

# Introduction

This book examines legal mobilization by the Canadian feminist movement in the post-Charter era. As such, the project by necessity explores contested terrain, since neither “feminism” nor “legal mobilization” is a sharply defined concept with a universally accepted meaning. Political activism by women in Canada has been and is a complex and dynamic phenomenon even as its history and development have paralleled similar activism in other countries.<sup>1</sup> Early-nineteenth-century activists were motivated to a large degree by a general reform impulse, and they viewed greater participation by women in social, economic, and political life as an antidote to the “moral decay” they associated with increased immigration and urbanization. Their activism focused on establishing women’s access to basic civil and political rights, especially in the areas of property ownership and voting. Legal mobilization played an important, if subsidiary, role during this early period. Later, and most famously, five prominent members of the movement – Henrietta Edwards, Louise McKinney, Irene Parlby, Nellie McClung, and Emily Murphy – challenged the conventional interpretation of the word “persons” in section 24 of the British North America Act, 1867 (now the Constitution Act, 1867). As interpreted by the Canadian Supreme Court, “persons” in this section of the Act did not include women, thereby preventing them from being appointed to the Senate. However, on appeal to the Judicial Committee of the Privy Council (JCPC), these women persuaded the JCPC that the BNA Act should be viewed as a “living tree capable of growth and expansion within its natural limits.”<sup>2</sup> Consequently, twelve years after women had obtained the right to vote in federal elections, the JCPC recognized them as “persons” under Canadian constitutional law.

As early objectives were achieved throughout the first half of the twentieth century, the movement shifted its target in the 1960s, toward a more comprehensive strategy of liberating women from the constraints imposed by traditional notions of their role in society. This strategy provided the impetus for the establishment in 1967 of the Royal Commission on the

Status of Women, which would eventually issue 167 recommendations for improving the position of women in Canadian society.<sup>3</sup> In 1972 the commission's recommendations led to the formation of the National Action Committee on the Status of Women (NAC) by approximately thirty women's groups. NAC was to serve as an umbrella organization to lobby for, and monitor the implementation of, the commission's recommendations.<sup>4</sup> The federal government itself responded to the commission by establishing the Canadian Advisory Council on the Status of Women (CAC), which had the task of amplifying and transmitting the demands of women's groups to government. The women's movement expanded at a rapid rate during the 1970s, and by the 1980s it possessed a strong organizational structure linked together in a network with NAC at its centre.<sup>5</sup> However, as Sylvia Bashevkin notes, this apparently "smooth pattern of growth ... masked growing internal conflict." By the mid-1980s, according to Bashevkin's account, the leaders of the established women's organizations who initially dominated NAC gave way to a more militant set of activists.<sup>6</sup> The tensions generated by this shift in leadership have been evident in the development of feminist legal strategies and activism.

At the risk of oversimplification, the common thread running through the suffrage-oriented activism of the nineteenth century to the multifaceted activism of late-twentieth-century feminism is the "organized pursuit of women's social, political, and economic equality."<sup>7</sup> In this sense, the objective of post-Charter feminist legal mobilization has been relatively straightforward: to articulate a constitutional doctrine of substantive equality and use that doctrine as the standard for evaluating the legal rules and other public policies most relevant to women's interests. To a large degree, this objective became part of the women's movement's strategic agenda as a result of its experiences during the 1970s.

Although Canadian feminists achieved important legislative victories at the national level during that decade, they found themselves on the losing side in every case crucial to their interests decided by the Supreme Court of Canada between 1973 and 1982.<sup>8</sup> Three judgments in particular – *Lavell*, *Morgentaler*, and *Bliss* – epitomize this futility. In *Lavell* the Court upheld a provision of the federal Indian Act which stipulated that Aboriginal women, but not Aboriginal men, lost their status under the Act by marrying non-Aboriginals. The Court defined "equality before the law" to mean "equality of treatment in the enforcement and application of the laws." The Court reasoned that, because the impugned provision applied equally to all Aboriginal women, it satisfied this principle of equality. In *Morgentaler*, decided only three years after the United States Supreme Court's landmark abortion rights decision, *Roe v. Wade*,<sup>9</sup> the Court declined the opportunity to review Canada's abortion law on the grounds that it had no place in "the loud and continuous public debate" on this policy question.<sup>10</sup> In the Court's

view, it had no warrant to overturn Parliament's judgment that "the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion." At issue in *Bliss* were provisions of the Unemployment Insurance Act that treated benefit applications based on pregnancy differently from regular applications or disability-based claims. The Court rejected Stella Bliss's assertion that these differential rules discriminated on the basis of sex, since in principle they applied equally to men and women. To the obvious objection that only women would ever be in a position to claim pregnancy-based benefits, the Court replied that "any inequality between the sexes in this area is not created by legislation but by nature."<sup>11</sup>

