

**“Beyond Winners and Losers?
What has happened to women’s equality
after 25 years of Charter struggles?”**

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Introduction

With the patriation of Canada's constitution and the drafting of a homegrown *Charter of Rights and Freedoms*, advocates for women, among other equality seekers, ensured that Canada's *Charter* contained more than individualistic rights, and a commitment to more than mere formal equality (Dobrowolsky 2000; Abu-Laban and Nieguth 2000; James 2004). Women's groups, in particular, were celebrated for both tightening up the wording and broadening the intent of Section 15, as well as adding an entirely new equality provision, Section 28, to Canada's *Charter of Rights and Freedoms* (Kome 1983). The former was extended further when gay and lesbian activism prompted the Supreme Court to interpret sexual orientation as a prohibited ground for discrimination (Smith 1999). In the words of Alan Cairns, constitutional "outsiders" became "insiders" as they successfully lobbied to have their interests and identities recognized, and then, having carved their constitutional "niches," these "Charter Canadians" went on to strenuously protect their hard fought equality rights at the expense of realizing new constitutional amendment packages, first with the Meech Lake Accord (1987) and then with the Charlottetown Agreement (1992) (Cairns 1991; Cairns 1992). The struggle has continued into the present, as Aboriginal women, for instance, have spurred the courts to resolve longstanding disputes over discrimination based on sex and racialization, which had only been partially addressed in 1985 (in a challenge to the *Indian Act*, led by Sharon McIvor).

Yet, these so-called "successes" came alongside the rise and consolidation of neo-liberalism in the 1980's and 90's, and then, amidst prevailing social investment discourses, both of which have been highly detrimental to women's equality (Dobrowolsky and Jenson 2004). When it comes to the *Charter* and the Supreme Court, do we see somewhat of a "lag" when it comes to the consequences of neo-liberalism? What does women's activism around the *Charter* and the Supreme Court tell us about the neoliberal trajectory? Has it played out in the same ways, and has neoliberalism had the same kind of impact on women at the level of the *Charter* and the courts as it has in other realms? Has neoliberalism "rolled out" here as elsewhere? The answers to these questions are not clear cut, as the story here is a contentious one, with competing assessments.

This paper critically evaluates whether women are winners or losers when it comes to the *Charter*, and in so doing outlines the more complex and contested consequences of neo-liberalism and interest mediation vis-à-vis the constitution and the courts. As we shall see, it depends when you ask, and in what context. It also depends upon who asks, who answers, on behalf of whom, and for what reasons. In other words, the answer is contingent, and always political. What will, in fact, become apparent, is that the objective reality is much more mixed: gains and losses, steps forward and steps back, are subject to the strength, and legitimacy, of the political actors involved (whether they be women's groups, political officials or judges), the ideas they embrace, as well as the actions they take.

Part I provides a brief overview of how perspectives have shifted with respect to women, *Charter* equality and the courts. This is counterposed by women's socio-economic and political realities and the impact that these realities have on women's equality, and their equality seeking. **Part II** considers the role of the courts, and reviews a number of illustrative court cases to show how presumed equality successes, and defeats, are never straightforward. **Part III** examines shifts in terms of institutions, ideas, interests and identity politics, to explain the current status of Canadian women's equality. Finally, the implications of the current dearth of *Charter* champions are noted in the conclusion.

1) The Backdrop

After successfully entrenching various rights in the Constitution, equality seekers began using the *Charter* and courts as a strategy to make political inroads, especially given intransigent legislatures. Because key feminist organizations led the charge, many analysts identified women as *Charter* champions, including right wing critics. However, whereas the left commended these efforts (Dobrowolsky 1997, 2000; Smith 2002), the right condemned them. Conservative scholars worried that anti-oppression activists had gained too much political ground. They pinpointed women's efforts, and groups like LEAF, as epitomizing the work of an anti-democratic "Court Party" (Morton and Knopff 2000). The impression given here was that feminists had overtaken the

courts, and the hearts and minds of judges! For example, when Madame Justice Rosalie Abella, a renowned equality advocate, was appointed to the Supreme Court, right wing decrivals came fast and furious.

While the right exaggerated the impact of women, the left tended to minimize women's gains (e.g., Bakan and Smith 1997). Women were, more often than not, considered to be "losers" not "winners" in the courts, and in the game of Charter chess. As socioeconomic equality deteriorated, and despite diametrically opposed broader public perceptions of women's gains, the left, and even liberals, grew disillusioned. Canada's first woman Supreme Court justice, the late Bertha Wilson, posed the question before a diverse group of feminist equality advocates, academics and activists: "Why....are so many dissatisfied with the way things have worked out? Why do they feel that they expended a great deal of effort and cherished such high expectations to so little avail?" (Wilson 1993, 1).

Concomitantly, equality seekers' efforts were denounced and added to a list of problematic "special interests" (Dobrowolsky 1998). This de-legitimizing discourse was useful to the promoters of neoliberalism who wanted to streamline the state and silence voices that called for political and constitutional equality, as such forms of redress would require the kind of political and legal activism staunchly opposed by the right. Nonetheless, due to a more conducive climate for equality seeking at the court level, as well as a more charitable assessment of the courts by the citizenry, the right wing critique did not immediately take hold, nor did it have the intended blanket effect, and there was a "lag" in neoliberal consolidation. Consider here the work of key women's groups that highlighted potential threats to equality in the Meech Lake Accord proposals of the late 1980's. While their stance was, no doubt, oppositional, it still served to galvanize numerous equality seekers and garnered public support.

