The Evolution of Women's Human Rights in the Supreme Court of Canada



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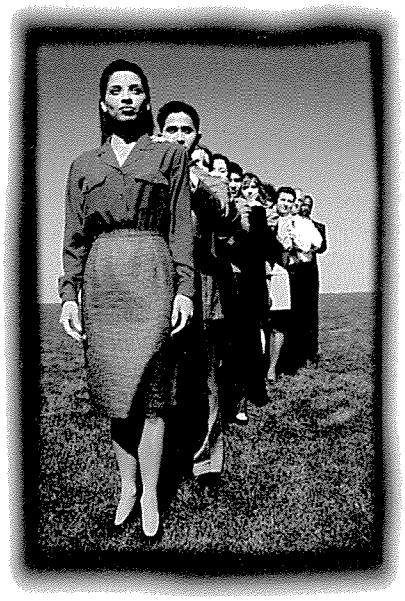
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In the late nineteenth century in Canada, women were subject to a host of legal impediments. They were excluded from holding political or professional office, from managing their own property or deciding significant issues of education or religion affecting their children. Married women were virtual legal non-entities with few enforceable rights. By 1875, powerful and complex forces of social, economic and political change were having enormous impact on a new society and on the lives of women in it. But it was the law that crystallized these roiling changes into recognizable patterns of social evolution and served to document, transform, and in some cases, rein in the pace of progress.



In the early years of the Supreme Court of Canada, the law played a role in both creating and reinforcing myths about women and gender-based power imbalances. The first century or so can be dispatched easily, with reference to the Supreme Court's 1928 decision in the famous "persons" case. The Court held that women were not "qualified persons" under the *Constitution Act*, 1867 and therefore could not sit as members of Canada's Senate. It was left to the Privy Council in Britain, Canada's highest appellate court at the time, to reverse the decision.

A similar perspective continued into the second half of the twentieth century, and survived even the enactment of the Canadian *Bill of Rights* in 1960. This was illustrated in the 1974 decision of the Supreme Court in *A.G. Can. v. Lavell*. The Court held that guarantees contained in the *Bill of Rights* extended only to procedural equality and not to substantive rights. A few years later, the Supreme Court concluded in *Bliss v. A.G. Can.* that differential treatment of pregnant women did not amount to discrimination on the basis of sex: "any inequality between the sexes in this area is not created by legislation but by nature", and "[i]f section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women."

This approach to equality could only be coherent in relation to a notion of identical treatment of persons, all of whom happen to be male. Both of these cases had a material impact on the evolution of what was to become the equality guarantees in the Constitution as women advocated strongly against the legacy of *Bliss* and *Lavell* and sought clearer and more compelling constitutional protection for women's rights.

This approach only began to change in the 1980s with two major developments: first was the *Canadian Charter of Rights and Freedoms* in 1982, then the ensuing equality rights provisions three years after that. The second is the appointment of women jurists to the Supreme Court of Canada. In 1989 the Court decided a major equality rights case, *Andrews v. Law Society of British Columbia*. The Supreme Court expressly rejected the "identical treatment" equality paradigm and recognized that substantive equality may require different treatment for those who are differently situated. Equality was recognized as a concept requiring an understanding of "the context of the place of the group in the entire social, political and legal fabric of our society." In fact, it is arguable that the evolution of the concept was more basic than that—it also moved women into the circle of norms that had until then been based on a male perspective.

The next wave of cases shows that the Court recognized the challenge of fashioning legal principles which include all aspects of women's experiences, especially those aspects of women's lives that are not experienced in the same way by men. Three good examples are the Court's decisions in the areas of spousal violence *(Lavallee)*, sexual violability *(McCraw)* and pregnancy *(Brooks)*.

In *R. v. Lavallee*, Madame Justice Wilson recognized that spousal abuse is a type of violence that is foreign to the world inhabited by the hypothetical "reasonable man". Accordingly, when determining what was "reasonable" in the context of Lyn Lavallee's plea of self-defence (Lyn Lavallee had shot and killed her abusive partner), the subjective experiences of a battered woman had to be considered. The Court also identified and rejected persistent myths about wife battering and women in abusive relationships.

In *R. v. McCraw*, the Supreme Court carried this reasoning to whether the threat to rape is a threat to cause serious bodily harm. The Court again took the position that the perspective of women should be part of the analytical framework, rather than an exception that had to be fitted into a male paradigm. In finding that a threat of rape is, in fact, a threat to cause serious bodily harm, the Court considered the overall context of women's social and sexual disadvantage and expressly included women when ascertaining how the ordinary person would react to threatening letters.

Ten years after *Bliss*, the Supreme Court once again considered whether differential treatment of pregnant women constitutes sex discrimination in *Brooks v. Canada Safeway Ltd.* The Court noted that the *Bliss* decision was inconsistent with the *Andrews* approach to equality and other decisions of the Court in the area of human rights. Looking at the social, political and legal context of women in society, the Court noted that pregnancy is one of the most significant ways in which women have been disadvantaged. The decision is significant not only because of the reversal of *Bliss*, but also for the pronouncement that women should no longer disproportionately bear the costs of having and raising children.

An extraordinary example of bringing women into the ambit of the "rule" of inclusive legal reasoning is the concurring decision of Madame Justice Wilson in *R. v. Morgentaler*. She alone found that Criminal Code provisions on abortion violated a woman's right to life, liberty and security of the person in a substantive manner:

> In essence, what [the provision] does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state...This is not, in my view, just a matter of interfering with her right to liberty in the sense ... of her right to personal autonomy in decision-making, it is a direct interference with her physical 'person' as well... Can there be anything that comports less with human dignity and self-respect?

In noting that a man could not understand the dilemma faced by a woman because he could never experience it, she stated:

> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.

The Supreme Court's 1999 decision *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* is the most recent affirmation of an approach that treats women as part of the norm instead of as an exception which needs to be fitted into the male "mainstream". As a result of failing a fitness test a female firefighter lost her job. The broader legal issue in the case was whether the test unfairly excluded women from firefighting jobs. A unanimous court noted that a standard that may seem "neutral" might in fact entrench a male norm as the "mainstream" into which women must integrate. The result is to shield systemic discrimination, in this case, in the context of a male-dominated profession, from scrutiny. The Court fashioned a new approach to discrimination cases and applying the new approach to the claimant's case, found a *prima facie* case of discrimination which could not be justified by the employer.

Conclusion

While it has become fashionable to decry judicial activism in recent years—particularly that of the Supreme Court of Canada since the *Charter*—the reality of the Supreme Court's history to date has been rather more placid than the alarmists allow. In the early years, where women's human rights have been concerned, judicial conservatism maintained a social structure that was only reluctantly beginning to accept the new roles that women were beginning to play. More recently, the *Charter* has provided the impetus to the Court to recognize women's human rights as part of the equality equation rather than as an exception to it. ■

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