than dealing with the real world whose starting point is a widespread

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43 R.B. Cowan, "Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-76" (1976) 8 Col. Hum. Rts L. Rev. 373. There is, however, a new tendency in American feminist literature to develop an approach to equality rights for women which falls into neither the "equal" rights or "special" rights camps. See, for example, the "acceptance" approach offered by C.A. Littleton, "Reconstructing Sexual Equality" (1987) 75 Cal. L. Rev. 1279. See S. Law, "Rethinking Sex and the Constitution" (1984) 32 U. Pa. L. Rev. 955 calling for equal treatment in all areas except reproduction and also Kay, "Equality and Difference: The Case of Pregnancy" (1985) Berkley Women's L. J. 1. Alternative nomenclature (result-equality/integrative feminism) has been employed by Boyd and Sheehy to characterize the different feminist approaches to equality: S.B. Boyd and E.A. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 C.J.W.L. at 8-13.
historically determined imbalance.44

Lessard argues that formal legal equality in effect embodies a public/private distinction which poses an insurmountable barrier to ending women’s subordination.

Thus, most feminists recognize that although formal equality may be necessary for achieving substantive equality for women, it is not sufficient.45 As Vickers notes, the Charter was enacted at the same time as American litigation-based interest groups have become fed up with the formal notion of equality.46 Recognizing the limitations inherent in formal equality, various feminists have advanced contextualized theories of equality which are essential to the achievement of equality goals for those groups experiencing systematic social inequality. Feminists, however, do differ as to their respective analyses of the causes of social inequality. Vickers, for example, regards social inequality as the consequence of historical contingency,47 whereas MacKinnon views such inequality as the result of a systematic distribution of power which subordinates women to men.48 But regardless of the different perspectives on the aetiology of women’s social inequality, the vast majority of feminists now advocate a contextualized approach to equality questions which requires that judicial recognition be given to women’s private experience of subordination.49

44 Lessard, supra, note 15 at 119.

45 Lahey, supra, note 7; Olsen, supra, note 11, 1519.


48 MacKinnon, supra, note 16.

Most feminist theorists are aware that such a contextualized approach to equality requires the rejection of liberalism.\textsuperscript{50} For instead of being content with mere formal equality, the claims of the "new equality seekers" go "beyond the abstract rights and formal guarantees to take into account the contingencies of sex, race, age and handicap which bump against practices central to the operation of liberal democracy."\textsuperscript{51} The contextualized approach to equality requires the court to consider the socio-historic roots of current inequality.\textsuperscript{52} Thus, the success of this approach depends, to a large extent, upon the courts' rejection of the public/private split which is both implicit in the notion of formal legal equality and a cornerstone of liberal democracy and jurisprudence.

However, a consensus on the appropriate approach to furthering feminist goals through equality litigation is merely the starting point. The success of the endeavour ultimately depends upon the courts' receptiveness to a contextualized approach to equality and their willingness to reject traditional concepts of formal equality. In order to get some sense of how far the courts are prepared to adopt a contextualized approach it is necessary to refer to the cases decided to date which have involved sex equality either directly or indirectly. Whilst it is true that there has been no authoritative decision by the Supreme Court of Canada regarding the appropriate approach to equality claims raised under the \textit{Charter}, there are now sufficient lower court decisions to indicate general judicial tendencies. And while the decisions of the lower courts at this early stage are neither determinative of what the Supreme Court will say nor the future of equality litigation, these decisions are important both because they will inevitably affect large numbers of women and they indicate the kinds of barriers that those invoking the \textit{Charter} to further feminist struggles will confront.

Accordingly, I will examine the cases decided to date involving sex equality claims in each of the three areas where state action is involved in either constituting or ameliorating women's


\textsuperscript{52} Sheppard \textit{supra}, note 49 at 219.
subordinate position: 1) protective or remedial labour legislation; 2) the legal recognition and regulation of a specific type of family; and 3) legislation designed to protect women from sexual violence or victimization. After examining each of these areas in succession I shall attempt to draw some general conclusions regarding the courts' treatment of sex equality claims. Following that, I will examine the argument that the attainment of formal legal equality is a necessary condition for women's substantive equality by focussing on the legal regulation of reproduction, in particular, the legal regulation of abortion.

A. Protective or Remedial Labour Legislation

As previously demonstrated, the wage relationship, as constituted and regulated by the common law of property and contract, is beyond the scope of Charter review. However, the fact that employers historically have abused their superior economic power to the detriment of workers, both male and female, has resulted in the introduction of minimum standards and collective bargaining legislation to moderate the rigours of the common law.\textsuperscript{53} In addition, as part of its general role to facilitate the reproduction of the social order, the state has introduced legislation designed to regulate the direct interaction of women's employment and reproductive requirements. Unemployment and minimum standards legislation regarding maternity benefits and leave most obviously straddles the interrelated areas of protective employment legislation and the legal regulation of reproduction. I shall address each of these sub-areas of protective labour legislation in turn.

Both the federal and provincial governments have introduced legislation to prohibit discrimination on the basis of sex, whether that discrimination takes the form of job assignment, compensation or sexual harassment. Such legislation is relevant to equality litigation

\textsuperscript{53} One explanation for the legislation is that each employer has a short term interest in extracting as much labour power as possible, which might detrimentally affect the employee. The state, on the other hand, is concerned with the reproduction of the social order as a whole, and thus must introduce protective legislation to allow workers to reproduce themselves. See J. Ursel, "The State and the Maintenance of Patriarchy: A Case Study of Family, Labour and Welfare Legislation in Canada" in J. Dickinson and R. Russell, ed., \textit{Family, Economy and State} (Toronto: Garamond Press, 1986) 150 at 161.
under the Charter in two ways. First, the question is whether this legislation, if specifically addressed to women workers, violates the equality provisions contained in section 15(1), or is saved by the affirmative action protection provided in section 15(2). And second, judicial interpretation of such legislation is significant because it may be used as a basis for justifying certain interpretive approaches to the equality provisions contained in the Charter.

To date there are no decided cases addressing the issue of whether protective employment legislation other than maternity related statutory provisions infringe the equality provisions contained in the Charter. This is not surprising, since most protective legislation for women, such as prohibitions on sexual harassment for example, although specifically designed to deal with a social situation experienced overwhelmingly by women, are couched in gender neutral language. By contrast, affirmative legislation such as the Pay Equity Act recently introduced in Ontario specifically refers to the gender of the incumbents who traditionally fill specific job classes in order to proactively address the problem of the gap between female and male workers' wages which results from the systematic undervaluation of women's work. Although constituting a prima facie violation of section 15(1) of the Charter, it is likely that such legislation will be saved by section 15(2) which protects legislation designed to ameliorate the conditions of disadvantaged groups. But here it is important to note the recent decision of the Manitoba Court of Queen's Bench which held that since section 15(2) is an exception to the equality guarantee contained in section 15(1) the party seeking to uphold the affirmative action plan or provision must adduce sufficient evidence to persuade the court that the beneficiaries of the provision are disadvantaged in the context of the Charter. The restrictiveness of the Court's interpretation of

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54 See, for example, Human Rights Code, 1981, S.O. 1981, c.53, s.6(2) dealing with sexual harassment in the workplace.

55 S.O. 1987, c.34.

56 In Apsit v. Manitoba Human Rights Commission (1986), 23 D.L.R. (4th) 277, 22 C.R.R. 134 (Man. Q.B.) the motions judge concluded that an affirmative action plan approved of by the Manitoba Human Rights Commission constituted a prima facie violation of s.15 of the Charter, and remitted the case to trial for determination of whether or not the plan was saved
section 15(2) can only be appreciated in the context of the litigation, which involved a challenge to an affirmative action plan approved by the Manitoba Human Rights Commission granting Indian groups and persons of native ancestry first option to license areas to grow wild rice.

In other words, the Court refused to take judicial notice of the historic discrimination against native people in Canada, requiring instead that the Commission prove it. The question this case raises is whether such a narrow approach will be adopted by courts required to rule upon the constitutional validity of affirmative legislation designed to benefit women, and if so, what sufficient evidence of women's disadvantaged position is to consist of.

Recently, the Supreme Court of Canada issued a decision which might be interpreted as signalling the Court's willingness both to consider systematic discrimination and to take proactive steps to redress the consequences of such discrimination. In Action Travail\textsuperscript{57} the Supreme Court, reversing the decision of the Federal Court of Appeal, upheld an order of the Canadian Human Rights Commission requiring Canadian National Railways to institute an employment equity program. The program required CN to hire at least one woman to fill every four job openings until the goal of 13 per cent female participation in blue collar, non-traditional jobs was reached. The Court upheld the employment equity program on the grounds that it was "essential to combat the effects of past systematic discrimination."\textsuperscript{58} What has heartened feminists is the Court's broad definition of systematic discrimination:

systematic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group

under s.15(2). In essence, at trial the issue was whether a policy of giving preference to people with a native background in the issuance of licences to grow wild rice on designated Crown land constituted an affirmative action program designed to ameliorate the conditions of a disadvantaged group. At trial, Simonson held that although the government of Manitoba had established that native people were disadvantaged, it had failed to establish a reasonable relationship between the cause of the disadvantage and the form of ameliorative action (1988), [1988] 1 W.W.R. 629 (Man.Q.B.) at 643.


\textsuperscript{58}Ibid. at D/4232.
because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that "women just can't do the job."\(^5\)

But before one becomes overly sanguine about the significance of the Supreme Court's decision in *Action Travail* as prefiguring a judicial willingness to adopt an approach to equality rights which will redress the impact of systematic discrimination, it is important to acknowledge that in this case the Court was validating the decision of an expert tribunal specifically established to administer remedial legislation designed to ameliorate, among other things, sex discrimination in the workplace. By contrast, a challenge to legislation on the grounds that it violates section 15 requires the court to scrutinize and invalidate legislation on the grounds that it operates to the detriment of women on account of a range of historic social and economic factors. This difference of contexts is crucial, for in the former the court is being asked to uphold a decision made by an administrative tribunal to adopt an expansive, remedial interpretation of a governing statute, whereas in the latter the court is being asked to invalidate legislation on the grounds of its disparate detrimental impact upon women as a class.\(^6\)

The very fact that we consider it to be a victory if the court upholds a remedial interpretation of a statute by a tribunal suggests something about how the courts have traditionally exercised their curial power. Thus, while it is logically possible that the courts may import the type of remedial approach specifically authorized under human rights legislation into its interpretation of the equality guarantees contained in the *Charter*, it is not necessary that they do so. Much will depend upon the type of legislation being impugned, the competing interests involved, the persuasiveness of the evidence of historic disadvantage and the courts willingness to invalidate legislation on grounds that go beyond formal equality.


\(^6\) *In obiter* Simonsen, while specifically averting to the Supreme Court's decision in *Action Travail*, *supra*, note 57, in the context of a s.15 challenge to legislation, emphasized the distinction between human rights statutes and the Charter. See Apsit (1988), *supra*, note 56 at 647.
In *Weatherall v. Attorney-General of Canada* the Federal Court clearly embraced a notion of formal equality, while simultaneously rejecting a broader sociological perspective on the continuing significance of male/female power differentials. The Court held that the use of female prison guards in non-emergency strip searches of male inmates constituted a pejorative form of discrimination in the treatment of the sexes. The federal government sought to justify this activity on the ground that it was part of an affirmative action programme designed to provide employment opportunities in federal penal institutions for women, and thus was saved under section 15(2). The Court found, however, that the use of female guards for strip searches was not necessary to their employment in male prisons. Moreover, the Court further held that the provision in the Penitentiary Service Regulations, C.R.C. 1978, c.1251 which protected female inmates against searches by male guards, but did not provide comparable protection for male inmates against searches by female guards constituted a violation of section 15(1). The Court asserted that:

> The distinction cannot be justified on the basis of the suggestion that male guards, by their inherent maleness are more likely to exploit such situations as cross-gender searches and surveillance than are female guards that would be to give effect to the kind of stereotyping that [s. 15] was designed to avoid.62

However much one might applaud the Court's rejection of cross-gender searches and its validation of the affirmative action programme in general, surely the refusal by the Court to recognize the historic and continuing sexual subordination of women by men bodes ill for a contextualized approach to equality claims raised under the Charter. The question this case poses is whether other courts have adopted a similar notion of formal equality to invalidate legislation designed to address the sexual coercion of women by men. Moreover, *Weatherall* suggests that unless the courts are prepared to adopt an explicit contextualized approach, protective legislation may serve to reify concepts of formal equality, rather than address the

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62Ibid. at 303.
consequences of women’s social and economic subordination.

