SOCIAL MOVEMENTS AND THE EXPANSION OF JUDICIAL POWER


by

Gregory A. Hein

A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy
Graduate Department of Political Science
University of Toronto

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Abstract


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This dissertation considers a dramatic transformation: the expansion of judicial power in Canada. Many believe that constitutional rights have unleashed a wave of revolutionary changes. According to their assessment, the Charter (1982) has elevated the prominence of judges, undermined deeply rooted conventions, and lured political adversaries into the courtroom. Others suggest that “post-materialists” are jeopardizing Canadian democracy by using the Charter to circumvent Parliament and the provincial legislatures. If this explanation is correct, members of the “court party” take their unpopular claims to courts because judges do not face the competing pressures of electoral politics. A rival interpretation insists that value change has preceded and produced institutional change. Post-materialists started to litigate during the early 1970s because they felt ignored and excluded by political élites. These interests are fueling the process of judicialization by advocating a form of pluralism that requires the judicial review of political actors. I test these explanations by comparing two social movements as they move from one institutional context to another. Instead of relying on secondary sources and personal interviews, I developed the Court Challenges Database (1970-1995) and the National Survey on Strategic Choices (1995).

The evidence is intriguing. The “court party thesis” is the weakest explanation because it presents a caricature of post-materialists. Most activists criticize the conventions of Canadian politics, but they are not using litigation to side-step the great representative
institutions. Post-materialists form coalitions that target cabinet ministers, senior bureaucrats, and members of the Supreme Court because they understand the limits of legislative strategies and the dangers of judicial review. The "judicial pluralism" thesis is more compelling. Post-materialists continue to promote the principle of judicially enforced political accountability because they believe that "action-forcing provisions," mandatory duties, and constitutional rights will make governments representative, responsible, and responsive. This pressure is gradually changing the shape of the Canadian state.

The "Charter revolution thesis" is the strongest explanation because it shows us how social transformations can be accelerated, redirected, and even tamed by state structures. Feminists and environmentalists both express post-materialist values, but their attitudes, strategies, and chances of success are influenced by the presence or absence of legal rights, the character of statutory regimes, and the distribution of decision-making authority. The Charter revolution thesis has another remarkable strength: it can tell us why governments have treated post-materialists differently. Feminists managed to win impressive legal tools during the patriation round (1980-1981) because federal officials hoped that constitutional guarantees would tame the forces of regionalism and undermine Québec nationalism. However, this nation-building imperative has worked against environmentalists since the "death" of the Meech Lake Accord (1990). The federal government does not want to generate a steady flow of territorial disputes by introducing rights that protect the natural environment.
Acknowledgements

After writing this book-length dissertation, I am filled with a sense of pride and modesty. Pride because I surpassed my expectations. Modesty because my scholarship was fostered and strengthened by those who were willing to help.

While designing the National Survey on Strategic Choices (1995), I received insightful comments from Sylvia Bashevkin, Larry LeDuc, Neil Nevitte, and Robert Vipond. Throughout this journey, I was challenged and guided by the members of my supervision committee, Richard Simeon and Grace Skogstad.

This study also reflects the sage advise of my supervisor, Peter Russell. When I was just beginning, he was patient and enthusiastic. When I was nearing the end, he pushed me to make my work more rigorous. For this, I am grateful.
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<td>ALCAN</td>
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<td>NAFTA</td>
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<td>Peace Order and Good Government</td>
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Glossary

**administrative decision** Any decision made by unelected officials who exercise circumscribed powers. Line departments can make administrative decisions by managing a range of regulatory statutes. Boards and tribunals reach such decisions by settling an array of complex disputes.

**administrative judicial review** A supervisory role performed by superior courts to ensure that boards and tribunals respect their limited statutory powers. When decision-makers move beyond the proper scope of authority, superior courts grant the appropriate remedies, such as prohibition.

**advocacy group** A loose, unstructured association or a highly institutionalized organization that pursues various forms of collective action—except litigation. Because an advocacy group lacks legal expertise, it rarely enters the judicial process.

**cabinet decision** Any order-in-council issued by executives in a Westminster parliamentary system. Choosing not to act is also considered a decision because some litigants want cabinet ministers to perform statutory duties.

**cause of action** A claim in law sufficient enough to demand judicial attention. The composite of facts necessary to give rise to the enforcement of a right. If the statement of claim fails to disclose a cause of action, the case will be dismissed.

**certiorari** A common law writ issued from a superior court to a tribunal of inferior jurisdiction inquiring into the validity of proceedings. It is commonly used for the purpose of quashing orders issued by administrative boards.

**citizen suit** A statutory cause of action that invites citizens to enforce regulatory laws by suing private corporations when public agencies have not acted against alleged violators. Some provisions authorize citizens to sue public agencies that fail to respect non-discretionary duties.

**claim** Any action brought to a court to protect private or public rights. Some litigants request administrative remedies, such as certiorari, and constitutional remedies, such as annulment, while others ask the courts to enforce quasi-criminal provisions.

**class action** A claim brought by the representative members of a group of individuals. Various procedural rules are established by formal statutes and the common law. Typically, the class of applicants must share a common interest and request the same remedies.

**costs** A court order requiring the losing party to pay the legal expenses of the prevailing party. Courts use their discretion to determine the appropriate amount. The award can vary depending on the novelty of the claim and the behaviour of the litigants.

**court coalition** To press their common interests in court, three or more groups from the same social movement establish a temporary alliance. Some partners appear as parties and intervenors; those without formal status participate as out-of-court supporters.

**defensive action** A reactive claim that counters a hostile action. Single groups, strategic pairs, and court coalitions usually respond by seeking intervenor status.

**factum** A formal document submitted by intervenors to present written arguments. Common law courts use their discretion to limit the scope and length of facta.

**hearing** A proceeding convened by a court to determine questions of fact and questions of law. A single claim can generate several hearings to consider procedural and substantive issues.
**hostile action** A threatening claim launched by political opponents. When litigants launch defensive claims, usually by seeking intervenor status, they are responding to these hostile actions.

**in camera** (in private) Most court decisions are open to the public, but some issues are considered by judges and the direct parties in chambers. Some statutory provisions force courts to reach decisions in camera.

**information** A statement that informs magistrates of a summary conviction offence. Citizens as private prosecutors can lay an information to enforce regulatory statutes.

**injunction** A judicial remedy awarded to stop a party from performing a particular act. Interlocutory injunctions preserve the status quo until the trial phase. Permanent injunctions are issued at the end of judicial proceedings.

**intervenor** (amicus curiae) A “friend of the court” is a formal participant who does not have the right to appear as a party. By introducing oral arguments and written submissions, intervenors can present concerns about pressing legal questions.

**justiciable** A justiciable issue is capable of being argued and decided in a court of law. Judges will dismiss a claim if they do not have the authority to hear it. Courts will also reject actions that raise abstract or hypothetical questions.

**legal advocacy group** An institutionalized organization that has the expertise and resources to appear before quasi-judicial tribunals and common law courts.

**legal advocate** An individual who supports a legal advocacy group as an employee, advisor, or volunteer. Most are lawyers who work at private law firms, but some are non-lawyers who offer different types of expertise.

**legal principle** Any doctrine or standard that shapes the interpretation of common law rules, ordinary statutes, and constitutional guarantees. Instead of asking the courts to nullify laws, some litigants try to influence these principles.

**mandamus** A prerogative writ issued by a superior court, compelling public authorities to perform their duties and respect the rules of natural justice. Before such a writ is granted, the applicant must show that the duty is imperative, not discretionary.

**municipal decision** Any decision made by a democratically elected government or administrative agency of local jurisdiction. For example, city councils and conservation authorities make municipal decisions.

**natural justice** A cluster of rules applied to boards and tribunals charged with adjudicating disputes where legal rights and interests may be affected. Quasi-judicial bodies must, among other things, notify affected parties and reach decisions that are untainted by bias.

**offensive action** A well-planned claim that is initiated to achieve a specific set of objectives. It is not designed to counter hostile actions brought by political opponents.

**party** One of the principal participants in a judicial proceeding. In criminal cases, Crown prosecutors face defendants. In civil cases, the parties appear as plaintiffs and defendants. Before appellate courts, the parties appear as appellants and respondents.

**POGG** The broadest federal constitutional power. Parliament can pass statutes to promote the Peace, Order, and Good Government of Canada. This residual power can sustain laws that deal with a “national emergency” or a general problem of “national concern.”

**private prosecution** (from an information) An action that stops interference with a public right or compels the performance of a public duty. Governments can choose to act as one of the parties or invoke their prerogative powers to stop such actions.
privative clause  A statutory provision designed to move administrative boards and tribunals outside the scope of judicial review. Courts still consider judicial review petitions, but they are very reluctant to nullify decisions protected by these shields.

privileged communications  Husbands and wives do not have to disclose their personal conversations under legal pressure. This principle also protects communications that litigants have with their religious counsellors, therapists, and lawyers.

provincial court  A common law court maintained and staffed by provincial governments. Section 92 of the Constitution Act (1867) invites the provinces to maintain courts of civil and criminal jurisdiction.

public nuisance  A nuisance is an act or omission that damages property or causes physical injury. A public nuisance is a harmful act or omission that interferes with a public right enjoyed by members of the community.

public trust doctrine  A principle that forces the state to become the formal trustee of all public resources. This doctrine has roots in the common law, but it can be recognized by statutory provisions and constitutional guarantees.

section 96 court  A common law court maintained by one of the provincial governments but staffed by the federal executive-in-council. This power to appoint is formalized under section 96 of the Constitution Act (1867). The federal government staffs provincial appeal courts, superior trial courts, and district courts.

section 101 court  A statutory court that is maintained and staffed by the federal government. Section 101 of the Constitution Act (1867) invites the federal Parliament to establish a national court of appeal and any other courts “for the better administration of the laws of Canada.” There are three separate section 101 courts: the Supreme Court of Canada, the Tax Court of Canada, and the Federal Court of Canada, which has a trial division and an appeal division.

sponsor  A legal advocate or legal advocacy group that chooses to represent a party or intervenor. Because most sponsors work with like-minded groups, they usually offer their services pro bono.

standing  The legal right of an interested individual or group to appear before a court. When applicants meet certain common law requirements, they appear as parties with full rights and liabilities.

statute of limitations  A provision that forces potential litigants to bring their claims within a certain period of time. This type of rule prevents parties from bringing “stale evidence.” It also reflects the principle that individuals should not be allowed to exercise the threat of legal action for an unreasonable amount of time.

strategic pair  A temporary alliance between one advocacy group and one legal advocacy. As partners, they can appear before common law courts and administrative tribunals to press their claims. Outside the judicial system, they can pursue other forms of collective action.

strict liability  A form of liability that does not ask the prosecutor to show intent. Because of the possible harshness of holding parties accountable in this way, courts require strong evidence of legislative intent to create strict liability before the usual requirement of mens rea (a guilty mind) will be dropped.

summary conviction offence  There are two basic types of offences in Canada. Most crimes are indictable offences; they are tried by common law judges and juries. Public welfare laws and regulatory regimes often rely on summary conviction offences; they are usually tried by magistrates. Citizens as private prosecutors can enforce summary conviction offences, not indictable offences.
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CHAPTER ONE

Canada's Political Tradition

I. The Puzzle

Historians rarely cast judges as principal players when they tell Canada's story. Canadian courts have supervised administrative agencies, like their counterparts in other common law countries, and they have generated bitter controversies by trying to resolve federal-provincial disagreements. However, the principle of legislative supremacy imposed a severe constraint for more than a century: courts could not challenge responsible governments by questioning the substance of their decisions.¹ The Fathers of Confederation introduced two narrowly framed rights to protect religious and language minorities, but judges were not asked to enforce a long list of constitutional guarantees. According to the conventional wisdom, these structural features reflected and sustained a political culture that was shaped by the British tradition.² Most citizens acknowledged the benefits of parliamentary democracy. They wanted elected representatives to rank the importance of social values and direct the course of public policy. Instead of demanding limits on the exercise of state authority, they deferred to the wisdom of legislators and expertise of bureaucrats. Not surprisingly, most political élites defended this view of democracy. If they

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respected the federal division of powers and honoured the conventions of parliamentary government, their decision-making authority was virtually boundless. Some readers might wonder if judges quietly expanded their dominion to promote certain interests. They did the very opposite. While accepting conventional disputes, most members of the judiciary insisted that courts were poorly equipped to solve complex problems.

The American tradition is quite different because political institutions have encouraged the growth of judicial power. The Framers decided to counter the forces of tyranny by fragmenting state authority. Instead of emulating Westminster, they divided two levels of government into three separate branches. Some of these architects feared the rise of arrogant, unaccountable judges, and the written Constitution fails to recognize broad judicial review powers, but most of the Framers assumed that courts would respect the “will of the people” by invalidating improper congressional laws. Individualism reinforced this distrust of state authority. The anti-federalists managed to win the Bill of Rights during the ratification period. They wanted to place another set of constraints on the new national government while trying to preserve important elements of democratic life, including free speech and private property. These structural features have affected the rhythm and substance of American politics. Critics on the left and right have always attacked the unelected branch, especially when judicial thinking has threatened their interests, but judges have exercised a growing degree of influence over many areas of public policy since Marbury v. Madison (1803). During the late nineteenth century, the Supreme Court overturned core elements of the welfare state to defend property rights. By the 1970s, courts were challenging democratically elected legislatures to control industrial pollution and

promote gender equality. Competing groups have not ignored this crucial arena. If the literature is correct, they have fueled the expansion of judicial power by urging courts to tackle a wide range of social problems.4

As we approach the twenty-first century, these political traditions seem less distinct. Canadian judges still understand the limits of adjudication, but they are using their powers to evaluate a wide range of public policies. While the U.S. Supreme Court has returned to the doctrine of formal equality, Canada's highest court has accepted a substantive interpretation of equality — one that attempts to help “disadvantaged” groups.5 This general shift has affected patterns of participation. Instead of relying on traditional forms of collective action, anti-poverty activists, labour unions, business corporations, and feminists are emulating American groups by mounting legal campaigns.6 At the same time, Canadians are becoming less deferential and more confrontational.7 In both countries, citizens routinely challenge their political leaders, often by invoking the language of rights. I want to solve this puzzle. If generations of Canadians appreciated the virtues of parliamentary democracy, why are courts assuming such a prominent role? If the principle of legislative supremacy undermined the forces of litigiousness, why are organized interests willing to fight costly court battles?

Most students of Canadian politics will quickly offer the dominant explanation. In 1982, after years of rancorous bargaining, the first ministers asked courts to interpret and

enforce the Charter of Rights and Freedoms. During the 1970s, federal officials wanted to attack two of Canada’s enduring problems, fractious regionalism and Québécois nationalism. Prime Minister Pierre Trudeau believed that new constitutional rights would strengthen the national community by obscuring territorial cleavages. His adversaries proposed an alternative: they wanted to make central institutions more responsive to regional interests. Despite serious disagreements, the first ministers reached a compromise. After winning an amending formula that recognizes the authority of provinces, not entire regions, the premiers persuaded the Liberal government to add section 33. By invoking the infamous “override clause,” they would be able to shield their laws from certain guarantees.8

If this interpretation is correct, the Charter is transforming Canadian politics.9 By the 1970s, very few citizens were inspired by the language of the British North America Act. This nineteenth century document virtually ignores the idea of citizenship. Instead of proudly declaring liberties and freedoms, orderly clauses divide powers and responsibilities between two levels of government. The Charter gives individuals and distinct communities a direct stake in Canada’s Constitution by entrenching a series of boldly worded guarantees. It is difficult to ignore the consequences. Most citizens wanted to reject the old conventions of élite accommodation by the late 1980s. When the first ministers presented the Meech Lake Accord, “Charter Canadians” refused to believe that “eleven men” could rearrange the division of powers, alter the amending formula, and create new rights – without consulting anyone. To protect their interests, they challenged the closed character of executive federalism and the substance of the agreement.

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8 This clause can override “fundamental freedoms,” “legal rights,” and “equality rights.” When section 33 is invoked, governments can limit these guarantees for five years.
The Charter has unleashed a wave of changes, but there is one twist. It has not transformed political life in Québec. Instead of endorsing Trudeau’s vision, most members of the governing class believe that constitutional rights impose unfair limits on their autonomy. Most citizens like the Charter. As liberal democrats, they want both levels of government to protect vulnerable minorities and fight discriminatory practices using the federal Constitution, human rights agencies, and the Québec Charter. However, most francophones continue to resist the political purpose of constitutional rights. They do not want to strengthen the national community by weakening the distinctiveness of Québec society.

This widely accepted account fuses two arguments that emphasize the power of political institutions. The “national unity thesis” tells us why Trudeau and his cabinet colleagues would want to surrender some of their autonomy by imposing new limits on the principle of parliamentary supremacy. They were influenced by their “structural location” in the federal system. According to the “citizens’ constitution theory,” this grand experiment has transformed the relationship between citizens and the state by strengthening the appeal of rights, cultivating new identities, and challenging well-established political arrangements. These complimentary interpretations were designed to help us understand the politics of constitutional reform, but they force us to consider another possibility.

Institutional change is promoting the growth of judicial power. Constitutional rights encourage Canadians to think about their political identities differently, but they also create new opportunities for those who want to fight their battles in court. I call this explanation the “Charter revolution thesis” because it emphasizes the dramatic and multiple effects of 1982.

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A rival interpretation suggests that new values are changing the character of Canadian politics. \(^{12}\) Citizens born after World War II have experienced economic affluence, unprecedented levels of physical security, and greater educational opportunities. Shaped by these tectonic shifts, "post-materialists" cherish peace, psychological well-being, social equality, and biodiversity. If this explanation is correct, post-materialists are taking their claims to courts, not legislatures. They are fueling the growth of judicial power by abandoning the great representative institutions. To accept such an argument, we have to believe that litigation solves a difficult strategic dilemma. Post-materialists rarely win political contests because they express unpopular ideas. Some challenge deeply rooted cultural norms, while others require highly intrusive forms of state intervention. Knowing that governments will demand serious concessions, these new interests characterize legislative politics as seamy and unprincipled. Instead of compromising their lofty values, they are tempted to stay outside the formal policy-making process. However, post-materialists cannot ignore the state— they have to win certain public policies to achieve their objectives. Litigation solves this conundrum. Without lobbying cabinet ministers and bureaucratic officials, post-materialists can attack unfavourable laws and expand the scope of entitlements. Appropriately, this argument is called the "court party thesis." Post-materialists can circumvent Parliament and the provincial legislatures because prominent members of the Supreme Court see themselves as thoughtful agents of social change. Like their supporters, they want to eliminate gender inequality, preserve generous social programs, and protect "disadvantaged" minorities.

Proponents of the court party thesis know that new patterns of participation emerged before 1982. They cite an impressive body of research that traces the gradual decline of deference. As Canadians became more distrustful, they demanded greater control over policy-making institutions. During the 1960s, post-materialists asked both levels of government to encourage public participation. When Trudeau proposed his charter during the 1970s, they mobilized their supporters to win certain guarantees. The court party thesis acknowledges these changes, but it does not suggest that pre-Charter groups favoured litigation. The explosion occurred after Canada's first ministers introduced constitutional rights. Since then, post-materialists have flooded the courts with highly controversial claims.

These rival interpretations are persuasive, but they are not flawless. Proponents of the court party thesis recognize the literature on “new politics” without considering an important finding: even though post-materialists pursue unconventional forms of participation, they rarely ignore representative institutions. For example, Swedish activists might criticize legislative traditions that rely on secretive bargaining, but they rarely fight legal battles because other tactics are more attractive. Although litigation is a promising strategy in some countries, like the United States, social movements are


influenced by every element of the "political opportunity structure," including the electoral system, the character of the party system, and the configuration of bureaucratic agencies. Despite this evidence, the court party thesis asks us to believe that highly educated "knowledge workers" choose to ignore crucial sites of power. The Charter revolution thesis suffers from another deficiency. By insisting that state institutions shape the preferences and strategies of all political actors, it underestimates an obvious source of change. Organized interests rarely allow formal constraints to determine their chances of success. They learn how to work around unfavourable rules or try to have the rules of the game tilted in their favour.\(^{15}\) The Charter revolution thesis acknowledges the marginal role played by organized citizens. During the patriation round, they reacted to the federally managed process. However, it fails to consider an intriguing possibility: post-materialists have struggled to expand the bounds of judicial power since the late 1960s.

I developed an alternative explanation to correct these flaws. *Post-materialists are fueling the process of judicialization by advocating a form of democratic pluralism that requires the judicial review of political actors. These interests promote the principle of judicially enforced political accountability because they believe that "action-forcing provisions," mandatory duties, and constitutional rights will make governments representative, responsible, and responsive.* Typically, pluralism refers to the degree of social diversity. Overlapping cleavages can run through societies, following divisions based on race, ethnicity, language, region, class, gender, and even sexual orientation. As a normative theory, pluralism suggests that competing interests have an equal chance of achieving their goals because democratic states are accessible and responsive. By carefully listening to different groups, legislators can make decisions that promote the "public interest."\(^{16}\) However, this image


seemed quite unreal during the 1960s. Post-materialists were virtually ignored because they dared to question well-established economic arrangements and deeply entrenched attitudes. Canadian policy-makers were more willing to consult concerned citizens during the 1970s, but post-materialists confronted another challenge. They could develop persuasive arguments and present compelling evidence, but their adversaries had more resources and better connections. Both levels of government introduced new measures to eliminate racism, sex discrimination, and industrial pollution, but regulators were asked to observe vague guidelines. Line departments did not try to encourage public participation – they drafted standards by considering the interests of their clients. Human rights agencies had to perform a wide range of tasks, but they were given weak statutory powers and small operating budgets.

Faced with these strategic problems, post-materialists started to see litigation as an instrument of pluralism. By entering the courtroom, they could expose secretive agreements and document the effects of antiquated laws. After exploring the possibilities of pre-Charter claims, these new interests marshalled their resources to change the rules of the game. While praising the virtues of openness and transparency, they demanded public funding and formal entry points into every policy-making institution. By promoting the principle of judicially enforced political accountability, post-materialists asked Canadian governments to emulate elements of the American tradition. Leading activists argued that Parliament and the provincial legislatures would be more responsive if they had to consider certain fundamental values. The policy-making process would still be shaped by political executives, opposition parties, and central agencies, but courts would enforce fully entrenched constitutional guarantees. Inspired by the same idea, some post-materialists proposed a new statutory language. Instead of following vaguely worded guidelines, cabinet ministers and bureaucratic officials would have to respect mandatory duties, strict standards, and exacting schedules. If they failed to meet these binding obligations, private litigants could ask courts to intervene.
This interpretation challenges the court party thesis. Post-materialists celebrate social diversity, public participation, minoritarian democracy, and creative state intervention. Instead of trying to circumvent the great representative institutions, they try to encourage a lively debate between courts and legislatures. Sceptical readers can reject this characterization and still accept the “judicial pluralism thesis” because these interests are influenced by normative concerns and strategic calculations. As experienced political actors, they understand the limits of judicial review. After working around a series of procedural hurdles, litigants can find themselves before unsympathetic courts; judges dismiss speculative claims, narrow the scope of constitutional rights, and defer to the expertise of administrative agencies. Post-materialists do not overlook such obvious problems. Instead of trying to circumvent Parliament and the provincial legislatures, they achieve their objectives by grafting litigation onto traditional forms of collective action.

The Design

I test these explanations by comparing the emergence of two social movements in Canada. Feminists and environmentalists promote post-materialist values, but they confront different institutional opportunities. This mix of characteristics is crucial. The post-materialist agenda transcends national boundaries. Feminists in Italy and Germany challenge the same discriminatory practices, while activists in North America demand special immigration laws to help female victims of political oppression. At UN conferences, women from around the world apply the principle of equality to challenge “patriarchal” norms. The global character of environmental degradation is even more apparent. Hazardous substances released into the atmosphere do not respect jurisdictional

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boundaries. Governments that usually rely on national regulatory instruments are drafting international agreements to curb the catastrophic effects of climate change.

Post-materialists might share these common goals, but they encounter different political opportunities. Feminists in France confront powerful bureaucratic agencies and closed policy-making institutions. Because the idea of direct democracy has shaped the structure of the Swiss state, environmentalists can try to stop unfavourable policies by initiating referenda. In Canada, feminists can base their equality claims on two constitutional rights, section 15 and section 28. Using these instruments, private litigants can attack discriminatory laws and demand new entitlements. The Charter recognizes a long list of guarantees, but it does not protect the natural environment. Several provincial governments introduced narrowly framed rights during the 1990s, but potential litigants have to manoeuvre around a maze of obstacles. According to the literature, remarkably few groups enter the courtroom. Environmentalists establish community projects, bargain with bureaucratic officials, lobby cabinet ministers, and appear before legislative committees, but they rarely choose to litigate.

It is impossible to evaluate the explanations just by studying a handful of recent court cases. We have to see if new values changed the character of judicial politics—before


Canada's Constitution was amended. This design problem was easy to solve. I examine post-materialists as they move from one institutional context to another. During the pre-Charter period (1970-1981), litigation was an unlikely strategy. The Canadian Bill of Rights recognized "equality before the law," but it was not an entrenched document. By emphasizing this quasi-constitutional status and defending a formalistic model of equality, the Supreme Court developed a narrow interpretation. Environmentalists could try to win legal contests, but regulatory regimes favoured the traditional polluting industries and the common law privileged proprietary interests. During the post-Charter period (1982-1995), the rules of the game were very different. The first ministers imposed a temporary moratorium on section 15, the principal equality clause, to identify and remove discriminatory laws. Feminists could arm themselves with new constitutional guarantees after 1985, but governments refused to create broadly framed environmental rights. Because this historical comparison will sift through hundreds of court decisions, trace the patterns of litigation, and reconstruct major legislative battles, we can evaluate the explanations by assessing their predictive power.

The first test is very important. The explanations have to predict the frequency of participation. (i) If the Charter revolution thesis is correct, both movements will reject litigation – until they can invoke boldly worded constitutional rights. Feminists should flood the courts with controversial claims after 1985. Because environmentalists failed to win new legal weapons, most groups will continue to rely on conventional forms of collective action. Without their "own" rights, they should characterize litigation as costly and time-consuming. (ii) The court party thesis suggests that post-materialists are drawn to the judicial form, but it does not ignore the effects of institutional change. The rate of participation should increase gradually after 1982 and dramatically after 1985. Feminists have stronger rights, but environmentalists will try to win favourable decisions. (iii) The

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judicial pluralism thesis is the only explanation that predicts relative continuity. Post-materialists do not need constitutional rights to win legal contests. The frequency of participation should climb as both movements learn how to overcome the limits of judicial review. Feminists can invoke new equality rights during the post-Charter period, but environmentalists will continue to explore novel arguments.

The explanations can pass the second test by predicting the sites of court battles.

(i) The Charter revolution thesis asks us to consider the effects of institutional variables. As private prosecutors, environmentalists should take their claims to the lower criminal courts. If litigants file judicial review petitions to challenge provincial tribunals, they will have to appear before one of the section 96 courts. Because feminists want to shape the interpretation of constitutional rights, they should present their arguments to appellate courts and the Supreme Court. There is one exception. Québec judges will hear very few claims because the Charter has not transformed political life outside English Canada.

(ii) The court party thesis acknowledges the same set of rules, but it believes that post-materialists have turned the highest court into a powerful ally. They should take most of their controversial claims to the Supreme Court.

(iii) The judicial pluralism thesis predicts a high degree of convergence. To improve their chances of winning, both movements will present novel claims to provincial courts, section 96 courts, the Federal Court, and the Supreme Court.

A compelling explanation should be able to predict the legal success rate. Some students of judicial politics try to measure the multiple effects of court victories. This line of inquiry encounters serious methodological problems because researchers have to untangle complex causal relationships. My test is not as ambitious: it forces us to find out if claims were “allowed” or “dismissed.”

(i) The Charter revolution predicts that litigants will fall miserably – unless they can invoke powerful constitutional rights. After the moratorium is

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23 Section 96 courts are maintained by provincial governments but staffed by the federal government. This power to appoint is formalized under section 96 of the Constitution Act (1867).
lifted, feminists will start to win favourable decisions. Using weaker instruments, environmentalists should continue to lose most of their challenges. (ii) The court party thesis suggests that leading members of the Supreme Court are promoting the equality rights project. With the support of such well-placed allies, feminists should be wildly successful. Environmentalists failed to win their own constitutional rights, but some judges will be sympathetic. (iii) The judicial pluralism thesis is the only explanation to predict a degree of continuity. The success rate will gradually improve as post-materialists learn to overcome the limits of litigation.

We cannot evaluate the explanations without considering another possibility. After losing in court, litigants could work with like-minded groups to win legislative battles. By mixing different forms of collective action, they might try to counter the effects of damaging judgements. (i) If the Charter revolution thesis is right, the two movements will behave differently. Environmentalists will not pursue this strategy because they rarely choose to litigate. Feminists should use section 15 to win dramatic court battles, but they will fight political battles to defend their constitutional interests. (ii) Post-materialists will characterize legislative politics as seamy and unprincipled, if the court party thesis is correct. After the first ministers introduce constitutional guarantees, they will reject the great representative institutions. (iii) The judicial pluralism thesis disagrees. To overcome the limits of judicial review, coalitions of groups will combine litigation and traditional legislative tactics.

When these strategies fail, activists could try to change the rules of the game. They might knock down an old common law barrier by persuading governments to amend the law of costs. (i) The Charter revolution thesis insists that governments dominate the process of institutional change. Loosely organized interests do not have the resources to alter the shape of the state. They can only ally themselves with political élites who want similar structural reforms. (ii) If the court party thesis is correct, post-materialists should view judges as the primary agents of social change. Because they want to avoid the vulgarities of
legislative politics, feminists and environmentalists should refuse to bargain with private interests and state officials. There is one exception. They might react if governments propose to introduce stronger justiciable rights. (iii) The judicial pluralism offers a very different interpretation. Post-materialists believe that state institutions are crucial sources of power. Their opponents will always have larger annual budgets and better political connections, but feminists and environmentalists can make governments more responsive by winning favourable rules. As "structural actors," they should fight for constitutional guarantees, broadly framed statutory rights, intervenor funding, and mandatory duties that bind political executives.

The final test is provocative. Using survey data, we can ask post-materialists to evaluate the effectiveness of litigation. (i) The Charter revolution thesis expects to find a high degree of divergence. After winning section 15 and section 28, feminists should be very optimistic. These guarantees are not just commanding legal resources – they are inspiring entire generations of women. Without their own constitutional rights, environmentalists will view litigation as costly and dangerous. (ii) The court party thesis acknowledges the effects of institutional variables, but it suggests that post-materialists are attracted to the judicial form. Although environmentalists will express optimism, feminists should characterize litigation as a powerful instrument of social change. (iii) The judicial pluralism thesis predicts a high degree of convergence. Because they understand the risks of legislative politics and the limits of judicial review, post-materialists should characterize litigation as a moderately effective strategy.

Before working through this battery of tests, I had to conduct three major research projects. It would be impossible to understand the growth of judicial power without mapping the patterns of litigation. Students of Canadian politics usually concentrate on a few court cases initiated over a short stretch of time.\(^\text{24}\) Several obstacles have discouraged

\(^{24}\) There are several exceptions. See Elizabeth Swanson and Elaine Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990).
researchers from producing a more thorough review. Published law reports list the formal participants, but groups can support like-minded individuals outside the courtroom. The groups themselves are poor sources of information. Predictably, most executive directors would rather spend their resources fighting new battles instead of archiving old cases. Despite these hurdles, I managed to compile a comprehensive body of cases: seventy-one from the pre-Charter period and 184 from the post-Charter period. Graph I illustrates this dramatic increase. The Court Challenges Database offers basic facts about each decision, including the cause of action, the organizational form of participation, the legal form of participation, and important judicial comments.

Graph I: Feminists and Environmentalists in Court (1970-1995)

The second project takes us outside the courtroom. By studying structural battles in Ontario and Canada, we can examine crucial moments of institutional change. After reviewing hundreds of periodicals, from major newspapers to small newsletters, I surveyed twenty-seven legislative committees. Some considered significant constitutional amendments (the Special Joint Committee on a Renewed Canada), while others
contemplated modest proposals (the Standing Committee of the House of Commons on Human Rights). The most revealing document is still confidential. A task force developed the *Ontario Environmental Bill of Rights* in camera, but I managed to secure a copy of the minutes.\(^{25}\)

The literature on judicial politics is flourishing, but there is an odd omission. Legal scholars and social scientists debate the merits of litigation – without asking the participants. Instead of relying on personal interviews to fill this gap, I conducted the National Survey on Strategic Choices in 1995. Selecting the advocacy groups posed several challenges. Organizations from both movements have created directories, but they are quite different. The Canadian Environmental Network publishes a comprehensive directory that lists relevant characteristics, including policy objectives, political activities, the number of individual members, and the number of employees.\(^{26}\) The feminist directory is much less helpful; it simply divides groups into broad categories.\(^{27}\) The National Action Committee on the Status of Women is willing to release a membership list, but it refuses to disclose addresses. Without knowing basic facts about each group, it was impossible to design a proportionate sample. For example, I could not choose a particular mix of groups based on their size or strategic preferences. While considering some type of random sample, I encountered another complication. By using telephone directories and general directories of organizations, I discovered that many groups had apparently disbanded.\(^{28}\) Both movements claim to have thousands of organizations as members, but I could only confirm six-hundred addresses. Knowing that mailed surveys are weakened by low response rates, I decided to include all of these organizations, three-hundred environmental groups and three-hundred

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\(^{25}\) After appealing a decision under the *Ontario Freedom of Information and Protection of Privacy Act*, I received a copy of the minutes (File EBR940429-Appeal P-9400730).


feminist groups. Such limitations may have created hidden biases, but this number represents a large subset of the entire population. By cross-referencing my list with secondary sources, I was able to verify that it includes a wide range of groups, from national organizations with impressive annual budgets to community groups that rely on volunteers.

The National Survey on Strategic Choices also targeted "legal advocates." Most are private lawyers or law professors who offer their services to legal advocacy groups, but some provide different types of expertise. Selecting these participants was an easy task. The primary source was the Court Challenges Database because I wanted to include lawyers who have presented at least one claim. Newsletters provided a comprehensive list of executive directors, litigation directors, and other legal advocates who have supported challenges without actually appearing as counsel. These sources produced two-hundred names; one-hundred feminist advocates and one-hundred environmental advocates.

Four sets of respondents received similar versions of the same questionnaire. One version was designed for the advocacy groups. Executive directors reported a range of organizational characteristics, including the number of individual members, the size of the budget, and the principal objectives. By answering another cluster of questions, they ranked the effectiveness of various political strategies, from demonstrations to public education campaigns. This series was developed to uncover interesting correlations. We might find, for example, that litigious groups also use their resources to lobby cabinet ministers. The other version of the questionnaire was designed for the legal advocates. Because we selected some of the core questions from the monumental World Values Survey, readers will be able to compare the attitudes of feminists, environmentalists, and a representative sample of the Canadian population.

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29 Roughly six percent of the legal advocates provide other types of expertise.
30 The different versions appear in the Appendix.
31 The 1990 World Values Survey included a representative sample (N = 1730) of the Canadian population.
on an ideological scale. The legal advocates should favour the post-materialist objectives: “protecting freedom of speech” and “giving people more say in important government decisions.” However, we could discover some unexpected correlations. If feminists want governments to enforce strict criminal laws, they might favour a materialist goal: “maintaining order in the nation.” A large percentage of environmentalists might express post-materialist values, but place themselves on the right of the scale.

Both versions asked the respondents to assess the effectiveness of litigation. By reviewing the Canadian literature, I developed four distinct positions. (i) The “optimists” believe that constitutional litigation is an instrument of social change because the Charter has created a “forum of principle.”32 Well-entrenched interests still dominate majoritarian institutions, but courts are willing to protect the poor and the “marginalized.” (ii) Students of legal mobilization theory reject this naïve optimism. Litigants cannot transform entire societies just by asserting their rights because courts are like other state institutions – they are shaped by political pressures.33 If social movements realize these limits, if they fight their battles in different “arenas,” rights can be effective instruments. (iii) Neo-Marxists and critical legal scholars are thoroughly sceptical because they believe that most judges promote classical liberalism to defend corporate interests.34 Disadvantaged groups can


press their claims in court, but they will eventually realize that Parliament is the real “engine” of social change. (iv) Some of these sceptics believe that litigation is very dangerous.35 Constitutional rights trap those who hope to transform society. Instead of using their resources to win legislative battles, “progressive” groups quickly discover one of the risks of judicial politics: “reactionary” interests can use rights to attack welfare programs, pay equity policies, air control standards, and mining regulations.

By refining these positions, we can invite four sets of respondents to offer their assessment. Because of their training, the legal advocates might be very optimistic. If advocacy groups usually pursue conventional forms of collective action, they might express some reluctance. Certain types of groups might be very sceptical. For example, “radical feminists” who manage rape crisis centres could stress the hazards of litigation. If the court party thesis is correct, most of the legal advocates should place themselves on the left of the ideological scale, choose the post-materialist objectives, and characterize litigation as a powerful instrument of reform.

**Conceptual Problems**

Before studying the pre-Charter period, we have to consider several conceptual problems. A quick survey of the literature reveals a mix of overlapping terms. Students who compare regulatory regimes characterize the American political system as highly exceptional. Private litigants can influence public agencies by asking courts to enforce mandatory duties. This policy style is called “legalism” because judges routinely intervene to police the rule-making process. Another body of work encounters serious methodological problems because it attempts to understand a highly amorphous process – the growing

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dominance of legal forms. Some trends are easy to measure. For example, the process of “unionization” refers to a single, quantifiable change: the increasing proportion of workers who belong to organized unions. The process of “legalization” is less precise because it seems to encompass an unknown number of abstract transformations.36

While recognizing legalism as a policy style and legalization as a tangle of complex changes, I want to explain the growth of judicial power. Although it sounds quite awkward, some students call this process the “judicialization” of politics. Judges accept tasks that were previously executed by other state officials. Courts decide to tackle controversial issues, balance competing interests, protect certain programs, and eliminate policy options. A less obvious change can occur at the same time: other state officials decide to adopt legalistic rules.37 Administrative tribunals might use such procedures to shield themselves from hostile actions. If they become more formal and less flexible, they might jeopardize their distinctiveness by acting more like the common law courts.38 Governments can introduce legalistic procedures to make policy-making institutions transparent and accessible.39 They might insist that line departments consult concerned citizens. If these trends occur simultaneously, decision-making styles gradually converge. Judges behave like political actors, while legislators and bureaucrats behave like rule-bound judges.

The next conceptual problem is not as troublesome. Journalists frequently discuss the pursuits of different "groups," knowing that their audiences will understand. They rarely talk about "social movements" because these organizations are larger and less tangible. Groups have clear boundaries and formal leaders, broad movements do not. Two camps dominate the academic literature: those who defend resource mobilization theory and those who identify the emergence of "new social movements." The first body of work applies rational choice theory to understand the effects of persistent organizational problems.40

The second approach is fascinated by the "politics of identity."41 Though based on competing assumptions, a growing body of scholarship acknowledges the importance of organizational variables and the cultural dimensions of collective action.42 This approach characterizes social movements as "interconnected networks" of groups that "construct and cultivate new identities."43 As social and political actors, they try to influence the state and civil society. I prefer this interpretation because it recognizes the presence of distinct groups. Some develop hierarchical structures and behave like autonomous corporations; others adopt consensual decision-making styles and work with broad coalitions. Members


43 For example, see Susan Philips, "Meaning and Structure in Social Movements: Mapping the Network of National Canadian Women's Organizations," *Canadian Journal of Political Science* 24(4) (1991), 756-57. This article includes a brief but useful literature review.
share broadly framed goals, but internal fissures can be caused by ideological disagreements, strategic preferences, and regional differences.

Naming social movements presents a curious problem. We know that distinct strands of feminism exist. Activists might promote liberalism or socialism — some even refuse to call themselves “feminists.” Despite these ambiguities, I decided to emphasize ideology (the feminist movement) instead of gender (the women’s movement). This separates women who want some form of equality from those who want to save the “traditional family.” Environmentalism is just as variegated. Some activists call themselves “conservationists” because they stress the importance of resource management without demanding strict limits on economic growth. They usually disagree with “deep ecologists,” those who insist that all organisms have an equal right to live. Recognizing these distinct ideologies is more than a mere formality. We might find that some activists are more willing to litigate.

The explanations consider the influence of “state structures.” Social scientists examine structures produced by domestic economies and religious cleavages. Several characteristics make political institutions quite different. Because governments monopolize the exercise of coercive power, they create rules that are formal and binding. Social norms can endure for generations, but they are not always sustained by state authority. Although political conventions do not exist as formal legal structures, most institutions are held in

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Constitutions establish executives, legislatures, and courts. They can unify authority by forming one central government or divide power by establishing two levels of government. Within these broadly framed structures, institutions exist as criminal laws, ordinary statutes, regulatory regimes, and bureaucratic protocols. They can produce discrete jurisdictions, formal hierarchies, and divisions of labour.

Constitutions can establish highly centralized governments, but states are not perfectly coherent. While they are components of a single national system, thousands of institutions reflect different principles. Because this fragmentation creates a web of constraints and opportunities, I characterize political institutions as the "rules of the game." This phrase helps us imagine how competing interests view the state. To achieve their objectives, trade unions and business corporations have to know, if not respect, parliamentary procedures and the conventions of executive federalism. When groups try to change the rules of the game, they fight "structural battles." To improve their chances of winning entitlements, gays and lesbians might demand new constitutional guarantees. Instead of demanding stronger regulatory standards, environmentalists might ask provincial officials to amend the law of standing.

II. Judicial Power in Canada and the United States

Before considering the strengths and weaknesses of each explanation, I want to take a closer look at the central problem. Readers will not appreciate the significance of this study unless they want to solve the puzzle. Canadian judges have become prominent political players. Because they are willing to tackle complex social problems, a growing number of public policies are shaped by Parliament, the provincial legislatures, bureaucratic agencies — and the Supreme Court. However, Canada’s political tradition resisted the expansion of judicial power for over a century. While generations of citizens recognized the virtues of parliamentary democracy, governments invoked the principle of legislative
supremacy to preserve their decision-making autonomy. We can understand the origins of these constraints by comparing two political traditions.

The judicialization of American politics is not puzzling – it would be perplexing if courts were marginal institutions. Instead of emulating Westminster, the Framers parcelled and dispersed authority.47 To protect the new republic from tyranny, they granted important responsibilities to the president, the House of Representatives, the Senate, thirteen state governments, and a federal judiciary. Some of these early architects characterized civil rights as meaningless declarations or flimsy “paper checks,” but the anti-federalists won an impressive concession during the ratification process by persuading James Madison and most of his allies to endorse the Bill of Rights. These structural features have influenced the character of American politics. Courts have exercised some degree of influence over most social debates since Marbury v. Madison (1803). The first wave of judicial activism started at the end of the nineteenth century, when the progressive movement demanded measures to stem the harmful consequences of industrialization.48 Legislators introduced safety codes, unemployment insurance, minimum wage laws, and collective bargaining rights. After failing to stop these threatening reforms, corporate interests turned to a sympathetic institution. Between 1899 and 1937, the Supreme Court invalidated 184 state laws by defending property rights and individual freedoms.49

By the 1950s, a new force fueled the expansion of judicial power, the idea that judges could promote social equality. Instead of using courts to preserve economic arrangements, the National Association for the Advancement of Colored People developed a sophisticated strategy to attack segregated education, discriminatory electoral laws, and “covenants” that restricted property ownership. This approach produced one of the most dramatic legal

47 James Madison, Federalist 47 and Alexander Hamilton, Federalist 78.
victories in American history. In 1954, after considering decades of carefully planned litigation, the Supreme Court decided that racially segregated education violated the Fourteenth Amendment. Brown v. Board of Education did not provide a list of promising reforms, but it created a new expectation. If legislators refused to respect democratic values, if well-entrenched interests slowed the pace of reform, vulnerable minorities could ask judges to make the “right” decision. This idea persists even though a respected body of scholarship has documented the limits of constitutional litigation. Some of these works ask us to consider the rise of neo-conservatism, the legacy of President Ronald Reagan, and the resurgence of judicial deference. The consequences are difficult to overlook. The Supreme Court did not seem like a brash agent of social equality under the leadership of Chief Justice Warren Burger and Chief Justice William Rehnquist does not see himself as a defender of the disadvantaged.

The process of judicialization accelerated during the 1970s because Congress devised an ingenious strategy. When legislators designed a new generation of laws to protect workers, consumers, and the natural environment, they extended their control by introducing “action forcing provisions” and “non-discretionary duties.” If agencies fail to meet mandatory orders and strict schedules, concerned citizens can ask the courts to intervene. These measures have transformed American regulatory politics. After judges


became full partners in the rule-making process, competing interests moved their battles into the courtroom. While business groups challenged "oppressive" standards, unions and environmentalists launched "citizen suits" to attack bureaucratic inertia.54 By the 1980s, federal administrators confronted a sobering fact—the courts scrutinized most of their major decisions. The pace of judicialization waned during the early 1990s, but two Republican presidents could not reverse this trend.

A different set of forces have shaped Canada's political tradition. The Fathers of Confederation did not admire the United States. During the 1860s, when civil war was ravaging the new republic, the British system seemed considerably more attractive. It was promoting decisiveness and clear lines of accountability, not intense adversarialism. The Fathers of Confederation designed federal institutions to accommodate regional interests and linguistic differences, but the British North America Act created a central government that could develop a vital national economy. These architects did not engage in a grand debate about "inalienable" rights or the proper role of judicial review. Protecting individuals from the state was a foreign idea—one that would have fettered the Crown.55 They simply assumed that Parliament would protect citizens and resolve federal-provincial disagreements.56

Of course, the Fathers of Confederation underestimated the significance of judicial review. Canada's high courts have accepted the often difficult responsibility of umpiring


55 Alan Cairns and Cynthia Williams, eds., Constitutionalism, Citizenship, and Society in Canada (Toronto: University of Toronto Press, 1985); Peter Russell, Constitutional Odyssey: Can Canadians be a Sovereign People? (Toronto: University of Toronto Press, 1992). The Constitution Act (1867) only includes two provisions for the protection of minority rights, section 93 and section 133; both reflect Canada's cultural dualism.

The first wave of activism started at the end of the nineteenth century, when the Judicial Committee of the Privy Council “corrected” the British North America Act by applying the doctrine of dual sovereignty. The JCPC insisted that both levels of government are “equal and independent.” This defence of provincial rights generated even more controversy during the economic depression of the 1930s. Federal officials wanted to introduce a series of social programs, but some of their principal measures were revoked. The importance of judicial review declined after World War II. This period of history produced hundreds of new co-operative arrangements and a corresponding reluctance to fight court battles. However, conflict replaced consensus during the 1970s, when competing governments tested their constitutional powers by pursuing unilateral policy initiatives. Not surprisingly, this new bravado undermined the norms of co-operative bargaining.

The principle of legislative supremacy stopped the Supreme Court from expanding the scope of judicial review beyond federal-provincial disputes. Canada’s judiciary supervised administrative tribunals, but questioning the wisdom of the Crown was unthinkable. If statutes respected the federal division of powers, judges refused to doubt their validity. This arrangement was preserved for over a century because Canadians


acknowledged the virtues of parliamentary democracy. Most citizens trusted responsible governments to rank the importance of social values and direct the course of public policy.

The legal establishment defended this view of democracy throughout the 1960s. Premier John Robarts asked the Chief Justice of the Ontario Court of Appeal to consider a range of possible reforms, including a charter of fundamental rights. James McRuer’s response is an important piece of historical evidence because it vehemently rejects the American system. As a staunch defender of parliamentary government, he could not ignore an obvious irony. Congress can pass laws to “advance the social well-being of the people,” but just five members of the Supreme Court can revoke these measures. By trying to prevent tyranny, the American Constitution deprives citizens of the “ultimate right to determine their own social affairs through democratic institutions.” Guided by this sentiment, his royal commission presented an alternative that would not offend Canada’s proud political tradition: a “solemn statutory declaration” on the importance of human rights. This proposal lacked the drama of a fully developed constitutional amendment, but he promised that it would not undermine the principle of legislative supremacy.

The defenders of parliamentary democracy continued to prevail during the early 1970s, but their opponents were gaining support. While the first ministers struggled to amend the British North America Act, the Molgat-MacGuigan committee was asked to consider both sides of this great debate. A number of witnesses endorsed Trudeau’s view of human rights, including several prominent law professors. They stressed the dangers of majoritarian democracy, an idea that now seemed at odds with Canada’s cultural diversity.

64 Ibid., 2:1586-88.
65 Ibid., 2:1606.
66 See the comments of Walter Tarnopolsky, for example. Minutes of Proceedings and Evidence of the Joint Committee of the House of Commons and Senate on the Constitution of Canada (Ottawa: Queen’s Printer, 1971), 8:26-27.
and the importance of protecting vulnerable minorities. However, some of the participants were still convinced that constitutional rights would weaken Canadian democracy. They wanted elected officials to dominate the policy-making process, not judges. The Victoria charter would have entrenched a cluster of fairly traditional guarantees, but the principle of legislative supremacy was saved by Québec. At the last minute, Premier Robert Bourassa decided to oppose a social policy provision. The next round of bargaining produced the current Charter, but the idea of parliamentary democracy was defended by two provincial premiers, Sterling Lyon of Manitoba and Allan Blakeney of Saskatchewan. In 1980, at a memorable federal-provincial conference, they wondered why judges should be allowed to “dictate” their preferences. Lyon and Blakeney prized the principle of legislative supremacy because it gave responsible governments “the ultimate authority to define and reflect basic social values.” If voters disliked a particular policy or favoured another party, they could exert their influence during general elections. If courts enforced vaguely worded rights, voters would not be able to remove judges who delivered “regressive” decisions.

The Hays-Joyal committee was asked to consider the same concerns. Some of the participants believed that Trudeau’s “noble sentiments” would “shackle” future generations by eliminating important policy options. Others wanted to prevent the erosion of participatory democracy because they feared that a charter would transfer decision-making

68 Russell, Constitutional Odyssey, 89-91.
70 Federal-Provincial Conference of First Ministers on the Constitution of Canada (Ottawa: Canadian Intergovernmental Conference Secretariat, 1980), 477. The premier of Prince Edward Island, Angus MacLean, supported Lyon and Blakeney.
71 Ibid., 477-78.
authority from Parliament and the provincial legislatures to the "cloistered sanctuaries of judicial tribunals." According to these sceptics, a number of barriers would place Trudeau's charter beyond the reach of most Canadians. While representative institutions can establish committees to hear from concerned citizens, courts can only accommodate a small number of litigants, usually two. Legal fees represent an even steeper hurdle. Trudeau's charter would grant new rights to "everyone," but few citizens would be able to shoulder the expense of litigation. Courts would be more powerful, but not more accessible. This final defence of parliamentary democracy also reflected a desire to protect Canada's distinctiveness. The principle of legislative supremacy discouraged a threatening trend – the "Americanization" of politics. When constitutional lawyers and civil libertarians presented the United States as a model worth emulating, their adversaries wanted to discuss the poor treatment of Japanese-Americans during World War II and the persistence of racial discrimination. After characterizing American society as "rule-bound and adversarial," they argued that a charter would jeopardize two of Canada's most admirable characteristics, "tolerance and compromise."

If parliamentary democracy had few supporters by the end of the 1970s, another pressure slowed the process of judicialization: the desire to preserve decision-making autonomy. The principle of legislative supremacy may have seemed archaic to those enamoured with the American tradition, but it gave governments a compelling incentive to oppose the entrenchment of constitutional rights. If they respected the federal division of powers, and the conventions of parliamentary democracy, their authority was virtually boundless. A charter would have undermined this autonomy and complicated the task of governing. New laws would have to respect economic imperatives, the demands of

73 This phrase was used by Peter Russell in "A Democratic Approach to Civil Liberties," Frederick Vaughan, Patrick Kyba, and O.P. Dwivedi, eds., Contemporary Issues in Canadian Politics (Scarborough: Prentice-Hall, 1970), 97.
75 Alan Blakeney, Federal-Provincial Conference of First Ministers on the Constitution, 487.
competing interests, administrative realities, the constraints of federalism, and a long list of constitutional values. Both levels of government guarded their broad discretionary powers for one-hundred years, but something happened during the 1960s. Federal officials wondered if a charter might encourage national unity—the benefits of constitutional rights were beginning to outweigh the loss of some decision-making autonomy. Predictably, the premiers opposed this strategy. Subjecting their laws to judicial scrutiny was hardly an appealing proposition. They knew that constitutional rights could bolster the legitimacy of the national government at their expense. The mere threat of provincial opposition forced Prime Minister John Diefenbaker to pass the Canadian Bill of Rights as an ordinary statute. Twenty years later, Lyon and Blakeney presented a sincere defence of parliamentary democracy, but they also hoped to protect their decision-making powers.\textsuperscript{76} The override clause reveals the strength of this incentive.\textsuperscript{77} Most premiers were willing to accept Trudeau’s charter of fundamental rights during the patriation round because they managed to win section 33.

Within single jurisdictions, governments continued to defend their impressive discretionary powers. During the late 1970s, they resisted a major source of judicialization: regulatory statutes that establish action-forcing provisions and non-discretionary duties. Readers will remember that Congress adopted these devices to influence administrative agencies. However, parliamentary institutions create different incentives. Federal and provincial executives dominate every stage of the policy-making process—they control the legislative agenda, the bureaucracy, and the “public purse.” Canada’s political élites did not want to diminish this autonomy by emulating the American tradition. Instead of

\textsuperscript{76} Cairns, \textit{Charter versus Federalism}.

\textsuperscript{77} Some believe that section 33 weakens the Charter, but the sceptics demanded this last vestige of parliamentary supremacy. See Sterling Lyon, “Without section 33 there would be no Charter,” \textit{Western Report}, 10 March 1986, 57.
imposing unrealistic time-tables and binding obligations, most pre-Charter laws were based on “enabling provisions” and permissive guidelines.78

The process of judicialization was hindered by another constraint. Instead of questioning the legitimacy of judicial review, some politicians wondered if courts would be able to solve complicated social problems. This argument stressed the obvious but crucial differences between legislative policy-making and formal adjudication. Political executives can ask line departments and central agencies to undertake a wide range of tasks. If issues need to be scrutinized more closely, they can establish royal commissions. Political inquiry is not bound by strictly enforced rules that stop decision-makers from considering certain types of material. They can be guided by epidemiological studies, economic statistics, scientific data – and simple intuition. Courts, on the other hand, purposely exclude evidence that may be irrelevant or prejudicial. Judges can settle clearly defined disagreements between a small number of litigants, especially pecuniary disputes between two parties, but they cannot evaluate a long list of policy alternatives and hear from hundreds of participants.79 The reactive nature of adjudication is just as significant. Because litigants determine the timing and substance of legal challenges, courts cannot solve “polycentric” problems by planning.

This traditional view of adjudication influenced the structure of the regulatory state.

After World War II, federal and provincial officials did not expect courts to shoulder the growth of government.80 They established thousands of independent agencies to regulate

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78 There are some exceptions to this general rule. See Schrecker, The Political Economy of Environmental Hazards; Hoberg, “Environmental Policy: Alternative Styles.”
the natural environment, supervise the broadcasting industry, resolve labour disputes, 
compensate victims of violent crimes, and eliminate different forms of discrimination. These  
hybrid institutions combine the flexibility of bureaucratic decision-making and the rigour of
formal adjudication. While respecting the principles of natural justice, administrative 
boards and quasi-judicial tribunals can develop distinctive approaches. Instead of copying 
the common law courts, they cultivate expertise in one policy area, craft their own 
evidentiary rules, and hear from a broad range of participants.81

The courts did not try to expand their dominion by promoting an ambitious model of 
adjudication. Canada's judiciary admired traditional civil liberties and praised the virtues 
of a small state.82 This ideological bias was reinforced by a more pressing concern. Most 
judges believed that assertiveness would undermine a precious source of authority – their 
legitimacy.83 Instead of fostering the process of judicialization, courts maintained a series 
of threshold barriers. By enforcing strict standing requirements, they favoured litigants who 
wanted to protect proprietary interests.84 Advocacy groups could seek intervenor status, 
but most judges refused to jeopardize the plodding but determined pace of adjudication by 
admitting participants who exercised different rights. Predictably, Canada's conservative 
judiciary discouraged another form of group participation, class actions.85 Few judges 
wanted to tackle diffuse, "polycentric" problems. Some barriers were lowered during the

Elaine Hughes and Alistair Lucas, eds., Canadian Environmental Law and Policy (Toronto: 
Emond Montgomery, 1993).
81 David Mullen, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984," 
Ivan Bernier and Andrée Lajoie, eds., Regulations, Crown Corporations, and Administrative 
Tribunals (Toronto: University of Toronto Press, 1985); Kenneth Kernaghan, "Judicial Review of 
Administrative Action," Kenneth Kernaghan, ed., Public Administration in Canada (Toronto: 
Methuen, 1985); Kenneth Kernaghan, The Independence of Federal Administrative Tribunals and 
Agencies in Canada (Ottawa: Canadian Bar Association, 1990).
83 Peter Russell, "The Political Role of the Supreme Court of Canada," Canadian Bar Review 
(1975); Robert Lewis, "Interview with Bora Laskin," Maclean's, 21 February 1977; Robert 
84 Kenneth Swan, "Interventions and Amicus Curiae Status in Charter Litigation," Sharpe, 
ed., Charter Litigation.
85 William Bogart, "Questioning Litigation's Role: Courts and Class Actions in Canada," and 
Gerald Rosenberg, "Class Actions for Mass Torts: Doing Individual Justice by Collective 
1970s. The Supreme Court departed from the common law tradition by allowing “genuinely interested” litigants to question the validity of certain statutes. A handful of groups were allowed to intervene because they could demonstrate expertise in a particular policy area. However, it would be misleading to exaggerate the magnitude of these changes. The traditional model of adjudication continued to exert a strong influence.

These constraints produced distinctive patterns of participation. Advocacy groups could ask courts to review boards and tribunals, but most judges deferred to the expertise of administrators. Corporations hoped to attack the welfare state by invoking the division of powers, but most courts were reluctant to support such an indirect strategy. To achieve their objectives, well-established interests quietly pressured senior bureaucrats and cabinet ministers. Left-leaning activists supported the CCF-NDP because courts seemed entirely unsympathetic. When politically weak groups launched legal claims, they usually failed. During the 1890s, Roman Catholics in Manitoba wanted to secure public funding for a separate school system, but the JCPC dismissed their claims. The Supreme Court did not use the Canadian Bill of Rights to solve controversial social problems seventy years later—it narrowly interpreted this quasi-constitutional document. These patterns were very stable, but the two political traditions started to converge during the 1980s. Canadian

judges are expanding the bounds of adjudication by encouraging intervenors and allowing new forms of evidence. Like their American counterparts, they are willing to challenge the wisdom of public policies. Competing interests have responded to this shift. Instead of relying on legislative strategies, they are marshalling their resources to fight costly court battles.

**III. Solving the Puzzle**

The explanations acknowledge the same set of independent variables, but they disagree. Most students of Canadian politics accept the dominant interpretation. (i) If the Charter revolution thesis is correct, we have to consider the effects of institutional change. By entrenching boldly worded rights, the Charter has transformed English Canadian political culture, elevated the prominence of judges, and lured a long list of groups into the courtroom. (ii) The court party thesis is even more provocative. Post-materialists are bringing their unpopular claims to courts because judges do not face the competing pressures of electoral politics. Instead of using conventional strategies to influence Parliament and the provincial legislatures, they are mounting impressive legal campaigns. (iii) If the alternative explanation is right, post-materialists are not abandoning the great representative institutions — feminists and environmentalists are fueling the process of

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acknowledging the wisdom of legislatures and the expertise of bureaucrats, citizens invoke

whereas way. Voters in both countries seem satisfied and disenchanted. Instead of

changes, Many of the enduring differences between Canada and the United States have

benefits of legislative supremacy. Since 1982, the Charter has transformed a way of dramatic

national unity. This imperative was so powerful that Trudeau was willing to surrender the

create dysfunctional administrative problems, but it needed a new instrument to foster

undercut qualified nationality. The Liberal cabinet knew that our challenges would

rights. They hoped that constitutional guarantees would obviate extralegal curbs and

Instead of accepting these proposals, federal officials proposed a charter of fundamental

powers remain the Senate, and exercise greater control over Supreme Court appointments.

institutions more responsive to regional interests. They wanted to restructure the division of

The first explanation is highly premature. During the 1970s, assertive provincial

### The Charter Revolution

#### Strategic Choices

through pretexts produced by the Court challenges Database and the National Survey on

each account, but those committed to one interpretation might be surprised when we get

review of political actors. Readers can start to think about the strengths and weaknesses of

Judicialization by promoting a model of democratic pluralism that demands the judicial

Chapter One: Canada's Political Tradition
constitutionsal rights to demand entitlements and criticize intrusive laws. The Charter is fueling this broad shift, but it privileges certain interests more than others. Some phrases try to undermine the pull of provincialism by identifying particular non-territorial characteristics, including religion (section 15), age (section 15), and ethnicity (section 27). Two separate guarantees promote equality — the principle that has the greatest potential to cross-cut territorial cleavages. These "constitutional niches" have not magically transformed weak social groups into unbeatable political actors, but they offer "Charter Canadians" valuable symbolic resources, an important source of inspiration, and new political opportunities. Those who are not "named" in the Charter can still adopt the language of rights and present novel legal arguments, but they do not receive the full benefits of formal inclusion.

Trudeau hoped that entrenched rights would act as instruments of national unity, but these transformations have exacerbated one of Canada's greatest political problems. By cultivating non-territorial identities, the Charter has complicated the process of constitutional change. Organizations that represent women, Aboriginal peoples, language minorities, and ethnic groups now see themselves as constitutional players with just as much credibility as political elites — if not more. When the first ministers presented the Meech Lake Accord in 1987, Charter Canadians challenged the closed nature of executive federalism and the substance of the agreement. Instead of expressing trust, they wondered how "eleven men" could jeopardize section 15, ignore the fundamental importance of multiculturalism, and reject the principle of Aboriginal self-government — without consulting anyone but their closest advisors.95 This argument contributed to the "death of Meech Lake." Other forces are obstructing the pace of reform, including the amending procedure and the idea of "provincial equality," but Charter Canadians have narrowed the range of options that governments can choose from.

It is difficult to exaggerate the significance of these changes, but they have not transformed political life in Québec. This point should be considered carefully. If the rival explanations are correct, post-materialists in every region are encouraging courts to enter the political fray. If the Charter revolution thesis is correct, English Canadians are promoting the growth of judicial power. After being outwitted by federal officials during the patriation round, Premier René Lévesque refused to endorse Canada's new Constitution. Moved by an almost boundless sense of betrayal, the Parti Québécois government invoked the override clause to protect every provincial statute from judicial review. During the late 1980s, the Liberal government applied the same provision to issue a controversial decree—all outdoor commercial signs have to appear in French only. This decision widened the gulf between Québec and English Canada. After watching Bourassa shield Bill 178, most English Canadians refused to support the Meech Lake Accord. They feared that future governments would use the "distinct society clause" to ignore fundamental democratic values.

The Charter revolution thesis asks us to consider the consequences of this division, but it does not imply that Québec francophones dismiss liberal principles. They hope that constitutional rights will protect vulnerable minorities and promote certain fundamental values—without jeopardizing the distinctiveness of Québec society. Recently published survey research has confirmed elements of this interpretation. Most francophones like the Charter. They believe that it will improve national unity without weakening the provinces. However, when these respondents considered some of the targets of constitutional litigation, such as social welfare programs, their enthusiasm faded. This ambivalence seems to be the dominant sentiment. If courts fail to understand the special

96 Sniderman, Fletcher, Russell, and Tetlock, The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy, 164-176. During the late 1980s, researchers working on the Charter of Rights Project interviewed four sets of respondents, ordinary citizens (N = 998), political élites (N = 474), administrative élites (N = 260), and legal élites (N = 352). Not surprisingly, most Parti Québécois legislators believe that constitutional rights will weaken the power of the provinces.
characteristics of Québec society, if they choose to rewrite language policies or use their discretion to create binding national standards, francophones start to see the Charter as a serious threat.

The Court Party

The court party thesis acknowledges the consequences of institutional change, but it claims that new values are promoting the growth of judicial power. Generations born after World War II have experienced unprecedented economic prosperity, enviable levels of physical security, and better educational opportunities. Shaped by these structural transformations, they place greater importance on social values, such as racial diversity, global peace, gender equality, psychological well-being, and biodiversity. As political interests, post-materialists characterize themselves as “disadvantaged outsiders.” However, they tend to be highly educated, upper-middle class professionals, who work as lawyers, bureaucrats, university professors, and journalists. These elite activists favour litigation because it solves a difficult strategic dilemma: the court party is reluctant to enter the seamy world of legislative politics, but it wants to influence the course of public policy.

Post-materialists express highly controversial goals. Feminists want to destroy deeply entrenched cultural norms. They believe that patriarchal values have shaped every social institution, producing subtle forms of inequality. Environmentalists claim that governments jeopardize human health and delicate ecosystems by misusing natural resources and sanctioning industrial pollution. They want legislators to adjust consumer

behaviour by imposing onerous “green taxes.” If the court party thesis is right, very few Canadians embrace these radical ideas. Voters are asking governments to place priority on fiscal restraint and deregulation, not employment equity and environmental protection. The court party is also disadvantaged by representative institutions because they tend to favour territorially concentrated interests. As geographically dispersed interests, post-materialists are less able to influence electoral politics. Not surprisingly, members of this coalition are reluctant to enter the formal policy-making process. Knowing that state officials will demand serious concessions, they characterize legislative politics as compromising and unprincipled.

Despite these reservations, the state is the only institution capable of remedying the problems that post-materialists identify. Environmentalists want governments to restructure the tax system, regulate powerful economic interests, and curb profitable forms of development. Just as much intervention is needed to promote an ambitious model of equality. The state has to redistribute wealth, tame various types of discrimination, and help disadvantaged groups by treating individuals differently. Litigation is the quintessential post-materialist strategy because it solves this strategic dilemma. The court party can use constitutional rights to circumvent Parliament and the provincial legislatures. They can finally achieve their objectives without confronting the traps of legislative politics. Instead of wasting scarce resources trying to pressure neo-conservative governments or struggling to educate indifferent voters, feminists and environmentalists can develop the expertise and organizational skills to win impressive legal battles.

If this provocative explanation is correct, certain state officials are backing the court party. Although post-materialists like to portray themselves as “embattled outsiders,” leading members of the court party have received considerable financial assistance from the

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federal Court Challenges Program, including LEAF and the Charter Committee on Poverty Issues. Human rights commissions represent another source of support. According to the proponents of the court party thesis, adjudicators are not impartial umpires who deliver fair decisions – they are post-materialists who use their authority to favour like-minded complainants. As prominent members of the coalition, commissioners use their annual reports to denounce governments for not recognizing new rights. Law schools are not strictly public, but they generate most of the ideas that drive the court party. As law professors, post-materialists counsel legal advocacy groups, work for human rights tribunals, advise central agencies, and produce “advocacy scholarship,” which always overstates the democratic nature of the Charter. While these sources of support are important, one institution is responsible for transforming the court party into a powerful political force, the Supreme Court. Post-materialists cluster around Canada’s highest court because several leading members see themselves as noble agents of social change. Instead of preserving legal traditions that favour established interests, they use their powers to protect disadvantaged groups.

**Judicial Pluralism**

This form of pluralism reflects normative concerns and strategic calculations. Post-materialists celebrate social diversity, public participation, minoritarian democracy, and creative state intervention. These new interests want to encourage a lively debate between courts and legislatures because they understand the limits of judicial review and the risks of legislative politics. This claim challenges the court party thesis. From direct experience, feminists and environmentalists know that court strategies are dangerous and time-

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consuming. After marshalling their resources to pass through layers of procedural hurdles, post-materialists can suffer crushing defeats. They know that courts are not powerful agencies of social change. To preserve their legitimacy, judges dismiss speculative claims, narrow the scope of constitutional rights, measure the possible costs of their decrees, and defer to the expertise of administrative tribunals. As experienced litigators, post-materialists still expect to confront unsympathetic judges. The first ministers introduced the Charter, but this formal document did not create an army of left-leanin judges who care about gender equality and biodiversity.

Although post-materialists understand the limits of judicial review, they characterize litigation as an instrument of pluralism. If granted the opportunity, feminists and environmentalists can present their concerns to legislative committees, administrative boards, and line departments; they can develop persuasive arguments and submit compelling evidence. However, their adversaries have more resources and better connections. Even though governments introduce laws and establish new agencies to garner public support, they quietly undermine their effectiveness. Environment Canada has to perform a wide range of costly tasks, but it receives a relatively small operating budget.

Human rights commissions are asked to eliminate private forms of discrimination, but they exercise weak statutory powers. Faced with these strategic problems, post-materialists believe that litigation can attack closed policy-making institutions and punish unresponsive governments. Feminists can document the inequities produced by certain Criminal Code provisions. By fighting court battles, environmentalists can expose secretive arrangements between regulatory officials and their clients. Post-materialists learn how to enhance the value of litigation just as they learn to overcome the limits of legislative strategies.

When these strategies fail, feminists and environmentalists demand new institutions that will promote democratic pluralism. Because post-materialists understand the significance of state structures, they fight to have the rules of the game tilted in their favour. While praising the virtues of openness and transparency, they ask for entry points
into every stage of the decision-making process. Instead of just demanding access, they
want political executives, bureaucratic agencies, and royal commissions to fund citizens who
challenge well-entrenched interests. By promoting the principle of judicially enforced
political accountability, post-materialists ask Canadian governments to accept elements of
the American tradition. Leading activists argue that Parliament and the provincial
legislatures would be more responsive if they had to honour certain fundamental values.
The policy-making process would still be dominated by elected representatives, but judges
would enforce fully entrenched constitutional guarantees. Inspired by the same idea,
environmentalists have proposed a new statutory language. Instead of following vaguely
worded guidelines, governments would have to respect mandatory duties, strict standards,
and exacting schedules. If they failed, private litigants could ask courts to intervene.
Political élites have resisted some of these demands, but feminists and environmentalists
are changing the structure of the federal state and the rhythm of Canadian politics by
advocating judicial pluralism.

IV. The Plan

I have divided this study into seven chapters. The next four chapters are dedicated
to the historical comparison. In Chapter II, we learn how pre-Charter environmentalists
achieved their objectives. Chapter III examines the feminist movement, but I also begin to
build some comparative themes. The next two chapters are more involved because they
examine the effects of value change and institutional change. In Chapter IV, readers will
find out if post-Charter environmentalists are winning court battles. We complete this
survey in Chapter V by learning how constitutional rights have shaped feminist strategies.
This comparison analyzes a considerable amount of evidence. Those unfamiliar with
judicial politics might feel overwhelmed, especially when we rush through densely written
legal decisions. I developed a game metaphor to help readers understand the different choices that both movements have confronted.

Using this heuristic device, each chapter unfolds in three parts. The first part maps the political context and presents the "rules of the game." We consider the laws and principles that create obstacles and opportunities. The second part selects a cross-section of cases to see how post-materialists "play by the rules of the game." After reviewing the broad patterns of litigation, we examine the effects of standing requirements and other threshold standards. Judges act like "gatekeepers" by admitting certain groups and dismissing others. When feminists and environmentalists manoeuvre around these barriers, they face different strategic problems. To succeed, they have to "overcome the limits of litigation." Winners reap the advantages of judicial decrees. Losers can opt out of the game or fight legislative battles to counter damaging decisions. The third part considers a fascinating strategy. Instead of going back to court with the same flawed tools, post-materialists struggle to "change the rules of the game."

Chapter VI performs one of the most important tests. Using the National Survey on Strategic Choices to peer inside both movements, we will find out if feminists and environmentalists are profoundly committed to a range of post-materialist values. At the same time, readers will discover how advocacy groups and legal advocates evaluate litigation (N = 401). This source of data might reveal that some activists characterize court strategies as costly and dangerous. While expressing similar normative concerns, feminists might be more optimistic than environmentalists. After winning constitutional rights, they might see litigation as a powerful instrument of social reform. In Chapter VII, we can finally solve the puzzle. We can evaluate the rival explanations by sifting through the evidence.

The principal subjects of this study are judges and activists. Although most North American social scientists recognize the growing importance of courts, my research should still interest those who rarely think about judicial politics. It should certainly intrigue
proponents of neo-institutionalism who face the difficult task of explaining change. This theoretical approach insists that political actors cannot escape the effects of institutions—authoritative rules shape their preferences, policy objectives, and strategies. Writing in the late 1970s and early 1980s, the first generation of scholars launched an impressive attack against behaviouralism.102 By showing how nations respond to the same challenges differently, they demonstrated the importance of state structures. Industrialized democracies confronted similar economic shocks, for example, but their responses were shaped by the autonomy of central banks, the configuration of bargaining arrangements, and the organization of business interests. While insightful, these comparative works failed to capture the dynamic nature of political life. Institutions were characterized as constraints that produce highly stable patterns.

To correct this flaw, a second generation of scholars started to investigate different sources of “institutional dynamism.”103 Instead of relying on the comparative method to find cross-national variations, they examine the history of state structures. These works are not static or mechanical because they are designed to study minor shifts and dramatic transformations. According to this growing body of research, formal intervention is only the most visible source of change. Governments can purposely modify institutions by amending written constitutions or destroying entire regulatory regimes. However, some changes are not orchestrated by the state. New social pressures can affect the prominence of old institutions. As they alter the balance of power, previously latent institutions can become

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highly salient. Ideas can be just as forceful. Institutions encourage policy-makers to make certain decisions, but innovative ideas can change the goals of political executives, central agencies, and line departments. My design was inspired by this project. I examine two sources of change. By surveying hundreds of court decisions and reconstructing major legislative battles, I can determine if broad transformations (post-materialist values) are changing the structure of the Canadian state (constitutional guarantees and statutory rights). We can see if these changes are diminishing the authority of certain institutions (legislatures) while raising the prominence of others (courts).

Of course, some readers will find this theoretical problem abstract and esoteric. They might be more intrigued by the normative implications. Although I hope to solve an empirical puzzle, one of the explanations delivers several startling declarations. According to proponents of the court party thesis, post-materialists are "subverting" liberal democracy. Instead of patiently building public support, they are abandoning the great representative institutions. This shift is threatening, they argue, because members of the court party bring wildly ambitious claims. Post-materialists do not ask courts to protect individuals from intrusive governments – they invoke constitutional guarantees to expand the scope of state activity. My study is not designed to discredit these assertions, but the court party thesis will certainly be weakened if feminists and environmentalists pursue a broad range of strategies, including litigation. If post-Charter activists continue to target opposition parties, cabinet ministers, and legislative committees, if they try to influence Parliament and the provincial legislatures, it would be difficult to characterize them as an "undemocratic elite."

