

# **The Women's Court of Canada: A Valuable Resource for Legal Practice**

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## **1.0 Introduction**

Through this paper, I hope to convince you that the Women's Court of Canada (WCC), an innovative law reform project through which feminist jurists reconsider and rewrite decisions in important Charter equality cases, can be a highly relevant and useful resource for any lawyer. In my view, this will be true regardless of your field of practice, due to the centrality of substantive equality as a value in Canadian law. However, I make my case using illustrations from the area of statutory human rights claims, whether before a human rights tribunal, labour arbitrator or other administrative decision-maker. I chose this area as a focus due to my professional background as counsel to a provincial human right commission and due to the similarities between the objectives and principles governing statutory human rights and s 15 claims and the crossover of issues between test case s 15 litigation and systemic human rights complaints in both private and public sectors.

In the pages that follow, I will outline specific ways in which WCC jurisprudence can assist with statutory human rights advocacy, using examples from the judgments that have been issued to date. WCC "Justices" have issued six judgments, on issues as diverse as segregated classrooms for children with disabilities<sup>1</sup>, denial of income assistance<sup>2</sup> and survivors' pensions<sup>3</sup> to young women, barriers and lack of funding support for Aboriginal women to participate in constitutional talks<sup>4</sup>, tax treatment of child care expenses<sup>5</sup>, and one province's rollback of its pay

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\* The views expressed in this paper are the author's own and do not represent those of her employer or any other organization with which she is affiliated.

equity commitment to women<sup>6</sup>. I will explore how this jurisprudence can help those asserting statutory human rights to:

- explain substantive equality and how it informs the interpretation and application of human rights principles in the context of a particular case
- analyze challenging issues from a substantive equality perspective
- respond effectively to attempts to justify discrimination
- find helpful sources: articles, cases, publicly available data, international law

## 2.0 How the WCC can help human rights lawyers

### 2.1 Explaining substantive equality and its implications for a particular case

As is the case for Charter claims, when interpreting statutory human rights, one must adopt a liberal and purpose-oriented approach. For this reason, courts and tribunals typically refer to the goals of human rights legislation at the outset of their analysis, through references to a preamble or objectives statement in the human rights statute and more general descriptions of the principles of equality and protection from discrimination<sup>7</sup>.

These statements will be generally consistent with the notion of substantive equality, which was recently described by the Supreme Court of Canada in the following terms:

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: “The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”: *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal “like treatment” model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. ...

...An insistence on substantive equality has remained central to the Court's approach to equality claims.<sup>8</sup>

By way of example, in McLachlin J.'s (as she then was) judgment for the Supreme Court of Canada in *Meiorin*<sup>9</sup>, she cites the following purposes (among others) from s 3 of British Columbia's *Human Rights Code* when introducing a more expansive approach to interpreting human rights legislation than had previously been recognized:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

These legislative pronouncements clearly align with a substantive equality approach. McLachlin J. also went on in that case to state that human rights legislation and s 15 of the Charter are aimed at the “same general wrong” and to adopt an approach that was generally consistent with the Court's substantive equality analysis under the Charter<sup>10</sup>.

Parties seeking human rights protection must, therefore, refer to the overall purpose of that protection and articulate it in substantive equality terms when advancing their claims. However, doing this effectively requires more than simply referring to a preamble and/or repeating the often quoted excerpt from *Andrews*, above. The real value of a purposive approach to a human rights claim is that it legitimizes efforts to make sure the decision-maker understands in concrete and clear terms how the issue raised in a particular case violates the fundamental principle of substantive equality and what the resultant impact is.

The WCC judgments do this exceptionally well, providing both helpful models and useful content that can be adapted when crafting legal arguments. When explaining the dynamics of inequality, you could work from or cite Denise Rhéaume's clear and concise description in *Law*<sup>11</sup> of stereotyping and prejudice and the role each plays in perpetuating inequality. As is the case for all of the WCC judgments, Rhéaume's explanation would be easy to adapt to legal advocacy because it is written as part of a judicial decision. In addition to explaining these more familiar manifestations of inequality, Rhéaume provides a model for analyzing cases where *neither* prejudice *nor* stereotyping are operating through a substantive equality principles. While her reasons in this regard are geared to evaluating governmental benefits, they may help you devise argument for other contexts where the discrimination at issue is not easily linked to well-recognized dynamics of inequality.

Another excellent source of analysis and content when developing a purposive human rights analysis is Melina Buckley's WCC judgment in *Symes*. While that case was about tax policy, the dynamics of gender inequality Buckley describes in the following excerpt are clearly relevant to a multitude of barriers faced by women in the workplace:

84. Women in Canada generally are economically unequal to men. They are poorer than men and face a higher risk of poverty. Race and disability complicate and deepen this inequality. Being a single mother, a woman of colour, an Aboriginal woman, or a woman with a disability further increases the risk of poverty. Even when their incomes are above the poverty level, women are not economically equal to men. Though women have moved into the paid labour force in ever-increasing numbers over the last decades, they do not enjoy equality in earnings, in access to non-traditional jobs and managerial positions, or in benefits. The gap between men's and women's full-time, full-year wages is, in part, owing to occupational segregation in the workforce that remains entrenched and to the lower pay that is accorded to traditionally female jobs. Though the wage gap has decreased in recent years, with women employed on a full-time, full-year basis now earning about 72 per cent of the amount earned by men in comparable jobs, part of this narrowing

of the gap is due to a decline in men's earnings as a result of restructuring and not to an increase in women's earnings (see, for example, Day and Brodsky, at 6-7).<sup>12</sup>