Minimum standards legislation, or more specifically, statutory or regulatory exclusions therefrom, has been the subject of at least one Charter challenge, and another one has recently been threatened. At issue is the exclusion of domestic workers from certain minimum standards, specifically the requirement to pay overtime premiums once a stated number of hours has been worked during a week as provided in the Ontario and British Columbia Employment Standards Acts. Although the excluded class of workers, domestics, are described in a manner which is gender neutral, when the historic incumbency of that class of workers is averted to the exclusion of domestic workers from overtime pay clearly has a disparate negative impact on women workers. In British Columbia a petition challenging the validity of the regulations issued under the authority of the Employment Standards Act was dismissed. However, the petition was brought before section 15 was in effect. Thus, the Domestic Workers’ Union was unable to argue that the exception of domestic workers from overtime pay violated their right to equal treatment.

In Ontario, Intercede, the organization representing domestic workers, managed to obtain legislative amendments to the Employment Standards Act requiring the employer either to grant overtime pay or time-off in lieu of overtime. Intercede threatened

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65 In Domestic Workers’ Union v. A.-G. of B.C., supra, note 63, the petitioner brought an application to the Supreme Court of British Columbia to challenge the validity of the overtime pay provisions contained in the Employment Standards Act Regulation, supra, note 64. Basically the Domestic Workers’ Union argued that by failing to provide for overtime pay for domestic workers the legislation violated, among other things, s.7 of the Charter. In dismissing the petition the Court asserted that as s.15 of the Charter was not in effect at the time the petition was argued before the Court.

66 O.Reg.308/87, supra, note 64.
to initiate an equality challenge under the Charter to the exclusion of domestic workers from the statutory overtime provisions. Less than a year later, however, Intercede announced its intention to proceed with a legal challenge since employers were ignoring legislation. While it is likely that such a challenge will succeed on the ground that the exclusion of domestic workers from overtime provisions violates their right to equal treatment with other workers in a manner that is not justified under section 1 of the Charter, it is just as likely that successful legislation will not have much impact upon the plight of domestic workers. Although it is true that the legislative exceptions for domestics reflects their historic lack of political influence, judicial action requiring the legislature to treat domestics the same as other workers for the purpose of overtime pay will have little material impact on domestic workers. If employers are willing to ignore the amendments to the overtime provisions because they do not believe that domestic workers will enforce their legal entitlements, it is unlikely that further amendments to the overtime provisions, in the absence of a significant strengthening of the enforcement provisions, will provide employers with any greater incentive to obey the legislation. In situations of abject economic dependence workers’ legal entitlements are rarely effective unless the state adopts a policy of rigorous enforcement. Thus, formal legal equality for domestic workers is most likely to be a symbolic, as opposed to, material victory. Moreover, to obtain a material improvement in the economic lot of domestic workers the courts would either have to end the profound economic dependency of domestic worker, or devise an effective enforcement regime. In either case it would be necessary to persuade the court that exceptional remedies are required to alleviate a situation of systematic social and economic subordination. While it is logically possible that the courts may be so persuaded, in light both of the their historic rejection of economic dependency as a reason for judicial action and their overwhelming preference for invalidating legislation rather than devising positive remedies, it is highly unlikely that such an argument would be persuasive.

Prior to 1971, unemployment due to pregnancy was not indemnified under the *Unemployment Insurance Act* on the grounds that it was the predictable result of presumably voluntary sexual activity. As part of a major overhaul of the unemployment insurance scheme to close the gaps in welfare provisions, the federal government amended the *Unemployment Insurance Act* to provide for maternity benefits. However, the maternity benefit provisions imposed by far the most stringent eligibility requirements of any benefits under the *Unemployment Insurance Act*. Since claimants otherwise entitled to unemployment benefits would be ineligible if they were pregnant it was just a matter of time before the maternity provisions would be challenged as violating the guarantee of equality under the law contained in the *Canadian Bill of Rights*.

In its infamous decision in *Bliss v. A.G. of Canada* the Supreme Court of Canada held that maternity benefits under the *Unemployment Insurance Act* did not contravene the equality provisions of the *Bill of Rights*. The Supreme Court ruled that the denial of "regular" benefits on account of pregnancy did not discriminate on the basis of sex nor deny women equality under the law. The Supreme Court adopted a narrow procedural, as opposed to substantive, definition of the equality guarantees under the *Bill of Rights*. In addition, it applied the difference principle to resolve the question of whether differences of treatment on the basis of pregnancy constituted a form of sex discrimination. While the Court conceded that the maternity benefit provisions of the *Unemployment Insurance Act* had an unequal impact on women and men, the Court stated that this was due to "nature," and not the legislation. Since pregnant women were not similarly situated to other claimants different treatment did not constitute unequal treatment.

*Bliss* proved to be an unfortunate legal precedent for it has been relied on extensively to narrow the prohibition against sex discrimination in employment provided by federal and provincial

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human rights statutes to exclude pregnancy. However, Bliss also proved to be a rallying cause for feminists organizations. According to Morton and Pal, Bliss had broad political implications for feminist objectives. After Bliss, feminist organizations began to argue that since the Bill of Rights had proven ineffective to ensure equality rights for women, a constitutionally entrenched charter of rights with stronger and more explicit guarantees was needed. Moreover, these demands coincided fortuitously with the nation-building agenda of then Prime Minister Trudeau and the Liberal Party. Feminists groups proved to be crucial allies in Trudeau's constitutional quest. They effectively bargained their support for a rewording of the equality rights clause that would preclude any future decisions like Bliss. What the Canadian people got was section 15 of the Charter — the most sweeping constitutional guarantee of equality to be found in any liberal democracy in the world. The key clause of section 15, "the equal benefit of the law," comes directly from Bliss.

It is necessary, however, to stand back and critically evaluate the significance of section 15. Clearly, the impact of Bliss was to heighten the awareness of feminist organizations as to the significance of constitutional language when it comes to entrenching effective equality guarantees. Thus, these organizations managed to obtain language which on its face appears to preclude the narrow procedural interpretation to the equality provision which the Supreme Court offered in Bliss. However, it is important to recognize that there exists a significant divergence of opinion as to exactly what section 15 requires. For example, by contrast with the legislative audits undertaken by feminists groups which have adopted an aggressive use of the "equal benefit" clause, the audits undertaken by "provincial governments have tended to adopt a minimalist methodology that limits the scope of equality rights to statutes

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71 Pal and Morton, supra, note 3.

72 Ibid. at 153.
employing sex as a basis of legislative classification.\textsuperscript{73} This approach, predictably, has been criticized by feminists as ignoring systematic discrimination resulting from laws that are facially neutral but which reinforce the social subordination of women.

Moreover, it would appear that there are already several instances where the courts have adopted a narrow approach to equality rights when interpreting section 15.\textsuperscript{74} What the courts will do when faced with the issue of whether or not differential treatment on the basis of pregnancy constitutes sex discrimination is not known, and cannot be predicted with any ease if the American experience is any guide.\textsuperscript{75} Since the \textit{Unemployment Insurance Act} was amended in 1981 to treat pregnant women the same as any claimant in terms of the requirements for benefits,\textsuperscript{76} it is difficult to think of a statute which singles out pregnant women for unfavorable treatment.

The vast majority of pregnancy discrimination which occurs does so with respect to work assignments, disability plans and seniority entitlements. But these sorts of employment issues have been relegated by the courts to the private sphere, and thus are not subject to \textit{Charter} scrutiny. Moreover, the \textit{Charter} seems to have little impact in persuading courts to adopt an expansive approach to questions of sex discrimination in cases where section 15 has not been argued. Recently, the Manitoba Court of Appeal upheld the decision of the lower court that a disability plan that treated pregnant workers differently from other workers regarding benefits did not constitute prohibited sex discrimination under the provincial human rights act.\textsuperscript{77} In so deciding, the lower court followed the narrow approach to sex discrimination adopted in \textit{Bliss}, even though

\textsuperscript{73} \textit{Ibid.} at 157 (emphasis omitted).

\textsuperscript{74} See cases cited at infra, note 153.


\textsuperscript{76} Pal and Morton, supra, note 3 at 152.

it had been distinguished in similar cases.\textsuperscript{78}

Since Bliss, however, four provinces and the federal government have amended their human rights statutes to provide explicitly that discrimination on account of pregnancy is sex discrimination.\textsuperscript{79} The legislative recognition that pregnancy discrimination constitutes a prohibited form of sex discrimination has had a demonstrative effect on labour arbitrators and adjudicators even where pregnancy discrimination is not explicitly prohibited.\textsuperscript{80} But by far the vast majority of the protections for pregnant workers, however inadequate, have been provided by legislation.\textsuperscript{81}

Paradoxically, the fact that it has required legislation to protect pregnant workers from discrimination in employment, lends the protections vulnerable to attack. Whilst it might seem far-fetched that legislation prohibiting pregnancy discrimination could be challenged on the ground that it constituted a form of sex discrimination, this has already occurred in the United States. In \textit{California Fed. Savings & Loan Assn. v. Guerra}\textsuperscript{82} an employer challenged California state legislation which provides a woman with up to four months unpaid maternity leave and guaranteed job protection upon her return on the ground that it was discriminatory because it only applied to women and not to men. At first instance the District Court agreed with the employer and struck down the legislation because it failed to provide equal treatment for men and women. The decision was reversed by the Court of Appeal, and this

\textsuperscript{78}Brooks, supra, note 77.


\textsuperscript{81}For example, Employment Standards Act, R.S.O. 1980, c.137, PART XI which provides for maternity leave.

\textsuperscript{82}758 F.2d 390 (9th Circ., 1985)
in turn was upheld by the Supreme Court. In the majority of the Supreme Court stated that since the legislation merely provided pregnant women with equal employment opportunities it was consistent with Title VII of the Civil Rights Act, 1964. However, there was a dissenting opinion to the effect that the legislation violated the requirement of equal treatment by treating pregnant women differently from other disabled workers. With the introduction of the Charter it is possible that analogous maternity leave provisions contained in employment standards legislation across Canada could be challenged on the basis that by treating pregnant women differently from other workers section 15 of the Charter has been violated. Of course, merely because this argument is available does not entail that it will succeed; there remains the possibility of saving the maternity leave provisions under either section 15(2) and/or section 1 of the Charter. However, time and money may have to be spent in defence of the status quo, which itself is the result of struggles by feminists in the legislative arena. Thus, with the advent of the Charter, legislation designed to redress, however inadequately, the ability of employer’s to discriminate against women workers in the private sphere is now liable to challenge.

B. The Legal Recognition and Regulation of the Family

The family has always played a central role in feminist discussions of the public/private distinction. It has traditionally been regarded as circumscribing the private sphere (women’s world), and it has been contrasted to the public world of the market (men’s

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84 See Symes, supra, note 75, 207-210 for a discussion of the dissent.

85 In Schacter v. Canada, (1988), 88 C.L.L.C. 14,021 (Fed. Ct.), a natural father challenged the unemployment insurance scheme on the ground that the benefits available to adoptive fathers were not available to natural fathers and hence constituted a violation of s.15 of the Charter. In his decision, Strayer J. made it clear that the provisions with respect to adoptive parents were for the purpose of facilitating child-rearing, whereas the provisions with respect to natural mothers were for the purpose of facilitating childbirth, and thus Schacter’s claim should not in any way be seen as encroaching upon maternity benefits.
This initial feminist conceptualization of the public/private split reflected early judicial decisions in both North America and the United Kingdom which justified different treatment of men and women in terms of their separate spheres. Unlike the courts, however, feminists have not regarded the "sanctity of the family" as a haven from the competition and struggle of the market, but rather have perceived it as replicating the broader social inequalities between men and women. The lack of state intervention in the family itself, its privacy, has been characterized by Stang Dahl and Snare as coercive. The segregation of women into individual household units as a method of "privately" ensuring social reproduction has been seen by feminists as not only contributing to women's economic and social subordination, but implicating them emotionally in their subordination to individual men.