CHAPTER TWO

The Environmental Movement in Pre-Charter Canada

I. Mapping the Context

This chapter unearths evidence that challenges the conventional wisdom. The literature suggests that pre-Charter environmentalists rejected litigation after discovering the limits of judicial review. However, the Court Challenges Database reveals that some groups persisted after losing. Readers will learn how litigators enforced a new generation of regulatory statutes by acting as private prosecutors. Students of constitutional politics might be surprised to find out that environmentalists demanded new rights before feminists even considered such a strategy. After considering the changing political context and the rules of the game, we will review the broad patterns of litigation.

The Political Milieu

As the environmental movement emerged during the late 1960s, three overlapping strands developed. While conservationists promoted a relatively uncontroversial set of concerns that stressed the efficient, careful use of natural resources, preservationists wanted to protect wild-spaces, wildlife, and agricultural land from most forms of development. Environmentalists hoped to address deeper, structural problems by emphasizing the

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harmful effects of industrial pollution, fossil fuels, commercial waste, and nuclear power. Despite these differences, pre-Charter activists shared several core assumptions. According to their provocative critique, the market always underestimates the risks posed by toxic substances and the costs of economic growth. After witnessing the pioneering work of international organizations, they insisted that environmental destruction was a global crisis. In 1972, the UN Conference on the Human Environment declared that traditional rights mean very little unless the natural environment "permits a life of dignity and well-being." Guided by this general principle, the participants of the Stockholm Conference established UNEP, the United Nations Environment Program, to cultivate international legal norms and institutional arrangements. The Club of Rome, a group of scientists, urban planners, and economists, issued a stern warning the same year: unchecked population growth and rapid resource depletion pose a series of grave threats.

These ideas produced some of Canada's most notable environmental groups, including Pollution Probe (1969), la Société pour Vaincre la Pollution (1970), Greenpeace (1971), the Nova Scotia Ecology Action Centre (1971), and the Sierra Club of Western Canada (1973). Single-issue groups usually disappeared as quickly as they formed, but some organizations became relatively institutionalized. After relying on confrontational tactics for several years, Pollution Probe decided to dedicate more resources to research and lobbying. Most groups achieved their objectives just by cultivating public awareness.

Ontario activists forced voters to consider the damaging effects of water pollution. They argued that consumers and industries were destroying the Great Lakes by dumping human waste, phosphates, and toxic chemicals. One campaign attracted considerable media coverage by declaring that Lake Erie was on the verge of "dying."

Moved by similar discoveries, Canadians in every region started to view industrial pollution and resource mismanagement as serious problems. During the 1972 federal election campaign, they urged political candidates to consider a range of social, environmental, and energy issues. However, the first wave of public interest dissipated as the pace of economic growth slowed. The federal agenda quickly responded to this shift. Before the 1974 general election, the rival parties debated the merits of wage-and-price controls, not the possible benefits of strict environmental regulations. During the 1979 campaign, the Liberal government promoted the virtues of constitutional change, but the Conservative Party managed to win by promising to fight inflation and unemployment. A year later, the Liberal Party followed a similar strategy to regain power. Instead of discussing air pollution or nuclear proliferation, it pledged to attack unemployment and rising energy prices.

Though uneven, this growing public pressure forced governments to respond. During the early 1970s, federal officials introduced a new generation of environmental laws, including the Clean Air Act and the Environmental Contaminants Act. These statutes were designed to manage the discharge of harmful substances by introducing general standards and summary conviction offences for non-compliance; they did not create absolute liability provisions or indictable offences. The Department of the Environment (1970) was asked to implement and enforce new regulatory measures, but it was granted a small operating budget and weak powers. Although some DOE officials were attracted to the global

8 Harold Clarke, Jane Jenson, Lawrence LeDuc, and Jon Pammett, Absent Mandate: Interpreting Change in Canadian Elections (Toronto: Gage, 1991).
perspective that emerged from the Stockholm Conference, their agency did not have the capacity to anticipate and prevent complex problems. These limitations were caused by the absence of political will. The Liberal government did not want to create a regime that would hinder industrial growth and slow the development of natural resources. Trudeau wanted the provinces to dominate this controversial field of public policy.

The Ontario government was just as reluctant, but environmental activists and opposition critics forced the provincial government to introduce a series of laws during the early 1970s, including the *Environmental Protection Act*. This pressure was sustained by political realities: the Conservative Party was forced to govern without a majority between 1975 and 1981. After becoming the leader of the Liberal Party in 1975, Stuart Smith struggled to raise the profile of environmental issues. Michael Cassidy did the same after accepting the leadership of the NDP in 1977. As strong advocates within the legislature, they persuaded Premier Bill Davis to introduce the *Environmental Assessment Act*. The EAA was, however, like other Ontario statutes. Instead of establishing rigorous standards, strict schedules, and mandatory duties, it gave the executive considerable room to manoeuvre.

Both levels of government refused to make policy-making institutions more accessible. Typically, environmental groups were not allowed to enter an informal bargaining process between bureaucratic officials and their clients. Most laws created barriers, not participatory rights.

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Improvements Act did not force decision-makers to hear from concerned citizens. The Canada Water Act and the Clean Air Act formalized “notice and comment” procedures, but nothing else. Ontario statutes provided several entry points, but they still protected the Crown’s discretionary powers. The core functions of the MOE were shielded from public scrutiny. Bureaucratic officials could issue control orders or grant certificates of approval without consulting anyone. Environmentalists challenged this closed, secretive approach because it appeared to favour polluters. From their perspective, regulations were drafted by cautious, unimaginative officials who sympathized with business interests. Instead of trying to protect the natural environment, industries marshalled their superior resources to challenge standards and evade prosecution. Faced with this problem, environmentalists began to see openness as an “essential countervailing force.”

The Rules of the Game

If environmentalists felt ignored or excluded by cabinet ministers and bureaucratic officials, they could pursue a number of legal claims. By acting as private prosecutors, pre-Charter activists could enforce summary conviction offences. This cause of action is recognized by criminal statutes and certain regulatory laws. To encourage strict compliance, the Fisheries Act promises informants half of any financial penalties imposed by the

courts. Private prosecutors avoid two obstacles that frustrate civil litigants. Anyone can lay an “information,” a formal complaint documenting the facts of an alleged offence. Citizens do not have to meet standing requirements by demonstrating some personal injury or financial stake – they can even prosecute without witnessing the alleged offence. The second advantage is just as significant. Informants can bring their claim without worrying about the threat of a costs award. This traditional barrier is supposed to dissuade frivolous civil claims, not criminal actions.

Pre-Charter environmentalists could question the conduct of lower courts, quasi-judicial tribunals, administrative boards, bureaucratic officials, and cabinet ministers. Quasi-judicial bodies have to respect a series of procedural rules called the principles of natural justice. For example, their decisions cannot be tainted by any degree of bias. A less stringent standard applies to those who perform administrative duties. When statutes do not ask boards and regulators to follow quasi-judicial rules, they only have to meet the duty of fairness. They cannot, for example, purposely exclude evidence brought by interested parties. Elected officials do not have to meet these standards, but they have to respect statutes that create mandatory obligations. Using their discretion, judges can remedy violations by issuing prerogative writs. This inherent power creates a number of legal options. If tribunals ignored the principles of natural justice, environmentalists could quash unfavourable decisions by securing writs of certiorari. Activists could force cabinet ministers to meet mandatory obligations by winning writs of mandamus. If certain decisions violated clearly defined duties, they could ask courts to issue interlocutory or permanent injunctions. Several pre-Charter statutes acknowledged these traditional causes of action.

23 For fuller definitions of these terms, readers can consult the Glossary.
The *Federal Court Act* invites applicants to file two types of claims. Section 18 cases scrutinize administrative orders, while section 28 cases review quasi-judicial decisions. In Ontario, the same procedural rights are recognized by the *Judicial Review Procedure Act* and the *Statutory Powers Procedure Act.*

If these options seemed unattractive, environmentalists might have launched a number of tort actions, including those based on trespass and nuisance. For example, pre-Charter activists could initiate private nuisance claims against gravel companies or mining operations if they damaged property or caused personal injury. Faced with these circumstances, environmentalists could ask common law courts to order injunctions and award damages. If several activists owned land that was crossed by a body of water, and that water was somehow harmed, they could bring an action to protect their riparian rights. The principle of strict liability creates another civil cause of action. Those who bring such claims only have to show that some loss or injury was caused by the escape of a dangerous substance. Defendants have to shoulder the burden of proof – they have to show that reasonable measures were taken to prevent the harm.

Environmentalists could pursue any one of these options, but pre-Charter litigants confronted threshold barriers that limited access. To stop frivolous claims from undermining the judicial system, the common law established strict standing requirements. While several tests were crafted for different types of actions, they asked potential litigants to demonstrate pecuniary or proprietary interests. Not surprisingly, such rules favoured individual property owners and incorporated businesses. Because environmental groups wanted to protect public resources, they could not expect to win access. Common law courts promised to hear public nuisance claims, but they still enforced highly restrictive

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standing requirements. Successful litigants had to show that diffuse problems caused personal injuries. Their stake had to be “direct, distinct, and substantial.” If such problems affected hundreds of property owners or entire communities, they would be sent away. Most of these tort actions failed because another principle was less ambiguous and more authoritative: the Attorney-General is supposed to protect the “public interest.”

Canada’s judicial system became more accessible during the middle of the 1970s, when the Supreme Court decided to liberalize the law of standing. In Thorson, it announced that litigants could question the validity of declaratory statutes because such measures did not establish indictable offences or mandatory duties.29 In McNeil, the high court broadened this rule by deciding that responsible applicants could challenge regulatory statutes that “directly affected” members of the public.30 These changes only helped litigants who wanted to attack federal and provincial laws. If environmentalists asked for other remedies, they still faced the restrictive public nuisance rule. For example, Thorson and McNeil did not help pre-Charter activists who invited courts to issue prerogative writs. Activists stopped by this obstacle could seek leave to intervene. By winning party status, intervenors could examine or cross-examine witnesses, file motions, submit evidence, and appeal adverse rulings. By appearing as friends of the court, they could present oral arguments and written submissions. However, most courts discouraged intervenors by asking applicants to demonstrate a direct stake, usually pecuniary. Canada’s judiciary rarely granted party status to “strangers” because it feared that intervenors would slow the process of adjudication by introducing new issues.

Private prosecutors did not have to meet any of these standing tests, but they faced another set of obstacles. This form of legal action can be very expensive because complainants, like the Crown, have to meet the criminal burden of proof (beyond a reasonable doubt). Some informants have to hire expert witnesses and cover the costs of

scientific reports. If they manage to prove their claims, courts can only enforce certain sanctions. Sympathetic judges cannot craft tougher remedies or raise the level of fines—they are usually bound by limits that legislators choose. Private prosecutors also confront two inherent problems. Citizens can lay charges, but the Crown can take over any prosecution. The Attorney-General can even decide to abandon seemingly strong cases. The second limitation is just as significant. Although highly publicized convictions might discourage future offences, environmentalists cannot prevent harmful activities by laying charges—they can only react. After 1978, private prosecutors confronted another barrier. In *Sault Ste. Marie*, the Supreme Court affirmed the defence of due diligence.31 To enforce regulatory offences, private complainants and Crown prosecutors only have to demonstrate that certain injurious acts occurred. They do not have to prove that defendants intended to cause harm. However, Canada’s highest court decided that defendants can escape charges simply by demonstrating “reasonable care.” A mining company can try to show, for example, that a pollution prevention plan was based on the best available technology. This judgement forces potential complainants to speculate about possible preventive measures.

Pre-Charter activists could initiate civil actions, but they confronted several risks. Civil proceedings are usually expensive and time-consuming because the rival parties can submit an endless number of motions. Litigants face a more fundamental problem: the common law was designed to protect proprietary interests. The rules governing nuisance and trespass, for example, only reach diffuse problems indirectly. Courts can award damages to compensate some private loss or injury, but they cannot issue permanent injunctions to stop public problems.32 Environmentalists could try to organize class actions, but the common law favours disputes between two parties. Pre-Charter applicants had to

constitute a clearly defined class with nearly identical interests.\(^{33}\) The “class representative,” the individual who dared to bring such a claim, was forced to bear an enormous financial burden. In 1983, the Supreme Court “virtually eliminated” this legal option by deciding that Ontario’s *Rules of Civil Procedure* did not provide the framework to manage class proceedings.\(^{34}\)

If environmentalists were undaunted, they faced another obstacle. Civil claims do not have to meet the higher burden of proof reserved for criminal cases, but the lower standard is still a steep hurdle for those who have to demonstrate the indirect effects of toxic substances.\(^{35}\) Plaintiffs have to trace the causal path between various injuries and a single source. This task is often complicated by the state of scientific data. Environmentalists routinely cite epidemiological evidence, for example, but this branch of inquiry suffers from several inherent problems.\(^{36}\) Because experiments cannot be conducted in highly controlled settings, the subjects of study are exposed to thousands of potentially harmful substances. Researchers are forced to contend with long latency periods, the uneven nature of human memory, and incomplete historical records.

Most judicial review claims are easy to prove because they raise purely procedural questions, but environmental groups confronted two traps if they pursued this avenue. One of the most compelling remedies, mandamus, is only effective when statutes establish


mandatory duties. Courts are willing to enforce guidelines, instructions, and schedules if they are presented as imperatives. They usually refuse to read onerous duties into vaguely worded declarations. Most pre-Charter statutes assigned the Crown broad discretionary powers without creating mandatory duties that could be enforced by courts – they were designed to diminish the scope and reach of judicial inquiry. The second problem was even more daunting. Traditional prerogative remedies are not designed to prevent harmful but lawful acts. Litigants cannot, for example, ask the courts to revoke valid certificates of approval because they allow companies to discharge toxic substances. Courts will not force cabinet ministers to rewrite lawful regulations that appear to favour polluters. When municipal governments or line departments face such claims, they can simply present the defence of statutory authority. They can win just by proving compliance.

If environmentalists were not dissuaded by these hurdles, they still confronted one of the most intimidating deterrents. Canada’s judiciary enforced a deeply rooted common law principle to discourage frivolous claims: the losing party should pay the expenses of the prevailing party. Private prosecutors do not face the threat of a damaging costs award, but civil litigants do. Courts usually apply the “two-way” or “party-and-party” rule, which forces the loser to pay roughly half of the expenses incurred by the winner. If losing parties ask pressing legal questions, judges can use their discretion to wave costs. However, courts can also punish “aberrant behaviour” by awarding costs against the losing party and the wayward lawyer. These rules might have dissuaded the most determined activists. Instead of risking financial ruin, community groups with small budgets might have stayed away from the judicial system.

The literature acknowledges many of these obstacles, but it stresses the absence of certain statutory rights and common law principles. Most American regulatory laws invite private litigants to enforce crucial provisions. Litigants can, for example, prosecute those

who violate the Clean Air Act and the Toxic Substances Control Act. Some statutes even allow applicants to seek special forms of relief. The Clean Water Act invites concerned citizens to sue for damages. Citizens can also affect the rule-making process by suing administrators who fail to perform mandatory duties. These causes of action remove an important element of uncertainty – environmental groups may not win, but they do not have to exhaust their resources just to win standing. The public trust doctrine creates another cluster of opportunities. According to this principle, natural resources should not be divided into parcels by those who only care about their monetary worth. As valuable “gifts of nature,” they should be protected for whole nations and future generations. Certain rights and obligations spring from this doctrine. As accountable representatives, those in power have to manage natural resources wisely. If they ignore their special duties, private litigants can ask the courts to intervene. A number of federal and state laws acknowledge the public trust doctrine to varying degrees, including the National Environmental Policy Act and the Michigan Environmental Protection Act. Canadian litigants cannot base their claims on similar measures. The common law protects fishing and navigation rights enjoyed by the public, but it stops short of recognizing anything broader. Even though a few statutes hint at such a doctrine, they do not codify any broad duties. This deliberate omission forced pre-Charter litigants to search elsewhere.

After considering these seemingly insurmountable obstacles, most students of environmental politics characterized litigation as a deeply flawed strategy. Moved by

38 Clean Air Act, 42 U.S.C. 7401; Toxic Substances Control Act, 15 USC 2601. General judicial review rights are protected by the Administrative Procedures Act (5 U.S.C 500-596) and the Judicial Review Act (5 U.S.C. 701).
39 Clean Water Act, 33 U.S.C. 1251. Financial awards are given to the Environmental Protection Agency.
41 National Environmental Policy Act, 42 U.S.C. 4321; Michigan Environmental Protection Act, M.C.L.A. 691.
empirical research and normative concerns, they warned environmentalists that Canada's regulatory regime was tilted in favour of the polluting industries. Instead of correcting this obvious imbalance, the judiciary simply "expanded the range of defences open to those accused of committing environmental offences." Despite the important victories achieved by American litigators, these critics concluded that "pro-development interests had a firm grip on the law."

II. Playing by the Rules of the Game

There is a reward for learning such a complex set of rules. Instead of speculating about their effects, we can use the Court Challenges Database to determine the frequency of participation, the sites of court battles, and the legal success rate. The explanations disagree. (i) The Charter revolution thesis offers a gloomy prediction. Because environmentalists cannot base their claims on boldly worded constitutional rights, they will reject litigation. (ii) The court party thesis suggests that post-materialists are drawn to the judicial form, but it recognizes the institutional constraints. Although environmentalists want to rely on litigation, they cannot. After losing a string of decisions during the early 1970s, pre-Charter activists will abandon the courts. (iii) If the judicial pluralism thesis is correct, we should find the very opposite. Environmentalists will enter the courtroom to punish polluters, embarrass unresponsive governments, and expose closed regulatory regimes. They might lose most of their claims, but these sophisticated activists will learn

how to overcome the limits of litigation. To counter the effects of unfavourable decisions, they will graft litigation onto conventional forms of collective action.

**Environmentalists in Court**

Pre-Charter litigants confronted a series of legal barriers, but decision-making institutions were closed and governing parties seemed unresponsive. According to Graph II, environmentalists responded to these competing incentives by launching about six claims a year, except in 1972 when the rate doubled. This increase occurred just as Ontario introduced the *Environmental Protection Act*. Activists marshalled their resources to enforce the EPA. Curiously, there is another jump during the early 1980s, when Canada’s first ministers were drafting the patriation agreement. This horseshoe pattern appears to support the judicial pluralism thesis. Most groups designed legislative strategies; they presented their concerns to standing committees and pressured cabinet ministers. However,
some activists were determined to fight court battles. Governments refused to create new legal rights, but some groups hoped to win modest victories.

Table I: The Organizational Form of Environmental Challenges (1970-1981)

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Advocacy Group</td>
<td>19</td>
</tr>
<tr>
<td>Individual(s)</td>
<td>17</td>
</tr>
<tr>
<td>Strategic Pair</td>
<td>12</td>
</tr>
<tr>
<td>Advocacy Group</td>
<td>8</td>
</tr>
<tr>
<td>Court Coalition</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

To understand the organizational form of participation, we have to remember a simple typology.⁴⁶ Even though “advocacy groups” pursue different forms of collective action, they rarely enter the judicial process. Although they promote some of the same policy objectives, “legal advocacy groups” have the expertise to appear before quasi-judicial tribunals and common law courts. Advocacy groups and legal advocacy groups can form temporary alliances. When two organizations work together, they are called “strategic pairs.” When three or more groups form an alliance, they are called “court coalitions.” Table I documents the effects of strict standing requirements. Instead of confronting the traditional threshold standards, advocacy groups worked with like-minded individuals as out-of-court supporters. Instead of wasting their resources trying to win access, they convened press conferences or pressured bureaucratic officials. Most of the claims were presented by legal advocacy groups. They sponsored individuals or established strategic pairs and court coalitions to improve their chances of winning.

These patterns reflect changes that affected the very structure of the environmental movement. After watching American litigants win important court decisions, Canadian

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⁴⁶ These terms can be found in the Glossary.
activists created three legal advocacy groups. In 1970, a small network of lawyers, scientists, and community activists established CELA, the Canadian Environmental Law Association, and CELRF, the Canadian Environmental Law Research Foundation. CELRF was asked to promote law reform by organizing conferences, appearing before legislative committees, and publishing a wide range of material, including the *Canadian Environmental Law Reports*. CELA was asked to perform a more specialized function — it was supposed to expand the strategic repertoire by providing legal advice to individuals, local groups, and national organizations. The founders hoped that litigation would embarrass indifferent governments and attack bureaucratic inertia. As the first general counsel, David Estrin initiated an aggressive campaign to enforce Ontario’s *Environmental Protection Act*. To prod the Davis cabinet and the new Ministry of Environment, he filed a flurry of claims between 1970 and 1973. CELA and CELRF published *Environment on Trial* in 1974. As a practical manual, it discussed the benefits and risks of different strategies. Community groups considering legal action could find lists of state officials, copies of subpoenas, and EPA “smoke density charts.” As a polemic, it announced their principal goal — to win an “environmental bill of rights” in every Canadian jurisdiction. CELA entered the courtroom less frequently during the late 1970s because the Conservative government gave administrative boards and quasi-judicial tribunals important responsibilities. At the same time, CELA agreed to operate as a legal aid clinic. The new mandate provided badly needed resources, but it also imposed certain restrictions. Instead of sending threatening letters to MOE officials and promising to launch disruptive

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47 The Environmental Law Centre was established in Alberta in 1981, but it does not launch legal challenges.  
49 David Estrin was general counsel until 1973, when he went to work on the *James Bay and Northern Québec Claims Settlement Act* (S.C. 1976, c. 32).  
50 David Estrin and John Swaigen, eds., *Environment on Trial* (Toronto: CELRF and CELA, 1974).  
51 Personal interview with David Estrin, October 1995.
challenges, CELA advocates provided sound advice.\textsuperscript{52} They presented their concerns to the Ontario Municipal Board and the Environmental Assessment Board, not the Ontario High Court of Justice.

WCELA, the West Coast Environmental Law Association, was established in 1974 by the Sierra Club, the B.C. Wildlife Federation, and a group of law students at University of British Columbia.\textsuperscript{53} After receiving grants from the British Columbia Law Foundation, it established the West Coast Environmental Law Research Foundation to conduct policy analysis and co-ordinate public education campaigns. By working together, they published reports, pressured regulators, appeared before legislative committees, and launched court challenges. During the pre-Charter period, about fifteen percent of WCELA's budget was dedicated to litigation. In 1976, Andrew Roman established PIAC, the Public Interest Advocacy Centre, to represent consumers, environmentalists, and welfare recipients before administrative tribunals and common law courts. PIAC has received funding from the federal government to sponsor individuals and advocacy groups, including the Saskatoon Environmental Society, the Canadian Arctic Resources Committee, and the Consumers' Association of Canada.\textsuperscript{54}

When these groups entered the courtroom, they raised different policy issues. Table II reveals that a large proportion of litigants wanted to protect one of Canada's greatest natural resources – water. CELA guarded the Great Lakes by enforcing the \textit{Environmental Protection Act} and WCELA invoked the \textit{Fisheries Act} to protect the Georgia Straight. Groups in Southern Ontario were moved by another pressing concern: the endless flow of residential, commercial, and industrial waste. They hoped that highly publicized court challenges would change consumer attitudes and embarrass municipal authorities. The small number of wilderness and wildlife claims is not too surprising. Provincial officials promoted massive


\textsuperscript{54} Personal interview with Andrew Roman, June 1995.
engineering projects that threatened entire ecosystems. However, governments refused to introduce environmental assessment laws that established rigorous standards and mandatory duties.

Table II: The Issues Raised by Environmental Litigants (1970-1981)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water Pollution</td>
<td>17</td>
</tr>
<tr>
<td>Waste</td>
<td>14</td>
</tr>
<tr>
<td>Air Pollution</td>
<td>6</td>
</tr>
<tr>
<td>Noise Pollution</td>
<td>6</td>
</tr>
<tr>
<td>Land Preservation</td>
<td>6</td>
</tr>
<tr>
<td>Wilderness and Wildlife</td>
<td>5</td>
</tr>
<tr>
<td>Energy</td>
<td>4</td>
</tr>
<tr>
<td>Pesticides and Herbicides</td>
<td>2</td>
</tr>
<tr>
<td>Forests</td>
<td>1</td>
</tr>
<tr>
<td>Indoor Air Quality</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Pre-Charter litigants raised different issues, but they were moved by the same strategic calculations. Because environmentalists believed that policy-making institutions were dominated by the old polluting industries, they viewed courtrooms as crucial entry points. When activists were excluded from bargaining arrangements, they could attract the media and anger governments by pressing their claims in court.55 During the early 1970s, WCELA hoped that litigation would expose a secretive regulatory regime. The B.C. government quietly “gutted” the Health Act without informing the public because it wanted to undermine a new trend: legal challenges designed to protect the environment.56 WCELA and a private informant countered this tactic by persuading a Provincial Court judge to prevent certain types of development around Shuswap Lake.57

55 Personal interview with David Estrin, October 1995.
Pre-Charter litigants also punished governments that ignored their own laws. Instead of hoping that MOE officials would enforce the *Ontario Water Resources Act*, CELA worked with private informants who wanted to prosecute polluters. In 1973, CELA urged the Air Management Branch to charge one of Northern Ontario’s principal employers, INCO. Although it refused to take any action, CELA was able to prove that INCO’s Copper Cliff Refinery had violated section 13 of the EPA. During the late 1970s, the Davis cabinet established a royal commission to study PCBs instead of using the new administrative regime. CELA failed to win a writ of mandamus, but it publicized a damaging piece of evidence: the government was circumventing the Environmental Assessment Board. CELA pursued the same strategy to break up secretive arrangements between line departments and their clients. In 1980, federal and provincial officials refused to prosecute Cyanamid Canada because it promised to reduce toxic emissions over a four year period. Unhappy with this control order, CELA decided to enforce the *Fisheries Act*. It managed to prove that Cyanamid was causing irreversible harm to aquatic life in the Welland River. These cases reveal one of the benefits of litigation. Environmentalists could issue authoritative ultimatums – they could promise to seek legal remedies if political executives ignored their concerns.

This defiance was directed at a broad range of targets. The figures in Table III appear to support the judicial pluralism thesis. Pre-Charter activists explored every available option. A large proportion of litigants attacked polluters directly. By acting as private prosecutors, they asked Canada’s judiciary to enforce summary conviction offences.

An even larger number of claims targeted public authorities who exercised statutory powers. Municipal governments were attacked, for example, by those opposed to pesticide spraying and waste disposal sites. By asking courts to issue certiorari writs, environmentalists questioned administrative boards and quasi-judicial tribunals. Elected officials escaped the pre-Charter period virtually unscathed. Federal and provincial cabinet ministers faced just nine mandamus applications. Environmental litigants challenged the validity of one provincial statute, but they never asked the courts to review federal laws.

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals and Corporations</td>
<td>25</td>
</tr>
<tr>
<td>Provincial Administrative Decisions</td>
<td>13</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>10</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>5</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>4</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>4</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>1</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>0</td>
</tr>
<tr>
<td>Hostile Actions</td>
<td>0</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

We should not be surprised to learn that environmentalists brought their early claims to every level of Canada's judicial system. They could not explore the merits of various legal arguments by bringing all of their challenges to a single court. Table IV reveals that judges in Ontario and British Columbia considered most of the cases, roughly seventy-six percent. They convened fifty-seven hearings to consider a wide array of claims. This regional concentration corresponds to broad demographic variables, but one piece of evidence is startling. Québec courts did not hear a single claim – judges in English Canada

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64 Table IV records the number of hearings because some disputes generate several hearings before different courts. Provincial courts, section 96 courts, and section 101 courts convene hearings to settle disputes. They entertain pre-trial motions, answer procedural questions, review evidence, and consider appeals. Naturally, not all hearings are trials.
considered every environmental challenge. Readers should not doubt the comprehensiveness of the Court Challenges Database; it is considerably more thorough than any informal survey found in the literature. The Charter revolution thesis comes the closest to explaining

Table IV: Where Environmentalists Take Their Legal Claims (1970-1981)

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ontario High Court of Justice</td>
<td>17</td>
</tr>
<tr>
<td>Ontario Provincial Court</td>
<td>17</td>
</tr>
<tr>
<td>B.C. Supreme Court</td>
<td>13</td>
</tr>
<tr>
<td>Federal Court - Appeal Division</td>
<td>6</td>
</tr>
<tr>
<td>Federal Court - Trial Division</td>
<td>5</td>
</tr>
<tr>
<td>Ontario Court of Appeal</td>
<td>4</td>
</tr>
<tr>
<td>B.C. Court of Appeal</td>
<td>3</td>
</tr>
<tr>
<td>B.C. Provincial Court</td>
<td>3</td>
</tr>
<tr>
<td>Manitoba Court of Appeal</td>
<td>2</td>
</tr>
<tr>
<td>Supreme Court of Canada</td>
<td>1</td>
</tr>
<tr>
<td>Nova Scotia Supreme Court - Appeal Division</td>
<td>1</td>
</tr>
<tr>
<td>Manitoba Court of Queen's Bench</td>
<td>1</td>
</tr>
<tr>
<td>Nova Scotia Supreme Court - Trial Division</td>
<td>1</td>
</tr>
<tr>
<td>Saskatchewan Court of Queen's Bench</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>75</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

this pattern of divergence, but it predicts that such a gap will appear after 1982, when English Canadian political culture is transformed by constitutional rights. Using the same logic, it might be possible to argue that Québec francophones resisted the political purpose of the Canadian Bill of Rights. Still, another force must be at work because environmentalists did not base any of their claims on this quasi-constitutional document. We should consider the possibility that institutional variables have reinforced a distinct political culture. The civil law tradition discourages novel legal strategies by constraining the interpretive nature of judicial review and most regulatory statutes are designed to cultivate consensus, not adversarialism.  

Instead of resisting this policy-making style, environmentalists bargained with bureaucratic officials and industry representatives or

pursued their objectives outside the formal policy-making process. Though attractive to English Canadian activists, the American tradition did not lure Québec groups into the courtroom. They did not see litigation as an important political instrument.

Judges as Gatekeepers

Environmental groups hoped that litigation would punish polluters and pry open secretive bargaining arrangements, but Canada’s judiciary might have discouraged these activists by preserving the great common law barriers: standing and justiciability. To understand how judges perform this gatekeeping function, we have to consider the legal form of participation. Four types of litigants can enter the courtroom. Those with “party status” can examine witnesses, file motions, introduce evidence, and appeal adverse rulings. At the same time, they have to shoulder certain liabilities. For example, judges routinely apply the law of costs, forcing the losers to pay the winners some portion of their expenses. If this option seems unattractive, activists can seek “intervenor status” to present oral arguments and written submissions about pressing controversies. Crown attorneys enforce indictable offences, but ordinary citizens can enforce summary conviction offences by acting as “private prosecutors.” Finally, legal advocacy groups can represent individuals or advocacy groups as “sponsors.”

Table V reveals a cunning strategy. Almost half of the litigants side-stepped the law of standing altogether by participating as private prosecutors. Complainants did not have to waste valuable resources just to secure access. Some advocacy groups brought civil claims as parties, but environmentalists never participated as intervenors. This strategic choice appears to reflect the same sharp instincts. Knowing that courts rejected most

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67 These terms can be found in the Glossary.
applications, pre-Charter activists explored other possibilities. Table VI allows us to examine the legal status of groups that presented more than one claim. After evaluating

Table V: The Legal Status of Environmental Groups (1970-1981)

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Prosecutor</td>
<td>20</td>
</tr>
<tr>
<td>Party</td>
<td>11</td>
</tr>
<tr>
<td>Sponsor</td>
<td>9</td>
</tr>
<tr>
<td>Sponsor and Party</td>
<td>5</td>
</tr>
<tr>
<td>Intervenor</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>45</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

the risks and benefits of different claims, CELA lawyers decided to rely on private prosecutions. WCELA initiated fewer actions, but it also preferred to enforce regulatory statutes by acting as a private prosecutor. Advocacy groups usually asked for party status, but some were stopped by the old public nuisance rule. When this happened to Pollution Probe and the Federation of Ontario Naturalists, they assisted individual litigants at a
distance. As out-of-court supporters, they raised badly needed funds, pressured legislators, and organized press conferences.

When we examine some of the civil claims, it is easy to understand why CELA and WCELA participated as private prosecutors. During the early 1970s, most judges automatically asked applicants to demonstrate pecuniary or proprietary interests. One of the first claims challenged the validity of a sewage permit, but the B.C. Supreme Court decided that citizens acting in the "public interest" could not raise objections. Pollution Probe and CELA confronted the same barrier when they attempted to stop Lake Ontario Cement from excavating sand dunes on Crown land. The High Court of Justice dismissed the application because the applicants failed to demonstrate a "special, distinct interest." According to Justice Mayer Lerner, Canada's courts must dismiss "ill-founded actions" that simply express a particular "philosophy." Another coalition wanted to stop a construction project that jeopardized the Elora Gorge, but Ontario's High Court of Justice refused to abandon the law of England. Justice Francis Weatherston insisted that "public rights can only be enforced by the Sovereign acting through the Attorney-General." He explained why this rule must be enforced: state officials would be overwhelmed if "every crank were at liberty to drag them at any time before the courts." This barrier did not disappear after Thorson and McNeil because most courts narrowly interpreted the new standing rule. In 1980, a group of determined activists failed to challenge the seal hunt because they asked for the wrong remedy. The Federal Court decided that litigants could only ask the courts to review statutes — they could not present mandamus petitions. A year later, Greenpeace wanted to stop the Vancouver Public Aquarium from importing killer whales, but it was

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68 Re Piatocka and Utah Constuction Mining [1971] 5 W.W.R. 626; Pollution Control Act, S.B.C. 1967, c. 34.
71 Re Canadians for the Abolition of the Seal Hunt and Minister of Fisheries and Environment (1980) 10 C.E.L.R. 1; Fisheries Act, R.S.C. 1985, c. F-14.
stopped by the B.C. Supreme Court. Justice Howard Callaghan decided that private individuals have no inherent right to seek injunctive relief when they are trying to protect the general public.

Some courts dismissed claims because they raised speculative or “inappropriate” questions. For example, the Binbrook Anti-Dump Committee wanted to show that an environmental assessment purposely ignored compelling alternatives, but the Ontario Divisional Court refused to assess the merits of any study. Justice Donald Steele insisted that courts cannot “decide whether a report is good or bad, but only whether it respects certain statutory requirements.” In 1981, the Committee for Justice and Liberty wanted to prevent the infamous Mackenzie Valley Pipeline. The plaintiffs wanted to argue that members of the National Energy Board failed to consider a number of “environmental and socio-economic variables.” However, the Federal Court of Appeal could not find any “triable questions.” It quickly rejected the political purpose of this claim.

A few groups were successful because regulatory statutes replaced common law requirements. The Saanich Inlet Preservation Society wanted to stop the Cowichan Valley Regional District from storing petroleum products in “environmentally sensitive areas.” The public nuisance rule would have prevented such an action, but the B.C. Municipal Act allows “sufficiently interested” citizens to file judicial review applications if they believe that certain by-laws should be quashed. However, very few pre-Charter laws included these provisions. The most significant standing victory occurred in 1974, just after the Supreme Court issued Thorson. The plaintiff asked for an injunction to stop the City

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of Winnipeg from spraying a pesticide called methoxychlor. Surprisingly, the Manitoba Court of Appeal decided that citizens have the right to enforce statutory provisions without the consent of the Attorney-General. Environmental litigators celebrated this ruling. David Estrin found it "heartening" to know that some members of the judiciary dared to make "bold, innovative" decisions.\(^7\)

**Confronting the Limits of Litigation**

If environmentalists managed to win access, they confronted another layer of obstacles. Even if judges expressed a degree of sympathy, courts had to enforce strict standards of proof. As well-financed defendants, public authorities and private corporations could use their resources to present persuasive legal arguments. According to Table VII,

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Wins</th>
<th>Number of Losses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals and Corporations</td>
<td>17</td>
<td>7</td>
</tr>
<tr>
<td>Provincial Administrative Decisions</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total (1)</strong></td>
<td><strong>27</strong></td>
<td><strong>34</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

private prosecutors were very successful. Environmentalists punished mining operations and construction companies by enforcing regulatory laws. Courts were also willing to question provincial agencies that exercised statutory powers. The general success rate seems to support the judicial pluralism thesis. By learning how to overcome some of the limits of litigation, pre-Charter activists managed to win forty-four percent of their claims.

\(^7\) Estrin, "Annual Survey of Environmental Law," 431.
However, without constitutional guarantees or broadly framed statutory rights, they did not pose a threat to those at the pinnacle of Canada’s political system. One action attacked a provincial law, but it was dismissed. When environmentalists asked courts to issue mandamus writs, they always failed.

When we examine the cases more closely, the Charter revolution thesis seems even stronger. Environmentalists developed novel arguments and cunning strategies, but most groups were soundly defeated. A large proportion of litigants failed because courts were unwilling to question the expertise of administrative boards and quasi-judicial tribunals. This cluster of cases reveals a form of judicial restraint that most students of political science overlook. Some litigants wanted the courts to sift through the substance of a ruling. In 1974, Pollution Probe and the Consumers’ Association of Canada asked the Federal Court of Appeal to overturn an order issued by the National Energy Board because, they alleged, it did not consider the “social costs” of exporting electricity. After questioning whether the claim raised any justiciable issues, Chief Justice Roy Jackett argued that courts do not have the right to enforce anything but the procedural rules imposed by the principle of natural justice. Boards and tribunals can, he insisted, use their discretion to adopt rules that stray from the common law tradition.

Most judicial review claims encouraged courts to expand the scope of natural justice. This is a crucial point. Environmentalists believed that all public authorities should respect these procedural requirements – even those who perform administrative tasks. If the judiciary had agreed, this strategy would have diminished the discretionary powers exercised by thousands of bureaucrats and administrators. One of CELA’s early claims asked the Ontario High Court of Justice to quash certificates of approval that were granted to a charcoal company.\(^7\) However, Justice James Donnelly decided that Ontario’s EPA did not require the Director of Air Management to convene a public hearing before granting an

\(^7\) Heineman v. Ontario and Adventure Charcoal (1972) Canadian Environmental Law News 1(3); Environmental Protection Act, R.S.O. 1990, c. E-19.
approval. The principles of natural justice do not apply, he decided, because the agent was not acting "in a judicial manner." David Estrin called Heineman one of the worst pre-Charter decisions because it "insulated" a core element of the regulatory process from judicial review.\textsuperscript{79} WCELA confronted the same barrier. In 1976, the B.C. Wildlife Federation wanted the B.C. Supreme Court to stop a construction company from filling in three streams. WCELA lawyers argued that statutory provisions compelled the Comptroller of Water Rights to convene a public hearing before issuing the approval, but Justice Henry McKay decided that issuing water permits was a "purely administrative" task.\textsuperscript{80} In 1977, a group of concerned citizens asked the Federal Court of Appeal to quash a dumping license that was granted to Eldorado Nuclear Limited, but Justice Rod Kerr dismissed this section 28 application because the Atomic Energy Control Board did not make a "quasi-judicial ruling."\textsuperscript{81} CELA lawyers criticized this decision because it confirmed the discretionary nature of administrative decisions — it challenged their view that judicial review applications could make all public officials more accountable.

Some environmental groups managed to evade the old standing requirements, but they confronted another one of the great common law principles: those who assert must prove. In 1972, CELA asked the Ontario High Court of Justice for an interlocutory injunction to close a garbage dump, but Justice John Cromarty dismissed the petition because there was no "concrete evidence" that irreparable harm would occur.\textsuperscript{82} Following this defeat, David Estrin argued that Canada's judiciary must develop a special test for interlocutory injunctions when environmental issues are at stake because "it is nearly impossible for plaintiffs to demonstrate complex causal links." This tenacious litigator even conceded that courts seemed unwilling to stop public problems. A second challenge failed because the

\textsuperscript{79} Personal interview with David Estrin, October 1995.
\textsuperscript{80} Re B.C. Wildlife Federation and DeBeck (1976) 1 B.C.L.R. 244; Water Act, R.S.B.C. 1960, c. 405.
\textsuperscript{82} \textit{Halliday v. Berrill} (1972) \textit{Canadian Environmental Law News} 1(3).
litigant, a Winnipeg environmentalist, failed to show that methoxychlor would cause irreparable harm. Justice Roy Matas simply decided that a single spraying of this pesticide would not produce any damaging effects.\(^8\)

Pre-Charter activists did not have the resources or expertise to generate their own scientific data. State officials exacerbated this problem by refusing to release potentially damaging evidence; political executives and senior bureaucrats wanted to preserve the closed, co-operative arrangements that shielded their clients. To dissuade environmentalists who demanded internal memoranda or departmental studies, they simply characterized scientific research as uncertain and inconclusive.\(^4\) One of CELA's early challenges failed because Ontario's MOE refused to provide crucial data. Without this evidence, it could not prove that sewage from the City of Sudbury was damaging the Whitson River.\(^5\) This barrier also hindered civil actions. In 1979, after the B.C. Minister of Forests extended a controversial tree farm license, the Islands Protection Society asked for a writ of certiorari. The B.C. Supreme Court was willing to apply the principles of procedural fairness, but it could not find any compelling evidence. According to Justice George Murray, the affidavits only presented "statements of belief."\(^6\) In 1980, a group of activists wanted the Trudeau government to punish Canadians who violated the Seal Protection Regulations, but the Federal Court could not find any proof that public officials were deliberately pursuing a policy of "non-enforcement."\(^7\) After rejecting the heart of their claim, Justice A.M. Walsh scolded the plaintiffs for asking the courts to do what legislators would not — end the seal hunt.

If pre-Charter activists somehow managed to side-step these obstacles, they confronted judicial deference. Courts were very reluctant to regulate the behaviour of cabinet...
Chapter Two: The Environmental Movement in Pre-Charter Canada

ministers. This form of restraint was provocative because judges often disclosed doubts about their own legitimacy. When CELA and Pollution Probe brought the sand dunes challenge, the Ontario High Court of Justice expressed little sympathy. The plaintiffs claimed that section 2 of the Provincial Parks Act created a public trust, forcing the government to protect ecologically significant sites. Justice Mayer Lerner, unable to repress his scorn, characterized this assertion as "pretentious" because it was based on "aesthetic" complaints. After deciding that section 2 did not impose any binding duty, he issued a steep costs award. CELA confronted the same barrier in 1973, when it represented two plaintiffs who wanted to challenge Jean Marchand, the federal Minister of Transportation. They claimed that low-flying planes landing at the Markham Airport breached the Aeronautics Act, but the Federal Court quickly dismissed this argument by acknowledging the Crown's "considerable" discretionary powers. Justice Louis Pratte insisted that courts cannot transform vague guidelines into mandatory duties.

These cases help us understand why most environmental groups failed to win court victories, but the general success rate obscures some of the broader limits of litigation. Unsympathetic judges diminished the significance of legal victories. For example, after deciding that Adventure Charcoal violated several regulations, an Ontario Provincial Court judge awarded costs against the private informant. Judge McLean enforced the EPA, but he found the action "costly, irresponsible, and frivolous." Other courts decided not to order substantial fines. CELA won Strathy v. Konvey, but the defendant, a construction company, was only fined twenty-five dollars for cutting down a long row of maple trees. In 1981, after declaring that Cyanamid violated the Fisheries Act, another Ontario Provincial Court

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88 For example, see "Cabinet supremacy challenged," Winnipeg Free Press, 8 June 1978, 14.
judge simply ordered the company to pay a one-dollar fine. Litigators did not walk into the courtroom without understanding these obvious limits. They wanted courts to breathe life into forgotten statutes, read new obligations into permissive clauses, and promote environmental values, but some obstacles seemed insurmountable. According to one experienced activist, most judges were "profoundly puzzled" by the very appearance of advocacy groups. Instead of considering the substance of their claims, they would send environmentalists to a more "appropriate" forum, the Ontario Legislative Assembly. Environmentalists expected judges to express indifference and even hostility, but they were thoroughly intimidated by the traditional costs rule. After losing the sand dunes challenge, CELA and Pollution Probe needed several years to pay the four-thousand dollar award. Near the end of the pre-Charter period, some activists began to doubt the value of litigation. In 1981, as Canada's first ministers were drafting the Charter, CELA's general counsel did not characterize legal action as an instrument of reform. John Swaigen conceded that environmentalists have more influence when they use the media to change public opinion.

**Overcoming the Limits of Litigation**

If the study ended here, the evidence would support the Charter revolution thesis. Unable to base their claims on powerful constitutional rights, most environmentalists left the courtroom without achieving their objectives. However, some groups did manage to win. Despite the conservative character of Canada's judiciary, some courts dared to accept the arguments presented by environmentalists. A cluster of cases succeeded because judges

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94 Personal interview with Ann Wordsworth, September 1995. She later became one of Ruth Grier's political advisors.
96 Personal interview with John Swaigen, July 1995.
enforced the principles of fairness and natural justice. The first recorded case was successful because the B.C. Director of Pollution Control stopped concerned citizens from admitting evidence.\textsuperscript{97} The \textit{Pollution Control Act} included a privative clause to restrict the reach of judicial inquiry, but the B.C. Supreme Court still issued a writ of certiorari.\textsuperscript{98} In 1979, WCELA persuaded the same court to overturn a ruling made by the Pesticide Control Appeal Board.\textsuperscript{99} The plaintiffs offered several arguments to prevent the use of herbicides around Okanagan Lake. They insisted, for example, that several hearings were too informal. The defendant lost this court battle because it delegated final approval to another public authority. Some of these judicial review petitions challenged closed regulatory regimes. In 1980, the Ontario High Court of Justice quashed a ruling because the Director of Environmental Approvals failed to convene public meetings.\textsuperscript{100} The plaintiffs managed to win an authoritative declaration: when certificates of approval for waste disposal sites impose “significantly different” requirements, the regulators must consult interested citizens.

Most successful claims asked the courts to enforce summary conviction offences. Compared to civil actions, this legal strategy was efficient and effective. Private informants could side-step the law of standing and avoid the threat of a costs award. The higher burden of proof was not a major obstacle because few cases had to demonstrate complex causal links.\textsuperscript{101} In 1972, CELA persuaded an Ontario Provincial Court judge that North Canadian Enterprises harmed Silver Creek by discharging iron-laden effluent. After deciding that CELA did not have to prove intent, Chief Justice Anthony Vannini declared

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{97} \textit{Re Application of Hooker Chemicals} (1970) 75 W.W.R. 354; \textit{Pollution Control Act}, S.B.C. 1967, c. 34.
\item \textsuperscript{98} The B.C. Supreme Court reprimanded the same public authority a year later. \textit{Hogan and Director of Pollution Control} [1971] 3 W.W.R. 519.
\item \textsuperscript{101} Personal interview with David Estrin, October 1995.
\end{itemize}
\end{footnotesize}
that “pollution is probably one of Canada’s greatest opponents.”

Two years later, after winning another private prosecution, David Estrin argued that criminal actions can embarrass unresponsive governments without “bankrupting” local environmental groups. WCELA also succeeded as a private enforcer. One highly publicized case was filed by the Union of B.C. Indian Chiefs and WCELA litigators in 1981. Without enduring the frustrations of a civil proceeding, they persuaded a B.C. Provincial Court judge to convict the Greater Vancouver Regional District. After issuing a five-thousand dollar fine, Judge Govan asked the GVRD why it was constructing a new head office—instead of building better sewage plants.

Canada’s judiciary was reluctant to question the Crown, but one court was willing to scrutinize the behaviour of cabinet ministers. This legal victory captured more media attention than any other pre-Charter environmental challenge. In 1980, Ron Reid, the president of the Federation of Ontario Naturalists, launched an action to enforce the Environmental Assessment Act. Two decisions outraged FON, Pollution Probe, and CELA. After authorizing the construction of Highway 404 without receiving approval, the Minister of Transportation cobbled together a report that overlooked obvious threats to the regional ecosystem. The premier was willing to chastise his cabinet colleague, James Snow, but he still exempted the project. However, a Provincial Court judge decided that section 4 of the EAA creates a mandatory duty that “binds the Crown.” A member of the Ontario executive was convicted for the first time since 1923. This court coalition also managed to

win an authoritative decree. Judge White warned that democratic life would suffer if those in power failed to respect the "supremacy of the law."

Table VIII: Strategic Alliances Formed by Environmental Groups (1970-1981)

<table>
<thead>
<tr>
<th>Group</th>
<th>Strategic Pair</th>
<th>Court Coalition</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canadian Environmental Law Association</td>
<td>8</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>Pollution Probe</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>West Coast Environmental Law Association</td>
<td>3</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Federation of Ontario Naturalists</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>B.C. Wildlife Federation</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Consumers’ Association of Canada</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>15</td>
<td>11</td>
<td>26</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Environmentalists formed alliances to improve their success rate. Instead of accepting defeat, they struggled to overcome the limits of judicial review. The jaded reader might find this notion naïve or amusing, but it cuts to the heart of pre-Charter litigation. Because court strategies were flawed, environmentalists had to combine different forms of collective action. They learned this technique by working together. Activists with different skills and political connections combined a range of tactics. Coalitions not only expanded the strategic repertoire, they distributed the costs of litigation. CELA and Pollution Probe established one of the first court coalitions in 1972. The sand dunes challenge was dismissed, but Justice Mayer Lerner still provided a valuable commodity: public awareness. A team of activists appeared before standing committees and presented their case to bureaucratic officials, while opposition critics placed direct pressure on the Davis cabinet. This strategy worked. Within a year of losing, the government decided to expropriate the lease, compensate Lake Ontario Cement, and establish the Sandbanks Provincial Park.  

Another challenge followed the same strategy. When the Conservative government amended

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107 Ontario Legislative Assembly, Debates, 3rd Session of the 29th Legislature, June 1973, 931.
the *Environmental Protection Act* in 1976, it declared that regulations on non-refillable containers “shall be filed by July 1977.” CELA and Pollution Probe wanted to enforce this apparent duty because the Attorney-General failed to respond, but the Ontario High Court of Justice protected the Crown’s discretionary powers. After losing, these pre-Charter activists worked with their legislative allies to demand strict regulations that would lead to a complete ban. The soft drink industry managed to block this proposal, but the Environment Minister, George McCague, eventually developed a compromise: seventy-five percent of Ontario’s stock had to be in refillable bottles.

Some groups affected the legislative agenda just by threatening to litigate. This strategy influenced the response to one of Ontario’s worst environmental disasters. In 1969, biologists discovered that a pulp and paper complex at Dryden had released mercury-contaminated effluent into the English-Wabigoon River, jeopardizing the health of two Aboriginal bands and an entire ecosystem. The Davis cabinet could not ignore the obvious social and environmental problems, but it secretly placed more importance on the economic health of the region. Because Reed Paper was one of Northern Ontario’s principal employers, it was allowed to ignore several restorative orders. Instead of accepting this timid response, environmentalists and opposition critics organized a loosely structured campaign. While Pollution Probe demanded compensation packages and stricter regulatory standards, CELA promised to initiate a disruptive court challenge. The government began to falter during the 1975 general election, when the Minister of Natural Resources, Frank Miller, and the Environment Minister, George Kerr, openly contradicted each other. Two years later, the coalition stopped Reed Paper from receiving a lucrative logging permit because the Conservative cabinet could not explain why one of Ontario’s worst polluters

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should rule over a 19,000 square mile "fiefdom." This political victory forced the different participants to negotiate. After establishing a royal commission, Davis introduced a cluster of new regional programs. In 1983, Ontario Hydro reached a compensation agreement with the Whitedog Band for damages caused by flooding during the 1950s. Finally, in the summer of 1986, the Ontario government reached an agreement with federal officials, Reed Paper, and the company that eventually bought the mill. As CELA's lawyer in 1973, Ian Scott issued the legal threat. Twelve years later, as the Attorney-General, he introduced a settlement that gave the bands $16.7 million. A similar measure was introduced by David Crombie, the federal Minister of Indian Affairs and Northern Development.

Environmental groups formed court coalitions to improve their chances of winning larger political contests, but this strategy did not always work. Some battles were very costly. After the Grand River Conservation Authority gave Wellington County permission to build in the Elora Gorge, two dissenting members asked CELA to launch a civil suit. They quickly confronted the law of standing and judicial deference. Because the plaintiffs were motivated by "political goals," the Ontario High Court of Justice refused to determine if the GRCA "made the right or wrong decision." After agreeing with this decision, the Court of Appeal awarded costs in favour of the defendants. Both of these judgements threatened CELA's very existence because they questioned the appropriateness of public interest litigation. To counter this threat, CELA's supporters raised ten-thousand dollars to form the Elora Gorge Defence Fund. When Canada's highest court rejected their leave to appeal

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112 Minutes of Proceedings and Evidence of the Standing Committee on Resources Development, 1st Session of the 31st Legislature, June 1977, 36.
113 Minutes of Proceedings and Evidence of the Standing Committee on Resources Development, 2nd Session of the 31st Legislature, March 1978, 32. After experiencing several delays, the Hartt Commission was transformed into a second royal commission that also considered the social and economic conditions of northern Ontario.
in 1978, they appeared before the Ontario Municipal Board, the one agency that could still stop the project.116 Activists with different areas of expertise documented the hidden environmental costs and presented several compelling alternatives, but the OMB decided to approve the controversial project. Completely demoralized, John Swaigen argued that “conservation in Ontario does not mean a thing if the gorge cannot be saved.”117 The Davis cabinet ignored this final plea by endorsing the OMB ruling.

III. Changing the Rules of the Game

Environmentalists learned how to manoeuvre around certain obstacles by developing new strategies and mixing different forms of collective action. However, we still have to find out if pre-Charter activists pressured governments to modify the rules of the game. Instead of returning to court with flawed tools, they might have demanded stronger legal tools. The explanations make different predictions. (i) The Charter revolution thesis insists that governments dominate the process of institutional change. Like other loosely organized interests, environmentalists do not have the resources to alter the shape of the state. They can only ally themselves with political élites who want similar structural reforms. (ii) If the court party thesis is correct, post-materialists should view judges as the primary agents of social change. Because they characterize legislative politics as seamy and compromising, environmentalists should refuse to bargain with private interests and state officials. There is one exception. They might react if governments propose to introduce stronger justiciable rights. (iii) The judicial pluralism thesis claims that post-materialists are structural actors who routinely demand favourable rules. Because they feel excluded and ignored by those in

power, environmental groups should fight for broad statutory rights, non-discretionary duties, intervenor funding, and constitutional guarantees.

Environmental Rights and the Ontario Government

Since the early 1970s, environmentalists resisted Canada’s political tradition by viewing rights as instruments of democratic pluralism. While acknowledging the limits of litigation, CELA and WCELA believed that courts could provoke unresponsive governments and cultivate participatory democracy. They were deeply influenced by the work of Joseph Sax, a law professor who encouraged American environmentalists to pursue court challenges. His principal work, published in 1971, begins by claiming that powerful interests usually “manipulate legislative and administrative institutions.”

This raises the value of litigation because courts offer stable “entry points” for citizens who want to tame polluters and promote environmental values. Citizens will lose some cases, he concedes, but they can present their claims to “outsiders” who do not behave like other political actors. Instead of brokering competing interests and bowing to public pressures, judges “can do what is right.”

CELA and WCELA knew that Canada’s experience contradicted this optimistic assessment, but they still believed that courts could play a crucial role. In the 1974 edition of Environment on Trial, David Estrin and John Swaigen sound like American litigators. According to their critique, decision-making institutions favour the polluting industries by excluding those who want to protect the natural environment. The MOE is not a powerful steward – it is a “captured agency.” Regulations are “written in secret” by civil servants who sympathize with their clients.

Like Sax, Estrin and Swaigen believed that new

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119 Ibid., 110.
legal rights would correct this imbalance. Concerned citizens would be able to pry open secretive arrangements, admonish bureaucrats, and prosecute polluters.121

The first structural battle occurred in 1971, when the Ontario government decided to introduce the Environmental Protection Act. Instead of simply pressuring the Davis cabinet to establish strict regulatory standards, a coalition of activists demanded the same provisions that framed American statutes: broad causes of action, detailed schedules, and mandatory duties. According to FON and Pollution Probe these instruments would prevent industries from capturing the Ministry of Environment. If it had to meet strict time-tables and implement aggressive programs, the subjects of regulation would not be able to exert their considerable influence—structure would protect MOE officials from highly capable interests. This configuration would also make litigation more meaningful. The courts would be able to enforce specific, imperative rules, not vague guidelines. CELA and CELRF wanted broad causes of action that would reach into the very heart of the regulatory process. With new statutory rights, environmental groups would be able to stop polluters from receiving certificates of approval.122

When the EPA was introduced during the summer of 1971, Davis called it Canada’s first “environmental bill of rights.”123 Most activists found this characterization painfully ironic because Bill 94 promised to remove a crucial legal tool, the right to enforce summary conviction offences. The Conservative government understood the growing appeal of human rights, but it wanted to stop private litigants from initiating disruptive, controversial claims. This strategy frustrated environmental advocates. Instead of fighting for new legal tools, they were forced to defend an old common law principle.124 Before passing the final draft, George Kerr, the Environment Minister, decided that Bill 94 would not remove the right to

123 Ontario Legislative Assembly, Debates, 4th Session of the 28th Legislature, July 1971, 3455. At the same time, the government passed a bill that established the Ministry of the Environment.
prosecute. However, he refused to make regulatory institutions more accessible. The EPA would expand the scope of Ontario’s regulatory regime without creating an independent board or new causes of action.125 Some opposition members invoked the work of James McRuer to attack Bill 94. According to their interpretation, he argued that democratic laws should present detailed instructions, not vague, discretionary guidelines.126 The most perceptive critics understood why environmentalists wanted to constrain the Crown’s discretionary powers.127 Fred Burr, a member of the New Democratic Party, knew that pre-Charter activists distrusted elected officials. Robert Nixon, the leader of the Liberal Party, characterized Bill 94 as anachronistic because it assumed that Canadians trusted their political leaders.

Environmentalists launched their second structural battle when the Davis government decided to establish an environmental assessment regime. Ontario activists were mesmerized by the almost limitless potential of rigorous requirements.128 They would be able to stop massive projects that threatened the natural environment, from waste incinerators and pulp mills to hydro-electric dams and nuclear generators. Instead of looking to other Canadian jurisdictions, CELA wanted to import the core elements of an American statute, the National Environmental Policy Act. This law is still prized by many North American activists because concerned citizens can enforce an onerous duty: the possible environmental effects of every major federal decision must be reviewed. Because NEPA includes demanding standards and non-discretionary duties, private litigants can force administrators to produce “environmental impact statements” just by asking courts to

127 Ontario Legislative Assembly, Debates, 4th Session of the 28th Legislature, July 1971, 4425-4466.
intervene. This campaign faced the same daunting obstacle. Davis did not copy NEPA. His cabinet hoped to quell public pressure without fettering the Crown’s discretionary powers. Bill 14 declared that the social and environmental effects of all provincial projects and certain private projects would be reviewed. The Environmental Assessment Board would hear from concerned citizens and determine the adequacy of major assessments. However, the executive retained the right to exempt any project. The Conservative government did not want this onerous duty to hinder the pace of economic development and complicate the regulatory process. It even proposed to shield the new regime from judicial review by including a strong privative clause.

Environmentalists marshalled their resources to fight for certain amendments. CELA and CELRF wanted a capable, independent board that would document the costs of development and block harmful projects. They did not want the cabinet to exercise a veto. FON believed that only one institution had enough legitimacy to exempt projects, the Ontario Legislative Assembly. Unwilling to trust future governments, the Conservation Council of Ontario and Pollution Probe wanted the Environmental Assessment Act to pare away most of the Crown’s discretionary powers. Bill 14 would fail to make the regulatory process more accessible, they argued, unless it compelled the executive to meet a long list of mandatory duties. Although pre-Charter activists demanded these new statutory tools, they were forced to defend another established cause of action. This was CELA’s only victory—it persuaded the Davis government to remove the privative clause. The EAA did not add any justiciable rights, but environmentalists would still be able to enforce the principles of natural justice by filing judicial review petitions.

Despite losing two successive battles, environmentalists continued to fight for structural changes. Ironically, the Conservative cabinet fueled this project. By failing to

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129 Ontario Legislative Assembly, Debates, 5th Session of the 29th Legislature, July 1975, 3531.
enforce two of Canada's strongest regulatory statutes, it seemed arrogant and unresponsive.\textsuperscript{131} MOE officials occasionally asked citizens to submit their concerns, but the consultative process was wildly unbalanced: environmentalists were pitted against organizations that represented powerful corporations or entire industrial sectors.\textsuperscript{132} The environmental rights project was also shaped by CELA’s court challenges. The Elora Gorge case profoundly affected Ontario activists. From their perspective, the traditional costs rule was archaic and undemocratic because it “intimidated” citizens who wanted to litigate.\textsuperscript{133} The NDP agreed with this assessment.\textsuperscript{134} Marion Bryden and Mac Makarchuk asked the Davis cabinet to reform the law of costs and ease standing requirements. Predictably, the Conservative caucus expressed little sympathy. They liked the common law tradition because it prevented a “flood” of challenges from disrupting political life.\textsuperscript{135} Government MPPs offered a radically different interpretation of the Elora Gorge dispute: a handful of self-righteous zealots ignored important democratic principles by jeopardizing the “rights of the majority.”\textsuperscript{136}

After failing to change the structure and substance of two regulatory statutes, pre-Charter activists began to understand the virtues of an environmental bill of rights. Instead of trying to win disparate measures, they urged the Davis cabinet to eliminate every barrier that dissuaded private enforcement, including restrictive standing requirements, the old costs rule, and standards of proof that favour defendants. The provincial government could not unilaterally introduce constitutional guarantees, but it could create boldly worded rights and recognize the public trust doctrine. David Estrin and John Swaigen borrowed this idea


\textsuperscript{133} “CELRF claims that environmentalists are intimidated by court costs,” \textit{CELA Newsletter} 3(6) 1978.

\textsuperscript{134} Minutes of Proceedings and Evidence of the Standing Committee on Resources Development, 2nd Session of the 31st Legislature, March 1978, 31; Ontario Legislative Assembly, \textit{Debates}, June 1978, 3042-3047.

\textsuperscript{135} Ibid., 3049.

\textsuperscript{136} A government MPP, Jack Johnson, made this comment.
from the American tradition. During the early 1970s, most state legislatures emulated Congress by introducing non-discretionary duties and action-forcing provisions. Michigan and Minnesota also passed separate statutes to create substantive guarantees.\(^{137}\) After declaring a general duty that legislators must accept, the *Michigan Environmental Protection Act* and the *Minnesota Environmental Rights Act* invite concerned citizens to sue polluters and administrators.

The Conservative government never initiated a debate on environmental rights, but opposition critics prodded the Davis cabinet by introducing a series of private bills. Between 1979 and 1981, they forced the Ontario Legislative Assembly to discuss three separate proposals. The Liberal Party presented an EBR in 1979 that sounded like it was written by CELA. Stuart Smith argued that environmental rights would make the MOE more assertive. Bill 185 would have tilted the rules of the game in favour of strict enforcement by reversing the burden of proof, eliminating the old standing rule, and creating new causes of action.\(^{138}\) However, the Environment Minister decided that courts should not exercise any control over such a complex field of public policy.\(^{139}\) Harry Parrot quickly dismissed Bill 185 by calling it “undemocratic.” When the NDP introduced the second EBR in 1980, Marion Bryden defended the legitimacy of litigation. Judicially enforced rights would not usurp the Crown’s authority, she insisted, they would simply allow concerned citizens to “supplement” the work of MOE officials.\(^{140}\) Courts would play a more important role, but they would not set standards. Instead of seriously considering Bill 91, Conservative MPPs wanted to


\(^{138}\) Ontario Legislative Assembly, *Debates,* 3rd Session of the 31st Legislature, December 1979, 5481. Smith’s second EBR, Bill 134, was introduced in 1981, during the 1st Session of the 32nd Legislature.


cultivate a "climate of confidence." They believed that environmental rights would threaten the "stability and certainty" that investors correctly demand. As the pre-Charter period was ending, the NDP introduced Bill 134. The timing of this proposal revealed a problem that still frustrates environmentalists. Because human rights are widely accepted, they are considerably more credible than environmental rights. During the patriation round, Trudeau counted on the support of Canada's largest province. Some of the first ministers praised the virtues of parliamentary supremacy, but Davis was ready to accept new constitutional guarantees. However, he refused to introduce a cluster of statutory rights to promote environmental values.

Environmental Rights and the Federal Government

Toronto was the site of most structural battles during the early 1970s. The federal policy-making process was closed, secretive, and remote. Very few groups had the capacity or the resources to penetrate such a system. In 1970, the Special Committee on Environmental Pollution considered a range of matters, but it did not hear from any environmentalists. Three years later, the Standing Committee on Fisheries and Forestry reviewed the Canada Wildlife Act.\textsuperscript{141} Some activists wanted Bill C-131 to establish clearly worded, imperative instructions, but they did not demand new causes of action.\textsuperscript{142} An important turning point occurred in 1974, when Trudeau established an inquiry to study a proposed pipeline that would transport oil from Alaska through the Mackenzie River Valley. The commissioner, Thomas Berger, supported WCELA and represented the Nishga people before becoming a B.C. Supreme Court judge. This experienced shaped his approach. Instead of adhering to old conventions, he decided to fund select participants, including the

\textsuperscript{141} Minutes of Proceedings and Evidence of the Special Committee of the House of Commons on Environmental Pollution, 3rd Session of the 28th Parliament; Canada Shipping Act, R.S.C. 1985, c. S-9.

\textsuperscript{142} Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry, 1st Session of the 29th Parliament, March 1973, 20:27.
Canadian Arctic Resources Committee. Berger was also willing to take his inquiry to the small villages of Northern Canada. This was the first time that members of a broader coalition worked together: environmentalists and feminists defended their interests while acknowledging the legitimacy of Aboriginal claims. Pollution Probe and NAC, the National Committee on the Status of Women, defended the principle of self-government and called for strict limits on the development of natural resources. This inquiry influenced Canadian policy-makers by creating a model of public participation. The Davis cabinet adopted a similar approach for the Royal Commission on Electrical Power Planning and the Royal Commission on the Northern Environment. Federal officials also recognized the potential benefits of openness. By the late 1970s, the Department of the Environment started to believe that public forums could generate support for tougher laws.

CELA was ready to present structural demands in 1975, when the Trudeau government introduced Bill C-25, the Environmental Contaminants Act. The ECA was designed to complement several statutes, including the Fisheries Act and the Arctic Waters Pollution Act. By granting the federal government new responsibilities, it promised to regulate “deleterious chemical substances.” CELA asked the Standing Committee on Fisheries and Forestry to consider a number of amendments. Heather Mitchell wanted Bill C-25 to give prosecutors an advantage by reversing the burden of proof. Those who produce and use chemicals, she argued, should have to demonstrate their safety. CELA also asked the members to codify Stein, the Manitoba Court of Appeal decision that rejected the old standing rule. Pollution Probe activists wanted the Environmental Contaminants Act to emulate the American tradition. They hoped that it would include a detailed schedule of dangerous substances and strict time-tables. Industry groups were far more concerned about the quasi-criminal sanctions. Not surprisingly, the Canadian Manufacturers'
Association wanted federal officials to draw a clear distinction between “real crimes” and “technical offenses.”

When the final version of Bill C-25 was introduced, it did not include new justiciable rights. Although environmentalists were able to participate at a distance, the ECA emerged from a process of bargaining between state officials and the subjects of regulation. Jean Marchand did not hide this fact—he proudly declared that industry representatives played a crucial role. The Conservative caucus supported the general purpose of the ECA, but it wondered why vague guidelines were favoured over mandatory duties. Joe Clark presented CELA’s basic argument to the House of Commons. He even urged the government to reform the law of standing. During this contest, Canada’s environmental litigators confronted an obstacle that would hamper their project for decades. The Trudeau cabinet did not want to engage in costly jurisdictional battles with the premiers only to win more control over a complex area of public policy. This reluctance was reinforced by Department of Justice officials who stressed the limits of federal powers. Instead of seriously considering new legal rights, their primary goal was securing the complete co-operation of the provinces.

CELA also pressured the federal government to reform the Environmental Assessment and Review Process. David Estrin and John Swaigen wanted the same legal weapons that American litigators wielded. During the 1970s, the two regimes were based on very different assumptions. The EARP process was guided by a list of vague directives that were easily ignored. On the other hand, NEPA allowed private litigants to enforce onerous, mandatory requirements. In 1974, the Environment Minister, Jack Davis,

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149 Ibid., 4389.
established a panel of bureaucratic officials to improve the EARP process, but CELA dismissed the proposed changes because they failed to circumscribe the Crown’s discretionary powers. In 1979, the federal government introduced the Government Organization Act to formalize the EARP regime and establish Environment Canada. Legal advocates opposed Bill C-35 because this new regulatory agency was not asked to administer the strongest federal statute, the Fisheries Act.

Trudeau never initiated a debate on environmental rights, but a member of his caucus presented an EBR in 1981. Compared to the Ontario bills, this private motion was weakened by ambivalence. Charles Caccia wanted the government to introduce new causes of action, but he feared that unsympathetic judges would issue damaging decisions. Because the first ministers were busy drafting the Charter, Conservative legislators wondered why the constitutional package did not include any rights to protect the natural environment. They found this omission highly amusing because the Environment Minister was also one of Trudeau’s closest advisors. However, John Roberts simply argued that regulatory disputes should be kept out of the courts. He also suggested that such measures would be unconstitutional because provinces are responsible for “civil rights” and the “administration of justice.” While promoting the Charter – a bold departure from Canada’s political tradition – Roberts propped up the British North America Act to dismiss the idea of environmental rights.

Fighting for Constitutional Rights

During the pre-Charter period, very few environmentalists entered the constitutional arena. In 1970, an odd collection of activists appeared before the Molgat-MacGuigan

155 Ibid., 11391.
committee. The Toronto Liberal Association was one of the only groups to propose new rights. Most participants wanted to talk about jurisdictional issues; they stressed the importance of a strong central government. Instead of forming coalitions to win dramatic structural battles, the national groups stayed away from this debate. In 1978, when the next round of bargaining began, CELA was prepared to participate. John Swaigen and Toby Vigod demanded several boldly worded guarantees. Surprisingly, Bill C-60 already included one clause that hinted at the public trust doctrine. Section 4 proclaimed the importance of protecting Canada's great natural resources. CELA advocates wanted to transform this declaration into a stronger duty that would force all policy-makers to protect the environment. After discussing the failure of Ontario's regulatory regime, they asked the Lamontagne-MacGuigan committee to consider the implications of inaction: if the Constitution does not provide some direction, "there is every reason to believe" that governments will continue to be "erratic and negligent" when they respond to environmental problems.

A handful of groups appeared before the Hays-Joyal committee in 1980, but the principal players refused to participate. The Liberal cabinet dashed their hopes by removing the tentative public trust provision from Bill C-60. CELA and WCELA were appropriately pessimistic. Most federal legislators rejected the idea of environmental rights. An important element of Canada's political tradition was still firmly rooted. They still believed that complex regulatory problems should be solved by line departments.

157 Minutes of Proceedings and Evidence of the Special Committee of the Senate and House of Commons on Bill C-60, 4th Session of the 30th Parliament, September 1978.
158 Section 4 used the legally significant word "trust" to declare the importance of preserving Canada's resources.
159 This passage appears on page 3 of CELA's brief.
161 Ibid., 24:96.
and expert tribunals, not the courts. Trudeau's package of amendments was not uncontroversial, but he wanted to entrench a number of rights already protected by the great common law tradition. Environmentalists proposed an amorphous guarantee that clashed with the human rights model. Canada's legal advocates were forced to accept this reality during the final days of the pre-Charter period.
CHAPTER THREE

The Feminist Movement in Pre-Charter Canada

I. Mapping the Context

After finding out that environmentalists pursued legal strategies throughout the first period, readers might assume that feminists did the same. Moved by their post-materialist values, they might have learned how to transform litigation into an instrument of social change. While such a proposition is plausible, this chapter will confirm an important element of the conventional wisdom. Most students of Canadian politics believe that feminists rejected litigation after losing a series of dramatic court challenges. However, pre-Charter activists did emulate the environmental movement by urging federal and provincial governments to consider certain institutional reforms. As structural actors, they promoted their interests by demanding capable human rights commissions and constitutional guarantees. Before considering the rules of the game and the patterns of pre-Charter litigation, we should have some sense of the changing political context.

The Political Milieu

At the start of the pre-Charter period, the feminist movement engaged in a dramatic national debate. After forming an alliance between FFQ, la Fédération des Femmes du

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Québec, and the Committee for the Equality of Women, Laura Sabia persuaded Prime Minister Lester Pearson to establish the Royal Commission on the Status of Women. The RCSW report acknowledged an idea that would inspire generations of feminists: women “require special treatment to overcome the adverse effects of discriminatory practices.” A cluster of principles emerged from this central declaration. The commissioners insisted that women should not be forced to shoulder the indirect costs of pregnancy and childcare. Nothing should be able to stop them from working outside the home and earning a fair salary. As husbands and fathers, men have to support their wives and daughters, but the state has to accept a more onerous responsibility – it must create innovative programs to counteract pervasive forms of inequality. Guided by these goals, the RCSW surveyed a tangled web of economic and political problems; it also examined the effects of fiscal statutes, welfare state policies, and criminal laws. Most of the 167 recommendations addressed federal responsibilities. The commissioners demanded, for example, generous family allowance payments and national childcare services.

This debate was very significant, but some activists stayed away. A younger generation of feminists wondered why the RCSW considered “women’s issues” instead of trying to solve “structural” problems. They also attacked the commissioners for avoiding one of the most controversial issues: violence against women and children. As radical feminists and socialists, these critics viewed the RCSW as hopelessly naïve. However, most women, especially those who belonged to one of the established advocacy groups, accepted

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5 Ibid., 388.
the report. In 1972, at a widely attended conference, they decided to form the National Action Committee on the Status of Women. The new members of NAC passed a daunting number of resolutions. The federal state was asked to introduce equal pay legislation, pensions for "home-workers," a guaranteed annual income for single mothers, parental leave benefits, and a minimum wage that matched inflation.

