

Work Women Did to Make Constitutional Rights Work for Women

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Drawing on deep political roots in her family and her experiences in Canada and internationally as a United Church minister, **Nancy Ruth** has made change for women and girls her priority wherever she serves. In collaboration with other feminist activists, she co-founded the organizations named in this article as well as the Canadian Women's Foundation, the Linden School, the Women's Future Fund, and www.section15.ca. As a member of the Senate of Canada since 2005, she continues to push for the full promise of Canada's constitutional equality rights to be realized in public policy.

Abstract

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Women were mobilizing in anticipation of constitutional reform in 1980 and secured a first round of significant amendments to section 15 equality rights by January 1981. The final *Constitution Act, 1982* placed a three-year moratorium on section 15. Governments needed time to adjust their legislation to the equality requirements. Activist Nancy Ruth reflects on what the women's movement did during those three years to create a rights framework that would work for women. She sets forth six major initiatives that have not been incorporated into the historical record. She concludes by assessing the strengths and weaknesses of this period of activism for women's equality.¹

Résumé

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Les femmes se sont mobilisées en perspective de la réforme constitutionnelle en 1980 et ont obtenu une première série de modifications importantes aux droits à l'égalité de l'article 15 en janvier 1981. La *Loi constitutionnelle* définitive de 1982 a imposé un moratoire de trois ans sur l'article 15. Les gouvernements avaient besoin de temps pour adapter leur législation aux exigences de l'égalité. La militante Nancy Ruth se penche sur ce qu'a fait le mouvement féministe durant ces trois années, en vue de créer un cadre de droits qui

fonctionnerait pour les femmes. Elle décrit six grandes initiatives qui n'ont pas été incorporées aux archives historiques. Elle conclut en évaluant les forces et les faiblesses de cette période de militantisme pour l'égalité des femmes.

I formally came to the constitutional lobby in early 1981. Kay Macpherson invited me to the January 27, 1981 meeting at the Cow Café in Toronto, which was a key launching event for the Ad Hoc Committee of Canadian Women on the Constitution (Collins 1981). Until 1985, most of my work was in public outreach and education. Then the Women's Legal Education and Action Fund (LEAF) became my focus. But, like many women, I had the Constitution on my radar early on.

In a televised speech on October 2, 1980, Prime Minister Pierre Elliot Trudeau launched the constitutional initiative. The proposed laws were tabled in the House of Commons on October 6, 1980. From that moment, women across the country were at least curious—and, more often, fully engaged—on this new front for equality. It came ten years after the Royal Commission on the Status of Women (RCSW), ten years of slogging on issues that were critical to women's equality—with some successes (family property law, reproductive rights to a degree) and many stalls (pay equity, section 12(1)(b) of the *Indian Act*). We had learned from history about the issues, women, and organizations of women's activism in Canada in the twentieth century—what stood in the way of rights for all women, what the first-wave women did to create change, and what successes and limitations they faced. After the Report of the RCSW was released in 1970, with its sweeping and specific call to action, we plunged in with great expectations and an escalating sense of just how hard it is to change the *status quo*.

What would the *Canadian Charter of Rights and Freedoms* mean for women's equality? Would it help or would it hinder? At the outset, the press canvassed human rights experts—all men—such as Gordon Fairweather (then chair of the Canadian Human Rights Commission), Justice Walter Tarnopolsky (an expert on discrimination law before being appointed to the bench), and Alan Borovoy (longtime head of the Canadian Civil Liberties Union). Our first reaction was: Why are the press not seeking out expert women? What would they say? Thanks to the advance work of Beverly Baines and Mary Eberts, working with the Canadian Advisory Council on the Status of Women (CACSW) and its president Doris Anderson, we knew the bad news soon enough. We were galvanized—we were just as qualified to speak and, if we were not going to be

asked nicely to join the party, we were going to crash the party.

On November 6, 1980, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada opened its hearings. The Canadian Advisory Council on the Status of Women appeared on November 18, 1980. Its submission became our first road map, supported by the study papers commissioned by the council and subsequently published (Doerr and Carrier 1981).

The council spoke in favour of entrenchment (which was nonetheless a hotly debated issue in the women's movement, although opposition was always the minority position). The council proposed new wording for section 15 and other provisions of the Charter and those changes became our political objective (CACSW 1980).