Increasingly, however, feminists have begun to recognize that the initial conceptualization of the public/private split in terms of the market/family divide implies an uncritical acceptance that this distinction is natural, rather than itself created by state action, and disregards the fact that women workers have always been involved in both the market and the family, often simultaneously. The state, both through legislation and judicial action, has long been involved in constituting the family. Only certain types of relationships have been and continue to be recognized by law as marriages, and only those legally recognized relationships may enjoy state provided

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88 Stang Dahl and Snare, supra, note 39 at 14.


91 Ursel, supra, note 53.
benefits. While it is true that "common law" relationships, relations not formally sanctioned by the state or church through the institution of marriage, are now recognized for the purpose of obtaining benefits from the state, a wide range of long-term mutually supportive relationships other than heterosexual couplings have been denied legal recognition for the purpose of making claims upon the state.2 Moreover, the long history of protective legislation relating to maximum hours of work for women and the more recent regulation of the interplay between women’s reproductive and employment needs provide indisputable evidence of the state’s recognition that women have had, and continue to have, joint and often contradictory responsibilities in both spheres.3 And it is exactly this dual responsibility that results in women’s subordination; women’s childrearing duties have resulted in their disadvantaged position in the labour market, and this, in turn, has contributed to their continuing economic dependence upon men. And when women are unable to undertake remunerated employment because of their childbearing and rearing responsibilities, the state has required women to establish that they are not economically dependent upon men as a condition for obtaining state benefits for their own and their children’s subsistence.

Thus, it is important that feminists do not allow the pervasiveness of the "ideology of privacy" to obscure the fact that, and the degree to which, the state is implicated in both the constitution and regulation of the family. But once the appropriate household unit is constituted by the state, the family is left in privacy to regulate its internal affairs to the extent that it conforms to state norms. And more significantly perhaps, the very constitution of the household unit as the site of social reproduction, that is, the fulfillment of the material and emotional needs of the members of society, minimizes the extent to which the state is involved in


fulfilling the material needs of its citizens. Ultimately, the family is dependent upon the "family wage" of the male worker, who sells his labour power in order for both himself and his dependents to subsist. But because no individual capitalist is concerned with the reproduction of the social order as a whole, but rather with the extraction of the maximum amount of surplus labour value, the state must step in to ensure that exploitation does not exceed the point at which workers are not able to fulfill their material needs.\textsuperscript{9} However, the state intervenes in a manner so as to ensure that the vast majority of the material needs of its citizens are met privately within the household unit which is supported by the male wage. Consequently, there is a presumption that women are economically dependent upon men, and only when that presumption is rebutted will the state step in to meet, however minimally, the needs of women and children. According to Zaretsky, 

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the rise of the state in modern history does not take over the responsibilities and functions from the family so much as it accompanies a shift from patriarchal to a private, ostensibly non-political family unit. Rather than the state replacing the family, the modern nation-state and modern family emerged together as the necessary compliment of one another, each applying and presupposing the other. In order to see the connection between them, it is necessary to conceptualize the market economy as the crucial mediation first in securing the political rights of the private individual (or the family unit) and later as supplying the means by which interdependence and altruism was to be achieved.... The redefinition of the family in terms of private property established it as an "autonomous" realm and was associated with a pushing back of government's power to intervene.\textsuperscript{95}
\end{quote}

The legislative and administrative activity involved in constituting and regulating the family is clearly public action in terms of the liberal distinction between public and private activity and, as such, is subject to Charter scrutiny. But, once the family is granted legal recognition because it conforms both to the "ideal family" and the norms of behaviour established by regulatory agencies, its internal activities are deemed to be private and, consequently, the Charter does not apply. However, a range of equality issues arise with respect to the differential treatment of men and women in relation both to the legal recognition of the family

\textsuperscript{94}Ursel, supra, note, 53.

and benefits provided by the state. I shall examine a number of these cases in terms of both the approaches to equality they adopt and the assumptions they reflect. In the first group of cases I shall consider, women have sought to invoke the Charter's guarantee of equality to extend legal recognition either to individual family members or to non-traditional "families" for the purpose of claiming state benefits. By contrast, the second group of cases all involve equality challenges by men to legislation designed specifically to address women's economic subordination.

Feminists first sought to use the equality guarantees contained in the Charter to attack those few remaining statutes which denied formal equality to men and women in marriage. In 1985 LEAF initiated several cases across the country challenging provincial statutes which restricted women's options for naming themselves and their children. By precluding a married woman from using a name other than her husband's or from passing her surname, rather than her husband's, on to her children, LEAF asserted that the legislation violated the equality rights provided under the Charter. In two instances this argument was accepted by the courts, and in the face of similar litigation several other provinces amended their legislation to reflect LEAF's demand for formal legal equality in respect of a married woman passing on her surname to her children.

The success of this litigation demonstrates the courts'
willingness to accept arguments advocating formal legal equality when issues of obvious symbolic, though of little material, import are raised. The symbolic significance of these decisions in establishing the right of a married woman to maintain a separate formal legal identity from her husband's when married, and to pass on her name to her children, should not be underestimated. However, the attainment of such formal equality does nothing in itself to further substantive equality for women either within or outside of marriage. The question this type of case poses is whether this symbolic affirmation of women's separate legal identity from men cashes out when material interests are involved.

Although courts have responded to formal equality arguments in order to grant legal recognition to married women, to date the Ontario Supreme Court has refused to extend legal recognition to cohabiting same sex partners for the purpose of obtaining dependent coverage under the Ontario Health Insurance Act. In Andrews v. Minister of Health the applicant sought, among other things, a declaration that to the extent that the Act and regulations precluded coverage of cohabiting same sex partners as dependents, the statute and its subordinate legislation violated section 15. Although cohabiting heterosexual couples receive dependent coverage, homosexual couples living together in a domestic situation are classified as single persons and must pay single person premiums. In addressing the equality issue McRae J. adopted a formal threestep approach which appears so far to have overwhelmingly found favour with the courts:

Those challenging the law must:
(1) identify the class of individuals who are alleged to have been treated differently;
(2) demonstrate that the class purported to be treated differently from another class is similarly situated to that other class in relation to the purpose of the law;

99 R.S.O., 1980, c.197, Ont. Reg. 452/80, ss.1(e),(b),111(2).
100 (1988) (Unreported) (Ont.S.Ct.).
101 Counsel for Andrews also argued that the provision also violated ss.2(d) and 7, but these arguments were given short shrift by the courts.
McRae identified homosexual couples living together in a domestic situation as the distinct class. As to whether this class was similarly situated to heterosexual couples he asserted:

Homosexual couples are not similarly situated to heterosexual couples. Heterosexual couples procreate and raise children. They marry or are potential marriage partners and most importantly they have legal obligations of support for their children whether born in wedlock or out and for their spouse... A same sex partner does not and cannot have these obligations.

And finally he held that the distinction was not discriminatory because same sex cohabitants are treated in exactly the same manner as all other unmarried (whether in the legal or "common-law" sense) people in the province. Moreover, McRae J. sought to further justify his decision in light of his characterization of the purpose of the Act, which he saw as "to promote and assist with the establishment and maintenance of families" through "a scheme of health insurance which benefits all Ontario residents with particular assistance to spouses and dependent children in the more "traditional" heterosexual context."

Not only does this decision adopt a narrow, formal approach to the equality rights under the Charter, more importantly, and much more damagingly, it clearly adopts, endorses and perpetuates a familial ideology, wherein the ideal family is still taken to mean a social relationship sanctified by law and preferably by a recognized religion, comprising an adult male, female adult, and their biological or adopted children. Implicit in familial ideology is the belief that the "ideal" or "traditional" family is normal. The danger of this familial ideology, according to Gavigan, is that the law by assuming,

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102 Ibid. at 7.

103 Ibid.

104 Ibid. at 9.

105 Ibid. at 12. He went on to say that a line must be drawn somewhere.

and thereby ensuring, that there is but one family form, reproduces and reinforces the subordination of women.\textsuperscript{107}

This decision is part and parcel of a well-established judicial proclivity to define spouse in such a way as to deny same-sex couples the benefits granted to heterosexual couples.\textsuperscript{108} Although the possibility of using the \textit{Charter} to end discrimination against cohabiting lesbians and gays has been mooted in several government background papers, the success of this endeavour will depend upon the tenacity of familial ideology. But at the same time as the rhetoric of the family is reaching a feverish pitch in public debate,\textsuperscript{109} there is evidence of chinks in the pervasiveness of familial ideology. Protections in human rights statutes are being extended to include sexual preference and there is some evidence that members of the Supreme Court of Canada may not be opposed to extending equality protections to homosexuals.\textsuperscript{110} Thus, legislation and Charter-litigation provide two avenues for challenging both the assumptions and effects of familial ideology. Whether the later tactic will prove successful remains to be seen.

The decisions in the next two cases, which both involve equality challenges by men to legislation designed to alleviate the dire economic circumstances of sole support mothers, appear on their face to be inconsistent. In \textit{Shewchuk v. Ricard}\textsuperscript{111} the British Columbia Court of Appeal held that legislation which allowed a single mother to sue the natural father of her child without

\begin{thebibliography}{99}
\bibitem{107}Ibid. at 294.
\bibitem{108}Leopold and King, \textit{supra}, note 92 at 166-9.
\bibitem{109}The assault on feminism by the pro-family right is being lead by REAL women of Canada. The President of the National Committee on the Status of Women, which led the drive for equality rights in the \textit{Charter}, felt compelled to adopt the 'pro-family' rhetoric insisted upon by REAL Women: "[w]e agree with Real Women's goals of preserving family values and integrating family life into government policies..." (S. Cameron, "Homey Muffins, Pink Brochures Belie REAL Women's Focus" \textit{The [Toronto] Globe and Mail} (18 Dec. 1986) A 1,5. See also the discussion of the recently-established men's groups such as, "In Search of Justice," and the "Canadian Council for Family Rights," an umbrella group for about twenty groups in National Association of Women and the Law (1988) 8(3) \textit{Jurisfemme} 9-13.
\bibitem{110}Leopold and King, \textit{supra}, note 92 at 185.
\bibitem{111}(1986), 24 C.R.R. 45, 2 B.C.L.R. (2d) 324 (B.C.C.A.).
\end{thebibliography}
providing a similar right for natural fathers did not infringe the Charter. However, in both Attorney General of Nova Scotia v. Phillips\textsuperscript{112} and Reference Re Family Benefits Act (N.S.), Section 5\textsuperscript{113} the Nova Scotia Court of Appeal struck down a statutory provision which provided family benefits to single mothers with dependent children on the grounds that it did not provide equivalent benefits to single fathers with dependent children. Although seemingly inconsistent, once the objectives of the respective statutes and the actual impact of the decisions are considered the two decisions are remarkably consistent.

Shortly after Vicki Louise Shewchuk gave birth she filed a complaint under the Child Paternity and Support Act\textsuperscript{114} alleging that Ricard was the father of her child. When the complaint came before the provincial court, Ricard argued that the Act violated section 15 since the consequences for non-compliance with an order under the Act were directed solely at the putative father, without providing an analogous remedy against a mother who abandoned her child leaving the father with the sole responsibility for support. This unequal treatment, Ricard asserted, constituted discrimination which could not be justified under section 1. The Provincial Court accepted Ricard's argument, and issued a declaration that the Act was of no force or effect.\textsuperscript{115} The Attorney General then applied to the judge to state a case, which resulted in the initial decision being overturned.\textsuperscript{116} Ricard appealed from that decision, and five groups concerned both about the general issue of the effectiveness of the equality guarantees in the Charter and the particular problems of low-income women and single mothers were given permission to intervene.