Pre-Charter feminists could not achieve their goals without also reforming Canada's legal institutions. They targeted the family law regime and the criminal justice system. Some groups helped separated and divorced women by demanding equitable maintenance awards, strict custody orders, and generous child support payments. Large coalitions of activists urged the federal government to decriminalize abortion. This battle began during the late 1960s, but the first dramatic demonstration occurred in the spring of 1970, when the Abortion Caravan travelled from Vancouver to Ottawa. CARAL, the Canadian Abortion Rights Action League, was founded in 1974 to support the tenacious Doctor Henry Morgentaler. Even though the RCSW virtually ignored sexual violence, this problem became more pressing during the late 1970s. Branches of Women Against Violence Against Women raised public awareness and generated controversy by holding Take Back the Night marches. With the support of like-minded activists, they demanded longer sentences for perpetrators and special forms of protection for victims of "sex crimes."

The RCSW profoundly influenced most pre-Charter activists, but they were also shaped by a particular ideology. The anti-statist tradition has influenced the evolution of American feminism. Many activists distrust the state because they see it as an instrument

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7 Jill Vickers, Pauline Rankin, and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto: University of Toronto Press, 1993).
of patriarchy. Canadian political culture has cultivated a very different sentiment. Most feminists see the state as an agent of social change. Patriarchal values have shaped political institutions, they concede, but state agencies can fight discrimination, punish sex offenders, provide crucial services, and redistribute scarce economic resources. If this interpretation is correct, pre-Charter feminists were fueled by a "radical liberalism" that encouraged women to enter the "ordinary political process." Of course, it would be misleading to suggest that every activist subscribed to the same ideology. During the 1970s, some activists struggled to distance themselves from "mainstream" political life. They began by rejecting hierarchical structures and majoritarian rules. Consensual decision-making styles replaced these "patriarchal devices" so that every "woman's voice would be heard." Because efficiency was characterized as a "male value," women with different needs and talents were encouraged to share their ideas in supportive settings. For example, the Ontario Committee on the Status of Women adopted a "non-hierarchical" decision-making structure because it did not want to operate like an "interest group." Indian Rights for Indian Women developed a consensual approach after rejecting the "White man's procedures." Traditional forms of collective action were also questioned. Some groups simply hoped that "consciousness-raising" would unleash revolutionary changes. Those who wanted to confront the state organized marches and disruptive protests. Activists who belonged to the Women's Liberation Movement chided "mainstream" groups because they believed that lobbying did not challenge the "systemic"

13 Cohen, "The Canadian Women's Movement."
15 Personal interview with Naomi Black, July 1995.
nature of oppression.\textsuperscript{17} Bread and Roses, a socialist collective, believed that women would never destroy patriarchal institutions unless they "refused to participate in the system."\textsuperscript{18}

We have to consider these alternative styles, but the literature suggests that practical considerations were more important than ideological convictions. Most groups reached some compromise by blending traditional forms with elements of the "feminist method." A surprising number of community groups offered social services to women and their children after accepting grants from the Secretary of State.\textsuperscript{19} Even though NAC experienced fractious ideological debates, it still retained a fairly traditional structure. Some prominent activists rejected consensual styles because they seemed to undermine an important organizational characteristic — decisiveness.\textsuperscript{20} Instead of rejecting patriarchal institutions, the National Association of Women and the Law encouraged community groups to draft constitutions using Robert's Rules of Order.

Another cleavage remained dormant throughout the pre-Charter period. Most activists did not try to understand the controversial relationship between race and gender. The large, institutionalized groups were dominated by White, middle-class professionals who believed that all women faced similar barriers. Socialist collectives were aware of class differences, but they rarely considered the distinct obstacles created by racism. Still, one issue did attract considerable attention. Aboriginal women wanted the federal government to remove section 12 from the Indian Act.\textsuperscript{21} This provision was introduced during the nineteenth century to punish women who married "non-Indian men." Those who broke this rule lost their status, but the same penalty did not work in reverse — federal officials decided that men should never lose their status unless they decided to become enfranchised.

\textsuperscript{17} Ibid., 20.
\textsuperscript{20} Personal interview with Doris Anderson, June 1995.
In 1969, Mary Two-Axe Early established Indian Rights for Indian Women to challenge this discriminatory rule.

Canada's federal parties did not respond to the feminist movement by urging women to present themselves as candidates. Between 1968 and 1980, the proportion only climbed to six percent.22 Despite this sobering statistic, the political climate was reasonably favourable during the early 1970s because most voters were willing to support the growth of the welfare state.23 After losing his majority in 1972, Trudeau was forced to govern with the support of the NDP, an ally of the feminist movement. However, the political climate changed as the health of the economy deteriorated. During the 1974 campaign, the leaders did not discuss the merits of day care or the costs of sexual violence — they considered the possible benefits of wage-and-price controls. Feminist groups exercised even less influence during the 1979 campaign. When Trudeau shifted the debate to constitutional questions, NAC wondered why he was conspiring to ignore social problems.24 From their perspective, the Conservative Party was not an attractive alternative. Instead of trying to help unemployed women and single mothers, it simply “extolled the virtues of economic restraint.” The climate was just as inhospitable during the 1980 general election. Trudeau seemed thoroughly indifferent; despite their pleas, he refused to meet with activists from Canada’s largest feminist organization.25

Ontario’s party system was only slightly more responsive. The Conservative Party was predisposed to dismiss anything that sounded too radical, but it was forced to govern without a majority between 1975 and 1981. This dynamic created certain advantages for feminists. The NDP was eager to support almost any goal that redistributed economic resources. As a well-placed ally, it urged the Davis cabinet to consider a broad range of reforms, including new divorce laws and stronger human rights provisions. The Liberal

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22 Cohen, “The Canadian Women’s Movement.”
Party was willing to endorse some of these measures. In 1975, Stuart Smith replaced Robert Nixon as the leader after promising to pursue a more “progressive” agenda.

Both levels of government responded to the feminist movement by modifying the structure of the state. The federal cabinet was willing to accept the general thrust of the RCSW, but it refused to move beyond the principle of equal opportunity.26 In 1971, Trudeau established the Equal Opportunities Office after appointing a minister who was supposed to “integrate women’s issues.” Two years later, the Secretary of State was asked to manage the Women’s Program and the Native Women’s Program.27 The federal government also established CACSW, the Canadian Advisory Council on the Status of Women. Some structural adjustments were paired with policy changes. During the middle of the 1970s, the Liberal government hoped to improve the “status of women” by amending a number of statutes, including the Criminal Code, the Immigration Act, the Public Service Employment Act, and the Pension Act.28 The principle of equal opportunity continued to shape the federal response until the end of the pre-Charter period. Not surprisingly, most feminists doubted Trudeau’s sincerity. Instead of establishing a commanding central agency or a highly capable ministry, he gave small budgets and weak powers to officials who operated at the periphery.29 Sceptical activists believed that CACSW was established to manage and placate their demands.30 They refused to believe that it could attack the roots of

discrimination.\textsuperscript{31}

The Ontario government also refused to stray beyond the principle of equal opportunity. A green paper published during the early 1970s encouraged the Davis cabinet to emulate the federal model. Instead of passing a series of ambitious laws, the Ontario Status of Women Council was established. The first president of NAC was invited to manage this new agency, but Laura Sabia resigned in the summer of 1976 after deciding that independent advocacy groups were far more effective.\textsuperscript{32} Even though Davis was reluctant to introduce controversial measures, Ontario did have Canada's strongest human rights code.\textsuperscript{33} During the pre-Charter period, feminists managed to win several amendments. In 1972, with the help of like-minded activists, they persuaded the Conservative government to prohibit "sexual discrimination."\textsuperscript{34} NAC hoped that boards of inquiry would solve the very problems that courts were ignoring. By adopting new methods, they would be able to challenge harmful attitudes and compensate victims of discrimination.

\textit{The Rules of the Game}

During the pre-Charter period, imaginative litigators confronted a number of opportunities. Private prosecutors are not allowed to enforce indictable offences, but women's shelters could provide legal advice and moral support to victims of rape and domestic violence. With the consent of like-minded complainants, they could use highly publicized criminal trials to demand legislative reforms. If these options were unappealing, feminist litigators could file tort claims to address the effects of inequality. They might have argued, for example, that publishers and distributors of pornography injured certain victims

\begin{footnotes}
\item[31] "Sexual equality policy only half-adopted," \textit{Montreal Star}, 12 January 1978, A13; Patricia Bell, "Ottawa is ignoring women's council, members charge," \textit{Globe and Mail}, 11 January 1979, T3.
\end{footnotes}
of sexual assault. As civil litigants, feminists could ask for a broader range of remedies, including damages and injunctions. This option also promised more control. Instead of relying on police officers and Crown lawyers, they could select the strongest cases and design their own arguments.

During the pre-Charter period, hundreds of administrative boards and quasi-judicial tribunals were established to regulate the natural environment and counter various forms of private discrimination. This created a potentially valuable entry point for both movements: judicial review claims. Environmentalists could challenge the National Energy Board and the Ontario Environmental Assessment Board. Using the same causes of action, feminists could target the Ontario Human Rights Commission, the Canadian Human Rights Commission, and Saskatchewan’s Crimes Compensation Board. By asking courts to enforce the principles of natural justice, litigants could attack unfavourable decisions. A less stringent standard applies to officials who perform administrative tasks, but they still have to respect the duty of fairness. These public authorities cannot, for example, intentionally exclude evidence brought by interested parties. By pursuing this avenue, feminists could challenge social services boards that treated single mothers unfairly. Governments do not have to meet such standards, but they have to respect statutes that create mandatory obligations. By persuading courts to read new duties into permissive clauses, determined litigants might have expanded the scope of certain entitlements.

Of course, the Canadian Bill of Rights presented the most compelling legal option. After 1960, feminists could base their claims on section 1. This quasi-constitutional right promises to protect individuals from discrimination based on “race, national origin, colour, religion, and sex.” It also guarantees “equality before the law.” Pre-Charter litigants could use this instrument to challenge federal statutes, including the Criminal Code, and executive orders. Most readers will know that Canada’s highest court narrowly interpreted section 1. However, we have to remember that the Supreme Court seemed uncharacteristically daring
in 1970. It surprised feminist lawyers and legal scholars by deciding that elements of the *Indian Act* were discriminatory.\(^{35}\)

Feminists also confronted fewer threshold barriers. Environmentalists were hindered by traditional standing rules throughout the pre-Charter period. To ask for damages, injunctions, and prerogative writs, applicants had to demonstrate direct, pecuniary interests. Feminists could dodge this archaic common law barrier by pursuing section 1 claims. After *Thorson* and *McNeil*, they could reap the benefits of the new standing test, which allowed applicants to question the validity of statutes.\(^{36}\) The Canadian Bill of Rights was the source of another advantage. Environmentalists were poor candidates for intervenor status because they brought most of their unconventional claims to provincial courts and section 96 trial courts. Feminists had a better chance because they could use a quasi-constitutional guarantee to raise pressing legal questions. As intervenors with party status, they could introduce expert witnesses to document the "battered wife syndrome." As friends of the court, they could present written submissions and oral arguments that challenge myths about rape.

Despite these advantages, pre-Charter feminists faced a series of obstacles. Environmentalists achieved some of their objectives as private prosecutors because most regulatory statutes created summary conviction offences. However, these enforcement instruments were rarely added to laws governing welfare benefits, unemployment insurance, labour practices, and child custody. Tort claims were just as unlikely. Pre-Charter environmentalists discovered that common law principles often privileged proprietary interests. According to feminist scholars, the common law tradition also favours patriarchal values.\(^{37}\) For example, the "reasonable man" standard establishes a single, universally applicable measure for liable conduct without considering the needs and interests of women.


Readers do not have to endorse this provocative interpretation to acknowledge other deterrents. Feminists wanted to argue that seemingly neutral laws produce unexpected forms of discrimination. However, strict standards of proof discouraged such complex arguments. Potential litigants also confronted the traditional costs rule. To explore the benefits of different civil claims, they had to accept considerable financial risks. These barriers might have dissuaded feminists, but one hurdle probably seemed insurmountable: judicial restraint. Knowing the deferential character of Canada's judiciary, experienced litigators might have viewed *Drybones* as an aberration. They might have warned advocacy groups to stay away from the courts.

**II. Playing by the Rules of the Game**

The Court Challenges Database tells us how the rules of the game shaped feminist strategies. Instead of speculating about the characteristics of pre-Charter litigation, we can determine the frequency of participation, the sites of court battles, and the legal success rate. The explanations consider some of the same variables, but they disagree. (i) The Charter revolution thesis offers a somber prediction. Feminists will reject litigation because they cannot base their claims on boldly framed constitutional guarantees. (ii) The court party thesis insists that post-materialists are drawn to the judicial form, but it also recognizes the effects of formal obstacles. Although feminists want to rely on litigation, they cannot. After losing a string of decisions during the early 1970s, these pre-Charter activists will reject court strategies. (iii) If the judicial pluralism thesis is correct, we should find the very opposite. Feminists will enter the courtroom to attack discriminatory laws and embarrass unresponsive governments. They might lose most of their claims, but these sophisticated activists will learn how to overcome the limits of litigation. To counter the effects of unfavourable decisions, they will graft litigation onto conventional forms of collective action.
Feminists in Court

Potential litigants confronted a cluster of legal barriers, but representative institutions were dominated by men and governing parties refused to move beyond the principle of equal opportunity. According to Table IX, feminists responded to these competing incentives by staying away from the judicial system. While environmentalists initiated sixty-two actions, feminists presented just nine claims. Their participation was so sporadic that we cannot use a simple line graph to plot the number of cases filed each year. During the early 1970s, when CELA and Pollution Probe were busy enforcing Ontario’s new environmental statutes, feminists entered the courtroom twice. Instead of developing novel legal arguments, they pursued conventional forms of collective action. When feminists did enter the courtroom, they usually worked with like-minded individuals. Two advocacy groups appeared as formal litigants, but most organizations participated as out-of-court

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Claims</th>
<th>Number of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1971</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1972</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1973</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1974</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1975</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1976</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1977</td>
<td>2</td>
<td>1</td>
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<tr>
<td>1978</td>
<td>2</td>
<td>2</td>
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<tr>
<td>1979</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1980</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>1981</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Total  9  10

Source: Court Challenges Database
supporters. Sympathetic activists helped by organizing marches and raising badly needed funds.\footnote{38} This type of intervention was not planned. NAC did not have a legal committee that anticipated worthy cases by scrutinizing court dockets.

Table X: The Organizational Form of Feminist Challenges (1970-1981)

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual(s)</td>
<td>5</td>
</tr>
<tr>
<td>Advocacy Group</td>
<td>2</td>
</tr>
<tr>
<td>Court Coalition</td>
<td>2</td>
</tr>
<tr>
<td>Legal Advocacy Group</td>
<td>0</td>
</tr>
<tr>
<td>Strategic Pair</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>9</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

After considering the frequency of participation, we should not be surprised to learn that feminists formed only two court coalitions between 1970 and 1981. Environmentalists were far more willing to organize strategic pairs and court coalitions – alliances generated twenty-nine percent of their pre-Charter claims. Table X reveals another crucial piece of evidence: feminists did not establish any legal advocacy groups. One challenge was supported by the Vancouver Legal Assistance Society, but feminists did not try to copy CELA or WCELA. Still, lawyers played a special role outside the courtroom. They often accepted the demanding organizational tasks that others shunned; some offered sophisticated policy analysis. Because these advocates appreciated the significance of institutions, they could document the risks and benefits of various legislative strategies.\footnote{39} Most lawyers provided advice as individual members, but the National Association of Women and the Law performed this role for the entire feminist movement. NAWL gained

\footnote{38} "The Bliss challenge," \textit{Kinesis} (March 1978).
\footnote{39} For example, see Louise Dulude, \textit{Women and Aging: A Report on the Rest of Our Lives} (Ottawa: CACSW, 1978).
credibility by combining legal expertise and political savvy. Pre-Charter feminists did not establish legal advocacy groups because they seemed to be consumed by a profound sense of scepticism. CELA and CELRF developed Environment on Trial to encourage innovative court challenges; the only legal guide published by feminists declared that the law “is not for women.” Instead of urging feminists to launch section 1 challenges, the authors argued that most laws hurt women.

This chapter will show that most activists characterized the Supreme Court as a “faceless, conservative institution,” but we still have to understand why a handful of groups dared to enter Canada’s judicial system. Table XI offers several clues. Sexual assault generated more claims than any other issue because criminal defendants attacked statutory provisions that protected victims of rape. Feminists reacted to these threatening actions by supporting the complainants. Three claims addressed different forms of racial discrimination. Most groups wanted to fight gender inequality, not racism, but some litigants entered the courtroom to help immigrant women and Aboriginal women.


<table>
<thead>
<tr>
<th>Issue</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Assault</td>
<td>3</td>
</tr>
<tr>
<td>Aboriginal Women</td>
<td>2</td>
</tr>
<tr>
<td>Racism and Immigration</td>
<td>1</td>
</tr>
<tr>
<td>Marriage and Divorce</td>
<td>1</td>
</tr>
<tr>
<td>Workplace Equality</td>
<td>1</td>
</tr>
<tr>
<td>Abortion</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>9</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database


42 Personal interview with Doris Anderson, June 1995.
Both movements entered the courtroom to challenge private interests. While environmentalists punished corporations that violated regulatory standards, feminists countered criminal defendants who wanted to escape prosecution. Despite this similarity, pre-Charter activists directed their anger at different targets. Readers will remember that environmentalists rarely questioned the validity of statutes. They usually asked courts to issue one of the prerogative remedies. Feminists never attacked cabinet ministers or bureaucratic officials by requesting writs of mandamus and they filed just two certiorari claims. NAC and NAWL did not establish special committees of lawyers to explore the
benefits of tort claims, private prosecutions, and judicial review petitions. When feminists did choose to litigate, they usually hoped that section 1 would knock down a discriminatory law. Because most litigants invoked the Canadian Bill of Rights, they usually presented their arguments before the Supreme Court. This preference was not shared by the environmental movement. Even though activists participated at every level of Canada's judicial system, they rarely appeared before the highest court. Some persuaded section 96 judges to issue prerogative writs; others asked the lower courts to enforce summary conviction offences.

Faith in Canada's judiciary did not fuel pre-Charter feminists. They entered the courtroom to stop courts from issuing threatening decrees. Most litigants were moved by rage, not by the promise of dramatic legal victories. The Murdoch case angered many Canadian women because “it seemed so blatantly unfair.”43 This dispute began when Irene Murdoch divorced her husband to escape an abusive relationship. She dared to contest a separation agreement because it ignored her substantial contributions to the family ranch. While co-managing the operation for thirty years, she depleted an inheritance to purchase land and finance loans. Wanting these efforts acknowledged, Irene requested a modest spousal support award and half of the family assets. Her husband reacted to this display of independence by abandoning Irene outside the local hospital after breaking her jaw. Instead of trying to reach a fair compromise, James Murdoch gave most of the ranch to his son, who then leased it back for a nominal amount. NAC did not have a team of elite litigators to intervene before the appellate courts, but it organized marches across Canada to support the Murdoch challenge.44

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Judges as Gatekeepers

Defiance compelled some pre-Charter feminists to enter the courtroom, but they still confronted the great common law barriers, standing and justiciability. Before the Supreme Court delivered Thorson and McNeil, Canada’s judiciary could exclude applicants who failed to demonstrate direct, pecuniary interests. The new rule lowered this barrier, but courts could still turn away claims that asked speculative, abstract questions. We have to find out how judges responded to these early claims. They could have expressed sympathy or hostility. Although environmentalists managed to work around these threshold standards, feminists did not. Two advocacy groups requested joint party status, but their claim was

Table XIV: The Legal Status of Feminist Groups (1970-1981)

<table>
<thead>
<tr>
<th>Group</th>
<th>Out-of-Court</th>
<th>Party</th>
<th>Intervenor</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Action Committee on the Status of Women</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>B.C. Federation of Women</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Vancouver Status of Women</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Alberta Committee on Rights for Native Women</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Canadian Abortion Rights Action League</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Foundation for Women in Crisis</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Manitoba Status of Women Committee</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>National Association of Women &amp; the Law</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Ontario Committee on the Status of Women</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Toronto Business and Professional Women’s Club</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Toronto Organization for Domestic Workers’ Rights</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>University Women’s Club of Toronto</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Vancouver Rape Relief</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>12</td>
<td>2</td>
<td>4</td>
<td>18</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

quickly dismissed. A handful of organizations secured intervenor status, but feminists usually participated as out-of-court supporters.

One battle attracted more competing interests than any other pre-Charter case, the dispute over section 12 of the Indian Act. A coalition of groups backed the appellants, Jeannette Corbière Lavell and Yvonne Bédard. NAC participated outside the courtroom by organizing demonstrations and establishing a small legal defence fund. An odd mix of groups managed to win intervenor status: the North Toronto Business and Professional Women's Club, the University Women's Club of Toronto, and the Alberta Committee on Rights for Indian Women. Groups with stronger records of advocacy watched from a distance while this unlikely coalition challenged section 12. The Trudeau government was determined to defend every element of the Indian Act. Jean Chrétien, the Minister of Justice, encouraged a number of sympathetic organizations to intervene, including the National Indian Brotherhood, the Indian Association of Québec, and the Union of B.C. Indian Chiefs. Another team of intervenors entered the courtroom when Henry Morgentaler challenged Canada's old abortion law. The Foundation for Women in Crisis and the Canadian Civil Liberties Association argued that section 251 of the Criminal Code violated the Canadian Bill of Rights by discriminating against women. CARAL, the Canadian Abortion Rights Action League, co-ordinated the battle outside the courtroom by collecting donations, organizing marches, lobbying legislators, and calling press conferences. This coalition faced four anti-abortion groups.

Remarkably, feminists initiated only one pre-Charter claim. In the summer of 1977, Tony Tourangeau was accused of unlawfully confining two women. During the trial,
Judge Bewley described the victims as "very nubile," "impressionable," and "stupid." Because the defendant was only trying to excite a "bunch of little girls," this B.C. Provincial Court judge reduced the sentence to six months. The Court of Appeal issued a reprimand for such misplaced leniency, but public pressure forced the British Columbia Judicial Council to conduct an inquiry. Lynn Smith, a prominent feminist lawyer, wanted to represent the B.C. Federation of Women and the Vancouver Status of Women, but they were stopped by Canada's cautious judicial tradition. To participate, the applicants had to demonstrate a "direct stake." After the B.C. Supreme Court dismissed their appeal, these tenacious activists pressed their claims in another forum – the court of public opinion. Smith asked Canadians to consider something overlooked by the inquiry: the judiciary was discouraging victims from reporting sexual assault by "condoning violence against women."51

Confronting the Limits of Litigation

When feminists side-stepped the traditional threshold tests, they faced another set of hurdles. Without party status, litigants could not build strong legal arguments by filing motions, cross-examining witnesses, and presenting evidence. Using only written submissions and oral arguments, they had to persuade courts that certain federal statutes caused indirect forms of discrimination. Public agencies and private corporations could defend their interests by presenting compelling counter claims. Pre-Charter feminists never beat these poor odds – they lost every challenge. Environmentalists managed to win forty-four percent of their claims because they could ask courts to enforce summary conviction offences and issue prerogative writs. Feminists faced the steepest hurdle because they invited the greatest controversy. Most litigants asked Canada's cautious judiciary to breathe life into a narrowly framed, quasi-constitutional right.

When we sift through the decisions, the Charter revolution thesis seems highly compelling. By questioning the appropriateness of certain types of evidence, judges routinely dismissed the stories that women told. Feminists quickly discovered one of the inherent limits of adjudication. The traditional adversarial system prizes clearly defined, falsifiable facts, which are expressed dispassionately. Competing litigators are granted the freedom to rip apart and reconstruct the elements of a case. This system diminishes the value of evidence that depends on contextual subtleties. Plaintiffs can present involved narratives, but adjudication favours the fragments of a story. Jeannette Corbière Lavell confronted this barrier when she challenged the Indian Act.\(^{52}\) An Ontario District Court decided that section 12 strips women of their Indian status—without having any discriminatory effects. After calling her testimony "dubious, emotional, and militant," Justice Benjamin Grossberg argued that Aboriginal women could visit their old reserves to relieve their sense of cultural isolation. When Irene Murdoch presented her harrowing story, it was reduced to a handful of discrete issues.\(^{53}\) The Alberta Court of Appeal refused to accept her claim because she had already received alimony payments. The Supreme Court knew that she had purchased land and financed loans, but the majority stressed the absence of a "common intention" to divide the assets equally. Instead of expressing sympathy, Justice Ronald Martland agreed with the trial court judge. According to his assessment, Murdoch had simply performed "the work done by any ranch wife."\(^{54}\)

Most challenges were stopped by judicial restraint. One case was launched because the Ministry of Employment and Immigration decided to deport six domestic workers. With the support of an advocacy group, they filed the first complaint ever received by the Canadian Human Rights Commission. At the same time, they asked the Federal Court to


\(^{54}\) Ibid., 436.
issue an interlocutory injunction. Instead of attacking the deportation orders directly, their statement of claim insisted that the East Indian Control Program violated the Canadian Human Rights Act by targeting applicants from “non-European nations.” This strategy only irritated the Federal Court. The domestic workers wanted to become permanent residents, but they purposely asked for the wrong remedy, a temporary injunction. The heart of their argument was destroyed: the CHRA did not apply because the deportation orders were not discriminatory.

Section 1 claims confronted the same daunting obstacle. When Lavell appeared before an Ontario District Court, Justice Grossberg did something that epitomizes Canada’s cautious tradition. After questioning the appropriateness of politically motivated claims, he suggested a more legitimate strategy: if section 12 is “distasteful or undesirable to Indians,” they should ask Parliament “to correct any unfairness or injustice.” When she launched an appeal with Yvonne Bédard, the Supreme Court managed to save section 12 by asserting the principle of legislative supremacy. As a staunch defender of parliamentary democracy, Justice Roland Ritchie refused to believe that quasi-constitutional rights could fetter the Crown’s authority. He was deeply troubled by the implications of bold judicial review. If the Supreme Court was brazen enough to eliminate whole legislative regimes, he warned, “Parliament would be powerless.” The Indian Act was protected three years later, when Flora Canard challenged several provisions that regulated wills and estates. This legal fight began after federal officials decided that she could not be the administrator of her husband’s estate. The Manitoba Court of Appeal concluded that section 43 was unlawful because it treated Indians and “non-Indians” differently, but the Supreme Court disagreed. Justice Ritchie refused to believe that section 1 could “whittle away” the special status “so

56 Ibid., 187.
58 Ibid., 490.
clearly recognized in the British North American Act. Justice Jean Beetz supported this interpretation by arguing that judges do not have the authority to invalidate legislative regimes “in one stroke.”

The abortion campaign also confronted this seemingly immovable tradition when it challenged Canada’s old abortion law. Feminist groups did not encourage a cadre of lawyers to consider different legal options – they depended on the tenacity of one doctor. Henry Morgentaler experienced a frustrating sequence of victories and defeats during the 1970s. The Québec Court of Appeal overturned an acquittal because it believed that a jury wrongly accepted the defence of necessity. Instead of ordering a second trial, it decided that he was guilty. Morgentaler appealed this ruling, but the Supreme Court behaved predictably by respecting two Criminal Code provisions, section 251, which imposed sanctions on doctors who performed abortions, and section 613, which still permits appellate courts to overturn jury acquittals. According to Justice Louis-Phillipe Pigeon, Parliament purposely strayed from the common law tradition when it gave appellate courts this power. Justice Brian Dickson concurred by declaring that “we must accept . . . the values expressed by Parliament.” The Supreme Court also refused to accept Morgentaler’s equality argument because it questioned the Crown’s wisdom. Chief Justice Bora Laskin dismissed this section 1 claim by insisting that such inquiries are “foreign to our constitutional traditions.” He issued a pronouncement that demoralized feminists and their supporters: quasi-constitutional rights cannot be invoked “to supervise the administrative efficiency of legislation.”

Canada’s judiciary also enforced common law rights designed to protect individuals from wrongful prosecution. Environmentalists never confronted this obstacle. During the

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60 Ibid., 207.
62 Ibid., 670.
63 Ibid., 621.
64 Ibid., 632.
65 Ibid., 635.
middle of the 1970s, feminists managed to win an amendment to the *Criminal Code*. The "rape shield" law was designed to alleviate the trauma and humiliation of sexual assault trials. Defence lawyers were not allowed to ask complainants prying questions about their sexual history. To create a more sympathetic setting, section 142 forced trial court judges to determine the significance of controversial evidence in camera. However, the Supreme Court undermined this "feminist rule." Chief Justice Laskin acknowledged the legitimate purpose of section 142, but he urged lower court judges to protect the right to a fair trial. Forsythe infuriated feminists because it seemed to ignore the dangers that women constantly face. According to this critical perspective, Canada's high court was not enforcing a noble, timeless principle – it promoted the myth that sexually experienced women are less likely to tell the truth. The Supreme Court weakened another legislative victory the same year. Section 143 of the *Criminal Code* imposed limits on the defence of mistaken consent. The Trudeau government wanted to stop perpetrators from using this common law defence to escape prosecution. *Pappajohn* did not overturn any convictions, but the Supreme Court urged judges and juries to consider the issue of consent. 

Feminists expressed pessimism throughout the entire pre-Charter period. If any activists hoped that courts would promote equality, their optimism was destroyed by judges who issued unsympathetic decrees. During the 1970s, some women wanted to give their children "hyphenated names," but the lower courts attempted to stop this "embarrassing practice." Instead of trying to cultivate civility and fairness, several courts enforced eccentric rules. One judge discounted a woman's testimony because she appeared to be experiencing menopause. In another courtroom, lawyers and witnesses could not use the

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67 Ibid., 274.
70 Ibid., 156.
word "female" because the presiding judge found it "highly offensive."72 The Supreme Court was more tactful, but feminists believed that it was "tipping the scales of justice against women."73 After Morgentaler, some activists wondered why Canada's highest court consistently supported "reactionary forces."74 From their perspective, it was arrogant and undemocratic to overturn jury acquittals. Pappajohn and Forsythe generated even more outrage. According to rape crisis counsellors, the Supreme Court hurt the integrity of the criminal justice system by discouraging women from bringing complaints.75 These decisions produced an almost boundless cynicism. Feminists did not anticipate dramatic legal victories – they were trying to defend favourable rules introduced by Parliament. At the end of the pre-Charter period, with the support of Svend Robinson, a young member of the federal NDP, feminist groups mounted a campaign against the "male-dominated" Supreme Court.76

The tradition of judicial restraint also stopped anti-abortion groups from winning, but feminists had to pursue defensive tactics to counter these tenacious opponents. In 1979, the Ontario High Court of Justice considered an application to end abortion services at provincial hospitals.77 In 1981, another claim requested a permanent injunction to prevent the Toronto Transit Commission from removing anti-abortion posters.78 These actions were dismissed, but the feminist movement had to fight Joseph Borowski, the arch-enemy of

72 Vianney Carriere, "Judge won't allow word 'female' in his court," Globe and Mail, 30 November 1979, 1.
75 "Pappajohn is down to his final appeal," Kinesis (November 1979); Elizabeth Gray, "Courting regression on rape," Maclean's, 28 July 1980.
Henry Morgentaler. After hearing his legal case, the Saskatchewan Court of Queen’s Bench questioned the validity of section 251 and prohibited the federal government from funding abortions.\textsuperscript{79} This dispute quickly turned into an extended debate about jurisdictional issues and standing. The injunction against federal funding was overturned, but the Supreme Court shocked feminists by deciding that Borowski could challenge the \textit{Criminal Code}.\textsuperscript{80}

\section*{Overcoming the Limits of Litigation}

Pre-Charter environmentalists learned how to manoeuvre around some of the great common law barriers by mixing different forms of collective action. Instead of accepting unfavourable court decisions, they formed coalitions to fight larger political battles. Feminists might have emulated this strategy. Their success rate was demoralizing, but some judges offered valuable resources: dissenting opinions. Chief Justice Laskin was willing to support Irene Murdoch. After scolding the majority for not recognizing her “extraordinary” contributions, he defended the idea of creative judicial intervention.

Governments can exercise their constitutional powers to reform Canada’s family law regime, he acknowledged, but “the better way is not the only way.”\textsuperscript{81} Chief Justice Laskin presented another spirited dissent when the Supreme Court dismissed \textit{Canard}. After characterizing the \textit{Indian Act} as a “self-contained code” that assigns special status, the majority was able to ignore the discriminatory effects of section 12. Instead of endorsing this interpretation, his dissenting opinion noted the obvious: Parliament did not pass any

\footnotesize{\textsuperscript{79} Borowski v. Canada (Minister of Justice and Minister of Finance) [1980] 3 W.W.R. 1. \textsuperscript{80} Borowski v. Canada (Minister of Justice and Minister of Finance) [1980] 5 W.W.R. 283; Borowski v. Canada (Attorney General) [1981] 2 S.C.R. 575; \textsuperscript{81} Murdoch v. Murdoch [1975] 1 S.C.R. 451.}
companion statutes to move the *Indian Act* beyond the scope of section 1. He refused to assume that certain laws could be shielded from the Canadian Bill of Rights.82

Jeannette Corbière Lavell and Yvonne Bédard lost their legal battle, but a surprising number of judges dared to challenge the *Indian Act*.83 In 1971, the Federal Court of Appeal declared that section 12 violated the Canadian Bill of Rights.84 After applying *Drybones*, Justice Arthur Thurlow decided that Indian women did not enjoy the same rights and privileges as Indian men.85 The feminist movement achieved another victory when the Ontario High Court of Justice concluded that section 12 "rests on a distinction that harms Indian women but not Indian men." Instead of nervously weighing the administrative costs of his decision, Justice John Osler issued a confident declaration — the discriminatory effects are "perfectly apparent."86 When the Supreme Court considered this case, Chief Justice Laskin decided that section 12 "excommunicates" Indian women without harming the rights exercised by Indian men.87 The majority, he argued, simply attempts to "explain away" the discriminatory effects of "statutory banishment" by adhering to a narrow interpretation of "equality before the law." A separate dissent written by Justice Douglas Abbott chastized the majority for making the Canadian Bill of Rights "mere rhetorical window dressing."88 He was willing to admit that section 1 "substantially affected" the doctrine of parliamentary supremacy.

The feminist movement did not waste these political resources. They mixed different types of collective action and formed coalitions to improve their chances of winning legislative contests. Table XV records the advocacy groups that pursued variegated strategies. The list is comparatively short — environmentalists were far more willing to establish alliances. Not surprisingly, Canada's largest feminist group supported both court

88 Ibid., 484.
coalitions. Although NAC acted as a co-ordinator, these challenges were not guided by an established set of conventions. Activists reacted to different circumstances by taking their claims to legislatures, bureaucracies, courts, and international tribunals. Some groups did not have the capacity to support lengthy campaigns that jumped from one institution to another, but new coalitions emerged as old alliances withered away.

Table XV: Strategic Alliances Formed by Feminist Groups (1970-1981)

<table>
<thead>
<tr>
<th>Group</th>
<th>Court Coalition</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Action Committee on the Status of Women</td>
<td>2</td>
</tr>
<tr>
<td>B.C. Federation of Women</td>
<td>1</td>
</tr>
<tr>
<td>Vancouver Status of Women</td>
<td>1</td>
</tr>
<tr>
<td>Alberta Committee on Rights for Native Women</td>
<td>1</td>
</tr>
<tr>
<td>North Toronto Business and Professional Women’s Club</td>
<td>1</td>
</tr>
<tr>
<td>University Women’s Club of Toronto</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Three coalitions organized to fight the *Indian Act*. The first alliance dissolved after the Supreme Court delivered *Lavell and Bédard*, but Mary Two-Axe Early persuaded more groups to form another coalition.89 The Trudeau government confronted NAC, Indian Rights for Indian Women, the Canadian Research Institute for the Advancement of Women, and the Manitoba Action Committee on the Status of Women. They depended on a broad repertoire of tactics. During the fall of 1974, NAC declared that October 22 was a National Day of Mourning for the Canadian Bill of Rights.90 Activists in every province wore black to acknowledge the “death” of section 1. They also pressured federal legislators. In 1978, Mary Two-Axe Early appeared before the Lamontagne-MacGuigan committee on Bill C-60 to challenge the *Indian Act*. Some of the members were unsympathetic, but she gained an influential ally. Gordon Fairweather, the Canadian Human Rights Commissioner, declared

that section 12 was "blatantly discriminatory." The Minister of Indian Affairs and Northern Development reacted to this campaign by promising statutory changes, but Hugh Faulkner wanted to repeal section 12 without making the amendment retroactive.91

Another coalition appeared before the UN Human Rights Committee. Sandra Lovelace initiated this novel action in 1977 after receiving moral support and financial assistance from the Tobique Women’s Group. Instead of quietly waiting for the federal government to respond, they organized a series of disruptive demonstrations in Fredericton, outside the regional headquarters of the Department of Indian Affairs and Northern Development.92 In 1979, these determined activists gathered public support by leading a march to Ottawa. Two years later, Aboriginal women celebrated an important political victory. The UN Committee decided that section 12 violated the International Covenant on Civil and Political Rights by separating Sandra Lovelace from her cultural community. This ruling was released just before the patriation round, but the Liberal government failed to appreciate the irony. Aboriginal women and their supporters would not achieve their principal goal until 1985.

The Supreme Court sparked another wave of protest by refusing to acknowledge marriage as an equal partnership. Justice Martland was not moved by Irene Murdoch’s story because he refused to abandon Canada's political tradition: he could not modify the family law regime without also questioning the Crown. This decision epitomized the conservative approach cherished by most members of the judiciary, but the consequence was unpredictable. The Supreme Court inadvertently pitted the principle of legislative supremacy against an even more compelling principle — equality. Murdoch did not care

about Justice Martland’s abstract concerns. She declared that Canada’s highest court was “turning women into slaves.”93 Fueled by defiance, feminists organized an impressive campaign to overturn the regime that Murdoch affirmed. This battle revealed a striking similarity between the two movements. After expressing profound distrust, pre-Charter activists attacked different forms of discretionary power. Environmentalists wanted mandatory duties to bind cabinet ministers and bureaucratic officials. They hoped that a new statutory language would discipline the regulatory process. Feminists trusted legislators more than judges. Some governments were willing to introduce progressive laws, but Canada’s judiciary seemed trapped in the nineteenth century. To remedy this problem, they demanded exacting, mandatory rules to stop the lower courts from exercising so much discretionary authority.94

Ontario activists achieved a modest victory in 1975 when the Davis government decided to eliminate one of the barriers faced by Irene Murdoch. Bill 75 asked the courts to recognize the “direct, quantifiable involvement” of women in “financial enterprises.” Some Liberal members endorsed this new rule, but the NDP refused to support amendments that failed to recognize marriage as an equal partnership.95 Ontario’s social democrats also demanded mandatory training courses because they believed that too many judges were “out of touch.” The Conservative government ignored these criticisms, but a coalition was established to fight the second stage of the Murdoch campaign. Feminists wanted to expand the definition of “family assets” and narrow the discretionary powers exercised by lower court judges. The Ontario Status of Women Council explained why both changes were desperately needed: they would stop courts from applying “discredited case law.”96

95 Ontario Legislative Assembly, Debates, 5th Session of the 29th Legislature, June 1975, 3209-12. Bill 75 received royal assent in July 1975.
96 Ontario Legislative Assembly, Debates, 1st Session of the 31st Legislature, October 1977, 903.
The Davis government responded two years later by introducing Bill 59, the *Family Law Reform Act*, Bill 60, the *Succession Law Reform Act*, Bill 61, the *Children’s Law Reform Act*, and Bill 62, the *Marriage Act*.97 The pivotal amendment finally introduced the principle of equal partnership; judges were asked to divide joint assets equally. Leading advocates praised these measures, but they demanded the removal of certain “exceptions.” Divorce applicants could claim, for example, assets “not ordinarily enjoyed by both partners.” Another proposal was more controversial: they insisted that Bill 59 would have “disastrous consequences for women” if lower court judges could still “use their discretion.”98 The NDP supported the *Murdoch* coalition by presenting this argument to the Ontario Legislative Assembly. Evelyn Gigantes and Marion Bryden insisted that too many judges were defending antiquated values – they asked women to lead small, inconsequential lives or announced that menopause clouds the meaning of testimony.99 The NDP wanted new rules to tame these attitudes, but the Attorney-General, Roy McMurtry, refused to constrain the lower courts.

At the same time, feminists struggled to defend the national component of Canada’s family law regime. The 1968 *Divorce Act* established criteria for every phase of the separation process except the division of assets and property. Courts were asked to apply statutory rules on child custody, spousal maintenance, and child support. Just as feminist groups began to win stronger provincial laws, the federal government considered vacating this crucial policy area.100 Some recommended a complete departure, while others promoted a less radical form of devolution: the provinces could exercise greater control, but they would have to respect certain general guidelines. Feminists demanded the very

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opposite; binding rules enforced by the federal government. Not surprisingly, they refused to trust the same provincial officials who needed five years to correct Murdoch. NAC managed to counter this threat after forcing Trudeau to consider the political implications – if the Liberal government abandoned the field of family law, it would lose the support of women across Canada.

Feminists thoroughly distrusted the judiciary, but they did learn how to achieve legislative victories after losing in court. Pre-Charter activists mounted another successful campaign to counter the negative effects of Bliss. This dispute started in 1971, when Trudeau’s first cabinet responded to the RCSW by amending a number of federal statutes, including the Unemployment Insurance Act. 101 Section 30 invited pregnant women to apply for special maternity benefits if they could meet an exacting requirement. Claimants had to demonstrate at least twenty weeks of insurable employment, but ten weeks of work had to occur thirty weeks before the expected “date of confinement.” This confusing condition was based on a biological fact: the average pregnancy is about forty weeks long. By adding the “magic ten rule,” federal officials stopped women from entering the workforce just after conceiving. Another rule, formalized in section 46, prevented pregnant women from claiming general benefits.

The feminist movement celebrated the expansion of UI coverage, but the logic of section 30 began to unravel when they discovered the story of Stella Bliss. After announcing her pregnancy in 1975, she was fired by her employer, the manager of a Ford dealership. The B.C. Human Rights Commission issued an order of reinstatement the next year, but she was fired again, just before the birth of her son. Bliss could not receive maternity benefits because she failed to satisfy the “magic ten rule.” Even though she was willing to work, section 46 prevented her from receiving the same general benefits that male claimants enjoyed. Despite losing the first stage of the UI appellate process, she managed to win the

next round. As an umpire exercising statutory powers, Justice Frank Collier decided that section 46 recognized sexual differences to skirt a well-established principle: claimants should receive benefits if they are willing to work.

This dispute became more controversial when the Unemployment Insurance Commission launched an appeal. After agreeing to accept the case, Lynn Smith, the Chair of the Vancouver Legal Assistance Society, organized a loose coalition of unions and advocacy groups. NAC and the Vancouver Status of Women worked with the B.C. Federation of Labour to establish a legal defence fund. Andrew Roman, the founder of PIAC, supported the Bliss challenge by persuading John Nelligan, an influential lawyer, to act as co-counsel. This coalition was highly capable, but it confronted the same barrier that stopped other section 1 claims, Canada’s cautious judicial tradition. The Federal Court of Appeal was not tempted to agree with Smith and Nelligan. Justice Louis Pratte confounded feminists by deciding that section 46 treats unemployed pregnant women differently “because they are pregnant and not because they are women.” The Supreme Court also blamed biology. Instead of wrestling with the difficult policy issues, Justice Ritchie delivered an uncomplicated declaration: “any inequality between the sexes . . . is not created by legislation but by nature.” He considered the virtues of maternity benefits without acknowledging the harmful effects of section 46. How could the Supreme Court condemn Parliament, Justice Ritchie wondered, for trying to help pregnant women.

After the Supreme Court released Bliss, the legal challenge turned into an impressive legislative campaign. Instead of expressing resignation or acquiescence, Smith issued her own declaration: “we will take it up with the politicians now.” With the support of other groups, NAC and NAWL urged the Minister of Employment and Immigration to present their

104 Ibid., 191.
case to the federal cabinet. Trudeau responded to this growing pressure by establishing the Task Force on Unemployment Insurance. Feminists persuaded the members to accept their equality argument: the “magic ten rule” and section 46 hurt the very women who need special support. The Liberal government became increasingly sympathetic as the political context changed. During the patriation round, it was difficult to promote constitutional equality rights and defend discriminatory laws. At the end of the pre-Charter period, the federal cabinet agreed to amend the *Unemployment Insurance Act*.\(^{106}\) By combining different forms of collective action, feminists persuaded Parliament to counter the damaging effects of a Supreme Court decision.

### III. Changing the Rules of the Game

Pre-Charter environmentalists formed broad coalitions to win legislative contests. When this strategy failed, they urged federal and provincial governments to modify the rules of the game. Pollution Probe pressured the Davis cabinet to liberalize the law of standing and create new causes of action, while CELA promoted a new statutory language that would encourage rigorous judicial review. We have to find out if feminists pursued similar strategies. After discovering the limits of litigation, they might have demanded stronger legal rights. The explanations offer rival predictions. (i) The Charter revolution thesis insists that governments dominate the process of institutional change. Like other loosely organized interests, feminists do not have the resources to alter the shape of the state. They can only work with political elites who want similar structural reforms. (ii) If the court party thesis is correct, post-materialists should view judges as the primary agents of social change. Because they characterize legislative politics as seamy and unprincipled, feminists should refuse to bargain with state officials and private interests. There is one exception.

Post-materialists might react if governments propose to introduce stronger justiciable rights.

(iii) The judicial pluralism thesis claims that feminists are structural actors who routinely demand favourable rules. Because these pre-Charter activists feel ignored and excluded by those in power, they should fight for constitutional guarantees, broadly framed statutory rights, and intervenor funding.

**Equality Rights and the Ontario Government**

The RCSW urged Canadian governments to consider a range of policy changes, but feminists also marshalled their resources to win certain structural changes. After organizing a loose coalition of like-minded activists, the Ontario Committee on the Status of Women persuaded the Davis government to intensify the fight against private forms of discrimination. In 1972, Bill 199 added age and sex to the provincial human rights code. This pre-Charter battle was not very dramatic. Instead of sparking an intense debate, Bill 199 received strong public support. It was endorsed by the Canadian Civil Liberties Association, the Liberal Party, and the NDP. At the start of the pre-Charter period, the Ontario model seemed to represent an acceptable compromise. The government would tackle pressing social problems without offending the principle of parliamentary supremacy and citizens could seek different types of compensation without straining the civil courts.

This optimism withered away as feminists began to understand the limits of statutory codes. By the middle of the 1970s, both movements confronted the same problem. After winning favourable laws, the Conservative government would quietly undermine their effectiveness. It was willing to introduce the *Environmental Protection Act* and the *Environmental Assessment Act*, but the new MOE was not granted the resources to develop an impressive enforcement branch. The Ontario Human Rights Commission was just as

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vulnerable. The Davis cabinet exerted considerable influence by appointing party
supporters and restricting the size of the budget. Most provincial governments pursued
similar strategies, leaving feminists profoundly pessimistic. Human rights workers did not
become powerful agents of social change. Some scolded female complainants for bringing
“silly” complaints.108 Others were dedicated but constrained. They did not have the
capacity to attack deeply rooted, “structural problems.”109

By the late 1970s, feminists became convinced that Ontario’s regime was far too
conciliatory. They wanted the OHRC to pursue an aggressive, adversarial approach.
Instead of quietly negotiating settlements, human rights administrators would investigate
complaints, “prosecute” offenders, and issue authoritative decrees. Although feminists
rejected litigation after suffering crushing defeats, they hoped that OHRC boards would
behave more like courts. This strategy confronted a familiar obstacle, judicial constraint.
Canada’s judiciary enforced the principles of natural justice, but it did not expect human
rights commissions to follow every element of the common law tradition. Instead of
replicating the rules of adjudication, it was willing to preserve alternative forms of dispute
resolution. In 1979, two decisions acknowledged the virtues of bargaining and reconciliation.
The first claim was brought by a complainant who wanted to overturn an unfavourable
ruling.110 The second claim was more troublesome. As a tort action, it was designed to
circumvent the entire process.111 Both challenges failed because Ontario courts were not
willing to endanger the OHRC — they refused to invite a flood of collateral civil claims and
judicial review petitions.

Despite this new barrier, NAC activists continued to believe that structural reforms
would improve Ontario’s regime. They wanted human rights commissions to process single

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108 Norrie Preston, “Wrong turn for human rights,” Status of Women News (Fall 1979);
Maryka Omatsu, “Kathleen Ruff: commitment and no apologies,” and Louise Dulude,
N.R. 455.
claims and solve diffuse social problems. Instead of playing a reactive role, the OHRC could
enforce stringent equity programs that reached into every public and private workplace.
Feminists hoped to win these changes in 1981, when the Davis government amended the
*Ontario Human Rights Code*. The debate over Bill 7 was dominated by one issue, sexual
orientation. Feminists worked with gays and lesbians to demand formal protection, but
the Conservative government was not prepared to accept such a controversial idea. Some
back-bench members argued that “alternative lifestyles” threatened the “traditional family.”
NAC did manage to win one concession. Bill 7 promised to prohibit “persistent sexual
harassment in the workplace.” Robert Elgie agreed to strengthen this declaration by
removing the word “persistent.” However, he was not willing to acknowledge the benefits
of adversarialism. The Davis cabinet refused to adopt any measures that might make the
OHRC arrogant and unaccountable.

**Equality Rights and the Federal Government**

When feminists appeared before the Royal Commission on the Status of Women, the
language of rights framed most of the proposals. Still, these pre-Charter activists did not
espouse the virtues of the American tradition, like some environmental litigators. They
were inspired by the work of international organizations, especially the United Nations. To
win certain policy changes, feminists urged the federal government to respect principles and
standards that were advanced by the UN. After proposing a new family law regime, the
Canadian Federation of University Women asked the Liberal government to ratify the UN

112 Ontario Legislative Assembly, *Debates*, 1st Session of the 32nd Legislature, May 1981,
741. Bill 7 received royal assent in December 1981.
113 Gunther Plaut, “Ontario’s giant steps to protect human rights,” *Globe and Mail*, 27
February 1981, 7; Sylvia Stead, “Clearer powers urged for rights officials,” *Globe and Mail*, 11
114 *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Queen’s
Printer, 1970). At the University of Toronto, Robarts Library has a copy of most RCSW
briefs.
Declaration on the Elimination of Discrimination Against Women. The National Council of Women wanted Canada to respect UN conventions that promoted equality in the workplace. Some groups criticized the Canadian Bill of Rights, while demanding new programs. The large national organizations did not employ lawyers who could present sophisticated legal arguments, but they knew that section 1 was not a constitutional guarantee. Without offering any specific proposals, they wondered if a charter of rights would strengthen Canada's commitment to equality.

Feminists also pushed the Trudeau government to create a federal human rights regime. As the Supreme Court undermined the value of section 1, this campaign gathered momentum.115 Because judges expressed antiquated attitudes, feminists hoped that human rights administrators would promote an ambitious model of equality. The Department of Justice responded to these pressures in 1975, but the first proposal was condemned by NAC and CACSW. Bill C-72 followed a similar legislative strategy. Even though the Liberal government promised to fight discrimination, it only established a series of vague guidelines. Federally regulated employers were not asked to implement rigorous equity programs. They did not have to worry about mandatory schedules and costly compensation awards.116 A coalition of feminist groups asked the Trudeau cabinet to consider an alternative regime. After witnessing the decline of provincial agencies, the National Association of Women and the Law wanted federal tribunals to hear entire classes of complaints and root out the causes of discrimination.117 NAC activists wanted to shift the onus of proof. Employers have the resources to meet this burden, they argued,


This chapter reveals some of the structural preferences that pre-Charter activists shared. Environmentalists asked governments to create new standards of proof; they wanted polluters to demonstrate their innocence before civil courts and criminal courts. Feminists applied the same principle to a different forum; they wanted to privilege human rights complainants by forcing employers to shoulder the burden of proof. Another similarity is even more striking: pre-Charter activists wanted to pare away some of the discretionary powers exercised by state officials. Because environmentalists distrusted political executives and bureaucratic officials, they wanted regulatory statutes to include mandatory duties, rigorous standards, and broad causes of action. Because feminists distrusted trial court judges, they wanted a new family law regime that narrowed the scope of discretion.
Fighting for Constitutional Rights

As the RCSW inquiry was ending, feminists had an opportunity to demand new legal instruments. Between 1968 and 1971, the first ministers struggled to modify Canada's Constitution. They considered a daunting range of issues at seven “summit conferences,” though some proposals were quickly dismissed. As the bargaining progressed, they concentrated on the federal spending power, social policy responsibilities, an amending formula, and Trudeau’s charter of rights. This round of discussions respected the conventions of elite accommodation. Governments and their advisors carefully developed a compromise – concerned citizens were not invited to interfere. The institutions of executive federalism were closed and secretive, but the Liberal government did allow public participation at a distance. Individuals and organizations could appear before the Molgat-MacGuigan committee. Although the modern feminist movement was still forming as this forum travelled across Canada, the older groups could not ignore such an important debate. Activists from the National Council of Women urged the Liberal government to promote the principle of equality.121 Instead of presenting highly refined legal arguments, they simply endorsed Trudeau’s argument: a more authoritative, less tentative series of rights would strengthen Canadian democracy. Some of the newer groups were more concerned about abortion. An openly radical organization, the Women’s Liberation Movement, hoped to win “reproductive rights.”122 Feminists also confronted their most determined opponent, the anti-abortion movement. A loose coalition of groups wanted to protect the “unborn” by winning fetal rights. These demands did not affect the bargaining process: Premier Robert

122 Ibid., 46:50.
Bourassa was quite conscious of public opinion in Québec, but Canada's first ministers toiled away without really considering this broader debate. After the Victoria charter was rejected, other issues climbed to the top of the federal agenda.

Ironically, the members of the Supreme Court encouraged feminists to continue their fight. Without trying, they advanced the equality rights project by generating fear and anger. This point is worthy of careful consideration. Feminists were not moved by optimism after hearing about Jeannette Corbière Lavell, Yvonne Bédard, and Irene Murdoch – they hoped that Trudeau's charter would force judges to abandon narrow precedents and archaic attitudes. Most advocacy groups pursued the RCSW agenda throughout the 1970s, but a handful of prominent activists started to develop the next phase of the equality rights project. Doris Anderson exercised considerable influence as the editor of *Chatelaine*, a widely read women's journal. Her witty editorials captured the absurdity of *Murdoch* and the section 12 challenges. In 1974, seven years before Canada's first ministers introduced the Charter, she urged women to consider the benefits of constitutional rights.123

Mary Eberts did not represent any pre-Charter litigants, but she provided valuable advice after graduating from the LL.M. program at Harvard. When NAC was fighting for a federal human rights regime, Eberts presented a sophisticated analysis. Feminists should demand strong human rights codes, she argued, but they have to understand the limits of such measures. Complainants will not be allowed to question the validity of discriminatory laws. Another problem was just as worrisome: women could win important victories, but courts still retained the right to overturn CHRC decisions. This assessment ended with one compelling idea. In 1977, three years before the patriation round, Eberts argued that constitutional guarantees "would be the best protection against discrimination."124 Lynn Smith agreed. After presenting two pre-Charter claims, *Bliss* and *Tourangeau*, she urged her colleagues to consider the frailties of section 1 and the benefits of constitutional change.

Curiously, the equality rights project seemed to lose energy between 1978 and 1980. Environmentalists appeared before the Lamontagne-MacGuigan committee, but feminists stayed away. Although CELA asked the members to endorse the public trust doctrine, NAWL did not demand new equality guarantees. Canada's largest feminist group asked the Liberal government to consider eleven policy objectives during the 1980 election campaign, but NAC did not demand any justiciable rights. These events appear to support the Charter revolution thesis. Feminists demanded policies and programs, not structural changes. They reacted to the process of constitutional reform at the last minute — when Trudeau needed help to win his charter of rights. However, this interpretation fails to understand the sequence of strategic choices. Most elite activists still wanted stronger equality rights, but they underestimated Trudeau's determination. They assumed that provincial opposition would hinder the patriation process. When an agreement started to take shape, during the fall of 1980, feminists organized to fight for new legal tools.

The task of mobilizing women was complicated by partisan differences, ideological concerns, and linguistic cleavages. Like their leader, Joe Clark, most Conservatives refused to support the federal government. They criticized Trudeau for trying to amend Canada's Constitution unilaterally. Some left-leaning activists believed that constitutional rights would weaken the feminist movement by encouraging the "process of professionalization." They did not want lawyers, academics, and policy experts to wield more authority than community activists. From this critical perspective, the constitutional forum seemed like a seductive trap. Instead of fighting for "material" changes, women would expend their resources trying to win abstract declarations. This debate also damaged the

128 Black, "Ripples in the Second Wave: Comparing the Contemporary Women's Movement in Canada and the United States."
relationship between Québec francophones and English Canadian activists. Predictably, most Québec feminists resisted the political purpose of Trudeau's charter. They did not want to constrain their government just to strengthen national unity.\textsuperscript{129} In 1981, after an intense internal struggle, FFQ, la Fédération des Femmes du Québec, decided to leave NAC.

The equality rights project confronted another obstacle—distrust. After witnessing \textit{Murdoch} and \textit{Bliss}, women were asked to grant courts even more control over their lives. Rape crisis centres were asked to forget \textit{Pappajohn} and \textit{Forsythe}. Distrust was not simply expressed by radical feminists who wanted to undermine the "capitalist state." The president of NAC, Lynn McDonald, was one of the principal opponents.\textsuperscript{130} Instead of dismissing these concerns, Doris Anderson forced Canadian women to consider the alternative. The first ministers would still introduce a charter, she argued, but they would not create stronger equality rights.\textsuperscript{131} Left alone, they would likely entrench a guarantee that resembled section 1. With the help of sympathetic journalists, especially Michelle Landsberg, she urged women to promote their constitutional interests.\textsuperscript{132} A broad cross-section of groups responded to this plea by appearing before the Hays-Joyal committee. Most of the participants endorsed Anderson's argument, but they certainly did not sound like naïve optimists. NAWL lawyers wanted boldly worded guarantees to replace section 1 and mandatory training courses to educate narrow-minded, unresponsive judges.\textsuperscript{133}

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\textsuperscript{129} Chaviva Hosek, "Women and the Constitution," Keith Banting and Richard Simeon, eds., \textit{And No-One Cheered} (Toronto: Methuen, 1983).
\textsuperscript{130} Vickers, Rankin, and Appelle, \textit{Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women}.
\textsuperscript{131} Personal interview with Doris Anderson, June 1995.
\textsuperscript{133} Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, 1st Session of the 32nd Parliament, November 1980, 22:50.
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Instead of simply advocating formal changes, they wanted courts to acknowledge the complex, structural nature of inequality. Activists from CARAL expressed even less faith in Canada's judiciary. They imagined a "terrifying" scenario: unsympathetic judges would determine the scope of abortion services and "pro-life" groups would flood the judicial system with hundreds of hostile actions.134 CARAL was willing to support an amended version of Trudeau's charter, one that promised to protect reproductive rights, but it was reluctant to trust the "all-male" Supreme Court.135

Mary Eberts appeared before the Hays-Joyal committee as a representative of CACSW. Pessimistic activists refused to support the charter because they distrusted Canada's courts, but she reversed this argument. Because women distrust the judiciary, they have to fight for strong, unambiguous guarantees.136 Eberts also expressed grave concerns about the new section 1, the "reasonable limits clause." From her perspective, this provision was designed to protect the interests of governments, not the rights of citizens. She feared that it would invite judges to preserve unconstitutional laws. Some groups demanded stronger equality guarantees and "social rights" to help the "disadvantaged."137 The federal NDP supported both demands. Not surprisingly, anti-abortion groups appeared before the Hays-Joyal committee to ask for fetal rights and a broader declaration that recognized the "right to life."138 When few legislators expressed sympathy, they argued that Trudeau's charter would weaken Canadian democracy by transferring too much authority to judges.139

The Liberal government was not eager to accept the feminist agenda. Instead of trying to appear responsive, it ordered the Canadian Advisory Council on the Status of

134 Ibid., 24:116.
135 Ibid., 24:106.
136 Ibid., 9:126 and 9:141.
137 Ibid., 29:21. For example, see the position taken by the National Anti-Poverty Organization.
139 Ibid., 34:117.
Women to cancel a planned conference. Ironically, this decision energized the equality rights project. After stirring public interest by resigning, Doris Anderson decided to organize another conference with the support of AHC, the Ad Hoc Committee on the Constitution. The principal members were lawyers from Toronto and Ottawa. Beth Symes, Marilou McPhedran, and Beth Atcheson worked together while setting up the Toronto Women's Health Clinic. Beverly Baines, a law professor at Queen's University, supported the campaign by contributing to *Women and the Constitution*. This CACSW report demonstrated the need for institutional change by tracing the evolution of pre-Charter jurisprudence. AHC activists were motivated by strategic calculations, not grandiose visions. According to their sources, a “black book” was being circulated by Department of Justice officials; it revealed that Trudeau wanted to introduce a narrowly framed equality right. This was their primary goal – to stop Canada's first ministers from entrenching anything that resembled the old section 1.

The disagreements that immobilized NAC also threatened to fracture the Valentine's Day Conference. Some women wanted to adhere to consensual styles of decision-making instead of following the hopelessly conventional *Robert's Rules of Order*. Radical feminists did not want to support a small cadre of professional women who believed that formal rights could destroy patriarchal institutions. Members of the federal Conservative Party continued to express reluctance. Maureen McTeer hoped that an emotional appeal would undercut the growing support for constitutional change.

141 Sherene Razack’s personal interview with Mary Eberts, March 1988.  
However, at the end of this debate, most of the participants were willing to take the risk. To accomplish their ambitious objectives, AHC activists targeted provincial premiers who still opposed Trudeau’s charter, especially Allan Blakeney. Saskatchewan’s premier praised the virtues of parliamentary democracy, but he was also deeply committed to equality. Feminists placed just as much pressure on federal officials. This strategy worked. Jean Chrétien, the Minister of Justice, agreed to strengthen section 15, the principal equality clause. He also added section 28. This provision declares that all Charter rights are guaranteed to men and women equally. AHC had to fight another battle after the Supreme Court stopped the Liberal government from amending Canada’s Constitution unilaterally. To accommodate the provinces, Trudeau agreed to add section 33.

Feminists were profoundly threatened by this rule. By applying the override clause, governing parties would still be able to defend discriminatory laws. Remarkably, AHC persuaded the first ministers to protect section 28—future governments would not be allowed to shield their laws from this declaration of equality.


147 Personal interview with Doris Anderson, June 1995.
Symes, and McPhedran urged other activists to consider the next stage of the fight: women would have to establish an organization that could pursue “test case litigation.” With the support of Eberts and Baines, they quietly developed the components of a larger strategy. CACSW gave this small unnamed group the resources to study public interest litigation in the United States and Canada. Nancy Jackman, a philanthropist who supported the equality rights project, was prepared to offer a generous grant to establish a new legal defence fund. At the same time, feminist lawyers struggled to change the composition of Canada’s highest court. As private attorneys and legal scholars, they certainly recognized the political, discretionary character of adjudication. Knowing that judicial decisions reflect ideological preferences and personal attitudes, these “realists” urged the federal government to appoint the first female Supreme Court justice by inviting Trudeau to make one of Canada’s national institutions more representative. In 1982, just after entrenching the Charter, he responded by appointing Bertha Wilson. A three-year moratorium stopped feminists from using section 15 in court, but they pursued a novel strategy. Instead of assuming that governments would review their laws and correct potential violations, teams of activists conducted their own “statutory audits.” These efforts would eventually reap great rewards.

Even though feminists and environmentalists asked for different amendments, pre-Charter activists shared some of the same structural interests. Environmentalists wanted new justiciable rights because they distrusted cabinet ministers and bureaucratic officials who rarely enforced regulatory standards. A similar instinct challenged section 33. Feminists believed that future governments would use the override clause to preserve discriminatory laws. After witnessing the slow response to Murdoch, they refused to support this last vestige of legislative supremacy. Pre-Charter activists also distrusted

Canada's conservative judiciary. Environmentalists demanded new statutory rules after realizing that most judges were unsympathetic. Feminists expressed even less confidence. During the 1970s, they wanted provincial governments to narrow the discretionary authority exercised by insensitive lower court judges. During the patriation round, they could not summon enough faith to support the section 1 because it asks courts to apply a vague common law standard, "reasonableness." In the next two chapters, we will discover how this distrust shaped the evolution of post-Charter litigation.
CHAPTER FOUR

The Environmental Movement in Post-Charter Canada

I. Mapping the Context

This chapter challenges the conventional wisdom. The literature suggests that environmentalists rarely enter the courtroom because Canada's Constitution does not try to protect the natural environment.\(^1\) Unable to base their claims on broadly framed rights, these post-Charter activists characterize legal strategies as costly and dangerous. Although some litigants win unexpected victories, most groups reject litigation – they would rather pursue conventional forms of collective action. This interpretation sounds compelling, but the Court Challenges Database documents hundreds of post-Charter claims. A second generation of litigators developed imaginative legal arguments and aggressive court strategies. Instead of ignoring the judicial system, broad coalitions of groups continued to promote the environmental rights project. Before reviewing the rules of the game and the patterns of litigation, the reader has to have some sense of the changing political context.

The Canadian environmental movement confronted a series of threats. As governments promoted trade liberalization and deregulation, an economic recession hurt the most important source of funding, contributions from individual members.

The Political Milieu

Two very different ideas have emerged during the post-Charter period. Those who promote “deep ecology” challenge well-established attitudes by insisting that all living species are equal.\(^2\) This declaration leaves little room for compromise. Deep ecologists frequently dismiss policy-makers and environmentalists who are misguided enough to express “anthropocentric” objectives. They certainly reject the second idea. In 1987, under the leadership of Gro Harlem Brundtland, the UN World Commission on Environment and Development decided that “sustainable development” meets the “needs of the present without compromising the ability of future generations to meet their own needs.”\(^3\) Not surprisingly, governments and industries quickly embraced this very palatable concept. Instead of demanding “zero growth,” the severe standard proposed by the Club of Rome in 1972, it allows responsible forms of economic development. Even though public agencies and private institutions adopt self-serving interpretations of “sustainability,” this principle has cultivated the legitimacy of environmentalism.

These new ideas encouraged different strategic responses. As pre-Charter groups matured, they became institutionalized. Instead of relying on dedicated volunteers, they recruited highly educated activists who could enter the formal policy-making process. This professionalism disenchanted some groups, especially proponents of deep ecology. They consciously or unknowingly emulated elements of the “feminist method” by rejecting hierarchical structures and traditional forms of collective action. After criticizing the conventions of ordinary legislative politics, these activists praised the virtues of “non-violent

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\(^3\) UN World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), 43.
civil disobedience." A relatively small number of groups have pursued this alternative approach, including Earthroots, Friends of the Lubicon, and the Sea Shepherd Conservation Society. The principle of sustainable development has cultivated co-operative forms of bargaining because it acknowledges competing values. Environmentalists have to negotiate with their traditional adversaries, the polluting industries, to win policies that protect vulnerable ecosystems and promote economic growth.

Another idea fueled post-Charter activists: the global character of environmental destruction. During the 1980s, they witnessed the Bhopal chemical disaster, the Chernobyl catastrophe, and the massive Exxon-Valdez oil spill. These disasters demonstrated the limits of domestic regulatory regimes. By citing a growing body of scientific research, international organizations persuaded industrialized governments to endorse a string of multilateral agreements. The OECD and the UN Economic Commission for Europe introduced targets to reduce emissions of sulphur dioxide, nitrogen oxides, and volatile organic compounds. To advocate the principle of sustainable development, the Brundtland Commission demonstrated the relationship between population growth, the world economy, energy consumption, and the uneven distribution of resources. The international regime continued to develop throughout the second period. In 1992, the UN Conference on Environment and Development produced an ambitious agenda to address climate change, toxic substances, unregulated biotechnology, and rapid deforestation. The participants of the Rio Conference adopted a series of covenants to promote "biodiversity."

Public opinion was also affected by domestic incidents. In Ontario, MOE officials had to grapple with the Dow Chemical "toxic blob," which caused irreparable harm to the St.

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Clair River, and the huge Hagersville tire fire. Water pollution was a pressing issue throughout the 1980s, especially in southern Ontario, because the International Joint Commission continued to release disturbing reports about the health of the Great Lakes. Environmentalists adopted new goals as scientific evidence became more certain. After introducing the concept of "zero-discharge," Pollution Probe asked regulators to stop the release of all persistent toxic substances. Acid rain captured even more attention because it pitted Canada against the United States. At the beginning of the post-Charter period, the Coalition on Acid Rain organized a continental campaign that received considerable financial support from Toronto and Ottawa. These well-funded activists managed to achieve their objectives by pursuing an ingenious mix of tactics. Between 1985 and 1990, Brian Mulroney's Conservative government introduced the Acid Rain Abatement Policy, the Canadian Council of Ministers of the Environment drafted a series of federal-provincial agreements, the Ontario cabinet dedicated eighty-five million dollars to reduce sulphur dioxide emissions, and President George Bush strengthened the Clean Air Act.

These disasters increased the saliency of environmental issues, but economic problems undermined the benefits of greater public support. After the patriation round, the unemployment rate climbed to twelve percent, the value of the dollar slipped, interest rates were pushed over twenty percent, and the GNP declined for the first time since the Great Depression. Predictably, the 1984 election campaign was dominated by two concerns, the rising costs of unemployment and the burgeoning national debt. The newly elected Mulroney government promised to counter the forces of economic continentalism, but the Macdonald Commission on Economic Union persuaded most of Canada's political élites to support trade liberalization. A new set of neo-liberal assumptions gradually replaced the broad consensus that had sustained the post-war welfare state. While feminists defended

7 Harold Clarke, Jane Jenson, Lawrence LeDuc, and Jon Pammett, Absent Mandate (Toronto: Gage, 1991).
established social programs, environmentalists struggled to preserve national regulatory standards. The Conservative government expressed little sympathy: Environment Canada received less than one percent of the federal budget and the operating budget of Canadian Wildlife Service was reduced by twenty-two percent. Ironically, this political climate revealed an unexpected source of strength. During the early 1980s, Trudeau hoped to cultivate the trust of feminist groups by providing generous grants. Although federal funding helped establish the Canadian Environmental Network, and some organizations received project-based grants, most groups developed without public support. The recession hurt both movements, but environmentalists were more resilient.

During the 1988 election, a broad coalition of activists joined the Pro-Canada Network to oppose the Free Trade Agreement. Feminists and environmentalists argued that trade liberalization threatened valuable cultural institutions, fragile natural resources, and generous social programs. Mulroney refused to abandon the FTA, but he was willing to spend millions of dollars on highly visible projects, including the South Moresby National Park. The federal cabinet also introduced a new generation of regulatory statutes. The Canadian Environmental Protection Act was designed to regulate the entire “life-cycle” of persistent toxic substances by forcing DOE officials to collect data from private sources, determine the risks of dangerous substances, formulate rigorous standards, and draft “equivalency agreements” with their provincial counterparts. In 1990, when a wave of public support peaked, the Conservative government announced the Green Plan. The Environment Minister was willing to allocate 850-million dollars to fund a range of projects, but Robert de Cotret refused to create carbon taxes. Post-Charter activists continued to oppose trade liberalization during the early 1990s, when Canada, the United States, and Mexico presented the North American Free Trade Agreement. Another network of groups

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struggled to achieve concessions. After recognizing the right of each nation to determine the stringency of regulatory standards, the final draft established scientific review boards to advise "dispute-settlement panels." NAFTA also created a body to co-ordinate research and consider public concerns, the Commission for Environmental Co-operation.

When the Liberal Party won the 1993 general election, post-Charter activists expressed optimism. Two legislative allies joined the federal cabinet: Paul Martin became the Finance Minister and Sheila Copps became the Environment Minister. However, the pressures produced by globalization did not suddenly vanish. Prime Minister Jean Chrétien still had to lower the rate of unemployment and tackle the national debt. During his first two years, he decreased transfer payments to the provinces, reduced the size of the bureaucracy, and accelerated the pace of deregulation. To make the Canadian business climate more " hospitable," the Liberal cabinet proposed to exempt private corporations from layers of "burdensome" regulations. 12 Instead of acting like vigilant stewards, federal environment ministers have encouraged this trend by working with their provincial counterparts to strip away "costly forms of duplication."

Ontario's political system reacted to the same pressures differently. During the early 1980s, the waning Conservative government was reluctant to introduce new environmental laws. Although it considered introducing a "spills bill" to discourage accidental discharges of toxic substances, industry groups refused to accept any measures that included absolute liability provisions. 13 This issue hurt the Davis cabinet during the 1985 election campaign. Every leader promised to strengthen the Environmental Protection Act, but the opposition parties sounded more credible. The outcome favoured environmentalists. The old regime ended, David Peterson's Liberal Party needed the

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support of the NDP to govern, and the new leader of the Conservative Party was willing to support certain legislative reforms. As the Environment Minister, Jim Bradley did not waste this rare opportunity. After granting new enforcement powers to the embattled MOE, he introduced the Municipal-Industrial Strategy for Abatement, new regulations to stem acid rain, an ambitious waste management program, and a "spills bill."

The Liberal Party managed to win the 1987 general election, but the composition of the government was quite different. Those sympathetic to business interests wielded more influence. The Conservative Party also shifted to the right under the leadership of Andy Brandt. This political climate slowed the pace of reform. Bradley was still an important ally, but he faced new sources of opposition. Environmentalists were less eager to support the government during the 1990 general election. Because the Conservative Party argued that strict regulatory standards were discouraging investment, most activists supported the winning party, the NDP. Ontario's social democrats confronted grave economic problems, some caused by their own spending, but they managed to keep an important election promise: Premier Bob Rae introduced the Environmental Bill of Rights. The political context turned against the environmental movement when the Conservative Party regained power in 1995. After forcing MOE officials to reduce their operating budget, Mike Harris cut more than three million dollars from Ontario's recycling program, endorsed the development of the Temagami Region, and promised to repeal the ban on solid waste incinerators.14

These political cycles opened and closed crucial entry points, but an important shift occurred between 1982 and 1995. Line departments became more accessible and the Mulroney government responded to the Brundtland Commission by establishing the National Task Force on the Environment. Post-Charter activists were encouraged to work with agricultural organizations, industries, unions, and municipalities. However, by the early 1990s, most groups dismissed these "multi-stakeholder initiatives" because they failed

14 "The common sense revolution comes to Ontario's environment," CIELAP Newsletter 3(3) (Fall 1995); "Environment will suffer under Tory plan," Globe and Mail, 14 June 1996, A3.
to produce significant victories. Activists expressed their concerns and agreed to major concessions, but the Canadian Environmental Protection Act did not create new justiciable rights, the Green Plan rejected carbon taxes, and the federal government still reduced the size of the VIA Rail system. Environmentalists discovered the limits of winning access: even though coalitions could present persuasive arguments and compelling evidence, their opponents exercise more political power.\(^{15}\) They have bigger budgets and better connections. Ontario officials established similar arrangements, but they also strengthened the credibility of the administrative regime by appointing several prominent environmentalists. Instead of favouring loyal party supporters, the Liberal cabinet asked Mary Monroe, Michael Jeffrey, and Grace Patterson to sit as members of the Ontario Municipal Board or the Environmental Assessment Board. Readers will remember that John Swaigen was the general counsel of CELA and an MOE prosecutor. During the post-Charter period, he became the Chair of the Environmental Appeal Board.