Although these failures in the 1970s might have turned the women's movement away from legal mobilization, they in fact had the opposite effect. Women's groups took full advantage of the opportunity that emerged between 1980 and 1982 to shape the content of the most important constitutional modification in Canadian history. In the end, the text of the Charter of Rights and Freedoms reflected their successful effort to broaden the document's equality rights section, to exempt affirmative action programs from that section, and to add an interpretive clause guaranteeing the Charter's equal application to women and men.<sup>12</sup> Consequently, the Charter's adoption made possible a period of successful interest-group litigation and broader legal mobilization unprecedented in Canadian history. Indeed, according to Sylvia Bashevkin, even during a period of conservative control of national politics (1984-93), the Canadian women's movement saw its combined legislative and judicial success rate increase from 50 to 87 percent.<sup>13</sup> The change was particularly impressive in the area of litigation, where the success rate increased from zero to almost 90 percent.

### **A Reversal of Fortunes**

The emergence of the Canadian women's movement as an influential and effective participant in constitutional politics and litigation is a remarkable case of successful entry into the field of legal mobilization, particularly when set against the experience of its counterpart in the United States. During the 1970s, the American women's movement enjoyed uncommon success in both the political and legal arenas. Indeed, almost 70 percent of its national legislative and judicial initiatives were successful during the decade, successes that included important legal victories in the areas of equal rights, family law, reproductive freedom, and employment.<sup>14</sup> Most importantly, in 1972, after almost fifty years of effort by the movement, the US Congress sent the Equal Rights Amendment (ERA) to the states for ratification. The amendment provided that "equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex," and it gave Congress the power to enforce the amendment through appropriate legislation.

By modifying the national constitution and providing Congress with an independent source of legislative power to regulate against sex discrimination, the ERA contributed to the movement's political agenda in at least two ways. First, it created new opportunities to legislate sexual equality on a national basis, thereby providing for federal regulation of matters normally within state jurisdiction. Second, it supported the movement's existing litigation strategy by creating the possibility that sex-based classifications would become subject to a "strict scrutiny" standard of constitutional review.<sup>15</sup> With presidential support, broad consistency with existing constitutional and statutory rules, and overwhelming approval by both houses of Congress, the ERA moved rapidly toward ratification.<sup>16</sup> Indeed, by early 1973 a positive outcome seemed certain, with thirty of the necessary thirty-eight states having voted for ratification. As the 1970s ended, however, the American movement experienced a drastic reversal of fortune. In particular, according to Jane Mansbridge, the ERA ratification process stalled, and pro-ERA sentiment diminished as its opponents argued that it would produce "major substantive changes" in public policy through federal judicial interpretation.<sup>17</sup> In 1978 Congress attempted to salvage the ERA by extending the ratification deadline, but in 1982, just as Canadian feminist activists were acquiring the most powerful legal tool in their history, this new deadline passed with the amendment still three states short of ratification.

### **Canadian Feminists in the Constitutional Arena**

The decision by Canadian feminists to concentrate significant resources on achieving policy reform through the development of legal rules provides an excellent opportunity to examine both the process by which legal doctrine changes and the impact of those changes on politics and society. To exploit this opportunity, this book pursues two lines of analysis. First, it examines how Canadian feminists became key constitutional actors and explores the role of the Canadian women's movement during three periods of intense debate about formal amendment of the Canadian constitution. It was during these debates that the movement successfully sought to incorporate, and then to preserve, a constitutional doctrine of equality that would serve its broader policy goals. The second line of analysis is to examine the manner in which the movement mobilized this doctrine through litigation to support its policy agenda. The focus in this second part of the analysis is on the Women's Legal Education and Action Fund (LEAF), which is the most active and visible feminist litigating organization in Canada. Based in part on strategies and tactics developed by women's groups in the United States, LEAF's activity has contributed to reversing the litigation defeats of the 1970s, to protecting important legislative victories, and to expanding women's rights in areas such as reproductive freedom and family law.