Ricard conceded before the British Columbia Court of Appeal that the Child Paternity and Support Act had a rational and


\textsuperscript{114}R.S.B.C. 1979, C.49.


constitutional purpose which was to provide support for illegitimate children. However, what he continued to object to were the different, and much more coercive remedies, provided to mothers as opposed to fathers when it came to enforcing an obligation for child support. The majority of the Court agreed that the different treatment of women and men under the Act constituted a prima facie case of discrimination which was not saved under section 15(2). However, the Court held that the statutory violation of the equality right was a demonstrably justified limitation under section 1.

The Court of Appeal’s analysis of the objective of the statutory scheme bears repeating in full:

The principal reason for the Child Paternity and Support Act is to identify the father of the illegitimate child. That is the fundamental question to be decided before the broad objectives of providing financial assistance to a mother and to a child, and of relieving the state from that obligation, can be met.

It is important to note that the state, through the superintendent, may apply for the affiliation order, and the superintendent, as well as the mother, may be provided by a municipality with legal assistance. The obligations of the father and mother to support the child, and the means of establishing the quantum of maintenance, are subsidiary to the broad public purpose of the legislation, namely, to establish paternity and therefore provide a basis for shifting the financial responsibility for the child from the public to the private domain. (emphasis added)

In effect, what the Act provides is a mechanism for the state to transfer the economic responsibility for single mothers with dependent children from the state to the natural father. Moreover, even if an impecunious woman does not want to maintain a relationship, albeit one solely of an economic nature, with the man who fathered her child, the state may override her wishes in order to establish the economic claim. Thus, the courts are willing to

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117 Nemetz, C.J. stated that the legislation did not violate s.15 as there was a biological justification for the difference in treatment - women bear children.

118 Supra, note 111. In Friesen v. Gregory (1986), 55 Sask. R. 245 (Sask. Unified Fam. Ct.), similar Saskatchewan legislation was challenged on the grounds that by not entitling unwed fathers to sue natural mothers for the support of illegitimate children a violation of s.15(1) of the Charter had occurred. Dickson J. found the impugned statutory provision to constitute a prima facie violation of s.15(1). Dickson was of the opinion that the provision was saved by both ss.1 and 15(2). He held that since it was designed to "identify the father and impose upon him some or all of the support burden" the legislative provision constituted "a pressing and substantial concern in any community. If it is not pursued, the child and the mother may suffer deprivation and the community may have to bear the financial burden of providing them the bare necessities of life." (at 248) Thus, like Shewchuk the Court was prepared to condone discrimination on the basis of sex so long as it promoted the privatization of the costs of social reproduction.
uphold legislation which privatizes the costs of social reproduction even to the extent that the legislation denies the formal equality of men and women.\textsuperscript{119}

In \textit{A.G. V. Phillips}\textsuperscript{120} and \textit{Re Family Benefits Act Reference}\textsuperscript{121} the Nova Scotia Court of Appeal unanimously decided that a provision of the \textit{Family Benefits Act} entitling single mothers with dependent children to state benefits violated section 15 of the \textit{Charter} since it did not provide similar benefits for single fathers with dependent children. The Court held that so long as there were single fathers similarly situated with dependent mothers regarding their economic circumstances legislative discrimination in favour of women could not be justified, even though there are many more women than men in need of such assistance. The Court rejected the argument that the benefits to single mothers should be characterized as an affirmative action programme. Characterizing the object of the \textit{Act} as the relief of poverty, the Court also asserted that the legislation could not be saved by section 1 since the government did not demonstrate "that the distinction between males and females under the Family Benefits Act bears any true relationship to the relief of poverty."\textsuperscript{122} Obviously, the Court was not cognizant of the overwhelming statistical evidence of the fact that single mothers constitute an increasingly high percentage of Canadians officially classified as poor.\textsuperscript{123}

But the most significant aspect of the decisions in \textit{Phillips} was the Court of Appeal's affirmation of the lower court's categorical refusal to remedy the legislative violation of the \textit{Charter}
by extending the benefits to men. Noting that two other provinces had amended similar statutes to cover dependent fathers and thus remedy the violation of section 15, the Court refused to "act like a legislature" by committing the government to an increase in social benefits spending.\(^\text{124}\) In fact, what the Court did was strike down the provision which bestowed benefits upon dependent mothers. Thus, the extension of financial benefits to dependent fathers continues to depend upon a positive legislative act.

The decisions of the respective provincial appellate courts in *Shewchuk* and *Phillips* are consistent if the judicial characterization of the object of the impugned legislation is considered. In *Shewchuk* the statute treated men and women dissimilarly by enabling both single mothers and the state to make economic claims for child support against the man who fathered the child in order to shift at least part of the cost from the public purse to the father. Thus, a legislative violation of formal equality was upheld on the ground that its purpose was to privatize the costs of social reproduction. In *Phillips*, by contrast, the object of the *Family Benefits Act* was characterized as the alleviation of poverty in general, although there is a clear social trend which demonstrates the increasing feminization of poverty.\(^\text{125}\) Because the Court chose to characterize the purpose of the impugned legislation as the amelioration of poverty in general, it was not prepared to save legislation which violated the principle of formal equality. Moreover, it ignored the urgings of the respondent father to extend the benefits to single fathers, and remedied the discriminatory aspect of the statute by denying benefits to single mothers. Thus, the immediate impact of both *Shewchuk* and *Phillips* was the same — it lessened the financial burden of the state in terms of providing economic benefits to impoverished families.\(^\text{126}\)

\(^{124}\) *Phillips*, supra, note 112.

\(^{125}\) *Supra*, note 122. For a discussion that the term "feminization of poverty" as ignoring the significance of the connectedness with class and race see Fox-Genovese, *infra*, note 210, 345.

\(^{126}\) To date, with the exception of *Schacter*, supra, note 85, although a number of courts have been urged to remedy the defects of social welfare legislation that discriminates against a particular group of otherwise deserving people by extending the benefits of the legislation to them, the preferred judicial option is to strike down the benefits. For a discussion of this judicial proclivity see A. Petter, "Backwards March: The Political Wrongs of Charter of Rights"
The decision of the British Columbia Supreme Court in Re MacVicar and Superintendent of Family and Child Services et al.\textsuperscript{127} is the inevitable corollary of the decision in Shewchuk where a natural father’s economic responsibility for his children was reaffirmed. MacVicar involved a petition by a father for an order restraining the placement for adoption of his daughter on the grounds that the provision of the Adoption Act requiring the consent of the natural mother or the natural father who is married to the mother before a child can be placed for adoption violates section 15 of the Charter. MacVicar maintained that the Adoption Act discriminated on the basis of sex and marital status against himself and other fathers who never married the mother of their child. Moreover, as MacVicar indicated, both the Child Paternity and Support Act and the Family Relations Act impose a duty upon a father to contribute to the support of his child even if he has not married the child’s mother. According to MacVicar, it would be unfair to impose a duty to support a child if the father is not given a corresponding right to be informed of, or consent to, the impending adoption of his child.\textsuperscript{128}

Characterizing the purpose of the Adoption Act as promoting the welfare and best interests of a neglected or unwanted children by providing them with new homes, the Court found that the consent provisions in the statute created a distinction between natural mothers and natural fathers and a further distinction between natural fathers who marry the natural mother and natural fathers who do not. Since the Court was persuaded that natural mothers and natural fathers were similarly situated having regard to the purpose of the Act, it found that the distinction on the basis of sex created an inequality.\textsuperscript{129} Moreover, the Court found that the

\textsuperscript{127}(Seminar on the Canadian Charter of Rights and Freedoms, University of Edinburg, May 20-21, 1988) [unpublished].

\textsuperscript{128}Ibid. at 41.

\textsuperscript{129}Ibid. at 46.
discrimination could not be justified under section 1. Acknowledging that the requirement of the consent of natural fathers who are not married to the natural mother of the child might slow down the adoption process, the Court noted that the consent of both the natural divorced father and the mother was required, even though they both might be difficult to find. Thus, the Court held that

[130] To separate a natural father permanently from his child without his consent, with notice dependent on the goodwill of the mother or the concern of a judge, is an effect entirely disproportionate with the benefit of that provision to the community, the mother or the child.

And unlike Phillips, where the court refused to extend benefits in order to remedy discriminatory legislation, the Court in MacVicar by granting the restraining order implicitly extended the requirements of notice of and consent to adoption to all natural fathers. Thus, it would appear that courts are more likely to extend procedural protections to omitted classes of persons in order to save discriminatory legislation than they are to extend financial benefits bestowed under welfare legislation to remedy a similar defect.\textsuperscript{131} In the circumstances of MacVicar, where the father had an ongoing relationship with his daughter, this requirement does not appear either to be unduly onerous nor privilege the rights of paternity in a situation beyond where it might be warranted. However, if the consent of a natural father to adoption is required across the board it is possible to think of many situations where the mere connection of genetic paternity will give men rights over children. Thus, this decision tends to reinforce paternal control over children. The question is how far the courts will be prepared to extend this; will they, for example, be prepared to extend the natural father’s rights to require a woman to notify the natural father of her decision to

\textsuperscript{130}Ibid. at 50.

\textsuperscript{131}Contrast MacVicar with Phillips, supra note 112. Moreover, regardless of what the courts do, the legislature can still undermine any progressive action by the courts. See, for example, the B.C. government’s response to the result in Silano v. R. in right of British Columbia (1987), 16 B.C.L.R. (2d)113, [1987] 5 W.W.R. 739 (B.C.S.C.). After the court struck down a distinction based on age, the government raised the level of welfare payments to those under 26 and decreased the payments to those over 26 so that both groups would receive the same amount.
have an abortion?\textsuperscript{132}

Several themes emerge from the preceding examination of the decided cases which have involved Charter challenges against aspects of the legal regulation of the family. On the one hand, the demand for formal equality has been used by feminists to obtain a symbolic victory enabling married women to maintain their own names,\textsuperscript{133} while on the other, it has been used by men to deprive women of important material benefits provided by the state.\textsuperscript{134} Irrespective of the significance of symbolic victories, it is clear that they are not sufficient for ensuring material improvements in women's lives. And at the same time as state benefits have been struck down on the grounds that they violate the equality guarantees of the Charter, discriminatory legislation which provides recourse against natural fathers for the economic support of their children has been upheld on the grounds that it shifts the burden of social reproduction from the public to the private domain. It is impossible to regard a decision that reinforces women's economic dependency upon men by privatizing the obligation for support as a progressive victory.\textsuperscript{135} Moreover, familial ideology has presented a barrier to members of non-traditional family units who seek to rely on the equality guarantees to obtain state benefits which are available to traditional families. While the Charter may be used to slowly chip away at the ideology of familism, it is difficult to see how it can be used to shift the burden of social reproduction from the private sphere to the public sphere having regard to the courts' institutional


\textsuperscript{133}See text, supra, at notes 97 to 99.

\textsuperscript{134}Supra, note 112.

\textsuperscript{135}Margret Eichler has made the point that the state benefits financially from the designation of the family as "private" since this ideology legitimates minimal state provision for welfare. M. Eichler, Families in Canada Today (Toronto: O.I.S.E. Press, 1983) at 274; S. Boyd and E.A. Sheehy, supra, note 44 at 30-31. A central demand of feminism is that the state either directly supply women with adequate material resources or provide women with realistic opportunities such that they can provide themselves and their children with an acceptable standard of living.
limitations. And finally, formal equality has been invoked to extend paternal control over children. Thus, in general, the cases illustrate what amounts to either a profound unwillingness or inability on the part of the courts to regard the different treatment of men and women in terms of the legal regulation of the family as in any way related to the subordination of women either within or without the family.

C. Legislation Designed to Protect Women from Sexual Violence or Victimization

Paradoxically, the first rash of equality cases to hit the courts consisted of attempts by male defendants to invoke the guarantees of sex equality contained in section 15 of the Charter to invalidate legislation which was specifically designed to protect women from sexual violence and victimization. In the majority of these cases the arguments for formal equality have been successful, with the result that the sexual protection legislation has been struck down. In those cases where the courts were willing to uphold the legislation, they did so not on the grounds that it was necessary to counteract the widespread and pervasive sexual violence against women in our society, but rather on the ground that it was necessary to protect young women from their own biological capacities.