However, as time went on, right wing discourses and dictates (Morton and Knopff 2000; Morton and Allen 2001; Brodie 2002a, Brodie 2002b), began to resonate more widely, moving beyond academic circles, and into the broader political realm (and public consciousness). Neoliberal justifications also crept their way into court decisions, as will be discussed below.

Today, Conservative Prime Minister Stephen Harper, as well his top advisors, are advocates of the "Calgary school" (aka Morton, Knopff et al), who not only bolster the view that women's equality is a *fait accompli*, but that the judiciary needs to be reigned in, as well as distanced from left/liberal ideas, interests and collective identities.¹ This explains why the Harper government drastically scaled back the Status of Women Canada, and shut down both the Court Challenges program and Canada's Law Commission in the fall of 2006.

There is, however, substantial evidence that challenges the government's view that Canadian women's equality is a given. Neoliberal streamlining had the effect of rolling back women's equality in multiple ways. At the height of neoliberal restructuring, in the mid 1990's, when the Canada Assistance Plan (CAP) was replaced by the Canada Health and Social Transfer (CHST), Day and Brodsky wrote:

This...is no less significant than...the constitutionalizing of equality guarantees in the 1980s. At stake now is not just the repeal of the general entitlement to social assistance, further cuts to federal funding, the loss of national standards, and the threat of a race to the bottom in social programs- all of which will affect Canadian women, and especially Canada's poorest women. Also at stake is the ability of women's human rights to be a vital, responding, alternative discourse in a time of global and national restructuring (1998, 6).

Given the dramatic nature of the cuts and the devastation in their wake, this period was then followed by a return to strategic social spending in the late 1990's and early 2000's. Nevertheless, Canadian women's concerns were sidelined (Dobrowolsky and Jenson 2004; Dobrowolsky 2008). For all these reasons, the economic situation is a difficult one for many Canadian women and dire

¹ Ian Brodie is currently the Prime Minister's chief of staff, but was formerly political scientist and student of the Calgary school. When feminist legal academic and activist, Marilou McPhedran questioned Brodie about this government's position on gender equality, he replied "We support gender equality....in Afghanistan". Exchange at the "Charter at 20 Conference," March 2007, McGill University. More on this in Part III of this paper.

for others, including: lone mothers, senior women, Aboriginal and other racialized women, women with disabilities, immigrant women, and so on.

Bruce Porter outlines the stark reality that exists, despite so-called *Charter* equality “gains”:

Since the Supreme Court issued its first [equality] decisions under section 15 in *Andrews*, half a million more households have fallen into poverty. The number of single mothers living in poverty has increased by more than 50 per cent and their poverty has, in many cases, deepened to the point of extreme destitution. Food banks, a rare phenomenon in the early 1980's and unheard of when the Charter was first being debated are now a critical means of survival for three quarters of a million people and fail to come close to meeting the needs of an estimated 2.4 million hungry adults and children. Women and children have been most dramatically affected by the epidemic of homelessness... (2006, 42).

Let us now turn to the courts, and then assess *Andrews*, among other key equality cases, to further problematize the nature and forms of equality for Canadian women.

II) Courts and Cases: More Ambiguity than Achievement

We have certainly seen laudable changes to the composition of Canada's highest court, from the first woman Supreme Court justice (Bertha Wilson), to the first woman Chief Justice (Beverly McLachlin) and with the total number of women justices averaging at about one third of the Court. However, we cannot forget how long these judicial appointments were in coming (recall, it was Canada's Supreme Court that had ruled that women were not even persons and were not eligible for Senate or judicial appointments, culminating in the 1929 *Persons* case), and that, the makeup of the courts can change, given different political mandates. Moreover, the numbers of women, and levels of racial diversity in the lower courts, are still not high (see Devlin, MacKay and Kim 2000) and, may be slipping.²

At the same time, women judges will not necessarily be more progressive in their approach to the Charter and sex equality. As research on women and politics reveals, numerical representation of women does not automatically translate into their substantive representation (Gotell and Brodie 1996; Trimble 1997; Trimble and Arscott 2003). Still, legal studies do suggest that women Supreme Court justices, up to early 2000 at least, “have been more open and courageous in their equality analysis than their male colleagues” (Majury 2002a, 313).

Moreover, despite the Supreme Court's initial, more expansive, interpretation of substantive equality, it is not hard to find examples of sexist (and racist) commentary, particularly from Canada's lower courts, and sometimes even directed at progressive women Supreme Court Justices. Recall here the infamous *Ewanchuk* case. An Alberta trial judge, Mr. Justice McClung, acquitted Steven Ewanchuk of sexually assaulting a 17 year old who had come to look for a job. The judge resorted to rape myths and engaged in blatant sexual stereotyping, when he quipped that the young woman was not exactly wearing a “bonnet and crinolines”. Later, when the Supreme Court heard the case and McClung was taken to task for his judgment (in both senses of the word), McClung lashed out in the media with a loathsome retort directed at Madame Justice L'Heureux-Dubé. While *Ewanchuk* is touted as a feminist victory, for the Supreme Court ultimately ruled that “no means no”, one could also credibly claim that the positive ramifications may have been lost in the negative publicity.