The federal government's October 1980 wording of section 15 was a great gift to the politically and organizationally mature women's movement that existed in Canada ten years after the RCSW. The flaws in the initial version of section 15 were made crystal clear by the CACSW: they were easily "demonstrable," to use a Charter concept. We were offered a retread—with one difference: the proposed section 15 used the wording from the 1960 *Canadian Bill of Rights* ("the right of the individual to equality before the law and the protection of the law") that the Supreme Court of Canada had applied to the detriment of women (Jeannette Lavell, Yvonne Bédard, and Stella Bliss²).

The one difference was that the proposed section 15 referred to "equal protection of the law without discrimination." This change suggested a standard that was very similar to the phrase "equal protection of the laws" used in the Fourteenth Amendment to the United States Constitution. We were to get a foreign import with seriously bad baggage. There were two very significant problems for women in Canada if the Fourteenth Amendment were used. The first was that American courts did not agree on whether discrimination on the ground of "sex" should be subject to the highest level of scrutiny, requiring a compelling justification. In other words, sex might be treated differently than other grounds. The second was that, even if discrimination on the basis of sex were found, women would be entitled only to be treated the same as the group to whom they were being compared. As we delved more into under-

standing these provisions, it became clear that “sameness” treatment would perpetuate and not address deep-rooted and wide-spread (“systemic”) discrimination against women. Women needed a legal standard for equality *in the result of the treatment*. It was clear that the Fourteenth Amendment was not getting American women closer to equality in the result (which is one of the reasons American women were pursuing an Equal Rights Amendment at this same time) and there was no reason for it to be acceptable to us.

It was no easy thing to change the wording of a proposed constitution. It helped that governments, particularly the federal government, were the Goliath in this struggle and the women’s movement was the David.

The very first thing that happened in the fall of 1980 was public outreach in the form of a series of speaking engagements. Women’s groups all across the country (not only ones that were formally part of the second-wave women’s movement) wanted information and analysis, and they wanted to be connected to what was happening elsewhere. The National Action Committee on the Status of Women (NAC) held a workshop on October 18, 1980 (Persons Day) titled “Mothers of Confederation Think It’s Time to Hear Women’s Views on the Constitutional Debate.”³ Groups also relied on local women who brought particular knowledge, and a small group of women crisscrossed the country making speeches, gradually creating an informal web of experts, organizers, organizations, and resources. Although the established women’s groups started work on developing their views on the Charter very early on, expertise outside these groups grew quickly as a generation of young women, many of them lawyers, law professors, and law students, became knowledgeable and engaged. Very soon there were experts in every province and territory. They became the heart of a new network that operated informally and largely outside established groups. It was an active and vocal action network. Politicians of all stripes heard from the network and governments knew it was there very early on.

Indeed, women’s voices were heard by the federal government before the Ad Hoc Conference in February 1981. The Minister of Justice, Jean Chrétien, announced changes to the proposed Charter before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada on Janu-

ary 12, 1981. One of the more significant changes was to add a guarantee to section 15(1) of “equal benefit of the law.” This was in response to women’s deep concern about the limits of being treated the same as men, when what needed to be taken into account in achieving equality were our differences from men in our day-to-day lives so that we would have equality in the result, in the benefit, of the law.

Although the first big push, accelerated by the Ad Hoc Conference, was to get the best possible constitutional equality standard, there was very early recognition that we would have to do much more. We wanted accessible, “lived rights,” as I have heard them called and not only formal, paper rights. It was clear from the struggle to get the standard right that nothing could be taken for granted and that, in the present as in the past, nothing would be given with respect to women’s equality. It would have to be taken.

Gradually, as we caught our breath from the first round and digested what we had learned, our agenda expanded. What did we know about the substantive interpretation of the Charter? How could we spread this knowledge to organizations, the grassroots, the media, and elites? How could we use the three-year moratorium period to push for government compliance? How could we become involved in Charter cases before the courts? What resources did we need and how could we find and harness them?

Six National Initiatives

Six national initiatives emerged out of this thinking. First, with the ink on the Constitution barely dry and the three-year moratorium on section 15 running, the CACSW under new president Lucie Pépin held its conference on women and the Constitution on May 31, 1981. Beth Atcheson’s presentation focused on the possibility of creating a fund to support Charter litigation on behalf of women. This idea initially came from women such as Beverley Baines and Marilou McPhe-dran who had spent time in the US and observed legal defense funds there. It was further developed through discussions with Canadian women litigators such as Mary Eberts and Beth Symes. The CACSW took this up,⁴ continued its critical developmental work, and retained four women—Beth Atcheson, Mary Eberts, Beth Symes, and Jennifer Stoddart—to study the subject and make recommendations. Their final report was released

in October 1984. Its first recommendation was:

...a legal action fund to concentrate on issues of sex-based discrimination is an essential component of an effective strategy to use these sections in furtherance of women's goal of equality in Canadian society...Canadian women can more effectively achieve gains in equality through a coordinated and systematic approach to litigation than by merely repeating...the random or reactive approach to litigation that has been followed in the past. (Atcheson et al. 1984, 1-2)

The report made very specific recommendations about the how such a fund should undertake cases and how it should be organized.