The greatest number of such cases involve constitutional challenges to section 146 of the Criminal Code, which provides that every male person who has intercourse with a female person who is under the age of fourteen years and who is not his wife is guilty of an offence. The argument is that since females cannot be charged with the analogous offence of having intercourse with a male under the age of fourteen years, section 146 discriminates against men on the basis of sex in a manner which cannot be justified under section 1 of the Charter. While all of the lower courts have found section 146 to constitute a prima facie violation of section 15, a slight majority of them have found that the violation was justified under section 1. The lack of consistency in the results is attributable to different judicial characterizations of the purpose of the provision.
In *R. v. Monk*\(^ {136}\) the Saskatchewan Court of Queen's Bench characterized section 146 as "designed to suppress child pregnancies — a risk to which male children are not exposed". Consequently, the different treatment of young women and young men was demonstrably justified under section 1. Several other courts have also upheld section 146 on the grounds that it was designed to protect young women from becoming pregnant.\(^ {137}\) By contrast, in *R. v. Lucas*,\(^ {138}\) although the Ontario District Court took judicial notice of the biological differences between males and females, the Court held that in the absence of persuasive psychological or sociological evidence to the contrary, "it seems only fair and appropriate that protective laws should provide equal protection for both male and female persons who might be preyed upon by adults by either sex."\(^ {139}\) The Court held that since section 146 violated the *Charter* no prosecution could be maintained against the accused. Revoking the legislative protection afforded to young women on the grounds that similar protection is not provided for young men seems a somewhat perverse result if the court's overall concern was protecting young people from sexual victimization.

Since there is almost equal authority both for upholding and invalidating section 146, it is impossible to predict the responses of the various levels of appellate courts to the argument that section 146 violates the *Charter*. Moreover, even if it were socially preferable to extend the protections of section 146 to young men who were being sexually victimized by older women in order to save the legislation, no matter how anomalous such situations may in fact be, it is unlikely that the courts would be prepared to do this. Rather, the likely result would be that the protections offered to young women would be invalidated. But regardless of the actual results of the various challenges, what is most significant about these


\(^{139}\) *Ibid.* at 7.
cases is the complete absence of any willingness on the part of any of the courts to take judicial notice of the systematic sexual victimization of women by men.\textsuperscript{140} When the courts uphold the legislation they do so on the basis of biology, rather than social relations of victimization.\textsuperscript{141}

The ease with which the courts are willing to embrace arguments of formal equality in order to strike down legislation designed to protect women from sexual victimization is clearly evident in \textit{R. v. Howell}.\textsuperscript{142} In that case the accused applied to the District Court of Newfoundland to quash an indictment charging him with having had sexual intercourse with his stepdaughter contrary to s.153(1)(a) of the \textit{Criminal Code}. The grounds were that the section had no effect as it violated the guarantee against sex discrimination contained in section 15. Specifically, the accused argued that his right to equal treatment was violated because a stepmother having intercourse with her stepson would not have committed an offence. Riche C.D.J. asserted that young children of both sexes were similarly situated with respect to the harmful effects of sexual intercourse. Moreover, he went on to state that

\begin{quote}
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Even in the case of pregnancy although in most cases the burden and responsibility for the child falls upon the female this does not mean that a male person can always walk away from such an experience and forget it. The stepmother who has sexual intercourse with her teenage stepson and as the result becomes pregnant may place substantial responsibilities upon that boy's shoulder. Should the mother die he could be saddled with the responsibility of bringing up that child. This could adversely affect his opportunity to find a normal life for himself.\textsuperscript{143}]
\end{quote}

In order to show that the offence violated the equality guarantees of the \textit{Charter}, Riche constructed a hypothetical situation which broached the absurd in order to demonstrate the harsh impact of

\begin{footnotes}


\textsuperscript{142} Ibid.

\textsuperscript{143} Ibid. at 275.
\end{footnotes}
pregnancy upon young men, while simultaneously ignoring the profound negative impact that pregnancy might have upon a young woman who, while biologically able to give birth, was psychologically, emotionally and economically unprepared to do so.

The decisions of the lower courts illustrate an egregious ignorance of the extent of the sexual victimization of women. But this can hardly be surprising considering the record of the courts in dealing with sexual assault. Why would feminists think that the entrenchment of equality rights in the Charter would do anything to change this? In fact, equality arguments are just one of a number of tactics made available by the Charter to defendants charged with sexual offenses which can be used to invalidate legislation designed to shield women from some of the negative consequences of sexual assault. In Seaboyer a defendant charged with sexual assault challenged the Criminal Code provisions which severely restricted the number of situations in which a complainant could be cross-examined about her prior sexual conduct with others than the accused on the grounds that it violated his right to a fair trial as provided by section 11 of the Charter. While upholding the "rape shield" provisions in general, the Ontario Court of Appeal stated, albeit in obiter, that there may well be exceptions wherein the court ought to exercise its residual discretion to allow cross-examination. The result of this decision is to place a premium upon attempts to fashion exceptions whereby the courts are invited to exercise their discretion. The ease with which this may be done is suggested by the Court of Appeal's hackneyed, but predictable, reference to the complainant/prostitute and the importance of her past sexual conduct to a just determination of a case. In Canadian Newspapers Co. Ltd. v. A.G. of Canada the appellant, a newspaper publisher, successfully

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144Boyle and Rowley, supra, note 140.


146Ibid. at 305.

147(1985), 17 C.C.C. (3d) 385, 49 O.R. (2d) 557. Leave to appeal to Supreme Court of Canada granted April 24, 1985, 49 O.R. (2d) 557n, 14 C.R.R. 276n. However, in R. v D.(G.) (1987), 62 O.R. (2d) 567 the Ontario High Court accepted an application for an order quashing the non-publication order granted by the provincial trial judge. On behalf of the High Court, Rosenberg J. rejected the argument made by the defendant in a sexual assault case that his
argued that the blanket prohibition against publishing, upon the application of either the complainant or the prosecutor, the name of complainants in sexual assault cases constituted a prima facie violation of the Charter’s guarantee of freedom of expression. The Ontario Court of Appeal stated that the trial judge should exercise his on her discretion and balance in each case the competing interests at stake before deciding whether or not to prohibit the publication of the complainant’s identity. The problem with this sort of discretionary remedy is that it deprives the complainant of any degree of certainty that her identity will be protected. Moreover, like Seaboyer this "solution" merely enlarges the discretion of the judiciary in an area in which the courts can hardly be said to have exercised any sensitivity to the causes or consequences of sexual violence against women.

Cases such as Seaboyer and Canadian Newspapers have increasingly demanded the attention and resources of groups like LEAF which were originally formed to use the Charter to further feminist struggles for equality.148 As a result of the Charter, feminist organizations are having to spend precious time, energy and money in the courts defending legislation that it took many women many years to achieve.149 Perhaps this is the ultimate paradox of the Charter: whilst feminists organizations are attempting to develop situated and contextual theories of equality which will address equality rights were being infringed because, unlike the complainant, his identity was not protected on the ground that the accused and the complainant are not similarly situated (at 574).

The Supreme Court of Canada recently overturned the Court of Appeal’s decision in Canada Newspapers (see Judgments No. 19298, Sept. 1 1988). While acknowledging that the mandatory publication ban constituted a prima facie violation of s. 2(b), the unanimous court went on to assert that the interests protected by the ban (the complainant's willingness to come forward) overrode the minimal restriction imposed upon the newspaper's freedom of expression. It is important to note, however, that the court left it open for the accused to argue that he was being denied a fair trial on the grounds that the publication ban would preclude favourable defense witnesses from coming forward.

148 LEAF, supra, note 97 at 4,19.

149 B. James, "Breaking the Hold: Women Against Rape" in M. Fitzgerald et al., eds, Still ain’t Satisfied: Canadian Feminism Today (Toronto: Women's Press, 1982) 68 for the feminist struggle regarding amendments to the rape legislature. See also L. Snider, "Legal Reform and Social control: the Dangers of Abolishing Rape" (1985) 13 Int. J. Soc. L. 337 for an alternative evaluation of the reform of the rape legislation.
women's social and historical subordination, innumerable other litigants, including defendants charged with sexual assault offences and right-to-life organizations, are simultaneously invoking the Charter to claim a formal equality which may well erode victories which feminist believed they had already won.

II. THE JUDICIAL APPROACH TO SEX EQUALITY

What general conclusions can be drawn from the judicial approach to equality evinced to date? Lahey identifies an apparent contradiction between the various equality provisions in the Charter, which when read together appear to form a legal basis for eliminating actual social and economic inequalities, and the judicial interpretation of those provisions to date, which manifests an ideology of equality which does not address systematic social subordination. She concludes that

> [0]n an empirical level, male complainants are making and winning ten times as many equality claims as women. On the substantive level, women are loosing claims when a loss has a major and material impact on the conditions of inequality that women experience ... And even when women have successfully pursued equality claims on the substance, judges have applied a purely neutral and "empty" concept of equality which defines discrimination as any form of classification. Each and every victory for women on this basis makes it even easier for men to win equality claims than it is for women.\textsuperscript{150}

One possible reason for the astounding number of successful challenges initiated by men is that of the few remaining uses of explicit uses of gender-based classification in the statute books most benefit women.\textsuperscript{151} By contrast, the majority of section 15 claims brought by women are likely to involve claims of systematic discrimination — claims that are notoriously difficult to establish even when there is specific remedial legislation designed to address the specific problem. Moreover, even in those cases where feminists would applaud the result, the reasons offered by the courts are such that it would be difficult to characterize the decisions as victories.

\textsuperscript{150}Lahey, supra, note 7 at 82.

According to Buist,

Either we are afforded the protection or benefit of the law for some archaic reason that betrays our image and perpetuates our subordination, or we are flatly denied the protection or benefit by a misguided definition of equality which will never redress power imbalance.152

These findings are clearly supported by the cases reviewed above. When protective or remedial legislation directed at addressing women's economic or sexual subordination has been successfully defended from equality challenges by men, the courts have upheld the "discriminatory" legislation either because it privatizes the costs of social reproduction or it protects women from the consequences of their own reproductive capacity. Such judicial pronouncements both reinforce women's economic dependency upon men and define women in terms of their biology. Consequently, in seeking to preserve the status quo from constitutional challenges, images of women which reinforce their social subordination are being endorsed and perpetuated by the courts. The courts have failed to recognize that the real justification for protective legislation for women is not the physical condition of being female, but rather the social and economic relations which make being female significant.

By and large the courts have adopted an extremely narrow and formalistic approach to equality rights guaranteed under the Charter. Moreover, the weight of judicial authority states that the purpose of section 15 is to require those who are similarly situated be treated similarly.153 According to the British Columbia Court of Appeal in Andrews v. Law Society of British Columbia154 a successful claimant under section 15 must demonstrate three things:


Moreover, once a finding has been made that there is a *prima facie* violation of section 15, then the court is required to consider whether that infringement can be justified under section 1. Despite a great deal of criticism and some judicial authority to the contrary, this approach has generally found favour with the courts. *Andrews* is significant not only for the narrow and formalistic approach it embodies, but also because it was the first equality case argued before the Supreme Court of Canada. LEAF successfully sought permission to intervene at the Supreme Court since in *Andrews* it is expected that the Court will outline its approach to equality rights cases, addressing key definitional questions such as the meaning of equality and discrimination, the relationship between sections 15 and 1 of the *Charter*, and the degree of protection to be accorded to various groups complaining of equality. In both oral and written arguments LEAF's counsel urged the Court to "adopt a purposive approach to the interpretation of section 15, which would recognize both the legal process and substantive aspects to equality, and acknowledge that the purpose of the substantive equality guarantees is to promote the equality of hitherto powerless, excluded and disadvantaged groups." LEAF urged the Court to reject the formal approach implicit in the "similarly-situated" test. In considering whether a group not specifically enumerated in section 15 should be considered "akin" to those enumerated in section 15

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158 LEAF, *supra*, note 157 at 37.
protections, LEAF argued that the Court should determine on the facts whether the case involves a denial of substantive equality to that group of a kind section 15 is designed to address. To aid in this inquiry LEAF suggested that the Court consider:

(a) whether and to what extent it is related to an enumerated ground (e.g., marital status and sex, citizenship and national origin);
(b) whether it is institutionalized throughout society so as to affect, in a systematic and cumulative way, dignity, respect, access to resources, physical security, credibility, membership in community, or power;
(c) whether it has a social history of disempowerment, exploitation, and subordination to and by dominant interests.