**The Rules of the Game**

The range of legal options slowly expanded between 1982 and 1995 as federal and provincial governments introduced a new generation of environmental statutes. The Supreme Court contributed to this period of legislative activity by approving certain applications of the *Ocean Dumping Control Act*. After recognizing the special threat posed by toxic substances and the limits of disparate provincial regimes, Canada's highest court decided to preserve this statute using POGG, the broadest constitutional power.\(^{16}\) To promote the "peace, order, and good government of Canada," federal officials could manage ocean pollution. *Crown Zellerbach* allowed the Mulroney cabinet to establish a


comprehensive system to control the entire "life-cycle" of dangerous substances. In 1988, the Conservative government introduced the *Canadian Environmental Protection Act* by consolidating a series of statutes, including the *Clean Water Act*, and by granting new powers to regulatory officials. CEPA creates several access points. Concerned citizens can request an amendment to the Priority Substances List (section 12), object to the outcome of a formal assessment (section 13), and ask the Environment Minister to investigate an alleged infraction (section 108). CEPA also formalizes two well-established causes of action (section 136). Victims of environmental offences can sue for damages after an incident occurs. If they want to stop some imminent threat, private litigants can ask courts to issue injunctions. These provisions might have formed the basis of compelling post-Charter claims.

Ontario environmentalists confronted even more legal options. The *Class Proceedings Act* allows judges to stray from the conventions of traditional adversarial disputes. When corporations cause diffuse social problems, groups of victims can ask for relief. Under this new regime, judges can "certify" select applicants and ask defendants to produce certain types of data. Because class actions are still expensive, the Law Foundation of Ontario supports a fund to defray some of the costs. The *Environmental Bill of Rights* creates another cluster of opportunities. Several measures offer citizens greater influence over different stages of the regulatory process. For example, any two residents can ask the Environmental Commissioner to review established policies and consider the benefits of new regulations (section 61). A similar right exists for those who want to report offences: two individuals can petition the Environmental Commissioner to conduct an investigation. The EBR even establishes a new civil cause of action. Concerned citizens can ask the courts to prevent the "imminent contravention of a statute" (section 84). If the offence has already

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occurred, applicants must first apply for an investigation. Although potential plaintiffs have to enter a procedural maze before seeking judicial relief, they do not have to meet the old standing rule. Ontario's EBR also includes a provision that amends the law of public nuisance. Section 103 removes two common law barriers: plaintiffs do not have to secure the consent of the Attorney-General and courts cannot dismiss an action just because the applicant has suffered personal injury or economic loss to the same degree as other members of the public.

The Charter does not try to protect the natural environment, but it still presents several intriguing options. Section 7 lures “pro-choice” activists and “pro-life” groups into the courtroom by protecting “life, liberty, and the security of the person,” but it also recognizes the “principles of fundamental justice.” Using this provision, creative litigators could challenge public policies that threaten human health or personal security. By arguing that certain industrial practices cause serious physical injuries, they could try to oppose municipal waste incinerators. Some litigants might have developed a substantive interpretation of section 7 to attack the closed character of Canada’s decision-making institutions. If administrative agencies and line departments failed to provide meaningful participation, environmentalists could try to oppose the approval of a hydro-electric dam or a nuclear generator. Section 15 creates another bundle of opportunities. Using this broad guarantee, post-Charter activists could challenge certain disparities. For example, CEPA allows provincial governments to supplant national regulatory standards by signing equivalency agreements. Tenacious litigators might have argued that such arrangements fail to provide equal protection from the adverse affects of toxic substances.

Environmentalists confronted a broader range of legal options and fewer procedural barriers. The Supreme Court continued to liberalize the law of standing by inviting Joseph

Borowski to challenge Canada's old abortion law.\textsuperscript{22} After Thorson, McNeil, and Borowski, responsible advocacy groups had a better chance of securing access. The standing trilogy lowered the requirements for litigants who asked constitutional questions and Finlay extended the scope of the genuine interest rule to administrative actions.\textsuperscript{23} In 1986, a welfare recipient was allowed to argue that federal officials were mismanaging the Canada Assistance Plan. Instead of questioning the validity of a statute, Robert Finlay asked for an injunction to stop the flow of revenue to Manitoba. This single ruling gave environmentalists greater access.\textsuperscript{24} They could press their claims by presenting civil claims and judicial review applications.

If the literature is correct, these changes did not make litigation an attractive strategy. Environmental groups stayed away from the courtroom because they still faced too many hurdles. CEPA does not begin by declaring a substantive guarantee. Canada's principal environmental statute includes several non-justiciable participatory rights, but it does not create any new causes of action. Although section 136 provides relief to those who are directly affected by an offence, it purposely excludes citizens who have not suffered a personal loss. This civil cause of action is even more restrictive than it appears because relatively few substances are regulated under the Priority Substances List or the Toxic Substances List. The \textit{Class Proceedings Act} creates a new regime for addressing diffuse social problems, but several barriers continue to discourage potential litigants. The Law Foundation of Ontario was not overwhelmed by requests – the CPA fund was virtually ignored during the second period.


\textsuperscript{23} \textit{Minister of Finance of Canada v. Finlay} [1986] 2 S.C.R. 607.

The *Environmental Bill of Rights* created a new cause of action, but Bill 26 purposely rejected the "judicial model" of political accountability.\(^{25}\) After acknowledging the limits of adversarialism and the merits of consensual decision-making styles, the members of the task force argued that concerned citizens should always try informal bargaining before resorting to litigation.\(^{26}\) This sentiment shaped the EBR. Section 84 applicants must apply for an investigation before seeking judicial relief; they can only ask courts to intervene if the conclusions seem "unreasonable." Their claims can be dismissed by the Attorney-General and the Ontario Court of Justice if section 84 actions fail to serve the "public interest." Judges can decide, for example, that certain issues should be resolved by the Environmental Assessment Board. At trial, their opponents can present the defence of statutory authority or the defence of due diligence. Potential litigants confront another obstacle: section 118 includes a broad privative clause that immunizes most of the EBR. Except for the cause of action created by section 84, "no action, decision, failure to take action, or failure to make a decision . . shall be reviewable." Similar declarations have not stopped courts from hearing judicial review claims, but most judges are unwilling to overturn decisions protected by a privative clause unless they are "patently unreasonable" or "clearly irrational." Even if environmentalists negotiate around these barriers, they still confront the traditional costs rule. The EBR does not establish special standards for public interest groups.

Post-Charter litigators could try to develop innovative constitutional claims, but the Supreme Court introduced several limits. Section 7 protects the security of individuals, not incorporated groups or entire communities. In *Operation Dismantle*, Justice Bertha Wilson argued that it cannot be invoked to stop diffuse harms that posed a threat to every Canadian.\(^{27}\) In another precedent-setting decision, Justice Antonio Lamer concluded that a "substantive interpretation" should be restricted to the "inherent domain of the judiciary" as


\(^{26}\) Ibid., 52.

guardian of the justice system. Without this constraint, he warned, the Supreme Court would be transformed into a “super judicial legislature.” These judgements discourage two types of claims – those that try to protect the natural environment and those that challenge regulatory standards to defend corporate interests.

Although formal amendments and court decisions introduced new opportunities, environmentalists confronted several enduring barriers. Common law standards of proof did not wither away. Because such rules make it difficult to demonstrate complex causal links, they might have discouraged certain types of litigation. Section 7 sounds dramatic, but it would be very difficult to show, for example, how a waste disposal facility has threatened the health and security of local residents who live within a specific area. Another obstacle continued to frustrate environmental groups throughout the 1980s. Canada’s judicial system was more accessible after Finlay, the fourth standing decision, but some courts were reluctant to apply the genuine interest rule. A cluster of decisions appeared to contradict the Supreme Court by applying elements of the old public nuisance standard. This uncertainty might have discouraged post-Charter litigants.

II. Playing by the Rules of the Game

There is a reward for learning such an intricate set of rules. Instead of speculating about their effects, we can use the Court Challenges Database to determine the frequency of participation, the sites of court battles, and the legal success rate. The explanations predict different patterns. (i) If the Charter revolution thesis is correct, judges should become less deferential and more daring as they accept their new responsibilities. Despite this general shift, environmentalists should reject litigation because Canada’s Constitution does not

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30 Roman and Pikkov, “Public Interest Litigation in Canada.”
protect the natural environment. If some groups try to explore the possibilities of section 7, they will suffer crushing defeats. (ii) The court party thesis suggests that post-materialists want to favour litigation, but it also acknowledges the effects of political institutions. Feminists will lead the Court Party because they can base their claims on two boldly worded guarantees, section 15 and section 28, but environmentalists should play a supporting role by winning modest victories. Litigants will not bargain with state officials and private interests after losing in court. As post-materialists, they should characterize legislative politics as seamy and unprincipled. (iii) The judicial pluralism thesis is the only explanation that predicts relative continuity. Environmentalists will continue to press their claims in court. Decision-making institutions became more accessible after 1982, but governments became constrained by the pressures of globalization. Like their predecessors, coalitions of groups will win important battles by grafting litigation onto conventional legislative strategies.

**Environmentalists in Court**

Post-Charter activists still confronted a series of legal hurdles, but some governments were unresponsive. The pressures of globalization imposed considerable constraints, making litigation an attractive alternative. Environmentalists reacted to these competing incentives by launching 116 court challenges. The participation rate peaked in 1990, when they asked Canada's judiciary to consider eighteen claims. This remarkable pace could not be sustained, but the rate increased again in 1994 after a temporary decline. We can appreciate the magnitude of change by considering one comparative finding. During the pre-Charter period, environmentalists presented sixty-two actions. Between 1990 and 1995, they launched seventy-three challenges. Graph III also records the number of hearings. As environmental claims became more complex, they generated more hearings. Another trend reveals the risks of judicial politics. Environmentalists wanted to win by
launching offensive challenges, but they were forced to act defensively when their opponents brought hostile actions.\textsuperscript{31} Litigants responded to this threat during the middle of the 1980s and the early 1990s, when they were forced to fight nine defensive battles.

Even though environmentalists entered the courtroom more frequently, individuals presented fewer claims. Some advocacy groups responded to \textit{Finlay} by choosing to litigate, but Table XVI reveals that sixty-five percent of the actions were launched by strategic pairs and court coalitions. These patterns reflect deeper changes that affected the very structure of the environmental movement. During the early 1980s, CELA and WCELA appeared before administrative boards and legislative committees, but they dedicated a smaller percentage of their resources to litigation.\textsuperscript{32} Ironically, as this strategic shift occurred, the number of

\textsuperscript{31} The frequency of defensive claims is too uneven to plot on a longitudinal line graph. The broken line documents the frequency of defensive claims indirectly by showing the number of offensive actions.

environmental lawyers increased dramatically, especially in Ontario. A new generation of litigators created four legal advocacy groups. In 1989, the Québec Environmental Law Centre was established by a loose network of Montréal lawyers who wanted to promote the

Table XVI: The Organizational Form of Environmental Challenges (1982-95)

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategic Pair</td>
<td>40</td>
</tr>
<tr>
<td>Court Coalition</td>
<td>36</td>
</tr>
<tr>
<td>Advocacy Group</td>
<td>25</td>
</tr>
<tr>
<td>Legal Advocacy Group</td>
<td>9</td>
</tr>
<tr>
<td>Individual(s)</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>116</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

idea of public interest litigation. One of the founders, Franklin Gertler, articled at CELA and the current executive director, Yves Corriveau, intervened during the first phase of the Great Whale dispute as a member of Greenpeace Québec. In 1992, CELA worked with a coalition of community activists to establish Canada’s newest legal advocacy group, the East Coast Environmental Law Association. Although ECELA is restricted by a small operating budget, it has intervened to support the Newfoundland Inshore Fisheries Association.

These groups reflect a growing commitment to legal strategies, but they only play a marginal role. The Canadian Environmental Defence Fund is more important. CEDF was established in 1985 by a handful of prominent advocates, including Daniel Green, the current director of SVP, la Société pour Vaincre la Pollution, and Adele Hurley, the co-director of the Coalition on Acid Rain. The founding members were moved by two court decisions.

35 After forming in 1981, CEDF experienced serious organizational problems. In 1985, it was brought back to life by some of the founding members.
Rosenberg failed to save the Elora Gorge, leaving Ontario activists thoroughly demoralized.36 Palmer was just as disheartening.37 In 1982, Elizabeth May represented a coalition of community activists who argued that phenoxy herbicides pose a serious threat. They failed to prove their case and an unsympathetic judge issued a $200,000 costs award. Most of the participants wanted to reject litigation after suffering such a crushing defeat. CELA advocates reacted differently. Knowing that financial barriers could prevent future claims, John Swaigen and Grace Patterson urged other environmentalists to consider the benefits of a legal defence fund. Their argument was simple but compelling: if potential litigants were supported by an independent organization, they would be less intimidated by the old costs rule. They imagined a new division of labour. CELA would continue to operate as a clinic, and CEDF would back promising court challenges.38

The American tradition has influenced the Canadian Environmental Defence Fund. The first executive director accepted a modest grant from the Peterson government, but CEDF advocates refuse to jeopardize their independence by relying on state funding. Individual donations generate about eighty percent of the operating budget. A committee manages the case-selection phase; it searches for claims that will promote environmental values, stop harmful practices, establish favourable precedents, and assert a national presence. However, CEDF has adopted a distinctive organizational structure. Instead of directly sponsoring litigants, a small administrative staff manages the Legal and Expert Assistance Program.39 Worthy applicants receive help from lawyers, biologists, epidemiologists, and urban planners who are willing to provide their services at a reduced rate.40 Because CEDF wants to respect the principle of participatory democracy, it has

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38 Alanna Quinn, “President’s message,” CEDF News (Spring 1988).
rejected the rigid hierarchical approach that other legal advocacy groups favour. Court strategies are developed by private lawyers and their clients. Community activists are not excluded from the planning process – they can form “litigation committees” to present their concerns.41

Graph IV: SLDF in Court (1990-1995)

Source: Court Challenges Database

The Sierra Legal Defence Fund was not established until 1990. The founding members were inspired by Finlay, the Supreme Court decision that extended the genuine interest rule, and Canadian Wildlife Federation, a judgement that breathed new life into EARP, the federal environmental assessment regime.42 By presenting thirty-two claims, it quickly became one of the principal players. This rapid ascent was interrupted in 1993 because the courts were busy considering a number of appeals. Graph IV also reveals the

41 Personal interview with Gord Crann, June 1995; Personal interview with Murray Klippenstein, July 1995.
risks of assertiveness. After winning a series of challenges, these brash litigators had to counter a barrage of hostile actions. SLDF has emulated every element of the American model. Instead of seeking state support, it received $300,000 from the U.S. Sierra Legal Defence Fund and $610,000 from the B.C. Law Foundation. Individual donations generated about one-third of the operating budget until 1993. While working out a formal policy, the board of directors decided that public funding could threaten two crucial strengths, autonomy and stability. The executive director is allowed to accept “project-based funding” from philanthropic foundations, governments, and select corporations, but the “core functions” are supported by one source of revenue – individual members. The founding members designed a centralized organizational structure to cultivate rigour and efficiency. They granted important responsibilities to the board of directors, administrative assistants, and a communications department, but SLDF is dominated by a small team of litigators. Staff lawyers identify the strongest cases, allocate resources, and develop the legal arguments.

These groups adopted different mandates and distinctive styles, but they were moved by some of the same strategic calculations. Even though policy-making institutions became more accessible during the 1980s, post-Charter activists still confronted powerful opponents. Governing parties espoused the virtues of biodiversity, while promoting trade liberalization, deregulation, and “global competitiveness.” Environmentalists responded by asking courts to preserve delicate ecosystems, enforce national standards, and discipline wayward agencies. When the founding members of CEDF announced their plans, Roger Cotton and Elizabeth May issued a bold ultimatum: if governments are “unprepared to correct the imbalance between environmental groups and their political opponents, then we

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43 Judy Lindsay, “Sierra Legal is necessary despite its obvious flaws,” Vancouver Sun, 11 February 1992, D9.
44 Greg McDade, Sierra Legal Defence Fund Newsletter 2 (1992), 2; Greg McDade, Sierra Legal Defence Fund Newsletter 8 (1994), 2.
must do it ourselves." This sense of injustice has fueled many post-Charter claims.

Although it sounds laughable to the uncommitted, the image of David and Goliath has framed a surprising number of public appeals. The challenge against low-level military flying was a perfect case for CEDF because of the "gross inequity." A politically weak group, the Innu of Northern Labrador, confronted a government agency that often seems ominous and indifferent, the Department of Defence. According to the current executive director, CEDF helps "brave, unpaid volunteers who risk personal financial ruin" to protect the environment. The founders of SLDF wanted to help citizens who confront "daunting uphill battles against large institutions with seemingly endless resources." In 1992, Greg McDade declared that "we are hacking out trails where Canadian law has not often gone." This rhetoric is supposed to cultivate support, but the SLDF agenda is guided by a relatively sophisticated social theory. These litigators know that legal institutions influence individuals, bureaucratic agencies, and entire industries. Common law rules, ordinary statutes, and constitutional guarantees "form the lattice-work that defines the very structure of our society." SLDF enters the courtroom to "redesign these basic structures" and challenge "corporate-driven development pressures."

By pursuing this approach, post-Charter litigants addressed a range of issues, from land preservation and indoor air quality to water pollution and the use of pesticides. Between 1982 and 1995, biodiversity climbed to the top of the agenda: thirty-two claims urged courts to save wildlife and wild-spaces. For example, environmentalists entered the
courtroom to protect a UN World Heritage Site, the Wood Buffalo National Park. Those who visit the boreal forests and vast wetlands of this natural sanctuary discover the largest herd of wild bison on Earth and two endangered species, the Whooping Crane and the Peregrine Falcon. Despite these “gifts of nature,” federal officials encouraged commercial logging for decades. In 1992, after the federal Environment Minister refused to respond, the Canadian Parks and Wilderness Society and SLDF asked the Federal Court to enforce the National

Table XVII: The Issues Raised by Environmental Litigants (1982-1995)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wilderness and Wildlife</td>
<td>32</td>
</tr>
<tr>
<td>Water Pollution</td>
<td>19</td>
</tr>
<tr>
<td>Forests</td>
<td>18</td>
</tr>
<tr>
<td>Waste</td>
<td>13</td>
</tr>
<tr>
<td>Energy</td>
<td>9</td>
</tr>
<tr>
<td>Land Preservation</td>
<td>9</td>
</tr>
<tr>
<td>Pesticides and Herbicides</td>
<td>9</td>
</tr>
<tr>
<td>Air Pollution</td>
<td>3</td>
</tr>
<tr>
<td>Peace and Disarmament</td>
<td>3</td>
</tr>
<tr>
<td>Indoor Air Quality</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>116</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

_Parks Act._ This strategy worked. The Mulroney government agreed to stop all forms of development. SLDF is fueling another trend: the growing number of forestry challenges. Just after forming, it launched an intensive campaign to make the “forest-planning process more accountable.” One action was launched because B.C. officials turned public review into a “hollow exercise.” They granted Fletcher Challenge cutting and road permits without considering evidence produced at several hearings. The B.C. Supreme Court did not find

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any violations, but this case helped environmentalists achieve a political victory. Because of growing public pressure, the provincial cabinet placed a moratorium on logging in parts of the Walbran Valley and agreed to strengthen the Forest Act.58

Like their predecessors, post-Charter activists refused to believe that regulatory laws could simply be ignored. Instead of deferring to the expertise of bureaucratic agencies, they targeted individuals and corporations. During the 1980s, CELA and WCELA helped complainants enforce several provincial statutes.59 During the 1990s, SLDF launched an impressive campaign to enforce the Fisheries Act because Crown prosecutors decided not to lay charges against two forestry companies, MacMillan Bloedel and Fletcher Challenge.60 Environmentalists continued to target polluters, but they were eager to challenge those at the top of Canada’s political system: cabinet ministers and their departments had to counter forty-four claims. By asking for writs of mandamus, these litigants hoped that courts would enforce or create imperative duties. Another change was predictable.

Table XVIII: The Targets of Environmental Litigation (1982-1995)

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial Administrative Decisions</td>
<td>26</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>24</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>20</td>
</tr>
<tr>
<td>Hostile Actions</td>
<td>18</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>11</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>8</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>3</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>3</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>2</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>116</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Environmentalists could not move so many disputes into the courtroom without angering their adversaries. Post-Charter activists had to fight eighteen defensive battles. According to Table XVIII, several patterns are highly stable. Because the Charter does not try to protect the natural environment, litigants rarely question the validity of laws. Without powerful constitutional rights, they frequently challenge public authorities who exercise circumscribed powers, including municipal governments, administrative boards, and regulatory directors. Table XIX reveals some of the same patterns. The Sierra Legal Defence Fund is the principal legal advocacy group, but it has never targeted a statutory provision. The largest cluster of claims challenged provincial administrators and provincial cabinet ministers.

Table XIX: The Targets of SLDF Litigation (1990-1995)

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial Administrative Decisions</td>
<td>10</td>
</tr>
<tr>
<td>Hostile Actions</td>
<td>7</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>6</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>4</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>4</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>1</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>0</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>0</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>0</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>32</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Post-Charter environmentalists brought their claims to every level of Canada's judicial system, from the N.W.T. Territorial Court and the Ontario Provincial Court to the Alberta Court of Appeal and the Supreme Court. This wide distribution reflects the influence of two decentralizing forces. Regionalism and linguistic cleavages fragment the feminist movement, but the environmental movement is also pulled apart by another force. Though aware of global problems, most groups try to protect distinct ecosystems. While activists in Southern Ontario try to prevent the effects of industrial pollution, their
counterparts in B.C. oppose clear-cutting on Vancouver Island. Although groups in Northern Alberta and Northern Québec understand the global character of environmental degradation, they have organized to fight massive resource development projects. State

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court - Trial Division</td>
<td>45</td>
</tr>
<tr>
<td>B.C. Supreme Court</td>
<td>39</td>
</tr>
<tr>
<td>Federal Court - Appeal Division</td>
<td>30</td>
</tr>
<tr>
<td>Ontario Court of Justice</td>
<td>20</td>
</tr>
<tr>
<td>B.C. Court of Appeal</td>
<td>15</td>
</tr>
<tr>
<td>Alberta Court of Queen’s Bench</td>
<td>13</td>
</tr>
<tr>
<td>Supreme Court of Canada</td>
<td>7</td>
</tr>
<tr>
<td>Alberta Court of Appeal</td>
<td>7</td>
</tr>
<tr>
<td>Nova Scotia Supreme Court - Trial Division</td>
<td>7</td>
</tr>
<tr>
<td>Ontario Court of Appeal</td>
<td>5</td>
</tr>
<tr>
<td>Alberta Provincial Court</td>
<td>5</td>
</tr>
<tr>
<td>B.C. Provincial Court</td>
<td>4</td>
</tr>
<tr>
<td>Nova Scotia Supreme Court - Appeal Division</td>
<td>3</td>
</tr>
<tr>
<td>Saskatchewan Court of Queen’s Bench</td>
<td>3</td>
</tr>
<tr>
<td>Québec Court of Appeal</td>
<td>2</td>
</tr>
<tr>
<td>Québec Superior Court</td>
<td>2</td>
</tr>
<tr>
<td>Saskatchewan Court of Appeal</td>
<td>1</td>
</tr>
<tr>
<td>Manitoba Court of Queen’s Bench</td>
<td>1</td>
</tr>
<tr>
<td>P.E.I. Supreme Court - Trial Division</td>
<td>1</td>
</tr>
<tr>
<td>N.W.T. Territorial Court</td>
<td>1</td>
</tr>
<tr>
<td>Ontario Provincial Court</td>
<td>1</td>
</tr>
</tbody>
</table>

| Total                                                       | 202                |

Source: Court Challenges Database

institutions are just as significant. English Canadian feminists are inspired by section 15 and section 28, but environmentalists are not drawn into the courtroom by boldly worded guarantees. Without their “own” rights, environmentalists explored section 7 claims, initiated private prosecutions, and launched judicial review petitions. The Supreme Court considered a handful of claims, but an impressive number of litigants appeared before both divisions of the Federal Court to win injunctions and prerogative writs. Post-Charter activists pursued an aggressive campaign between 1989 and 1994. After *Canadian Wildlife Federation*, they hoped that Federal Court judges would reform every element of the
Environmental Assessment Review Process. To manage this barrage of litigation, sixty-five hearings were convened.

Table XXI: Where SLDF Advocates Take Their Claims (1990-1995)

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>B.C. Supreme Court</td>
<td>20</td>
</tr>
<tr>
<td>Federal Court - Trial Division</td>
<td>10</td>
</tr>
<tr>
<td>B.C. Court of Appeal</td>
<td>10</td>
</tr>
<tr>
<td>Supreme Court of Canada</td>
<td>3</td>
</tr>
<tr>
<td>B.C. Provincial Court</td>
<td>3</td>
</tr>
<tr>
<td>Nova Scotia Supreme Court - Trial Division</td>
<td>2</td>
</tr>
<tr>
<td>Alberta Court of Queen's Bench</td>
<td>1</td>
</tr>
<tr>
<td>Ontario Court of Justice</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>50</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

When environmentalists appeared before section 96 courts and provincial courts, they often presented their concerns to judges in Ontario and British Columbia. These members of the judiciary considered just over forty percent of the claims. This general finding obscures an interesting shift. Ontario courts reviewed the largest proportion of pre-Charter actions because CELA was determined to enforce the *Environmental Protection Act* and the *Environmental Assessment Act*. However, litigation became less important as the administrative regime became more credible. Activists wanted to appear before the Ontario Municipal Board or the Environmental Assessment Board. This change did not occur in British Columbia. Table XXI reveals one of the consequences. The Sierra Legal Defence Fund did not rely on boards and tribunals; it hoped that judges would make regulatory institutions more responsive. SLDF usually asked B.C. courts to discipline provincial officials.

When environmentalists presented their claims to section 96 judges, they rarely appeared before Québec courts. Remarkably, ninety-seven percent of the post-Charter hearings were convened by English Canadian judges. The founding members of the Québec Centre of Environmental Law were inspired by dramatic legal victories, especially Canadian Wildlife Federation, but they confronted several deeply rooted barriers. The Québec Civil Code discourages novel legal strategies by constraining the interpretive nature of judicial review. Regulatory statutes and administrative regimes are designed to cultivate consensus, not adversarialism. Instead of trying to resist this policy-making style, environmentalists bargain with bureaucratic officials and industry representatives or pursue their objectives outside the formal policy-making process. The Charter revolution thesis was the only explanation to predict the gulf between Québec and English Canada. Constitutional rights did not disrupt these stable policy-making styles and the corresponding patterns of participation because most francophones have rejected the political purpose of Trudeau’s grand patriation strategy.

**Judges as Gatekeepers**

Even though post-Charter activists wanted to discipline regulatory officials and prod indifferent governments, they still confronted the great common law barriers. The Supreme Court extended the general interest rule, but Canada’s judiciary preserved other threshold standards. If litigants asked abstract or hypothetical questions to achieve their political goals, courts would erect the law of justiciability. Table XXII and Table XXIII document the same patterns from different angles. Finlay did lure environmentalists into the courtroom. During the pre-Charter period, when environmentalists were trying to avoid the old standing rule, forty-four percent of the litigants appeared before courts as private prosecutors. The proportion dropped to ten percent during the post-Charter period. After this barrier was

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62 Phone interview with Franklin Gertler, October 1995.
knocked down, sixty-six percent of the participants decided to seek party status. A second trend is just as significant. Canada’s appellate courts were more willing to grant intervener status. Environmental groups never appeared as friends of the court before 1982. After 1982, intervenors presented nineteen claims. Legal advocacy groups usually participated as sponsors, but they always intervened when the Federal Court and the Supreme Court considered national issues. Although some of the large advocacy groups were out-of-court supporters, they often appeared as litigants with party status. For example, the Western Canada Wilderness Committee presented eleven claims as a party with full rights and liabilities. Most groups explored different forms of participation. To achieve their objectives, CELA, WCELA, and the Sierra Club of Western Canada requested four distinct types of legal status.

We have to sift through the decisions to determine when courts responded to *Finlay*. Canada’s judiciary still forced litigants to demonstrate a "personal stake" during the middle of the 1980s. For example, the B.C. Supreme Court dismissed an application brought by Greenpeace and the Sierra Club of Western Canada because the subject of review, a tree cutting permit, did not affect the public. This barrier also stopped litigants who asked for

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Table XXII: The Legal Status of Environmental Groups (1982-1995)

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intervenor</td>
<td>19</td>
</tr>
<tr>
<td>Private Prosecutor</td>
<td>12</td>
</tr>
<tr>
<td>Sponsor</td>
<td>6</td>
</tr>
<tr>
<td>Party</td>
<td>32</td>
</tr>
<tr>
<td>Sponsor and Party</td>
<td>41</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>110</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

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writs of mandamus. One plaintiff wanted to argue that Saskatchewan violated the
Environmental Assessment Act by approving a plan to reprocess uranium, but she was not

In 1987, Energy Probe asked the Ontario High Court of Justice to invalidate the Nuclear Liability Act, but Justice Robert Montgomery decided that a strong record of advocacy and

<table>
<thead>
<tr>
<th>Group</th>
<th>Out-of-Court Sponsor</th>
<th>Private Prosecutor Sponsor</th>
<th>Intervenor Party</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sierra Legal Defence Fund</td>
<td>0</td>
<td>23</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>West Coast Environmental Law Association</td>
<td>3</td>
<td>10</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Canadian Environmental Defence Fund</td>
<td>7</td>
<td>9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Canadian Environmental Law Association</td>
<td>3</td>
<td>0</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Sierra Club of Western Canada</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Western Canada Wilderness Committee</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>Greenpeace Foundation</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>B.C. Public Interest Advocacy Centre</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Energy Probe</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Canadian Parks and Wilderness Society</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>B.C. Wildlife Federation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Friends of the Earth</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>N.S. Ecology Action Centre</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Edmonton Friends of the North</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Friends of the Athabasa</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Public Interest Advocacy Centre</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Rivers Defence Coalition</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>23</td>
<td>47</td>
<td>11</td>
<td>43</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database
research “is not sufficient to provide status.”67 Environmentalists still confronted resistance at the end of the second period—nine years after Finlay. In 1995, the Federal Court was asked to reverse an Atomic Energy Control Board ruling, which approved a new waste disposal system for uranium tailings. 68 Because the plaintiff did not live near the proposed site, Justice Darrel Heald decided that she failed to demonstrate a sufficient stake.69

Environmental groups confronted another threshold barrier. During the 1980s, the judiciary still discouraged applicants who wanted to appear as friends of the court. The B.C. Wildlife Federation secured intervenor status to challenge the Industrial Development Act. This provincial statute allowed ALCAN to build the Nechako River dam.70 However, the giant aluminum company persuaded the B.C. Court of Appeal to exclude all environmentalists. Justice Donald Seaton acknowledged that most public interest groups “lack the economic leverage” to win legislative contests, but he refused to complicate his task by adding participants who would introduce new issues. If post-Charter activists sidestepped this obstacle, they still confronted the doctrine of justiciability. Judges were eager to dismiss controversial claims that asked abstract questions. For example, a coalition of peace activists insisted that cruise missile testing violated the Charter, but Operation Dismantle failed to present a “reasonable cause of action.”71 The statement of claim irritated the Federal Court of Appeal because it failed to ask a discrete legal question. Instead of expressing sympathy, Justice Louis Marceau refused to speculate about a “contingent” set of circumstances. He argued that democracy would be jeopardized if courts based their decisions on “conjectures,” “hopes,” and “expectations.” The Supreme Court was

69 Ibid., 291.
willing to entertain "political questions," but the majority dismissed this challenge by stressing evidentiary problems. Because it was impossible for the appellants to prove their claim, it was not justiciable.

By the late 1980s, most courts were willing to apply Finlay. The B.C. Supreme Court allowed WCWC activists to challenge the Wildlife Act. Justice Carol Huddart reprimanded some of the plaintiffs for using correspondence to lobby an impartial judge, but she decided that "concerned citizens" should not be turned away just because they fail to meet the old standing rule. In 1990, the International Wildlife Coalition asked for an injunction to stop the Vancouver Public Aquarium from catching two Beluga whales. As the author of the Federal Court decision, Justice Frank Collier concluded that IWC passed every branch of the genuine interest test. The Alberta Court of Queen's Bench issued a similar ruling in 1992, when it allowed three environmental groups to bring a politically charged case. The Alberta Wilderness Association, the Peace River Environmental Society, and the Sierra Club of Western Canada challenged a controversial forest management agreement between the provincial government and Daishowa, a multi-national corporation based in Japan.

Confronting the Limits of Litigation

When environmentalists managed to win access, they faced another layer of obstacles. Even if judges expressed sympathy, courts had to enforce strict standards of proof. As well-financed defendants, public officials and private corporations could use their

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resources to present compelling counter claims. We have to remember that post-Charter litigants launched more court challenges and some of their claims attacked major public policies. However, the evidence presented in Table XXIV appears to support the Charter revolution thesis. Because environmentalists failed to win broadly framed rights, their success rate did not change. After 1982, it dropped from forty-four percent to forty-one percent. These figures correspond to the pattern that we discovered in Chapter II: as environmentalists moved away from pinnacle of authority, from cabinet ministers to municipal officials, their chances improved. When litigants questioned the wisdom of the Crown, they won twenty-six percent of their claims. When they challenged public authorities who exercise statutory powers, activists won forty-one percent of their battles. This suggests that courts are willing to question municipal governments, administrative boards, and regulatory officials, but they are less eager to aggravate elected officials who dominate the

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Wins</th>
<th>Number of Losses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial Administrative Decisions</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>6</td>
<td>14</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>Hostile Actions</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Total (12)</td>
<td>43</td>
<td>61</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

policy-making process. The rate of success jumps even higher when environmentalists counter hostile action brought by private interests. Environmentalists were relieved to win sixty-five percent of their defensive challenges. Table XXV reveals that Canada's most
litigious environmental group established a respectable record. SLDF advocates surpassed the average by winning just over fifty percent of their legal battles. The largest proportion of victories stopped hostile actions. If we subtract these defensive actions, the rate of success is less impressive. Even though SLDF crafted innovative legal claims, it only managed to win thirty percent of the offensive challenges.

When we take a closer look at the decisions, it is easy to understand why most claims failed. Some litigants naively hoped that courts would expand the scope and reach of judicial review. They wanted every state official to respect the principles of natural justice— even those who perform administrative tasks. In 1984, Energy Probe argued that a member of the Atomic Energy Control Board was biased, but the Federal Court refused to apply the standard of review reserved for officials who make quasi-judicial decisions. When environmentalists challenged local governments, courts often responded by declaring the importance of political accountability. In 1988, WCWC opposed a municipal by-law that approved residential housing on the Terra Nova Agricultural Reserve. The plaintiffs

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Wins</th>
<th>Number of Losses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provincial Administrative Decisions</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Hostile Actions</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total (10)</strong></td>
<td><strong>12</strong></td>
<td><strong>11</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

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75 Ten cases are still before the courts because SLDF usually appeals unfavourable decisions.


believed that several elected officials were predisposed to favour the project, but their claim was dismissed. The B.C. Court of Appeal refused to believe that politicians have to “keep an open mind.” Justice Mary Southin argued that democratic institutions would suffer if public officials were compelled to maintain “an inscrutable face and a silent tongue.”

The Supreme Court agreed with this witty assessment. Justice Gerard La Forest decided that politicians are “entitled to bring a closed mind to the decision-making process.” These sentiments frustrated activists who wanted to protect another agricultural reserve. After hearing their submissions, the B.C. Court of Appeal insisted that judges cannot question the wisdom of local decisions. It refused to threaten the “honour of duly elected representatives.”

Some post-Charter challenges side-stepped the law of standing, but they confronted standards of proof that purposely favour defendants. The anger generated by one decision motivated the founders of CEDF. Elizabeth May represented a coalition of community activists who wanted to prevent Stora Forest Industries from spraying phenoxy herbicides. Because these post-Charter litigants asked the N.S. Supreme Court to issue a permanent injunction, they were forced to show that “irreparable harm” would occur without judicial intervention. Justice Merlin Nunn argued that courts should not assess the risks and benefits of toxic substances even if trials “take on the aura of a scientific inquiry.” If scientific studies are not certain, he decided, “courts cannot resolve the conflict.” After presenting this sophisticated appraisal, Justice Nunn simply accepted the expert witnesses called by the defendant because the plaintiffs presented an unconventional argument: those

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who make and use dangerous substances should shoulder the burden of proof. Both parties presented uncertain data to bolster their claims, but he ruled against the plaintiffs.84

This obstacle continued to discourage environmentalists. In 1990, NAC and CEDF supported community activists who opposed low-level military flying in Labrador.85 The coalition wanted the Minister of Defence to perform an EARP review before resuming training exercises, but the Federal Court dismissed this challenge because the plaintiffs expressed a number of "speculative and hypothetical" comments without submitting any "concrete evidence that low-level flying ... is causing extensive environmental damage."86 The same hurdle stopped the most ambitious Charter challenge initiated by environmentalists. In 1994, Energy Probe challenged the Nuclear Liability Act.87 This federal statute is designed to shield the nuclear industry from civil litigation. According to the statement of claim, it violates section 7 and section 15 by elevating the dangers of nuclear power and discriminating against "potential victims" of an accident. However, after wondering whether any justiciable issues were raised, the General Division of the Ontario Court of Justice decided that Energy Probe activists did not prove their assertions. It even declared that public interest groups "can be far more effective ... outside the courtroom."88

Another set of claims failed because courts were reluctant to question political executives.89 After the Federal Court transformed the EARP regime into a cluster of legally binding rules, litigators hoped that judges would scrutinize the substance of highly technical assessments and force the federal cabinet to pursue certain policy options. They were

86 Ibid., 311.
88 Ibid., 754. According to Energy Probe, this federal statute also violates the division of powers.
quickly disappointed. In 1990, Greenpeace planned to stop the Mulroney government from reducing the size of VIA Rail by claiming that several orders-in-council violated EARP, but the Federal Court refused to review this “purely legislative” decision.90 When Greenpeace moved to the Appeal Division, Justice Mark MacGuigan declared that courts cannot determine “the desirability of universal environmental protection.” The Vancouver Island Peace Society confronted this obstacle when it asked the Federal Court to prevent nuclear vessels from visiting Canadian ports.91 Instead of launching an expensive constitutional challenge, they decided to argue that several orders-in-council violated EARP. Despite this strategic manoeuvre, the Federal Court refused to place new limits on the Crown’s prerogative powers.92 Justice Andrew MacKay decided that litigants cannot question the substance of public decisions that are based on “morality” or “international obligations.”93

Some post-Charter environmentalists faced judges who preserved one of the great common law barriers, the costs rule. Legal advocacy groups challenged this tradition by arguing that new standards should be developed for public interest litigants. In 1993, SLDF and the Sierra Club of Western Canada intervened to support an official they usually opposed, the Chief Forester of British Columbia, because he wanted MacMillan Bloedel to accept a smaller “allowable annual cut.”94 SLDF litigators presented an unlikely interpretation of the Forest Act: the Chief Forester can reduce the harvest rate in any “tree farm license area” because “sustained” actually means “maintained in perpetuity.”

93 Vancouver Island Peace Society v. Canada (1993) 11 C.E.L.R. (N.S.) 1. This decision was upheld by the Federal Court of Appeal.
Realizing that his chances of winning were poor, Greg McDade also argued that courts should not award costs against litigants who raise questions of public importance. The B.C. Supreme Court was not moved by this plea. After declaring that politicians are the real “guardians of the public interest,” Justice Kenneth Smith concluded that SLDF did not express “universally shared” concerns. The Alberta Wilderness Association and the Peace River Environmental Society confronted the same barrier when they brought a second challenge against Daishowa. The Court of Queen’s Bench refused to create a special costs rule just to encourage public interest litigants. Justice David McDonald argued that courts should do the very opposite – discourage politically motivated claims that are based on “paper-thin evidence.” According to his assessment, the statement of claim “contained elements of advocacy . . . irrelevant to the narrow legal issue.”

As environmentalists entered the courtroom more frequently, they faced new threats. Private corporations and public officials questioned their right to enforce summary conviction offenses. CELA encountered this problem during the late 1980s, when it hoped to enforce the Environmental Protection Act. Toronto Refiners and Smelters asked the Ontario Court of Appeal to dismiss the action because an MOE “program approval” shielded the company from litigation. This tactic failed, but CELA confronted an unsympathetic trial judge who admitted that he would rather “be back with his burglars and murderers.” When the Sierra Legal Defence Fund launched an aggressive campaign to enforce the Fisheries Act, it was stopped by the B.C. government. SLDF hired a professional biologist to conduct “fish

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habitat investigations” and a former MOE prosecutor to develop legal strategies.99 They filed two actions against the Greater Vancouver Regional District. However, the Attorney-General decided to take over both challenges.100 After asking a Provincial Court judge to grant fourteen adjournments, the Crown attorney dropped the charges because an informal agreement allowed the GVRD to discharge sewage during heavy rainstorms.101

Because private interests launched hostile actions, post-Charter environmentalists had to expend some of their resources fighting costly defensive battles. In 1988, the federal government ignored the advice of an administrative board by continuing to prohibit the use of alachlor. When Monsanto appeared before the Federal Court of Appeal to oppose this decision, Pollution Probe and Friends of the Earth intervened to support the Mulroney government.102 The frequency of defensive claims increased during the 1990s.103 CELA intervened before the Supreme Court to defend an important component of Ontario’s Occupational Health and Safety Act -- a “reverse onus” clause.104 In British Columbia, the Sierra Legal Defence Fund organized to counter SLAPPs, Strategic Lawsuits Against Public Participation.105 An old adversary brought one of these hostile actions. MacMillan Bloedel

persuaded the B.C. Supreme Court to quash by-laws that prevented certain types of residential development in “sensitive areas.” To appeal this judgement, Greg McDade and Karen Wristen had to argue that large corporations are using the legal system to “intimidate and harass” citizens who do not share their views.

**Overcoming the Limits of Litigation**

If the story ended here, we would have to accept the Charter revolution thesis. However, some environmentalists managed to win – even though the rules of the game favoured other interests. Most students of Canadian politics acknowledge several highly publicized victories, but the Court Challenges Database unearths a broad range of patterns by documenting every decision. Some litigants succeeded because judges eagerly enforced the principles of fairness and natural justice. For example, PIAC persuaded the Federal Court to quash a controversial mining license because members of the Yukon Territory Water Board organized secret meetings with the applicants and the Islands Protection Society persuaded the B.C. Supreme Court to revoke several permits, which allowed MacMillan Bloedel to spray pesticides on the Queen Charlotte Islands, because the Environmental Appeal Board failed to convene public hearings.

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stopped the Greater Victoria Water District from logging. Instead of demanding strong evidence of adverse effects, the B.C. Supreme Court simply decided that GVWD officials did not have the authority to allow commercial logging. Greg McDade called this decision a “significant victory” because it can be invoked to prevent logging in other watersheds.

Post-Charter activists have not matched CELA’s impressive pre-Charter record, but some groups achieved their objectives as private prosecutors. During the early 1980s, WCELA litigators enforced the *Pollution Control Act* by filing charges against corporate interests and public authorities. They achieved an “unprecedented victory” when a B.C. Provincial Court judge compelled the District of North Vancouver to pay financial penalties and respect a probation order. Another group of activists appeared before an Alberta Provincial Court to enforce the *Fisheries Act*. The defendant, Suncor, was forced to pay eight-thousand dollars for discharging “deleterious substances” into the Athabasca River. In 1988, the CEO of Panarctic Oil was ordered to pay $150,000 for dumping tonnes of industrial waste into the Arctic Ocean.

Even though courts were reluctant to question the Crown, judicial activism produced several dramatic victories. *Canadian Wildlife Federation* encouraged environmentalists to reassess the value of litigation. In 1984, the Trudeau government passed an order-in-council to make the Environmental Assessment Review Process more precise. This approach

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112 Simunic *et al.* v. The District of North Vancouver (1982) CELA Newsletter 8(3); *Pollution Control Act*, S.B.C. 1967, c. 34.
was quite conventional, but the Department of Justice injected several imperative clauses into a Guidelines Order without considering their implications. During the late 1980s, when provincial governments were promoting huge resource development projects, litigators pounced on this mistake. A coalition of groups organized to oppose the Rafferty-Alameda dams in Saskatchewan and the Federal Court was sympathetic. According to Justice Bud Cullen, the Guidelines Order was more than a set of permissive instructions — he decided that enforceable rights structured the EARP regime. The defendants hoped to circumvent this ruling by granting another license, but the Federal Court reprimanded the Mulroney government for “seeking ways to abridge or avoid the process.” Justice Francis Muldoon argued that representatives of the Crown should respect the law more “scrupulously” than other citizens. The rate of assessments increased after Canadian Wildlife Federation.

When Jean Charest was the Environment Minister, he told a legislative committee that “initiating departments” conducted almost forty major reviews between 1989 and 1991.

As this challenge was moving through the judicial system, a second challenge targeted the Three Rivers Dam in Alberta. Friends of the Oldman River presented a similar case: the Guidelines Order creates mandatory duties that must be enforced. The trial division of the Federal Court decided that two statutes did not force the Crown to conduct an environmental review, but the Appeal Division disagreed. After acknowledging the binding nature of EARP, Justice Arthur Stone ordered a new assessment

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120 Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-13, 3rd Session of the 34th Parliament, October 1991, 1:37
one that conformed to federal standards, not those established by Alberta. Predictably, competing interests participated as intervenors when this dispute reached the Supreme Court. CELA, Friends of the Earth, CEDF, the Sierra Club of Western Canada, SLDF, and Friends of the Oldman River worked with several Aboriginal organizations. Together, they managed to defeat federal officials and five provincial governments. In 1992, the Supreme Court declared that environmental protection "has become one of the major challenges of our time." Justice La Forest agreed with the Federal Court of Appeal: the Guidelines Order was not an unenforceable "administrative directive." By acknowledging the Brundtland Commission, the Supreme Court also endorsed a very broad definition of "environment." Provincial officials did not want to be constrained by an onerous federal regime, but Justice La Forest confirmed that POGG could sustain comprehensive regulatory statutes. Some litigators expressed great optimism after Oldman River. From their perspective, the Supreme Court instructed every judge in Canada "to take a liberal view of the law in favour of environmental protection."

Aboriginal peoples and environmental groups worked together to win another impressive victory. Cree and Inuit leaders failed to stop the massive James Bay project during the early 1970s, but they did manage to secure financial compensation and a binding promise: any supplementary projects would be subject to an independent review. However, when Hydro-Québec officials initiated the second phase of construction, they refused to follow the federal process. By characterizing the original agreement as a "private contract," they hoped to circumvent the EARP regime. Ottawa and Québec endorsed this

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126 James Bay and Northern Québec Claims Settlement Act, S.C. 1976, c. 32.
interpretation, but the Federal Court decided that statutory guarantees protected the
plaintiffs. Justice Paul Rouleau expressed a “profound sense of duty to respond favourably
[because] any contrary determination would provoke . . a sense of victimization.”

The Federal Court compelled the Environment Minister, Lucien Bouchard, to conduct an EARPC
review. The same coalition won a parallel dispute that began when the National Energy
Board ordered Hydro-Québec to review the potential effects of exporting power. The
Federal Court of Appeal and the Supreme Court jeopardized the Great Whale project by
agreeing with the NEB. After these judgements were delivered, the New York Power
Authority and Consolidated Edison cancelled lucrative contracts with Hydro-Québec.

Most of these victories were achieved by strategic pairs and court coalitions. Like
their predecessors, post-Charter activists believed that collaboration could solve certain
problems. Knowing that litigation was dangerous and expensive, small teams of groups
decided to share the risks and distribute the costs. Because most judges seemed
unsympathetic, groups with different areas of expertise hoped to bolster the credibility of
their claims by appearing together. Outside the courtroom, coalition partners organized
press conferences and demonstrations. While litigators presented compelling legal claims,
advocacy groups could bargain with bureaucratic officials. A strategic pair followed this
approach to stop logging in the Wood Buffalo National Park. During the early 1990s,
most members of the Canadian Parks and Wilderness Society believed that litigation was
far too risky, but the president was eager to work with the Sierra Legal Defence Fund.
As a young lawyer, Harvey Locke believed that carefully planned legal challenges could
protect Canada’s national parks from logging and commercial development. These groups

128 (Great Whale 3) Hydro Québec and the AG of Québec v. Canada (National Energy Board)
129 “Supreme Court rules for the environment in James Bay case,” Sierra Legal Defence Fund
130 Personal interview with Rick Lindgren, July 1995.
131 (Wood Buffalo) Canadian Parks and Wilderness Society v. Canada (Minister of
132 Personal interview with Mary Granskou, October 1995.
developed an arrangement to promote their common interests. SLDF provided the legal services and CPAWS covered the general expenses; they combined different areas of expertise and mixed litigation with conventional tactics. This strategy worked—the Mulroney government responded to their demands before the Federal Court issued a judgement.133

Hundreds of groups supported collaborative claims. Table XXVI records the principal participants: groups that supported more than two campaigns. The older legal advocacy

<table>
<thead>
<tr>
<th>Group</th>
<th>Strategic Pair</th>
<th>Court Coalition</th>
<th>Total</th>
</tr>
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<tr>
<td>Sierra Legal Defence Fund</td>
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<td>Canadian Environmental Defence Fund</td>
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<tr>
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<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Western Canada Wilderness Committee</td>
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<td>Canadian Environmental Law Association</td>
<td>4</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>B.C. Public Interest Advocacy Centre</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Canadian Parks and Wilderness Society</td>
<td>2</td>
<td>4</td>
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<tr>
<td>Greenpeace Foundation</td>
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<tr>
<td>Energy Probe</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Friends of the Earth</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>B.C. Wildlife Federation</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Galiano Conservancy Association</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Nova Scotia Ecology Action Centre</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Public Interest Advocacy Centre</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Rivers Defence Coalition</td>
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<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>55</strong></td>
<td><strong>78</strong></td>
<td><strong>133</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

groups became less litigious after 1982, but CELA and WCELA achieved some of their objectives by organizing strategic pairs with like-minded advocacy groups. They also supported large coalitions that intervened before the Federal Court of Appeal and the Supreme Court. Not surprisingly, Canada's most litigious environmental group appears at the top of this list. Between 1990 and 1995, the Sierra Legal Defence Fund organized thirty collaborative actions. The Canadian Environmental Defence Fund rarely appeared as one of the formal litigants, but it provided different types of assistance to fourteen campaigns.

133 "Keeping the wood in Wood Buffalo," *Sierra Legal Defence Fund Newsletter* 2 (1992), 3.
Table XXVI also confirms the dominance of two regions, Southern Ontario and British Columbia. Some well-established groups from Ottawa and Toronto were guided by national mandates. They intervened when courts were scrutinizing major federal laws. Groups from B.C. were even more willing to form alliances. An impressive number of collaborative challenges were organized by SLDF, WCELA, the Sierra Club of Western Canada, and the Western Canada Wilderness Committee.

Of course, this approach did not improve the legal success rate. Environmentalists continued to lose more than half of their claims. However, strategic pairs and court coalitions could shift their resources to fight legislative contests. To overturn damaging decisions, they launched appeals, organized marches, and pressured cabinet ministers. One battle started because the judiciary refused to endorse a new practice. During the middle of the 1980s, several Ontario boards granted “intervenor funding” to correct an imbalance: proponents had the resources to promote their interests, but concerned citizens could not afford to participate. 134 Section 96 courts rejected this type of intervention because the common law does not try to correct certain inequities by distributing public funds. Section 101 judges defended this tradition with just as much vigor. In 1986, the Federal Court scolded the National Energy Board for trying to “legislate” intervenor funding. 135 Instead of accepting these unfavourable decisions, CELA and Energy Probe urged the Ontario government to act. Fortunately, the Attorney-General was sympathetic. In 1988, Ian Scott introduced the Intervenor Funding Project Act. 136 Bill 174 promised to assist worthy applicants who wanted to appear before the Environmental Assessment Board or the Ontario Energy Board. 137 The EAB was also allowed to award costs at the end of an

137 Applicants could also receive financial support to appear before “joint boards.”
inquiry. Even though Bill 174 excluded the Ontario Municipal Board, it represented an important legislative victory. Between 1988 and 1995, hundreds of groups received support.

Some coalitions managed to defeat highly capable opponents. In 1987, ALCAN signed an agreement with both levels of government. It was allowed to expand the Kemano dam complex without respecting the EARP regime. Three years later, the Carrier-Sekani Tribal Council and the Nechako Neyenkut Society formed an alliance with WCELA, the Sierra Legal Defence Fund, the B.C. Wildlife Federation, and the Rivers Defence Coalition. They persuaded the Federal Court to order an assessment by showing that ALCAN was causing irreparable damage to the Nechako River ecosystem, but the Appeal Division disagreed.\textsuperscript{138} The second phase of the campaign began in 1994. By invoking the \textit{Utilities Act}, SLDF litigators argued that ALCAN failed to secure an “energy project certificate.”\textsuperscript{139} The B.C. Supreme Court was not impressed. Instead of reviewing the substance of the claim, Justice Robert Hutchison simply acknowledged the Crown’s “complete discretion.” These actions were dismissed, but they generated intense political pressure. Premier Mike Harcourt was forced to justify the social, economic, and environmental costs of redirecting the Nechako River.\textsuperscript{140} At the end of the second period, after receiving new evidence from the B.C. Utilities Commission, the NDP government responded. Even though ALCAN threatened to launch a civil challenge, the Harcourt cabinet decided to oppose the completion of the massive project.

Coalitions entered the courtroom to win, but most environmentalists believe that unfavourable decisions can produce certain benefits. If readers want to understand one of the crucial elements of judicial politics, they should consider this point very carefully. Like their predecessors, post-Charter activists know that damaging judgements can expose unfair


\textsuperscript{139} (Kemano 3) \textit{United Fisherman and Allied Workers' Union v. B.C. (Minister of Energy)} [1994] B.C.J. 2839; \textit{Utilities Act}, S.B.C. 1980, c. 60.

\textsuperscript{140} “Exemption on Kemano ruled illegal,” \textit{Vancouver Sun}, 25 May 1993, 1.
arrangements. Without winning, they can embarrass corporations and unsettle governments. After the Kemano project was cancelled, old court decisions were transformed into victories. Even though SLDF lost in court, Greg McDade declared that “litigation is a mighty weapon in the war against environmental destruction.” Members of the Nechako River coalition agreed with this enthusiastic assessment because they discovered that legal action can promote “green values.” The Wood Buffalo challenge produced the same degree of optimism. The Canadian Parks and Wilderness Society characterized litigation as a “powerful tool” after it managed to guard Canada’s largest national park. According to Mary Granskou, the current executive director, court challenges have actually strengthened the various branches of CPAWS by “cultivating their prestige and credibility.”

III. Changing the Rules of the Game

Environmentalists learned how to overcome the limits of litigation. By mixing different forms of collective action, they managed to win court contests and legislative battles. However, we still have to find out if post-Charter activists asked political executives to modify the rules of the game. Instead of returning to court with flawed tools, they might have demanded stronger legal rights. The explanations make different predictions. (i) The Charter revolution thesis insists that governments dominate the process of institutional change. Like other loosely organized interests, environmentalists do not have the resources to alter the shape of the state. They can only ally themselves with political élites who want similar structural reforms. (ii) If the court party thesis is correct, post-materialists should view judges as the primary agents of social change. Because they characterize legislative

politics as seamy and unprincipled, environmentalists should refuse to bargain with private interests and state officials. There is one exception. Post-materialists might react if governments propose to introduce stronger justiciable rights. (iii) The judicial pluralism thesis claims that environmentalists are structural actors who routinely demand favourable rules. Because they feel excluded and ignored by those in power, these post-materialists should fight for broad statutory rights, non-discretionary duties, intervenor funding, and constitutional guarantees.

Environmental Rights and the Ontario Government

When the Conservative Party still dominated Ontario politics, David Estrin and John Swaigen initiated the environmental rights project. They failed to win stronger legal tools, but the next generation of advocates confronted an unusual opportunity after the 1985 general election. The new government was incredibly sympathetic. Jim Bradley proposed an ambitious agenda as the Environment Minister and Ian Scott, one of CELA’s old legislative allies, became the Attorney-General. Because the Liberal Party governed without a majority, it formed an accord with the NDP. By working together, they introduced MISA, new regulations on acid rain, and an ambitious waste management program. David Peterson’s government even strengthened the MOE by granting the enforcement branch new powers. If environmentalists wanted to change the rules of the game, this was the perfect political context. As other groups pursued policy objectives, CELA started to build a coalition that would demand new legal rights.

One of the first structural campaigns was sparked by Naken. In 1982, the Supreme Court decided that trial court judges could not settle class actions fairly and efficiently. The ruling quietly urged governments to create new statutory tools. The Ontario Law

Reform Commission had already proposed a series of amendments, but the Davis cabinet was reluctant to anger business interests.\textsuperscript{145} Of course, the political climate was very different during the late 1980s. After convening a conference that promoted “access to justice,” the Attorney-General established an advisory committee by selecting representatives from the legal profession, the insurance industry, the environmental movement, and the business community.\textsuperscript{146} Scott strayed from Canada’s political tradition by creating a novel incentive. He would accept any recommendations that received unanimous support – private groups could design a public measure by agreeing to make certain concessions. Some business leaders generated hostility by warning environmentalists to consider the “costs of litigiousness,” but the advisory committee managed to produce Bill 28.\textsuperscript{147} The \textit{Class Proceedings Act} was introduced just before the 1990 election campaign. It was proclaimed by the NDP government two years later. With this new regime in place, courts can use their discretion to consider entire classes of plaintiffs. They can even decide to grant contingency fees. Because this form of litigation is very expensive, a fund was established to assist worthy applicants.

Although environmentalists have presented their structural demands to every Canadian government, the most dramatic battles have occurred in Ontario.\textsuperscript{148} They continued to receive strong support from the NDP.\textsuperscript{149} Ruth Grier drafted several versions of


\textsuperscript{146} For a list of the participants and a discussion of various issues, see Allan Hutchinson, ed., \textit{Access to Civil Justice} (Toronto: Carswell, 1990).


\textsuperscript{149} “Give public a voice in action against polluters, Rae urges,” \textit{Toronto Star}, 5 February 1984, A6; Paul Muldoon and Leslie Stalker, “Equal access: suing polluters on their own turf,”
Chapter Four: The Environmental Movement in Post-Charter Canada

an environmental bill of rights using Environment on Trial a rough guide. Jim Bradley was willing to consider such a measure, but the Liberal government failed to introduce an EBR. After winning the 1990 general election, Bob Rae’s cabinet asked an advisory committee to submit recommendations. This arrangement did not produce consensus. CELA and Pollution Probe demanded broad causes of action and new standing rules, but industry groups opposed any changes that would make the regulatory process “uncertain” and “litigious.” However, the new Environment Minister refused to abandon an important election pledge. After asking a small task force to design an EBR, Grier promised to accept the final draft – if it received unanimous support. Because the previous advisory committee had disintegrated so quickly, she asked Michael Cochrane to chair the task force. He had demonstrated his negotiating talents as the chair of the class actions advisory committee. The second decision was even more significant. Lawyers who represented forest companies and mining interests were purposely excluded because they vehemently opposed the idea of an EBR. Three business representatives were appointed because they expressed a willingness to co-operate. Bob Anderson (Business Council on National Issues), George Howse (Canadian Manufacturers’ Association), and John Macnamara (Chamber of Commerce) faced two environmentalists, Rick Lindgren from CELA

Alternatives (Fall 1984); Ontario Legislative Assembly, Debates, 3rd Session of the 33rd Legislature, April 1987, 245; Ontario Legislative Assembly, Debates, 1st Session of the 34th Legislature, December 1987, 1035; “NDP environmental bill likely to be doomed in spite of support,” Globe and Mail, 7 May 1987, A3.
150 Ontario Legislative Assembly, Debates, 2nd Session of the 34th Legislature, June 1989, 1775.
153 After the EBR task force, Michael Cochrane returned to Scott and Aylen, where he works as a family lawyer.
and Paul Muldoon from Pollution Probe. The NDP favoured these advocates because of their legal expertise and political savvy. It is difficult to characterize the sixth member. Before founding the Public Interest Advocacy Centre in 1976, Andrew Roman represented the Consumers' Association of Canada, Pollution Probe, and the Federation of Ontario Naturalists. After moving to a private law firm during the late 1980s, he continued to advise public interest groups and publish scholarly articles on the law of standing. Initially, Muldoon and Lindgren assumed that Roman was the “third environmentalist.” They would soon discover that he had accepted a very different role. Finally, the MOE was represented by Sally Marin, a lawyer from the Legal Services Branch.

Between the fall of 1991 and the summer of 1992, these players attended more than forty confidential meetings. The private representatives were invited to discuss the stages of bargaining with their “constituents,” but they were not allowed to contact the media. An “inter-ministerial committee” of bureaucratic officials provided support by addressing administrative problems and quantifying the costs of each provision. During this short period, the task force considered a daunting range of proposals, including an electronic registry, new public participation procedures, “statements” of environmental values, and “whistle-blower” rights to protect workers who report violations. However, one issue caused the greatest controversy. Would Ontario's EBR improve access to judicial relief by creating new causes of action and reforming the public nuisance rule?

The political context favoured CELA and Pollution Probe when the process began because the NDP was determined to introduce new justiciable rights. Business interests could bargain with their adversaries and win some concessions or abandon the task force and watch the Rae cabinet introduce threatening measures. Quite aware of this

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156 The MOE's deputy minister co-chaired the task force, but he allowed Michael Cochrane to manage the process.
157 Confidential interviews with MNR officials, July 1995. Most of the IMC members were from the Ministry of Natural Resources and the Ministry of the Environment.
opportunity, the environmental representatives presented the same argument that David Estrin and John Swaigen developed during the 1970s. Canada’s decision-making institutions have privileged the polluting industries by excluding their opponents. Citizens can present their concerns to legislative committees and line departments, when they choose to consult, but the core elements of the regulatory process are still thoroughly insulated.\footnote{158 Personal interview with Paul Muldoon, July 1995.} Although governments periodically respond to public pressure by introducing new laws, they jealously guard their broad discretionary powers. Bold sounding statutes establish vague, permissive guidelines. The effects are predictable. Bureaucratic agencies formulate regulations without considering environmental values – they promulgate thousands of “secret laws.” Muldoon and Lindgren knew how to make the regulatory process “accessible and transparent.”\footnote{159 “Minutes of the Task Force on the Ontario Environmental Bill of Rights.” After appealing a decision under the \textit{Ontario Freedom of Information and Protection of Privacy Act}, I received a copy (File EBR940429-Appeal P-9400730).} A cluster of new rights would flow from a single, broadly worded duty: if governments failed to protect the natural environment, ordinary citizens would ask the courts to intervene.

The business representatives expressed different demands. As the subjects of regulation, their clients believed that litigation would threaten two crucial qualities, “clarity and certainty.” When Muldoon and Lindgren proposed broad causes of action, they imagined zealous activists “flooding the courts with frivolous claims.” Anderson, Howse, and Macnamara wanted to maintain the great common law barriers because they stopped “mischievous” groups from launching politically motivated claims. They asked the environmentalists to consider the apparent tension between efficiency and accessibility: as new groups clamour to express their interests, the regulatory process becomes less “rational” and more “cumbersome.” Another disagreement emerged during the early stages of bargaining. The participants presented normative arguments that clashed. The business representatives admired majoritarian democracy. They wanted responsible governments to
determine the appropriate degree of environmental protection. When pushed into a corner, they even lamented the loss of legislative supremacy because it stopped judges from acting like policy-makers. Muldoon and Lindgren promoted the virtues of participatory democracy by stressing the frailties of majoritarian institutions. They argued that citizens could force governments to become more responsive — if they were armed with new rights.

The inter-ministerial committee could not formally endorse any one position, but it often sympathized with the business representatives. IMC members from the Ministry of Natural Resources warned the task force not to make the regulatory process "unruly" and "uncertain." They did not want to fight an endless number of procedural battles. Officials from the Ministry of Finance were troubled by the potential costs of an EBR. Muldoon and Lindgren also confronted a surprising source of opposition. Andrew Roman did not become the "third environmentalist." Instead of discussing the benefits of judicial review, he argued that courts are overwhelmed by "polycentric problems." The founder of PIAC characterized the law of public nuisance as "archaic and contradictory," but he was reluctant to recommend broad causes of action and substantive guarantees because environmental disputes raise complex scientific questions. These divisions allowed Cochrane and Marin to propose certain concessions. Without Roman's support, the environmentalists realized that most of the members opposed a substantive duty. Another change seemed far more likely. AG officials wanted the task force to clarify the public nuisance rule. As the process continued, the chair promoted a principle that every participant was willing to accept — political accountability.

During the winter of 1992, the context turned against the environmentalists. After aggravating business interests by strengthening labour laws, the Rae government alienated public service workers by imposing the "social contract." Just as the NDP began to falter, a cabinet document was leaked to the press. This disclosure helped the business representatives by suggesting that a weaker EBR would be acceptable. As an opposition

160 Personal interview with Andrew Roman, June 1995.
member, Grier promoted the principle of judicially enforced political accountability. By promising to give citizens boldly framed rights, her private bills would have forced courts to accept new responsibilities. However, after losing the support of their allies, Ontario's social democrats did not have the political capital to fight for these structural changes. Despite this unfavourable shift, the environmental representatives continued to demand substantive guarantees. Using the Charter as their model, Muldoon and Lindgren argued that political executives should have to respect certain fundamental values. As critics of majoritarian democracy, they insisted that governments “should not have the exclusive power to define and enforce societal norms.” Their view of citizenship would have startled the Fathers of Confederation. Instead of simply voting every four or five years, concerned individuals would appear before the courts as “principled litigants.” Not bound by deferential attitudes, they would ask judges to intervene when governments ignored environmental values. To make this argument more palatable, Muldoon and Lindgren adopted an ironic strategy. They hoped to reassure the business representatives by admitting that very few environmentalists “can afford to litigate.” The task force could remove some of the old common law barriers and introduce new causes of action, but most groups would still rely on traditional forms of political participation.

As the process of bargaining advanced, the business representatives continued to champion majoritarian democracy. This is one of the most intriguing elements of the story. Howse, Anderson, and Macnamara presented a normative argument, which questioned the legitimacy of judicial review, but they also admitted that majoritarian institutions favour their interests. This argument should be considered carefully because it might be slowing the judicialization of environmental politics. Responsible governments, even those committed to socialism, sanction industrial pollution and harmful natural resource projects to promote economic growth. Activists can lobby bureaucratic officials or try to build public support by organizing marches, but political executives cannot ignore the benefits of nuclear energy or commercial mining. Of course, unelected judges are not influenced by the same
incentives. If courts were asked to enforce broadly framed regulatory rights, they might ignore the pressures that promote economic development. The business representatives did not want to surrender these advantages, but they knew that some agreement had to be worked out. Near the end of the process, the task force managed to construct a compromise.\textsuperscript{161} Howse, Anderson, and Macnamara agreed to endorse a civil cause of action (section 84) and a new public nuisance rule (section 103). However, they secured several major concessions. To stress the importance of political accountability – and limit recourse to judicial review – they decided that litigation would be "an option of last resort."\textsuperscript{162} Complainants have to proceed through layers of administrative stages before filing legal claims. The business representatives also persuaded Muldoon and Lindgren to recognize the defence of statutory authority and the defence of due diligence.

Just before the task force presented Bill 26, Michael Cochrane encouraged the members to "sell" the compromise. He wisely anticipated the various sources of opposition. Although most environmentalists supported the EBR, some groups suspected that corporate polluters would be able to win hostile actions.\textsuperscript{163} These pessimists refused to see judges as potential allies.\textsuperscript{164} Their opponents believed that Bill 26 threatened Ontario's fragile economy. The Ontario Waste Management Association warned that another maze of legalistic procedures would "increase the costs of doing business" and "discourage investment."\textsuperscript{165} The Ontario Mining Association attacked section 84 because it wanted "to focus on consensus-building and conciliation."\textsuperscript{166} Bill 26 received very little support from opposition critics. Predictably, the Conservative Party claimed that it would create another

\textsuperscript{161} Ontario's EBR includes 125 sections. I only discuss rules that might affect the pace of judicialization.
\textsuperscript{162} Report of the Task Force on the Ontario Environmental Bill of Rights, 17.
\textsuperscript{163} Minutes of Proceedings and Evidence of the Standing Committee on General Government, 3rd Session of the 35th Legislature, October 1993, G-483.
\textsuperscript{164} Ibid., G-565.
\textsuperscript{165} Ibid., G-507 and G-545.
\textsuperscript{166} Ibid., G-536.
“layer of bureaucracy.” Liberals supported the general purpose, but they wondered why the NDP had abandoned the judicial model of political accountability. Some members could not resist an obvious but unfavourable comparison: the government introduced weak environmental rights after ignoring the collective bargaining rights exercised by public service workers. When Bill 26 was finally proclaimed, the Rae cabinet called the EBR a “powerful tool” to protect the environment. Despite this bold declaration, most industry groups expressed relief. After contemplating the implications, they realized that judges would still be minor players.

The NDP government introduced the Environmental Bill of Rights, but it failed to make two structural changes. In 1989, the Ontario Law Reform Commission had encouraged the Liberal cabinet to amend the law of standing and the law of costs. As an opposition party, the NDP had characterized these common law barriers as “archaic rules” that favoured corporate interests. After winning the 1990 general election, the new Attorney-General established an advisory committee, but Howard Hampton did not force the participants to reach an agreement. Unlike his predecessor, he did not promise to accept recommendations that received unanimous consent. Without this crucial incentive, business groups were unwilling to compromise. They favoured rules that stopped environmentalists from initiating court battles. After this process fell apart, the legislative agenda became cluttered with more pressing issues. In 1991, the NDP refused to support a private bill that

167 Ontario Legislative Assembly, Debates, 3rd Session of the 35th Legislature, September 1993, 3173. In 1993, Bud Wildman became the Environment Minister; he guided Bill 26 through the legislative process.
promised to make the judicial system more accessible by lowering standing requirements and reforming the old costs rule.\textsuperscript{171}

The NDP government missed a second opportunity the next year. In 1992, Grier and Hampton refused to expand the \textit{Intervenor Funding Project Act}. CELA argued that worthy applicants should receive funding to appear before the Ontario Municipal Board because many OMB judgements affect the natural environment. A study conducted for the Attorney-General and the Environment Minister endorsed this demand.\textsuperscript{172} After hearing from a broad range of interests, the authors urged the government to fund pre-hearing work, OMB intervenors, Environmental Appeal Board appellants, and judicial review applications. The Rae cabinet renewed the IFPA, but it was not expanded. The next government was far less sympathetic. Because the Conservative Party promised to “streamline” the regulatory process, it decided to terminate this experimental project.\textsuperscript{173} At the end of the second period, environmentalists were not demanding structural reforms – they were fighting to preserve favourable rules. According to CELA, the Harris cabinet quickly jeopardized the integrity of Ontario’s regulatory regime by favouring “private commercial interests.”\textsuperscript{174}

\textbf{Environmental Rights and the Federal Government}

When the environmental rights project moved from Toronto to Ottawa, it confronted even steeper obstacles. Both levels of government expressed some of the same reservations, but Trudeau, Mulroney, and Chrétien had to consider the potential threat to federal-provincial relations. If citizens could ask federally appointed judges to review provincially

\textsuperscript{171} Ontario Legislative Assembly, \textit{Debates}, 1st Session of the 35th Legislature, November 1991, 1267. This private bill was introduced by the previous AG, Ian Scott.
\textsuperscript{172} William Bogart and Marcia Valiante, \textit{Access and Impact: An Evaluation of the Intervenor Funding Project Act} (Toronto: Queen’s Printer for Ontario, 1992). The Rae government refused to support a private bill introduced by Robert Chiarelli that would have expanded the IFPA’s scope.
\textsuperscript{174} Rick Lindgren, “Harris government kills intervenor funding law,” \textit{Intervenor} 21(2) (1996), 1.
endorsed projects, environmental litigation would generate an almost constant supply of jurisdictional disputes. Despite this substantial barrier, CELA advocates continued to demand structural changes. In 1982, they appeared before the Standing Committee on Justice and Legal Affairs to strengthen the Access to Information Act, but their concerns were completely ignored.\textsuperscript{175} Because it includes so many exemptions, most environmental groups use CEPA or the Pest Control Products Act to secure data on toxic substances.\textsuperscript{176} After the Nova Scotia Supreme Court issued Palmer, CELA asked the Liberal government to reverse the civil standard of proof and amend the law of costs.\textsuperscript{177} Grace Patterson, the executive director, proposed an EBR that would invite citizens to sue private polluters and public agencies. The new Environment Minister was sympathetic. As an opposition MP, Charles Caccia acknowledged the unfair burden placed on litigants who target toxic substances.\textsuperscript{178} However, the Liberal government did not introduce any new justiciable rights before losing the 1984 general election. Caccia had commissioned a report on the possibility of federal environmental rights, but it was very discouraging. The authors concluded that an EBR would be opposed by every provincial government, most federal departments, and whole industrial sectors.\textsuperscript{179}

During the late 1980s, post-Charter environmentalists marshalled their resources to fight two structural battles. The first contest began when the Mulroney government introduced the Canadian Environmental Protection Act. Bill C-74 was introduced by a politician who recognized the appeal of human rights. During the patriation round, Tom MacMillan supported the Charter when other members of Conservative Party defended the

\textsuperscript{177} Jane Gadd, "Groups urge subsidies for court challenges in the public interest," Globe and Mail, 30 September 1983, 4.
\textsuperscript{178} "Minister proposes reversing onus of proof in pollution cases," Winnipeg Free Press, 25 January 1984, 16.
\textsuperscript{179} Canadian Environmental Law Research Foundation, Preliminary Analysis of Elements of a Federal Environmental Bill of Rights (Toronto: CELRF, 1984).
principle of legislative supremacy. He also endorsed Caccia's EBR proposal in 1981. Just before presenting Bill C-74, polling data confirmed what he already suspected: most respondents liked the idea of rights that protect human health, wildlife, and natural resources. However, as a member of the federal cabinet, the new Environment Minister confronted an old dilemma. Boldly worded rights sounded appealing, but he did not want to narrow his own discretionary powers by introducing new causes of action. Although CEPA was still called "an environmental bill of rights," MacMillan opposed any measures that would allow judges to control a "whole area of public policy." He even questioned the legitimacy of judicial review by declaring that "courts are not accountable to anyone." Another argument reinforced these new concerns. After receiving advice from the Department of Justice, MacMillan decided that Canada's Constitution prevented the federal government from introducing a string of unconventional civil rights.