Second, on May 22-23, 1982, two dozen women from across Canada with expertise on discrimination against women and who were active in the women's constitutional lobby, through Ad Hoc or otherwise, came together in a workshop over a weekend at Toronto City Hall. It was organized by Lois Lowenberger, Beth Symes, Marilou McPhedran, and Beth Atcheson. The purpose of the workshop was indicated in the letter of invitation: "...this national workshop will be a crucial step to: (a) improving communication both personally and professionally, and (b) working toward a national strategy on using the Charter for Canadian women through legal writing, litigation and networking."⁵ The group looked ahead to potential challenges in interpreting the Charter in the interests of women. They also identified sources and resources that might be helpful. In addition to doing some early thinking about a legal action fund, they identified the need for those with academic credentials to begin writing on the Charter and women's equality in order to add weight and legitimacy to the issues, to encourage open and innovative thinking, and to influence judicial education. An example of this type of initiative was the comprehensive volume *Equality Rights and the Canadian Charter of Rights and Freedoms* (Bayefsky and Eberts 1985). I think that it was the first text on the subject.

Third, the May 1982 workshop also identified the importance of conferences. It was recommended that there be one for potential Charter decision-makers: lawyers, judges, prosecutors, legal administrators, governments, and private sector entities. This seed would become the National Symposium on Equality Rights,

which took place in January 1985 in Toronto (Smith et al. 1986).

Fourth, the participants at the May 1982 workshop also recommended a conference for lay women and women's groups, to keep the learning, connections and mobilization of the 1980-1981 years going at least until section 15 of the Charter came into force on April 17, 1985. Although the new Constitution came into force on April 17, 1982, the federal government had placed a three-year moratorium on section 15, ostensibly to allow all governments time to implement equality rights. The Charter of Rights Coalition (CORC), an umbrella group, was established. CORC created an audio-visual in English and French on Charter issues and organizing and, in coordination with existing groups, it organized an ambitious series of grassroots conferences in every province and territory (Nowell 1996).⁶

Fifth, we were skeptical about whether the three-year moratorium on section 15 was a commitment or spin. In the end, I think it was a commitment, but governments were really only looking at clear examples of explicit or formal discrimination; i.e. where a statute referred to women or to men, to mothers or to fathers, and so on. They never got to substantive discrimination. A number of women's groups undertook ambitious statute audits in an attempt to identify substantive discrimination against women that required attention. The Charter of Rights Educational Fund (CREF) undertook an audit of both federal and Ontario statutes. CREF started as a large Toronto Charter study group comprised of women who believed that they should be knowledgeable about and active in the interpretation and implementation of the Charter. It sponsored two public study days on the Charter at Toronto City Hall on January 15 and February 19, 1983. With respect to the significance of statute audits to women, Beth Atcheson of CREF said in a fundraising request letter dated March 4, 1983 to the federal Department of Justice:

The Fund has a primary interest in reviewing legislation from the citizens' perspective, and the particular perspective of women...our concerns about the reviews currently under way by governments are held sufficiently strongly that we have been exploring how we might conduct our own audit. It would provide us with a legislative agenda to present to government...It would also dove-tail with plans

being made for the post-implementation period; if litigation strategies are to be devised, an information base of the type provided by an audit would be most useful.⁷

Audits were also conducted in other provinces, including Manitoba and British Columbia.

Finally, LEAF was launched in 1985 to ensure that the courts protect the equality provisions in section 15 and section 28 of the Charter of Rights and Freedoms (Razack 1991).

Observations

I have several observations to make about activism for women's equality, drawing on my own experiences between 1980 and 1985 as well as on what I have done since then. It is obvious that context is always changing and issues themselves have their own personalities. Working on a proposed new constitution in the 1980s was, by definition, very different from working on pay equity, reproductive freedom, or violence against women in a new millennium. However, I think that there are some constants about productive activism.