With respect to women, for example, such an inquiry would require the Court to consider "an historical context characterized by disenfranchisement, preclusion from property ownership, exclusion from public life, and a sex-based poverty and devaluation of women's contributions in all spheres of social life which continue down to the present day."

Although it is logically possible that the courts will take a contextualized approach to equality cases, it is highly unlikely that they will do so on a systematic basis. While it is true that in *Brown v. Board of Education* the United States Supreme Court considered the history of the educational segregation of blacks in terms of its impact on their social and economic subordination in the United States, in 1987 the Supreme Court refused to take account of the overwhelming statistical evidence that the death penalty discriminates against blacks who murders whites in the context of a constitutional challenge to the death penalty. It is important to remember that just because a court is prepared to take a contextualized approach in one case does not entail either that the same court or other courts will adopt such a contextualized approach in succeeding cases which raise equality issues. In fact,

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judicial methodology, as feminists have noted, militates against the systematic consideration of context. And not only does judicial methodology itself pose real barriers to the success of such an approach, the very way in which rights are framed in constitutional documents such as the Canadian Charter of Rights poses another barrier. These rights are framed in abstract and general language, and although the equality provisions contained in the Charter are amenable to progressive interpretations offered by feminists, as the decisions issued to date clearly demonstrate they are equally amenable to formal and narrow interpretations which are antithetical to feminist struggles.

This suggests that there is an inherent dilemma for feminists struggles which resort to legal argumentation for equality rights — the tendency towards abstraction. LEAF's intervention in Andrews is a clear example of this. Andrews involves a constitutional challenge by a British citizen who is a permanent resident of British Columbia to the citizenship requirements of the Barristers and Solicitors Act on the grounds that it violates section 15. LEAF has intervened in this case because of its significance for establishing an authoritative approach to the question of equality rights in the Charter. Somewhat ironically, LEAF is urging the Supreme Court to adopt a contextualized approach to equality cases in a case in which it has no position on the constitutional validity of the impugned legislation. Moreover, there is no way for LEAF to avoid intervening in cases which, although they have no direct bearing on the question of women's social situation, may be used to establish general approaches to the interpretation of equality issues in the abstract. The nature of legal argumentation is such that general and abstract language, which is also often vague and ambiguous, must be given meaning in a range of highly particularized and discrete contexts. And as careful analyses of judicial interpretations

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163 Lahey, supra, note 7 at 83.


165 R.S.B.C 1979, c.26, s.42.
of section 1 have demonstrated, although Oakes apparently offers the semblance of determinacy, the courts have virtually unfettered discretion when it comes to determining whether a prima facie violation of the Charter is justified. The indeterminacy which can be exploited in the Oakes test can also be exploited in any general statement of what section 15 requires. Consequently, it is difficult to see how favorable language can of itself be considered a victory, since the judiciary is free to choose how to apply the general language in a particular case. And perhaps most destructively, the debate then focuses on what constitutes the most appropriate language or interpretation, and the concrete demands and results fade into the background.

Moreover, it is arguable that this tendency towards abstraction which is characteristic of legal methodology is in fact part of the very structure of liberal law under capitalism. According to Pashukanis, the essence of law within liberal capitalism is to be found in its distinctive form: that of the rights and duties of individual subjects who are equal before the law. The juridical constitution of free and equal individuals has both distinctive economic advantages and serves to generate the appearance of individual liberty and voluntaristic contractual relations, which contributes to the occlusion of class relations and economic constraints. Subjects appear free and equal before the law, yet this formal legal equality and freedom is embedded in a social context of overreaching inequality. In other words, the formal legal equality before the state masks the systematic inequality in the private sphere. And this is exactly the significance of the

169 Weitzer, supra, note 168 at 143.
public/private distinction for liberal constitutional adjudication; the Canadian Charter reifies the split and identifies the public sphere as the source of oppression while systematically obfuscating the extent to which the public sphere constitutes the private. To the extent that the social relations of subordination which characterize a particular society are both constituted by and reflected in law it is unlikely that the law can be used to transform, instead of just meliorating, the conditions which give rise to social subordination. Consequently, on this reading of the limitations of legal rights within liberalism, constitutional litigation to further substantive equality claims should be broached with great skepticism, if at all.

As opposed to this stream of thought which tends to reject the efficacy of legal rights in the struggle to end social inequality, there is an alternative view, which although rejecting liberalism, regards legal rights as "an important instrument in the defense of the liberties of the classes and sexes." Sumner suggests that

[the modern legal right or state-conferred capacity is ... more a product of the balance and forms of political power than of the eternal structure of commodity exchange.... Therefore one of its most important features is that it expresses the relative social power and political coherence of different classes, class fractions and social groups. As such, in this limited and precise sense, modern rights (and their erosion) can be seen as part of the milestones in the rise (and fall) of the political power of modern social classes.... Legal rights must be seen as the gained territory of power struggle which only becomes a barren waste if its conquerors fail to settle upon and cultivate it.]

According to Williams, rights and entitlement discourse are "the sole proven vehicle of the European-driven legal tradition capable of mobilizing peoples of colour as well as their allies in the majority." And this view concerning the mobilizing power of struggles for legal

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rights is shared by many feminist writers.\(^{173}\) Moreover, Sumner argues that the experience of winning and enjoying legal rights is a necessary condition for the formation of class culture with a full sense of socialist democracy. In light of this debate, it is crucial to evaluate the argument that the demand for formal legal equality itself may in fact be an important progressive demand for feminists in certain situations. According to Eisenstein, "[a]ll feminisms contain aspects of liberal feminism at their core — the demand for equality, freedom of individual choice, and the recognition of woman as an autonomous being. However feminism chooses to define these particular demands, these are its starting points."\(^{174}\) And while Eisenstein admits that history demonstrates that formal legal equality is not sufficient for substantive social equality, she suggests that it may very well be a necessary condition for obtaining it. If this analysis is correct, it suggests that there might be a positive role in Charter litigation for furthering feminists struggles in Canada. For although it is highly unlikely, if not impossible, for a court to systematically adopt a contextualized approach to equality claims within a liberal-capitalist political economy, courts are particularly amenable to arguments for the extension of formal equality.

A. The Legal Regulation of Reproduction – Abortion

Nowhere has the argument for the significance of legal rights and formal equality as the first step in the feminist struggle for substantive equality been made more persuasively than with respect to the issue of reproductive freedom for women. The demand for access to safe, legal and funded abortion has been a cornerstone of the struggle for full sexual and reproductive freedom, which is, in turn, "an essential precondition to full and equal participation in

\(^{173}\) L. Gotell, "A Helluva lot to lose...but Not a Helluva lot to win: The Canadian Women's Movement, Equality Rights and the Charter" (Annual Meeting of the Atlantic Political Science Association, University of New Brunswick, Fredericton, October 31, 1987) [unpublished]. References at supra, note 50.

According to Petchesky two essential ideas underlie a feminist view of reproductive freedom:

The first is derived from the biological connection between women's bodies, sexuality and reproduction. It is an extension of the general principle of "bodily integrity," or "bodily self-determination," to the notion that women must be able to control their bodies and procreative capacities. The second is a "historical and moral argument" based on the social position of women and the needs that such a position generates. It states that insofar as women, under the existing division of labour between the sexes, are the ones most affected by pregnancy, since they are the ones responsible for the care and rearing of children, it is women who must decide about contraception, abortion and childbearing.  

And as Gavigan has noted, concepts such as freedom, equality, autonomy and privacy, which are central to liberal law, may in fact be used to legitimize women's right to demand control of their bodies and to reject state interference. This is particularly true in countries such as Canada where the criminal law has been used to control or regulate women's reproductive capacity. Until January 28, 1988 when the Supreme Court of Canada handed down its decision in Morgentaler, the availability of legal abortions was governed by the Criminal Code, and determined in practice by hospital administrators and doctors. Moreover, the "criminal prohibition of abortion, save for therapeutic reasons, has been interpreted to endow neither the woman nor the fetus with formal rights. The only 'right' apparently extended by the law is a 'right' of medical practitioners not to be prosecuted in the criminal courts if they comply with the legislation." By employing the criminal law, the most profound expression of the state's coercive powers, the

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177 S. Gavigan, supra, note 175 at 275. But see also MacKinnon, supra, note 16, 93-102 for a contrary view.


180 Gavigan, supra, note 132 at 107.
federal government clearly established that a woman’s decision concerning whether or not to continue her pregnancy could not be trusted to her, but rather was a matter of public concern. Thus, the demand for the decriminalization of abortion has, paradoxically, been a demand to turn what has traditionally been considered a public issue, a woman’s decision to terminate a pregnancy, into a matter of private choice.

Ultimately feminist organizations turned to the courts to challenge the Criminal Code provisions which limited and regulated women’s access to safe legal abortions. Successive federal governments have manifested an extreme unwillingness to tamper with the legislation in light of the polarization of right-to-life groups and the pro-choice movement. Even the finding of its own Committee on the Operation of the Abortion Laws that in practice the legislation was arbitrary and unfair did not move the government.\(^{181}\)

And perhaps most strikingly, the government ignored repeated evidence that juries were unwilling to convict Dr. Henry Morgentaler for violating section 251 of the Criminal Code. On three previous occasions juries had acquitted Morgentaler of the charge of illegally "procuring a miscarriage" without the prior approval of a therapeutic abortion committee of an approved or accredited hospital. On each occasion the acquittal was overturned by the Quebec Court of Appeal.\(^{182}\) Although he was once again acquitted by the jury, during the last prosecution Morgentaler challenged section 251 on the ground that it violated the Charter.\(^{183}\)

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\(^{182}\) For a brief discussion of the previous charges laid against Dr. Morgentaler and their eventual outcome see S. Martin, "R. v. Morgentaler and Smolling" (1985) 1 C.J.W.L. 194 at 195-6.

\(^{183}\) Two other doctors, Drs. Smolling and Scott were also charged with Dr. Morgentaler for violating s.251 of the Criminal Code.
Morgentaler’s acquittal was reversed by the Ontario Court of Appeal. Counsel for the defense\textsuperscript{184} sought to persuade the Court that the legislation not only violated the principle of fundamental justice guaranteed by section 7, it also violated section 15. The latter argument was summarily rejected on the grounds that "[a]ny inequality of the sexes in this area is not created by legislation but by nature."\textsuperscript{185} Moreover, the Court did not accept the section 7 argument, and, thus, overturned the acquittal. However, in a landmark decision which has been celebrated as a great victory in the feminist struggle for women’s reproductive freedom the Supreme Court of Canada struck down the \textit{Criminal Code} provision regulating abortion on the grounds that it violated the \textit{Charter}.

But once the initial heady days immediately preceding the decision had past, feminists began to look much more carefully at the actual basis of the decision in order to prepare for the struggle which lay ahead.\textsuperscript{186} Although undeniably a victory in that the extremely coercive and arbitrary \textit{Criminal Code} provision was no longer in effect, a reading of the actual decision demonstrates how narrow the victory actually is.

The first thing to note about the decision is the fact that it generated so many different responses from the members of the Supreme Court, a group not noted for their profound ideological differences. While five judges agreed that section 251 of the \textit{Criminal Code} violated the \textit{Charter}’s guarantee of fundamental justice, two dissented.\textsuperscript{187} But even among the judges who agreed

\textsuperscript{184}Interestingly, Morris Manning, who was Dr. Morgentaler’s defense lawyer, was also hired by a group called "Freedom of choice" to challenge what Manning called "compulsory unionism between an individual employee and management, which occurs when a union is certified to represent all employees." \textit{The Toronto Globe and Mail} (4 July 1985) A1, A6.