Environmentalists appeared before the Legislative Committee on Bill C-74 to present an alternative model. They wanted to constrict the Crown's discretionary powers by winning strict time-tables, mandatory duties, exacting standards, and broad causes of action. Concerned citizens would not have to litigate, they argued, unless federal officials decided to ignore their own laws. Environmental lawyers knew why Bill C-74 was so "timid" and "apologetic." According to Toby Vigod, the executive director of CELA, the Mulroney government was receiving "extremely conservative advice" from the Department of Justice. Instead of underestimating the scope of POGG, the broadest federal power, she argued that it could sustain broadly framed environmental rights. An EBR could recognize a cluster of quasi-constitutional guarantees, like the Canadian Bill of Rights. While legal

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182 Ibid., 14:14.
183 Ibid., 14:11.
184 Ibid., 5:29.
advocates presented this argument, Friends of the Earth, Greenpeace, and Pollution Probe countered another threat. Provincial governments would be allowed to ignore certain parts of CEPA if they signed equivalency agreements. Fearing the erosion of strong national standards, environmentalists opposed this provision.

Although industry groups challenged some of the proposed criminal sanctions, they expressed a surprising degree of support. The Canadian Chemical Producers’ Association and the Mining Association of Canada defended the very characteristics that environmentalists attacked. They hoped that equivalency agreements would eliminate costly areas of overlap by reducing the size of the federal regulatory regime. While hoping for “clear” standards, these interests did not want to narrow the Crown’s discretionary powers. They believed that CEPA would produce “irrational decisions” if federal officials were compulsed to follow an endless number of procedures. Some organizations promised to fight any measures that would judicialize environmental policy. After characterizing litigation as “counter-productive,” the Asbestos Institute insisted that new justiciable rights would threaten “Canada’s cultural identity.”185 With the support of like-minded interests, it argued that CEPA should not allow “individual citizens to by-pass the normal political process.”

As it progressed through the legislative process, Bill C-74 received little support from opposition parties. NDP critics laughed when MacMillan called CEPA an environmental bill of rights. Lynn McDonald, the president of NAC during the patriation round, wanted to know why the Conservative cabinet refused to make the judicial system more “accessible and democratic.”186 After demanding new civil rights, Audrey McLaughlin claimed that discretionary clauses weakened Bill C-74. The Liberal Party noted the correspondence between CEPA and the Meech Lake Accord. According to David Berger, both documents encouraged the process of decentralization. The government did not respond to any of these

185 Ibid., 3:11.
criticisms. MacMillan defended CEPA by insisting that non-justiciable rights would encourage public participation. At the same time, he continued to characterize the division of powers as an inescapable constraint – even though Crown Zellerbach undermined this interpretation. In 1988, as CEPA was moving through the legislative process, the Supreme Court decided that POGG could support federal environmental statutes. After characterizing toxic substances as a grave threat, the high court decided that provincial regulatory regimes were too disparate and disjointed.

The federal cabinet did not transform the Green Plan into a bill of rights, but it was willing to reform the environmental assessment regime. This structural battle started just after Canadian Wildlife Federation was released. Readers will remember this major decision: it concluded that EARP was sustained by legally binding rules. The Federal Environmental Assessment and Review Office characterized the new process as “very demanding and extremely difficult to manage.” According to these frazzled officials, the Federal Court of Appeal removed two crucial components from the EARP regime, “discretion” and “common-sense.” Energy, Mines, and Resources was just as angry – it requested statutory amendments that would inject “flexibility” into a rigid process.

The Mulroney cabinet responded to these pleas by introducing the first version of the Canadian Environmental Assessment Act. Bill C-78 declared that federal officials would consider the potential effects of every project and program, but it restored the Crown’s broad discretionary powers. Vaguely worded, permissive guidelines were designed to undermine the legalistic character of EARP. Post-Charter groups expressed the same sentiment that motivated their predecessors – complete distrust. Governments fostered this distrust by appearing arrogant and unresponsive. During the 1970s, the Davis cabinet virtually ignored the Environmental Assessment Act. During the 1980s, both levels of government seemed to skirt the federal EARP regime by approving a series of potentially harmful projects.

Activists countered this trend by pressuring the Mulroney cabinet to eliminate “layers of discretion.”\textsuperscript{188} To shield the federal review process from the “whims of each government,” they demanded rigorous procedures and mandatory duties.\textsuperscript{189} Some activists even proposed an enforcement branch that would be completely “removed from the political realm.”\textsuperscript{190} Not surprisingly, industry groups supported Bill C-78 because it was designed to correct an “intolerable” regulatory process. They wanted the Conservative government to restore “certainty” and “predictability.”\textsuperscript{191}

Intense public pressure forced the federal government to draft another version. The new Environment Minister, Jean Charest, had to consider a mix of competing demands. Even though business interests hated the new regime, environmentalists refused to accept discretionary guidelines. Provincial officials constrained the scope of choice even more. Just as Bill C-13 began to advance through the legislative process, EARP litigation sparked several controversies. Alberta was forced to defend a huge kraft paper mill, while Québec entered the courtroom to protect the Great Whale project. After responding to these hostile challenges, the premiers did not want a federal regime that would hinder the development of natural resources. To counter this threat, environmentalists appeared before the Legislative Committee on Bill C-13 to defend their vision. Prominent activists argued that judges should supervise every phase of the review process. According to Franklin Gertler, citizens deserved to be distrustful.\textsuperscript{192} Before environmentalists asked courts to intervene, federal officials routinely ignored EARP. He expressed even less faith in provincial governments because they seem to believe that massive engineering projects are powerful “economic engines.”\textsuperscript{193}

\textsuperscript{188} Ibid., 8:59.
\textsuperscript{189} Minutes of Proceedings and Evidence of the Special Committee to Pre-Study Bill C-78, 2nd Session of the 34th Parliament, November 1990, 11:5.
\textsuperscript{190} Ibid., 12:13.
\textsuperscript{191} Ibid., 9:5.
\textsuperscript{192} Minutes of Proceedings and Evidence of the Special Committee on Bill C-13, 3rd Session of the 34th Parliament, October 1991, 7:30.
\textsuperscript{193} Ibid., 7:14.
Although industry representatives continued to defend the virtues of flexibility, Charest agreed to eliminate most of the discretionary clauses that weakened Bill C-78. After making this significant amendment, he could announce that Bill C-13 “does not try to court-proof the process.”\(^{194}\) However, some legislators wanted the Conservative government to transform the CEAA into an environmental bill of rights. They demanded new causes of action and intervenor funding. With the support of other Liberal members, Ethel Blondin argued that boldly worded guarantees could bolster national unity. To make her proposal sound more appealing, she declared that “Canadians from coast to coast share an abiding relationship with the land they love.”\(^{195}\) Québec officials did not share this optimistic view. They promised to initiate “judicial warfare” if the Mulroney government jeopardized their economic autonomy.\(^{196}\) Charest refused to rewrite the CEAA, but he did exempt energy exports to stop future court challenges from hindering the Great Whale project. The Liberal Party was elected before Bill C-13 received royal assent. Instead of adding new legal instruments, the Chrétien government only made several minor changes.\(^{197}\)

At the end of the second period, the political context favoured the polluting industries. Environmentalists still hoped to win justiciable rights, but they had to expend their resources fighting two intertwined threats: decentralization and deregulation. While in opposition, Liberal legislators characterized CEPA as timid and deferential. Instead of acknowledging the merits of equivalency agreements, they argued that every provincial government should respect rigorous national standards. This defence withered away after the 1993 general election because Mulroney and Chrétien faced the same problems. While responding to the pressures of globalization, they had to lower unemployment and control the burgeoning national debt. The new Liberal government suddenly understood the

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\(^{194}\) Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-13, 3rd Session of the 34th Parliament, October 1991, 1:37.

\(^{195}\) House of Commons, Debates, 3rd Session of the 34th Parliament, February 1993, 16235.


\(^{197}\) Canadian Environmental Assessment Act, S.C. 1995, c. 5.
benefits of a smaller, "leaner" bureaucracy. It reduced the size of the bureaucracy and adopted a more accommodating style. Instead of trying to improve the enforcement of environmental laws, the federal cabinet promised to exempt private corporations from "burdensome" regulations. To make Canadian businesses more competitive, the Liberal government decided that agencies should only have to monitor "voluntary compliance agreements." Provincial officials have reinforced this approach by trying to eliminate "costly duplication." 198

When the Standing Committee on the Environment conducted an elaborate review of CEPA in 1994, post-Charter activists hoped to counter these threatening trends by defending an older vision of Canadian federalism. 199 A broad coalition of environmentalists asked the members to consider one of the great virtues of strong national governments – they can “balance diverse social values.” 200 Their assessment did not consider the records of different political parties; it emphasized structural considerations. Provincial officials can be dazzled by massive resource projects or captured by powerful industrial interests. The federal executive can fall into similar traps, they conceded, but national governments are well placed to understand the relationship between economic development and the natural environment. Trudeau and his supporters might have applauded such an argument during the early 1980s, but it sounded antiquated at the end of the second period. Canada’s political elites were moving in the opposite direction.

199 Section 139 of CEPA required a five-year review. CEPA Office, Reviewing CEPA: Public Participation for Environmental Protection (Hull: Supply and Services Canada, 1994).
Fighting for Constitutional Rights

Very few pre-Charter groups mobilized their supporters to demand constitutional rights. CELA appeared before the Lamontagne-MacGuigan committee on Bill C-60 to promote the public trust doctrine, but most environmentalists wanted to discuss jurisdictional problems. In 1980, every major advocacy group ignored the Hays-Joyal committee. However, something happened during the patriation round. At a distance, they watched feminists win one of the greatest structural battles in Canadian history. With the support of other activists, the Ad Hoc Committee managed to secure two equality rights, section 15 and section 28. After witnessing this victory, environmentalists started to imagine the benefits of entrenched guarantees. Instead of asking courts to enforce procedural rules, they could ask substantive questions. Determined litigants could attack the federally regulated nuclear industry or stop provincial governments from approving harmful waste incinerators. This optimism spread, though some activists refused to believe that abstract rights could turn conservative judges into committed ecologists.

Mulroney sparked the first post-Charter battle by trying to counter the damaging effects of the patriation round. After the Liberal government worked out an agreement with nine premiers, isolating René Lévesque, most Québécois francophones expressed a sense of betrayal. The Meech Lake Accord was designed to bolster the legitimacy of Canada’s Constitution by recognizing Québec as a distinct society, but the Conservative government agreed to a series of general amendments. The provinces would exercise greater control over

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immigration policy and Supreme Court appointments. To restrict the use of the federal spending power, they would receive fair compensation for opting out of certain “shared-cost programs.” These changes were released in 1987, just as the Canadian Environmental Assessment Act was being debated. Ironically, concerned citizens were asked to review this federal regulatory statute, but they were excluded from the process of elite accommodation. The first ministers drafted the Meech Lake Accord without consulting anyone but their closest advisors. Like the Fathers of Confederation, they simply assumed that Canadians would trust their wisdom and expertise. However, environmentalists did not express deference — they criticized the closed nature of executive federalism and the substance of the Meech Lake Accord. While feminists attacked the distinct society clause, CELA and Energy Probe mobilized their resources to protect the federal spending power.203 They did not want the Constitution Act to rule out the possibility of ambitious national programs supported by generous levels of funding. Environmentalists did not use this opportunity to demand an EBR, but they wanted new rights to protect Aboriginal peoples.

The second structural battle was very different. After witnessing the “death of Meech Lake,” the Québec government asked a commission to consider possible constitutional amendments — it also promised to hold a referendum on sovereignty. The Mulroney government responded by establishing the Citizens’ Forum on Canada’s Future and a special joint committee.204 Most of the participants challenged the old conventions; they did not want to be excluded from the process of constitutional change. Not daring to question this sentiment, the Conservative cabinet asked another special joint committee to work with the provincial legislatures. Between 1991 and 1992, Canadians were asked to consider twenty-eight changes, including property rights, Senate reform, the devolution of

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certain powers, provisions to encourage economic union, limits on the federal spending power, a distinct society clause, a "Canada clause," and new guarantees to protect Aboriginal peoples.

Environmentalists opposed every measure that would narrow federal powers because they distrusted the provinces. Some activists described the ideal regulatory regime.205 Armed with an impressive budget, Environment Canada would enforce strict national standards. Instead of trying to persuade the provinces to sign vaguely worded agreements, it would secure compliance by applying tough criminal sanctions. A strong federal regime is essential, they insisted, because most provincial governments place economic development above environmental protection. As the executive director of the Canadian Arctic Resources Committee, Stephen Hazell argued that "pollution havens" would form without strong federal guidance.206 When WCELA appeared before the Standing Committee on the Environment, Calvin Sandborn declared that provincial governments "always put jobs before the environment." Post-Charter activists expressed the same concerns when they appeared before the Beaudoin-Dobbie committee on a Renewed Canada. Members of an Edmonton group issued a stern warning. If federal officials abandon their responsibilities, the regulatory system would collapse. Industries would win significant concessions by threatening to move from one jurisdiction to another.207

While defending their vision of federalism, environmentalists debated the merits of different constitutional rights. Predictably, most activists viewed property rights as a serious threat. With the support of feminist groups and social democrats, they criticized the

Mulroney government for trying to appease the business community. The same constellation of activists enthusiastically endorsed the principle of self-government. These provisions were recognized by the federal package, but environmentalists demanded another amendment. Paul Muldoon, Marcia Valiante, and Franklin Gertler argued that Canada's Constitution is incomplete because it fails to acknowledge the "inherent value of nature." They imagined the effects of new environmental rights. The regulatory process would quickly become "accessible and transparent." Instead of relying on narrowly framed statutory rights, entrenched guarantees would protect human health and delicate ecosystems. To make their argument more compelling, CELA and Pollution Probe characterized environmental rights as potential instruments of national unity.

This strategy might have worked during the patriation round, but something happened after the Meech Lake Accord was rejected. Most political élites viewed the Charter as a liability because it was disrupting the process of constitutional change. To protect their rights, certain groups opposed some of Québec's basic demands, including the distinct society clause. By defending their interests so strenuously, they jeopardized the stability of the entire country. This interpretation influenced the Charlottetown debate.

Although most Conservative politicians liked the idea of property rights, they were reluctant to expand the Charter. The premier of Ontario presented a "social covenant" to counter the effects of deregulation and trade liberalization. However, instead of advocating justiciable rights, Bob Rae hoped that constitutional "pledges" would declare the importance of universal health care, generous social programs, environmental protection, and collective bargaining. He did not want judges to review such crucial areas of public policy.

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208 Minutes of Proceedings and Evidence of the Select Committee on Ontario in Confederation, 1st Session of the 35th Legislature, August 1991, C-1391.
209 Minutes of Proceedings and Evidence of the Special Joint Committee on a Renewed Canada, 3rd Session of the 34th Parliament, January 1992, 32:60.
coalition of activists continued to demand new environmental rights, but this proposal received very little support. After witnessing the disruptive EARP challenges, federal officials wanted to discourage litigation. The Environment Minister even questioned the legitimacy of judicial review. When Jean Charest was asked to consider new constitutional guarantees, he argued that “republican ideas” have jeopardized Canada’s “consensus-building” institutions.\footnote{Minutes of Proceedings and Evidence of the Standing Committee on the Environment, 3rd Session of the 34th Parliament, November 1991, 15:25.} In 1981, feminists managed to win two broadly framed rights. Environmentalists asked for similar amendments just ten years later, but they were quickly dismissed.

rejection of justiciable rights represents an attempt to keep the “economically disadvantaged” from winning in court.
CHAPTER FIVE

The Feminist Movement in Post-Charter Canada

I. Mapping the Context

This chapter is probably the most controversial. After the Charter was introduced, journalists, law professors, and social scientists engaged in a fierce debate. Proponents of the court party thesis believe that feminist litigators have come close to "capturing" the Supreme Court.\(^1\) By turning equality rights into powerful instruments of social change, they have managed to win dramatic court victories. Predictably, neo-Marxists and critical legal scholars reject this interpretation. Convinced that litigation is costly and dangerous, they warn all disadvantaged groups to stay away from Canada's conservative judiciary.\(^2\) Those familiar with this normative battle should be very intrigued by the evidence we uncover. Before reviewing the rules of the game and the patterns of litigation, readers should have some sense of the changing political context. Post-Charter feminists developed a complex

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ideology, one that attacked “systemic inequality.” Some of the old cleavages endured, but new fissures formed during the late 1980s, when “doubly disadvantaged” women decided that “mainstream” activists were ignoring their special needs. A wave of groups emerged to define the interests of disabled women, lesbians, and “women of colour.” These shifts occurred just as feminists confronted new threats. Instead of defending Canada’s welfare state, governments reacted to the pressures of globalization by promoting deregulation, trade liberalization, and the decentralization of constitutional powers.

The Political Milieu

The structure of the feminist movement continued to change. NAC still brokered diverse ideas and co-ordinated broad legislative campaigns, but most advocacy groups concentrated on particular policies or provided specialized services. To achieve their ambitious goals, national organizations hired economists, lawyers, administrators, and social scientists. Some activists resisted this professionalization because they valued “personal experience,” not formal credentials. In 1983, after the Trudeau cabinet introduced the second rape shield law, they criticized NAC and NAWL for relying on lawyers who worked at large private firms. At the 1988 annual general meeting, some members of NAC wondered why Canada’s largest feminist groups followed “patriarchal” procedures.

3 Jill Vickers, Pauline Rankin, and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto: University of Toronto Press, 1993).
Delegates urged governments to promote equality, but a formal executive reached decisions by enforcing Robert's Rules of Order. Some activists promoted an alternative method because they could not accept this apparent contradiction. They discussed the virtues of consensus and "inclusiveness," not efficiency and adversarialism. NAC responded to these pressures by adopting a more decentralized committee system.

Another criticism was even more disruptive. Feminists expect every economic and political institution to reflect the diversity of Canadian society, but the major advocacy groups were dominated by White, middle-class professionals. Some activists resisted this hypocrisy by forming their own organizations. In 1985, DAWN was established to defend the interests of women who are hearing, visually, or physically impaired. The founding members of the DisAbled Women's Network wanted to reveal how different types of inequality interact. Their studies have unearthed several clear patterns of discrimination: disabled women earn considerably less than other women and they are more likely to be victims of sexual assault. Some activists forced the feminist movement to consider the relationship between gender inequality and "structural racism." With funding support from the Secretary of State, they formed the National Organization of Immigrant and Visible Minority Women, Women Working with Immigrant Women, and the South Asian Women's Action Network. These groups struggled to make NAC more responsive, while pursuing their own agendas. At the 1992 annual general meeting, they presented a controversial argument: men subjugate women, but "women of privilege" unknowingly oppress women who are less fortunate. Most of the delegates seemed sympathetic. The new president promised to address the concerns expressed by women "who face the harshest levels of discrimination." Not surprisingly, some of the activists warned Sunera Thobani not to

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“create divisiveness.” At the end of the second period, NAC was still trying to manage this source of conflict.

By grappling with these debates, the feminist movement developed ambitious demands. Most activists rejected the old pre-Charter approaches. It seemed silly to think that governments could attack the roots of inequality by trying to improve the “status of women.” They wanted the federal state to introduce generous benefits for mothers, pensions for “home-workers,” stronger sexual assault provisions, comprehensive employment equity regimes, and rigorous pay equity laws. Even though NAC won pregnancy benefits during the early 1980s, the Liberal cabinet did not rush to implement these costly measures.

Trudeau asked a prominent feminist judge to chair the Royal Commission on Employment Equity, but he rejected most of Rosalie Abella’s recommendations. Instead of establishing strict standards and exacting schedules, Bill C-62 simply hoped that federally regulated corporations would respect the “principle of fair competition.” The Ontario government was even less responsive. In 1982, Davis undermined the Ontario Status of Women Council by asking his former press secretary to become the chair. Feminists were alarmed because Sally Barnes opposed one of their basic goals, “equal pay for work of equal value.”

This decision generated so much anger that a new agency was created in 1983, the Women’s Directorate.

The political context did not improve during the 1984 federal election campaign. By organizing one of three formal debates, NAC compelled the leaders to confront a range of social and economic issues. This represented a modest victory, but the wrong party was triumphant. Although Mulroney promised to oppose free trade with the United States, he changed his mind after accepting the conclusions of a massive royal commission. The new Conservative government decided that deregulation and trade liberalization would strengthen the Canadian economy. This agenda forced the feminist movement to defend the welfare state. With the support of anti-poverty groups and environmentalists, NAC organized an impressive campaign. According to their assessment, federal officials failed to appreciate the dangers of neo-liberalism because they depended on a "gender-neutral" analysis. Trade barriers protected women in vulnerable labour sectors, important cultural institutions, and non-renewable resources; trade liberalization favoured male professionals, American interests, and the old polluting industries. This argument did not move the Mulroney cabinet. As "global competitiveness" became the principal objective, feminist groups were virtually ignored. NAC continued to demand national day care services, for example, but the Conservative government refused to introduce such an expensive program.

Feminists also discovered the dangers of public funding. This crisis culminated when advocacy groups appeared before a House of Commons subcommittee to defend the Women's Program. Their task was complicated by REAL Women, a group that promotes the "traditional family" and opposes the principle of gender equality. Feminists had to explain why they should receive financial assistance from taxpayers who did not agree with their objectives. Despite impassioned pleas, the Mulroney cabinet proceeded to weaken

17 Harold Clarke, Jane Jenson, Lawrence LeDuc, and Jon Pammett, Absent Mandate (Toronto: Gage, 1991).
an entire class of critics. Between 1989 and 1992, the Secretary of State reduced funding levels by as much as seventy-five percent. According to Judy Rebick, the eleventh president of NAC, even the strongest groups struggled to survive. This passage of post-Charter history revealed an important difference between the two movements. Because environmentalists never received the same level of support, they were far less vulnerable.

Feminists regained some of their hope after the 1993 general election. Liberal legislators criticized the Free Trade Agreement and NAFTA as opposition members because these measures posed such a grave threat to Canada's autonomy. They worked with feminists to demand stronger criminal laws and new social programs, including national day care services. However, the Liberal government eventually accepted the "neo-liberal consensus."21 The seventh president of NAC became one of Chrétien's closest political advisors, but Chaviva Hosek did not persuade the federal cabinet to restore generous levels of public funding. Advocacy groups were not deluged with Secretary of State grants. As Minister of Finance, Paul Martin has continued to dismantle the welfare state, though at a slower pace. In 1994, the Liberal government broke an election promise by ratifying NAFTA without securing several "side agreements." Feminists have suffered in this new climate because most of their policy objectives require greater state intervention or higher levels of public funding.

The political context in Ontario was far more favourable. With the support of the NDP, the new Liberal cabinet increased funding to feminist groups, introduced a program to control domestic violence, established a task force on midwifery, and improved the enforcement of child custody orders. Bill 154 was the most dramatic measure – it created a pay equity regime to attack "systemic gender discrimination." The Peterson government refused to introduce a more rigorous set of standards for public servants, but it agreed to

regulate the entire public sector and private sector firms with more than ten employees.\textsuperscript{22} In 1990, Ontario voters elected an old ally of the feminist movement, the NDP. A sustained period of reform culminated when the Rae cabinet introduced Bill 79. The Employment Equity Act was enormously controversial because it asked employers to meet mandatory schedules and rigorous "numerical goals."\textsuperscript{23} This period of legislative activity came to an abrupt end after the 1995 general election. The Conservative government abolished the new employment equity regime and reduced funding to women's groups. To lower the provincial deficit, the Harris cabinet has imposed strict restrictions on welfare recipients. Instead of fighting for new programs, feminists were forced to defend many of their old legislative victories.

\textbf{The Rules of the Game}

If post-Charter feminists were ignored by neo-conservative governments, they might have explored several opportunities. Private prosecutors are not allowed to enforce indictable offences, but women's shelters could provide legal advice to victims of sexual assault and domestic violence. With the consent of like-minded complainants, they could use highly publicized criminal trials to demand certain legislative reforms. Nothing stopped feminist lawyers from testing various tort claims. They might have argued, for example, that publishers and distributors of pornography caused certain men to rape. As civil litigants, feminists could ask for a broader range of remedies, including damages and injunctions. This option also promised greater control. Instead of relying on police officers and Crown lawyers, litigators could select the strongest cases and design their own arguments.\textsuperscript{24} If these strategies seemed too remote, feminists might have filed judicial review petitions. By asking courts to enforce the principles of natural justice, they could

\textsuperscript{22} Pay Equity Act, S.O. 1987, c. 34.
\textsuperscript{23} Employment Equity Act, S.O. 1993, c. 35.
\textsuperscript{24} Lisa Freedman, "Civil courts: a powerful tool for education," Status (March 1983).
challenge boards and tribunals that follow quasi-judicial procedures. By asking courts to
enforce the duty of fairness, they could challenge public authorities that perform
administrative tasks. Governments do not have to meet these standards, but they have to
respect statutes that create mandatory obligations. By persuading courts to read new
duties into permissive clauses, feminists might have broadened the scope of certain
entitlements.

These legal options became less attractive after the first ministers introduced the
Charter. Between 1982 and 1985, feminists could explore several unlikely strategies. Section
7 entices “pro-choice” activists and “pro-life” groups into the courtroom by protecting “life,
liberty, and the security of the person,” but it also recognizes the “principles of fundamental
justice.”25 By developing a substantive interpretation, cunning litigators might have
challenged policies that jeopardized personal security or psychological well-being.26 If
administrative agencies and line departments failed to provide meaningful participation,
litigants could attack welfare programs or health regulations. Of course, feminists could
finally use “their” rights in 1985. After recognizing equality before the law, a procedural
right, and equality under the law, a substantive guarantee, the first part of section 15
promises the “benefit” and “protection” of the law “without discrimination.” The second part
is just as significant. By protecting programs that improve the “conditions of disadvantaged
individuals,” it promotes an important idea: to achieve equality, certain groups have to be
treated differently. Section 15 is the justiciable right that feminists wanted so badly, but
they managed to win another declaration that is laden with symbolic meaning. Section 28
declares that all rights and freedoms “are guaranteed equally” to men and women.

Post-Charter litigants confronted more legal options and fewer procedural hurdles.

We already know that the Supreme Court continued to liberalize the law of standing.27 If

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25 F.L. Morton, Morgentaler v. Borowski: Abortion, the Charter, and the Courts (Toronto:
McClelland and Stewart, 1992).
26 Martha Jackman, “Rights and Participation: The Use of the Charter to Supervise the
advocacy groups were "genuinely interested," they could appear as plaintiffs to challenge statutes and executive orders. Feminists could also present their demands by intervening. In 1983, the Supreme Court knocked down some of the old common law rules. This experiment was abandoned because it placed too many constraints on judicial discretion.

The new rules force applicants to justify their presence. After declaring their areas of expertise, potential intervenors have to explain how they can assist the court. These requirements preserve some of the old requirements, but they do not exclude activists who can demonstrate a "legitimate" interest and a strong record of advocacy. As friends of the court, post-Charter feminists could present written submissions and oral arguments to challenge myths about rape. As intervenors with full party status, they could provide expert witnesses to document the "battered wife syndrome."

After the patriation round, most activists characterized the Charter as an unambiguous victory. However, some feminist scholars remained deeply sceptical. According to these critics, the equality rights project still confronts serious obstacles. A coalition of liberal activists managed to win two abstract declarations, but patriarchal values have shaped every element of Canada's judicial system. Litigants can try to challenge obvious forms of discrimination if they "meet male-defined criteria and speak in voices that are acceptable to men." Women like Irene Murdoch and Jeannette Corbière Lavell can try to tell their stories, but worthy "facts" are separated from context and personal accounts are dismissed as anecdotal. It is even harder to demonstrate the effects of "systemic discrimination" because this idea challenges the very principles that courts value — fairness, impartiality, and objectivity. Liberal feminists ignore another daunting obstacle. Some

29 Kathleen Lahey, Presentation at OISE, March 1989.
rights have a long, illustrious history. Rooted in the common law tradition and respected by
generations of judges, they place limits on the exercise of state authority. Some protect
those accused of committing indictable offences; others stop governments from censoring the
media. Equality rights are less credible and more controversial. Feminists can present
ambitious claims, but these older guarantees will usually trump section 15.

II. Playing by the Rules of the Game

We can find out how these rules affected feminist strategies by using the Court
Challenges Database to study the frequency of participation, the sites of court battles, and
the legal success rate. The explanations disagree. (i) If the Charter revolution thesis is
correct, the rate of participation should increase abruptly after 1985. Québec francophones
will stay away from the courts, but English Canadian activists will invoke section 15 to win
favourable decisions. (ii) The court party thesis predicts an even higher rate of participation
because post-materialists want to by-pass the great representative institutions. After
persuading the Supreme Court to accept a substantive interpretation of equality, feminists
will celebrate a series of stunning legal victories. Because these post-materialists are so
successful, they should avoid the seamy world of legislative politics. (iii) The judicial
pluralism thesis expects the rate of participation to climb gradually, but feminists should
realize that litigation is more effective when it complements traditional strategies. To
overcome the limits of judicial review, these post-materialists will mix different forms of
collective action.

Feminists in Court

Post-Charter activists still confronted legal barriers and policy-making institutions
became more accessible, but the pressures of globalization made governments less
responsive. Feminists reacted to these competing incentives by organizing sixty-eight challenges. The most litigious period occurred between 1989 and 1991, when they brought twenty-six claims. Readers will remember that the rate of environmental litigation also accelerated during this three year period. Still, feminists did not participate as frequently; environmentalists presented over one-hundred claims. Graph V also reveals the number of hearings. The almost continuous increase reflects the growing complexity of equality litigation. Despite this steady climb, several trends seem to contradict the two explanations that predicted dramatic change, the Charter revolution thesis and the court party thesis. The rate of participation is inflated by the high number of defensive challenges. Feminists wanted to win legal contests by launching offensive challenges, but they were forced to act defensively when their political opponents brought hostile actions. The most fractious period occurred between 1987 and 1990, when fifty-three percent of the challenges were defensive.

Graph V: Feminists in Court (1982-1995)

Source: Court Challenges Database

30 The frequency of defensive claims is too uneven to plot on a longitudinal graph.
The rate of participation behaved predictably for seven years. After the moratorium on section 15 was lifted, the rate began to rise as feminists developed their ambitious model of equality. However, the frequency wavered quite dramatically after 1990. Because some cases take years to resolve, the rate often dropped after litigators filed an unusually high number of claims. This technical observation does not explain why the frequency plummeted in 1992. We have to consider political variables. The Mulroney cabinet “severely limited” the equality rights project by eliminating an important source of funding.\textsuperscript{31} Without the support of the Court Challenges Program, the feminist movement could only present two claims. The Chrétien cabinet also affected the pace of participation by restoring funding.\textsuperscript{32} This evidence seems to support the judicial pluralism thesis. Section 15 became an important defensive weapon between 1988 and 1992, when the Mulroney government virtually ignored the feminist movement. Activists entered the courtroom more frequently, but the uneven rate of participation suggests that litigation did not displace traditional forms of collective action.

To fight these post-Charter battles, feminists formed new groups and strategic alliances. Table XXVII documents several dramatic shifts. During the first period, most claims were brought by women who received support from like-minded activists. After 1982, individuals initiated very few actions. Although some advocacy groups were lured into the courtroom, legal advocacy groups quickly became the dominant players. They organized more challenges than any other type of participant. Litigators sponsored plaintiffs and complainants, but they also appreciated the value of collaboration — strategic pairs and court coalitions organized thirty-seven percent of the claims. These patterns reflect deeper


changes that have affected the very structure of the feminist movement. After the patriation round, the Ad Hoc Committee was replaced by CREF, the Charter of Rights Education Fund, and CORC, the Charter of Rights Coalition. They received considerable support from a

<table>
<thead>
<tr>
<th>Form</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Advocacy Group</td>
<td>30</td>
</tr>
<tr>
<td>Court Coalition</td>
<td>19</td>
</tr>
<tr>
<td>Advocacy Group</td>
<td>7</td>
</tr>
<tr>
<td>Strategic Pair</td>
<td>6</td>
</tr>
<tr>
<td>Individual(s)</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>68</strong></td>
</tr>
</tbody>
</table>

Table XXVII: The Organizational Form of Feminist Challenges (1982-1995)

Source: Court Challenges Database

broad range of advocacy groups, including NAC, the Elizabeth Fry Society, and the Canadian Council of Learning Opportunities for Women. The members of this coalition shared the same basic objectives, but an informal division of labour existed between 1982 and 1985. CORC activists travelled across Canada to discuss the possibilities of section 15 litigation, knowing that some women were still reluctant to support costly court battles, and they scrutinized statutes to find possible violations.\(^{33}\) Distrust fueled this exercise. Instead of hoping that legislators would use the moratorium to identify and abolish discriminatory laws, feminists compelled governments to review "statutory audits."

As the leading members of CREF, lawyers from Toronto and Ottawa started to design an organization that could present complex legal claims. During the patriation round, they discovered one of the principal lessons of judicial politics – the importance of winning interpretive battles. When the Ad Hoc Committee expressed concerns about the reasonable limits clause, they were dismissed by the "three kings," Gordon Fairweather, the Canadian Human Rights Commissioner, Walter Tarnopolsky, a prominent constitutional

law professor, and Alan Borovoy, the president of the Canadian Civil Liberties Association. Instead of deferring to these male authorities, feminist lawyers wanted to cultivate their own expertise. They knew that a small cadre of litigators would have to develop an alternative interpretation of the Charter. CREF activists pursued two closely related projects. By publishing several academic articles, Mary Eberts documented the limits of pre-Charter jurisprudence and explored the possibilities of post-Charter claims. As the principal legal scholar, she conducted a comparative study of public interest litigation with Beth Atcheson and Beth Symes. After surveying a range of groups, they decided to follow the American tradition. Instead of providing basic legal services as a clinic, the Women’s Legal Education and Action Fund would carefully select cases to establish favourable precedents, discipline unresponsive governments, and attack the roots of inequality.

LEAF quickly became Canada’s most aggressive legal advocacy group. After the moratorium was lifted, it organized forty-seven challenges. The most litigious period occurred between 1987 and 1991, when LEAF asked Canada’s judiciary to consider twenty-eight claims. The rate of participation is very uneven. In 1986, after fighting four legal contests, LEAF only presented one claim. The next descent was far more dramatic. In 1992, the Mulroney government frustrated the equality rights project by eliminating a single source of funding, the Court Challenges Program. Graph VI also reveals the influence of private adversaries: thirty-five percent of the claims countered hostile actions. LEAF litigators never launched more than four offensive campaigns during any twelve month period. As the

political climate worsened, they defended old legislative victories by turning section 15 into a shield.

LEAF did not become the principal player by emulating Canadian groups. CELA was rejected as a model because the founders believed that provincial legal clinics were too constrained. After watching NAC grapple with a series of internal struggles, they imagined several horrible scenarios. If groups participated as voting members, different "factions" might try to control the board of directors – REAL Women could seek membership just to sabotage the equality rights project.37 Ironically, by choosing to copy the National Association for the Advancement of Colored Peoples, the founders adopted an organizational form that appears to violate elements of the "feminist method." Instead of developing a consensual style, they designed a highly centralized structure to cultivate efficiency, stability, and continuity. Important responsibilities were given to several committees, an administrative staff, and a board of directors, but a small team of lawyers accepted most of

the decision-making authority.\textsuperscript{38} To improve their chances of winning decisive court victories, the architects of LEAF wanted the legal committee to dominate every stage of the case-selection process. Another organizational characteristic reveals the influence of the American tradition. Because some of the founders believed that public funding would make LEAF vulnerable and dependent, they hoped to rely on select businesses, well-established law firms, and philanthropic institutions. Despite the obvious risks, the first fundraising campaign characterized the legal committee as an élite cadre of professionals to win the support of "upper-class women."\textsuperscript{39} In 1990, an endowment was formed with the support of Nancy Jackman, one of the founding members, and several large corporations. This "sister organization" was designed to save LEAF from "life-threatening" attacks, but it has generated enough revenue to give the national office about $10,000 each month.\textsuperscript{40}

Although LEAF advocates understood the risks of public funding, they could not resist the temptation. Between 1985 and 1988, the Toronto office received over one-million dollars from the Secretary of State and the newly elected Peterson government. After the moratorium on section 15 ended, the Mulroney cabinet established the Court Challenges Program to support deserving claims.\textsuperscript{41} Applicants could receive $35,000 to participate at each level of the judicial system. As LEAF realized the costs of constitutional litigation, it urged the Conservative government to provide even more assistance. With a broad coalition of human rights activists, it demanded federal funding to challenge provincial statutes.\textsuperscript{42}

The idea of local autonomy produced another set of pressures. During the early years, the organizational structure was so centralized that individual donors were not allowed to

\textsuperscript{38} Mary Eberts and Gwen Brodsky, \textit{LEAF Litigation Year One} (Toronto: Women's Legal Education and Action Fund, 1986).
\textsuperscript{39} Sherene Razack's personal interview with Marilou McPhedran, February 1988.
\textsuperscript{40} "LEAF Foundation to raise $5 million endowment fund," \textit{LEAF Lines} (November 1990).
\textsuperscript{41} "Here's how Charter challenges can be funded," \textit{Canadian Human Rights Advocate} (January 1987). During the first five years, the CCP was part of the Canadian Council on Social Development. After 1990, it was managed by the Human Rights Research and Education Centre in Winnipeg.
\textsuperscript{42} "Community groups want challenge program widened," \textit{Canadian Human Rights Advocate} (July 1988); "Section 15 is useless without public funding," \textit{Canadian Human Rights Advocate} (March-April 1989); "Court Challenges extended but lid kept on its mandate," \textit{Canadian Human Rights Mandate} (May 1990).
register their concerns. In 1988, they were invited to elect the board of directors as members of one of the provincial “branches.”

This decision-making body is important because it has to co-ordinate several tasks, including lobbying, fund-raising, and public education. However, as the branches became more independent, they wanted to exercise more control over the case-selection process. Instead of simply funnelling resources to the Toronto office, they wanted to choose some of their own cases.

West Coast LEAF accomplished this goal by establishing a separate source of revenue, the B.C. Litigation Fund. LEAF-Manitoba and LEAF-New Brunswick have asserted their independence by receiving provincial grants to study sexual abuse and legal aid programs.

Although most of the founding members were inspired by the American tradition, these branches forced the legal committee to consider arrangements that would accommodate Canada’s regional character.

We have to consider the internal tensions that shaped LEAF because it quickly became an important player, but the equality rights project was sustained by a network of advocacy groups. During the middle of the 1980s, the Charter of Rights Coalition asked a series of legislative committees to consider carefully researched studies.

The National Association of Women and the Law carved out a special role by developing education programs and financing the *Journal of Canadian Women and the Law.* The feminist movement also received support from several new legal advocacy groups, including the Charter Committee on Poverty Issues and the Canadian Disability Rights Council. One of the most important groups was established before LEAF. In 1981, the B.C. Public Interest Advocacy Centre received $140,500 from the Law Foundation of British Columbia to assist

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43 Sherene Razack’s personal interview with Pat Wouters and Susan Clark (early members of the Board of Directors), February 1988.
44 Meeting of LEAF’s Board of Directors, November 1991.
45 “Branch and chapter developments,” *LEAF Lines* (Summer 1995).
the "disadvantaged" and the "under-represented." It has presented section 15 claims to attack racial discrimination and gender inequality.

These groups adopted distinctive organizational structures and accepted different sources of funding, but they shared one overriding objective. After watching the Supreme Court undermine the Canadian Bill of Rights, post-Charter feminists organized to promote an ambitious model of equality. Leading feminist lawyers were guided by a sophisticated understanding of judicial review. When Sheila McIntyre explained why women had to support LEAF, she sounded like an astute legal realist. Because courts consider broad social and economic forces, "the shaping of the Charter will be an intensely political process," one that is "far more responsive to public pressure than constitutional law." Most of the early claims attacked obvious forms of discrimination, but LEAF presented a fully developed interpretation of equality in 1989, when the Supreme Court was asked to hear Andrews. Mary Eberts and Gwen Brodsky, the first director of litigation, developed their case by characterizing the Charter as an instrument designed to help the "excluded" and the "powerless." After promoting the virtues of certain "egalitarian principles," they presented the central problem: most discriminatory laws use "gender-neutral" language to obscure "systemic patterns of dominance and subordination." The formal model of equality failed to attack subtle, unintended forms of discrimination because courts ignored contextual issues – they refused to acknowledge that certain plaintiffs were "disadvantaged." LEAF wanted the judiciary to respect the democratic spirit of section 15 by rejecting this old

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51 Sheila McIntyre, "Journey throughout uncharted territory," Broadsia (March 1983).
54 Ibid., 18.
approach. Eberts and Brodsky strengthened their case by presenting another argument: if the judiciary developed a formalistic interpretation of section 15, it would be overwhelmed by serious administrative problems. Thousands of laws that treat individuals and groups differently would be vulnerable. This strategy worked. LEAF persuaded the Supreme Court to accept a substantive interpretation of equality.

Table XXVIII: The Issues Raised by Feminist Litigants (1982-1995)

<table>
<thead>
<tr>
<th>Issue</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Assault</td>
<td>14</td>
</tr>
<tr>
<td>Workplace Equality</td>
<td>9</td>
</tr>
<tr>
<td>Abortion</td>
<td>9</td>
</tr>
<tr>
<td>Child Care and Support</td>
<td>7</td>
</tr>
<tr>
<td>Aboriginal Women</td>
<td>6</td>
</tr>
<tr>
<td>Marriage and Divorce</td>
<td>6</td>
</tr>
<tr>
<td>Welfare and Unemployment</td>
<td>6</td>
</tr>
<tr>
<td>Racism and Immigration</td>
<td>4</td>
</tr>
<tr>
<td>Membership Restrictions</td>
<td>3</td>
</tr>
<tr>
<td>Lesbian Rights</td>
<td>2</td>
</tr>
<tr>
<td>Peace and Disarmament</td>
<td>1</td>
</tr>
<tr>
<td>Pornography</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>68</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Post-Charter activists wanted to fight deregulation and embarrass unresponsive governments. While the Sierra Legal Defence Fund urged political elites to respect environmental values, feminists challenged “damaging myths” by allowing women to document their stories. They hoped that women could use section 15 to “tell those in power how inequality pervades their lives.” Not surprisingly, a significant proportion of litigants asked the courts to make family life more equitable. They defended favourable child custody laws or attacked rules that hurt divorced women. In 1985, LEAF lawyers challenged the notion that women and children are owned by men. They asked section 96

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57 Eberts and Brodsky, LEAF Litigation Year One, 2.
courts to invalidate two types of laws, those that stopped married women from using their maiden names and those that prevented both parents from giving their children "hyphenated surnames." Another cluster of claims challenged threatening "myths" about reproductive life. For example, B.C. officials authorized the apprehension of Baby R after the plaintiff refused to have a Cesarean section. Somehow, they hoped to retrieve the fetus without ordering a doctor to perform "any medical procedures on the mother." After arguing that a woman and her fetus are inseparable, LEAF persuaded the trial court judge to discipline the Superintendent of Family and Child Services. Feminists asked the judiciary to consider a number of controversial issues, from pornography to "institutionalized racism," but Table XXVIII reveals sexual assault produced more actions than any other single issue. Another issue remained just as salient. Like their predecessors, post-Charter groups mobilized to help Aboriginal women.

Table XXIX: The Targets of Feminist Litigation (1982-1995)

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hostile Actions</td>
<td>22</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>12</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>11</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>7</td>
</tr>
<tr>
<td>Provincial Administrative Decisions</td>
<td>5</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>3</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>3</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>3</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>1</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>1</td>
</tr>
</tbody>
</table>

Total 68

Source: Court Challenges Database

To achieve their ambitious goals, litigators had to challenge criminal defendants, private corporations, and various public authorities. Table XXIX unearths several intriguing patterns. Although post-Charter activists anticipated great legal victories, thirty-two percent of their claims attacked hostile actions. LEAF was forced to protect favourable laws just after the moratorium on section 15 ended. In British Columbia, fathers entered the courtroom to challenge the *Child Paternity and Support Act*. Feminists quickly learned one of the central lessons of judicial politics: rights are difficult to “own” because they create new resources for competing interests. Another finding makes the court party thesis seem less compelling. The proponents insist that élite activists are obstructing popular majorities by asking courts to overturn provincial and federal laws. However, most of the claims (seventy-four percent) did not ask judges to invalidate statutes. A surprising number of litigants hoped to influence the interpretation of constitutional rights and common law rules — without challenging any laws. Even though LEAF lawyers routinely intervened to shape the evolution of legal principles, they attacked fewer than ten statutory provisions.

Table XXX: The Targets of LEAP Litigation (1985-1995)

<table>
<thead>
<tr>
<th>Target</th>
<th>Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hostile Actions</td>
<td>17</td>
</tr>
<tr>
<td>Legal Principles</td>
<td>11</td>
</tr>
<tr>
<td>Provincial Statutes</td>
<td>5</td>
</tr>
<tr>
<td>Provincial Administrative Decisions</td>
<td>4</td>
</tr>
<tr>
<td>Federal Statutes</td>
<td>4</td>
</tr>
<tr>
<td>Federal Administrative Decisions</td>
<td>2</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
<td>2</td>
</tr>
<tr>
<td>Municipal Decisions</td>
<td>1</td>
</tr>
<tr>
<td>Provincial Cabinet Decisions</td>
<td>1</td>
</tr>
<tr>
<td>Federal Cabinet Decisions</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>47</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

---

Some feminists emulated strategies that were refined by post-Charter environmentalists. They hoped to embarrass cabinet ministers, overturn administrative orders, and reprimand public authorities by filing civil claims and judicial review petitions. In 1990, LEAF initiated a tort action against the Metro Toronto Police Commission, the chief of police, and three investigating officers. These defendants failed to advise the plaintiff that she was the likely target of the “balcony rapist.” According to unconfirmed reports, they did not want “hysterical women” to ruin the investigation by inadvertently warning the perpetrator.\(^61\) To challenge this myth, LEAF lawyers developed an unconventional interpretation of the \textit{Police Act}: by endangering certain “disadvantaged” groups, the defendants violated their duty to protect the public. Like environmental litigators, they wanted to transform a vague statutory clause into a binding obligation. Some groups hoped

\begin{table}[h!]
\centering
\caption{Where Feminists Take Their Legal Claims (1982-1995)}
\begin{tabular}{ll}
\hline
Court & Number of Hearings \\
\hline
Supreme Court of Canada & 31 \\
Ontario Court of Justice & 13 \\
Ontario Court of Appeal & 9 \\
Federal Court - Trial Division & 8 \\
Federal Court - Appeal Division & 7 \\
B.C. Court of Appeal & 5 \\
B.C. Supreme Court & 5 \\
Saskatchewan Court of Appeal & 3 \\
Yukon Supreme Court & 3 \\
Alberta Court of Appeal & 2 \\
Alberta Court of Queen’s Bench & 2 \\
Nova Scotia Supreme Court - Trial Division & 2 \\
P.E.I. Supreme Court - Trial Division & 2 \\
Manitoba Court of Appeal & 1 \\
New Brunswick Court of Appeal & 1 \\
Nova Scotia Supreme Court - Appeal Division & 1 \\
Québec Court of Appeal & 1 \\
Yukon Court of Appeal & 1 \\
New Brunswick Court of Queen’s Bench & 1 \\
Québec Superior Court & 1 \\
Saskatchewan Court of Queen’s Bench & 1 \\
\hline
Total & 100 \\
\hline
\end{tabular}
\begin{flushright}
Source: Court Challenges Database
\end{flushright}
\end{table}

to generate public pressure, not favourable legal precedents. When Greenpeace and NAC targeted political executives, they rarely expected to win. During the early 1990s, Mulroney invoked an old constitutional provision to circumvent the Liberal-dominated Senate. To pass several controversial measures, including the Goods and Services Tax, he increased the size of the upper chamber and appointed loyal members of the Conservative Party. The B.C. Court of Appeal was asked to stop this manoeuvre, but Justice Harold Hollinrake decided that courts should not "place themselves in the political arena."62 Despite losing, NAC was able to publicize the damaging effects of fiscal constraint.

<table>
<thead>
<tr>
<th>Court</th>
<th>Number of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court of Canada</td>
<td>23</td>
</tr>
<tr>
<td>Ontario Court of Justice</td>
<td>10</td>
</tr>
<tr>
<td>Ontario Court of Appeal</td>
<td>6</td>
</tr>
<tr>
<td>Federal Court - Appeal Division</td>
<td>3</td>
</tr>
<tr>
<td>Federal Court - Trial Division</td>
<td>3</td>
</tr>
<tr>
<td>Saskatchewan Court of Appeal</td>
<td>3</td>
</tr>
<tr>
<td>Alberta Court of Appeal</td>
<td>2</td>
</tr>
<tr>
<td>B.C. Court of Appeal</td>
<td>2</td>
</tr>
<tr>
<td>B.C. Supreme Court</td>
<td>2</td>
</tr>
<tr>
<td>Manitoba Court of Appeal</td>
<td>1</td>
</tr>
<tr>
<td>Quebec Court of Appeal</td>
<td>1</td>
</tr>
<tr>
<td>Alberta Court of Queen's Bench</td>
<td>1</td>
</tr>
<tr>
<td>Quebec Superior Court</td>
<td>1</td>
</tr>
<tr>
<td>Saskatchewan Court of Queen's Bench</td>
<td>1</td>
</tr>
<tr>
<td>Yukon Supreme Court</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>60</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Feminists targeted a broad range of private actors and public officials, from criminal defendants and small businesses to federal cabinet ministers and municipal authorities. However, when activists entered the judicial system, they often appeared before the Supreme Court. According to Table XXXI, Canada's highest court considered roughly one-third of the post-Charter hearings. This figure reflects several changes. LEAF rarely

sponsored clients through every stage of the legal process. Instead of bringing civil claims to trial courts, feminist litigators discovered the benefits of intervening before appellate courts. Without wasting limited resources, they could fight interpretive battles and counter their political opponents. Another piece of evidence supports the Charter revolution thesis. English Canadian courts settled sixty-six disputes, but Québec courts only considered two claims. The contrast is even more pronounced when we compare both movements. Remarkably, post-Charter litigants brought ninety-eight percent of their challenges to courts in English Canada. This suggests that constitutional rights have not altered the preferences and strategies of Québec activists. They continued to pursue traditional forms of collective action. LEAF established a regional branch in Québec, but it experienced serious organizational difficulties.  

After finding out that Québec activists virtually ignored the judicial system, we should not be surprised to discover another similarity between the two movements. Environmentalists brought a significant proportion of their claims to both divisions of the Federal Court, and feminists routinely appeared before the Supreme Court. However, when they asked section 96 judges to consider their concerns, they usually appeared before courts in Ontario and British Columbia. These English Canadian judges considered about thirty-seven percent of the post-Charter claims. Both movements are supported by activists in every region, but most of the legal battles have occurred at four sites: Ottawa, Toronto, Victoria, and Vancouver.

**Judges as Gatekeepers**

Post-Charter feminists still confronted several hurdles. The Constitution Act (1982) formally invites citizens to seek the appropriate judicial relief, but section 24 does not force judges to admit litigants who want to transform the courtroom into a political arena.

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63 Personal interview with Carissima Mathen, October 1995.
Although the Supreme Court continued to liberalize the law of standing by confirming the genuine interest test, judges could erect several threshold tests to discourage frivolous or meddlesome claims. Litigants could be turned away if they failed to raise justiciable issues. Table XXXIII shows us that very few advocacy groups were lured into the courtroom by Thorson, McNeil, and Borowski. Instead of seeking party status, seventy-one percent of the participants decided to intervene. This figure reflects a series of strategic considerations.

<table>
<thead>
<tr>
<th>Form</th>
<th>Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intervenor</td>
<td>44</td>
</tr>
<tr>
<td>Sponsor</td>
<td>10</td>
</tr>
<tr>
<td>Party</td>
<td>4</td>
</tr>
<tr>
<td>Sponsor and Party</td>
<td>4</td>
</tr>
<tr>
<td>Private Prosecutor</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Although some students of judicial politics have characterized the standing trilogy as an unconditional victory for all public interest groups, LEAF advocates knew that courts still exercised a significant degree of discretion. Unsympathetic judges could, for example, simply decide that other litigants were somehow "more appropriate." Instead of wasting their energy trying to win party status, feminist lawyers expected to fight most of their battles by sponsoring individual women. However, this form of participation seemed very unattractive by the late 1980s. Because most section 15 claims targeted public institutions with large operating budgets, it was expensive and time-consuming to represent clients.

through every stage of the process, from preliminary hearings to the appellate phase.\textsuperscript{66} LEAF had to dedicate between $50,000 and $100,000 just to support a single claim — and some of these actions were never resolved. At the same time, the legal committee discovered the benefits of intervening. Despite the constraints imposed on friends of the court, they could challenge destructive attitudes, counter hostile actions, build favourable precedents, and influence the interpretation of section 15 — without exhausting their resources.\textsuperscript{67}

Table XXXIV: The Legal Status of Feminist Groups (1982-1995)

<table>
<thead>
<tr>
<th>Group</th>
<th>Out-of-Court Supporter</th>
<th>Intervenor</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Education and Action Fund</td>
<td>0</td>
<td>10</td>
<td>37</td>
</tr>
<tr>
<td>National Action Committee on the Status of Women</td>
<td>2</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>B.C. Public Interest Advocacy Centre</td>
<td>2</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>Canadian Abortion Rights Action League</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Canadian Association of Sexual Assault Centres</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>West Coast LEAF</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>DisAbled Women’s Network</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Metro Action Committee on Violence Against Women</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>National Association of Women and the Law</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Native Women’s Association of Canada</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Federated Anti-Poverty Groups of B.C.</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Minority Advocacy and Rights Council</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Toronto Rape Crisis Centre</td>
<td>1</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

Total 9 18 79 4 110

Source: Court Challenges Database

Table XXXIV illustrates the same patterns from a different angle by recording every group that brought more than two claims. As the principal legal advocacy group, LEAF lawyers never appeared before the courts as litigants with party status. They presented seventy-nine percent of their arguments by intervening. During the pre-Charter period, feminist groups usually participated as out-of-court supporters. Some organizations


\textsuperscript{67} Personal interview with Carissima Mathen, October 1995.
continued to support litigants outside the courtroom. For example, when the Canadian Abortion Rights Action League did not intervene, it hoped to sway public opinion by organizing marches and press conferences. These strategic decisions seem to support the judicial pluralism thesis. Post-Charter feminists did not respond blindly by taking advantage of every new entry point into the judicial process. After discovering the risks and benefits of different options, they favoured certain forms of participation.

By taking a closer look at the decisions, we can see how courts preserved some of the old threshold tests. Just after the Charter was introduced, the Ontario Status of Women Council wanted the judiciary to amend the spirit and substance of a provincial statute. Ordinarily, the *Family Law Reform Act* determined the division of marital assets. However, after the death of a spouse, the *Succession Law Reform Act* governed the split — without recognizing marriage as an equal partnership. Instead of correcting this "flaw," the High Court of Justice sent the applicants to a more "appropriate" forum, the Ontario Legislative Assembly. Some courts discouraged feminists from intervening. The Canadian Abortion Rights Action League wanted to counter Joseph Borowski when he challenged section 251, but the Saskatchewan Court of Queen's Bench decided that federal officials could defend Canada's abortion law without any assistance. After the application was dismissed, CARAL activists pursued an alternative strategy: they demonstrated outside the courthouse. In 1985, the Saskatchewan Court of Appeal excluded LEAF litigators from a similar dispute. They were not allowed to challenge Bill 53, a statute that was designed to discourage women from having abortions. This obstacle did not disappear when the Supreme Court established a new set of rules. In 1988, LEAF lawyers wanted to support Isabel Brown by arguing that day care is not inferior to "home care." Instead of

70 *Reference Re Bill 53, An Act to Amend Regulations on Abortion* [1985] Unreported Saskatchewan Decision. The Court of Appeal decided that Bill 53 was ultra vires.
acknowledging their expertise, the Manitoba Court of Appeal decided that intervenors would “inconvenience” the direct participants and lengthen the proceedings.\textsuperscript{71} A year later, CARAL wanted to challenge three Nova Scotia statutes that punished doctors for performing abortions outside regulated hospitals. Under this regime, women were not allowed to claim health insurance if they received services at “prohibited clinics.” CARAL was sent away because it was not directly involved.\textsuperscript{72}

Post-Charter environmentalists asked the judiciary to create a new cluster of rules just for public interest groups. The Sierra Legal Defence Fund encouraged courts to rewrite the law of costs and CELA challenged standards of proof that favour defendants. During the early 1990s, LEAF pursued the same strategy by asking the Supreme Court to design special rules for advocates who represent the “disadvantaged.” Instead of celebrating the genuine interest test, Mary Eberts and Dulcie McCallum argued that standing requirements continue to exclude the “dispossessed and the marginalized.”\textsuperscript{73} They explained why access is so crucial: even though courts can complement majoritarian institutions by repairing legislative omissions, individual litigants often ignore or simplify the “complex texture of systemic harm.” LEAF wanted new rules to establish clear procedural rights. Non-profit groups with strong records of advocacy would not have to waste their resources to secure the benefits of party status. However, the Supreme Court was not eager to abandon the standing trilogy. After deciding that judges should strike a balance between access and “efficiency,” Canada’s highest court defended the remaining common law barriers.\textsuperscript{74} Justice Peter Cory refused to believe that democracy would be strengthened if courts were compelled

\textsuperscript{73} Mary Eberts and Dulcie McCallum, “Canadian Council of Churches Factum,” (1992), 3.
\textsuperscript{74} Canadian Council of Churches v. Canada (Minister of Employment and Immigration) [1992] 1 S.C.R. 236.
to hear every "marginal" or "redundant" claim. At the end of the second period, feminist groups still confronted elements of the old tradition.

**Confronting the Limits of Litigation**

When litigants managed to win access, they faced another set of obstacles. Even if judges expressed sympathy, courts had to enforce strict standards of proof. As well-financed defendants, private corporations and public authorities could present persuasive counter claims. By documenting the legal success rate, Table XXXV presents a crucial piece of evidence. Although feminists lost every pre-Charter battle, but they won sixty-four percent of their post-Charter claims. Environmentalists launched more challenges between 1982 and 1995, but fifty-nine percent of their claims were dismissed. This gap corresponds to the distribution of institutional resources. NAC and LEAF walked into the courtroom armed with section 15 — a broadly framed constitutional guarantee. CELA and SLDF could have based some of their claims on section 7, but most litigants asked for prerogative writs by filing judicial review petitions. If the story ended here, we would have to figure out if the Charter revolution thesis is stronger than the court party thesis — both predicted this

<table>
<thead>
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<th>Target</th>
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<th>Number of Losses</th>
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<tbody>
<tr>
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<td>4</td>
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<tr>
<td>Legal Principles</td>
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<td>Federal Statutes</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Provincial Administrative Decisions</td>
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<tr>
<td>Federal Cabinet Decisions</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Individuals and Corporations</td>
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<td>0</td>
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Source: Court Challenges Database
dramatic change. However, the record sounds less impressive when we examine the different types of claims. The Court Challenges Database uncovered three areas of success. Without attacking any statutes, feminists influenced the interpretation of legal principles by intervening before the Supreme Court. They also won most of their battles against provincial officials who defended statutory provisions and administrative orders: seventy-three percent of these contests were successful. When feminists reacted to hostile actions, they were even more successful: eighty-one percent of these claims were endorsed. Federal officials were much better at thwarting the feminist movement. When post-Charter litigants attacked statutory regimes, administrative tribunals, and executive orders, only twenty-seven percent of their claims succeeded.

Table XXXVI: The Legal Success Rate of LEAF (1985-1995)

<table>
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<th>Number of Losses</th>
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<tbody>
<tr>
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<td>1</td>
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<tr>
<td>Provincial Administrative Decisions</td>
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<tr>
<td>Federal Statutes</td>
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<td>Individuals and Corporations</td>
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<tr>
<td>Total (6)</td>
<td>29</td>
<td>12</td>
</tr>
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</table>

Table XXXVI confirms what most students of judicial politics already suspect. LEAF is Canada's most successful legal advocacy group. While promoting an ambitious model of equality, these litigators managed to win seventy-one percent of their claims. Lawyers from the Sierra Legal Defence Fund were just as aggressive, but almost half of their challenges failed. Both groups countered hostile actions by acting defensively. When LEAF defended favourable laws, eighty-eight percent of the claims were accepted. The rate of success is still impressive when we examine the offensive challenges. Astonishingly, Canada's most litigious group won sixty-three percent of these actions. Despite this enviable record, one
finding seems to contradict the court party thesis. Feminists have not toppled a long list of federal and provincial statutes. Between 1985 and 1995, LEAF persuaded the courts to invalidate just five laws. Some anchored major policies, but others were attacked for their symbolic importance. For example, the Mulroney government was forced to amend the Unemployment Insurance Act after Schachter. However, another claim challenged an old Ontario statute that governed the naming of wives and children.75

Although post-Charter feminists won most of their court battles, we still have to explain why twenty-nine percent of the claims failed. After winning access, some litigants were constrained by the conventions of adjudication. To understand the effects of this barrier, readers will have to recall one of the rules of the game. Judges can use their discretion to grant intervenors the same rights and privileges exercised by litigants who have party status, but this rarely happens. As mere friends of the court, intervenors can present oral arguments and written submissions. They cannot file motions, cross-examine witnesses, call evidence, or appeal adverse rulings. Unlike the direct participants, they have to “take the case as they find it.” Very few courts allowed intervenors to move beyond the least intrusive type of participation. In 1990, LEAF litigators wanted to argue that section 731 of the Criminal Code and section 15 of the Penitentiary Act reinforce the “anguish of cultural dislocation” by separating Aboriginal women from crucial sources of support.76 They hoped to win this contest by writing a factum, presenting oral arguments, and submitting new evidence. Saskatchewan’s Court of Appeal only accepted the first request after declaring that intervenors usually complicate the process of adjudication. However, Justice Marjorie Gerwing ignored the factum – she quickly decided that Carol Daniels should be incarcerated at the Kingston Prison for Women. When LEAF challenged the Saskatchewan Crimes Compensation Board, it wanted to prove that certain officials violated

section 15 by ignoring the “battered wife syndrome,” but the Court of Appeal decided that intervenors could only submit facts. These common law rules forced some litigants to abandon or reformulate their claims. In 1993, the Canadian Abortion Rights Action League hoped to show that Nova Scotia violated the division of powers when it passed the *Medical Services Act*. However, after insisting that intervenors cannot widen disputes by introducing new issues, the Supreme Court refused to hear one of two arguments. CARAL was not allowed to introduce any claims that were based on POGG, the broadest federal power.

Some litigants encountered judges who refused to question administrative orders. Although Aleksandra Vinogradov believed that she was treated unfairly by the University of Calgary, the Alberta Human Rights Commission dismissed her complaint. LEAF filed a judicial review petition, but two courts preserved the original ruling. They respected a strongly worded privative clause: Alberta’s human rights regime stops judges from reviewing “questions of fact.” Feminists also failed when they entered the courtroom to defend favourable decisions. In 1993, after deciding that “same-sex couples” are protected by the *Canadian Human Rights Act*, a CHRC tribunal concluded that all public servants can apply for bereavement leave. However, before the Treasury Board compensated Brian Mossop, the Federal Court of Appeal overturned this decision. Justice Louis Marceau disappointed public interest litigators by issuing an unambiguous declaration – the Charter is not a “legislative amendment machine.” When the Supreme Court concurred, it attempted to separate the straightforward “legal issues” from the complicated normative questions.

According to Chief Justice Lamer, the Charter cannot be turned into an “interpretive tool” by officials who exercise statutory powers. He decided that boards and tribunals cannot

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change the spirit and substance of laws that are passed by democratically elected governments.

Most litigants worked around these barriers, but some obstacles seemed insurmountable. Canada's judiciary continued to value certain rights and freedoms more than others. Even though Andrews endorsed a substantive interpretation of equality, feminists usually failed when section 15 was pitted against deeply rooted legal rights. The rules of the game are purposely stacked in favour of criminal defendants because common law courts believe that wrongful imprisonment is the greatest threat to personal liberty. Post-Charter activists discovered this problem during the late 1980s, when a hostile action was launched by two men accused of committing sexual assault. They attacked the rape shield law because it stopped defence lawyers from asking complainants intrusive questions about their sexual conduct. Judicial discretion was constrained, but trial courts could still determine the significance of any evidence in camera. Not surprisingly, LEAF lawyers intervened to protect this favourable provision. After submitting research data to show that most victims are female and most perpetrators are male, they were able to argue that rape is not a "gender-neutral crime." The next component of their argument was more controversial. They urged the Supreme Court to reject the damaging assumptions that guided Forsythe and Pappajohn. According to Anne Derrick and Elizabeth Shilton, these pre-Charter decisions alienated Canadian women by promoting "pornographic myths." To respect section 15, the criminal justice system had to stop defence lawyers from harassing victims — it had to protect a vulnerable group of women. This claim was rejected because the rape shield law constrained an even more important guarantee. Most members of the

high court decided to "balance" the needs of the victim and the interests of the accused. Justice Beverley McLachlin explained why the right to a fair trial had to be guarded: it is "fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth." 86

A coalition of feminists confronted the same barrier in 1993. To circumvent another version of the rape shield law, two criminal defendants wanted complainants to surrender their counselling records. 87 LEAF developed a provocative counter claim by reviewing legal precedents and documenting the "realities" of rape. According to Sharon McIvor and Elizabeth Shilton, contemporary disclosure jurisprudence is not fair because it "reflects, exploits, and reinforces discriminatory stereotypes about women and children." 88 Instead of trying to remedy this "injustice," Canada's judiciary has permitted "discriminatory evidentiary practices." 89 They urged the Supreme Court to prohibit the disclosure of personal records in all sexual assault proceedings. Justice Claire L'Heureux-Dubé delivered a favourable dissent with the support of Justice La Forest and Justice Charles Gonthier. Knowing that defence lawyers wanted to conduct "fishing expeditions," she argued that new rules should reflect three constitutional guarantees: the right to a fair trial, the right to privacy, and the right to equality. 90 The majority was less sympathetic because it wanted to protect "one of the pillars of criminal justice," the right to present a full defence. 91 Justice John Sopinka acknowledged the importance of encouraging victims of rape to report their attacks, but he refused to characterize this policy objective as a "paramount consideration." 92 With the support of five members, he decided that defendants could still

89 Ibid., 9.
90 Ibid., 55.
92 Ibid., 20.
secure personal records by demonstrating their relevance. This ruling shocked women's shelters and rape crisis centres. The dissenting opinion might have provided some degree of comfort, but Justice L'Heureux-Dubé sided with the majority in Beharrell, a companion decision. After insisting that judges must "search for the truth," she refused to create a new class of "privileged communications" between victims of rape and their counsellors.

When feminists mounted their dramatic offensive challenges, they confronted another obstacle. Courts were very reluctant to redistribute economic resources by modifying fiscal statutes. Two separate claims failed to change the *Income Tax Act*. In 1992, Mary Eberts and Beth Symes persuaded the Federal Court to invalidate a cluster of rules that stop parents from deducting child care costs as business expenses. However, this ruling was eventually overturned by the Federal Court of Appeal and the Supreme Court. According to Justice Frank Iacobucci, the social costs of child care are "very real," but they are not caused by the *Income Tax Act*. He also issued a declaration that could undermine the creative character of equality litigation: when statutory language is unambiguous, the Charter should not be viewed as an interpretive tool. Justice L'Heureux-Dubé and Justice McLachlin countered the majority by considering certain contextual issues. The second challenge received greater public support because it affected more women. A team of litigators claimed that section 56 violated the Charter by forcing custodial parents, mostly women, to report child support payments as income. At the same time, it allowed non-custodial parents, mostly men, to deduct their contributions. Justice L'Heureux-Dubé and Justice McLachlin refused to believe that maintenance awards were consistently adjusted to solve this problem. The majority disagreed. Justice Gonthier characterized the *Income Tax Act* as a "special statute." Unlike laws that address one or two policy problems, it builds

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96 Ibid., 752-765.
hundreds of distinctions to achieve a number of pressing objectives. Instead of examining how section 56 affected divorced women as an entire class, Justice Gonthier decided that it helped both custodial parents. This interpretation shifted the burden of responsibility. He insisted that couples cannot blame the *Income Tax Act* just because they need more resources to care for their children.98

As LEAF confronted these barriers, it had to manage the tension between organizational efficiency and democratic participation. The founding members knew that most feminist groups prize “openness” and “inclusiveness.” They suspected that some activists would be reluctant to support a cadre of private lawyers from Toronto.99 To counter this image, Beth Atcheson, Marilou McPhedran, and Beth Symes characterized Charter litigation as quintessentially democratic. They imagined that LEAF advocates would foster their credibility by working with broad coalitions of women’s shelters, rape crisis centres, and large national groups.100 However, as the legal committee raced to “occupy as much territory as possible,” it was very difficult to keep this promise. According to Mary Eberts, the first chair, LEAF lawyers feared that “fruitful lines of exploration” would be eliminated if the feminist movement failed to “steer courts in the right direction.”101 When sympathetic activists asked why “their” legal advocacy group seemed so closed, they were asked to consider the onerous demands of constitutional litigation. If whole communities of women were routinely consulted, if LEAF dedicated more time and resources to build consensus, the case-management process would be gravely weakened. Bound by such a constraint, it would not be able to choose the strongest cases, direct section 15 jurisprudence, and react to hostile challenges.

98 Ibid., 695.
100 Sherene Razack’s personal interview with Beth Symes, Marilou McPhedran, and Beth Atcheson, March 1988.
The legal committee discovered the dangers of this approach when it responded to
the rape shield challenge.102 By trying to react quickly and decisively, LEAF advocates
committed two costly mistakes. They hired an established criminal defence lawyer, hoping
to improve their chances of winning intervenor status, and ignored obvious sources of
expertise, including CASAC, the Canadian Association of Sexual Assault Centres.103
Instead of documenting the "realities" of sexual assault and promoting an ambitious
interpretation of equality, Mark Sandler presented a narrow, legalistic argument. After
reading the factum, community activists reprimanded the legal committee for claiming to
represent the entire feminist movement. LEAF hoped to correct this blunder by introducing
the "workshop process."104 To cultivate new lines of accountability, Christie Jefferson, the
executive director, acted as a liaison between the Toronto office and various communities of
women. Informal "working groups" were established to answer strategic questions. They
usually included the lead counsel, one member of the legal committee, and activists who
understood the policy implications of a claim. Instead of simply dictating the details of a
particular strategy, litigators could explain the risks and strengths of different arguments.

By holding meetings in Vancouver, Toronto, Montréal, and Halifax, the Seaboyer working
group attracted a broad range of organizations, including METRAC, the Metro Action
Committee on Violence Against Women. Some demanded an entirely new legislative regime;
others wanted to defend the second version of the rape shield law. Despite these
disagreements, the coalition produced a highly provocative factum. The Supreme Court was
warned not to revoke rules that protected women and children from the "multiple effects of
systemic inequality." During the late 1980s, LEAF followed this workshop approach to
counter a string of hostile actions.105

103 Elizabeth Lennon, "Equality rights and violence against women," LEAF Lines (November
1990).
104 Sherene Razack's personal interview with Beth Symes, Marilou McPhedran, and Beth
Atcheson, March 1988; Kirk Makin, "Supreme Court decision helps turn over a new LEAF,"
Globe and Mail, 7 July 1990, D2.
The benefits of collaboration were obvious, but the legal committee was still reluctant to accept these decentralizing forces. LEAF litigators continued to demand almost full control because their personal credibility was at stake. As officers of the court and members of the legal community, they did not want to present arguments that were weakened by consultation. The workshop process also consumed an “unbelievable amount of patience and intellectual energy.”

Lawyers were asked to craft compelling arguments without offending outside participants who valued different ideas and respected their own decision-making procedures. Within LEAF, the members of the public education committee were aware of this fragile balance. Some litigators simply assumed that activists would defer to their expertise. One challenge faltered because the legal committee failed to appreciate the symbolic importance of process. Members of the Centre for Spanish Speaking Peoples were reluctant to trust trade unions and established feminist groups because these “agents of social change” seemed to ignore the interests of working-class immigrants.

Despite serious reservations, they formed an alliance with LEAF after receiving funding from the federal government. As a strategic pair, they wanted to argue that a language training program violated section 15 by indirectly favouring men, but their styles clashed. LEAF litigators wanted to identify specific goals and sort out legal problems. They were guided by the norms of professional life and the limits of constitutional law. Their partners refused to abandon a slower, deliberative style. At the same time, they wondered if privileged lawyers could represent women who face such different barriers.

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106 Sherene Razack’s personal interview with Mary Eberts, April 1988.
110 Sherene Razack’s personal interview with Mary Eberts, April 1988. CSSP and LEAF agreed to form a second working group, but this challenge was also abandoned. Nuala Doherty, “Immigrant women’s organization joins the challenge,” LEAF Lines (April 1990).
These tensions continued to frustrate LEAF during the 1990s. When the Supreme Court decided to review Canada's pornography law, Linda Taylor, Catherine MacKinnon, and Kathleen Mahoney were asked to meet with a diverse cross-section of women. This process was guided by an unambiguous declaration: equality arguments “must serve the interests of all systemically subordinated communities.” Most of the participants argued that pornography promotes sexual violence, but several disagreements emerged. Some lesbian activists opposed the very idea of regulating expression because they refused to trust the “patriarchal state.” LEAF litigators confronted a problem that democratic governments have always faced: consultation often generates irreconcilable positions. They were certainly not prepared to promote the principle of unrestricted free speech. During the late 1980s, LEAF urged the Supreme Court to preserve limits on certain forms of expression. The working group was eager to acknowledge that some women are “doubly disadvantaged,” but it was reluctant to stress the differences between lesbians and heterosexual women.

