ment for companies to disclose how their
nominating committees consider diversity in
identifying board nominees.

In Canada, 21 of the top 1,000 companies
have female CEOs—representing two per-
cent. In the U.S., three percent of the top
1,000 companies have female chief execu-
tive officers.

INFANTICIDE DEFENCE DEFENDED

In the fall, LEAF intervened in an appeal
court trial to offer its feminist perspective on
the ongoing relevance and importance of
infanticide as a homicide offence that is sep-
parate and distinct from murder.

In the past few years, LEAF says, there
has been “an emerging trend of the Crown
charging women who have killed their
newly born children with murder as
opposed to infanticide. The result is that
these women face life imprisonment with no
eligibility for parole,” says LEAF legal direc-
tor Joanna Birenbaum.

LEAF points out that the offence of infan-
ticide, which carries a maximum sentence of
five years imprisonment, “is intended to
account for the complex and gendered
social, economic, psychological and medical
context in which the offence occurs.”

Birenbaum says those who commit infan-
ticide tend to be young, poor, socially
isolated and without adequate social and
economic supports to cope with childbirth
caring for a child. They have often experi-
enced sexual or other abuse and have
denied the pregnancy to others, and
even to themselves. Additionally, many of
these women “have given birth alone, and
commit the offence in a state of panic,
intense pain, shock, dissociation,
exhaustion and alienation.”

“The offence of infanticide is treated dif-
ferently in law than murder because of the
many overlapping social, cultural, psycho-
logical and medical factors which may affect
the state of mind of accused women follow-
ing childbirth,” she adds. “It is a very serious
crime, but it is a crime which recognizes the
reduced culpability of women whose minds
are disturbed due to the interaction of these
color complex factors related to childbirth.”

Infanticide applies only to women who
have recently given birth. LEAF’s factum
argues that where the elements of infanticide
are present, the infanticide offence should
be available to women, regardless of whether
the Crown seeks murder charges.

analysis

PROGRESS ON
EQUALITY STALLED

BY SHELAGH DAY

When Section 15 of the Canadian Charter of
Rights and Freedoms came into force 25
years ago, no one imagined that govern-
ments would become major obstructers to
the promise of equality enshrined in the
Constitution. Yet that is what has happened.

Women were excited and hopeful in the
early 1980s when they fought for strong lan-
guage in the equality provisions in the
Charter in Section 15. They argued from
the outset for a substantive version of equality,
that is, for equality in the substance or con-
tent of the law, for a version of equality
capable of addressing and transforming the
real conditions of inequality that women
face, including economic inequality. If the
right to equality was given a substantive
interpretation, it would help women to us
address the deeply rooted social inequali-
ties that affect them because of sex, race,
colour and disability.

So when Section 15 came into force in
1985, with its new guarantees of equality
before and under the law, and equal benefit
and equal protection under the law, women
expected, in the words of constitutional
scholar Melina Buckley, the development of
a governmental “ethos of equality.”

However, when we now ask whether
Canada’s Section 15 has moved governments
to design policies and allocate resources in

ways that advance substantive equality, the
answer has to be no. Basic programs and
protections that should be firmly in place in a
constitutional democracy committed to
women’s equality are absent, partial or
shaky. These include equal pay for work of
equal value, a national child care program,
adequate civil legal aid, reliable police pro-
tection from male violence, adequate income
assistance and housing, and concerted
strategies to move Aboriginal women and
girls out of entrenched disadvantage. Many
essential programs and services have been
weakened by years of government restruc-
turing, cuts and privatization.

Turning the equality promise into reality
would require deliberate action and spend-
ring by governments, not withdrawal and
defension to the market. Moving towards a
more equal society would require setting
goals and allocating resources to achieve
them. But this has not happened.

Studies by the Standing Committee on
the Status of Women and by Auditor-Gen-
eral Sheila Fraser have said that Canada
has no working gender machinery. There
have been no plans, or paper plans with no
resources behind them. The result is that
conditions, particularly for the poorest
women, have worsened since 1985.

Cuts to essential programs and services
are not the only way that equality has been
undermined by governments. Equality
rights expert Gwen Brodsky notes in her
contribution to the book Poverty, Rights,
Social Citizenship and Legal Activism, that
in some cases, attorneys general have
argued for interpretations of Section 15
that drain it of substantive content and, in
particular, of any capacity to deal with
women’s material conditions.

Provincial and federal governments
have argued in Charter cases that the right
to equality does not impose any obligations
on governments to redress social inequality
or to alleviate conditions of poverty.
They have also argued that courts cannot
review government decisions about the
allocation of resources.