\textsuperscript{187}\textit{Supra}, note, 178 at 148.
that the legislation ought to be struck down as a violation of section 7 there was a wide divergence of opinion.

At the most restrictive end of the spectrum Beetz, with Estey concurring, adopted a narrow, procedural approach to fundamental justice guaranteed by section 7 of the Charter. While affirming the state's right to enact legislation restricting access to abortion on the grounds that the state had a legitimate interest in the foetus, Beetz went on to assert that section 251 violated section 7 because in actual operation the procedural mechanisms significantly delayed pregnant women's access to medical treatment, increasing the danger to their health and thereby depriving them of security of the person. But Beetz was careful to emphasize that requiring a woman to demonstrate to a committee of medical personnel that continuing her pregnancy would endanger her health would not offend the principles of fundamental justice, and that Parliament was not precluded from adopting another system, free of the failings of section 251, to regulate access to abortions. In fact, he asserted that it was Parliament's responsibility to balance the public interest in protecting the foetus against a women's health.

Dickson, with Lamer concurring, also adopted a narrow procedural view to section 7; however, he adopted a broader view than Beetz about what the phrase "security of the person" encompassed. He asserted that interference with a woman's priorities and aspirations constituted an infringement of her security of the person. Thus, he was prepared to go a bit further than Beetz in allowing a woman's private choice to trump the state's interest in the protection of the foetus.

Wilson, alone of the seven judges participating in the decision, offered a substantive interpretation of section 7. She concluded "that the right to liberty contained in section 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." Moreover, she

188. The members of the Supreme Court of Canada were unanimous in rejecting the s.15 argument raised by Morgentaler.

189. Supra, note, 178 at 74.

190. Supra, note, 178 at 71.
stated that the decision of whether or not to terminate a pregnancy was not "just a medical decision" but a "profound social and ethical one as well," and doubted the ability of "a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma." But while Wilson's analysis of section 7 echoed the rhetoric of feminist appeals for reproductive freedom as an element of personal autonomy, she concluded by asserting that the right of a pregnant woman under section 7 must be balanced against the state's interest in the protection of the foetus as potential life under section 1 of the Charter. And although Wilson refused to articulate a full-fledged scheme for balancing the competing interests, she suggested that a developmental approach to the foetus be adopted, thereby harnessing a woman's autonomy to foetal viability and medical technology.

Amongst the confusing plurality of opinions offered by the Supreme Court regarding the unconstitutionality of the Criminal Code provisions regulating a woman's access to abortion two common themes clearly emerge. First, there was unanimity that the state has an interest in the protection of the foetus. Although there was no convergence of opinion as to when the state's interest ought to surpass a woman's right to security of the person, all of the judges who held that the legislation violated the Charter were agreed that the public interest ought, in certain unidentified circumstances, to supersede a woman's private right. Second, none of the members of the Court addressed the issue of whether or not the government was under an obligation to provide access to safe legal abortions, all they did was declare that the present criminal law regime violated the Charter.

Thus, by striking down the existing legislation, the Supreme Court disclosed the limitations inherent in Charter litigation as an

\[191\] Ibid.

\[192\] By contrast, the United States Supreme Court articulated detailed rules regarding access to lawful abortions. See Roe v. Wade 410 U.S. 142 (1973).
instrument for furthering feminist struggles. A legal vacuum replaced the criminal provisions. In the absence of federal legislation, access to safe funded abortions depended either upon the response of individual provincial legislatures or individual hospitals. Provisional responses ranged from an attempt to prohibit public funding of abortions except for those cases involving a serious threat to a woman's physical health or life, to a commitment to fund even those abortions performed in free-standing clinics.


194 See B.C. Reg 221/88. Note that the British Columbia Supreme Court subsequently invalidated this Regulation on the ground that the cabinet had exceeded its authority under the Medical Services Act, R.S.B.C. 1979, c.255. See B.C. Civil Liberties Association v. A.G. of British Columbia, [unreported].


Moreover, it should be noted that the most "liberal" scheme of access to safe funded abortions was introduced in the province of Quebec in 1976 after the first round of convictions against Morgentaler — twelve years before the "historic" decision was handed down. And until the federal government finds the political will to enact legislation regulating access to safe, funded and legal abortions the arbitrary state of affairs which existed under administration of the Criminal Code provisions will be exacerbated by the differential provincial responses.¹⁹⁶ Thus, while the Supreme Court’s decision served to decriminalize abortion, a central demand in the feminist campaign for reproductive freedom, it failed either to provide much guidance as to what a constitutional scheme of regulation ought to consist of or to impose a positive duty upon the state to provide access to safe funded abortions.¹⁹⁷

NOTE: The province of Quebec has funded abortions performed in private clinics since the Morgentaler cases of the 1970's and the coming to power of the Parti Quebecois.

¹⁹⁶ On May 20, 1988, Justice Minister Hnatyshyn introduced a tripartite motion into the House of Commons which would, in effect, call for a free vote on three proposals restricting the availability of abortions. The main part of the motion would allow a woman, in consultation with her doctor, to terminate a pregnancy in the early stages. At later stages the pregnancy could only be terminated where, in the opinion of two doctors, the continuation of the pregnancy would seriously endanger the woman’s life or health. The first amendment would seriously restrict access to abortion, requiring the opinion of two doctors that the continuation of a woman's pregnancy would endanger her health and safety, defined so as to exclude emotional stress and social and economic conditions. (Hnatyshyn noted that this option might require the government to override the charter, "Restricting Abortion may flunk court test," The [Toronto] Globe and Mail (1 June 1988) A1.) The second amendment would expand a woman's access to abortion, giving her virtually unrestricted access: Canada, House of Commons, Order Paper and Notices, 2nd Sess., 33 Parl. at 37-9 (24 May 1988). Owing to procedural wranglings the vote on the motion was delayed and eventually withdrawn: "Tories plan to suspend Parliamentary rules for debate on abortion." The [Toronto] Globe and Mail (21 May 1988) A1; "New plan on abortion vote going to Tory MP's tomorrow" The [Toronto] Globe and Mail (19 July 1988). On July 22 the government introduced a new motion which was substantially the same as the first motion regarding abortion without the two amendments attached and is allowing amendments from the floor of the House and a free vote. S. Delacourt, "Government will take new abortion proposal; debate begins Tuesday" The [Toronto] Globe and Mail (22 July 1988) A1; S. Delacourt, "New abortion restriction draws criticism" The [Toronto] Globe and Mail (23 July 1988) A1, A2. On 28 July 1988 the House of Commons held a free vote on the motion. The government asserts that the motion will be the basis of new legislation regulating abortion.

¹⁹⁷ According to Estey, in a statement quoted shortly after he announced his retirement from the Supreme Court and just several months after the Court’s decision in Morgentaler was handed down, the effect of the decision was to throw the issue of abortion back to Parliament. The [Toronto] Globe and Mail (27 April 1988) A1, A5.
But clearly the most disturbing aspect of the *Morgentaler* decision for feminists is the implicit characterization of the debate around abortion as consisting of a conflict between the public interest in the protection of the foetus and the private right of a woman to personal autonomy. *Morgentaler* has not ended the debate over the criminalization of abortion, the issue of foetal rights or the question of state funding.\(^{198}\) In fact, only four months after *Morgentaler* was handed down an amendment to the *Criminal Code* was introduced in the Senate to make it an indictable offence punishable for two years imprisonment for a pregnant female person to use any means to carry out the intent "to cause the death of an unborn human being within her".\(^{199}\) Moreover, the Supreme Court is going ahead with the appeal of the *Borowski* decision, which involved a challenge to the *Criminal Code* provisions struck down in *Morgentaler*, on the ground that access to legal abortions infringed the right of a foetus to life, liberty and security of the person as guaranteed by section 7 of the *Charter*.\(^{200}\) In fact, the Supreme Court studiously avoided ruling upon this issue in *Morgentaler*.\(^{201}\) Although there appears to be but a tenuous legal basis for continuing with the appeal since the impugned provision has already been struck down, the Supreme Court of Canada has granted Borowski leave to resubmit his factum. Moreover, both LEAF,

\(^{198}\) See Petchesky, *supra*, note 176 at 286. If the experience in the United States of a concerted attack on abortion after their Supreme Court's decision in *Roe v. Wade*, *supra*, note 192, is any indication, *Morgentaler* is just the beginning of a wave of litigation and mobilization by the contending sides of the abortion debate.


\(^{201}\) *Supra*, note, 178 at 74 and 128.
representing the pro-choice feminist stance, and REAL Women, a pro-family, anti-abortion group,²⁰² have been granted leave to intervene. Thus, the Supreme Court of Canada has provided the venue for Borowski to debate the constitutional protection of the foetus's right to life with an unwilling government whilst LEAF and REAL Women act as handmaidens to the Court.

To date, Borowski's attempt to establish the status of the foetus as a legal person with a set of rights guaranteed under the Charter has not been successful, basically on the grounds that the common law has never granted the foetus such status.²⁰³ However, there is a clear and unsettling trend toward recognizing legal rights of the foetus in both American and Canadian case law and in the recent work of legal and medical scholars.²⁰⁴ What this suggests is that it is not necessary for the foetus to receive full recognition under the Charter, so long as the state is prepared to use the plethora of child welfare legislation at its disposal to exercise the public interest in the protection of the foetus. This tactic is increasingly being employed in Canada,²⁰⁵ whilst in the United States it is supplemented with a sophisticated and concerted attempt to reverse Roe v. Wade in the courts.²⁰⁶ Americans have learnt that judicial decisions are no less subject to reversal than are legislative policies,²⁰⁷ and that a change in the political climate which might

²⁰² Gavigan, supra, note 180 at 109.

²⁰³ Supra, note 200.


²⁰⁷ In Patterson v. McLean Credit Union, No. 87-107, a case pending before the U.S. Supreme Court, the court decided to reconsider the rights of minorities to sue private parties for racial discrimination under a post-civil War Statute. See Runyon v. McCrory, 96 S.Ct. 2586 (1976).
occasion an alteration in the political composition of the courts can result in the reversal of historic decisions. Thus, it is important to recognize that the courts and litigation strategies are no less arenas of political debate and instruments of political mobilization than legislatures and traditional lobbying. No matter how distinctive the courts' institutional form or rhetoric of decision-making, judicial institutions make political decisions — decisions which are directly related to the distribution of power and the maintenance of, or encroachment upon, existing social relations.

Consequently, the appropriate question when considering the impact of the Charter is which of the variety of existing available strategies is the best way to further the feminist struggle for reproductive freedom. To lobby for legislative changes, no less than Charter litigation, is to directly engage with the law, and both avenues may constitute forms of political mobilization. What it is important to keep in mind, however, is that although both the courts and the legislatures form part of the state, they have different institutional dynamics, roles and principles of legitimation. And these factors must be considered when it comes to evaluating any particular tactic as part of the overall strategy for obtaining reproductive freedom for women.

This problem of how best to obtain reproductive freedom for women has prompted a variety of diverse and contradictory responses from feminist writers. Kingdom has posed the question in its most general form: she asks whether feminist objectives are helped or hindered if feminists demands are expressed in terms of legal rights. Specifically, she is concerned that by phrasing the demand for access to safe funded legal abortions in terms of an absolute right to choose, feminists are themselves in danger of initiating the elision from decriminalization to deregulation. In a similar vein, Fox-Genovese is concerned that the present feminist demand for abortion is both premised upon radical individualism and rests upon the assumption that the decision of whether or not

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to continue pregnancy is a matter of private choice. Both Kingdom and Fox-Genovese share the concern that by framing abortion in terms of a private right to autonomy feminists are implicitly reinforcing the public/private split which has historically worked to women's disadvantage. This point is made with great force by MacKinnon who asserts that "[t]he political and ideological meaning of privacy as a legal doctrine is connected with the concrete consequences of the public/private split for the lives of women." MacKinnon worries that the law of privacy translates traditional social values (male sexual aggression and female sexual availability, in particular) into the rhetoric of individual rights as a means of subordinating these rights to specific social imperatives (such as female sexual subordination).