Not surprisingly, other scholars have also analyzed these two elements of feminist constitutional activism. It is rare, however, to find work that offers a combined analysis of both Charter litigation and participation in the broader politics of constitutional change. For example, two widely cited early works on equality rights litigation and LEAF contain either none or only a brief reference to the politics of constitutional amendment.<sup>18</sup> William Bogart's discussion of women and the courts is also singularly focused on litigation, as is a later study of feminist litigation by Morton and Allen.<sup>19</sup>

Although these studies share a similar subject matter, they reach varying conclusions about the utility of litigation. In 1989, just as the Supreme Court decided its first Charter equality rights case, the Canadian Advisory Council on the Status of Women offered a pessimistic assessment of sex equality litigation during the first three years that section 15 of the Charter was in effect.<sup>20</sup> After analyzing almost six hundred decisions delivered by courts at all levels, the study's authors (Gwen Brodsky and Shelagh Day, who were instrumental in founding LEAF) concluded that "the news is not good. Women are initiating few cases, and men are using the Charter to strike back at women's hard-won protection and benefits."<sup>21</sup> Brodsky and Day found only seven cases (1.2 percent of the total) in which women had initiated an equality rights claim.<sup>22</sup> Similarly, thirty-five of the forty-four cases involving sex discrimination claims concerned challenges by men, particularly against sexual offence provisions of the Criminal Code.

Despite this record, Brodsky and Day did not join those critics who questioned Charter-based legal mobilization. In their view, the problem was not litigation per se, but certain structural features of litigation that were nevertheless amenable to change. Women, they argued, faced outdated theories of equality and interpretive tests, as well as barriers to accessing the judicial process. They also faced a generation of judges who were either hostile to, or simply unfamiliar with, feminist equality claims. The solution to these problems, Brodsky and Day implied, was not retreat but, rather, stronger engagement in advocating appropriate theories and interpretations of equality, articulating more generous rules of standing and intervener participation, and paying greater attention to judicial appointments and continuing legal education for both judges and lawyers. In retrospect, the findings of the 1989 study and the strategy that emerged from it form an important part of the feminist legal mobilization story since 1990.

In 1991, Sherene Razack echoed Brodsky and Day's observations about the difficulty of making feminist gains in the courts. The organizing theme of her book about LEAF is the contradiction between litigation and feminism. The essence of this contradiction, she argued, is that litigation requires the articulation of "women's stories in a language and a setting structured to deny the relevance of women's experiences."<sup>23</sup> This tension

affected LEAF in its formative years, since its focus on litigation privileged a relatively homogeneous group of legally trained feminists. Not surprisingly, this meant that technical legal considerations, rather than community consultation and consensus building, drove the process of case selection. While this may have facilitated achievement of LEAF's early objectives, Razack argued, it limited its integration into the broader feminist community and led to charges of elitism.<sup>24</sup>

For Razack, the important question raised by LEAF's activity was the fate of feminism once it entered the legal arena. Could feminism, in other words, adapt to the demands of legal discourse and process without losing its ability to challenge an oppressive social order?<sup>25</sup> In many ways, according to Razack, this, rather than decisional outcomes, was the more important measure of litigation success. Indeed, Razack offered the paradoxical proposition that the success of feminist rights-based litigation should be its ability to challenge "rights thinking" itself.<sup>26</sup> To her, at least in 1991, LEAF's success in this sense was still an open question.

Although published more than a decade after Razack's book, a collection of essays edited by Radha Jhappan touches on similar themes. In her introduction, Jhappan notes the same paradox as Razack: feminist litigation at the same time that "feminist theorists regard law as an integral, formalized carrier of patriarchal relations."<sup>27</sup> The strategies adopted by LEAF, in particular, to overcome this paradox constitute the focus of many of the contributions to the volume. Authors such as Sheila McIntyre and Lise Gotell document changes in LEAF strategies (e.g., greater consultation and coalition building) and approaches to equality (e.g., shifting from essentialist to particularistic analyses of women's equality). In the end, however, Jhappan herself suggests that future success lies in constructing an approach based on justice, especially as conceptualized by critical race theorists, rather than on equality.<sup>28</sup>