When LEAF litigators appeared before the Supreme Court, they presented a highly controversial proposition. By degrading and “objectifying,” pornography “systematically exploits and subordinates” all women, even those who choose not to participate as subjects. This form of expression is not artistic or creative — it threatens personal liberty by contributing to sexual violence. Instead of using the old moral standards to defend section 163, Kathleen Mahoney and Linda Taylor persuaded every member of the high court to recognize the harmful effects of pornography. They managed to win without proving that prolonged exposure produces violent behaviour. LEAF celebrated Butler, but lesbian activists were less enthusiastic. After presenting their concerns to the working group, they

wondered why the “feminist argument” failed to acknowledge that pornography can be “liberating” and “subversive.” According to some critics, the Supreme Court simply legitimized rules that threaten a vulnerable group of women. The image of LEAF was profoundly changed by this dispute. The founding members sincerely believed that one legal advocacy group could represent all Canadian women. Without any hesitation, they called LEAF the “litigation arm” of the feminist movement. This optimistic characterization is now quietly dismissed by a second generation of litigators.

As LEAF was trying to manage these internal disputes, it had to fight four sources of opposition: criminal defence lawyers, a loose collection of activists who defend the “rights of men,” a well-organized anti-abortion movement, and women’s groups that promote the “traditional family.” During the moratorium on section 15, defence lawyers marshalled their resources to challenge the rape shield law. They claimed that feminist litigators wanted to “intimidate” judges. After watching LEAF win a string of court battles, these well-placed opponents argued that male defendants were being “victimized.” Judicial bias existed, they conceded, but it hurt men. During the late 1980s, a number of groups formed to assist fathers who were fighting child custody disputes. Not surprisingly, the Canadian Council for Family Rights and Fathers for Justice have adopted the principle of equality to frame their demands.

116 Gotell, “Policing Desire: Obscenity Law, Pornography Politics, and Feminism in Canada.”
117 Eberts and Brodesky, LEAF Litigation Year One.
The “pro-life” movement continued to oppose the equality rights project by initiating legal challenges. Joseph Borowski hoped that Canada's highest court would “discover” new rights to protect the fetus.121 When this strategy failed, a group of activists established the Canadian Rights Coalition to fund lawsuits against doctors who perform abortions.122 These interests continued to litigate, but they started to favour other forms of collective action, especially disruptive demonstrations. Like pre-Charter feminists, they have failed to win significant legal battles.123 Another opponent was just as tenacious. During the late 1980s, the members of REAL Women urged the Mulroney government to revoke funding to “special interest groups.” After losing several decisions, including Morgentaler and Daigle, they insisted that cunning feminists had “captured” the Supreme Court.124 As the


Chapter Five: The Feminist Movement in Post-Charter Canada

president, Gwen Landolt has argued that vaguely worded constitutional rights are jeopardizing the principle of “pure judicial impartiality.” These adversaries have influenced the evolution of section 15 litigation without winning many cases. In 1989, the Canadian Advisory Council on the Status of Women published a report that shocked the feminist movement. The authors, Gwen Brodsky and Shelagh Day, discovered that very few equality claims were brought by “disadvantaged” groups. This trend was so unsettling that some litigators were comforted by the presence of section 33. If the Supreme Court began to undermine the equality rights project, they could pressure governments to apply the override clause.

LEAF lawyers never resorted to such an extreme strategy, but they did perceive a dangerous trend. According to their assessment, the Supreme Court became more cautious during the early 1990s. Instead of characterizing litigation as an instrument of reform, Justice Sopinka declared that constitutional rights cannot “cure all the economic and social problems that affect Canadian women.” He urged advocacy groups to “use the political process, not the courts.” In 1992, feminists celebrated the tenth anniversary of the Charter, but they lamented the loss of Chief Justice Dickson and Justice Wilson. As the composition of the high court changed, a number of prominent lawyers began to doubt the value of litigation. Shelagh Day, the first executive director of LEAF, even questioned the efficacy of favourable decisions. The feminist movement has managed to win several important contests, she conceded, but “women are still being beaten and they continue to

princess and the pea: a feminist lawyer won’t be allowed to deduct her nanny’s salary,” Western Report, 3 January 1994; Michelle Landsberg, “Right-wing attack sets sights on female judges,” Toronto Star, 1 July 1995, K1.
earn less than men." In 1995, the new executive director of LEAF did not sound naively optimistic. After watching the Supreme Court become "conservative and deferential," Jane Rounthwaite encouraged women to be vigilant.

**Overcoming the Limits of Litigation**

Although post-Charter feminists confronted some of the same obstacles that frustrated environmentalists, but they managed to win sixty-four percent of their claims. We have to understand why such a dramatic transformation occurred. The rules of adjudication can filter out certain types of anecdotal evidence, but some litigants were allowed to tell their stories. To demonstrate the multiple effects of inequality, they presented highly personal testimony, detailed medical reports, and social science research. As the principal legal advocacy group, LEAF crafted a new "matrix" to show male judges how women view the world. This strategy was developed to counter one of the first hostile actions. In 1988, LEAF litigators entered the courtroom to represent the Federation of Women Teachers' Associations of Ontario. A disgruntled member challenged several by-laws that force all female teachers to join FWTAO. According to these rules, women can also join the "brother" union, the Ontario Public School Teachers' Federation, but they still have to pay their dues to FWTAO. Mary Eberts, Elizabeth Shilton, Kathleen Lahey, and Catherine MacKinnon "flooded" the courtroom with compelling stories by submitting the testimony of almost twenty economists, historians, and social scientists. After citing different types of evidence to demonstrate the quantifiable effects of discrimination, they

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130 "From the desk of the executive director," LEAF Lines (Fall 1995).

131 Sherene Razack's personal interview with Mary Eberts, April 1988.

argued that "female unions" promote gender equality. During this contest, LEAF learned how to broaden narrow legal issues. Instead of focusing on the immediate issues, it defended an idea that pre-Charter courts rejected: to foster meaningful equality, some laws have to treat individuals differently.

LEAF continued to win legal battles by following this basic strategy. Judges were compelled to hear "stories" about structural racism, male violence, and workplace discrimination. For example, when a doctor raised the defence of consent to counter sexual assault charges, LEAF lawyers introduced a provocative argument about unequal bargaining power. Helena Orton and Victoria Gray claimed that rape is a brutal form of control, which allows "men to assert dominance over women." By taking reasonable propositions from complex social theories, they argued that a woman who is suffering from chemical dependency does not have the faculties or autonomy to consent to a doctor who is trading drugs for sex. The Supreme Court did not adopt the language of oppression, but it acknowledged most of the evidence brought by LEAF. After rejecting this controversial defence, Justice La Forest ordered the defendant to pay two types of damages, actual and punitive. LEAF also intervened to ensure that section 15 influenced the interpretation of the Divorce Act. In 1990, the Manitoba Court of Queen's Bench revoked a spousal support order because the defendant, an elderly woman, failed to become "self-sufficient." When this dispute moved to Canada's highest court, Orton presented statistical evidence to show that divorced women often fall below the poverty line. After citing most of the reports introduced by LEAF, Justice L'Heureux-Dubé issued a sympathetic decree: the "feminization of poverty is an entrenched social phenomenon." To remedy this problem, she ordered lower courts to apply the doctrine of "equitable sharing."

Some litigants achieved their objectives because judges were willing to challenge administrative tribunals. One dispute started when Safeway refused to compensate pregnant women who were entitled to receive private benefits. The company simply advised the affected employees to collect UI benefits. The Manitoba Human Rights Commission endorsed this discriminatory policy by following Bliss, the infamous pre-Charter judgement. It decided that biological differences can justify certain disparities. LEAF litigators intervened to argue that women should not be punished for choosing to reproduce. While presenting a compelling section 15 claim, Lynn Smith and Kathryn Thomson argued that human rights commissions must strive to help disadvantaged groups because it is "unrealistic" to assume that public officials and private corporations will always attack inequality.

After admitting that Bliss "was wrongly decided," Chief Justice Dickson ruled against Safeway. Another action challenged the Canadian Human Rights Commission. During the early 1990s, the CHRC decided that an Aboriginal woman was partly responsible for her own dismissal even though she had experienced racial discrimination. Curiously, the federal government was ordered to find the complainant a contract outside Saskatchewan. Mary Pitawanakwat managed to win compensation, but she was asked to move away from her family and friends. According to NWAC, the Native Women’s Association of Canada, this ruling threatened the "larger Aboriginal community." After hiring Raj Anand, a prominent human rights lawyer, they persuaded the Federal Court to order the appropriate remedy, reinstatement with full compensation.

139 Re Isaac and the Workers' Compensation Board [1994] Unreported B.C. Decision - Vancouver Registry CA012128; Workers' Compensation Act, R.S.B.C. 1979, c. 437.
Ironically, some litigants won because of judicial restraint. Instead of urging courts to challenge tribunals, they asked judges to preserve favourable administrative orders. For example, a coalition of groups intervened to defend the Pay Equity Tribunal. The Municipality of Haldimand-Norfolk attacked a major ruling, but NAC and the Ontario Nurses’ Association persuaded two section 96 courts that Ontario’s pay equity regime was designed to attack “systemic discrimination against women.” A strongly worded privative clause encouraged both courts to adopt a deferential standard of review. If corporations filed hostile actions after receiving orders to compensate employees for wrongful dismissal or sexual harassment, feminist litigators usually intervened to counter these claims. When a Winnipeg restaurant challenged the Manitoba Human Rights Commission, LEAF appeared before the Supreme Court to offer support. By calling two expert witnesses, Catherine MacKinnon and Constance Backhouse, LEAF documented the relationship between male dominance and sexual harassment. This strategy was successful. Chief Justice Dickson admonished the Manitoba Court of Appeal for ignoring an “unbroken line of judicial opinion.”

Feminists even defended statutory provisions by appealing to judicial restraint. During the early 1980s, a coalition of activists pressured the Trudeau government to shield victims of sexual assault from public exposure. After the Criminal Code was amended, newspapers were not allowed to publish the names of any complainants. LEAF managed to win an impressive defensive challenge in 1988 by persuading the Supreme Court that section 442 imposed reasonable limits on two constitutional guarantees, freedom of the press and the right to a fair trial. LEAF also intervened to defend an important component of the

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144 Chris Paliare and Martha Milczynski, “The Haldimand-Norfolk Factum,” (1990), 11.
147 Ibid., 278.
Chapter Five: The Feminist Movement in Post-Charter Canada

Canada Pension Plan. In 1978, the Liberal cabinet introduced a “credit-splitting option” to recognize spouses who work at home without pay. In 1987, the Mulroney government had to strengthen this right because it was being waived by private agreements. Feminist groups and federal legislators wanted to protect vulnerable women who might be forced to “trade away” their share while negotiating a separation. LEAF saved these provisions by showing how they “promote equal access to economic resources.” Feminists pursued the same strategy to counter the anti-abortion movement. When LEAF litigators intervened to challenge Joseph Borowski, they did not ask the Supreme Court to be daring and creative. Instead of citing Justice Wilson, the great champion of the disadvantaged, the factum quotes Justice William McIntyre – the member who was least likely to support an activist decision. When Henry Morgentaler asked the Supreme Court to guarantee abortion services, Justice McIntyre refused to “manufacture a constitutional right.” By applying this conservative interpretation, LEAF simply claimed that Canada’s first ministers did not want to create “fetal rights.”

A surprising number of litigants affected the interpretation of constitutional rights and common law principles without directly challenging federal and provincial statutes. The political science literature virtually ignores this distinct set of claims. For example, LEAF intervened before the Supreme Court to argue that section 15 should influence the “law of limitations.” A number of criminal laws force potential parties to bring their claims within a certain period of time. While seemingly neutral, they can stop one group of complainants from taking judicial action: victims of sex crimes who repress painful memories for decades. Elizabeth McIntyre and Nicole Tellier argued that childhood sexual assault and exposure to toxic substances create harmful effects that may not become apparent for years.

this similarity, perpetrators can use violence and intimidation to “silence” their victims.\textsuperscript{154} Instead of attacking provincial laws or the federal \textit{Criminal Code}, they wanted to influence the application of certain standards, including “reasonable discoverability” and “fraudulent concealment.” The decision was not based on section 15, but it still favoured LEAF. Justice La Forest decided that victims of sexual assault should not be barred from bringing complaints because they could not “reasonably discover the wrongful nature” of an offence. LEAF pursued the same strategy to challenge a deeply rooted “myth” about rape: if women and children do not forcefully resist sexual advances, they are revealing their consent. When a young woman was sexually assaulted by the “boyfriend” of her mother, she pretended to be asleep instead of shouting for help.\textsuperscript{155} The Nova Scotia Court of Appeal dismissed the charges because there was “no evidence of any objection,” but LEAF persuaded the Supreme Court to restore the conviction. After characterizing rape as a brutal expression of power, Chantel Tie and Jean Whelan argued that most victims try to protect themselves by not resisting.\textsuperscript{156}

Post-Charter feminists managed to win some of their battles just by influencing the application of common law standards, but two of the greatest victories expanded the bounds of judicial power, \textit{Andrews} and \textit{Schachter}. In 1989, LEAF finally presented a fully developed interpretation of section 15. After criticizing the cautious tone of pre-Charter jurisprudence and identifying “systemic patterns of subordination,” Mary Eberts argued that courts have to promote “substantive equality” if they want to respect Canada’s Constitution.\textsuperscript{157} By considering contextual issues, they would protect those who have little access to “social and economic resources.” By acknowledging the democratic purpose of section 15, they would stop established interests from attacking laws that help disadvantaged Canadians. The Supreme Court understood the implications of this approach. They would have to broaden

the scope of inquiry, sift through new types of extrinsic evidence, accept more intervenors, and untangle complex policy problems. However, the alternative was even less attractive. If section 15 could invalidate laws because they treated individuals and groups differently, Canada's legal system would be overwhelmed by a flood of frivolous claims. This was the hook that LEAF needed. With the support of his colleagues, Justice McIntyre protected a broad range of favourable programs by deciding that "distinctions" are only unconstitutional when they cause some form of discrimination. Feminists persuaded the highest court to reject the old, formalistic interpretation of equality.

The second battle was just as significant. Before this dispute, the Unemployment Insurance Act granted leave with benefits to biological mothers and adoptive parents, but not biological fathers. With the support of the plaintiff, LEAF litigators decided to present an unconventional claim. After calling several expert witnesses to document the "realities" of pregnancy, childbirth, and recovery, they invited the Federal Court to extend the same benefits to all parents. This strategy worked: Justice Barry Strayer shocked the Conservative government by agreeing with LEAF. The Mulroney cabinet agreed to amend the UI regime, but it refused to believe that judges could impose massive, quantifiable costs by reading in new duties. When this contest moved to the highest level of Canada's legal system, the Department of Justice argued that "severance" was the appropriate remedy. By choosing such an intrusive remedy, the Federal Court placed unconstitutional limits on the Crown's prerogative powers. LEAF presented a very different argument. Mary Eberts and Jennifer Aitken stressed the limits of majoritarian democracy. Because representative institutions often fail to protect disadvantaged interests, the judiciary must provide creative

solutions. As the author of the decision, Justice Lamer decided that courts can rewrite laws by reading in new obligations if they also consider the economic effects of their decisions. Feminists instantly appreciated the importance of Schachter. Instead of revoking provisions or entire statutes, judges would be able to broaden the scope of certain entitlements.

Outside the courtroom, feminists achieved several modest victories just by threatening to litigate. During the 1970s, Ontario activists wanted the Davis cabinet to stop an unfair practice. If social workers discovered evidence of a “man-in-the-house,” single mothers lost their benefits. Legal aid clinics challenged the Ministry of Community and Social Services, but these actions were dismissed. However, when the moratorium on section 15 ended, LEAF advocates bolstered their bargaining leverage by promising to litigate. They characterized this old rule as “discriminatory, highly discretionary, and irrational” because it punished women for needing welfare support. Although LEAF was forced to accept a compromise, Helena Orton persuaded the Liberal government to introduce new regulations. Just before the 1987 general election, Ian Scott announced that single mothers “will not have to submit to the invasion of their privacy.” Feminists pursued the same strategy to pressure federal officials. In 1986, a base commander stopped military wives from organizing because the National Defence Act prohibited most forms of political participation. To fight these restrictions, LEAF advocates appeared before a special Senate committee – they also threatened to launch a section 15 action. Instead of refusing

164 Brief to the Standing Committee on the Administration of Justice, 14.
166 Eberts and Brodsky, LEAF Litigation Year One, 6-7; National Defence Act, R.S.C. 1985, c. N-5.
to negotiate, the Department of Defence agreed to amend the regulations.\textsuperscript{167} Another campaign countered the damaging effects of \textit{Lavell and Bédard}. After the patriation round, NAC continued to work with the Native Women's Association of Canada.\textsuperscript{168} In 1985, LEAF appeared before a Senate committee to challenge a cluster of membership requirements and residency rules, including the infamous section 12. The Mulroney government responded by giving bands greater control over membership and restoring the status of women who married "non-Indians."\textsuperscript{169} Bill C-31 did not, however, acknowledge the children and grandchildren of women who were affected by section 12. With the support of other groups, NWAC has demanded their inclusion by appearing before CHRC tribunals and the Federal Court.\textsuperscript{170}

LEAF was willing to bargain with state officials before litigating, but the important legislative battles occurred after courts delivered unfavourable decisions. Most of these contests were organized by teams of groups. We already know that feminists formed coalitions to respect the principles of participatory democracy. Activists from different communities worked together to build consensus. At the same time, LEAF lawyers hoped to cultivate their legitimacy by appearing to represent a broad cross-section of women. However, strategic pairs and court coalitions performed another important function. They could fight legislative campaigns by convening press conferences, organizing marches, and lobbying cabinet ministers. Table XXXVII lists the principal players. Predictably, Canada's most litigious group appears at the top. Though some members of the legal committee underestimated the benefits of collaboration, LEAF still formed twenty alliances with like-minded activists. An informal division of labour emerged after 1985: most advocacy groups

\textsuperscript{167} Minutes of Proceedings and Evidence of the Special Committee of the Senate on National Defence, 1st Session of the 33rd Parliament, June 1986, 15:7.
\textsuperscript{168} "Native women denied their rights," \textit{Toronto Star}, 3 July 1984, E1; "NAC's priority demands," \textit{Status} (Summer 1984).
assumed that LEAF would bring section 15 claims by sponsoring clients and intervening.

Still, this did not stop NAC from entering the courtroom, especially during the early 1990s,

Table XXXVII: Strategic Alliances Formed by Feminist Groups (1982-1995)

<table>
<thead>
<tr>
<th>Group</th>
<th>Strategic Pair</th>
<th>Court Coalition</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Education and Action Fund</td>
<td>5</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>National Action Committee on the Status of Women</td>
<td>0</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>B.C. Public Interest Advocacy Centre</td>
<td>1</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Canadian Association of Sexual Assault Centres</td>
<td>0</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Canadian Abortion Rights Action League</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>DisAbled Women’s Network</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Metro Action Committee on Violence Against Women</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Federated Anti-Poverty Groups of B.C.</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Native Women’s Association of Canada</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Toronto Rape Crisis Centre</td>
<td>0</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>West Coast LEAF</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>9</strong></td>
<td><strong>55</strong></td>
<td><strong>64</strong></td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

when Shelagh Day was the chair of the justice committee. As the first executive director of LEAF, she discovered that litigation could influence the political agenda. The largest coalitions were designed to counter hostile actions. When defendants and their counsel attacked *Criminal Code* provisions to escape prosecution, LEAF worked with the Canadian Association of Sexual Assault Centres, the Metro Action Committee on the Violence Against Women, and the Toronto Rape Crisis Centre.

Although feminists wanted to respect the idea of participatory democracy, environmentalists formed strategic pairs and court coalitions far more frequently.

Comparative figures reveal the size of this gap. Feminists initiated twenty-five collaborative challenges during the second period. Environmentalists launched seventy-six. LEAF arranged eight alliances between 1990 and 1995. The Sierra Legal Defence Fund organized thirty. The Charter revolution thesis might be able to explain this divergence. LEAF litigators established working groups to bolster their credibility, not to improve their chances of winning. They can eliminate unfavourable laws and influence the evolution of post-
Charter jurisprudence—without the support of like-minded advocacy groups. On the other hand, environmentalists were compelled to seek the advantages of collaboration because they had to use weaker legal tools. Working alone, CEDF and SLDF never achieved great legal triumphs. Like their predecessors, they formed coalitions to improve their chances of winning political battles.

It would be misleading to overstate this difference. Feminists could base their claims on boldly worded constitutional rights, but they still formed coalitions to overturn unfavourable decisions. Instead of accepting Thibaudeau, a small team of groups asked the federal cabinet to amend the Income Tax Act. Activists from NAC argued that Canada's highest court "ignored the reality of single female parents."171 To reinforce this basic argument, LEAF and the Charter Committee on Poverty Issues invited the public to consider the growing gulf between the female members of the Supreme Court and their male colleagues. The majority saved the tax on child support payments, but Justice McLachlin and Justice L'Heureux-Dubé delivered dissenting opinions. With the support of sympathetic legislators, this coalition persuaded Chrétien to replace the old requirements with new guidelines. The amendment will add millions of dollars to the General Revenue Fund because "non-custodial parents" can no longer claim their payments.

Feminists were able to counter most hostile actions by mixing different forms of collective action. After O'Connor, sexual assault centres were overwhelmed by a flood of court orders: hundreds of criminal defendants demanded private counselling records. Instead of releasing confidential information, several organizations secretly destroyed their files. Despite this preventative measure, fewer women lodged official complaints because they did not want to divulge highly personal information.172 When members of the

Chapter Five: The Feminist Movement in Post-Charter Canada

Canadian Association of Sexual Assault Centres organized a campaign to address these problems, they discovered a powerful legislative ally, the Minister of Justice. In 1996, Allan Rock introduced Bill C-46 to “severely limit” access to all counselling records. This measure will stop defence lawyers from conducting “fishing expeditions” during preliminary hearings. When trial court judges entertain such motions, they will have to respect a long list of insufficient grounds.173 A second coalition was just as successful. The Liberal government agreed to counter the effects of Daviault, the Supreme Court decision that recognized “extreme drunkenness” as a legitimate defence.174 Bill C-72 was designed to prohibit those accused of sexual assault and domestic abuse from invoking this controversial defence. It received support from every federal party. After losing two legal decisions, feminists managed to win two political battles.

The feminist movement learned how to fight these legislative campaigns by trying to counter the most notorious post-Charter decision, Seaboyer. Before this dispute moved to the Supreme Court, NAWL and LEAF appeared before the Subcommittee on the Status of Women to argue that Canada’s legal system reflects “myths and stereotypes about sexual violence.”175 Like pre-Charter activists, they wanted new statutory rules to constrain the exercise of judicial discretion. During the 1970s, feminists wanted mandatory requirements to influence the behaviour of family court judges. During the 1990s, they proposed an amendment to protect victims of rape: trial court judges would not be allowed to admit evidence of prior sexual conduct. When the Minister of Justice organized a series of

175 Ibid., 4:28.
conferences to study “gender bias in the legal system,” Kim Campbell discovered an almost inconsolable sense of scepticism. Some activists refused to trust male figures of authority because they “trivialized” and “euphemized” sexual violence. These critics even attacked the Charter. Section 15 provides some relief, they conceded, but the Supreme Court has privileged criminal defendants by vigorously enforcing traditional legal rights.176

In 1992, just after the Supreme Court issued *Seaboyer*, Campbell established the Panel on Violence Against Women. The Ontario EBR task force exercised more autonomy, but this advisory body was influenced by a similar set of incentives. Instead of trying to act alone, the Conservative government asked feminist groups to design new sexual assault provisions. The Minister of Justice was forced to make several changes during the early stages. NAC members refused to participate unless three “women of colour” were appointed. Some community activists wondered why the process seemed to favour professional women who characterized themselves as “experts.”177 The Department of Justice responded to these criticisms by endorsing an unusually “inclusive” process. Lee Lakeman, the executive director of CASAC, was asked to organize a “genuine constituent assembly” of women from across the country.178 Most of the lawyers wanted to sift through the details of *Seaboyer*, but consensus only emerged when the participants discussed broad legislative objectives. They imagined statutory guarantees that would generate waves of radiating effects. If properly crafted, a new law would protect complainants, lower the rate of sexual assault, and influence the behaviour of state officials. As an instrument of equality, the *Criminal Code* would send strongly worded messages to potential perpetrators, police officers, Crown prosecutors, defence lawyers, and trial court judges.179 LEAF and NAWL presented another

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controversial proposal. To complement these statutory declarations, every member of the
judiciary would have to attend mandatory training seminars. They assumed that courts
would use their discretionary authority to help complainants – if more judges understood the
"realities" of rape. The DisAbled Women's Network and the Native Women's Association of
Canada promoted the distinct interests of their members. They wanted the Criminal Code
to recognize the greater risks faced by “doubly disadvantaged” women.

This strategy worked. The coalition shaped the structure and substance of Bill C-49.
The preamble attempts to protect the third rape shield law from hostile actions by
proclaiming that evidence of prior sexual history “is rarely relevant.” The new rules shift
the burden of responsibility to those accused of sexual assault. They now have to show that
consent was clearly established. Two demands were ignored. According to feminist critics,
“gender-neutral language” continues to obscure a central fact: most sex crimes are committed
by men. The Conservative cabinet also refused to provide special protection to “women of
colour,” lesbians, disabled women, and “sex workers.” Despite these deliberate omissions,
Bill C-49 represented an impressive legislative victory. By mixing different forms of collective
action, from litigation to bargaining, feminists managed to achieve most of their policy
objectives.

Successive federal governments agreed to counter the damaging effects of Seaboyer,
Thibaudeau, O'Connor, and Daviault, but feminists discovered one of the dangers of post-
Charter politics: political executives can use their prerogative powers to undermine
favourable court decisions. The Canadian Abortion Rights Action League had to organize a
broad coalition of groups to preserve Morgentaler. Although Justice Wilson wanted to
recognize reproductive rights, the majority was far more prudent. Instead of “finding” new
guarantees, it revoked section 251 by concentrating on several procedural violations. When

180 Ibid., 1:25.
the Mulroney government responded by trying to build a compromise, it was criticized by anti-abortion activists and feminist groups. CARAL appeared before legislative committees to argue that Bill C-43 would block access to abortion services. LEAF advocates reinforced this argument by characterizing equality as the “primary principle of Canadian democracy.” After insisting that Bill C-43 violated Morgentaler, they threatened to launch a barrage of court challenges. Their opponents begged the federal cabinet to “protect life” by imposing stronger restrictions. When the Senate finally rejected Bill C-43 in 1991, the major battle was over. Aware of their dwindling political capital, the Conservatives quickly abandoned this controversial issue. However, anti-abortion groups were more tenacious. When Henry Morgentaler established a handful of new private clinics in Atlantic Canada, they persuaded Prince Edward Island, New Brunswick, and Nova Scotia to limit access to abortion services. Feminists had to launch another campaign. By intervening, CARAL persuaded section 96 courts to invalidate all of these restrictive measures.

Post-Charter feminists improved their success rate by grafting litigation onto traditional forms of collective action. They managed to win sixty-four percent of their court challenges – and a number of legislative battles. Environmental litigators were just as aggressive, but they lost fifty-nine percent of their legal cases. To accomplish this feat, LEAF

184 Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-43, 2nd Session of the 34th Parliament, January 1990, 6:78.
185 Ibid., 5:8.
advocates learned how to balance the demands of constitutional litigation and their commitments to the feminist movement. By learning from their blunders, they became responsive and accountable. During the early 1990s, the legal committee decided that all major cases should be guided by working groups. Despite serious budgetary constraints, it finally acknowledged the benefits of collaboration. Because some activists characterized LEAF as elitist and unrepresentative, the public education committee established a program to attract women from different “ethnic and linguistic communities.” In 1992, the new executive director promoted an “integrated analysis” of inequality. According to Joanne St. Lewis, the founders of LEAF were brave pioneers who “failed to recognize that women experience the justice system differently.” Like Sunera Thobani, the president of NAC, she argued that “White, middle-class, heterosexual assumptions” have dominated the feminist movement. The legal committee still controls the case-management process, but it is not dominated by well-established lawyers from Toronto. The members represent a range of political ideologies. Their agenda reflects the interests of poor women, lesbians, “women of colour,” and Aboriginal women.

IV. Changing the Rules of the Game

Instead of returning to court with flawed instruments, environmentalists mobilized to change the rules of the game. They hoped that a new statutory language would force political executives, central agencies, and line departments to follow mandatory duties, strict standards, and exacting schedules. Decision-making institutions would become more democratic by respecting the principles of natural justice and providing intervenor funding to

190 “LEAF appoints a new executive director,” LEAF Lines (Fall 1992); Joanne St. Lewis, “LEAF’s race, culture, religion, and gender inequality project,” LEAF Lines (Summer 1993). St. Lewis was the Director of the Education and Equity Program at the University of Ottawa.
192 Personal interview with Carissima Mathen, October 1995.
concerned citizens. After watching feminists win a string of legal contests, environmental litigators started to imagine the ultimate legal weapon – an entrenched guarantee. The Court Challenges Database has confirmed what they suspected: section 15 produced a measurable advantage.\(^{193}\) To improve their chances of winning, environmentalists urged Canada's first ministers to introduce new constitutional rules. We have to find out if feminists continued to fight structural battles. After NAC and LEAF learned how to overcome the limits of litigation, they might have demanded social rights to complement their equality guarantees.

The explanations disagree. (i) The Charter revolution thesis predicts that feminists will mobilize to defend their constitutional interests. If political elites are foolish enough to ignore these interests, if they propose threatening amendments, “Charter Canadians” should act decisively. Despite this fierce vigilance, feminists will not initiate any grand structural battles. Unless governments propose favourable changes, they will not waste their time and energy fighting for new rights. (ii) The court party thesis is not weighted down by ambiguities. After winning constitutional guarantees, feminists can finally abandon Parliament and the provincial legislatures. Because post-materialists believe that legislative politics is seamy and compromising, they will not waste their resources pursuing traditional forms of collective action. (iii) If the judicial pluralism thesis is correct, post-materialists are structural actors who routinely demand favourable rules. Feminists managed to win boldly worded guarantees during the patriation round, but they still want to make governments more responsive. Using section 15 and section 28 as political instruments, these post-Charter activists should fight for generous intervenor funding and stronger human rights regimes.

\(^{193}\) Feminists won sixty-four percent of their constitutional claims; with weaker legal tools, environmentalists managed to win forty-one percent of their court challenges.
Equality Rights and the Ontario Government

The first ministers imposed the three-year moratorium on section 15 because they wanted to scour their laws for possible violations. Instead of trusting these political élites, feminists pressured both levels of government. The Charter of Rights Coalition and the Charter of Rights Education Fund forced the Ontario government to consider an ultimatum: it could respect Canada's Constitution by amending a long list of statutes or face the administrative and political costs of complex litigation. Although Davis supported Trudeau's package of reforms during the patriation round, his waning government virtually ignored this threat. Just months before the 1985 general election, as promised, feminists combined legal action and lobbying to challenge an unfavourable rule. LEAF challenged a provision that shielded the Ontario Hockey Association and other amateur sports organizations from the provincial human rights code.194 After arguing that female leagues promote “substantive equality,” Mary Eberts insisted that male leagues do the opposite by discriminating against exceptional female athletes. The trial judge was thoroughly confused, but the Court of Appeal granted LEAF a partial victory.195 While the OHA was beyond the scope of the Charter, the amateur sports exemption violated section 15.

As this court challenge was moving through the appellate phase, Ontario voters pushed the old Conservative Party out of power. Feminists suddenly confronted an amazing opportunity: two sympathetic parties agreed to establish an accord with a common legislative agenda. With the support of the NDP, post-Charter activists encouraged the new Liberal government to respect Canada's Constitution. After espousing the virtues of “justice

195 In 1988, the Ontario Human Rights Commission ordered the OHA to admit Blainey as a member, but it did not force the all-male league to adopt a new policy on female players.
and equality,” the Attorney-General eliminated a series of unconstitutional provisions in 1986, including the first target of section 15 litigation, the amateur sports exemption.\footnote{196} Ian Scott declared that judges and legislators cannot “interpret equality in a narrow or technical way.” Under the leadership of Larry Grossman, most Conservative members endorsed this omnibus measure. However, right-wing backbenchers strenuously opposed one amendment: they did not want the \textit{Ontario Human Rights Code} to protect gays and lesbians by adding “sexual orientation” to an expanding list of prohibited grounds.

Even though feminists celebrated these changes, they wanted to correct deeper structural problems. Like their predecessors, post-Charter activists wondered why governments purposely constrained the Ontario Human Rights Commission. Poorly funded officials struggled to perform their duties – without the appropriate statutory powers. They were so overwhelmed that boards of inquiry could only consider a small percentage of complaints. When a coalition of groups asked the Peterson cabinet to “revolutionize” the entire system, LEAF advocates were eager to offer their analysis.\footnote{197} Mary Eberts and Anne Bayefsky presented an old pre-Charter argument: administrative commissions cannot attack the roots of inequality because they are forced to consider narrowly framed issues.\footnote{198} To make the process more effective, the OHRC should initiate aggressive investigations, accept whole classes of complainants, and enforce strict equity standards. These demands were not enthusiastically embraced. By the late 1980s, the Liberals were less willing to offend the business community. The next government was more sympathetic. To keep an election promise, the NDP asked a task force to review the aging human rights regime. Feminists

\footnote{196} Ontario Legislative Assembly, \textit{Debates}, 1st Session of the 33rd Legislature, October 1985, 1034. Bill 7 received royal assent in December 1986; \textit{Equal Rights Amendment Act}, S. O. 1986, c. 64.


\footnote{198} Eberts, “Sex-based Discrimination and the Charter,” 188.
persuaded the members to issue a long list of recommendations, but these proposals were quietly rejected.\textsuperscript{199} After aggravating business interests and public service unions, Ontario’s social democrats did not want to waste their political capital justifying stronger financial penalties, new enforcement mechanisms, and costly “regional centres.”

**Equality Rights and the Federal Government**

Feminists asked federal officials to consider a similar set of changes. After spending their time and money conducting statutory audits, they asked Trudeau to consider the same ultimatum that Davis ignored. He could respect Canada’s Constitution by asking the Department of Justice to identify unconstitutional provisions or confront a flood of litigation in 1985. The waning Liberal government passed several amendments, but the feminist movement was expecting much more. After winning the 1984 general election, the Conservative Party did not rush to introduce an impressive package of reforms. Patrick Boyer was asked to chair the Subcommittee on Equality Rights — just months before the moratorium ended.\textsuperscript{200} Feminists entered this forum to describe the contours of the equality rights project. Without discussing the intricacies of post-Charter jurisprudence, most of the participants characterized section 15 and section 28 as political instruments that women can claim to “own.”\textsuperscript{201} They urged the members to endorse a broad range of policy objectives, from national day care services to employment equity programs. When LEAF lawyers presented their case, they sounded like Paul Muldoon and Rick Lindgren. CELA wanted mandatory duties, exacting standards, and new statutory rights to flow from a public trust provision. With these measures in place, ordinary citizens could force governments to

\textsuperscript{200} In 1985, Bill C-27 was introduced to “Charter-proof” a long list of federal laws, but it did not include any of the policy changes demanded by feminist advocates; *Statute Law Amendment Act*, S.C. 1985, c. 26.
\textsuperscript{201} Ibid., 16:46.
respond. Shelagh Day presented a similar argument. By introducing section 15, Canada’s first ministers created a duty that private litigants can enforce. With the support of her colleagues, she issued a stern warning: if federal officials refuse to attack inequality, if the Mulroney cabinet decides to ignore subtle forms of discrimination, feminists will act decisively.202 Boyer did not dissuade LEAF advocates by questioning the legitimacy of bold judicial review – they were quite eager to document the limits of majoritarian institutions.203

The feminist movement was eager to win dramatic court victories, but it still had to fight private forms of discrimination. In 1981, when some of the provinces rejected the idea of constitutional rights, Trudeau emphasized the limitations of statutory regimes. A charter was badly needed, he insisted, because administrative commissions face certain inescapable constraints. During the moratorium on section 15, the Liberal cabinet amended the Canadian Human Rights Act by tackling two problems, sexual harassment in the workplace and discrimination against pregnant women. Bill C-141 also addressed the special barriers faced by the disabled.204 However, feminists hoped that federal officials would consider a series of structural reforms. According to Doris Anderson, the CHRC suffered from the same problems that weakened the OHRC – without broader powers and more bureaucratic resources, it could not attack the causes of inequality.205 Feminist lawyers urged the Department of Justice to make the process more rigorous and “transparent.”206 NAWL wanted clearly worded rules that would prevent the federal cabinet from appointing loyal party supporters and LEAF urged the Minister of Justice to add an interpretive clause that

203 Ibid., 16:115. Lynn Smith and Gwen Brodsky expressed the same criticism.
206 LEAF, Brief to the Department of Justice, June 1986.
would allow complainants to base their claims on “analogous grounds.”207 These proposals were completely ignored. In 1986, the Conservative government was espousing the merits of deregulation and trade liberalization – it did not want to offend business interests by creating an oppressive human rights regime. By the early 1990s, the Mulroney cabinet was asked to consider a new set of demands. The Native Women’s Association of Canada targeted section 67, a provision that stops “Indian women” from filing complaints.208 Another campaign received strong support from well-placed members of the judiciary. In 1992, the Ontario Court of Appeal decided to rewrite the Canadian Human Rights Act by extending protection to gays and lesbians.209 Fueled by this favourable decision, a coalition of activists persuaded the Chrétien cabinet to endorse the spirit and substance of Haig. Sexual orientation was finally added to the list of prohibited grounds.

Fighting for Constitutional Rights

Feminists bolstered their influence by changing the rules of the game. Armed with section 15 and section 28, they managed to win favourable court decisions and impressive legislative battles. Environmentalists followed a similar set of strategies, but their demands were dismissed. Without such capable instruments, most litigants filed judicial review petitions to secure prerogative writs. Despite this considerable advantage, feminists quickly discovered one of the risks of structural politics. They learned that constitutional rights impose an arduous duty on those who claim to own them: as rules that bestow great rewards, entrenched guarantees are very costly to defend.

Mulroney initiated the first post-Charter battle by trying to solve Canada’s great constitutional riddle. After the patriation round, most Québec francophones expressed a profound sense of betrayal. The Meech Lake Accord was designed to undercut this sentiment – and the flourishing separatist movement. The federal government wanted to recognize the distinctiveness of Québec society, but it rejected the idea of “asymmetrical federalism.” Every provincial jurisdiction was promised greater control over immigration policy, Supreme Court appointments, and future amendments. To restrict the use of the federal spending power, they would receive fair compensation for opting out of certain “shared-cost” programs. The first ministers drafted the Meech Lake Accord without consulting anyone. They appeared to assume that Canadians would trust their wisdom and expertise, but feminists expressed outrage, not deference. From their perspective, the process of élite accommodation was thoroughly “undemocratic” and strangely anachronistic. Eleven middle-aged men decided to adjust the division of powers, create new rights, and change the amending formula – without initiating a broad public debate.

When the national organizations appeared before the Tremblay-Speyer committee to attack the substance of the agreement, they had to manage an old problem. English Canadian activists angered their Québec counterparts by attacking the heart of the Meech Lake Accord, the infamous distinct society clause. Trust became the central theme of this debate. Feminists rejected the political purpose of entrenched rights, like most Québec...

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211 “How dare they,” LEAF Letter (Fall 1987).
francophones. Instead of rushing to protect the Charter, they supported Premier Robert Bourassa – they wanted the Constitution Act to respect their distinctiveness. The response in English Canada was very different because most feminists viewed the Charter as the “main instrument for the advancement of women’s interests.” 214 Mary Eberts and John Laskin presented a somber analysis as representatives of the Ad Hoc Committee. 215 If the first ministers introduced the distinct society clause, the meaning of every guarantee would be clouded. If the Supreme Court developed a generous interpretation, the Québécois government would be able to place serious limits on section 15 and section 28. LEAF expressed some of the same fears because it was trying to counter another threat – hostile actions. This distrust generated a list of stern recommendations. The National Association of Women and the Law argued that governments should have to consult “equality-seeking groups” before appointing new judges. 216 Like CELA and Energy Probe, NAC opposed any constraints on the federal spending power. Most activists despised the Mulroney cabinet, but they hoped that future governments would be able to “play a much more creative role.” 217 By forcing political elites to consider these concerns, English Canadians feminists contributed to the “death of Meech Lake.”

The second structural battle was very different. After failing to win their basic demands, Québec officials asked a commission to study possible constitutional amendments. At the same time, they promised to hold a referendum on sovereignty. The Mulroney government responded to this agenda by establishing the Citizens’ Forum on Canada’s Future and a special joint committee. 218 The participants issued their own

214 This bold claim was presented by the Coalition for Equality Rights. Minutes of Proceedings and Evidence of the Special Joint Committee on the 1987 Constitutional Accord, 2nd Session of the 33rd Parliament, August 1988, 12:5.
215 Ibid., 15:130.
ultimatum — they did not want to be excluded from the process of constitutional change. Afraid to ignore such a strong sentiment, the Conservative cabinet asked another special joint committee to work with the provincial legislatures. Between 1991 and 1992, Canadians were asked to consider twenty-eight changes, including property rights, Senate reform, the devolution of certain powers, provisions to encourage economic union, limits on the federal spending power, a distinct society clause, a Canada clause, and new guarantees to protect Aboriginal peoples.

Instead of simply opposing the process of decentralization, post-Charter feminists proposed an alternative. Most of the first ministers wanted to solve Canada’s constitutional crisis by accepting the principle of provincial equality. While recognizing the distinctiveness of Québec society, every province would receive a long list of new powers. This approach was championed by the premier of Newfoundland, Clyde Wells, and the leader of the Reform Party, Preston Manning. After considering the dangers of devolution and the costs of alienating Québec feminists, NAC promoted the virtues of asymmetrical federalism. If properly amended, the Constitution Act could give Québec and Aboriginal nations greater control — without weakening the central government. Both movements were motivated by the same concerns. They refused to accept limits on the federal spending power because some of their policy objectives required innovative national programs. NAC and CELA hoped that binding standards would force provinces to fight environmental degradation and different forms of inequality. These activists shared another concern. Most economic groups were quiet observers during the patriation round, but after watching the Charter influence every branch of law, corporate interests wanted to modify the rules of the game. LEAF and NAWL opposed the property rights provision with the support of environmental groups. By citing legislative records and Supreme Court judgements, they characterized the

219 Minutes of Proceedings and Evidence of the Select Committee of the Ontario Legislative Assembly on Confederation, 1st Session of the 35th Legislature, February 1991, C-845.
Charter as an instrument of "social justice." According to their interpretation, it was designed to help those who own very little property.\(^{220}\)

English Canadian feminists rushed to defend favourable rules, but some groups marshalled their resources to demand new rights. Aboriginal women confronted an unenviable dilemma. They could support the self-government provision and risk losing the protection of the Charter or oppose this broad declaration and risk losing the support of their communities. After fighting for over a decade to restore the status of "Indian women," NWAC quickly formed a position: all future governments should be compelled to respect the principle of equality. Canada's first ministers could amend section 15, by recognizing the special problems that Aboriginal women face, or introduce an entirely separate Aboriginal Charter of Rights and Freedoms.\(^{221}\) The Conservative government deliberately ignored these proposals. As the Minister of Constitutional Affairs, Joe Clark established a parallel forum to complement the Beaudoin-Dobbie committee. Groups representing the four streams of Aboriginal peoples were given funding to participate: the Assembly of First Nations (status Indians), the Native Council of Canada (non-status Indians), the Métis National Council, and the Inuit Tapirisat. When NWAC was shut out of this process, it asked Mary Eberts to appear before the Federal Court.\(^{222}\) Working together, they presented an argument that was designed to generate public controversy. By favouring "male-dominated" organizations, the Mulroney government placed serious limits on section 2, the provision that protects free expression, and section 28, the symbolically charged clause


that guarantees gender equality.\(^{223}\) The Supreme Court disagreed, but this dispute revealed some of the barriers that Aboriginal women still confront.

While NWAC was pursuing this campaign, some groups demanded “social rights” to complement section 15. Even though feminists were busy countering a wave of hostile actions, anti-poverty groups wanted Canada’s judiciary to determine the adequacy of welfare programs, unemployment insurance coverage, tax laws, and family benefits.\(^{224}\) Not surprisingly, they confronted an obstacle that also frustrated CELA and Energy Probe. After watching the Meech Lake Accord fall apart, most political élites viewed the Charter as a liability. Instead of promoting national unity, it was disrupting the process of constitutional change. To protect their new rights, a cluster of groups opposed some of Québec’s basic demands, including the distinct society clause. By defending their interests so strenuously, they jeopardized the stability of the entire country. This interpretation certainly influenced the Charlottetown debate. When the premier of Ontario proposed a measure to counter the effects of deregulation and trade liberalization, he did not urge the first ministers to accept broadly framed justiciable rights. The Rae government wanted a series of “pledges” to declare the importance of universal health care, generous social programs, environmental protection, and collective bargaining.\(^{225}\) Most NDP legislators supported this “social


covenant" because they wanted to discourage courts from reviewing such crucial areas of public policy.

When feminists appeared before the Beaudoin-Dobbie committee, they expressed some of the same concerns. Judy Rebick explained why most members of NAC were reluctant to support the anti-poverty coalition: too many women distrust the judiciary.226 Like their legislative allies, they refused to believe that judges would become champions of the welfare state by taming neo-conservative governments. LEAF advocates were just as reticent. After writing a somber report on Charter litigation, Gwen Brodsky argued that social rights would actually help privileged interests. Ignoring the purpose of such measures, they would use their resources to attack hundreds of valuable programs.227 She asked the participants to consider an alternative. A federal-provincial tribunal could enforce new "constitutional duties" by hearing complaints, monitoring schedules, and issuing directives. Courts would still enforce procedural requirements by exercising their judicial review powers, but they would not be allowed to tackle substantive questions. At the end of the second period, this ambivalence seemed to be the dominant sentiment. Feminists hoped that section 15 would attack the roots of inequality, but they could not ignore the limits of litigation.

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CHAPTER SIX

Post-Materialists and the Expansion of Judicial Power

I. The National Survey on Strategic Choices

The historical comparison generated an impressive body of evidence. While sifting through hundreds of court decisions, we traced the patterns of participation, documented the legal success rate, and tracked changing judicial attitudes. Instead of trying to study law and politics separately, we moved outside the courtroom by reconstructing a series of important legislative battles. Each explanation has certain strengths and weaknesses. The dominant interpretation cannot explain the persistence of pre-Charter litigants, but it manages to identify several pieces of the puzzle. Even though both movements pursue national goals, English Canadians are promoting the growth of judicial power. Québec activists rarely enter the courtroom. Another finding is just as dramatic – constitutional rights produce a measurable advantage. Because feminists can base their claims on section 15, they are more successful.¹

The court party thesis is less insightful. Some litigants appear to challenge popular majorities by asking judges to revoke statutes, but most claims do not invite bold judicial activism. Using a wide range of legal arguments, feminists and environmentalists target administrative orders, municipal by-laws, hostile actions, legal principles, and private companies. Post-materialists are not rejecting the great representative institutions. They present their concerns to legislative committees, opposition parties, and those at the top of Canada's political system – cabinet ministers. Still, this provocative explanation does

¹ Feminists won sixty-four percent of their constitutional claims; with weaker legal tools, environmentalists managed to win forty-one percent of their court challenges.
capture several crucial elements. Post-materialists try to improve their chances of winning by clustering around sympathetic courts. During the late 1980s, when Chief Justice Dickson and Justice Wilson exerted their influence, feminists viewed the Supreme Court as an important ally because it was more responsive than the Mulroney government.

The judicial pluralism thesis reveals the structural implications of post-materialism. For thirty years, feminists and environmentalists have struggled to change the rules of the game. Since the early 1970s, they have demanded constitutional guarantees, regulatory rights, favourable standing requirements, special rules to amend the law of costs, a new statutory language, and open decision-making institutions. This pressure is slowly changing the structure of the Canadian state. As post-materialist objectives move up the legislative agenda, as governing parties become more sympathetic, these interests will continue to win structural battles. However, the judicial pluralism thesis cannot explain why governments have responded differently. Feminists secured section 15 and section 28 during the patriation round. Environmentalists asked for similar instruments throughout the post-Charter period, but their demands were quickly dismissed.

Before reaching any definitive conclusions, we have to peer inside both movements using the National Survey on Strategic Choices (1995). Four sets of respondents received similar versions of the same questionnaire. After sending six-hundred advocacy groups the first version, we received 275 questionnaires: 141 from environmental groups and 134 from feminist groups. The return address for Québec was the University of Montréal, but the response rate was only thirty percent. The general response rate was forty-six percent. After sending two-hundred legal advocates the second version, we received 126 questionnaires, sixty-four from environmentalists and sixty-two from feminists. The general

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2 The National Survey on Strategic Choices (1995) was funded by SSHRCC (Doctoral Fellowship 752-93-2076) and a Toronto law firm: Gowling, Strathy, and Henderson. To improve the response rate, the targets received three copies of the questionnaire during a ten-month period. The different versions appear in the Appendix.
response rate was sixty-three percent. Very few Québec lawyers participated because most of the names were taken from the Court Challenges Database.

By developing a profile of the respondents, we can examine a series of potentially significant characteristics. Most of the advocacy groups are small. They have fewer than 5,000 individual members, under $50,000 for an annual budget, and less than four employees. Many rely on dedicated volunteers. About nine percent of the groups are large. They have more than 100,000 individual members, over $500,000 for an annual budget, and more than ten employees. About twenty percent of the respondents fall somewhere between these two extremes. They have 10,000 to 50,000 individual members, $100,000 to $250,000 for an annual budget, and four to ten employees. Another question asked the respondents to report the scope of their activities. Roughly one quarter focus on national issues or local problems; just under half pursue “provincial” or “regional” objectives. Both movements include large federations and national networks: sixty-two percent of the environmental groups are members of the Canadian Environmental Network and sixty-five percent of the feminist groups are members of NAC. Instead of depending on these formal links, seventy percent of the respondents support between two and six coalitions a year.

Despite these broad similarities, the feminist groups are more established. While sixty-one percent were formed during the pre-Charter period, forty-three percent of the environmental groups were founded after 1985. We discovered several interesting differences by asking a cluster of questions about funding. The environmental groups are more willing to accept donations from corporate sponsors and private foundations, but sixty-three percent rank individual members as the primary source of revenue. The feminist groups are more dependent on grants from the federal government: thirty-nine percent rank this source as the most important. A surprising number of feminist groups, fifty-five percent, rank provincial governments as the primary or secondary source. However, the effects of fiscal restraint are obvious – just over half of these respondents are receiving less public funding.
After being called to the bar, twenty-seven percent of the legal advocates earned a graduate degree; only seven percent received one of their degrees from an American university. Although some work at large firms, sixty-three percent work at firms that employ less than twenty partners and associates. Very few legal advocates are also state officials, but seventy percent have worked for a university or a public agency during their careers. Most of the respondents, seventy-three percent, are willing to offer their services at a reduced rate. Fifteen legal advocates are principal players – they are employed by one of the legal advocacy groups. Another question asked the respondents to report their annual salaries before deductions. Predictably, they earn more than most Canadians. While sixty-nine percent earn between $75,000 and $200,000, fifteen percent earn more than $200,000.

Table XXXVIII: The Ideological Preferences of Environmentalists

<table>
<thead>
<tr>
<th>Ideology</th>
<th>Advocacy Groups (%)</th>
<th>Legal Advocates (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>environmentalist</td>
<td>62</td>
<td>57</td>
</tr>
<tr>
<td>ecologist</td>
<td>38</td>
<td>8</td>
</tr>
<tr>
<td>conservationist</td>
<td>38</td>
<td>24</td>
</tr>
<tr>
<td>preservationist</td>
<td>20</td>
<td>6</td>
</tr>
<tr>
<td>deep ecologist</td>
<td>7</td>
<td>3</td>
</tr>
</tbody>
</table>

Source: 1995 National Survey on Strategic Choices (N = 392)

A cluster of questions unearthed ideological preferences and partisan loyalties. Because advocacy groups have employees and members who express different views, executive directors could check more than one position. Comparative figures are recorded in Table XXXVIII and Table XXXIX. Not surprisingly, most of the advocacy groups favoured the ideologies with the broadest appeal: sixty-two percent of the environmental groups selected "environmentalist" and forty-nine percent of the feminist groups preferred "integrative feminism." When the legal advocates were asked the same question, they selected a wider range of preferences. Roughly one quarter of the respondents are motivated by "liberal feminism," "integrative feminism," or "socialist feminism." Most of their counterparts
identify themselves as "environmentalists," but twenty-four percent call themselves "conservationists." Three ideological positions received little support: "radical feminism," "conservative feminism," and "deep ecologist."

<table>
<thead>
<tr>
<th>Ideology</th>
<th>Advocacy Groups (%)</th>
<th>Legal Advocates (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>integrative feminism</td>
<td>49</td>
<td>25</td>
</tr>
<tr>
<td>liberal feminism</td>
<td>24</td>
<td>26</td>
</tr>
<tr>
<td>socialist feminism</td>
<td>17</td>
<td>21</td>
</tr>
<tr>
<td>radical feminism</td>
<td>13</td>
<td>10</td>
</tr>
<tr>
<td>conservative feminism</td>
<td>13</td>
<td>10</td>
</tr>
</tbody>
</table>

Source: 1995 National Survey on Strategic Choices (N = 395)

Predictably, most of the advocacy groups refuse to identify a partisan preference. To attract a cross-section of citizens, they characterize their activities as "non-partisan." If the respondents did endorse a federal party, it was usually the NDP. Canada's social democrats have received support from fifty-two percent of the feminist groups and thirty percent of the environmental groups. The old parties did much worse: although nineteen percent of the respondents endorsed the Liberal Party, the Conservative Party received support from only three advocacy groups. Relatively few Canadians vote for single-issue parties, but the Green Party is championed by seventeen percent of the environmental groups. The legal advocates were more willing to indicate their partisan preferences. While sixty-two percent have voted for the NDP in federal elections, fifty percent have supported the Liberal Party. Most of the feminists rejected the Conservative Party, but it was selected by fifteen percent of the environmentalists. Another measure confirms this gap. Using an ideological spectrum, thirty-two percent of the environmentalists located themselves between the "centre" and the "right." Remarkably, ninety percent of the feminists placed themselves between the "moderate left" and the "left."
II. Legal Advocates as Post-Materialists

Using the National Survey on Strategic Choices, we can find out if feminists and environmentalists are deeply committed to post-materialist values. The court party thesis will fall apart if most activists defend materialist values. As the quintessential post-materialists, they should espouse the virtues of social diversity, gender equality, and biodiversity, not economic growth, fiscal restraint, and national security. The judicial pluralism thesis refuses to believe that post-materialists are abandoning representative institutions, but it expects the same sets of responses. The Charter revolution thesis offers a distinct interpretation. The Canadian state affects these interests differently. They might be moved by similar normative concerns, but institutions should shape their preferences, policy objectives, and strategies.

Table XXXX: The Distribution of Values

<table>
<thead>
<tr>
<th>Value Type</th>
<th>Canadians 1981 (%)</th>
<th>Canadians 1990 (%)</th>
<th>Environmentalists 1995 (%)</th>
<th>Feminists 1995 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>materialist</td>
<td>22.1</td>
<td>11.7</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>mixed</td>
<td>61.9</td>
<td>62.7</td>
<td>47</td>
<td>41</td>
</tr>
<tr>
<td>post-materialist</td>
<td>16.0</td>
<td>25.6</td>
<td>50</td>
<td>56</td>
</tr>
</tbody>
</table>

Source: 1981 World Values Survey (N = 1183); 1990 World Values Survey (N = 1645); 1995 National Survey on Strategic Choices (N = 125)

The core question was taken from the massive World Values Survey. Respondents were asked to rank four public goals. They could choose the materialist objectives,

3 The 1981 World Values Survey included a representative sample of the Canadian population (N = 1254). In 1990, it included a larger sample (N = 1730).
“maintaining order in the nation” and “fighting rising prices,” or select the post-materialist demands, “giving people more say in important government decisions” and “protecting freedom of speech.” Between 1981 and 1990, the number of Canadians who express new values jumped from sixteen percent to twenty-six percent, while the proportion of materialists dropped. Table XXXX reveals that most citizens have “mixed” value priorities. The legal advocates are far more committed to social diversity, global peace, gender equality, biodiversity, and psychological well-being — only three percent defend materialist values. The court party thesis is right: more than fifty percent of the respondents favour post-materialist values. By considering the four positions separately, we find that fifty-eight percent characterize public participation as the most important goal. While acknowledging the merits of protecting free speech, only twenty-two percent identify this objective as the most important. We already know that most feminists are not willing to endorse the idea of unrestricted speech. With the support of other groups, LEAF litigators have urged the Supreme Court to preserve limits on certain forms of expression.

Some readers might wonder why almost half of the legal advocates are moved by a mix of values. When feminists and environmentalists shuffle the four objectives, they usually pair “maintaining order” with public participation. This correlation is not too surprising. Post-materialists distrust political élites. They believe that public institutions are more responsive when policy-makers have to respect a long list of constitutional guarantees, mandatory duties, and exacting schedules. However, these new interests do not fear state authority. Environmentalists hope that strict regulatory laws will curb harmful forms of behaviour and they want these measures to be enforced by powerful bureaucratic agencies. Feminists ask state officials to prosecute rapists, regulate pornography, and

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prohibit hate literature. While promoting the virtues of equality, they argue that human rights commissions should exercise commanding statutory powers.

Table XXXXIII: Confidence in Institutions

<table>
<thead>
<tr>
<th>Institution</th>
<th>Confidence</th>
<th>Environmentalists 1995 (%)</th>
<th>Feminists 1995 (%)</th>
<th>Canadians 1990 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>legal system</td>
<td>very</td>
<td>22</td>
<td>7</td>
<td>10.0</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>65</td>
<td>69</td>
<td>44.0</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>10</td>
<td>22</td>
<td>39.2</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>3</td>
<td>2</td>
<td>6.8</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>very</td>
<td>30</td>
<td>27</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>54</td>
<td>44</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>14</td>
<td>27</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>2</td>
<td>2</td>
<td>-</td>
</tr>
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<td>unions</td>
<td>very</td>
<td>3</td>
<td>13</td>
<td>5.0</td>
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<tr>
<td></td>
<td>somewhat</td>
<td>40</td>
<td>52</td>
<td>29.9</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>46</td>
<td>32</td>
<td>49.4</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>11</td>
<td>3</td>
<td>15.7</td>
</tr>
<tr>
<td>private corporations</td>
<td>very</td>
<td>3</td>
<td>0</td>
<td>6.1</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>36</td>
<td>44</td>
<td>45.3</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>42</td>
<td>32</td>
<td>43.4</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>19</td>
<td>24</td>
<td>6.3</td>
</tr>
<tr>
<td>Parliament</td>
<td>very</td>
<td>5</td>
<td>7</td>
<td>5.6</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>58</td>
<td>51</td>
<td>31.7</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>34</td>
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<td></td>
<td>not at all</td>
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<td>5</td>
<td>10.7</td>
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<td>federal government</td>
<td>very</td>
<td>2</td>
<td>7</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>54</td>
<td>45</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>39</td>
<td>40</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>5</td>
<td>8</td>
<td>-</td>
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<td>federal public service</td>
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<td>5</td>
<td>6.1</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>51</td>
<td>54</td>
<td>43.5</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>39</td>
<td>36</td>
<td>43.0</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>7</td>
<td>5</td>
<td>7.5</td>
</tr>
<tr>
<td>provincial government</td>
<td>very</td>
<td>3</td>
<td>5</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>40</td>
<td>33</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>47</td>
<td>36</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>10</td>
<td>26</td>
<td>-</td>
</tr>
<tr>
<td>provincial civil service</td>
<td>very</td>
<td>3</td>
<td>5</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>somewhat</td>
<td>47</td>
<td>35</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not very</td>
<td>47</td>
<td>35</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>not at all</td>
<td>3</td>
<td>7</td>
<td>-</td>
</tr>
</tbody>
</table>

Source: 1990 World Values Survey (N = 1730); 1995 National Survey on Strategic Choices (N = 124)

We have to determine the effects of these post-materialist values. Inspired by similar normative concerns, feminists and environmentalists might criticize certain
institutions and favour unconventional strategies. An important question asked the respondents to evaluate a range of political, social, and economic institutions. Table XXXXI allows us to compare three sets of data. Although Canadians express relatively little faith in Parliament, more than half of the respondents are "very confident" or "somewhat confident" in the legal system. The same level of trust is expressed by eighty-two percent of the lawyers. I amended the World Values Survey by adding several institutions. Not

Table XXXII: Forms of Political Action

<table>
<thead>
<tr>
<th>Action</th>
<th>Response</th>
<th>Environmentalists 1995 (%)</th>
<th>Feminists 1995 (%)</th>
<th>Canadians 1990 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>sign a petition</td>
<td>have done</td>
<td>94</td>
<td>97</td>
<td>77.6</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>2</td>
<td>3</td>
<td>14.4</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>4</td>
<td>0</td>
<td>8.1</td>
</tr>
<tr>
<td>appear before a legislative</td>
<td>have done</td>
<td>80</td>
<td>66</td>
<td>-</td>
</tr>
<tr>
<td>committee</td>
<td>might do</td>
<td>20</td>
<td>34</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>0</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>join a boycott</td>
<td>have done</td>
<td>67</td>
<td>90</td>
<td>23.5</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>31</td>
<td>8</td>
<td>42.8</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>2</td>
<td>2</td>
<td>33.7</td>
</tr>
<tr>
<td>attend a lawful demonstration</td>
<td>have done</td>
<td>67</td>
<td>76</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>30</td>
<td>22</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>3</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>attend an unlawful</td>
<td>have done</td>
<td>8</td>
<td>18</td>
<td>22.2</td>
</tr>
<tr>
<td>demonstration</td>
<td>might do</td>
<td>34</td>
<td>59</td>
<td>42.4</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>58</td>
<td>23</td>
<td>35.4</td>
</tr>
<tr>
<td>lobby cabinet ministers</td>
<td>have done</td>
<td>73</td>
<td>77</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>27</td>
<td>23</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>never do</td>
<td>0</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>lobby bureaucratic officials</td>
<td>have done</td>
<td>86</td>
<td>74</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>14</td>
<td>24</td>
<td>-</td>
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<tr>
<td></td>
<td>never do</td>
<td>0</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>occupy an office or factory</td>
<td>have done</td>
<td>6</td>
<td>11</td>
<td>3.2</td>
</tr>
<tr>
<td></td>
<td>might do</td>
<td>23</td>
<td>44</td>
<td>20.4</td>
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<tr>
<td></td>
<td>never do</td>
<td>70</td>
<td>45</td>
<td>76.3</td>
</tr>
</tbody>
</table>

Source: 1990 World Values Survey (N = 1730); 1995 National Survey on Strategic Choices (N = 124)

surprisingly, the Supreme Court received a very favourable assessment – most of the legal advocates declare a high degree of confidence in this central institution. These patterns seem to confirm the court party thesis. Post-materialists are achieving many of their
objectives by choosing to litigate. As they win dramatic court battles, feminists and environmentalists express greater faith in legal institutions. This interpretation sounds compelling, but most of the lawyers also express confidence in traditional political institutions. Over half of the respondents trust Parliament, the federal government, and the federal public service. They express less faith in private corporations and their respective provincial governments. While the assessments are very similar, there is one interesting difference between the two movements. The feminists express more faith in unions.

The court party thesis is hurt by another cluster of responses. According to the data recorded in Table XXXII, post-materialist values do not narrow the scope of strategic choice. Proponents of this explanation expected the legal advocates to choose unconventional forms of political participation. Most of the respondents have attended lawful demonstrations and supported economic boycotts – some would even occupy private offices and join unlawful protests. However, these post-materialists do not reject conventional strategies. They sign petitions and present their concerns to legislative committees. Instead of ignoring crucial sites of power, ninety-eight percent of the respondents are willing to lobby cabinet ministers and bureaucratic officials. The ideological gap produces one interesting difference. Readers will remember that a significant proportion of environmentalists located themselves between the “centre” and the “right,” while most of the feminists placed themselves between the “moderate left” and the “left.” Influenced by these normative preferences, feminists are more willing to pursue disruptive forms of participation. Most of the environmentalists refuse to take over offices or attend unlawful demonstrations.

III. Evaluating Litigation

To investigate one of the central questions, we will combine the precision of survey data and the texture of the historical comparison. The principal players have experienced
unexpected triumphs and demoralizing losses. After considering these personal accounts, we will find out how four sets of respondents evaluate litigation. (i) The Charter revolution thesis expects to find a high degree of divergence. Feminists should be very optimistic because they can base their claims on section 15 and section 28. These guarantees are not just commanding legal resources. As symbolic instruments, they are inspiring entire generations of women. Without their “own” constitutional rights, environmentalists will view litigation as costly and dangerous. (ii) The court party thesis acknowledges the effects of institutional variables, but it suggests that post-materialists are attracted to the judicial form. Environmentalists will express some degree of optimism. Feminists should characterize litigation as a powerful instrument of social change. (iii) If the judicial pluralism thesis is correct, we should discover a high degree of convergence. Because they understand the hazards of judicial review and the limits of legislative politics, post-materialists should characterize litigation as a moderately effective strategy.

The historical comparison reveals a range of views. Most of the optimists are lawyers who offer their services to one of the legal advocacy groups. After the patriation round, the founders of LEAF were fueled by a bold vision. Mary Eberts characterized constitutional litigation as a dramatic clash of principles. Women would be able to knock down discriminatory laws, she promised, because courts will value logic and fairness, not economic power and political connections.\(^5\) Feminists will be able to promote an ambitious interpretation of equality — even if they counter popular majorities.\(^6\) During the early years, this confidence was infectious. The equality rights project seemed “exciting and innovative.”\(^7\) While working on the board of directors, Pat Wouters and Susan Clark

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\(^7\) Sherene Razack’s personal interview with Pat Wouters and Susan Clark (early members of the Board of Directors), February 1988.
discovered that section 15 litigation was “driven by enormous intellectual energy.” The legal committee was “improving the lives of thousands of women” by documenting the effects of inequality. Even though LEAF started to lose cases during the late 1980s, some activists continued to express optimism. As the co-editor of the Canadian Human Rights Reporter, Kathleen Ruff argued that “disadvantaged” communities could reap great rewards by litigating. She urged the Mulroney government to expand the Court Challenges Program. When feminists launched their campaign to oppose the Meech Lake Accord, the Manitoba branch of CORC characterized the Charter as an “instrument of social transformation.” It wanted to stop the first ministers from entrenching the distinct society clause. After fighting a series of court battles as LEAF litigators, Elizabeth Shilton and Kathleen Mahoney insisted that women were achieving “real equality.” By pressing their claims in court, they were modifying “accepted social hierarchies,” making workplaces more democratic, and reconfiguring traditional family structures.

We know that institutional change was not a source of optimism for environmentalists. Some litigators started to develop section 7 claims, but they could not base their novel arguments on constitutional rights that protected the natural environment. These post-materialists expressed optimism after beating poor odds. This point is crucial. The rules of the game are stacked against environmental litigants. Most regulatory statutes

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9 Minutes of Proceedings and Evidence of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, 2nd Session of the 34th Parliament, April 1990, 12:102.
are based on vague permissive guidelines, not strict mandatory duties. The Supreme Court liberalized the law of standing, but most advocacy groups are still intimidated by the law of costs. Viewed in this context, every victory is an unexpected triumph. When the Sierra Legal Defence Fund stopped logging and commercial development in the Wood Buffalo National Park, Greg McDade and Stewart Elgie asked other activists to consider the benefits of court strategies. By presenting their concerns, environmentalists could discipline wayward governments and reform the old polluting industries. After the Kemano project was cancelled, they characterized litigation as a "mighty weapon in the war against environmental destruction."13

This anecdotal evidence seems to confirm a principal component of the court party thesis. Instead of relying on democratic forms of collective action, post-materialists started to see courts as agents of social change. However, readers will remember that environmentalists lost fifty-nine percent of their claims. Some legal advocates could not ignore this poor rate of success. While acknowledging the strengths of certain procedural claims, they characterized litigation as risky and time-consuming.14 Andrew Roman presented one of the first pre-Charter claims, established the Public Interest Advocacy Centre, and published academic articles that challenged the old public nuisance standard, but he asked potential clients to recognize the limits of adjudication. His critique was not softened by a guarded optimism. The process of reasoning is random and irrational. To


save their legitimacy, judges defer to the expertise of administrators and the political authority of cabinet ministers. Powerful industries oppose strict regulations, science cannot offer definitive conclusions, and "courts are ill-equipped to solve complex problems." Most senior members of the judiciary know very little about the dangers of toxic chemicals or the consequences of climate change. When litigants win, when they manage to overcome these hurdles, governments can use their prerogative powers to counter the effects.15

This pessimism frustrated those who hoped to win stronger legal tools. A second generation of litigators wanted to emulate the feminist movement by demanding constitutional guarantees, but the sceptics rejected Charter litigation. After the Supreme Court sanctioned cruise missile testing, they decided that too many judges were unsympathetic.16 As one of the directors of WCELA, Bill Andrews argued that formal rights would not help activists who were fighting "in the trenches."17 When the Ontario government proposed an EBR, Paul Muldoon and Rick Lindgren demanded a cluster of institutional reforms as members of the task force. With the support of CELA, Pollution Probe, and the Canadian Environmental Defence Fund, they asked business representatives to endorse participatory rights, broad causes of action, and substantive guarantees. However, their position was undermined by Roman’s critique. He delivered a sober message: if environmental lawyers want to eliminate different forms of industrial pollution and curb the effects of global warming, they have to "give up their obsession with litigation."18 Courts would not be able to solve these "polycentric problems" by enforcing

15 Personal interview with Andrew Roman, June 1995.
18 "Minutes of the Task Force on the Ontario Environmental Bill of Rights" (File EBR940429-Appeal P-9400730).
new rights. Instead of working with state officials to develop innovative programs, environmentalists and their adversaries would fight hundreds of meaningless court battles.

Muldoon and Lindgren had to consider another source of opposition. When they discussed the stages of bargaining with their “constituents,” some activists argued that vaguely worded rights would undermine the strength of the environmental movement.\(^{19}\) Wayne Roberts, a leading member of the Green Economic Coalition, insisted that social change is produced by public pressure and “mass protest,” not litigation. Community groups organize local projects, establish legislative coalitions, and initiate direct actions. Legal advocacy groups are bureaucratic and institutionalized. Well-educated, middle-class professionals naively assume that courts will impose dramatic reforms. These sceptics hoped that Ontario’s EBR would make the regulatory regime more accessible, but they did not want judges to exercise commanding powers.

Pessimism affected the feminist movement just as much. The Ad Hoc Committee managed to win new constitutional guarantees. Still, some activists continued to resist the equality rights project. In 1982, after leaving NAC, Lynn McDonald wondered why the founders of LEAF expected judges to reject legal principles that have hurt women for centuries. As a social democrat, she did not want to see “basic social values” shaped by “elderly men” who are “less accountable to the public than elected politicians.”\(^ {20}\) Even though CACSW supported the great patriation campaign, it demanded a series of unconventional rules. The president, Lucie Pepin, argued that male judges over the age of fifty should not be allowed to hear sexual assault cases. Despite their optimism, LEAF litigators quickly discovered that most judges did not have the “life experience” to understand complex forms of discrimination. While planning Charter claims, they urged the

\(^{19}\) Personal interview with Paul Muldoon, July 1995.
Department of Justice to improve the Canadian Human Rights Commission.21 Feminists became even more sceptical during the 1990s. After the Supreme Court delivered Seaboyer, rape counsellors started to question the value of institutional change. The first ministers introduced the Charter, and federal officials amended the Criminal Code, but the “same old judges” were in control.22 Many activists agreed with this somber assessment. NAC demanded mandatory training programs for police officers, Crown attorneys, and judges because “all of our institutions reflect sexism, particularly our judicial institutions.”23

Although leading members of the Supreme Court endorsed the equality rights project, especially Chief Justice Dickson and Justice Wilson, lower court judges cultivated this distrust by issuing unsympathetic decrees. During the moratorium on section 15, when LEAF was taking shape, a Manitoba Provincial Court judge announced that “women should be given razor blades if they want abortions.”24 The Coalition for Reproductive Choice and the Manitoba Action Committee on the Status of Women expressed outrage, not optimism. In Ontario, NAC and the Toronto Rape Crisis Centre demanded the removal of a County Court judge who “rated” the seriousness of sexual assaults. Despite winning Morgentaler, CARAL continued to monitor the lower courts and section 96 trial courts. While dismissing charges against “pro-life” protesters, an Ontario judge declared that clinics commit a form of murder.25 The Judicial Council of Canada was asked to consider another incident. After a

21 Brief to the Department of Justice, June 1986.
Chapter Six: Post-Materialists and the Expansion of Judicial Power

Nova Scotia judge decided that CARAL activists could not challenge the *Medical Services Act*, they discovered that he once supported Birth Right, an anti-abortion group. These cases discouraged women who assumed that section 15 would undermine discriminatory attitudes. Near the end of her term as president of NAC, Judy Rebick did not express faith in Canada’s judicial system. She promised that women would “take to the streets” when judges ignored the democratic spirit of the Charter.26

These personal accounts are valuable, but we can use the National Survey on Strategic Choices to find out how feminists and environmentalists evaluate litigation. This evidence represents a crucial piece of the puzzle. Legal advocacy groups confront a range of obstacles. SLDF and LEAF have to work around threshold tests, vague regulatory statutes, and the enduring tradition of judicial deference. However, we could discover another constraint: internal opposition. Even though litigators seem hopeful, advocacy groups might express serious reservations. Respondents indicated their views by considering four positions.27 Those who are “very sceptical” believe that litigation is costly and dangerous. According to their assessment, formal rights actually help interests that oppose gender equality and environmental protection. The “sceptics” reject legal action because other forms of collective action are far superior. They do not want to waste their resources fighting court battles. The respondents are “moderately optimistic” if they believe that litigation should be grafted onto traditional strategies. These activists understand the limits of legislative politics and the risks of judicial review. Those who are “very optimistic” characterize litigation as a “powerful instrument of reform.” They assume that feminists and environmentalists can tame industrial pollution, attack the roots of inequality, and discipline wayward governments – without taking their concerns to representative institutions.