In more ways than one, this case casts a shadow of doubt on the nature and effects of such “successes”. Christopher Manfredi uses *Ewanchuk* as a prime illustration of the uncertain outcome of feminist activism:

² As will be discussed in Part III, recent changes made by the Harper government to the judicial appointment committees (JACs) are not likely to add diversity to the ranks of the judiciary. Ironically, for a government worried about judges who are too political and lacking in impartiality, the latest reforms appear to lay the ground for more conservative and less representative appointments, thereby *increasing* politicization and *decreasing* impartiality.

The increasingly narrow circumstances under which women can be said to have consented to sexual activity is to some extent inconsistent with the stated purpose of sexual assault law to promote the equal dignity and autonomy of women. Implicitly in LEAF's approach, in other words, is the idea that women have so little autonomy under current conditions that true consent is quite rare (2004, 124).

Indeed, Diana Majury identifies this danger of "over-protection" as one of the potential pitfalls of women's equality struggles (2002a, 335). This makes the *Ewanchuk* outcome less than clear. The waters become murkier in light of the issues raised in the cases that follow.

Charter Winners & Losers? Contestation & Contingency in a Context of Political Change

Are women "winners" or "losers" when it comes to pivotal equality cases? Here, it is important to query: who is asking the question, when and why? For example, on one hand, the right identifies LEAF as a powerful "Court Party" intervenor, exerting undue influence on the courts, and problematically shaping public policy in ways that respond to its feminist, minoritarian agenda (Morton and Knopff 2000; Brodie 2002).³ On the other hand, feminist analysts have tended to be more skeptical and/or pragmatic⁴ with views that can be summed up by the title of an early report on women's equality outcomes: "one step forward, or two steps back?" (Brodky and Day 1989). Subsequently, after ten years of feminist advocacy around the *Charter*, LEAF's aims and impact were reviewed and the conclusion was drawn that its:

proactive vision was severely tested by early equality cases that often involved male litigants who sought to undermine benefits achieved by feminist law reform. For example, men challenged the criminalization of sexual assaults, previously viewed as consensual, between older men and underage girls. Men also lost no time challenging evidentiary rules designed to ensure fair, non-sexist treatment of complainants during sexual assault trials. On other fronts, men challenged laws such as those providing economic assistance to single mothers, which were enacted to address the severe hardship of the most impoverished women (LEAF 1996).

Let us review the implications of some classic equality "wins".

In the classic 1989 *Andrews* case, Mark Andrews (and his co-claimant Elizabeth Kinersley) "successfully" used s. 15 to challenge the requirement of Canadian citizenship for admission to the British Columbia bar. Here the Supreme Court not only applied s. 15 for the first time (seven years after the Charter, and four years after s. 15 came into force), but also, moved away from the rigid formalism of the *Bill of Rights* that had preceded the *Charter*. *Andrews* was an accomplishment in that a more purposive approach to s.15 was taken. It also, no doubt, reflected the broader political context of women's equality mobilization.

Yet, while LEAF is often "credited (or blamed)" for the approach taken in *Andrews*, and while a cursory analysis might lead one to assume that it had an impact on the Supreme Court's decision, after a close and careful study of LEAF's factum vis-à-vis the majority view, Heather MacLvor concludes that LEAF's intervention: "made little or no difference to the outcome of the case" (2006, 208-209).

The Supreme Court's unanimity in its support of substantive equality here, nonetheless, raised the hopes of equality advocates (Majury 2002a, 305). The flip side, however, is that by abandoning the restrictive formalism of the past, "equality under the Charter has become an even more amorphous and uncertain concept" (Majury 2002b, 123). This observation is certainly borne out in this paper as we see how understandings of equality can not only expand, but also can contract over time, given a shifting political and socio-economic context. Indeed, it was not

³ Empirical studies show, however, that this "spectre of an almighty 'Court Party' using the Charter to trample majority opinion is overstated" (MacLvor 2006:200).

⁴ For some recent examples see: Jhappan 2002; Green 2003; Faraday et al 2006; McIntyre and Rodgers 2006. For an excellent review article that focuses on the women, the Charter and equality rights see Majury 2002a.

long before the Supreme Court's 1989 unanimity in *Andrews* "broke down in a trilogy of cases- *Egan*, *Miron*, and *Thibaudeau*- in 1995" (Faraday et al, 2006, 13).

Even the "success" of other cases considered to be equality milestones (e.g., those that recognized minority rights for gays and lesbians in *Vriend v. Alberta*, or that required the British Columbia government to provide sign language interpreters for deaf persons requiring medical services in *Eldridge*) become tempered over time. In Sheila McIntyre's assessment, and in hindsight, *Vriend* and *Eldridge* were ultimately "easy" cases that displayed "failures of nerve" and "in the case of *Vriend*, "undue defensiveness" (2006, 111). And yet, these cases sparked a significant anti-court backlash re: the nature and extent of judicial activism.

