

Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund

by Christopher P. Manfredi (Vancouver: UBC Press, 2004) Pp247.

PROFESSOR MANFREDI PROVIDES a fascinating description of the legal and political feminist mobilization efforts of the Women's Legal Education and Action Fund (LEAF). Through a two decade history of this Canadian feminist legal organization, Manfredi provides a meticulous analysis tracking LEAF's legal strategies from the early 1980s to 2000.

Unique to this book is its combined emphasis on the macrolevel participation of the women's movement in the various processes of constitutional modification and its microlevel examination of LEAF's litigation efforts to support this policy agenda. The interdisciplinary use of literature from political science and law provides a comprehensive analysis of feminist strategies in Canada. The politics of constitutional amendment in 1980 were an important forum for the Canadian feminist movement to present its broad concerns about the *Canadian Charter of Rights and Freedoms*.¹ Indeed, as Manfredi points out, the movement's recommendations were ultimately critical in creating a broader foundation for equality rights in section 15 than the language originally contemplated by the legislature. Manfredi's elaboration of the various political proposals put forth by feminist groups in 1980 and the subsequent constitutional discussions of the Meech Lake and Charlottetown Accords offer a distinctive and illuminating lens through which to examine the context of feminist litigation and to speculate as to its future.

While some of the overview of LEAF's activity in chapter one reads like lackluster statistics, the tables presented throughout the book on LEAF's participation, successes, individual judicial support and the use of LEAF materials and arguments in Supreme Court cases are a functional and valuable resource for anyone generally interested in equality jurisprudence.

Chapter two and other portions of the book are devoted to understanding the concept of substantive equality and following this equality logic through various factual manifestations and legal interpretations. Different from the emptier concept of formal equality wherein discrimination occurs only when similarly situated people are treated differently, LEAF has advanced the position that "equal treatment is insufficient precisely because it does not account for the cumulative effects of alleged past discrimination."² In one of its first Supreme Court of Canada interventions, LEAF in

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].
 2. Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004) at 35.

*Andrews v. Law Society of British Columbia*³ contributed to the establishment of the idea that formal equality has been quite thoroughly discredited in Canadian law.

The bulk of the book is a thorough doctrinal analysis of the variety of issues litigated by LEAF. Chapter three delineates the LEAF positions advocated in three controversial areas: (1) reproductive choice and fetal rights; (2) the regulation of expression, pornography in particular; and (3) sexual orientation. Chapter four outlines LEAF's participation in family law cases, while chapter five describes the tumultuous dialogue between Parliament and the courts in the law of sexual assault. These chapters are an absorbing and informative summary of not only feminist activism in the Supreme Court, but a digest of the most important cases involving equality rights arguments, essential and interesting reading for any law student or equality-seeking advocate.

Manfredi's analysis of LEAF facts submitted in Supreme Court cases measured against the actual decisions rendered by the Court in those cases demonstrates perhaps most clearly, and in a manner often obscured by merely reading Supreme Court judgments, the direct influence that feminist litigation has had on judicial interpretation of substantive equality.

Manfredi offers intermittent political and legal comparisons with the United States which provides noteworthy context to the analysis of feminist mobilization in Canada. For example, the failed ratification of the United States' Equal Rights Amendment can be attributed in part because certain political actors were fearful of the potentially expansive judicial interpretations of substantive equality that could result from the proposed legislation. The American emphasis on formal equality combined with the fact that intent, and not impact, continues to be a necessary element of discrimination in the U.S. constitutional context, makes the gains of the Canadian feminist movement all the more remarkable.

While Manfredi's book is undoubtedly a deserving tribute to the founding mothers of LEAF, it is not blind to the elitist critiques leveled at the organization or the lessons that have been learned as a result. The discussion of LEAF's line of reasoning in the obscenity case of *R. v. Butler*,⁴ and its subsequent modification in *Little Sisters Book and Art Emporium v. Canada*,⁵ is a poignant example of the way in which a feminist organization became more sensitive to the voices of additionally marginalized women and diversified its approach in order to meet the differing needs of its sisters. As Manfredi notes, although *Little Sisters* might be considered a failure in terms of outcome, the intervention "was as much about healing wounds within the

3. [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

4. [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449.

5. [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*].

[lesbian] feminist movement as it was about achieving a particular legal objective.”⁶ LEAF’s shift from an essentialist to a particularist analysis of women’s equality would likely better serve the organization in its representation of all women and would be more effective in combating the many forms of gender oppression.

While the book’s focus on LEAF is understandable given the organization’s persistent participation in litigation as a means of affecting change for women, the prominence conferred on LEAF undermines to some extent the longstanding efforts of other Canadian organizations to shape the legal and political landscape in favour of women and other disadvantaged groups. To his credit, Manfredi does mention other players in the feminist, gay/lesbian, anti-racist and disability movements who either aligned with LEAF or participated separately in seeking equality politically and legally, but the nature of any project that highlights merely one organization leaves the undeniable, albeit inaccurate, impression that LEAF was the major if not sole organization behind the successes of the Canadian women’s movement.

The sixth and final chapter asks whether LEAF made a difference through its various strategies of legal mobilization. Several indices of success are scrutinized including a lengthy emphasis on LEAF’s tendency to generate and bring social science evidence to its legal submissions. Not only did the Supreme Court of Canada make 108 references to extralegal material cited in LEAF facta, LEAF also contributed to increasing the feminist legal scholarship in circulation.⁷ Certainly, this creative measure of success had implications for both the feminist movement and litigation tactics generally.

LEAF’s interventions are found to have changed legal rules both directly and indirectly. Manfredi concludes that the area where legal change made the most significant practical achievement was in the area of abortion rights. LEAF’s defence of the elimination that only hospitals may perform abortions had far-reaching implications for women, with a significant increase in the number of legal abortions performed after 1988.⁸ Manfredi footnotes that since *Little Sisters* LEAF experienced two consecutive losses in *Boston v. Boston*⁹ and *R. v. Shearing*.¹⁰ Manfredi ponders that it may be too early to tell whether these losses signal a change in the relationship between LEAF and the Supreme Court. However, since the book’s publication, LEAF has most recently suffered other significant losses at the Supreme Court in *Newfoundland (Treasury Board) v. N.A.P.E.*¹¹ and *Auton v. British Columbia*.¹² I am inclined to think that these defeats portend something more

6. Manfredi, *supra* note 2 at 81.

7. *Ibid.* at 153.

8. *Ibid.* at 192.

9. [2001] 2 S.C.R. 413, 201 D.L.R. (4th) 1.

10. [2002] 3 S.C.R. 33, 214 D.L.R. (4th) 215.

11. (2004), 244 D.L.R. (4th) 1, 2004 SCC 66.

12. (2004), 245 D.L.R. (4th) 1, 2004 SCC 78.

than Manfredi's initial speculation. Given the ever-changing nature of this subject area, a future edition of this book may be needed to elaborate and explain the various phenomena at play. Notwithstanding any of the above critiques, this is a well-researched book that makes an important contribution to section 15 related scholarship and the conditions that gave rise to the equality provision and jurisprudence of the *Charter*.

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