27 If readers want to review this question in greater detail, they can see the Appendix.
Graph VII reveals several fascinating patterns. There is a gap between the legal advocates and the advocacy groups. The lawyers are deeply committed to court strategies:

Graph VII: Evaluating Litigation

Note: the axis records the number of respondents
Source: 1995 National Survey on Strategic Choices (N = 399)

thirty percent are “very optimistic” and sixty percent are “moderately optimistic.” The advocacy groups are less enthusiastic: sixty-two percent are “moderately optimistic,” but only twelve percent are “very optimistic.” Size only has a weak influence on the evaluations: the large national organizations and seventy-five percent of the small groups acknowledge the benefits of litigation. Although SLDF and LEAF can count on this reservoir of support, litigators have to consider a potential source of opposition: twenty-six percent of the executive directors are “sceptical” or “very sceptical.” They characterize litigation as risky and time-consuming.

Instead of relying on the core question, we forced the respondents to think about litigation comparatively. The gap between legal advocates and advocacy groups becomes

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28 Small groups have fewer than 5,000 individual members, under $50,000 for an annual budget, and less than four employees.
quite apparent. More than half of the lawyers believe that litigation is the "single most effective" strategy or "one of the most effective" strategies, but seventy-one percent of the executive directors characterize court strategies as "moderately effective" or completely "ineffective." This finding reveals the influence of legal training. When they think about the law, litigators stress the possibilities and executive directors emphasize the constraints. The gap between the two movements is just as significant. Environmental groups offer the worst assessment. They refuse to see litigation as the "single most effective" form of collective action and fifteen percent want to ignore the judicial system altogether. Feminist advocates offer the best evaluation. They refuse to characterize court strategies as "ineffective." Remarkably, sixty-two percent believe that litigation is the "single most effective" activity or "one of the most effective." This finding seems to confirm an important element of the Charter revolution thesis. Because feminists can base their claims on powerful constitutional rights, they are more willing to acknowledge the benefits of litigation.
Many environmentalists believe that court strategies are flawed because they do not have the same institutional resources.

**IV. Litigation as a Social Movement Strategy**

The historical comparison raised serious questions about the court party thesis. Post-materialists are promoting the growth of judicial power by asking courts to challenge closed decision-making regimes, tame industrial pollution, protect endangered species, fight racial discrimination, and promote gender equality, but they are not abandoning the great representative institutions, Parliament and the provincial legislatures. Post-Charter campaigns usually target opposition parties, federal cabinet ministers, appellate courts, standing committees, and senior bureaucrats. We can verify this conclusion using the National Survey on Strategic Choices – we can find out how the executive directors achieve their objectives.

Most of the respondents have contributed to legal contests as coalition partners and out-of-court supporters. Despite this willingness to litigate, advocacy groups continue to rely on traditional strategies. To achieve their goals, they establish public education projects (eighty-eight percent), launch media campaigns (seventy-six percent), lobby bureaucratic officials (seventy percent), conduct policy analysis (sixty-five percent), and pressure cabinet ministers (sixty-four percent). Instead of working alone, seventy percent of the respondents join coalitions every year. We discovered several interesting differences: feminist groups are more likely to appear before federal legislative committees, use electoral tactics, and organize demonstrations. Most of the environmental groups ignored the constitutional arena between 1987 and 1995, but thirty-seven percent of the feminist groups entered this crucial forum.
The court party thesis has failed too many tests. Post-materialists want to support well-organized legal campaigns — without rejecting traditional tactics. While recognizing the dangers of judicial review, most of the advocacy groups characterize litigation as "moderately effective." Instead of trying to undermine Parliament and the provincial legislatures, feminists and environmentalists hope that courts will make representative institutions more responsive to a broader range of interests. The judicial pluralism thesis captures this sentiment perfectly. Still, it does not tell us how the participants interact. To trace the structure of post-materialist strategies, we have to consider three sources of evidence: the Court Challenges Database, the historical comparison, and the National Survey on Strategic Choices.

Most of the respondents believe that community groups are "very effective." This finding is not surprising because both movements want to respect the standards of participatory democracy. Readers will recognize the popular myth: by "toiling in the trenches," by challenging well-entrenched interests, these activists slowly build support for dramatic reforms. However, lawyers are becoming more powerful. When feminists and environmentalists move their battles into the courtroom, they rely on the expertise of legal advocates. Graph XXXIII lists the principal litigators and their organizational affiliations. Most have provided their services to the pre-eminent legal advocacy groups. When LEAF sponsored a client or intervened before the Supreme Court, the claim was often presented by Mary Eberts, Helena Orton, Elizabeth Shilton, Lynn Smith, Kathleen Mahoney, Linda Taylor, or Anne Derrick. When SLDF entered the judicial system to defend the natural environment, it depended on Greg McDade, Mark Haddock, Stewart Elgie, or Karen Wristen. Some of the litigators have supported precedent-setting campaigns. Brian Crane helped Friends of the Oldman River and the Canadian Wildlife Federation reform the federal
environmental assessment regime. As the first director of litigation, Gwen Brodsky helped LEAF win *Andrews and Brooks*.  

### Table XXXII: The Litigators (1970-1995)

<table>
<thead>
<tr>
<th>Lawyer</th>
<th>Number of Claims</th>
<th>Organizational Affiliations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greg McDade</td>
<td>17</td>
<td>Sierra Legal Defence Fund</td>
</tr>
<tr>
<td>Mary Eberts</td>
<td>13</td>
<td>LEAF - Native Women’s Association of Canada</td>
</tr>
<tr>
<td>David Estrin</td>
<td>11</td>
<td>Canadian Environmental Law Association</td>
</tr>
<tr>
<td>Gwen Brodsky</td>
<td>8</td>
<td>B.C. Public Interest Advocacy Centre - LEAF</td>
</tr>
<tr>
<td>Mark Haddock</td>
<td>8</td>
<td>Sierra Legal Defence Fund</td>
</tr>
<tr>
<td>Stewart Elgie</td>
<td>6</td>
<td>SLDF - Canadian Parks and Wilderness Society</td>
</tr>
<tr>
<td>Rick Lindgren</td>
<td>6</td>
<td>Canadian Environmental Law Association</td>
</tr>
<tr>
<td>Helena Orton</td>
<td>6</td>
<td>Legal Education and Action Fund</td>
</tr>
<tr>
<td>David Poch</td>
<td>6</td>
<td>Energy Probe</td>
</tr>
<tr>
<td>Andrew Roman</td>
<td>5</td>
<td>Public Interest Advocacy Centre - Energy Probe</td>
</tr>
<tr>
<td>Elizabeth Shilton</td>
<td>5</td>
<td>Legal Education and Action Fund</td>
</tr>
<tr>
<td>Lynn Smith</td>
<td>5</td>
<td>Legal Education and Action Fund</td>
</tr>
<tr>
<td>Brian Crane</td>
<td>4</td>
<td>Friends of the Oldman - Canadian Wildlife Federation</td>
</tr>
<tr>
<td>Kathleen Mahoney</td>
<td>4</td>
<td>Legal Education and Action Fund</td>
</tr>
<tr>
<td>Calvin Sandborn</td>
<td>4</td>
<td>West Coast Environmental Law Association</td>
</tr>
<tr>
<td>Ian Scott</td>
<td>4</td>
<td>Canadian Environmental Law Association</td>
</tr>
<tr>
<td>Linda Taylor</td>
<td>4</td>
<td>Legal Education and Action Fund</td>
</tr>
<tr>
<td>Karen Wristen</td>
<td>4</td>
<td>Sierra Legal Defence Fund</td>
</tr>
<tr>
<td>Anne Derrick</td>
<td>4</td>
<td>LEAF - Canadian Abortion Rights Action League</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

An invisible web of personal and professional relationships has linked these experts to a wide range of advocacy groups. During the pre-Charter period, CELA received unwavering support from Pollution Probe and the Federation of Ontario Naturalists. Roger Cotton volunteered for one of Ralph Nader’s organizations and studied with John Swaigen at Osgoode Hall Law School. After the Elora Gorge challenge was dismissed, they encouraged other activists to establish the Canadian Environmental Defence Fund. Murray Klippenstein, another CEDF lawyer, articulated at CELA during the 1980s. NAC and CACSW

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depended on two legal scholars, Mary Eberts and Beverly Baines. When feminists asked the Liberal government to create a federal human rights regime, Eberts presented a compelling analysis. By tracing the evolution of section 1 jurisprudence, Baines persuaded pessimistic activists to consider the benefits of new equality rights.31

These relationships did not wither away during the post-Charter period – they flourished. As a member of the board of directors, Andrew Roman advised Energy Probe during the late 1980s, when it decided to take on the nuclear industry.32 After failing to stop pesticide spraying in Nova Scotia, Elizabeth May worked for PIAC, Cultural Survival, a national organization that promotes the principle of Aboriginal self-government, and the Sierra Club of Canada.33 While fighting for stronger environmental rights, Paul Muldoon has worked for Energy Probe, Pollution Probe, and CELA. Two prominent West Coast lawyers, Murray Rankin and John McAlpine, have supported WCELA and the B.C. Public Interest Advocacy Centre. The current executive director of SLDF, Greg McDade, was the executive director of WCELA during the late 1970s. Leading members of NAC, LEAF, and NAWL have not established permanent committees to weave disparate elements of a single national strategy, but the equality rights project depends on a similar network.34 As advocates and activists moved from one group to another, they extended new strands. Mary Eberts and Beth Atcheson were founding members of the Charter of Rights Education Fund and LEAF.35 After working together at the CBC, Marilou McPhedran helped Kathleen Ruff

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establish the _Canadian Human Rights Reporter_. The National Association of Women and the Law rarely enters the courtroom, but it has produced several prominent litigators, including Helena Orton, who became the second director of litigation for LEAF. Remarkably, Gwen Brodsky has worked for NAWL, LEAF, and the B.C. Public Interest Advocacy Centre. After leaving the Saskatchewan Human Rights Commission, Shelagh Day became the first executive director of LEAF. The relationship between two pivotal organizations was strengthened when she joined NAC to become the chair of the justice committee. Not all of these affiliations were forged by lawyers. After leaving the Canadian Congress for Learning Opportunities for Women, Susan McRae Vander Voet worked for LEAF and METRAC, the Metro Toronto Action Committee on Violence Against Women.

Table XXXIV: The Participation Rate of Litigators (1982-1995)

<table>
<thead>
<tr>
<th>Number of Claims</th>
<th>Number of Environmental Litigators</th>
<th>Number of Feminist Litigators</th>
</tr>
</thead>
<tbody>
<tr>
<td>five to twenty</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>two to four</td>
<td>29</td>
<td>12</td>
</tr>
<tr>
<td>one</td>
<td>99</td>
<td>59</td>
</tr>
<tr>
<td>Total</td>
<td>132</td>
<td>75</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

Of course, some of these players were more active than others. Table XXXIV unearthed an informal division of labour. By peering inside both movements, we discovered a hierarchy with three distinct tiers. The elite litigators occupy the highest tier. As counsel for CELA, SLDF, or LEAF, they presented between five and twenty claims. The middle tier is just as important. Instead of relying on this small cadre, feminists and environmentalists asked forty-one advocates to support between two and four challenges. The lowest tier reveals the effects of a dramatic transformation. During the early 1970s, very few women
practiced law and very few lawyers practiced environmental law. By the late 1980s, both movements could count on an expanding reservoir of private lawyers: 158 litigators presented just one claim. Many of these participants work for large urban firms, but some feminist lawyers have started to establish alternative firms that follow consensual decision-making styles.

We already know that most advocacy groups characterize litigation as "moderately effective." While pursuing conventional forms of collective action, environmental groups want legal advocates to enforce favourable laws (sixty-eight percent), stop damaging projects (sixty-three percent), and promote public awareness (sixty-two percent). After watching LEAF win a string of major court decisions, seventy-one percent of the executive directors want the environmental movement to fight for new justiciable rights. Without rejecting representative institutions, feminist groups hope that litigators will promote public awareness (seventy-one percent), challenge harmful laws (seventy percent), and catalyze legislative change (sixty-five percent). To improve their chances of winning, over half of the executive directors want the feminist movement to dedicate more resources to court challenges.

Most advocacy groups were willing to offer some degree of support – but legal advocates had to earn their trust. This point should be considered carefully. After leaving the patriation round, members of the Ad Hoc Committee asked women to imagine the possibilities of constitutional litigation. They emphasized the differences between the old section 1 and the new section 15. With such an impressive instrument, it was not difficult to...

generate enthusiasm. Without boldly worded constitutional guarantees, environmental lawyers adopted a very different approach. Knowing that most activists were sceptical, they decided to acknowledge the limits of judicial review. David Estrin and John Swaigen did not characterize litigation as an impressive weapon of social change. The first edition of *Environment on Trial* reviewed disappointing court decisions, financial barriers, and a wide array of legal hurdles. Post-Charter lawyers recognized the same obstacles. Even though Paul Muldoon urged both levels of government to create stronger rights, he knows that most groups cannot afford to initiate lengthy court battles. SLDF litigators promised to “revolutionize” Canadian environmental law, but they could not ignore the realities of judicial review. After failing to prevent a controversial forest management agreement between the Alberta government and Daishowa, Stewart Elgie admitted that litigation can be costly and ineffectual. He even questioned the institutional capacity of adjudication. While boards and tribunals can examine “substantive issues,” the common law courts usually focus on narrowly defined “technical issues.”

Environmental advocates recognized these problems, but they argued that legal claims could perform certain modest functions. Estrin and Swaigen promised that determined groups would be able to achieve their objectives just by threatening to litigate. They could secure access to decision-making institutions and embarrass wayward governments. Like other pre-Charter advocates, they believed that unfavourable decisions could be turned into valuable political resources. Post-Charter litigators expressed similar

38 David Estrin and John Swaigen, eds., *Environment on Trial* (Toronto: CELRF and CELA, 1974).
41 Estrin and Swaigen, eds., *Environment on Trial*, 11.
sentiments. As the general counsel for CELA, Rick Lindgren has argued that litigation can produce unlikely benefits. By losing in court, small community groups can affect the legislative agenda. They can expose poor enforcement measures or demonstrate the deficiencies of regulatory laws. CEDF lawyers would have to abandon their work if they rejected this modest approach. Instead of selling the great virtues of court strategies, Gord Crann characterizes legal action as an “agenda-setting tool.” Some feminists started to lower their expectation during the early 1990s, after LEAF lost a cluster of major contests. They stressed the importance of counter claims. By intervening, women could challenge fathers fighting custody disputes, rapists who wanted to escape prosecution, and corporate interests that ignored the democratic spirit of equality rights.

Litigators cultivated support by promoting the benefits of variegated strategies. Activists with different areas of expertise designed legal tactics and legislative campaigns. The court party thesis ignores this crucial piece of the puzzle. Post-materialists are fueling the growth of judicial power, but they are not trying to circumvent majoritarian institutions. During the pre-Charter period, Estrin and Swaigen warned advocacy groups about a dangerous trap—foolishly believing that courts are agents of social change. They urged community activists to organize press conferences, appear before public hearings, and lobby regulators. During the moratorium on section 15, the founders of LEAF published *Women and Legal Action* with the support of Doris Anderson and CACSW. While exploring the strengths of various approaches, they decided that litigation should be combined with other forms of political participation. Instead of promising dramatic victories, they ended by

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43 Personal interview with Rick Lindgren, July 1995.
44 Personal interview with Gord Crann, June 1995.
45 Personal interview with Susan McRae Vander Voet, September 1996.
46 Personal interview with David Estrin, October 1995; Personal interview with John Swaigen, July 1995.
conceding that litigation is a blunt, costly instrument. When LEAF started to accept cases, Beth Symes and Shelagh Day announced that Charter claims would be “one component of an overall strategy to achieve equality.” They wanted NAC to lobby legislators and develop public education projects because most judges are “White, upper-middle class, and male.” Their colleagues agreed. According to Mary Eberts, the process of elaborating constitutional rights should include public debate, political bargaining, and Charter litigation. While expressing optimism, Lynn Smith issued a grave warning: feminists must not allow litigation to “dominate the political and social struggle to obtain substantive equality.”

By the late 1980s, every major feminist organization espoused the virtues of integrative strategies. After LEAF lost a handful of important cases, they started to see that certain barriers were inescapable. Women could invoke section 15 and section 28, but some judges would never accept a substantive interpretation of equality. Instead of vigorously attacking the causes of discrimination, they guarded traditional guarantees, especially the right to a fair trial. While LEAF was fighting the Seaboyer challenge, Christie Jefferson insisted that “litigation is only one element of a larger political strategy.” As the second executive director, she wanted to encourage the workshop process. When NAWL activists appeared before the Legislative Committee on Bill C-49, they argued that women cannot ignore the law because it “can direct behaviour.” At the same time, they declared that feminists build consensus and public support by “lobbying in the political arena and

challenging sexist laws in the courts."^{53} During the 1990s, a new generation of litigators simply assumed that different forms of collective action "energized" the equality rights project. They acknowledged the limits of legislative lobbying and the risks of judicial review.\(^\text{54}\)

Without their own constitutional guarantees, environmentalists had to pursue variegated strategies. Because most of their claims failed, they usually planned to use traditional legislative tactics. As the general counsel for Pollution Probe and the co-counsel for CELA, Paul Muldoon has asked other activists to consider the various functions of litigation. By presenting private prosecutions and judicial review applications, environmental groups can stop harmful practices, compensate victims, disseminate information about pressing problems, prompt legislative reform, and prevent government officials from ignoring interests that lack political power. While identifying these strengths, he has continued to argue that legal action "cannot replace community organization – it cannot supplant campaigns to enhance public awareness."\(^\text{55}\) To win meaningful changes, environmentalists have to take their concerns to Environment Canada, provincial agencies, and the federal cabinet. Advocates from CEDF and SLDF have accepted this approach. According to Murray Klippenstein, it is almost impossible to characterize litigation as a powerful instrument of reform. Although favourable decisions can improve the enforcement of regulatory laws and generate public pressure, they cannot transform entire societies.\(^\text{56}\) Instead of rejecting traditional forms of participation, the Canadian Environmental Defence Fund "supports the movement" by providing services to small community groups and large coalitions. As the executive director of the Sierra Legal Defence Fund, Greg McDade insists

\(^\text{54}\) Personal interview with Carissima Mathen, October 1995.
\(^\text{56}\) Personal interview with Murray Klippenstein, July 1995.
that court challenges can punish polluters, fight bureaucratic resistance, and modify the basic "building blocks" of society.\textsuperscript{57} However, he also believes that litigation complements lobbying, direct actions, and policy analysis.

These variegated strategies respect certain strategic realities and a normative vision of Canadian democracy. Post-materialists champion social diversity, policy-making institutions that are accessible and transparent, gender equality, global peace, innovative state intervention, and elements of minoritarian democracy. Instead of rejecting representative institutions, feminists and environmentalists have encouraged a lively debate between judges and legislators. During the Charlottetown round, a coalition of environmentalists asked the first ministers to create new justiciable rights. As the principal representatives, Paul Muldoon, Franklin Gertler, and Marcia Valiante imagined a "dialogue between courts and legislatures with the opportunity for the public to participate."\textsuperscript{58} Sceptical readers can regard this declaration as rhetorical puffery. They can decide to characterize post-materialists as self-righteous demagogues. However, the evidence still stands – feminists and environmentalists are too sophisticated to ignore powerful state officials. When Beverly Baines urged women to support the equality rights project in 1980, she sounded like a seasoned political scientist, not a naive optimist. Coalitions of groups have to litigate and lobby because judges and legislators make political decisions that "involve important value choices."\textsuperscript{59} Mary Eberts agreed. Integrative strategies are crucial, she argued, because "judicial thinking" moves through cycles and "legislative moods" create shifting opportunities.\textsuperscript{60} After CACSW released a somber report on section 15 jurisprudence, feminist advocates defended constitutional litigation by insisting that women "do not have


\textsuperscript{58} Minutes of Proceedings and Evidence of the Select Committee on Ontario in Confederation, 1st Session of the 35th Legislature, August 1991, C-1397.

\textsuperscript{59} Baines, "Women, Human Rights, and the Constitution," 57.

\textsuperscript{60} Sherene Razack's personal interview with Mary Eberts, April 1988.
the luxury of choosing one forum over another.” According to their assessment, the judicial system is a crucial “arena of struggle” that shapes social values and state institutions. LEAF presented the same argument after lesbian activists criticized Butler. A new generation of lawyers concluded that litigation is just as risky and just as promising as other forms of political activism.

Because post-materialists share similar normative concerns and fight their battles by establishing coalitions, we should not be surprised to learn that feminists and environmentalists have worked together. Evidence from the National Survey on Strategic Choices confirms that both movements are committed to the same values. The legal advocates were asked to agree or disagree with a series of propositions. Predictably, eighty-four percent of the feminists accept the statements on social equality: “all citizens should receive equal wages for work of comparable value” and “having a job is the best way for a woman to be an independent person.” Although many work for large corporate law firms, sixty percent of the environmental advocates endorse these declarations. When the two sets of respondents consider the statements on biodiversity, there is complete agreement: seventy percent would give a “portion of their income” and “pay more taxes” to fight environmental degradation.

Even though feminists and environmentalists asked state officials to consider different public policies, professional relationships have linked the two movements. While supporting LEAF as a member of the board of directors, Susan Tanner was a respected member of the Ontario Environmental Assessment Board. After resigning as the

64 “LEAF board is an interesting blend,” *LEAF Letter* (Fall 1986), 2.
president of NAC, Lynn McDonald became an effective critic for the federal New Democratic Party. During the late 1980s, when the Mulroney government introduced CEPA, she wanted to know why the Conservative cabinet refused to create environmental rights. Some post-Charter challenges were launched by groups from both movements. The campaign to stop herbicide spraying in Nova Scotia was organized by Elizabeth May, just after she graduated from law school, Elizabeth Calder, a director of the N.S. Ecology Action Centre, and Victoria Palmer, a founding member of the Women of Framboise. Operation Dismantle was initiated by peace activists and environmentalists, but it received strong support from NAC and the B.C. Voice of Women. In 1990, NAC and CEDF worked with community activists to oppose low-level military flying in Northern Labrador. They wanted the Department of Defence to perform an EARp review before resuming training exercises.

Outside the courtroom, post-materialists marshalled their resources to oppose trade liberalization. When the Mulroney government decided that a free trade arrangement with the United States would strengthen the Canadian economy, feminists and environmentalists organized an impressive campaign to defend components of the welfare state. NAC activists argued that federal officials failed to appreciate the dangers of neoliberalism because they depended on a “gender-neutral” analysis. According to their research, trade barriers protected women in vulnerable labour sectors, important cultural

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Chapter Six: Post-Materialists and the Expansion of Judicial Power

institutions, and non-renewable resources, while trade liberalization favoured male professionals, American corporations, and the old polluting industries. During the 1988 general election, a coalition of groups established the Pro-Canada Network to attack the Free Trade Agreement. While feminists praised the virtues of generous social programs, environmentalists struggled to preserve national regulatory standards. They continued to oppose trade liberalization during the early 1990s, when Canada, the United States, and Mexico were drafting the North American Free Trade Agreement.

At the same time, post-materialists had to counter twin threats: decentralization and deregulation. The Meech Lake Accord was designed to bolster the legitimacy of Canada’s Constitution by recognizing Québec as a distinct society, but the Conservative government agreed to a series of general amendments. Every province was promised greater control over immigration policy and Supreme Court appointments. To restrict the use of the federal spending power, they would receive fair compensation for opting out of certain “shared-cost programs.” The Charlottetown Accord was just as threatening because it promised to grant the provinces new responsibilities and place limits on the federal spending power. Although constitutional issues became less prominent after the 1993 general election, Chrétien quickly accepted elements of Mulroney’s agenda. To make Canada more hospitable to business interests, the Liberal cabinet has lowered the deficit by cutting transfer payments and reducing the size of the bureaucracy. To remove costly forms of duplication, it hopes to rely on equivalency agreements and voluntary compliance agreements. Most provincial governments are reinforcing this trend by revoking “burdensome” regulations and granting new responsibilities to municipalities.

71 “The common sense revolution comes to Ontario’s environment,” CIELAP Newsletter 3(3) (Fall 1995); “Environment will suffer under Tory plan,” Globe and Mail, 14 June 1996, A3.
Post-materialists responded by promoting an older model of federalism. NAC activists challenged the proponents of devolution by criticizing the principle of provincial equality. They wanted Canada’s Constitution to recognize the distinctiveness of Québec without weakening the central government. Both movements refused to accept any limits on the federal spending power because some of their policy objectives required innovative programs and generous levels of funding. Most activists detested the Mulroney cabinet, but they hoped that future governments would be able to play a more creative role. For the same reasons, feminists and environmentalists refused to believe that vaguely worded “objectives” could replace legally binding rules and tough criminal sanctions. NAC and CELA hoped that mandatory standards would force provincial officials to fight environmental degradation and different forms of inequality. Like their predecessors, they asked Canada’s political élites to consider one of the great virtues of strong national governments: they can “balance diverse social values.”

While defending this vision of Canadian federalism, post-materialists opposed the property rights provision and endorsed a version of the “social covenant.” Not surprisingly, feminists and environmentalists criticized the Mulroney government for trying to appease the business community. By citing legislative records and Supreme Court judgements, they characterized the Charter as an instrument of justice. According to their interpretation, it was designed to help those who own very little property. Like the Rae government, they

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75 Jim Cunningham and Allyson Jeffa, “The right to own: should property be protected by the Constitution?” *Calgary Herald*, 29 September 1991, B1; Susan Delacourt, “Women’s
wanted a series of “constitutional pledges” to declare the importance of universal health care, generous social programs, environmental protection, and collective bargaining. NAWL and Energy Probe imagined a tribunal that would enforce new duties by hearing complaints, monitoring schedules, and issuing directives.

Because feminists champion the idea of minoritarian democracy, they could not ignore the plight of gays and lesbians. The Davis government refused to add sexual orientation to the *Ontario Human Rights Code* in 1981, but NAC and NAWL persisted. The Peterson cabinet accepted this controversial amendment five years later, just after the moratorium on section 15 was lifted. To reform the federal regime, an impressive campaign was launched by NAC, NAWL, LEAF, the B.C. Public Interest Advocacy Centre, and EGALE, Equality for Gays and Lesbians Everywhere. Some of their post-Charter claims failed miserably. However, they achieved a dramatic victory in 1992, when the Ontario Court of Appeal decided to rewrite the *Canadian Human Rights Act* by extending protection to gays and lesbians. Fueled by this favourable decision, the coalition persuaded federal officials to endorse *Haig* — sexual orientation was finally added to the list of prohibited grounds.

Another political alliance is older and stronger. Most preservationists do not believe that Canada’s Constitution should create special rights to hunt and fish and some feminists
have criticized the patriarchal character of modern band governments. However, the relationship between post-materialists and Aboriginal peoples is well established.

Table XXXXV: Aboriginal Organizations in Court (1970-1995)

<table>
<thead>
<tr>
<th>Organization</th>
<th>Number of Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Native Women's Association of Canada</td>
<td>4</td>
</tr>
<tr>
<td>Dene Nation</td>
<td>3</td>
</tr>
<tr>
<td>Haida Nation</td>
<td>3</td>
</tr>
<tr>
<td>James Bay Crees</td>
<td>3</td>
</tr>
<tr>
<td>Nechako Neyenkut Society</td>
<td>3</td>
</tr>
<tr>
<td>Aboriginal Women's Council</td>
<td>2</td>
</tr>
<tr>
<td>Carrier-Sekani Tribal Council</td>
<td>2</td>
</tr>
<tr>
<td>Cultural Survival</td>
<td>2</td>
</tr>
<tr>
<td>Fort McKay Indian Band</td>
<td>2</td>
</tr>
<tr>
<td>Metis Association of the Northwest Territories</td>
<td>2</td>
</tr>
<tr>
<td>Ahoushat Band</td>
<td>1</td>
</tr>
<tr>
<td>Alberta Committee on Rights for Native Women</td>
<td>1</td>
</tr>
<tr>
<td>Assembly of First Nations</td>
<td>1</td>
</tr>
<tr>
<td>Clayoquot Sound Band</td>
<td>1</td>
</tr>
<tr>
<td>Council of Yukon Indians</td>
<td>1</td>
</tr>
<tr>
<td>Framboise Mic Mac Band</td>
<td>1</td>
</tr>
<tr>
<td>Friends of the Lubicon</td>
<td>1</td>
</tr>
<tr>
<td>Gwich'in Tribal Council</td>
<td>1</td>
</tr>
<tr>
<td>Innu Rights &amp; the Environment</td>
<td>1</td>
</tr>
<tr>
<td>Little Red River Band</td>
<td>1</td>
</tr>
<tr>
<td>Naskapi-Montagnais Innu Association</td>
<td>1</td>
</tr>
<tr>
<td>National Indian Brotherhood</td>
<td>1</td>
</tr>
<tr>
<td>Native Council of Canada</td>
<td>1</td>
</tr>
<tr>
<td>Niahga Tribal Council</td>
<td>1</td>
</tr>
<tr>
<td>Sheehaht Band of Indians</td>
<td>1</td>
</tr>
<tr>
<td>Union of B.C. Indian Chiefs</td>
<td>1</td>
</tr>
<tr>
<td>Walpole Island Indian Band</td>
<td>1</td>
</tr>
</tbody>
</table>

Total: 43

Source: Court Challenges Database

Environmentalists want to protect endangered species, wild-spaces, natural resources, and old-growth forests. They understand the balance between humans and delicate ecosystems. By working together, environmentalists and Aboriginal organizations have challenged energy agreements, resource development projects, and massive pulp mills. Feminists could not ignore the condition of Aboriginal women because their lives were shaped by a regime that was designed to discriminate. For more than one-hundred years, the federal Indian Act privileged the interests of men.
In Canada, the relationship between post-materialists and Aboriginal peoples represents a major source of litigation. Table XXXV records the bands, councils, and advocacy organizations that launched court challenges with the direct support of feminists and environmentalists between 1970 and 1995. The early environmental claims usually targeted private corporations, municipal governments, or minor bureaucratic officials. For example, the Union of B.C. Indian Chiefs enforced the Fisheries Act with WCELA. This strategic pair persuaded a Provincial Court to convict the Greater Vancouver Regional District. The post-Charter victories were far more dramatic. When Hydro-Québec ignored the James Bay agreement by initiating the second phase of the Great Whale project, Cree and Inuit leaders received support from CELA, WCELA, Friends of the Earth, the Sierra Club of Canada, Greenpeace, and several American groups. After persuading the Federal Court to enforce EARP, they managed to win a parallel dispute: the Appeal Division decided that Hydro-Québec had to review the potential effects of exporting power. The New York Power Authority and Consolidated Edison responded to these decisions by breaking lucrative contracts. ALCAN was trying to expand the Kemano dam complex during this litigious period, but it confronted the Carrier-Sekani Tribal Council, the Nechako Neyenkut Society, WCELA, the Sierra Legal Defence Fund, the B.C. Wildlife Federation, and the Rivers Defence Coalition. Although three separate claims were dismissed, they generated intense political pressure. The provincial government was forced to justify the social, economic, and environmental costs of redirecting the Nechako River.

Feminist groups were just as vigilant. They invoked their equality rights to help those who are “doubly disadvantaged.” LEAF appeared before the Saskatchewan Court of Appeal to argue that section 731 of the Criminal Code and section 15 of the Penitentiary Act reinforce the “anguish of cultural dislocation” by separating Aboriginal women from crucial sources of support.\(^7\) NWAC hoped that litigation would discipline state officials who failed to understand an “undeniable” fact: all women encounter layers of discrimination, from unfair hiring practices to sexual harassment, but Aboriginal women confront several distinct barriers. In 1994, a Canadian Human Rights Tribunal punished a public servant who had experienced racism. NWAC persuaded the Federal Court to overturn this ruling by arguing that it would have damaging effects on “the larger Aboriginal community.”\(^8\) The most dramatic challenge was launched during the Charlottetown round. The Conservative government gave four Aboriginal organizations funding to attend constitutional conferences on self-government. When the Native Women’s Association of Canada was shut out of this process, it asked Mary Eberts to appear before the Federal Court.\(^9\) According to their statement of claim, the Mulroney government placed serious limits on free speech and undermined the principle of gender equality by favouring “male-dominated” groups.\(^9\)

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argument was eventually dismissed and it generated fierce debates within Aboriginal communities, but NWAC activists managed to publicize their vision of the Constitution.

While pressing their claims in court, post-materialists worked with Aboriginal peoples to demand modest policy changes and grand structural reforms. Sympathetic legislators and environmentalists helped two bands overcome one of Ontario's worst disasters: a pulp and paper mill at Dryden released mercury-contaminated effluent into the English-Wabigoon River, jeopardizing the health of an entire ecosystem. Davis assumed that the victims and their supporters would defer to the wisdom of the provincial cabinet and the expertise of bureaucratic officials, but he was wrong. Unrelenting political pressure forced successive governments to revoke lucrative logging permits, establish royal commissions, introduce new regional programs, acknowledge the denial of Aboriginal rights, and grant millions of dollars in compensation. After the Supreme Court delivered *Lavell and Bédard*, feminists marshalled their resources to challenge section 12 of the *Indian Act*. The Liberal government confronted NAC, the Canadian Research Institute for the Advancement of Women, the Manitoba Action Committee on the Status of Women, and Indian Rights for Indian Women. In 1974, thousands of activists wore black to mourn the "death" of the Canadian Bill of Rights. Four years later, while presenting their case to the Lamontagne-MacGuigan committee on Bill C-60, they gained an influential ally: the

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Canadian Human Rights Commissioner. Another coalition challenged the Indian Act before the UN Human Rights Committee and organized a series of disruptive demonstrations. A tribunal decided that section 12 violated the International Covenant on Civil and Political Rights by separating Aboriginal women from their cultural communities, but the Trudeau cabinet refused to respond. In 1985, twelve years after the infamous Supreme Court decision, NAC, LEAF, and NWAC persuaded the Mulroney government to restore the status of women who married “non-Indians.”

Although prominent Aboriginal activists have struggled to secure fully entrenched self-government rights with the support of their allies, they have not succeeded. Since the 1970s, post-materialists have worked with councils and advocacy organizations to promote their shared structural interests. When the Berger Commission reviewed the potential consequences of a pipeline through the Mackenzie Valley, NAC and Pollution Probe hoped that federal officials would recognize land claims, respect the principle of self-government, and place strict limits on the development of natural resources. In 1978, CELA asked the Special Joint Committee on Bill C-60 to endorse a boldly worded public trust doctrine. John Swaigen and Toby Vigod wanted to protect Canada’s natural resources and build support for the idea of self-government. When the first ministers presented the Meech Lake Accord, feminists and environmentalist criticized the closed nature of executive federalism.

98 Minutes of Proceedings and Evidence of the Special Committee of the Senate and House of Commons on Bill C-60, 4th Session of the 30th Parliament, September 1978.
and the substance of the agreement. Instead of expressing trust, they wondered how “eleven men” could jeopardize section 15, ignore the fundamental importance of multiculturalism, and reject the principle of Aboriginal self-government. During the Charlottetown round, post-materialists praised the virtues of asymmetrical federalism. They argued that Canada’s Constitution should grant more powers to Québec and Aboriginal nations – without weakening the central government. With the support of other feminist groups, NWAC activists urged the first ministers to act. They could rewrite section 15, by recognizing the special problems that Aboriginal women face, or introduce an entirely separate Aboriginal Charter of Rights and Freedoms.

This evidence seems to confirm the judicial pluralism thesis. Some advocates believe that litigation is a powerful instrument of social change, but most advocacy groups want to graft it onto other forms of collective action. By pressing their claims in court, they try to punish private corporations, enforce regulatory laws, attack the roots of inequality, undermine bureaucratic resistance – and make governments more responsive. To win policy changes, feminists and environmentalists establish coalitions with interests who also feel ignored or excluded by those in power. Because they pressure legislators to change the rules of the game, post-materialists are affecting the structure of the federal state and the rhythm of Canadian politics. It is difficult to dismiss such an interpretation. However, the Charter revolution thesis has one remarkable strength. Even though post-materialists are driven by this a particular vision of democratic pluralism, their attitudes, strategies, and chances of success are profoundly influenced by political institutions, especially constitutional rights.


100 Some of these proposals were published in 1992. Native Women’s Association of Canada, An Aboriginal Charter of Rights and Freedoms (Ottawa: NWAC, 1992).
The explanations are evaluated in Chapter VII, but we can start to think about this dynamic by considering the gulf between English Canada and Québec.

Although both movements are dominated by large federations that pursue national objectives, activists in Ontario and British Columbia are the principal players. With the support of other English Canadian activists, they are promoting the growth of judicial power. The idea of universal human rights inspired pre-Charter feminists, even though they distrusted the judiciary. Potential litigants could not count on the expertise of a legal advocacy group, but the Vancouver Community Legal Assistance Society filled this gap by supporting two claims, *Bliss* and *Tourangeau*.101 The American tradition inspired their counterparts. During the early 1970s, environmentalists established three groups to mount well-organized court challenges: CELA, WCELA, and the Public Interest Advocacy Centre.102 Another generation of legal advocacy groups emerged during the post-Charter period. After receiving generous grants from philanthropic foundations, law societies, individual members, and governments, post-materialists established LEAF, the Canadian Environmental Defence Fund, and the Sierra Legal Defence Fund.103 Québec is a large province with thousands of lawyers and most citizens are liberal democrats who want state officials to respect certain civil liberties. However, very few activists see litigation as a political instrument. The regional branch of LEAF has never taken root.104 A small network of Montréal lawyers established the Québec Environmental Law Centre in 1989, but it rarely enters the courtroom.105

104 Personal interview with Carissima Mathen, October 1995.
105 Phone interview with Franklin Gertler, October 1995.
Even though these groups want to solve national problems, they brought most of their claims to a handful of courts. We can determine the regional concentration of litigation using the number of hearings as an indicator. Activists from Ontario and British Columbia launched ninety percent of the pre-Charter claims – Québec groups stayed away from Canada's judicial system. There was an important shift between 1982 and 1995. Courts in the Prairie Provinces, the Atlantic Provinces, and the Territories considered thirty percent of the post-Charter challenges. Despite this trend, Québec judges are still marginal players. They were asked to review only six claims. This finding is definitive: the battlegrounds of judicial politics are Victoria, Vancouver, Toronto, and Ottawa, not Montréal and Québec.

Table XXXVI: Section 96 Courts and Provincial Courts as Sites of Litigation (1970-1995)

<table>
<thead>
<tr>
<th>Region</th>
<th>1970-81</th>
<th>1982-95</th>
<th>1970-81</th>
<th>1982-95</th>
<th>Total</th>
</tr>
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<tbody>
<tr>
<td>British Columbia</td>
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<td>58</td>
<td>1</td>
<td>10</td>
<td>88</td>
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<tr>
<td>Ontario</td>
<td>33</td>
<td>26</td>
<td>0</td>
<td>22</td>
<td>85</td>
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<tr>
<td>Prairie Provinces</td>
<td>4</td>
<td>30</td>
<td>0</td>
<td>9</td>
<td>43</td>
</tr>
<tr>
<td>Atlantic Provinces</td>
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<td>11</td>
<td>0</td>
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<td>Québec</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>2</td>
<td>6</td>
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<tr>
<td>Territories</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td>130</td>
<td>1</td>
<td>54</td>
<td>248</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

The judicial pluralism thesis helps us understand the implications of value change, but the Charter revolution thesis was able to predict this divergence. These explanations might fit together quite well. The decline of deference started before the patriation round. After experiencing unprecedented levels of physical security, stable economic growth, and greater educational opportunities, post-war generations expressed new priorities. Instead of just thinking about material needs, they asked political élites to fight racial discrimination, gender inequality, environmental degradation, and nuclear proliferation. To achieve their objectives, post-materialists explored different forms of collective action, from disruptive
demonstrations to conventional legislative tactics. English Canadian activists asked
governments to introduce constitutional guarantees, mandatory duties, and broad causes of
action because feminists were moved by the international rights movement and
environmentalists were inspired by the American tradition. However, the Charter is
intensifying and redirecting these pressures. Once citizens were granted a direct stake in
the constitutional compact, deferential attitudes seemed antiquated and misplaced. As
judges became more daring, English Canadian activists developed novel legal arguments
and sophisticated court strategies. These interests are promoting the growth of judicial
power, but feminists have enviable resources and a better chance of winning.
CHAPTER SEVEN

Explaining the Expansion of Judicial Power

I. Values and Institutions

Constitutional rights now seem like an intrinsic part of Canada's political tradition. By invoking their guarantees, citizens routinely criticize intrusive governments or demand new entitlements. The principle of parliamentary supremacy sounds archaic and undemocratic because most Canadians believe that legislatures should respect certain fundamental values. However, when we think about the growth of judicial power historically, it is puzzling. For over a century, the principle of legislative supremacy created a binding constraint: courts were not allowed to challenge responsible governments by questioning the substance of their decisions. The Fathers of Confederation introduced two narrowly framed cultural rights, but judges were not asked to enforce a long list of constitutional guarantees. These features reflect the influence of the venerable British tradition.¹ Successive generations acknowledged the benefits of parliamentary democracy. They expected elected representatives to rank the importance of social values and direct the course of public policy. Instead of demanding strict limits on the exercise of state authority, they deferred to the wisdom of legislators and expertise of bureaucrats. Not surprisingly, most political élites defended this view of democracy. If they respected the federal division of powers and honoured the conventions of parliamentary government, their decision-making

authority was virtually boundless. Judges did not quietly expand their dominion. While accepting conventional disputes, most members of the judiciary admitted that courts were poorly equipped to solve complex social problems.

The Charter revolution thesis solves this puzzle by pointing to the effects of institutions. Trudeau and his allies were not moved by the same concerns that shaped the American Constitution – they were not inspired by a profound distrust of state authority. The patriation campaign was guided by their structural location in the federal system. Boldly worded rights were designed to counter fractious regionalism and Québec nationalism. The Liberal cabinet knew that litigation would create administrative inefficiencies and political controversies, but it needed a new instrument to foster national unity. This imperative was so powerful that Trudeau was willing to surrender the benefits of legislative supremacy. Since 1982, the Charter has unleashed a wave of dramatic changes.2 It is cultivating distrust, challenging old attitudes, undermining well-established institutions, and promoting the growth of judicial power – except in Québec. Even though most francophones are liberal democrats, they do not want nationally framed rights to undermine the distinctiveness of their society.

The court party thesis acknowledges this institutional change, but it asks us to consider the profound effects of value change. Citizens born after World War II are more likely to cherish global peace, social equality, and biodiversity because they have experienced economic affluence, unprecedented levels of physical security, and greater educational opportunities. Post-materialists are taking their claims to courts, not the great representative institutions, because they can achieve their unpopular goals without entering the seamy world of legislative politics. Instead of wasting their resources trying to pressure

neo-conservative governments or struggling to educate indifferent voters, feminists and environmentalists can attack unfavourable laws and expand the scope of entitlements by choosing to litigate. This strategy works because prominent members of the Supreme Court view themselves as thoughtful agents of social change. They use their powers to attack gender inequality, preserve generous social programs, and protect “disadvantaged” minorities. If post-materialists were not attracted to the judicial form, if legal strategies failed to produce significant victories, the pace of judicialization would be much slower. Individuals and corporations would do what the first ministers intended: invoke traditional rights to check state intervention.

The alternative interpretation suggests that new interests are changing the rhythm of Canadian politics and the structure of the federal state. Using the language of social science, it flips the causal arrows: value change preceded and produced institutional change. Post-materialists started to see litigation as an instrument of pluralism during the early 1970s because they felt ignored and excluded by governing parties. To expose secretive agreements and document the effects of antiquated laws, they decided to litigate. When legal strategies failed, coalitions of groups organized to change the rules of the game. Instead of returning to courts with flawed tools, feminists and environmentalists demanded institutions that would promote democratic pluralism. According to this interpretation, the normative thrust of the court party thesis is a source of weakness. Post-materialists are not abandoning representative institutions – they want to make Parliament and the provincial legislatures more responsive. We can finally evaluate these explanations by sifting through the evidence.

II. The Court Party

If students of Canadian politics reject the court party thesis altogether, they are simply reacting to normative concerns. The proponents of this provocative explanation
deserve credit for identifying the link between post-materialism and the emergence of powerful courts. Using the National Survey on Strategic Choices, we confirmed that most legal advocates prize social diversity, global peace, gender equality, and biodiversity. More than half are post-materialists – only three percent are materialists. When the respondents expressed “mixed” priorities, they usually paired “maintaining order” with public participation. This correlation does not contradict the court party thesis. Although post-materialists distrust political élites, they do not fear state authority. Environmentalists hope that strict regulatory laws will curb harmful forms of behaviour and they want these measures to be enforced by powerful bureaucratic agencies. Feminists ask state officials to prosecute rapists, regulate pornography, and prohibit hate literature. While promoting the virtues of equality, they argue that human rights commissions should exercise commanding statutory powers. The court party thesis predicted another pattern. The lawyers are “very confident” in the legal system and the Supreme Court. They believe that litigation can produce significant victories: thirty percent are “very optimistic” and sixty percent are “moderately optimistic.” When we asked the legal advocates to evaluate litigation comparatively, more than half of the respondents characterized it as the “single most effective” strategy or “one of the most effective” strategies.

This optimism has inspired two generations of litigators. Even though few Canadians would recognize their names, Mary Eberts and Greg McDade are principal players who influence the evolution of environmental law and section 15 jurisprudence. Instead of designing their legal strategies in isolation, Helena Orton, Elizabeth Shilton, Kathleen Mahoney, Anne Derrick, Mark Haddock, and Stewart Elgie have encouraged hundreds of like-minded activists to press their claims in court. Individuals became less important after 1982 because these legal advocates formed different types of alliances with advocacy groups to reap the benefits of collaboration. Strategic pairs and court coalitions organized twenty-seven percent of the pre-Charter actions and over half of the post-Charter claims. Graph IX traces this dramatic increase. Both movements could launch so many
campaigns because they received financial support from government agencies and law societies. The Law Foundation of British Columbia has given large grants to the Sierra Legal Defence Fund and the B.C. Public Interest Advocacy Centre. Between 1987 and 1993, a substantial proportion of LEAF cases were subsidized by the Court Challenges Program.

Post-materialists received a different type of support from well-placed state officials. The court party thesis claims that administrative boards and quasi-judicial tribunals promote social equality and environmental values by acting like advocates, not impartial umpires. CHRC commissioners have scolded governments for ignoring the rights of vulnerable minorities. During the late 1970s, after mobilizing sympathetic interests, Gordon Fairweather backed the campaign against the Indian Act. He forced the Liberal

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government to consider the discriminatory effects of section 12. During the 1980s, several Ontario boards helped environmentalists by granting intervenor funding. They hoped to correct an imbalance: proponents had the resources to promote their interests, but concerned citizens could not afford to participate.\(^5\) Even though Canada’s judiciary refused to endorse this practice, the Peterson government was willing to introduce the *Intervenor Funding Project Act*.\(^6\) The first ministers created another opportunity: human rights commissions could try to expand their powers by using the Charter as an interpretive tool. In 1993, after deciding that “same-sex couples” are protected by the *Canadian Human Rights Act*, a CHRC tribunal concluded that all public servants can apply for bereavement leave. This strategy would have bolstered the authority and prominence of the entire federal regime, but the Supreme Court decided that boards and tribunals cannot change the spirit and substance of laws that are passed by democratically elected governments.\(^7\) Despite this reversal, Max Yalden continued to pressure the newly elected Liberal government.\(^8\) As the commissioner of the CHRC, he urged Chrétien to add sexual orientation to the list of prohibited grounds.

Some judges have promoted the post-materialist agenda by abandoning elements of Canada’s cautious judicial tradition. Chief Justice Dickson cultivated an interpretive approach that was designed to protect the interests of the disadvantaged and Justice Wilson earned the respect of the feminist movement by reading reproductive rights into the Charter.\(^9\) Although proponents of the court party thesis acknowledge these decisions, they emphasize the great victories, *Andrews* and *Schachter*. In 1989, LEAF persuaded the

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7 *Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 582.


Supreme Court to reject the old, formalistic model of equality. By concluding that “distinctions” are only unconstitutional when they cause some form of discrimination, Justice McIntyre guarded a broad range of social programs, including pay equity policies. Five years later, LEAF litigators defended the creative nature of judicial review. As the author of Schachter, Justice Lamer decided that courts can rewrite laws by “reading in” costly obligations if they also consider the economic effects of their decisions.

Environmentalists celebrated Oldman River the same year. After recognizing the work of the Brundtland Commission, the Supreme Court confirmed the binding nature of EARP and the constitutional validity of the federal regulatory regime. Outside the courtroom, some judges have sounded like committed members of the court party. Justice Wilson has argued that judges should exercise a “modest degree of creativity in areas where modern insights and life's experience have indicated that the law has gone awry.” When the rape shield challenge was before the courts, she suggested that Canada’s legal system ignored the needs of women. In 1991, Justice McLachlin argued that male legislators have attempted to solve difficult social problems “on the backs of women.”

The court party thesis identifies and arranges several pieces of the puzzle, but it is weakened by several flaws. Some litigants challenged popular majorities by asking judges to revoke statutory provisions; others achieved major victories by influencing the interpretation of constitutional rights and common law principles. However, most claims did
not invite bold judicial activism. Using a wide range of arguments, feminists and environmentalists targeted administrative orders, municipal by-laws, hostile actions, and private companies. The court party thesis presents a caricature of post-materialists – it exaggerates their contempt for representative institutions and their commitment to litigation. Instead of trying to circumvent Parliament and the provincial legislatures, feminists and environmentalists present their concerns to legislative committees, opposition parties, and government MPs. Using the National Survey on Strategic Choices, we learned that most legal advocates accept conventional forms of collective action. To achieve their goals, ninety-eight percent of the respondents are willing to lobby cabinet ministers and bureaucratic officials.

These views reflect a series of strategic considerations. Post-materialists understand the risks of relying on boards and tribunals. Some officials are unsympathetic. The Alberta Human Rights Commission and the Manitoba Human Rights Commission did not act like zealous advocates during the late 1980s – they dismissed complaints and depended on a formalistic interpretation of equality. CHRC commissioners exercised their powers to support the post-materialist agenda, but independent tribunals delivered unfavourable orders. The Native Women's Association of Canada entered the courtroom to challenge a curious ruling. Mary Pitawanakwat was the victim of racial discrimination, but she was asked to accept a new contract outside Saskatchewan, away from her family and friends. Even if environmental boards and human rights commissions are staffed by committed post-materialists, they have to follow clearly defined statutory limits, which are established by governments, and a long list of procedural rules, which are enforced by the courts. To maintain their credibility, these agencies cultivate distinct problem-solving styles. Canada's judiciary has frustrated post-materialists by preserving alternative forms of dispute resolution. In 1974, Pollution Probe and the Consumers' Association of

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16 Pitawanakwat v. Canada (Department of Secretary of State) [1994] F.C.J. 552.
Canada asked the Federal Court of Appeal to reverse an NEB order, but Chief Justice Roy Jackett decided that administrative agencies can use their discretion to stray from the common law tradition. Although pre-Charter feminists wanted the Ontario Human Rights Commission to become more adversarial, several judgements acknowledged the virtues of bargaining and reconciliation. They protected the OHRC regime by stopping a flood of collateral civil claims and judicial review petitions.

Post-materialists are not rejecting representative institutions because they also understand the risks of litigation. Proponents of the court party thesis can suggest that feminists are jeopardizing the strength of Canadian democracy by emphasizing bold judicial decisions, especially Andrews and Schachter. However, they have to overlook an enduring constraint to make this argument. The Charter tempts judges to enter the political fray, but courts know that governments have stronger democratic credentials. Instead of trying to antagonize the elected branch by pursuing a bold program of reform, Canada's judiciary has applied various devices to narrow the scope of review, circumscribe broadly framed guarantees, and accept laws that impose "reasonable limits." Those who lament the loss of parliamentary supremacy cringe when they think of Justice Wilson, the great champion of the equality rights project, but most of her colleagues have expressed different views.

Justice Sopinka has discouraged claims that invite brah activism. According to his

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assessment, feminists should “use the political process, not the courts” because the Charter cannot “cure all the economic and social problems that affect Canadian women.”

III. Judicial Pluralism

The court party thesis suggests that post-materialists started to promote the growth of judicial power during the 1980s, after the first ministers introduced constitutional rights. The alternative interpretation argues that feminists and environmentalists have viewed litigation as an instrument of pluralism since the early 1970s. Because they felt ignored and excluded by Canada’s political élites, post-materialists asked judges to enforce regulatory statutes, expose secretive bureaucratic arrangements, and correct legislative deficiencies. When legal strategies failed, they pressured governments to introduce mandatory duties, action-forcing provisions, statutory rights, and constitutional guarantees. This explanation does what the others cannot: by tracing the gradual emergence of new interests and identifying the nature of their demands, it reveals the structural consequences of post-materialism. The Charter is cultivating distrust, challenging old deferential attitudes, and luring political adversaries into the courtroom, but value change preceded and produced institutional change.

Post-materialists are inspired by a normative vision that prizes social diversity, policy-making institutions that are accessible and transparent, gender equality, global peace, innovative state intervention, and elements of minoritarian democracy. When Mary Eberts and Gwen Brodsky presented their substantive interpretation of equality as LEAF litigators, they characterized the Charter as an instrument designed to help the “excluded” and the “powerless.” During the EBR task force, Paul Muldoon and Rick Lindgren argued that political executives “should not have the exclusive power to define and enforce societal

norms." Like feminists, they defended the legitimacy of judicial review by documenting the frailties of majoritarian institutions. However, post-materialists do not want Parliament and the provincial legislatures to become peripheral— they want citizens to participate in a lively debate between courts and governments. By giving us a caricature of post-materialists, proponents of the court party thesis underestimate their commitment to participatory democracy. Litigation invites a centralized, hierarchical decision-making structure, but legal advocacy groups have not emulated traditional law firms. To maintain their credibility, they consult their "constituents," organize court coalitions, and support legislative campaigns. The Canadian Environmental Defence Fund rejected a conventional approach by allowing private lawyers and their clients to dominate the strategic-planning process. Although LEAF litigators were less willing to acknowledge the benefits of collaboration because "working groups" consume financial resources and intellectual energy, they became more responsive and accountable by learning from a series of embarrassing blunders.

Readers can view feminists and environmentalists as undemocratic zealots and still accept the judicial pluralism thesis because post-materialists are driven by normative concerns and strategic calculations. These activists are realists—they see judges as political actors who are influenced by competing social forces and public opinion. When Beverly Baines encouraged women to support the equality rights project during the patriation round, she argued that coalitions of groups have to litigate and lobby because judges and legislators make decisions that "involve important value choices." Post-materialists understand the dynamics of Canadian politics better than some politicians.

According to Mary Eberts, the distribution of state authority creates a powerful incentive to

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23 "Minutes of the Task Force on the Ontario Environmental Bill of Rights" (File EBR940429-Appeal P-9400730).
24 Personal interview with Gord Crann, June 1995; Personal interview with Murray Klippenstein, July 1995.
25 Sherene Razack's personal interview with Beth Symes, Marilou McPhedran, and Beth Atcheson, March 1988.
pursue variegated strategies. The Charter has expanded the scope of judicial review, but the policy-making process is shaped by political executives, opposition parties, and central agencies. Trends in judicial thinking move through cycles and voters can elect parties with different ideological programs. Guided by this sage assessment, most activists have refused to choose one forum over another.

Sceptics might have lingering doubts. They might suspect that feminists and environmentalists acknowledge the virtues of democratic participation while trying to circumvent the great representative institutions. However, the National Survey of Strategic Choices confirms these personal accounts. Post-materialists express greater faith in legal institutions as they win court battles, but they also express a surprising degree of confidence in Parliament, the federal government, and the federal public service. Instead of favouring unconventional forms of participation, including litigation, legal advocates sign petitions, appear before legislative committees, bargain with bureaucrats, and pressure those at the pinnacle of Canada's political system — cabinet ministers. The advocacy groups offered a similar response. To achieve their goals, they establish public education projects (eighty-eight percent), launch media campaigns (seventy-six percent), meet with bureaucratic officials (seventy percent), conduct policy analysis (sixty-five percent), and lobby cabinet ministers (sixty-four percent).

The court party thesis failed another test. Most of the legal advocates are willing to characterize litigation as an effective instrument of reform, but the advocacy groups are less enthusiastic: sixty-two percent are only "moderately optimistic." They argue that feminists and environmentalists should achieve their goals by mixing different forms of collective action. Although SLDF and LEAF try to cultivate this conditional support, they confront a source of opposition: twenty-six percent of the executive directors are "sceptical" or "very

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27 Sherene Razack's personal interview with Mary Ebets, April 1988.
sceptical" because they believe that litigation is risky and time-consuming. When legal advocates and advocacy groups evaluate court strategies comparatively, the gap widens. More than half of the lawyers believe that litigation is the “single most effective” strategy or “one of the most effective” strategies, but seventy-one percent of the executive directors characterize it as “moderately effective” or completely “ineffective.” The court party thesis ignores the ambivalence that many activists feel, but the judicial pluralism thesis captures this sentiment perfectly. Post-materialists pursue variegated strategies because they understand the limits of legislative strategies and the dangers of judicial review.

The judicial pluralism thesis can also explain the frequency of participation. The rival interpretations expected the rate to climb in 1982 and 1985, after periods of institutional change. They assumed that post-materialists would stay away from Canada’s judicial system unless governments intervened to create new rights. They did not predict the intriguing pattern illustrated in Graph X: the environmental movement persisted even though it failed to win broad statutory rights and constitutional guarantees. CELA caused
the first surge in 1972 by orchestrating a campaign to enforce Ontario's *Environmental Protection Act*. The Federal Court sparked the second jump in 1990. *Canadian Wildlife Federation* generated excitement because it declared that judicially enforceable duties framed the EARP regime.  

The judicial pluralism thesis solves this piece of the puzzle by reconsidering the role of political institutions. State structures create powerful incentives that are difficult to ignore; they even influence the goals and preferences of political players. However, sophisticated activists understand this dynamic. Instead of blindly responding to the push and pull of authoritative rules – they try to work around formal obstacles. The historical comparison confirmed this claim. When pre-Charter environmentalists confronted the traditional public nuisance standard, they worked with like-minded individuals as out-of-court supporters. The Federation of Ontario Naturalists and Greenpeace did not waste their resources trying to win access – they convened press conferences or pressured bureaucratic officials. A handful of advocacy groups brought civil claims as parties, but environmentalists never participated as intervenors. This strategic choice reflects the same sharp instincts. Knowing that courts rejected most applications, pre-Charter activists explored other legal options. After evaluating the risks and benefits of different claims, almost half of the litigants side-stepped the law of standing altogether by participating as private prosecutors. Complainants were very successful; they managed to win seventy-one percent of their actions, raising the general success rate to forty-four percent. By learning how to overcome some of the limits of litigation, environmentalists enforced regulatory statutes, punished the polluting industries, and embarrassed governments.

Post-Charter feminists were guided by similar instincts. Even though some students of judicial politics have characterized the standing trilogy as an unconditional victory for all public interest groups, experienced litigators emphasized a limitation: courts

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still exercise a significant degree of discretion. While applying the genuine interest test, unsympathetic judges can simply decide that other litigants are somehow "more appropriate." Instead of trying to secure party status, LEAF advocates expected to fight most of their battles by sponsoring individual women. However, this form of participation seemed very unattractive by the late 1980s. It was expensive and time-consum ing to represent clients through every stage of the process, from preliminary hearings to the appellate phase, because section 15 claims often targeted public institutions with large operating budgets. At the same time, the legal committee discovered the benefits of intervening. Despite the constraints imposed on friends of the court, they could challenge harmful attitudes, counter hostile actions, build favourable precedents, and influence the interpretation of section 15 – without exhausting their resources.

When courts dismissed their claims, post-materialists usually organized coalitions to launch legislative campaigns. Instead of accepting defeat, feminists and environmentalists asked governments to counter the effects of damaging decisions. Some readers might find this notion amusing because it sounds heroic, but it cuts to the heart of judicial politics. Experienced litigators understand the limits of legal strategies: while applying devices to narrow the scope of review, courts enforce threshold tests, standards of proof that favour defendants, and the law of costs. To improve their chances of winning larger battles, both movements combine traditional and unconventional forms of collective action. We know that some groups established alliances to bolster their credibility. LEAF

31 Elizabeth Atcheson, Mary Eberts, and Beth Symes, Women and Legal Action: Precedents, Resources, and Strategies for the Future (Ottawa: CACSW, 1984); Women's Legal Education and Action Fund, "Interventions at the Supreme Court of Canada" (Toronto: LEAF, 1986), 2.
33 Personal interview with Carissima Mathen, October 1995.
advocates hoped to garner support by consulting activists from different communities. However, coalitions also broadened the strategic repertoire. After losing in court, teams of groups were prepared to convene press conferences, organize marches, and lobby cabinet ministers. By countering unfavourable judgements, post-materialists could protect the natural environment and promote gender equality.

Pre-Charter feminists persuaded the Davis government to reform Ontario's family law regime. Murdoch demoralized many Canadian women, but Bill 59 forced judges to respect the principle of equal partnership. Using the same set of strategies, NAC and the Vancouver Status of Women countered Bliss. Even though Justice Ritchie decided that gender inequity is caused by nature not the federal state, they refused to give up. After entrenching the Charter, the Trudeau cabinet agreed to amend a number of statutes, including the Unemployment Insurance Act. Environmentalists did not improve their legal success rate, but post-Charter activists managed to improve their record outside the courtroom. When Canada's cautious judiciary reprimanded several administrative boards for granting intervenor funding, CELA and Energy Probe presented their concerns to a well-placed ally, Ian Scott. With the support of his Liberal colleagues, the Attorney-General promised to assist worthy applicants who wanted to appear before the Environmental Assessment Board or the Ontario Energy Board. West Coast activists achieved a stunning triumph after losing three court challenges. The B.C. government dared to oppose the

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34 Sherene Razack's personal interview with Beth Symes, Marilou McPhedran, and Beth Atcheson, March 1988; Kirk Makin, "Supreme Court decision helps turn over a new LEAF," Globe and Mail, 7 July 1990, D2.

Post-Charter feminists were even more successful. Between 1991 and 1995, the Supreme Court overturned the rape shield law, confirmed the validity of traditional disclosure requirements, protected income tax provisions that indirectly favoured men, and decided that “extreme drunkenness” was a legitimate defence.\footnote{Re Seaboyer and Gayme [1991] 2 S.C.R. 577; Thibaudeau v. Canada (Minister of National Revenue) [1995] 2 S.C.R. 627; The Queen v. O'Connor (1995) Supreme Court of Canada Judgment 24114; L.L.A. v. Beharriell [1995] Supreme Court of Canada Judgment 24568; Tu Thanh Ha, "Rock to limit drunk defence," Globe and Mail, 24 February 1995, A1.} However, teams of groups persuaded the federal government to counter the damaging effects of Seaboyer, Thibaudeau, O'Connor, and Daviault. When Kim Campbell was the Minister of Justice, she invited concerned activists to design the structure and substance of Bill C-49, the third rape shield law. To discourage hostile actions, the preamble declares that evidence of prior sexual history “is rarely relevant.”\footnote{Roz Currie, “Bill C-49: the new rape law,” Jurisfemme (March 1992); Personal interview with Susan McRae Vander Voet, September 1996.} NAC and LEAF refused to abandon their fight against the Income Tax Act. Because the Supreme Court “ignored the reality of single female parents,” they persuaded the Chrétien government to allow custodial parents to deduct support payments.\footnote{David Vienneau, “Top court upholds tax on support,” Toronto Star, 26 May 1995, A28; Tu Thanh Ha and Anne McIroy, “Tax on child support to end,” Globe and Mail, 5 March 1996, A1.} To counter the defence bar, feminists presented their concerns to the Minister of Justice. In 1996, after drafting Bill C-46 to “severely limit” access to all counselling records, Allan Rock introduced Bill C-72 to stop those accused of sexual assault and domestic abuse from using the drunkenness defence.\footnote{Anne McIroy, “Bill protects assault victims,” Globe and Mail, 13 June 1996, A4; Sheila McIntyre and Sharon McIvor, “Keep the personal records out of sexual assault cases,” Globe and Mail, 13 June 1996, A19. Kirk Makin, “Top court tosses out sex case,” Globe and Mail, 7 February 1997, A1; Margaret Wente, “Therapy or evidence,” Globe and Mail, 8 February 1997, D9; Tu Thanh Ha, “Bill rules out drunkenness as defence,” Globe and Mail, 25
If feminists and environmentalists pursued legal challenges and asked governments to "overturn" unfavourable judgements, their influence would not be that dramatic. These interests are changing the shape of the federal state because they understand the significance of institutions. Post-materialists offer community services, influence public attitudes, and win new policies, but they also fight to have the rules of the game tilted in their favour. Both movements have rejected deeply rooted elements of Canada's political tradition because they are driven by distrust. After watching generations of politicians sanction industrial pollution and gender inequality, post-materialists wanted to pare away the discretionary powers that governments guard, expose the secrecy of cabinet decision-making, and knock down the conventions of elite accommodation. Instead of deferring to the wisdom of legislators and the expertise of bureaucrats, they hoped that new institutions would force state officials to respect environmental values and a weighty interpretation of equality. This distrust has inspired every structural demand.

Pre-Charter activists wanted entry points into every stage of the policy-making process. Instead of just fighting for access, they insisted that bureaucratic agencies, administrative boards, and royal commissions should fund citizens who dare to challenge corporate interests. Governments could respond to this request without challenging Canada's political tradition. However, post-materialists also admired features of the American state. When the Ontario cabinet introduced the *Environmental Protection Act* in 1971, a coalition of groups presented a provocative argument. According to the Federation of Ontario Naturalists and Pollution Probe, a new statutory language would stop industries from capturing the Ministry of Environment. If MOE officials had to respect rigorous standards, detailed schedules, and mandatory duties, the subjects of regulation would not be able to exert their considerable influence. When the *Environmental Assessment Act* was introduced in 1975, Ontario activists wanted the Davis government to import the core elements of the *National Environmental Policy Act*. Because NEPA includes a cluster of
action-forcing provisions and non-discretionary duties, private litigants can prod public agencies and influence the rule-making process by asking courts to intervene. CELA and the Conservation Council of Ontario were mesmerized by the almost boundless potential of rigorous assessment requirements. They imagined well-organized coalitions stopping projects that threatened the natural environment, from massive hydro-electric dams to nuclear generators.

Pre-Charter feminists expressed similar demands. Environmentalists demanded new standards of proof because they wanted polluters to demonstrate their innocence before civil courts and criminal courts. When the Trudeau cabinet proposed a human rights regime in 1975, NAC activists urged the Department of Justice to shift the onus of proof. Employers have the resources to meet this burden, they insisted, complainants do not. The Liberal government promised to introduce a handful of vague guidelines, but advocates from NAWL argued that public agencies and private corporations should have to respect strict schedules and mandatory targets. They hoped that human rights commissions would behave more like common law courts. Ontario activists praised the virtues of an aggressive, adversarial approach. Instead of quietly negotiating settlements, OHRC officials would investigate complaints, “prosecute” offenders, and issue authoritative decrees. Instead of processing single claims, they would root out the causes of discrimination by hearing entire classes of complaints and enforcing stringent equity programs.

Pre-Charter activists demanded these statutory measures and constitutional rights because they were attracted to the idea of judicially enforced political accountability. Leading activists argued that Parliament and the provincial legislatures would be more responsive if they had to honour certain fundamental values. The policy-making process would still be dominated by elected representatives, but judges would enforce fully entrenched guarantees. At the start of the patriation round, federal officials considered a

number of amendments, including a provision that hinted at the public trust doctrine. Section 4 proclaimed the importance of protecting Canada's great natural resources. CELA advocates wanted to transform this tentative declaration into a stronger duty that would force all policy-makers to protect the environment. They urged the Lamontagne-MacGuigan committee to consider the implications of inaction: if the Constitution does not provide some direction, "there is every reason to believe" that governments will continue to be "erratic and negligent" when they respond to environmental problems.

Feminists were moved by distrust, not optimism. After hearing about Jeannette Corbière Lavell, Yvonne Bédard, and Irene Murdoch, they hoped that Trudeau's charter would force judges to abandon narrow precedents and archaic attitudes. During the late 1970s, Mary Eberts and Lynn Smith urged other activists to consider the grave limitations of section 1 and the possibilities of institutional change. They argued that constitutional guarantees "would be the best protection against discrimination." When members of the Ad Hoc Committee appeared before federal legislators in 1980, they sounded like John Swaigen and Toby Vigod. CELA wanted mandatory duties, exacting standards, and new statutory rights to flow from a public trust provision. With these measures in place, ordinary citizens could force governments to respond. Beth Atcheson and Beverly Baines presented a similar argument. By replacing the discredited section 1 with stronger guarantees, Canada's first ministers would create binding duties. Feminists would act decisively, they promised, if political executives refused to attack the causes of inequality.

Post-Charter environmentalists expressed the same sentiment that motivated their predecessors – unmitigated distrust. Canada's political élites fostered this suspicion by

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44 Minutes of Proceedings and Evidence of the Special Committee of the Senate and House of Commons on Bill C-60, 4th Session of the 30th Parliament, September 1978. Section 4 used the legally significant word "trust" to declare the importance of preserving Canada's resources.
45 This passage appears on page 3 of CELA's brief.
47 Sherene Razack's personal interview with Beth Symes, Marilou McPhedran, and Beth Atcheson, March 1988.
appearing arrogant and unresponsive. During the 1980s, both levels of government attempted to skirt the EARP Guidelines Order by sanctioning a series of potentially harmful projects. Policy-making institutions became more accessible; citizens could present their concerns to legislative committees, “multi-stakeholder” initiatives, and line departments, when they decided to consult. However, the core elements of the regulatory process remained thoroughly insulated. Because most statutes create broad, permissive mandates, bureaucratic agencies formulated thousands of “secret laws” without considering ecological values. Post-Charter activists confronted another problem. As governments reacted to the pressures of globalization, they became less responsive. The Mulroney cabinet garnered a degree of public support by introducing several environmental statutes, but it praised the virtues of deregulation and trade liberalization, not biodiversity. These pressures were even greater in 1993, when the Liberals regained power. While confronting the threat of Québec separatism, Chrétien had to lower the rate of unemployment and tackle the burgeoning national debt. Instead of bolstering the enforcement capabilities of Environment Canada, he has reduced the size of the bureaucracy and accelerated the pace of deregulation.

Environmentalists hoped that new legal rights would help to slow these threatening trends because they continued to believe that institutions are important sources of political power. When Greenpeace and Friends of the Earth appeared before the Legislative Committee on Bill C-74, they asked the members to consider the benefits of two American


49 Personal interview with Paul Muldoon, July 1995.
devices, action-forcing provisions and non-discretionary duties. Regulators would be more accountable, they argued, if CEPA included strict schedules, mandatory instructions, and exacting standards. Concerned citizens would not flood the courts with claims – unless governments decided to ignore their own laws. Post-Charter activists wanted the same measures to strengthen the Canadian Environmental Assessment Act. Like pre-Charter activists, they wanted to remove the federal review process from the “whims” of governing parties.

In Ontario, Paul Muldoon and Rick Lindgren adopted an argument that was developed by David Estrin and John Swaigen during the 1970s. Instead of fighting for disparate amendments, they imagined an environmental bill of rights that would eliminate every barrier that dissuaded private enforcement, including restrictive standing requirements, the old costs rule, and standards of proof that favour defendants. As members of the EBR task force, they argued that a cluster of ancillary rights could flow from a single, boldly worded duty: if governments fail to protect the natural environment, ordinary citizens can ask courts to intervene. Finally, after watching feminists win a dramatic structural battle during the patriation round, environmentalists started to think about the ultimate legal weapon – an entrenched guarantee. By asking courts to consider substantive questions, they would be able to attack the federally regulated nuclear industry or stop provincial governments from approving harmful waste incinerators. When prominent advocates appeared before the Beaudoin-Dobbie committee in 1992, they argued that Canada’s Constitution is incomplete because it does not acknowledge the “inherent value of nature.”

51 Minutes of Proceedings and Evidence of the Special Committee to Pre-Study Bill C-78, 2nd Session of the 34th Parliament, November 1990.
52 "Minutes of the Task Force on the Ontario Environmental Bill of Rights" (File EBR940429-Appeal P-9400730).
53 Minutes of Proceedings and Evidence of the Special Joint Committee on a Renewed Canada, 3rd Session of the 34th Parliament, January 1992, 32:60.
Proponents of judicial pluralism celebrate minoritarian democracy and the principle of judicially enforced political accountability, but it would be wrong to assume that post-materialists trust courts unconditionally. After losing fifty-seven percent of their legal claims, environmentalists know that some judges are unsympathetic. Although feminists have achieved a better record, they are even more suspicious. While demanding stronger justiciable rights, they demanded statutory rules and mandatory programs to mold the behaviour of Canada's judiciary. During the late 1970s, the Murdoch coalition wanted to stop the lower courts from applying "discredited case law." When the Davis government responded to growing public pressure, they argued that Bill 59 would have "disastrous consequences for women" if judges could still "use their discretion." During the patriation debate, members of the Ad Hoc Committee could not summon enough faith to support section 1 because it invited the judiciary to interpret and enforce a vague common law standard, "reasonableness." According to Mary Eberts, this provision was designed to protect the interests of governments, not the rights of citizens. She feared that it would tempt judges to write deferential decisions. This distrust did not disappear during the post-Charter period. The Seaboyer coalition continued to argue that trial court judges should not be allowed to admit evidence of prior sexual conduct. To challenge archaic attitudes, LEAF and NAWL insisted that every member of the judiciary should be compelled to attend mandatory training seminars. They believe that courts could use their discretionary powers to help complainants – if more judges appreciated the "realities" of rape.

55 Mary Eberts, "Women and Constitutional Renewal" Doerr and Carrier, eds., Women and the Constitution.
Post-materialists are changing the structure of the state. Inspired by the international human rights movement and elements of the American tradition, they have demanded participatory rights, a new statutory language, broad causes of action, and constitutional guarantees. However, feminists and environmentalists have also struggled to preserve institutions that favour their interests. Since the late 1980s, they have marshalled their resources to defend an older vision of Canadian federalism. When the first ministers presented the Meech Lake Accord with a sense of accomplishment, post-materialists expressed outrage, not deference. NAC and CELA refused to accept any constraints on the federal spending power because they want future governments to play a creative role.57

Using the Constitution as an instrument of reform, a sympathetic cabinet could allocate generous levels of funding to sustain ambitious national programs. Instead of relying on voluntary compliance agreements, binding standards and conditional grants would force the provinces to fight environmental degradation and different forms of inequality.