Cases identified as banner feminist "victories", have added fuel to this fire, such as the 1998 *Morgentaler* decision that struck down Canada's abortion law, or the *Butler* decision where the Supreme Court viewed pornography through the lens of "harm", and therefore considered it justifiable to limit the *Charter* right to freedom of expression. In both, LEAF played an instrumental role and this fact was not lost on right wing court watchers (Morton and Knopff 2000; Brodie 2002). Yet, these two cases also serve to highlight a much more convoluted political reality.

The *Morgentaler* decision has been described as "a huge step forward for women" (Majury 2002a, 317), and the epitome of how "advocacy lobbying, grounded in the Charter, had changed the balance of power in the legislative process" (Pal 1993, 152). LEAF's efforts "had an impact on social condition" in that the data are "relatively unambiguous that the rate of legal abortions increased after 1988, and that increase is almost entirely attributable to the removal of legal barriers to the establishment of private clinics" (Manfredi 2004, 195). *Morgentaler* also had "symbolic purchase" in that it was widely fêted as a feminist *Charter* and court win.

While Sheilah Martin credits these contributions, she also notes the "noteworthy limits to this decision that derive from the nature of litigation, the constraints of judicial reasoning, and the limiting narratives of law" (2002:344). In *Morgentaler*, the Court drew mostly on section 7 in its decision, rather than sections 15 and 28, despite LEAF's best efforts to make the connections to women's equality explicit. Therefore, in this case, and other related ones that arose in the next decade, such as: *Tremblay v. Daigle*; *Winnipeg*; and *Dobson*, despite the fact that "reproductive rights are a key location of women's social inequality" the Supreme Court persistently refused "to actively consider the implications for women's equality" (Rodgers 2006, 281).

Following the perceived feminist "successes" of *Morgentaler* and *Daigle*, anti-choice forces grew more vocal and even violent (with fire bombings of clinics and the shooting of abortion service providers). Anti-abortion activists' actions, and their discourses e.g., the "unborn child," also started to have an impact on the courts and beyond (see also Brodie, Gavigan and Jenson 1992). Consequently, "Ideological opponents of provision of such services have raised the issue of whether abortion services are truly a medically necessary service and have successfully persuaded some politicians to soft-pedal the issue" (Palley 2006, 568).

This, combined with the repercussions of neoliberal policies (cost cutting, offloading and privatization), explain access shortfalls. A 2003 report highlighted the gaps: only 18 per cent of all Canadian, general hospitals were providing abortion services, and, in a couple instances, there were no services whatsoever (in Prince Edward Island and Nunavut) (CARAL 2003). Canada's abortion law void persists and today, "the federal government lacks the coercive and monetary mechanisms to secure the policy goal of broad availability of abortion services and equal access to such services" (Palley 2006, 568). Canadian women remain, and arguably are more, circumscribed in their reproductive rights despite the *Morgentaler* "win".

Butler rocked the feminist community and resulted in huge rifts over LEAF's anti-pornography position. This case highlights another potential downfall of equality struggles: the need for oversimplified categorization, and propensity for essentialism. LEAF's strategy in *Butler* required oversimplifying sexuality and boiling down pornography to male power and male domination, full stop. LEAF advanced the claims of an "uncomplicated and unified legal subject" suggesting that "all pornography is harmful to all women" (Karaian 2005, 17). Yet, not only were there those women who were anti-censorship (Burstyn 1985), but there were radical liberals, lesbians, among others (Cossman, Bell, Gotell and Ross 1997), who took issue with this, illustrating that "a victory for LEAF may be a defeat for feminists (and nonfeminist women) who do not share the experiences and approaches of white, heterosexual female lawyers" (MacIvor 2006, 210).

Indeed, diverse women (lesbians, women of colour, Aboriginal women, women with disabilities, and so on), increasingly challenged not only LEAF, but many leading, national women's organizations beyond LEAF (e.g., NAWL, NAC et cetera) for their mainstream personnel, and their assumptions and strategies. The fallout from narrowly based equality struggles became more apparent not only with cases like *Butler*, but also with the challenges raised by women's mobilization around the Charlottetown Accord (1992) (Dobrowolsky 2000; Green 2001, 2003). These difficult experiences contributed greatly to analyses that highlighted the limitations of legal strategies when it came to addressing complex, intersecting forms of discrimination (Jhappan 2002).

As a result of shifts in identity politics mobilization and ideas, the discourses and tactics of key equality advocates were compelled to change. For example, LEAF's strategy moved from one of essentialism, to "particularity" (Gotell 2002, 147). LEAF nuanced its response after *Butler* and in the subsequent *Little Sister's* case, even though its efforts in the latter were still not without critics (Ryder 2001). While LEAF begins with a more complicated construction of the category sexual minority in *Little Sisters*, one that is:

diverse and intersecting, it then proceeds to group lesbians, gay men, bisexuals, and transgendered persons together so that throughout the remainder of the factum this diverse group's experiences are combined and their differences elided...Recognition of the intersecting understanding of identity is adopted and then relegated to the sidelines in order to present a "unified" argument (Karaian 2005, 129).