What We Did Well

We understood from the work of the first wave and the immediate post-RCSW era that equality is a fundamentally redistributive concept. Therefore, change will not happen because it is "the right thing," but because it is made to happen. We did not wait for others to act; we acted.

We had done excellent advance work. We were out of "the start gate" at the same time as the government and we could keep pace with the government timeline.

We had a positive, clear, and compelling story to tell to the broader public, to elites, and to experts.

We had solid leaders who could bridge the needs of the women's movement and our political system, and we gave them some scope.

We had a consensus on the core elements of our case and could also sustain exploration, discussion, and consideration of differences.

We had an existing constituency for women's equality. We broadened, deepened, and, from time to time, coordinated it to good effect. We achieved all this with minimal resources other than the CACSW, some small amounts from the federal Department of Justice,

the Province of Ontario, and the City of Toronto, and a wellspring of volunteer talent, time, and commitment.

We utilized our own networks well. We also utilized our networks with women in institutional positions of power.

We worked with integrity, both across party lines and through partisan linkages. We managed the political spectrum consciously and to our benefit.

We were exceptionally nimble for a pre-computer age. We accomplished an enormous amount of work through a mix of existing and new organizational platforms.

We grew together and we had fun.

What We Did Not Do So Well

We have a tendency to believe that the next equality tool will be the one that will do the job once and for all. In the case of the Charter, ultimately, we put too many eggs in the litigation basket. That was a known danger. In recommending a legal action fund, the authors of *Women and Legal Action* concluded:

Litigation will sometimes be the only, or the best, way of advancing women's interests. However, the authors stress that litigation should not be seen as a replacement for the varied activities of the women's movement. Public education, lobbying, use of the media, law reform and education of lawyers and the judiciary, as well as litigation, have a role in a coordinated equality strategy. (Atcheson et al. 1984, 4)

Despite this early warning to ourselves, we did not move to a deeper equality strategy after 1985. While we were very conscious of advocating only for equality standards that took into account the interests of all women in Canada, to a degree, we sacrificed inclusiveness and diversity for the speed with which we moved on a range of initiatives. The women's movement circa 1980 was on the cusp of grappling with the fundamental implications of diversity and intersectionality, especially with respect to race and class; however, existing women's organizations were just beginning this journey. Reliance on existing networks and relationships may be practical in demanding circumstances, but it does not help build new and challenging relationships, which themselves take time and nurturing. There were power issues in the women's constitutional lobby, with re-

spect to leadership and content, and, to a degree, the record has subsequently become contested. Given my comments about the redistributive nature of equality, we need to find ways to increase our collaboration for common goals and decrease our competitiveness.

Finally, we never fully grappled with the development of new resources. In my experience, no source of funds is reliable over the mid to long term. All money has strings attached. The private and charitable sectors have at least as bad a record as governments at funding for women and girls, and we are naïve about money and funding in general. If we look to other advocacy organizations and movements, we will see that the only source of long-term, relatively flexible, and independent funding is from individuals as the source, using a mix of tried and true, and innovative, mechanisms.

Endnotes

¹ This speech was written with the assistance of Beth Atcheson who works with me in the Senate as Director of Parliamentary Affairs. We first met in 1981 and worked together as volunteers with many wonderful women across Canada on the initiatives described in this article.

² *Attorney General of Canada v Lavell* [1974] SCR 1349; *Isaac et al. v Bédard* [1974] SCR 1349; *Bliss v Attorney General of Canada* [1979] 1 SCR 183.

³ University of Ottawa Library Archives and Special Collections, Canadian Women's Movement Archives, National Action Committee on the Status of Women Fonds, 10-24, Series 1 (Annual General Meetings), 635.1.

⁴ Personal correspondence, Mary Eberts to Nancy Jackman (now Nancy Ruth), June 17, 1981. Written on Tory, Tory, Deslauriers & Binnington Barristers & Solicitors letterhead.

⁵ York University Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds, 2007-020/006(05), Letter from Marilou McPhedran on behalf of the planning committee to workshop invitees, May 12, 1982. This file also contains the agenda and the list of participants. Beth Atcheson holds a draft report on the proceedings in her personal files.

⁶ Library and Archives Canada, Nancy Ruth Fonds, 1998-00022-2, Series 1, File 1-4. Charter of Rights Coalition.

⁷ York University Clara Thomas Archives and Special Collections, Marilou McPhedran Fonds, 2007-0231/012(01).

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