Because the governmental policies they tackle have counterparts in the private sector, the WCC judgments in *Law* and *Symes* also model how to make the harm concrete and particular with respect to a particular measure. By way of illustration, Rhéaume traces the history and design of the Canada Pension Plan survivor's pension in a manner that effectively exposes its roots in traditional, patriarchal norms that do not respond to the current reality facing young women in personal relationships and the workforce. A similar approach could uncover systemic discrimination in pension benefits offered through private sector employment or insurance contracts. Indeed, any employment or publicly available benefit to which women have unequal access could be examined in a similar way.

Also illustrative is Buckley's judgment in *Symes* in which she shows how the exclusion of child care expenses from the category of business expenses eligible for tax deductions is symptomatic of a long-standing practice of privileging men's needs in business. She in turn shows how this practice arose due to men's traditional dominance in this area of economic activity to the exclusion of women. As is the case for the *Law* decision, Buckley's approach in *Symes* could be applied in any number of situations where the policy or practice at issue has a negative impact on women (or other historically disadvantaged groups) because neither they as a group nor their experiences were part of the picture when the policy or practice developed.<sup>13</sup>

## 2.2. Analyzing challenging issues from a substantive equality perspective

Another particular strength of the WCC judgments is their careful and thoughtful analysis of particularly challenging issues from a substantive equality perspective. In this regard, Dianna Pothier's judgment in *Brant County*<sup>14</sup> and Mary Eberts', Sharon McIvor's and Teressa Nahanee's reasons in *NWAC v Canada*<sup>15</sup> are illuminating.

The *Brant County* case dealt with the decision of an Ontario School Board to place a 12-year-old girl in a segregated classroom for children with disabilities against the wishes of her parents. Her parents wanted her to remain in her original classroom, integrated with her peers. One of the challenging aspects of the case was the reality that some parents seek "special education" settings for their children and that some children may, due to learning disabilities, need to be shielded from the distractions of a classroom in order to learn. A related consideration was the impact the analysis in this case might have on claims by Aboriginal, ethno-cultural and/or racialized minorities for specialized schools for their children as a means to alleviate the devastating effects of racism, colonialism and other inequalities in the regular school system.

Pothier analyzes the issues raised in this case from a substantive equality perspective, taking into account all of these affected interests to arrive at a carefully wrought solution. Rejecting the notion that this case required figuring out whether a segregated or an integrated setting was in the best interests of this student, Pothier advocates a presumption of integration, at least in the case of education for children with disabilities. She place an onus on the state to demonstrate that

equal access to an education within the existing classroom and school system is not possible before it resorts to segregated settings.

In my view, Pothier's decision is a must-read for any claimant or advocate who is grappling with the question of when, if ever, a segregated setting is necessary to achieve equality. It is a difficult question with far-reaching implications, that applies in a myriad of settings in both the private and public sectors. For this reason, such cases require particularly careful thought and analysis. I have grappled with this issue in my own human rights practice, whether with respect to gendered sports teams or services for preschoolers with disabilities, and I imagine there are many other situations in which it arises. While you may not adopt Pothier's approach for your particular case, if you read her decision, you can at least be sure to have turned your and your client's minds to many of the implications of the position you are taking.

The Native Women's Association of Canada (NWAC) case is another where the WCC decision deals with a challenging issue within a substantive equality framework. In this case, the NWAC had challenged the failure of the Prime Minister and first Ministers to consult with the NWAC first hand in its own right as the representative of Aboriginal women across the country in governmental talks with Indigenous peoples mandated by Canada's Constitution. The NWAC argued that the four funded national Aboriginal groups at the table for such talks in the early 1990's were male-dominated and did not represent Aboriginal women. The male-dominated groups were opposed to the application of the Charter to Aboriginal self-government, while the NWAC supported its application, particularly the Charter's sex equality provisions.

In ruling against the NWAC, the Supreme Court of Canada found that it had failed to prove that men's voices were privileged in the talks and that Aboriginal women were unable to communicate with government. It found that the Aboriginal organizations involved had female members and had consulted women when formulating their positions and that the NWAC had access to other means for communicating their views. In the Supreme Court's opinion, the NWAC failed to provide the necessary evidence to demonstrate the negative impact on women it had alleged.