Again, LEAF is faced with the limitation of having to categorize, unify, and use the blunt instrument of law, in order to advance equality struggles.

In general, and over time, LEAF's position, along with those of other women's groups over this period (Dobrowolsky 2008), can be described as growing more defensive and reactive, rather than offensive and pro-active. One senior member of LEAF suggested that this also reflects the fact that section 15 was getting "a far more vigorous workout as a shield than as a sword" (quoted in MacIvor 2006, 207).

The larger point being made here is that so-called feminist "wins" can easily be called into question, by both critics and supporters. Moreover, it is also important to keep in mind that neither women, nor the feminist community, are monolithic or unified, but this is typically the outcome of categorical portrayals depicting "women's" "gains", or their "losses". Consequently, a "win" for some may not necessarily translate into a "win" for all.

Equality Losses?

Beverly Baines reviews sex equality "failures" in cases litigated by women, such as *Symes*, (which challenged the *Income Tax Act*); in cases litigated by men, such as *Trociuk* (where the Court ruled that section 1 would not apply re: women registering the surnames of their newborns in a provincial birth registration scheme, i.e., it determined this to be sex discrimination against men); as well as in cases on grounds other than sex that still translated into losses for women, as in *Law* (viewed as the most significant development in equality jurisprudence since *Andrews* and it comes as a response to the 1995 trilogy of *Egan*, *Miron* and *Thibaudeau*) (see Baines 2006, 75).

But again, losses, like wins, can be less than straightforward. What and who gets factored into such assessments? For instance, which women are affected by the "loss" exactly? In the *Symes* case, a founding member of LEAF sought equality in the application of tax laws to men and women, i.e., being able to deduct child care expenses as a business expense. In the end, the majority ruled against Beth Symes, but interestingly enough, two women Supreme Court Justices on the case dissented. As Audrey Macklin notes, this "defeat" was most likely felt by a certain, more privileged, class of women, given who actually brought the case forward, and who dissented from the majority view (1992). Consequently, *Symes* has been depicted by some as an illustration of "privileged women trying to take advantage of a privileging tax system in a way that potentially undermines the interests of other, more disadvantaged women" (Majury 2002a, 332).

Furthermore, in cases considered to be "failures", as with many "successes," we typically see more of a "ping pong" effect between various political actors: judges, legislators and

advocacy groups. For example, consider the back and forth, losses/gains/losses that occurred with court cases such as *Seaboyer* and *O'Connor* and then later in *Mills* and *Shearing*.⁵ A “loss” can also, sometimes, become more of a “win,” or at least, a more ambivalent outcome. In *Seaboyer*, although LEAF “unsuccessfully” defended the *Criminal Code*’s so-called “rape shield” law against a due-process challenge, the Supreme Court’s majority ruling caused a furor and acted as a catalyst for widespread women’s activism. A range of diverse women’s groups (see McIntyre 1994) worked with the Justice Minister at that time (Kim Campbell) and provided input into drafting a more sensitive and sensible law. What is more, “the new bill seemed to be influenced at least as strongly by Justice L’Heureux-Dubé’s dissent-- which, in turn, resembled LEAF’s arguments-- as by Justice McLachlin’s majority ruling. The net result was a win for LEAF” (MacIvor 2006, 211). But then again, in the final analysis, “it is unclear whether these rule changes had much impact on the level of violence against women or the actual processing of sexual assault cases” (Manfredi 2004, 195).

In short, this running tally of losses and wins is less important than the concrete repercussions that unfold given a changing legal, as well as socio-economic and political context. The shifting ground is significant in the post-*Law* context. In the *Law* case, the Supreme Court developed a complicated taxonomy for equality, “convert[ing] a 46-word guarantee into an elaborate analytic framework whose multipartite content now extends to two detailed pages” and yet, in spite of the intricate test developed by the unanimous *Law* Court, section 15 decisions are now “almost completely unpredictable. They are however depressingly consistent in their narrowing of the promise of substantive rights” (McIntyre and Rodgers 2006, 10-11).

Relapses and Mixed Messages

Ultimately what is most problematic, in my view, is the recent trend of equality backsliding in a context of marketization and the rise of the right, where substantive equality is presumed to exist (Dobrowolsky 2006, 2008). Despite the realities outlined in Part I of this paper, the general public assumes women have achieved not only formal, but substantive equality. And so, when feminist equality seekers and anti-oppression activists point to the contrary, they are dismissed as being out-moded policers of political correctness.

Yet, numerous legal scholars have tracked the deterioration of broader, purposive understandings of equality as initially articulated in *Andrews* (Faraday et al 2006; McIntyre and Rodgers 2006). Melanie Randall comments on the: “increasingly impatient reaction to discussions of gender discrimination and ‘women’s issues’ ” and suggests that it “appears to be a society-wide phenomenon. But it is also traceable in Canadian case law, in the Supreme Court’s tepid reception to discrimination, and in the diminishing rates of success of Charter equality claims” (2006, 280). Fiona Sampson writes, “To date, section 15 of the Charter has not fulfilled all of its potential; and more recently, post-*Law*, the Supreme Court’s section 15 analysis have become more regressive and confusing in relation to goals of substantive equality and the legal elimination of disadvantage” (2006, 267).