Although less pessimistic or skeptical than these works, Bogart's analysis was nevertheless cautious. He suggested that the Charter had made an important difference for women's success in the courts, with "feminist issues" gaining credence especially in the Supreme Court. Yet at the core of Bogart's analysis is what he called the "dangers of victory."<sup>29</sup> Two issues in particular attracted his attention in 1994: abortion and pornography. Both areas could be justifiably described as post-Charter successes for the women's movement, with the Supreme Court nullifying the Criminal Code abortion provision while upholding criminal prohibitions against obscenity. Yet in both cases the judicialization of these policy areas generated new, and in some ways more intractable, conflicts. In the case of abortion, for example, Bogart observed that feminist legal victories in both Canada and the United States fuelled anti-abortion movements of varying strength. The apparent victory on the issue of pornography regulation proved divisive among feminists

themselves. Bogart's point was that legal victories are a mixed blessing because legal success can generate a false sense that law itself can drive transformative policy change. As a result he was able to offer only qualified support for the strategy of legal mobilization.

The Morton/Allen study offers by far the most positive assessment of feminist legal activism, largely because it refines the definition of success. More precisely, they take this definition beyond mere outcome to measure a decision's impact on the "policy status quo" and on the development of legal rules.<sup>30</sup> Underlying this operationalization of success is the point that litigation can take different forms and serve different purposes, from offensive litigation to achieve favourable policy change to defensive litigation to preserve the policy status quo. As Morton and Allen point out, this means that success is not just a function of raw outcome (i.e., whether a group is on the "winning" side in a case). It also depends on whether a group is mobilizing offensively or defensively, and whether the outcome changes the policy status quo. The most valued outcome is an offensive win that generates policy change; the least valuable is a defensive loss that produces negative policy change.

These measures of success have a dramatic effect on Morton and Allen's assessment of feminist legal mobilization. Although women were on the losing side in fourteen of the forty-seven cases they examined, only three of these losses (21.4 percent) resulted in negative policy change. By contrast, seventeen of thirty-three nominal wins produced positive change (51.5 percent).<sup>31</sup> Moreover, in eleven cases where no policy change occurred, feminists still managed to acquire legal rules with future value for further litigation. Policy success was highest in the areas of private sector discrimination and family law, and success was much more likely in non-Charter cases.<sup>32</sup> To Morton and Allen, these findings raised questions about earlier skepticism.

While the four studies discussed above share an emphasis on litigation, Alexandra Dobrowolsky's 2000 book, *The Politics of Pragmatism*, offers a comprehensive treatment of the important role played by the Canadian women's movement during the three most recent episodes of what Peter Russell calls "mega-constitutional" politics.<sup>33</sup> Based on an extensive survey of documentary sources, as well as interviews with key actors, Dobrowolsky's book attempts to leverage the case study of Canadian women's constitutional activism to "reconsider the meaning and forms of representation."<sup>34</sup> The case study is impressive, as Dobrowolsky discusses to at least some degree the constitutional activism of forty-two women's organizations, both feminist and nonfeminist. The book provides a wealth of information about the development of lobbying strategies and tactics, and tells a story of multiple strategies and the establishment of creative alliances to overcome internal divisions, particularly within the feminist movement. The story leads

Dobrowolsky to conclude that “representation is about both interest and identity,”<sup>35</sup> and demonstrates how feminist participation in constitutional politics became more complicated as the identities it sought to represent expanded and became more complex. In this sense, Dobrowolsky’s book is a good complement to Razack’s discussion of the internal contradictions that eventually emerged in LEAF’s litigation activity. However, Dobrowolsky devotes only three paragraphs to “courts and the charter.”<sup>36</sup>