The case of Newfoundland (Treasury
Board) vs. Newfoundland and Labrador
Association of Public Employees (NAPE)
provides a good example. The government
negotiated a series of payments to com-
penstate female health care workers for
long-standing discrimination in their pay.
But in 1991, the province said it was experi-
cencing a financial crisis and cancelled the
$24 million in pay equity adjustments. NAPE
challenged the government on the grounds
that the cancellation violated Section 15. In
response, the province’s attorney general
argued that government had no obligation
to address sex discrimination in wages and
that the repeal of a non-obligatory scheme
cannot constitute discrimination.

The attorney general of British Columbia
then intervened in support, arguing that the
courts have no role in reviewing decisions

(Continued on page 13)
about public expenditures. In effect, the consistent position of governments is that the courts cannot enforce a right to substantive equality because that would engage them in commenting on, or interfering with, government decisions about spending.

And the courts have agreed. In fact, although courts have been accused of judicial activism, they have been the most activist in protecting governments from having to deal with the full implications of the rights they enact. Louise Arbour, when she was the United Nations High Commissioner for Human Rights, called the Supreme Court of Canada “timid,” and with good reason. The court has been fearful when faced with the remedial consequences of finding violations. And from an apparent desire to deny or narrow the remedy, the court has reasoned backwards, with rights to equality and security of the person thinned out as a result.

In NAPE, the court ruled that canceling pay equity adjustments violated Section 15. But it also determined that the government was entitled to cancel them because the province faced a financial crisis—that is, it was expecting to run a deficit. As feminist scholar Sheila McIntyre has noted, the court tends to defer to governments, even when cost-cutting reallocates social benefits away from disadvantaged groups.

There have certainly been Charter victories in the last 25 years, and some that have set out significant interpretive principles. In Eldridge, for example, the court ruled that governments were obligated to ensure services are provided in a way that takes the needs of disadvantaged groups into account—in this case, the need for a hospital to provide interpreter services for a deaf woman giving birth. In Friesen, an Alberta court ruled that the province’s human rights legislation was not compliant with the Charter because it did not include protection from discrimination based on sexual orientation.

Another Charter victory came in the case of Evanchuk, in which the court rejected the defence of “implied consent” in cases of sexual assault. Falkiner struck down the “spouse in the house” rule in Ontario’s welfare legislation, and more recently the court ruled in McIvor vs. Canada that the status registration provisions in the Indian Act discriminate against Aboriginal women and their descendants.

However, in some of these cases, victory was qualified. Evanchuk prevented a step backwards in sexual assault law. Eldridge was followed by a decision which ruled that governments were not obliged to bring in new programs to ensure equality, only to ensure that existing ones did not discriminate. And the remedy in the original McIvor ruling was narrowed by the B.C. Court of Appeal, allowing the government to continue to deny status to many Aboriginal women and their descendants.

So far, Section 15 has not been the powerful tool that feminists hoped would help shape public policy and spending priorities. Canada’s governments have obstructed women’s advancement and even diminished women’s equality while Section 15 has been in effect. And the Supreme Court has not given Section 15 the forward-looking, steady and thoughtful interpretation that is needed to give full reality to the concept of substantive equality.

There is nothing wrong with the wording of Section 15. But there is something wrong when governments refuse to live up to the Charter’s promise of equality and when courts permit government backsliding.

Now, because the cancellation of the Court Challenges Program, women (as well as members of other Charter-identified groups) have no access to the modest funds that were once available to bring forward Section 15 cases. Perhaps the worst irony of this moment, 25 years later, is that we have constitutional rights that we fought for, and helped to shape, but now cannot afford to use. Sheelah Day is a director of the Poverty and Human Rights Centre in Vancouver.

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**MAGAZINE RALLIES AFGHAN WOMEN**

BY LAURYN OATES

Humira Saqeeb started Afghanistan’s first women’s magazine, Negah-e-Zan dedicated to women’s empowerment, in May. (Photo: Lauryn Oates)

(KABUL) Transformative change has taken hold of Afghanistan since the ousting of the Taliban in 2001, and, thanks to a new magazine focused on women’s empowerment, women are documenting more of those changes.

Legal reform in the country, which has been characterized by both progress and regress, has seen a gradual, overall improvement. Last year, Afghan women secured domestic abuse legislation under the Elimination of Violence Against Women law. They also managed to win reforms to legislation drafted by the conservative cleric Mohammad Asif Mohseni that would have given Shia husbands power over their wives, including the right to decide whether they work outside the home and how often they must submit to sex. The bill was passed by the lower house of Parliament, the Wolesi Jirga, but only after women, together with supportive MPs, lobbied for amendments.

The development of the Afghan media sector stands out as a particular success story. Independent media outlets have burgeoned. New television and radio