One can choose from a range of cases that reflect these tendencies and trends. However, three cases are particularly illustrative not only for their retreat from substantive equality, but also for how this regression becomes intertwined with neoliberal inspired market calculations: *Auton*; *NAPE*; and *Gosselin*.

In the 2004 *Auton* decision, the Supreme Court ruled on whether expensive therapy to deal with autism should be covered by the British Columbia health care system. Here, the parents of autistic children argued that section 15 “imposes an obligation to fund the treatment for their

⁵ Majury sums up what was at stake in *Mills* and *Shearing* cases: “the Supreme Court of Canada increasingly has been willing to explore the gendered assumptions and values underlying the evidentiary issues. This process culminated in the almost unanimous decision in *Mills* in which the statutory protocols for the admission of confidential records pertaining to the complainant in a sexual assault trial were upheld. However, the more recent decision in *Shearing* represents a step backwards. The majority ruled that the accused could not cross-examine the complainant on the absence of entries in her diary relating to the abuse in order to raise the presumption that if it was not recorded it must not have happened. Then, in a sleight of hand, the majority ruled that the accused can cross-examine the complainant on the absence of entries in order to test the accuracy and completeness of her recollection of the events around the time she was abused” (Majury 2002a:321). For a more critical analysis of *Mills*, see (Gotell 2001).

children....that children with autism have unique needs and that a refusal by governments to meet those needs has a discriminatory consequence” (Porter 2006, 39). Although the Court relied on the rhetoric of substantive equality, it reverted to formalistic equality calculations by way of a “highly specified comparator analysis” (Pothier 2006, 149). The Chief Justice asserted that in order to demonstrate that section 15 had been violated, “the petitioners in *Auton* must show differential treatment in comparison to ‘a non-disabled person or person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non core therapy’ ” (Porter 2006, 40).

As Dianne Pothier perceives, this brings to mind the infamous *Bliss* case of the 1970’s, the pre-Charter, high-water mark in formal (in)equality, *Bill of Rights* absurdity, where a pregnant woman, Stella Bliss, was denied unemployment benefits when the Supreme Court ruled that “discrimination on the basis of pregnancy was not sex discrimination” (Pothier 2006, 148). Porter concurs that in *Auton* “[o]ne is reminded...of the futile quest for the ‘pregnant man’ comparator in the Bliss case” (Porter 2006, 40). In *Auton*, then, the Supreme Court’s “[e]xcessive pigeonholing leaves room only for formal equality because it does not allow for consideration of different needs and circumstances” (Pothier 2006, 148).

The bottom line here is the bottom line: this therapy was deemed to be too expensive. Financial calculations ultimately trumped both substantive equality and broader views of discrimination. Randall writes: “*Auton* represents a paradigmatic example of a simultaneous failure to grasp the nature of the discrimination at issue and over-sensitivity to the burden on governments which equality claims might pose” (Randall 2006, 289). Such justifications are plain to see in the next two cases that specifically involve women’s socio-economic status.

The 2004 *NAPE* case, {*Treasury Board v Newfoundland and Labrador Association of Public and Private Employees (NAPE)*} provides the first explicit example of “a cost-based justification alone of a claim of sex discrimination” (Young 2006, 66). Here the Supreme Court refused to prompt the Newfoundland and Labrador government to fulfill its \$24 million pay equity benefit obligation to women public health care workers. In *NAPE*, the Court wholeheartedly agreed that yes, discrimination and the violation of women’s equality had taken place; nonetheless, it deliberately decided not to compel the Newfoundland government to make reparations, given the financial burden that this would impose.

Some might suggest that such calculations were also at the root of the decades earlier *Bliss* decision, but here Young counters that the budgetary concern “was understated in *Bliss*, and not the primary mechanism for denying Stella Bliss’s claim” whereas in 2004:

the financial angle is key. Women’s equality rights- recognized by the government in its pay equity agreement promises- are cast as threats to the attainment of other public goods such as hospital beds and schoolrooms. And the effect to the judgment is to uphold discriminatory budget balancing: the levying of a targeted tax on an already vulnerable and economically disadvantaged group of female workers in the name of the greater economic good (Young 2006, 67).

The inequality between men and women is a reality that is currently being ignored by political leaders and now Supreme Court justices seemed to have resigned themselves to the fact that they cannot force the government to act to remedy this situation, due to its costliness!

In *Gosselin*, the Supreme Court was willing to disregard socioeconomic conditions and even fall back on stereotypes in order to limit expenditures. This 2002 case challenged social assistance programs that penalized youth in Quebec. Despite harsh realities, namely a recession that contributed to high unemployment rates (23%) for adults under 30,⁶ the Court deliberately ignored such structural impediments and some of the specifics involving a young, impoverished woman on social assistance (Kim and Piper 2000). And, contrary to efforts to transcend problematic portrayals of women (e.g., the stereotypes involved in *Ewanchuk*) in *Gosselin*, the Supreme Court perpetuated loaded representations of young, female welfare claimants, despite NAWL’s efforts to debunk such myths and portray the material conditions at stake:

Chief Justice McLachlin’s account of Gosselin’s misfortune placed emphasis, explicitly or not, on features about the individual herself: her mental health, her work ethic, her

⁶ See statistics cited in note 48 in McIntyre and Rodgers (2006, 15).

stamina, her range of poor personal choices. NAWL's account was more situational, still individual, but reflective of a broader context of destitution and misfortune" (Young 2006, 60).