Addressing some of these kinds of concerns, Petchesky has been careful to emphasize that to "demand that the state provide uniform, funded, and high-quality abortion services to all women has been to acknowledge that abortion should be a matter of public responsibility and not of 'private choice' alone." Thus, she has sought to emphasize that the feminist demand for reproductive freedom is not merely a negative demand for the state to abstain from intervening in the private sphere, but rather includes a positive demand that the state create the conditions whereby women may exercise autonomy and choice either by deciding to terminate an unwanted pregnancy in a safe and legal manner or by having the resources to raise children. And while it is true that the courts in a liberal political economy are ill-suited for bestowing such positive rights, it is appropriate to turn to the legislature to fulfill these types of demands. Thus, it is important to recognize that Charter litigation

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211 MacKinnon, supra, note 16 at 93.

212 Ibid. at 95, 97.

and legislative lobbying, as well as political mobilization, may not be mutually exclusive in all cases, but rather reinforcing. Legal notions of formal equality, privacy and autonomy may very well be a necessary first step to achieve substantive reproductive freedom for women both within and without socialism. Moreover, it is exactly these types of arguments that courts are particularly susceptible to, and it is here that Charter litigation might have a valuable role to play. By calling upon the Supreme Court to recognize the force of the claims of bourgeois (liberal) legality in Morgentaler, feminists created the occasion whereby the issue of access to safe, legal and funded abortions moved to the centre of public and political debate.

Thus, it is crucial to understand that Charter litigation, although at times a necessary arena of struggle, is not in itself sufficient (even when successful) to achieve substantive equality. However, it is equally important to understand that liberal rights and freedoms are contradictory and insufficient rather than illusory, and the struggle for social transformation may often involve pushing bourgeois forms of legality to their limit. Feminists must be vigilant against allowing litigation to dominate the political and social struggle to obtain substantive equality for women, because the tendency of litigation strategies is to transform politics into a series of narrow issues packaged as private and individual cases. As Tushnet has noted in the context of the NAACP's struggle for educational desegregation, it is important to distinguish between litigation as a tactic which is part of an overall political strategy for social justice, and litigation as the strategy for attaining social justice. Litigation must always be seen as part of a larger political struggle, and, therefore, must be evaluated in terms of what it contributes to the attainment of larger political goals. Charter litigation is a form of politics, but it is a peculiarly abstract and

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214 Gavigan, supra, note 175 at 274.


216 Cowan, supra, note 43 at 402.

Thus, it is crucial to consider the consequences of entering into an arena unsuited for concrete arguments about social conditions and organized around principles of universality and abstraction. Moreover, the consequences of both victory and defeat, the limited repertoire of judicial remedies, and the dangers of employing abstract rhetoric must be considered each time litigation is initiated. And finally, it must also be remembered that feminists, like other social activists, do not always have the luxury of the choice of whether or not to litigate, but must often respond to litigation, like Borowski, which was initiated to undermine some of the all-too-few and tenuous victories feminists have already won.

III. CONCLUSIONS

The public/private split is central to law within a liberal capitalist political economy, to feminist theory, and to political rhetoric. But how and where the distinction is drawn depends upon the theoretical perspective employed, the function it is designed to serve and the contradictions which emerge when a seemingly straightforward conceptual apparatus is employed to make sense of complicated and interrelated social phenomena. Moreover, within a given area, the public/private distinction is contested, shifting both over time and in relation to the specific issues under consideration. Thus, it is impossible to map the distinction by placing a snapshot of its contours in one area like a grid upon its contours in another area. "Public" and "private" are not analytic, a priori concepts, but rather socially constituted concepts whose significance is functional, rather than analytic. But while it is important to unearth the genealogy of the distinction in a particular context, its ideological significance must be systematically linked to a material basis if feminists, and other social activists, are to either exploit it or overcome it in the struggle for social transformation.

What is the possibility that Charter litigation will further the

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218 Mandel and Glasbeek, supra, note 168.

219 Rose, supra, note 13.
struggle for substantive equality for women? Any adequate answer to this question requires that we stop thinking of the law as a unity specifically organized for oppressing women, and recognize that "law" is comprised of specific, but indeterminate, social relations between various institutional actors and social agents. Here Smart's notion of "the uneven development of the law" is helpful, for it perceives law as operating on a number of dimensions at the same time. Law is not identified as a simple tool of patriarchy or capitalism. To analyze law in this way creates the possibility of seeing law both as a means of "liberation" and, at the same time, as a means of the reproduction of the social order. Law both facilitates change and is an obstacle to change.\(^{220}\)

Thus, it is crucial to be very concrete when it comes to evaluating a particular tactic in the overall strategy for ending women's oppression. Each common law rule, piece of legislation, or action of an administrative body must be examined with respect to its historical significance and role in either constituting, maintaining or ameliorating the social relations which constitute women's subordination at a given time. And while it is true that the past does not determine the future, it sets limits on what is possible. This recognition of the significance of history is what distinguishes a materialist from a liberal analysis of the possibilities of litigation. For a materialist, asking what is logically possible for the courts to do is pointless, instead the important question is what they are likely to do in light of the historical record and the balance of power at a particular time and in a particular context. In order to evaluate the impact of Charter litigation it is important to locate the courts in the structure of social relations. Moreover, it is equally important to see that the social relations which constitute women's oppression are themselves never static, but are in a constant process of redefinition, retrenchment, challenge, and struggle.

This essay is a preliminary attempt at showing how a crucial distinction for law within a liberal capitalist political economy operates within a number of areas which are central to women's position in society. The claim is not that the law or the public/private distinction is primary to or uniquely constitutive of

women's oppression, but rather that both contribute to the creation and maintenance of women's subordination under existing social relations. To date, the public/private distinction has operated primarily as a barrier to using constitutionally entrenched rights to end women's oppression as it is shaped by work, the family and sexual violence. The public/private distinction has operated in a variety of ways to exclude judicial scrutiny of the private sphere of the market, to reinforce the naturalistic ideology of familism and to emphasize women's biological vulnerability while ignoring men's socio-sexual aggression. The abstract and universal form of legal rights within liberalism has not proven to be amenable to the concrete, contextualized analysis which is a necessary first step for ameliorating women's systemic social subordination. Feminist demands can be accommodated within the formal notions of equality or the negative concept of autonomy both of which are part and parcel of liberal rights, but by celebrating the Charter feminists risk legitimating abstract rights which have been used to attack legislation which redistributes power, however marginally, from the powerful to the disadvantaged.\textsuperscript{221} The problem with endorsing Charter litigation as a terrain of progressive struggle is that it requires the concrete to be translated into the abstract, while simultaneously transferring power away from institutions which are in principle democratic to institutions which are by definition authoritarian.

Charter litigation is a particular form of political struggle. As Miliband has noted, legal rules and rights are particularly elastic notions for the courts are vested with a great deal of discretion. But how the courts will exercise their discretion depends upon the political climate.\textsuperscript{222} As the twenty-first century draws closer, the New Right, or the Neo-Conservatives, continue to consolidate their hold over the political agenda.\textsuperscript{223} Moreover, Petchesky identifies the

\textsuperscript{221}See Glasbeek and Mandel, supra, note 168; Petter, supra, note 126; Fudge, supra, note 25.


\textsuperscript{223}For a discussion of the growth of the New Right see S. Hall and M. Jacques, ed., The Politics of Thatcherism (London: Lawrence and Wishart, 1983); C. Leys, "Neo-Conservatism and the Organic Crisis in Britain" (1980) 4 Studies in Political Economy 41-63; Z. Eisenstein, Feminism and the State: Reagan, Neoconservatism and Revisionist Feminism (N.Y.: Monthly
ideology of privatism as the element in the antiabortion/antifeminist thrust that has provided the critical link between family and sexual politics and traditional economic and social conservatism which characterizes the New Right.\textsuperscript{224}

The ideology of privatism is employed in the New Right's moral offensive in two interlocking themes. The first can be seen in the antifeminist backlash, which involves making areas which are currently considered private (sexual preference and reproductive freedom) public. And the second is the anti-welfare backlash, which involves making the public, state-funded economic and social programs, private by subjecting them once again to unregulated market forces. But, as Petchsky observes, it is important to distinguish the New Right's appeal to privatism from that of classical liberalism, for the demands of privacy by the New Right are made on behalf of corporate bodies (churches, private schools, corporations, families, for example) rather than individuals.\textsuperscript{225} Thus, Petchsky fears that the New Right's appeal to privatism is closer to fascism than liberalism.

It is precisely this fear that has led several Canadian\textsuperscript{226} and some British\textsuperscript{227} commentators to extol the virtues of an entrenched bill of rights as a prophylactic against the erosion of personal liberties. According to them a constitutionally entrenched guarantee of individual rights will serve to protect the citizenry from the coercive paternalism of an over zealous state. However, the record of Canadian courts lends but limited support for the claim that the courts will provide institutionalized resistance to massive
encroachments on personal liberties by a democratically elected government.\textsuperscript{228} The rebuttal to this is, of course, that prior to 1981 Canadian courts were not armed with an entrenched \textit{Charter} of Rights.\textsuperscript{229} But if the American record during civil rights debacles similar to what occurred in Canada is considered, one can only conclude that the American courts failed systematically to defend individual rights in the face of a government committed to eroding them.\textsuperscript{230}

Moreover, recent Canadian \textit{Charter} jurisprudence suggests that \textit{Charter}-wielding courts will not prove to be the final bastion of individual rights against the encroachments of corporate actors. In \textit{Blainey} the Ontario Court of Appeal asserted that the \textit{Charter} was not meant to apply to private organizations,\textsuperscript{231} while in \textit{Dolphin Delivery} the Supreme Court of Canada stated that the \textit{Charter} did not apply to the common law between private parties.\textsuperscript{232} By insulating private institutions, such as corporations, or churches or schools, from the state, the \textit{Charter} may facilitate the coercion of individuals in the name of privacy and freedom.\textsuperscript{233} Moreover, the \textit{Charter} may be actively used by these private institutions to enhance their autonomy by challenging regulatory legislation which may be

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\item[228]\textsuperscript{228} T. Berger, \textit{Fragile Freedoms} (Toronto: Clark Irwin, 1981) for a discussion of the courts' failure to protect court liberties in Canada.
\item[229]\textsuperscript{229}Beatty, supra, note 226 at 49.
\item[230]\textsuperscript{230}Note the failure of the American Bill of Rights to protect Japanese Americans who were interned during the Second World War. See \textit{Korematsu }v\textit{ U.S. 323 U.S. 214 (1944) and also Hirabayashi }v\textit{ U.S. 320 U.S. 81 (1943), currently under petition. Note that the dissenting judge in the 1944 \textit{Korematsu} decision called the majority's conclusion a "legalization of racism", at 241-2. In 1984, a federal judge "vacated" Korematsu's 1944 conviction on grounds of government misconduct (misleading Court on so-called danger, etc.) and granted \textit{coram nobis} petition. \textit{Korematsu }v\textit{ U.S. 584 F. supp. 1406 (N.D. Cal. 1984).}

See also the U.S. Supreme Court's treatment of legislation designed to repress Communist activities in M.R.Belknap, \textit{Cold War Political Justice} (Westport, Conn.: Greenwood Press, 1977).
\item[231]\textsuperscript{231}Blainey, supra, note 18.
\item[232]\textsuperscript{232}Dolphin Delivery, supra, note 19.
\item[233]\textsuperscript{233}Fox-Genovese, supra, note 210 at 347-350, recognizes that there has long been corporatist elements within American liberalism.
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designed to redistribute the "natural" allotments of the market.\textsuperscript{234}

Thus, although the \textit{Charter} might have a limited capacity to further feminist struggles, it also has a capacity to undermine them. While the struggle for social transformation must be carried on in a number of arenas simultaneously, feminists must be careful to select those arenas which are least likely to contain and limit their goals, and most likely to challenge existing social relations. And if the preceding analysis of the impact of the \textit{Charter} on feminist struggles has any merit, feminists ought to approach the arena of \textit{Charter} litigation with great trepidation, if at all.

\textsuperscript{234} For a discussion of how the \textit{Charter} can be used to further corporate rights and erode social welfare legislation, see A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 973.