During the next round of bargaining, both movements encouraged the Beaudoin-Dobbie committee to consider one of the virtues of strong national governments. Their assessment did not consider the records of political parties — it emphasized structural considerations.58 Because the provinces tend to place economic development above post-


materialist values, premiers can be dazzled by massive resource projects and entire
departments can be captured by powerful industries. To create conditions that are
favourable to business interests, they are tempted to reject rigorous equity policies. The
federal executive can fall into similar traps, but national governments are well placed to
understand the relationship between economic growth and the natural environment. While
provinces turn their attention to regional concerns, national governments have the tools to
enforce universal principles, like gender equality and biodiversity. Trudeau and his
supporters might have applauded such an argument in 1981, but it sounded antiquated in
1992. Canada’s political élites were moving in the opposite direction.

The judicial pluralism thesis is convincing because it helps us understand the
structural implications of post-materialism. Fueled by an almost boundless distrust,
feminists and environmentalists have demanded transparent regulatory regimes, a
statutory language that limits discretionary powers, favourable standing requirements,
stronger justiciable rights, and special rules to amend the law of costs. This pressure is
slowly changing the shape of the Canadian state. As post-materialist objectives move up
the legislative agenda, as governing parties become more sympathetic, both movements will
continue to win structural battles. However, the historical comparison revealed that some
interests have organized to oppose judicial pluralism. Feminists have confronted a wide
range of adversaries, including organizations dedicated to the rights of men, especially those
embroiled in custody disputes, a steady stream of criminal defendants, and women who
want to preserve the values of the “traditional family.” Anti-abortion groups have struggled
to change the rules of the game since the early 1970s. They argued that Canada’s
Constitution should recognize the “right to life” when the first ministers were busy drafting
the Victoria charter.59 Ten years later, these determined opponents appeared before the

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59 *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and
House of Commons on the Constitution of Canada*, 3rd Session of the 28th Parliament,
December 1970.
Hays-Joyal committee to demand guarantees that would protect the “unborn.”60 Because few legislators wanted to endorse such controversial measures, they decided that Trudeau’s charter would weaken Canadian democracy by transferring too much authority to judges.

Environmentalists have won fewer structural battles because their adversaries are more capable. To secure stronger legal weapons and greater access to judicial relief, they have to beat multi-national corporations, organizations that represent entire industries, and public agencies that promote the development of natural resources. When the Mulroney government introduced CEPA in 1987, these opponents insisted that new justiciable rights would threaten “Canada’s cultural identity.”61 With the support of like-minded interests, the Asbestos Institute argued that CEPA should not allow “individual citizens to by-pass the normal political process.” Paul Muldoon and Rick Lindgren had to confront a similar argument as members of the EBR task force.62 When they proposed broad causes of action, Bob Anderson (Business Council on National Issues), George Howse (Canadian Manufacturers’ Association), and John Macnamara (Chamber of Commerce) imagined zealous activists “flooding the courts with frivolous claims.” While suggesting that litigation threatened two crucial qualities, “clarity and certainty,” these business representatives asked environmentalists to consider the apparent tension between efficiency and accessibility: as new groups clamour to express their interests, the regulatory process becomes less “rational” and more “cumbersome.”

Anderson, Howse, and Macnamara opposed the judicial model of political accountability because majoritarian institutions favour the interests of their clients. Their argument is one of the most intriguing parts of the story. Responsible governments, even those committed to social democracy, endorse industrial pollution and harmful natural resource projects to promote economic growth. Environmentalists can pressure bureaucrats

62 “Minutes of the Task Force on the Ontario Environmental Bill of Rights” (File EBR940429-Appeal P-9400730).
and try to cultivate public support by organizing demonstrations, but political executives cannot ignore the benefits of nuclear energy or commercial mining. Litigation poses a threat because unelected judges are not influenced by the same incentives. If courts were asked to enforce broadly framed regulatory rights, they might ignore the pressures that promote economic development. Although Muldoon and Lindgren had the quiet support of the NDP cabinet, the business community refused to surrender these considerable advantages. It managed to win this structural battle. Ontario’s EBR does not resemble the private bills that were championed by Ruth Grier in the late 1980s – it does not create substantive guarantees, a strongly worded public trust provision, or unconditional causes of action.

The judicial pluralism thesis seems to account for the unevenness of judicialization by identifying this daunting source of opposition. Using well-established historical methods, it shows us how value change has produced a series of institutional reforms. Despite these important strengths, it cannot explain why Canadian governments have responded differently. Even though feminists entered the patriation round late, they managed to secure two constitutional guarantees, section 15 and section 28. Environmentalists have demanded similar instruments for decades, but they have never won a significant structural battle.

IV. The Charter Revolution

If students of politics underestimate the importance of post-materialism or dismiss judicial pluralism as a fashionable idea, they are choosing to ignore a commanding body of evidence. It stops us from assuming that constitutional amendments – even grand projects championed by political elites – can produce change. However, the Charter revolution thesis is still the strongest because it shows us how institutions shape change. Social transformations can be accelerated, redirected, and even tamed by state structures. In Canada, feminists and environmentalists share some of the same values and forge alliances
with the same constellation of interests, but their attitudes, strategies, and chances of success are profoundly influenced by the presence or absence of legal rights, the character of statutory regimes, the formal division of labour between courts, and the distribution of decision-making authority. The Charter revolution thesis has another impressive strength: it can explain why judges and legislators have treated post-materialists differently.

The rival interpretations insist that post-materialists in every region are inviting courts to enter the political fray. They are wrong. Both movements are dominated by large federations that pursue national objectives, but activists in Ontario and British Columbia are the principal players. With the support of other English Canadian activists, they are promoting the growth of judicial power. Québec groups rarely entered the judicial system between 1970 and 1995. Remarkably, they asked courts to review just six claims. The Charter revolution thesis was the only explanation that predicted this gulf. The Constitution Act (1982) has not transformed political life in Québec. Despite their allure, boldly worded rights have not altered the preferences and strategies of francophones activists. As liberal democrats, they want governments to protect vulnerable minorities and fight discriminatory practices using human rights agencies and the Québec Charter.

However, very few see litigation as an important political instrument. Although LEAF has struggled to maintain a regional branch, it has never taken root. A small network of Montréal lawyers established the Québec Environmental Law Centre after the Federal Court delivered Canadian Wildlife Federation, but it rarely initiates legal challenges. These groups confront several barriers. The civil law tradition discourages novel arguments by constraining the interpretive nature of judicial review and regulatory statutes are designed to foster consensus, not adversarialism. Instead of trying to resist this policymaking style, post-materialists bargain with bureaucratic officials and industry representatives or they choose to pursue their objectives outside the formal policy-making process. Constitutional rights have not disrupted these stable patterns of participation.

63 Personal interview with Carissima Mathen, October 1995.
64 Phone interview with Franklin Gertler, October 1995.
When English Canadian activists decided to litigate, they had to play by the rules of the game. Because environmentalists could not invoke their “own” constitutional rights, few litigants questioned the validity of statutory provisions. Most groups challenged public authorities who exercise circumscribed powers, including municipal governments, administrative boards, and regulatory agencies. A large proportion of claims attacked polluters directly. By acting as private prosecutors, environmentalists could embarrass large corporations that ignored ecological values and prod governments that were indifferent or unsympathetic. Some of the most daring arguments requested a remedy that sounds arcane. By asking for writs of mandamus, these litigants hoped that courts would enforce or even create mandatory duties. To explore a wide range of legal options, environmentalists had to bring their claims to every level of Canada’s judicial system, from the N.W.T. Territorial Court to the Supreme Court. Because they wanted to stop harmful projects using the EARP Guidelines Order, post-Charter activists routinely appeared before both divisions of the Federal Court to win injunctions and prerogative writs. Feminists were moved by some of the same ideas, but they never attacked cabinet ministers or bureaucratic officials by requesting writs of mandamus. After 1982, they were lured into the courtroom by one boldly worded guarantee. Most litigants hoped that section 15 challenges would knock down discriminatory laws or influence the interpretation of legal principles. To achieve their ambitious objectives, feminists often intervened before Canada’s highest court.

Both movements have asked courts to make controversial decisions, but the judicial response reflects the distribution of institutional resources. The judicial pluralism thesis captures an important piece of the puzzle. By learning how to overcome some of the limits of litigation, pre-Charter environmentalists managed to win forty-four percent of their claims. Most of the successful challenges maneuvered around the public nuisance standing rule and the law of costs by participating as private prosecutors. However, without stronger statutory rights or constitutional guarantees, they did not pose a serious threat. When litigants asked courts to issue mandamus writs or revoke laws, they always failed. Pre-
Chapter Seven: Explaining the Expansion of Judicial Power in Canada

Charter feminists faced an even steeper hurdle because they invited the greatest controversy. Instead of asking lower courts to enforce summary conviction offences, most litigants asked the Supreme Court to breathe life into a narrowly framed, quasi-constitutional right.

Table XXXVII: The Legal Success Rate of Post-Materialists (1970-1995)

<table>
<thead>
<tr>
<th>Target</th>
<th>Number of Wins</th>
<th>Number of Losses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private Interests</td>
<td>51</td>
<td>25</td>
</tr>
<tr>
<td>Administrators and Bureaucrats</td>
<td>27</td>
<td>42</td>
</tr>
<tr>
<td>Cabinet Ministers</td>
<td>10</td>
<td>39</td>
</tr>
<tr>
<td>Total (22)</td>
<td>106</td>
<td>125</td>
</tr>
</tbody>
</table>

Source: Court Challenges Database

After the first ministers changed the rules of the game by introducing the Charter, feminists achieved an impressive record. Although environmentalists managed to win a number of legislative battles, they continued to lose over half of their legal challenges. Another finding confirms the influence of institutional variables. As post-materialists move away from pinnacle of Canada's political system, from cabinet ministers to municipal officials, their chances improve. According to Table XXXVII, post-materialists won twenty percent of their cases when they questioned the wisdom of the Crown by requesting prerogative writs and thirty-nine percent of their claims when they targeted public authorities who exercise limited statutory powers. The rate of success jumps even higher when they attacked private interests – sixty-seven percent of these actions accomplished their objectives. This correlation suggests that courts are willing to question unelected officials, but they are less eager to aggravate elected representatives.

Because constitutional rights produce a measurable advantage, feminists are more willing to acknowledge the benefits of court challenges. Using data gathered by the

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Feminists won sixty-four percent of their constitutional claims; with weaker legal tools, environmentalists managed to win forty-one percent of their court challenges.
National Survey on Strategic Choices, we discovered that advocacy groups and legal advocates evaluate litigation differently. When they think about the law, executive directors tend to emphasize the constraints and lawyers tend to stress the possibilities. This finding is important, but we also discovered a gap that corresponds to the distribution of institutional resources. Environmentalists are less willing to view litigation favourably because they have to rely on common law causes of action and narrowly framed statutory rights, not boldly worded constitutional guarantees. Environmental groups offer the worst assessment. They refuse to see litigation as the “single most effective” form of collective action and fifteen percent want to ignore the judicial system altogether. Feminist advocates offer the best evaluation. They refuse to characterize legal action as “ineffective.” Remarkably, sixty-two percent believe that litigation is the “single most effective” strategy or “one of the most effective” strategies.

The Charter revolution thesis emphasizes the multiple and dramatic effects of 1982. However, because this explanation stresses the power of state institutions, it can also help us understand an enduring constraint. The Charter granted courts new responsibilities, but most judges continue to believe that legislators have stronger democratic credentials. Instead of trying to expand their dominion by acting like an agent of social change, they have applied various devices to narrow the scope of review, circumscribed broadly framed guarantees, and preserved laws that impose “reasonable limits.” Feminists lost some of their most ambitious claims because the Supreme Court was very reluctant to redistribute economic resources by modifying fiscal statutes. Two separate claims failed to change the Income Tax Act. Mary Eberts and Beth Symes persuaded the Federal Court to invalidate a cluster of provisions that stop parents from deducting child care costs as business expenses, but this victory was only temporary. The Supreme Court disagreed. The second challenge attacked section 56 because it forced custodial parents, mostly women, to report child

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support payments as income. The same provision allowed non-custodial parents, mostly men, to deduct their contributions.\textsuperscript{68} However, after characterizing the \textit{Income Tax Act} as a “special statute” that addresses a number of pressing objectives, the Supreme Court decided that section 56 helped both custodial parents. LEAF failed to reform one of Canada’s principal federal laws because most senior members of the judiciary do not believe that courts should use their powers to alter the process of income redistribution.

Although \textit{Andrews} endorsed a substantive interpretation of equality, feminists usually lost when section 15 was pitted against deeply rooted legal rights. Post-Charter litigants discovered this obstacle during the late 1980s, when a hostile action was launched by men accused of committing sexual assault.\textsuperscript{69} A coalition of groups failed to save the second version of the rape shield law because it placed limits on a well-established common law guarantee. Canada’s high court decided to “balance” the needs of the victim and the interests of the accused. Justice McLachlin explained why the right to a fair trial trumped section 15: it is “fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth.”\textsuperscript{70} The \textit{O’Connor} challenge confronted the same barrier. To circumvent the third version of the rape shield law, criminal defendants wanted complainants to surrender their counselling records.\textsuperscript{71} LEAF presented an equality argument, but the Supreme Court protected “one of the pillars of criminal justice,” the right to present a full defence.\textsuperscript{72}

The Charter revolution helps us solve another piece of the puzzle. In Canada, sustained periods of judicial activism rarely precede formal amendments to ordinary laws.

\textsuperscript{68} \textit{Thibaudeau v. Canada (Minister of National Revenue)} [1995] 2 S.C.R. 627.
\textsuperscript{70} \textit{Re Seaboyer and Gayme} [1991] 2 S.C.R. 609.
statutes or the written Constitution. There are some obvious exceptions. The JCPC wanted
to "correct" the British North America Act at the end of the nineteenth century by applying
the doctrine of dual sovereignty.\textsuperscript{73} During this century, the Supreme Court lowered an old
barrier by crafting new standing requirements. Judicial activism produced an even more
dramatic victory in 1989. \textit{Canadian Wildlife Federation} is historically important because the
Federal Court dared to transform an oddly framed, permissive order into an enforceable
duty. Despite these episodes of bravado, courts have struggled to maintain their legitimacy
by passing up opportunities to promote the growth of judicial power. Since the early 1970s,
environmentalists have asked the judiciary to consider a provocative argument. If courts
extend the reach of natural justice requirements, if they force all public authorities to respect
a long list of procedural requirements, regulators, administrators, and local officials would
become more accountable.\textsuperscript{74} The literature suggests that some decisions have encouraged
boards and tribunals to replicate the conventions of adjudication, but this strategy has
rarely succeeded because it represents a significant departure from the common law
tradition.

After the Federal Court strengthened the EARP regime, environmentalists hoped
that judges would scrutinize highly technical assessments and make the federal cabinet
pursue certain policy options. They were quickly disappointed. Although courts were willing
to enforce the mandatory requirements, they refused to question the expertise of
bureaucratic officials by determining the adequacy of scientific evaluations.\textsuperscript{75} Without

\textsuperscript{73} Alan Cairns, "The Judicial Committee and its Critics," \textit{Canadian Journal of Political Science}
3 (1971); Frederick Vaughan, "Critics of the Judicial Committee: The New Orthodoxy and an
Alternative Explanation," \textit{Canadian Journal of Political Science} 19 (1986); Robert Vipond,
\textit{Liberty and Community: Canadian Federalism and the Failure of the Constitution} (Albany:

\textsuperscript{74} \textit{Heineman v. Ontario and Adventure Charcoal} (1972) \textit{Canadian Environmental Law News}
1(3); \textit{Re B.C. Wildlife Federation and DeBeck} (1976) 1 B.C.L.R. 244; \textit{Save the Environment from
Richmond Farmland Society and Western Canada Wilderness Committee v. Richmond}

\textsuperscript{75} For example, see \textit{Angus v. The Queen} (1990) 4 C.E.L.R. (N.S.) 274; (1990) 5 C.E.L.R. (N.S.)
expressing any doubts, they refused to place limits on the Crown’s prerogative powers by reviewing “purely legislative” decisions. Finally, when post-materialists asked the judiciary to reform the law of costs, they were sent away. Post-Charter environmentalists argued that courts should not penalize litigants who raise important legal issues, but this argument was flatly rejected. After characterizing politicians as “guardians of the public interest,” most judges insisted that courts should preserve the law of costs to discourage frivolous claims.76

If court strategies were shaped by ideologies, not institutions, if the Charter revolution thesis could not explain the judicial response to post-materialists, it still has one remarkable strength. This interpretation can tell us why governments have responded differently. Prominent feminists accelerated the post-war phase of the equality rights project during the early 1970s. While most groups demanded policy reforms that were endorsed by the RCSW, Doris Anderson and Mary Eberts urged women to consider the benefits of constitutional change. This campaign did not succeed because the feminist movement represented a commanding political force. The Liberal cabinet organized the patriation round because it hoped that a charter of fundamental rights would obscure territorial cleavages and undercut Québec nationalism. Federal officials knew that litigation would complicate the task of governing, but they wanted to craft a new instrument of national unity. This imperative was so forceful that Trudeau was willing to surrender the benefits of legislative supremacy. By agreeing to several concessions, he persuaded the provinces to accept a long list of guarantees, strengthen section 15, and move section 28 outside the scope of the override clause.

While the nation-building imperative favoured feminists, environmentalists were placed at a disadvantaged by another incentive. Within single jurisdictions, governments continued to defend their impressive discretionary powers. The first ministers were willing to consider constitutional rights while designing the Victoria charter in 1970 and the patriation package in 1981, but they resisted a major source of judicialization: regulatory statutes that include action-forcing provisions and non-discretionary duties. In the United States, an entire branch of government, Congress, adopted these devices to exert some degree of influence over a rival branch, the executive. Cunning legislators hoped to influence the implementation and enforcement of regulatory laws by forcing agencies to meet strict schedules, mandatory duties, and detailed targets. However, parliamentary institutions create different incentives. Federal and provincial executives dominate every stage of the policy-making process – they control the legislative agenda, the bureaucracy, and the "public purse." Canada's political elites did not want to diminish this autonomy by emulating the American tradition.

The Davis government introduced a new generation of statutes during the 1970s to garner public support, but it jealously guarded the Crown's prerogative powers.77 Instead of winning a dramatic structural battle, CELA and Pollution Probe had to defend a deeply rooted common law principle, the right to enforce summary conviction offences, because the Conservatives wanted to stop private prosecutors from initiating disruptive challenges. Ontario officials pursued the same strategy when they introduced Bill 14. The Environmental Assessment Board was asked to manage a comparatively rigorous regime, but the cabinet retained the right to exempt any project.78 Davis even threatened to shield the EAA from judicial review by including a strong privative clause. Opposition critics supported the pre-Charter campaign by proposing measures that would reverse the burden

77 Ontario Legislative Assembly, Debates, 4th Session of the 28th Legislature, July 1971, 3455. At the same time, the government passed a bill that established the Ministry of the Environment.
78 Ontario Legislative Assembly, Debates, 5th Session of the 29th Legislature, July 1975, 3531.
of proof and knock down the old standing rule.79 Conservative ministers were not sympathetic. After insisting that courts should stay away from such a complex field of public policy, Harry Parrot called environmental rights “undemocratic.”80 When we consider the final days of the pre-Charter period, it is easy to understand why feminists were more successful. Although Davis was ready to accept new constitutional guarantees as one of Trudeau’s allies, he refused to introduce statutory rights to protect the natural environment.

The incentives produced by parliamentary institutions did not disappear after 1982. The Peterson government refused to establish an environmental bill of rights, even though it introduced the Municipal-Industrial Strategy for Abatement, new regulations to stem acid rain, and a comprehensive waste management program. Ontario’s social democrats were willing to trade away some of their decision-making autonomy to create an EBR. However, just as CELA and Pollution Probe were about to win a significant structural battle, bureaucratic officials rushed to protect their interests. Although line departments and central agencies lack the prerogative powers that cabinets exercise, they organized to preserve stability and certainty – two commodities that are prized by Canada’s political tradition and jeopardized by litigation. The inter-ministerial committee could not formally endorse any single position, but it usually sympathized with the business representatives. Most IMC members urged the task force to reject the American model and accept a “consensual” style of policy-making. According to their assessment, public trust provisions and non-discretionary duties have produced serious “inefficiencies” in the United States because activists can launch an endless number of court challenges.81 The Ministry of Natural Resources feared that new causes of action and appellate rights would make the

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79 Ontario Legislative Assembly, Debates, 3rd Session of the 31st Legislature, December 1979, 5481. Smith’s second EBR, Bill 134, was introduced in 1981, during the 1st Session of the 32nd Legislature.


81 Confidential interview with IMC members, July 1995.
regulatory process "unruly" and "uncertain." While supporting this criticism, the Ministry of Finance announced that some of the proposed measures would be very expensive.

Officials from the MOE opposed the American tradition for different reasons because they have to control industrial pollution, conduct investigations, and enforce highly technical standards. They argued that participatory rights and action-forcing provisions could undermine their capacity to achieve meaningful changes. Instead of tackling difficult policy problems, the MOE would have to meet unrealistic targets, defend well-established policies, and follow thousands of procedural requirements. If courts were granted new responsibilities, corporations would be able attack single instruments and broad policies. Like generations of cabinet ministers, senior MOE officials argued that discretionary power is a crucial source of strength. By expressing such serious concerns, these bureaucratic agencies favoured business interests. The Rae cabinet called Ontario's EBR a "powerful tool" to protect the environment after it passed third reading, but the polluting industries were not threatened. Because the task force rejected the judicial model of political accountability, their lawyers realized that judges would still be minor players.

Environmentalists faced greater opposition when they demanded stronger federal laws. Trudeau, Mulroney, and Chrétien wanted to preserve their decision-making autonomy, like Davis and Peterson in Ontario, but they were just as determined to avoid costly jurisdictional disputes. Although CELA and Pollution Probe hoped to win a cluster of institutional reforms when the Environmental Contaminants Act was introduced, the Liberal cabinet did not want to antagonize the premiers only to win more control over a field

82 Confidential interview with MNR officials, July 1995.
83 Confidential interview with MOE officials, March 1994 and June 1995.
84 Peter Victor presented his concerns at the CIELAP Hart House Conference on the Ontario EBR (March 1994).
of public policy that is complex controversial. This reluctance was reinforced by Department of Justice officials who argued that federal environmental rights would be deemed unconstitutional. Pre-Charter activists confronted the same barrier during the patriation round. The governing Liberals simply pointed out that “civil rights” and the “administration of justice” are provincial responsibilities. While promoting the Charter, a bold departure from Canada’s political tradition, they characterized the British North America Act as an immovable constraint. This strategy worked because most political élites viewed environmental rights suspiciously. Trudeau wanted to entrench a number of guarantees that were already protected by the great common law tradition.

Environmentalists proposed a series of amendments that clashed with the human rights model. They hoped that Canada’s new Constitution would somehow protect old growth forests, the Great Lakes, and endangered species.

These pressures transformed the preferences of politicians who seemed sympathetic. Most federal Conservatives criticized the patriation package because they wanted to defend the principle of legislative supremacy and force the Liberals to negotiate with the provinces, but Tom MacMillan was eager to support the proposed charter. He also endorsed a private motion that urged the federal government to reverse the burden of proof and lower standing requirements. Although environmentalists were optimistic when MacMillan introduced CEPA six years later, he was profoundly changed by his new role. As a member of the federal cabinet, MacMillan opposed any measures that would allow judges to control a “whole area of public policy,” including action-forcing provisions, mandatory duties, and

broadly framed causes of action. He even questioned the legitimacy of judicial review by declaring that courts "are not accountable to anyone." Another argument reinforced these concerns. After receiving advice from Department of Justice, MacMillan decided that Canada's Constitution prevented the federal government from introducing anything that resembled an EBR. Privately, DOJ officials characterized environmental rights as "radical" because of their potential to disrupt intergovernmental relations.

When the story is retold, it is hard to believe that environmentalists persisted. Even though governments dismissed their concerns, they continued to fight structural battles. After Canadian Wildlife Federation and Oldman River, post-Charter activists urged the Mulroney government to strengthen the EARP regime by creating additional duties, participatory rights, a program to fund intervenors, and a review process that is shielded from political machinations. After watching feminists win fully entrenched equality rights and a series of favourable court decisions, environmentalists started to imagine the benefits of constitutional guarantees. During the Charlottetown round, they promised that a boldly worded public trust provision would undermine secretive regulatory arrangements, bolster the legitimacy of statutory measures, and force all state officials to respect the inherent value of the natural environment. To make their argument more compelling, CELA and Pollution Probe characterized environmental rights as potential instruments of national unity.

This strategy was doomed to fail. The nation-building imperative favoured feminists during the patriation round, but it placed environmentalists at a serious

92 Personal interview with Rick Lindgren, July 1995; Personal interview with Paul Muldoon, July 1995.
93 Minutes of Proceedings and Evidence of the Special Committee to Pre-Study Bill C-78, 2nd Session of the 34th Parliament, November 1990, 11:5 and 12:13; Minutes of Proceedings and Evidence of the Special Committee on Bill C-13, 3rd Session of the 34th Parliament, October 1991, 7:30.
94 Minutes of Proceedings and Evidence of the Special Joint Committee on a Renewed Canada, 3rd Session of the 34th Parliament, January 1992, 32:60.
disadvantage during the Charlottetown debate. Trudeau’s view of constitutional rights was harder to defend because the Charter was not bolstering national unity – it contributed to the “death of Meech Lake.” To protect their constitutional interests, certain groups opposed some of Québec’s basic demands, including the distinct society clause. By defending these interests so strenuously, they jeopardized the stability of the entire country. Most political élites accepted this interpretation in 1991. The Rae government proposed a series of “pledges” to counter the effects of deregulation and trade liberalization, but Ontario’s social democrats did not want judges to exercise new responsibilities. The EARP challenges reinforced this aversion to justiciable rights. By pressing their claims in court, post-Charter activists angered two of the most powerful provinces. Alberta was forced to defend a huge paper mill and Québec entered the courtroom to protect the Great Whale project. After responding to these challenges, they were determined to stop any measures that would give environmentalists stronger legal tools. Mulroney and his advisors were very aware of this opposition. They knew that statutory causes of action and constitutional guarantees would generate territorial conflicts. Litigants would be able to hinder the development of natural resources and federally appointed judges would exercise even more control over provincial laws. When CELA and WCEL presented their demands to the Environment Minister during the Charlottetown debate, he did not express sympathy. While raising doubts about the legitimacy of judicial review, Jean Charest argued that “republican ideas” have jeopardized Canada’s “consensus-building” institutions.

V. Judicial Power and the Future of Canadian Politics

The Charter revolution thesis is the most compelling when we test the rival explanations separately. However, this conclusion should not be misconstrued by enthusiastic proponents of neo-institutionalism. The strongest explanation fuses the judicial pluralism thesis and the Charter revolution thesis. By sifting through twenty-five years of evidence, the judicial pluralism thesis shows us how value change has altered the rhythms of political life and the structure of the federal state. Because post-materialists felt ignored and excluded by most governing parties, they asked judges to enforce regulatory statutes, expose clandestine bureaucratic arrangements, and correct legislative deficiencies. They learned how to overcome some of the limits of litigation, but feminists and environmentalists organized to change the rules of the game when legal strategies failed. After watching generations of politicians sanction industrial pollution and gender inequality, they wanted to pare away the discretionary powers that executives guard, expose the secrecy of cabinet decision-making, and topple the conventions of elite accommodation. To make governments responsive and accountable, post-materialists have demanded mandatory duties, action-forcing provisions, statutory rights, and boldly worded constitutional guarantees. This story is fascinating because their struggle has been shaped by a particular configuration of institutions.

An enhanced interpretation solves the puzzle by considering the consequences of post-materialism and the effects of state structures, but it also has some predictive power. Globalization will continue to push feminists and environmentalists into the courtroom by making governments less responsive to their demands. Both movements understand the potential consequences of economic integration. Binding rules can prevent policy-makers from introducing domestic subsidies, export bans, and countervailing measures that protect
the natural environment or help disadvantages groups.\footnote{David Vogel, "International Trade and Environmental Regulation," Norman Vig and Michael Kraft, eds., Environmental Policy in the 1990s: Reform or Reaction? (Washington: CQ Press, 1997).} Trade agreements can preserve a degree of autonomy by allowing such provisions, but governments cannot escape the constant fiscal pressures. In Canada, governing parties from different ideological traditions have accepted elements of the neo-liberal consensus. To make Ontario more competitive, the Harris cabinet has attacked the provincial deficit, placed new restrictions on welfare recipients, reduced the size of the bureaucracy, made the regulatory process more “efficient,” and pared away “dispensable” social expenditures, including a controversial employment equity regime and the intervenor funding project. Federal officials have also responded to these pressures. The Liberals emphasized the dangers of trade liberalization during the 1988 election, but they shifted to the right after winning the 1993 election because Chrétien and Mulroney confronted some of the same daunting problems, especially unemployment and the burgeoning national debt. Instead of defending the welfare state they helped to build, Chrétien and his allies have decreased transfer payments to the provinces, reduced the size of the civil service, and accelerated the pace of deregulation. If governments continue to pursue this agenda, feminists and environmentalists will continue to mount court challenges.

The effects of globalization are striking, but they are double-edged. Although politically weak interests will continue to see litigation as an instrument of democratic pluralism, governments are tempted to silence their critics by undermining the effectiveness of legal strategies. We have already witnessed this type of retribution. The equality rights project suffered a serious blow when it questioned the neo-liberal consensus — feminists presented just two claims in 1993 because the Mulroney cabinet reduced Secretary of State grants and abolished the Court Challenges Program. Global pressures have hurt environmentalists by reinforcing the nation-building imperative and the incentives that parliamentary institutions produce. As governments confront the demands of competitive
world markets, the benefits of decision-making autonomy increase rapidly. From this perspective, social rights and broadly framed environmental rights are very unattractive. They would diminish the discretionary powers that political executives prize, create another set of formal constraints, and generate intense territorial conflicts.

The current distribution of institutional resources could change if these pressures wane, but every possibility seems highly unlikely. Post-materialists could endorse bold reforms as opposition MPs. Still, they would confront the realities of globalization as members of a government. Even though Trudeau's vision of Canadian federalism has not disappeared altogether, very few politicians view constitutional rights as instruments of national unity. If governments refuse to change the rules of the game, courts will have the greatest influence. They can promote the growth of judicial power by using the Charter as a weapon of social reform or slow the pace of judicialization by deferring to the wisdom of legislators. This study confirms what others have already concluded. A stable pattern has emerged because courts have to accept controversial responsibilities while maintaining a crucial source of authority – their legitimacy. The moderate activism cultivated by Chief Justice Dickson and Chief Justice Lamer will not wither away soon. Feminists will continue to win favourable decisions unless they try to redistribute economic resources by attacking fiscal statutes. Environmentalists will have to toil away without boldly worded constitutional rights – they will have to hope that some courts dare to emulate the spirit of *Canadian Wildlife Federation* and *Oldman River*.

This study would have ended differently if post-materialists were determined to undermine the will of popular majorities, but the court party thesis is wrong. Proponents of judicial pluralism prize elements of minoritarian democracy, some litigants attack statutes, and most activists are reluctant to trust political elites, like citizens in other industrialized democracies. However, feminists and environmentalists see political parties and

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legislatures as vital institutions. Instead of rejecting traditional strategies to satisfy ideological anxieties, post-materialists combine different forms of collective action because they know that public policies are shaped by prominent cabinet ministers who are concerned about the state of the environment, Federal Court judges who preserve traditional threshold standards, senior bureaucrats who may be swayed by corporate interests, and opposition critics who spend their careers fighting sexual discrimination.
APPENDIX

I. Federal and Provincial Statutes

Canadian Environmental Protection Act, R.S.C. 1985 (4th Supp.), c. 16.
Capital Commission Act, R.S.B.C. 1979, c. 42.
Child Paternity and Support Act, R.S.B.C. 1979, c. 49.
City of Winnipeg Act, S.M. 1971, c. 105.
Clean Air Act, R.S.A. 1980, c. C-12.
Clean Air Act, R.S.C. 1985, c. C-32.
Conservation Authorities Act, R.S.O. 1970, c. 78.
Criminal Injuries Compensation Act, R.S.S. 1978, c. C-47.
Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3.
Dower Act, R.S.A. 1950, c. 90.
Employment Equity Act, S.O. 1993, c. 35.
Environmental Bill of Rights, S.N.W.T. 1990, c. 28.
Environmental Bill of Rights, S.O. 1993, c. 28.
Environmental Enforcement Statute Law Amendment Act, S.O. 1986, c. 68.
Environmental Protection Act, R.S.O. 1990, c. E-19.
Environmental Protection Act, S.N.S. 1973, c. 6.
Environmental Statute Law Amendment Act, S.O. 1988, c. 54.
Equal Rights Amendment Act, S.O. 1986, c. 64.
Family and Child Service Act, S.B.C. 1980, c. 11.
Appendix

Forest Act, R.S.A. 1980, c. F-16.
Forest Act, R.S.B.C. 1979, c. 140.
Health Act, R.S.B.C. 1960, c. 170.
Health Act, R.S.N.S. 1989, c. 195.
Health Services and Insurance Act, R.S.N.S. 1989, c. 197.
Heritage Conservation Act, R.S.B.C. 1979, c. 165.
Hospitals Act, R.S.N.S. 1989, c. 208.
Human Rights Act, S.B.C. 1984, c. 22.
Indian Act, R.S.C. 1985, c. I-5.
Industrial Development Act, R.S.B.C. 1979, c. 193.
Islands Trust Act, S.B.C. 1989, c. 68.
James Bay and Northern Québec Claims Settlement Act, S.C. 1976, c. 32.
Married Women's Property Act, R.S.O. 1950, c. 223.
Medical Act, S.N.B. 1981, c. 87.
Medical Services Act, R.S.N.S. 1989, c. 281.
Municipal Act, R.S.B.C. 1979, c. 290.
Ontario Energy Board Act, R.S.O. 1980, c. 332.
Pay Equity Act, S.O. 1987, c. 34.
Pest Control Products Act, S.N.S. 1986, c. 16.
Pesticide Control Act, R.S.B.C. 1979, c. 322.
Police Act, R.S.O. 1980, c. 381.
Pollution Control Act, S.B.C. 1967, c. 34.
Public Inquiries Act, R.S.B.C. 1960, c. 315.
Public Inquiries Act, R.S.O. 1990, c. P-41.
Utilities Act, S.B.C. 1980, c. 60.
Water Act, R.S.B.C. 1960, c. 405.
II. The Court Challenges


3. *Hogan and Director of Pollution Control* [1971] 3 W.W.R. 519.
32. Re B.C. Wildlife Federation and DeBeck (1976) 1 B.C.L.R. 244.
43. Islands Protection Society v. The Queen (1979) 9 C.E.L.R. 1.
Appendix


**Environmentalists in Court (1982-1995)**


52. Re NSP Investments Ltd. and Joint Board under the Consolidated Hearings Act (1990) 72 O.R. (2d) 379.


91. *(GRVD 1)* *United Fishermen and Allied Workers’ Union v. Greater Vancouver Regional District* [1993] Unreported B.C. Decision.


94. *(Bonnet Plume)* *Canadian Parks and Wilderness Society v. Canada (Department of Indian and Northern Affairs)* [1994] Unreported F.C. Decision.


113. Steven Murray v. Greenspace Services Ltd. (Chemlawn) [1995] Unreported O.J.


115. Canadian Parks and Wilderness Society v. Alberta (Director of Environmental Assessment and Minister of Environmental Protection) [1995] Unreported Alberta Decision.


**Feminists in Court (1970-1981)**


Feminists in Court (1982-1995)


III. National Survey on Strategic Choices
Environmental Advocacy Groups

Section I

1. How does this organization achieve its objectives? Please indicate the importance of the following activities by circling one number for each (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Activity</th>
<th>Very Important</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public education campaigns</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Lobbying cabinet ministers</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Appearing before provincial legislative committees</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Appearing before federal legislative committees</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Community service (e.g., recycling)</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Appearing before administrative boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Lobbying bureaucratic officials</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Election campaign tactics</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Litigation in the courts</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Media campaigns</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Protests or &quot;direct actions&quot;</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Letter writing campaigns</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Policy or scientific analysis</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Boycotts</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

2(a). How frequently does this organization appear before provincial or federal legislative committees, if ever? Please check one of the following.

- [ ] never
- [ ] once a year
- [ ] 2 to 4 times a year
- [ ] 6 to 8 times a year
- [ ] more than 8 times a year

2(b). How frequently does this organization appear before provincial or federal administrative boards and tribunals, if ever? Please check one of the following.

- [ ] never
- [ ] once a year
- [ ] 2 to 4 times a year
- [ ] 6 to 8 times a year
- [ ] more than 8 times a year
2(c). How frequently does this organization initiate “direct actions” or take part in political protests, if ever? Please check one of the following.

   ____ never  ____ 2 to 4 times a year  ____ 6 to 8 times a year
   ____ once a year  ____ 4 to 6 times a year  ____ more than 8 times a year

2(d). How frequently does this organization lobby provincial or federal cabinet ministers, if ever? Please check one of the following.

   ____ never  ____ 2 to 4 times a year  ____ 6 to 8 times a year
   ____ once a year  ____ 4 to 6 times a year  ____ more than 8 times a year

3. Has this organization participated in any constitutional discussions? Please check the appropriate choices.


4(a). Does this organization belong to the Canadian Environmental Network, one of the regional networks, or a federation of environmental groups. Please check one or more of the following.

   ____ CEN  ____ regional network  ____ federation of groups

4(b). How frequently does this organization join issue-based coalitions with other environmental groups, if ever? Please check one of the following.

   ____ never  ____ 2 to 4 times a year  ____ 6 to 8 times a year
   ____ once a year  ____ 4 to 6 times a year  ____ more than 8 times a year

5. How frequently does this organization participate in provincial or federal “round-table” forums, if ever? Please check one of the following.

   ____ never  ____ 2 to 4 times a year  ____ 6 to 8 times a year
   ____ once a year  ____ 4 to 6 times a year  ____ more than 8 times a year

6. The environmental movement confronts a wide range of state officials. Who seem to be the most responsive? Please indicate this organization’s views by circling one number for each of the following (1 = very responsive, 2 = responsive, 3 = somewhat responsive, 4 = unresponsive).

<table>
<thead>
<tr>
<th>Official</th>
<th>Very Responsive</th>
<th>Unresponsive</th>
</tr>
</thead>
<tbody>
<tr>
<td>federal legislators</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>provincial legislators</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>local officials</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>judges</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>bureaucratic officials</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>administrators on boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

7. In general, do the policy positions taken by this organization call for more or less government regulation, or do they tend to call for present levels of regulation? Please check one of the following.

   ____ more regulation  ____ less regulation  ____ present levels of regulation
8. Who are the most effective advocates of environmental reform? Please indicate this organization’s assessment by circling one number for each of the following (1 = very effective, 2 = effective, 3 = somewhat effective, 4 = ineffective).

<table>
<thead>
<tr>
<th>Role</th>
<th>Very Effective</th>
<th>Effective</th>
<th>Somewhat Effective</th>
<th>Ineffective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmentalist teachers &amp; educators</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Aboriginal bands and organizations</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Environmentalist judges</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Grass-roots environmental activists</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Environmentalists on administrative boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Environmentalist lawyers</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Environmentalist writers &amp; journalists</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>National environmental groups</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Environmentalist politicians</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>International environmental groups</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

Section II

1. Please note: this section asks questions about courts, not administrative boards and tribunals. In this organization’s history, how many times has it participated in the judicial system? Please indicate the number for each of the following.

- ____ as a litigant
- ____ as an intervenor
- ____ with a coalition of groups
- ____ by supporting an individual litigant
- ____ by supporting another group’s claim
- ____ other

2(a). Does this organization employ any lawyers? Please indicate the number for each of the following.

- ____ full-time counsel
- ____ part-time counsel

2(b). How frequently does this organization seek the services of lawyers on a contract basis, if ever? Please check one of the following.

- ____ never
- ____ 2 to 4 times a year
- ____ 6 to 8 times a year
- ____ once a year
- ____ 4 to 6 times a year
- ____ more than 8 times a year

2(c). If this organization employs a lawyer, or occasionally seeks the services of a lawyer, what tasks do they perform? Please check the appropriate choices or proceed to the next question.

- ____ appearances before administrative boards & tribunals
- ____ litigation in the courts
- ____ appearances before legislative committees
- ____ policy analysis
- ____ lobbying cabinet ministers
- ____ other
2(d). In this organization’s history, how many times has it sought legal advice from the following sources? Please indicate the approximate number of times for each.

- Canadian Environmental Law Association
- Canadian Environmental Defence Fund
- West Coast Environmental Law Association
- Sierra Legal Defence Fund
- Public Interest Advocacy Centre
- B.C. Public Interest Advocacy Centre
- Legal aid clinic or private law firm
- Other _______________________

3. What have Canadian environmentalists gained by taking their claims to court? Please check the response that best reflects this organization’s position.

- Litigation does little to help the environmental movement. If anything, it benefits those opposed to tough environmental laws.
- Litigation is costly and time-consuming. It makes little sense to initiate a protracted legal battle unless other strategies have failed.
- If litigation complements other political activities, like grass-roots activism or public education campaigns, it can benefit the environmental movement.
- Litigation is a powerful instrument of reform. By taking our claims to court, we can force governments to protect the environment.

4. How does this organization rate the effectiveness of litigation in relation to other political activities, such as lobbying and protest? Please check one of the following.

- Single most effective activity
- Moderately effective
- One of the most effective
- Ineffective

5. In the last 10 years, has this organization become more or less hopeful about the prospects of litigation, or have its expectations remained the same? Please check one of the following.

- More hopeful
- Less hopeful
- Remained the same

6. Litigation offers a number of potential benefits. Which are the most important? Please indicate this organization’s assessment by circling one number for each of the following (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Very Important</th>
<th>Important</th>
<th>Somewhat Important</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invalidate harmful laws</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Enforce beneficial laws</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Prevent damaging legal doctrine</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Develop good legal doctrine</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Make the policy process more accessible</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Create political bargaining leverage</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Promote public awareness</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Catalyze legislative change</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Stop a harmful project (e.g., a dam)</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>
7. Should the environmental movement fight for stronger procedural rights, like the right to participate in the decision-making process, or should it try to secure constitutional provisions that guarantee substantive environmental rights. Please check the response that best reflects this organization’s position.

___ We should fight for both – stronger procedural rights and a new Charter provision that guarantees the right to a healthy environment.

___ Trying to amend the Charter is a waste of time and resources. We should focus our efforts on securing stronger procedural rights.

___ Procedural rights by themselves offer very little – we should fight for a Charter provision that guarantees the right to a healthy environment.

___ Fighting for legal rights should not be a priority. The movement should rely on proven methods, like grass-roots activism and public education campaigns.

8(a). American environmentalists have used litigation for decades. Has their experience had a positive or negative impact on this organization’s assessment of litigation, or has it had no impact whatsoever? Please check one of the following.

___ positive impact
___ negative impact
___ no impact

8(b). In the last 10 years, women’s groups in Canada have used the Charter to further their objectives. Has their experience had a positive or negative impact on this organization’s assessment of litigation, or has it had no impact whatsoever? Please check one of the following.

___ positive impact
___ negative impact
___ no impact

9. Can you name 3 legal victories that greatly improved the state of the environment. Please use the space below.

________________________________________________________________________________

________________________________________________________________________________

________________________________________________________________________________

Section III

1. When was this organization founded? Please check one of the following.

___ before 1970
___ 1975 to 1979
___ 1985 to 1989
___ 1970 to 1974
___ 1980 to 1984
___ 1990 to 1994

2. What is the scope of this organization’s activities? Please check one of the following.

___ national
___ provincial
___ regional
___ local

3(a). Is this organization composed of individual members, organizations, or both? Please check one of the following.

___ individuals
___ organizations
___ both
3(b). How many individual members currently belong to this organization? Please check one of the following.

- Less than 1,000
- 1,000 to 5,000
- 5,000 to 10,000
- 10,000 to 25,000
- 25,000 to 50,000
- 50,000 to 100,000
- 100,000 to 250,000
- More than 250,000

3(c). In the last 3 years, has the number of individual members increased, decreased, or remained about the same? Please check one of the following.

- Increased
- Decreased
- Remained the same

4(a). How many people does this organization currently employ? Please indicate the number for each of the following.

- Full-time employees
- Part-time employees
- Volunteers

4(b). In the last 3 years, has the number of employees increased, decreased, or remained about the same? Please check one of the following.

- Increased
- Decreased
- Remained the same

5(a). What is this organization’s current annual budget? Please check one of the following.

- Less than $5,000
- $5,000 to $25,000
- $25,000 to $50,000
- $50,000 to $100,000
- $100,000 to $250,000
- $250,000 to $500,000
- $500,000 to $750,000
- More than $750,000

5(b). In the last 3 years, has the budget increased, decreased, or remained about the same? Please check one of the following.

- Increased
- Decreased
- Remained the same

5(c). What sources of revenue does this organization rely on? Please rank the importance of the following from 1 to 6, 1 being the most important, 6 the least.

- Corporate donors
- Provincial government(s)
- Individuals
- Private foundations
- Federal government
- Other

5(d). In the last 3 years, has the proportion of funding from government agencies increased, decreased, or remained about the same? Please check one of the following.

- Increased
- Decreased
- Remained the same

5(e). In the last 3 years, has the proportion of funding from private foundations and corporate donors increased, decreased, or remained about the same? Please check one of the following.

- Increased
- Decreased
- Remained the same
6. Please list this organization's four principal objectives.

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

7. How would you characterize this organization's perspective? Please check one or more of the following.
   ___ conservationist  ___ preservationist  ___ deep ecologist
   ___ environmentalist  ___ ecologist  ___ other _______________________

8. Even if this organization is officially non-partisan, which federal political party best represents its policy objectives? Please check one of the following.
   ___ Liberal  ___ Progressive Conservative  ___ NDP
   ___ Reform  ___ Bloc Québécois  ___ other _______________________

9. What is your position within the organization?
   ___ executive director  ___ counsel  ___ staff researcher
   ___ chairperson  ___ director of research  ___ other _______________________

10. Thank you very much for taking the time to answer our questions. In your opinion, will this questionnaire give us a fairly good picture of your organization's political activities? Did we overlook anything?
### Feminist Advocacy Groups

#### Section I

1. How does this organization achieve its objectives? Please indicate the importance of the following activities by circling one number for each (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Activity</th>
<th>Very Important</th>
<th>Important</th>
<th>Somewhat Important</th>
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<tbody>
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<td>Public education campaigns</td>
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<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Lobbying cabinet ministers</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
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<td>4</td>
</tr>
<tr>
<td>Community service (e.g., offering shelter)</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Appearing before administrative boards &amp; tribunals</td>
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<td>3</td>
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<td>3</td>
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</tr>
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<td>Litigation in the courts</td>
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<td>4</td>
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<tr>
<td>Media campaigns</td>
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<td>2</td>
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<tr>
<td>Protests or &quot;direct actions&quot;</td>
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<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Letter writing campaigns</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Policy analysis</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Boycotts</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

2(a). How frequently does this organization appear before provincial or federal legislative committees, if ever? Please check one of the following.

- never
- 2 to 4 times a year
- 6 to 8 times a year
- more than 8 times a year

2(b). How frequently does this organization appear before provincial or federal administrative boards and tribunals, if ever? Please check one of the following.

- never
- 2 to 4 times a year
- 6 to 8 times a year
- more than 8 times a year
2(c). How frequently does this organization initiate "direct actions" or take part in political protests, if ever? Please check one of the following.

- never
- 2 to 4 times a year
- 6 to 8 times a year
- once a year
- 4 to 6 times a year
- more than 8 times a year

2(d). How frequently does this organization lobby provincial or federal cabinet ministers, if ever? Please check one of the following.

- never
- 2 to 4 times a year
- 6 to 8 times a year
- once a year
- 4 to 6 times a year
- more than 8 times a year

3. Has this organization participated in any constitutional discussions? Please check the appropriate choices.

- Patriation, 1980-81
- Meech Lake, 1987-90
- Charlottetown, 1991-92

4(a). Does this organization belong to the National Council of Women, the National Action Committee on the Status of Women, the Fédération nationale des femmes canadiennes-françaises, the Association féminine d'éducation et d'action sociale, the Fédération des femmes du Québec, or some other federation of women's groups? Please check one or more of the following.

- NCW
- FNFCF
- FFQ
- NAC
- AFEAS
- other

4(b). How frequently does this organization join issue-based coalitions with other women's groups, if ever? Please check one of the following.

- never
- 2 to 4 times a year
- 6 to 8 times a year
- once a year
- 4 to 6 times a year
- more than 8 times a year

5. The women's movement confronts a wide range of state officials. Who seem to be the most responsive? Please indicate this organization's views by circling one number for each of the following (1 = very responsive, 2 = responsive, 3 = somewhat responsive, 4 = unresponsive).

<table>
<thead>
<tr>
<th>very responsive</th>
<th>unresponsive</th>
</tr>
</thead>
<tbody>
<tr>
<td>federal legislators</td>
<td>1 2 3 4</td>
</tr>
<tr>
<td>provincial legislators</td>
<td>1 2 3 4</td>
</tr>
<tr>
<td>local officials</td>
<td>1 2 3 4</td>
</tr>
<tr>
<td>judges</td>
<td>1 2 3 4</td>
</tr>
<tr>
<td>bureaucratic officials</td>
<td>1 2 3 4</td>
</tr>
<tr>
<td>administrators on boards &amp; tribunals</td>
<td>1 2 3 4</td>
</tr>
</tbody>
</table>

6. In general, do the policy positions taken by this organization call for more or less government regulation, or do they tend to call for present levels of regulation? Please check one of the following.

- more regulation
- less regulation
- present levels of regulation
7. Who are the most effective advocates of gender equality? Please indicate this organization’s assessment by circling one number for each of the following (1 = very effective, 2 = effective, 3 = somewhat effective, 4 = ineffective).

<table>
<thead>
<tr>
<th></th>
<th>very effective</th>
<th>ineffective</th>
</tr>
</thead>
<tbody>
<tr>
<td>feminist teachers &amp; educators</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>aboriginal women’s groups</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>feminists judges</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>grass-roots feminist activists</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>feminists on administrative boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>feminist lawyers</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>feminist writers &amp; journalists</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>national women’s groups</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>feminist politicians</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>international women’s groups</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

**Section II**

1. Please note: this section asks questions about courts, not administrative boards and tribunals. In this organization’s history, how many times has it participated in the judicial system? Please indicate the number for each of the following.

   ___ as a litigant  ___ by supporting an individual litigant
   ___ as an intervenor  ___ by supporting another group’s claim
   ___ with a coalition of groups  ___ other ____________

2(a). Does this organization employ any lawyers? Please indicate the number for each of the following.

   ___ full-time counsel  ___ part-time counsel

2(b). How frequently does this organization seek the services of lawyers on a contract basis, if ever? Please check one of the following.

   ___ never  ___ 2 to 4 times a year  ___ 6 to 8 times a year
   ___ once a year  ___ 4 to 6 times a year  ___ more than 8 times a year

2(c). If this organization employs a lawyer, or occasionally seeks the services of a lawyer, what tasks do they perform? Please check the appropriate choices or proceed to the next question.

   ___ appearances before administrative boards & tribunals  ___ litigation in the courts
   ___ appearance before legislative committees  ___ policy analysis
   ___ lobbying cabinet ministers  ___ other
2(d). In this organization’s history, how many times has it sought legal advice from the following sources? Please indicate the approximate number of times for each.

- Legal Education & Action Fund
- Public Interest Advocacy Centre
- Legal aid clinic or private law firm
- West Coast Legal Education & Action Fund
- B.C. Public Interest Advocacy Centre
- Other __________________________

3. What have women gained by taking their claims to court? Please check the response that best reflects this organization’s position.

- Litigation does little to help the women’s movement. If anything, it benefits those opposed to gender equality.
- Litigation is costly and time-consuming. It makes little sense to initiate a protracted legal battle unless other strategies have failed.
- If litigation complements other political activities, like grass-roots activism or public education campaigns, it can benefit the women’s movement.
- Litigation is a powerful instrument of reform. By taking our claims to court, we can force governments to create a more equitable society.

4. How does this organization rate the effectiveness of litigation in relation to other political activities, such as lobbying and protest? Please check one of the following.

- single most effective activity
- one of the most effective
- moderately effective
- ineffective

5. This year marks the 10th anniversary of section 15, the Charter’s principal equality provision. In the last 10 years, has this organization become more or less hopeful about the prospects of Charter litigation, or have its expectations remained the same? Please check one of the following.

- more hopeful
- less hopeful
- remained the same

6(a). Women’s groups in the United States have used litigation for decades. Has their experience had a positive or negative impact on this organization’s assessment of litigation, or has it had no impact whatsoever? Please check one of the following.

- positive impact
- negative impact
- no impact

6(b). Canadian environmental groups have also used litigation to further their objectives. Has their experience had a positive or negative impact on this organization’s assessment of litigation, or has it had no impact whatsoever? Please check one of the following.

- positive impact
- negative impact
- no impact

7. In the next 10 years, should the women’s movement dedicate more resources to fighting legal challenges, fewer, or the same amount? Please indicate this organization’s position by checking one of the following.

- more resources
- fewer resources
- the same amount
8. Litigation can offer a number of potential benefits? Which are the most important? Please indicate this organization's assessment by circling one number for each of the following (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Very Important</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invalidate harmful laws</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Enforce beneficial laws</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Prevent damaging legal doctrine</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Develop good legal doctrine</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Make the policy process more accessible</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Create political bargaining leverage</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Promote public education</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Catalyze legislative change</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Stop disruptive picketing</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

9. Can you name 3 legal victories that greatly improved the lives of Canadian women. Please use the space below.

__________________________________________________________

__________________________________________________________

Section III

1. When was this organization founded? Please check one of the following.

   ____ before 1970
   ____ 1970 to 1974
   ____ 1975 to 1979
   ____ 1980 to 1984
   ____ 1985 to 1989
   ____ 1990 to 1994

2. What is the scope of this organization's activities? Please check one of the following.

   ____ national
   ____ provincial
   ____ regional
   ____ local

3(a). Is this organization composed of individual members, organizations, or both? Please check one of the following.

   ____ individuals
   ____ organizations
   ____ both

3(b). How many individual members currently belong to this organization? Please check one of the following.

   ____ less than 1,000
   ____ 1,000 to 5,000
   ____ 5,000 to 10,000
   ____ 10,000 to 25,000
   ____ 25,000 to 50,000
   ____ 50,000 to 100,000
   ____ 100,000 to 250,000
   ____ 250,000 to 500,000
   ____ more than 500,000
3(c). In the last 3 years, has the number of individual members increased, decreased, or remained about the same? Please check one of the following.

____ increased  ____ decreased  ____ remained the same

4(a). How many people does this organization currently employ? Please indicate the number for each of the following.

____ full-time employees  ____ part-time employees  ____ volunteers

4(b). In the last 3 years, has the number of employees increased, decreased, or remained about the same? Please check one of the following.

____ increased  ____ decreased  ____ remained the same

5(a). What is this organization’s current annual budget? Please check one of the following.

____ less than $5,000  ____ $50,000 to $100,000  ____ $500,000 to $750,000
____ $5,000 to $25,000  ____ $100,000 to $250,000  ____ $750,000 to $1,000,000
____ $25,000 to $50,000  ____ $250,000 to $500,000  ____ more than $1,000,000

5(b). In the last 3 years, has the budget increased, decreased, or remained about the same? Please check one of the following.

____ increased  ____ decreased  ____ remained the same

5(c). What sources of revenue does this organization rely on? Please rank the importance of the following from 1 to 6, 1 being the most important, 6 the least.

____ corporate donors  ____ provincial government(s)  ____ individuals
____ private foundations  ____ federal government  ____ other ____________________

5(d). In the last 3 years, has the proportion of funding from government agencies increased, decreased, or remained about the same? Please check one of the following.

____ increased  ____ decreased  ____ remained the same

5(e). In the last 3 years, has the proportion of funding from private foundations and corporate donors increased, decreased, or remained about the same? Please check one of the following.

____ increased  ____ decreased  ____ remained the same

6. How would you characterize this organization’s perspective? Please check one or more of the following.

____ conservative feminism  ____ socialist feminism  ____ integrative feminism
____ liberal feminism  ____ radical feminism  ____ other ____________________
7. Even if this organization is officially non-partisan, which federal political party best represents its policy objectives? Please check one of the following.
   ____ Liberal  ____ Progressive Conservative  ____ NDP
   ____ Reform  ____ Bloc Québécois  ____ other ________________

8. Please list this organization's four principal objectives.

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________

9. What is your position within the organization?
   ____ executive director  ____ counsel  ____ staff researcher
   ____ chairperson  ____ director of research  ____ other ________________

10. Thank you very much for taking the time to answer our questions. In your opinion, will this questionnaire give us a fairly good picture of your organization's political activities? Did we overlook anything?

   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
   __________________________________________________________
Environmentalists as Legal Advocates

Section I

1(a). Do you consider yourself an environmentalist? Please check one of the following choices, and note that question 1(b) allows you to clarify your response.

_____ very much so          _____ in a limited way
_____ moderately so         _____ not at all

1(b). Which term best describes your views on environmental issues? Please check one of the following choices.

_____ conservationist       _____ preservationist       _____ deep ecologist
_____ environmentalist       _____ ecologist             _____ other ____________________

2(a). Do you usually think of yourself as being on the "left" or "right" of the political spectrum? If you never think in these terms, please continue to the next question. If you do, please indicate your response by circling a number from 1 to 5 on the following scale (1 = left, 2 = moderate left, 3 = centre, 4 = moderate right, 5 = right).

<table>
<thead>
<tr>
<th>left</th>
<th>moderate left</th>
<th>centre</th>
<th>moderate right</th>
<th>right</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

2(b). Which federal political party or parties did you support in the last two elections? Please check one or more of the following choices.

_____ Liberal       _____ Progressive Conservative       _____ Bloc Québécois
_____ NDP           _____ Reform                        _____ other ____________________

3. Which of the following goals do you consider the most important? Please rank the four goals, which are taken from the World Values Survey (1 = the most important, and 4 = the least important).

_____ maintain law and order
_____ give people more say in the decisions of government
_____ fight rising prices
_____ protect freedom of speech
4. Please indicate whether you agree or disagree with the following statements by circling one of the two choices.

- I would give part of my income if I were certain that the money would be used to prevent environmental pollution.  agree  disagree
- I would agree to an increase in taxes if the extra money is used to prevent environmental pollution.  agree  disagree
- The government has to reduce environmental pollution but it should not cost me any money.  agree  disagree
- All citizens should receive equal wages for work of comparable value.  agree  disagree
- Having a job is the best way for a woman to be an independent person.  agree  disagree
- When jobs are scarce employers should give priority to Canadians over immigrants.  agree  disagree

5. Which of the following political activities have you done, which might you consider doing, and which would you never do? Please circle one number for each (1 = have done, 2 = might do, 3 = would never do).

<table>
<thead>
<tr>
<th>Activity</th>
<th>done</th>
<th>might do</th>
<th>never do</th>
</tr>
</thead>
<tbody>
<tr>
<td>sign a petition</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>support a boycott</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>take part in a lawful demonstration or march</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>take part in an unlawful demonstration or march</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>occupy a government office or place of business</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>lobby cabinet ministers</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>appear before a legislative committee</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>lobby bureaucratic officials</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

6. How confident are you in the following institutions? Please circle one number for each selection (1 = very confident, 2 = somewhat confident, 3 = not very confident, and 4 = not at all confident).

<table>
<thead>
<tr>
<th>Institution</th>
<th>very</th>
<th>somewhat</th>
<th>not very</th>
<th>not at all</th>
</tr>
</thead>
<tbody>
<tr>
<td>unions</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>provincial government</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Parliament</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>provincial public service</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>federal public service</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>private corporations</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>legal system</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>federal government</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>
7. Did you vote yes or no for the 1992 Charlottetown Accord, or did you decide not to vote?
   ___ yes          ___ no          ___ decided not to vote

Section II

1. Please note: this section asks questions about courts, not administrative boards and tribunals. What have Canadian environmentalists gained by taking their claims to court? Please check the response that best reflects your assessment.
   ___ Litigation does little to help the environmental movement. If anything, it benefits those opposed to tough environmental laws.
   ___ Litigation is costly and time-consuming. It makes little sense to initiate a protracted legal battle unless other strategies have failed.
   ___ If litigation complements other political activities, like grass-roots activism or public education campaigns, it can benefit the environmental movement.
   ___ Litigation is a powerful instrument of reform. By taking our claims to court, we can force governments to protect the environment.

2. As an environmentalist, how would you rate the effectiveness of litigation in relation to other political activities, such as lobbying and protest? Please check one of the following.
   ___ single most effective activity          ___ moderately effective
   ___ one of the most effective              ___ ineffective

3. Litigation offers a number of potential benefits to those who are concerned about the environment. Which are the most important? Please indicate your assessment by circling one number for each of the following (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Very Important</th>
<th>Unimportant</th>
</tr>
</thead>
<tbody>
<tr>
<td>invalidate harmful laws</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>enforce beneficial laws</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>prevent damaging legal doctrine</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>develop good legal doctrine</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>make the policy process more accessible</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>create political bargaining leverage</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>promote public awareness</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>catalyze legislative change</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>stop a harmful project (e.g., a dam)</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

4. In the last 10 years, have you become more or less hopeful about the prospects of litigation, or have your expectations remained the same? Please check one of the following.
   ___ more hopeful          ___ less hopeful          ___ remained the same
5. Should the environmental movement fight for stronger procedural rights, like the right to participate in the decision-making process, or should it try to secure constitutional provisions that guarantee substantive environmental rights. Please check the response that best reflects your position.

___ We should fight for both – stronger procedural rights and a new Charter provision that guarantees the right to a healthy environment.

___ Trying to amend the Charter is a waste of time and resources. We should focus our efforts on securing stronger procedural rights.

___ Procedural rights by themselves offer very little – we should fight for a Charter provision that guarantees the right to a healthy environment.

___ Fighting for legal rights should not be a priority. The movement should rely on proven methods, like grass-roots activism and public education campaigns.

6. "Governments should help fund groups that use litigation to protect the environment or fight for equality."

Please indicate your response to this statement by checking one of the following choices.

___ strongly agree ___ disagree

___ agree ___ strongly disagree

7. Canadian environmental groups have launched a number of important court challenges over the last 20 years. In your opinion, which cases have had the greatest positive impact?

________________________________________________________________________

________________________________________________________________________

8. In your opinion, who are the most effective advocates of environmental reform? Please circle one number for each of the following (1 = very effective, 2 = effective, 3 = somewhat effective, 4 = ineffective).

<table>
<thead>
<tr>
<th></th>
<th>very effective</th>
<th>ineffective</th>
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<tbody>
<tr>
<td>environmentalist teachers &amp; educators</td>
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<td>2</td>
</tr>
<tr>
<td>environmentalists on administrative boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>environmentalist lawyers</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>environmentalist writers &amp; journalists</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>national environmental groups</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>environmentalist politicians</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>international environmental groups</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

Section III

1. Please check the academic degrees that you have completed.

___ B.A.        ___ M.A.            ___ Ph.D.

___ B.Sc.       ___ M.Sc.           ___ D.Jur.

___ LL.B.       ___ LL.M.           ___ other ____________________________

1(b). Have you received any degrees from American institutions? Please check the appropriate response.

___ yes  ___ no

2. Do you currently work in the private or public sector? Please check one of the following choices.

___ private law practice  ___ provincial agency  ___ legal advocacy organization
___ private consulting firm  ___ federal agency  ___ other ____________________

3. Have you ever worked for a government agency or university on a part-time or full-time basis? Please check the appropriate choices or move to the next question.

___ federal government agency (full-time)  ___ federal government agency (part-time)
___ provincial government agency (full-time)  ___ provincial government agency (part-time)
___ university (full-time)  ___ university (part-time)

4. If you are a practicing lawyer, and work at a private law firm, please indicate how many associates and partners it employs by checking one of the following choices. If you are not a practicing lawyer, please proceed to question 6.

___ self-employed  ___ 6 to 20  ___ 75 to 100
___ 2 to 5  ___ 21 to 75  ___ more than 100

5. How frequently do you offer your services pro bono? Please check the appropriate choice.

___ never  ___ 2 to 4 times a year
___ once a year  ___ more than 4 times a year

6. What is your approximate annual income before deductions? Please check one of the following choices.

___ less than $50,000  ___ $75,000 to $100,000  ___ $150,000 to $200,000
___ $50,000 to $75,000  ___ $100,000 to $150,000  ___ more than $200,000

7(a). Have you ever worked for one of the groups listed below on a full-time or part-time basis? Please check one or more of the following choices, or continue to the next question.

___ Canadian Environmental Law Association  ___ Canadian Environmental Defence Fund
___ West Coast Environmental Law Association  ___ Sierra Legal Defence Fund
___ Public Interest Advocacy Centre  ___ B.C. Public Interest Advocacy Centre
___ Women’s LEAF  ___ West Coast LEAF

7(b). Have you ever offered advice on select court challenges to any of the groups listed below? Please check one or more of the following choices, or proceed to the next question.

___ Canadian Environmental Law Association  ___ Canadian Environmental Defence Fund
___ West Coast Environmental Law Association  ___ Sierra Legal Defence Fund
___ Public Interest Advocacy Centre  ___ B.C. Public Interest Advocacy Centre
___ Women’s LEAF  ___ West Coast LEAF
7(c). Have you ever made a donation to any of the following groups? Please check the appropriate choices or move to the last question.

- [ ] Canadian Environmental Law Association
- [ ] Canadian Environmental Defence Fund
- [ ] West Coast Environmental Law Association
- [ ] Sierra Legal Defence Fund
- [ ] Public Interest Advocacy Centre
- [ ] B.C. Public Interest Advocacy Centre
- [ ] Women's LEAF
- [ ] West Coast LEAF

8. Thank you very much for taking the time to answer our questions. If you have any comments, please use the space below.

________________________________________________________________________
________________________________________________________________________
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________________________________________________________________________
Feminists as Legal Advocates

Section 1

1(a). Do you consider yourself a feminist or pro-feminist? Please check one of the following choices, and note that question 1(b) allows you to clarify your response.

____ very much so  
____ in a limited way  
____ moderately so  
____ not at all

1(b). Which term best describes your views on gender equality? Please check one of the following choices.

____ conservative feminism  
____ socialist feminism  
____ integrative feminism  
____ liberal feminism  
____ radical feminism  
____ other ______________________

2(a). Do you usually think of yourself as being on the "left" or "right" of the political spectrum? If you never think in these terms, please continue to the next question. If you do, please indicate your response by circling a number from 1 to 5 on the following scale (1 = left, 2 = moderate left, 3 = centre, 4 = moderate right, 5 = right).

left  moderate left  centre  moderate right  right

1  2  3  4  5

2(b). Which federal political party or parties did you support in the last two elections? Please check one or more of the following choices.

____ Liberal  
____ Progressive Conservative  
____ Bloc Québécois  
____ NDP  
____ Reform  
____ other ______________________

3. Which of the following goals do you consider the most important? Please rank the four goals, which are taken from the World Values Survey (1 = the most important, and 4 = the least important).

____ maintain law and order  
____ give people more say in the decisions of government  
____ fight rising prices  
____ protect freedom of speech
4. Please indicate whether you agree or disagree with the following statements by circling one of the two choices.

- I would give part of my income if I were certain that the money would be used to prevent environmental pollution.
- I would agree to an increase in taxes if the extra money is used to prevent environmental pollution.
- The government has to reduce environmental pollution, but it should not cost me any money.
- All citizens should receive equal wages for work of comparable value.
- Having a job is the best way for a woman to be an independent person.
- When jobs are scarce, employers should give priority to Canadians over immigrants.

5. Which of the following political activities have you done, which might you consider doing, and which would you never do? Please circle one number for each (1 = have done, 2 = might do, 3 = would never do).

- sign a petition
- support a boycott
- take part in a lawful demonstration or march
- take part in an unlawful demonstration or march
- occupy a government office or place of business
- lobby cabinet ministers
- appear before a legislative committee
- lobby bureaucratic officials

6. How confident are you in the following institutions? Please circle one number for each selection (1 = very confident, 2 = somewhat confident, 3 = not very confident, and 4 = not at all confident).

- unions
- Supreme Court
- provincial government
- Parliament
- provincial public service
- federal public service
- private corporations
- legal system
- federal government
7. Did you vote yes or no for the 1992 Charlottetown Accord, or did you decide not to vote?

_____ yes  _____ no  _____ decided not to vote

Section II

1. Please note: this section asks questions about courts, not administrative boards and tribunals. What have Canadian women gained by taking their claims to court? Please check the response that best reflects your assessment.

_____ Litigation does little to help the women’s movement. If anything, it benefits those opposed to gender equality.

_____ Litigation is costly and time-consuming. It makes little sense to initiate a protracted legal battle unless other strategies have failed.

_____ If litigation complements other political activities, like grass-roots activism or public education campaigns, it can benefit the women’s movement.

_____ Litigation is a powerful instrument of reform. By taking our claims to court, we can force governments to create a more equitable society.

2. As a feminist or pro-feminist, how would you rate the effectiveness of litigation in relation to other political activities, such as lobbying and protest? Please check one of the following, or proceed to the next question.

_____ single most effective activity  _____ moderately effective

_____ one of the most effective  _____ ineffective

3. Litigation offers a number of potential benefits to those who want gender equality. Which are the most important? Please indicate your assessment by circling one number for each of the following (1 = very important, 2 = important, 3 = somewhat important, 4 = unimportant).

<table>
<thead>
<tr>
<th>Benefit</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
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<tbody>
<tr>
<td>invalidate harmful laws</td>
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<tr>
<td>enforce beneficial laws</td>
<td></td>
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<tr>
<td>prevent damaging legal doctrine</td>
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<tr>
<td>develop good legal doctrine</td>
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<td>make the policy process more accessible</td>
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<tr>
<td>create political bargaining leverage</td>
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<tr>
<td>promote public awareness</td>
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<tr>
<td>catalyze legislative change</td>
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<tr>
<td>stop disruptive picketing</td>
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</table>

4. This year marks the 10th anniversary of section 15, the Charter’s principal equality provision. In the last 10 years, have you become more or less hopeful about the prospects of Charter litigation, or have your expectations remained the same? Please check one of the following.

_____ more hopeful  _____ less hopeful  _____ remained the same
5. Canadian women's groups have launched a number of important court challenges over the last 20 years. In your opinion, which cases have had the greatest positive impact?

6. In your opinion, who are the most effective advocates of gender equality? Please circle one number for each of the following (1 = very effective, 2 = effective, 3 = somewhat effective, 4 = ineffective).

<table>
<thead>
<tr>
<th>Advocate Type</th>
<th>Very Effective</th>
<th>Somewhat Effective</th>
<th>Ineffective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feminist teachers &amp; educators</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Aboriginal bands and organizations</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Feminist judges</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Grass-roots feminist activists</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Feminists on administrative boards &amp; tribunals</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Feminist lawyers</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Feminist writers &amp; journalists</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>National women's groups</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Feminist politicians</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>International women's groups</td>
<td>1</td>
<td>2</td>
<td>3</td>
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</tbody>
</table>

7. In the next 10 years, should the women's movement dedicate more resources to fighting legal challenges, fewer, or about the same amount? Please indicate your view by checking one of the following.

- More resources
- Fewer resources
- The same amount

8. "Governments should help fund groups that use litigation to fight for equality or protect the environment." Please indicate your response to this statement by checking one of the following choices.

- Strongly agree
- Disagree
- Agree
- Strongly disagree

Section III

1(a). Please check the academic degrees that you have attained.

- B.A.
- B.Sc.
- LL.B.
- M.A.
- M.Sc.
- LL.M.
- Ph.D.
- D.Jur.
- Other

1(b). Have you received any degrees from American institutions? Please check the appropriate response.

- Yes
- No
2. Do you currently work in the private or public sector? Please check one of the following choices.
   ___ private law practice  ___ provincial agency  ___ public interest law group
   ___ private consulting firm  ___ federal agency  ___ other ______________________

3. Have you ever worked for a government agency or university on a part-time or full-time basis? Please check the appropriate choices, or move to the next question.
   ___ federal government agency (full-time)  ___ federal government agency (part-time)
   ___ provincial government agency (full-time)  ___ provincial government agency (part-time)
   ___ university (full-time)  ___ university (part-time)

4. If you are a practicing lawyer, and work at a private law firm, please indicate how many associates and partners it employs by checking one of the following choices. If you are not a practicing lawyer, please proceed to question 6.
   ___ self-employed  ___ 6 to 20  ___ 75 to 100
   ___ 2 to 5  ___ 21 to 75  ___ more than 100

5. How frequently do you offer your services pro bono? Please check the appropriate choice.
   ___ never  ___ 2 to 4 times a year
   ___ once a year  ___ more than 4 times a year

6. What is your approximate annual income before deductions? Please check one of the following choices.
   ___ less than $50,000  ___ $75,000 to $100,000  ___ $150,000 to $200,000
   ___ $50,000 to $75,000  ___ $100,000 to $150,000  ___ more than $200,000

7(a). Have you ever worked for one of the groups listed below on a full-time or part-time basis? Please check the appropriate choices, or continue to the next question.
   ___ Women’s LEAF  ___ West Coast LEAF
   ___ Public Interest Advocacy Centre  ___ B.C. Public Interest Advocacy Centre
   ___ West Coast Environmental Law Association  ___ Sierra Legal Defence Fund
   ___ Canadian Environmental Law Association  ___ Canadian Environmental Defence Fund

7(b). Have you ever offered advice on select court challenges to any of the groups listed below? Please check one or more of the following choices, or proceed to the next question.
   ___ Women’s LEAF  ___ West Coast LEAF
   ___ Public Interest Advocacy Centre  ___ B.C. Public Interest Advocacy Centre
   ___ West Coast Environmental Law Association  ___ Sierra Legal Defence Fund
   ___ Canadian Environmental Law Association  ___ Canadian Environmental Defence Fund
7(c). Have you ever made a donation to any of the following groups? Please check the appropriate choices, or move to the last question.

___ Women's LEAF
___ Public Interest Advocacy Centre
___ West Coast Environmental Law Association
___ Canadian Environmental Law Association
___ West Coast LEAF
___ B.C. Public Interest Advocacy Centre
___ Sierra Legal Defence Fund
___ Canadian Environmental Defence Fund

8. Thank you very much for taking the time to answer our questions. If you have any comments, please use the space below.

__________________________________________________________________________
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BIBLIOGRAPHY

Law and Politics


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The Feminist Movement


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**The Environmental Movement**


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