This Supreme Court decision cannot be divorced from market rationales. In *Gosselin* the Court became "clearly overwhelmed by the prospect of 'tens of thousands of unidentified people' being owed 'hundreds of millions of taxpayer dollars' and dismisses the claim based on the absence of evidence that these tens of thousands have been adversely affected by their social assistance being reduced by two thirds" (Majury 2006, 229).

Nevertheless, rather than chalk up wins, or list what would seem to be a growing number of losses, it still is more helpful to consider how contexts have changed over time, to understand the attenuation of substantive equality.

III) Erasing Equality: Political Dynamics Changing Institutions and Ideas, Interests and Identities

For a start, it is important to acknowledge the growth in stature of the Supreme Court post-Charter, and the decline in support for more traditional political arenas and actors in this same period. The Canadian public has expressed faith in the Courts and in the *Charter* and this helps to explain why many believe substantive equality rights to be both apparent and real. Polls released in 2007 show that many Canadians consider the *Charter* to be a positive development (53%) and rate the Courts more highly than the legislatures (Supreme Court 47%; versus Parliament 37%) (Makin 2007, A1). Clearly, a more dynamic, liberal Court in the early days of Charter euphoria sealed these impressions. However, given both marketization and the rise of the right, the blush is off the Court's rose, and the colder climate for equality is setting in.⁷

Courts are not static. Appointments come and go, and reflect different political mandates. The composition of the court matters when it comes to equality and how it is understood and articulated. Supreme Court Justices keen to herald a new *Charter* era by transcending formal equality, legitimizing substantive equality and a "contextual mode of interpretation," notably Bertha Wilson and Claire L'Heureux-Dubé (see Grabham 2002, 661) are now gone. Diana Majury expresses her fear "that the Court will not longer feel the need to engage in a rigorous sex equality analysis" with the retirement of Justice L'Heureux-Dubé, "who has been a champion of women's equality rights. Her sexual assault judgments, often in dissent, are wonderfully affirming for feminist advocates who work on this issue" (2002a, 322).

Even since *Gosselin*, there have been modifications to the Supreme Court. As Brodsky and Day observe: "Four of the judges who sat on *Gosselin*, include L'Heureux-Dubé and Arbour JJ. who wrote most imaginatively are no longer on the Court" and they go on to question whether the "newly-composed Court positioned at a crucial crossroads" will "revert to a narrow, negative, formalistic conception of equality that is indifferent to material conditions of inequality and deprivation, or move forward with a substantive conception of equality?" (Brodsky and Day 2006, 337). As we have seen, formalism is certainly more in evidence given the weight of market forces.

Consider also the influence of right wing critiques. Recall how the right drummed up opposition to renowned equality advocate, Rosalie Abella's appointment to the Supreme Court. Indeed, this context may help to explain her cautious approach on the bench, and heretofore failure to reach the creative heights of Wilson or L'Heureux-Dubé.

The political ground shifted further in 2006: rightwing Chartersceptics are both advising political leaders, and are now in power. The Harper government's chief of staff, Ian Brodie, had made his views crystal clear in his 2002 book where he, for example, criticized both the Supreme Court and the Court Challenges Program for favouring feminist and gay-rights groups. Echoing his mentors, Morton and Knopff, Brodie castigates the high court for making political decisions under the pretext of interpreting constitutional law (Brodie 2002a). He also specifically targets the

⁷ For instance, in surveys taken in 1987, and 1999 support for the Supreme Court appears stronger than in the most recent surveys. In 1987 and 1999, Canadians were asked whether the Courts or legislatures should have the last word on Charter of Rights conflicts, and here over 60 per cent replied that the Courts should have the final say (see MacIvor 2006:129).

Court Challenges Programme (2002b). It is now obvious that these ideas were put into practice by the fall of 2006.

Because the Prime Minister and other Harper government officials have been opposed to how the Supreme Court has operated, especially in its broad and liberal interpretations of equality, they are keen to reign in the Court. They are also eager to shift the balance of the Court to reflect the current government's more right wing, Charterphobic views. As Peter Russell muses, the Conservatives are thinking "We are going to get people on the Bench of our persuasion" and in so doing dispense with "judicial and legal establishments [that] all love the *Charter*...[especially the] left-of-centre, civil libertarian judiciary [that] has been totally unbalanced by ideological appointments of Charterphiles" (Russell quoted in Schmitz 2007). Their first Supreme Court appointment, Marshall Rothstein, was supported by Prime Minister Harper for having "the appropriate 'judicial temperament' ...manifested by jurists who 'apply the law rather than make it, and...apply it in a way that uses common sense and discretion, without being inventive" (Schmitz 2007).

The Conservatives' "reforms" of the way federal judges are appointed also provide a means to this end. The Canadian Bar Association (CBA) sharply criticized the Harper government's changes to the judicial appointment committees (JACs). Beyond the CBA and leading judges, even columnists in the *Globe and Mail* see this "reform" for what it is: "There isn't any other way to put it: The Harper government, by perverting the rules and by appointing party loyalists to key positions, intends to stack Canada's courts with conservatives... this ideological contamination of the justice system must be seen as by far the worst misdeed committed by this administration (Ibbitson 2007, A4).