These separate studies of feminist litigation and constitutional activism constitute an undeniably rich empirical and theoretical contribution to our knowledge of the Canadian women’s movement, legal mobilization, and constitutional politics. Yet, they arguably miss an important phenomenon captured in Mansbridge’s observation that the US Equal Rights Amendment became fatally controversial only when its opponents linked the amendment to rights-based litigation. As I have argued elsewhere,<sup>37</sup> Mansbridge’s observation points to the value of broadly conceptualizing constitutions and the politics of constitutional modification. Constitutional rules impose constraints on political choice, and these constraints operate systematically to favour some outcomes over others. In this sense, the politics of constitutional modification is a competitive process of institutional design, in which the objective is to modify existing rules in order to change the dynamics of political power, alter the status of competing interests, and affect policy outcomes.<sup>38</sup> At the macrolevel, constitutional modification takes place through formal amendment, which is characterized by political bargaining conducted according to the formal rules of the amending process. At the microlevel of constitutional politics, rule modification occurs through judicial interpretation triggered by constitutional litigation. At both levels, constitutional rules are valuable legal resources that state-based actors distribute, and for which society-based actors compete, to serve their broader policy objectives.<sup>39</sup>

### **Purpose and Plan**

Although this book focuses on LEAF’s litigation activity in the Supreme Court of Canada, it situates that activity within the broader context of feminist constitutional activism in the formal amendment process. It also situates this detailed study of LEAF within the broader theoretical literature on legal mobilization, which has not yet been well exploited by Canadian scholars.<sup>40</sup> Placing the study in this context is important because a carefully constructed theoretical framework enriches the descriptive narrative of the Canadian women’s movement’s campaign. As this literature suggests, legal mobilization offers individuals, interest groups, and social movements both opportunities and challenges.<sup>41</sup> On the one hand, legal rights are an important tactical and strategic resource in the personal and political conflicts in which individual and collective actors find themselves enmeshed. On the

other hand, the process and discourse required to acquire and vindicate legal rights imposes its own unique set of constraints. This book seeks to understand how the Canadian women's movement exploited these opportunities and dealt with the challenges of operating in the legal arena during a twenty-year period spanning the 1980s and 1990s.

To achieve this objective, the book is divided into seven chapters. The first chapter moves from a general discussion of the sources of change in legal doctrine, including judicial attitudes, political environment, and the activities of interest groups and social movements, to a general overview of LEAF's participation in Supreme Court cases. Tying these two topics together is a theoretical discussion of legal mobilization as a strategic and tactical instrument for achieving policy change. Chapters 2 through 5 constitute the substantive core of the book, since in these chapters I provide a detailed discussion of feminist constitutional activism at both the macro (formal amendment) and micro (litigation) levels. My focus, especially in Chapters 3 to 5, is on LEAF's legal and policy arguments and their reception by the Court. My methodological approach is inspired by Lee Epstein and Joseph Kobylka's observation that "it is *the law and legal arguments as framed by legal actors* that most clearly influence the content and direction of legal change."<sup>42</sup> My approach assumes that neither traditional legal nor microlevel behavioural analysis is completely adequate for understanding the development, resolution, and impact of legal mobilization. On the one hand, traditional legal analysis ignores, or at least downplays, the political environment of legal mobilization. On the other hand, the behaviouralist focus on voting and judicial attitudes does not capture the complexity involved in developing the legal arguments necessary to mobilize constitutional rules in a favourable direction. My discussion of LEAF's activity in the policy areas covered by these chapters thus combines traditional analysis (since legal argumentation and doctrine are important for understanding the policy significance of legal mobilization) with certain aspects of extralegal analysis (since deciding these cases is a profoundly political exercise).

Chapter 6 steps back from this detail to analyze and assess the accomplishments of LEAF's litigation activity, as well as the impact of that activity on broader social conditions. In this chapter I offer three separate measures of impact: the Court's use of, and reference to, LEAF evidence and arguments; the jurisprudential influence of LEAF cases as measured by their citation in subsequent Court judgments; and changes in social practices that might be attributable to the legal rules developed in LEAF cases. Finally, the Conclusion uses this specific case of legal mobilization to reflect on some of the more general issues raised in the literature about the wisdom of this strategy and the conditions under which it may or may not be successful. It also offers some thoughts on the development of a feminist theory of the Charter.

No single book, of course, can do complete justice to the complex realities of either the Canadian feminist movement or legal mobilization. However, the success or failure of legal mobilization depends heavily on the skill with which litigants use the tools available to them in the litigation process, and on their ability to adjust to the structural constraints of adjudication. I hope that this book, by examining how a key actor within a particular movement applied its skills and adjusted to these constraints in a series of cases over several policy areas, and by situating its activity within an established theoretical framework, makes at least a modest contribution to understanding both the Canadian feminist movement and legal mobilization.