In the end, then, it may not be an "activist" court but rather an agenda-driven government that proves most decisive (Kelly 2005) when it comes to how Charter equality gets played out. These tendencies are also likely to be exacerbated because the current Harper government is so tightly controlled from the centre. Even from a minority government position, the Conservatives were able to act in ways that fundamentally changed the tenor of the courts and eliminated access to justice programs, and "Equality rights have no meaning in Canada if women, and other Canadians who face discrimination, cannot use them" (Day quoted in FAFIA 2006).

Changes to the Courts, changes to the government, and even changes to institutions like federalism matter, as do the changing ideas that go with them. Shifts in federalism and the financing of federalism help contextualize why the Court deemed that it was too expensive to have BC health services support therapy for autistic children, when earlier it had required BC hospitals to provide services for the deaf. Similarly, we saw how devolution has had an impact on the sorry state of abortion access in Canada, thereby attenuating the *Morgentaler* outcome.

Beyond changing institutions and ideas, shifts in political interests and identity politics also matter. Clearly, the foregoing political context helps us to understand why certain forms of interest mediation are not having the impact they once had. Some collective identities and interests are "in", and others are "out". As Gregory Hein's work shows, business interest groups have made more inroads with the *Charter*, and this is not surprising given marketization (2001), whereas this paper details how equality seekers, especially feminists, have become more "out" than "in" given the virulent anti-feminist backlash, the misperceptions around equality, and growing opposition to an "activist" court promoting substantive equality, as well as activist governments.

Feminist mobilization is obviously compromised from without, but it is also challenged from within. Strategies affect collective identities, and vice versa. Feminist "successes" are tempered by equality pursuits that can necessitate either "over-protection" or problematic categorization. Women with multiple, intersecting identities (e.g., lesbians, Aboriginal women, racialized women, immigrant women, women with disabilities) challenged equality seeking feminist groups like LEAF and NAWL for their essentialist tendencies. This, in turn, prompted analyses that reflected more "particularity". Yet, more "particularity" meant more specificity, which could serve to undercut broader equality claims for women in general.

Finally, as the women's movement became more complex, diverse and disperse, the right worked on simplifying and caricaturing equality seekers' aims and outcomes. This helped to create more rifts. Playing up inconsistencies and playing into divide and conquer tactics, effectively delegitimized feminists' multiple identities and their strategies, and thus consolidated

the interests of the right. All these changes, combined, help to explain the diminution of national women's organizations (e.g., National Action Committee on the Status of Women), the downsizing of offices devoted to women's equality (Status of Women Canada), as well as the demise of women's groups and equality seeking institutions, more broadly (e.g., from the loss of NAWL, to the Court Challenges Program closure).

Conclusion

The impact of feminist interest mediation on equality cases has undoubtedly been significant, and initially helped to forestall neoliberal advances. However, these capacities can also be exaggerated and was concertedly done so to promote a right wing Charterphobic agenda. Moreover, even notable feminist equality "wins" are not without their limitations given issues such as "over-protection", and "oversimplification". In the end, the outcomes of women's "wins" and "losses" are much more difficult to read given changing political circumstances, broadly conceived, and given a turbulent socio-economic environment. Given many women's precarious socio-economic and political status, it is not at all surprising that feminists and left liberals are not cheering, and some might even suggest that the leftist Charter critics may have been proven right. But what is the alternative? Here it is important not to lose sight of the larger political picture and consider the longer view.

Overall, back-pedaling on substantive equality is a serious problem for women in the current political climate where equality is considered a given, equality seekers' concerns are downgraded, and market concerns are upgraded. To be sure, while "the courts have been doing poorly on socio-economic rights claims, the legislatures have been doing worse, forcing groups to go to the courts to seek redress against drastic government cutbacks and draconian revisions to social programs." Still the "courts have largely failed in providing redress" (Majury 2002a:330).

Yet, to suggest that women have been either "winners" or "losers" is too simplistic an assessment. While it is true that many feminist "gains" have become "losses", outcomes are invariably more complicated given changing political circumstances. Any measurement of "success" is not only fraught with difficulties, but also is highly contingent. Therefore, it may be more fruitful to focus on the actors and processes involved given the particular socio-economic, political and cultural context-- the institutions, interests, ideas and identities at play at a specific conjuncture—their legitimacy, or lack thereof, and changes over time. For example, the neoliberal "lag" suggests that neoliberalization is not a consistent, immutable force, and that political mobilization, of various kinds, and at multiple levels, can affect its course.

In her thoughtful NAWL address, after Bertha Wilson noted women's growing dissatisfaction with the Charter, she then went on to query: "Are they right to give up so easily and so early in the Charter's history? I don't think so. Ten years is not very long in the history of a constitution" (Wilson 1993, 1). Now, more than 25 years later, this is still not a very long history. Moreover, as we have seen, politics, broadly defined, both in terms of contexts and in the multiple strategies of a wide array of political actors, will invariably change. In this there is hope.

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