In their judgment, Eberts, McIvor and Nahanee effectively uncover and challenge the assumptions underlying the Supreme Court's analysis. They do this by exposing the direct link between the male-dominated make-up and position of the four groups at the table and the history in Canadian law, through vehicles such as the *Indian Act*, of dispossessing Aboriginal women of their rights and traditionally equal roles within their societies. As Eberts et al conclude:

[85] The long history of profound structural inequality visited upon Aboriginal women by the Canadian state is, in our view, sufficient support for the NWAC's right to be present at the constitutional discussions. The NWAC and other women's organizations need not demonstrate on the facts of each particular case the negative proposition that male-dominated groups do not represent their interests, although we agree that in this case they have done so. There is no constitutional norm that men or male-dominated organizations must represent women unless women can show why, in a specific instance, this would deny their equality. Rather, this court finds that the constitutional norm is that women shall be entitled to speak for themselves. Only through such speech can Aboriginal women rebuild and reclaim their recognized position of equality in Aboriginal societies and promote their equality within Canada.<sup>16</sup>

This decision is clearly important for its effective analysis of what is required to ensure that Aboriginal women have an equal voice in Canada's inter-governmental relations with Indigenous peoples. Arguably, anyone whose work touches on these issues should read the

judgment and know the history of gender inequality at play. However, the decision also demonstrates how to mount an effective challenge to the more general assumption that members of a traditionally dominant group can and will speak for the oppressed. As such, its impact is far-reaching and could apply to other political spheres as well the other aspects of life in which human rights statutes operate. If having an equal voice in important decisions affecting members of an equity group becomes a dimension of a legal issue you are working on, I would suggest reading this judgment and considering how its approach might be adapted.

### **2.3 Responding effectively to justifications for discrimination**

When looking to WCC judgments for assistance, it will be important not to forget the s 1 analysis each provides. It is an equally helpful resource for human rights claimants because the manner in which a government must justify a discriminatory law under s 1 of the Charter is broadly similar to the test for *bona fide and reasonable cause* under human rights legislation.

The Supreme Court of Canada recently affirmed the overlap between the two tests in its decision in *Multani*. In that case, the Court overturned a school's complete ban on students wearing kirpans (religious ceremonial knives) under the Charter because no accommodation (a concept from human rights legislation) had been made for the students' religious needs. As the Court said:

This correspondence of the concept of reasonable accommodation with the proportionality analysis [under s 1] is not without precedent. In *Eldridge*, at para. 79, this Court stated that, in cases concerning s. 15(1) of the Canadian Charter, "reasonable accommodation" was equivalent to the concept of "reasonable limits" provided for in s. 1 of the Canadian Charter.<sup>17</sup>

The similarities between the two tests extend beyond the notion that the duty to accommodate is broadly similar to the requirement of minimal impairment. Both tests also require showing that there was a valid purpose for adopting the infringing measure and a logical rationale for using it to achieve this purpose. As a result, positive developments in s 1 analysis could helpfully inform our approach to justifications under human rights legislation in a number of ways. One such development can be found in the s 1 analysis of the WCC's judgment *Gosselin*<sup>18</sup> where Brodsky et al. develop an innovative approach to evaluating the objective underlying the discriminatory measure.

By way of background, the WCC *Gosselin* judgment starts with a comprehensive examination of the substantive inequality caused by a Quebec regulation that reduced social assistance payments for people under 30 years of age to \$170 per month unless they participated in a "workfare" type of program. In this respect, it is a very valuable "precedent" for exposing the substantive impact of punitive policies targeting the poor.

After concluding that the regulation discriminates on the basis of age and the analogous ground of being a "destitute young adult", Brodsky et al. go on to find that the regulation in question cannot be upheld under s 1 because its purpose is animated by negative stereotypes about this group. In their formulation of the legal principles to be applied in this case, where the objective behind a particular law operates on the basis of stereotype, it will not be pressing and substantial and cannot satisfy the *Oakes* test for upholding Charter breaches under s 1.

This is a very strong and significant “precedent” for both Charter law and human rights claims and could advance the law considerably. If adopted by a tribunal or court, the WCC’s approach in *Gosselin* would encourage employers and others to reexamine the history and rationale for their policies and practice to root out discriminatory stereotypes. It would also build on the positive development in *Meiorin* and related case law where the Court expressly directed employers, service providers and landlords to examine the objectives and assumptions underlying their policies and to ensure that they are sufficiently inclusive. The Court viewed this as necessary if human rights legislation was to provide an effective remedy to systemic discrimination.

#### **2.4 Finding sources: articles, cases, publicly available data, international law**

A very concrete and practical type of help provided by WCC judgments is through the sources that the “Justices” cite. Their judgments are replete with references to valuable articles, case law, publicly available social data and international law. Because these are used to support a judicial opinion, they will be particularly appropriate for advocacy before courts and tribunals.

Consider Jennifer Koshan’s decision in *NAPE*, which is a challenge to the Newfoundland and Labrador government’s decision to roll back salary adjustments it had agreed to make as part of a settlement of a pay equity complaint by female members of that province’s civil service.

Koshan’s reasons reference the source of pay equity as a right in international law, official government documents concerning the purpose and history of pay equity in Canada, Statistics

Canada reports substantiating the gendered wage gap, Federal Task Force and Royal Commission reports on the topic, and academic research and writing from the top experts in this field.<sup>19</sup>

Not only is this a treasure trove for any lawyer who needs to argue a pay equity case, it is in essence a check list of potentially helpful sources (or categories of sources) when addressing gender inequities in employment, regardless of the nature of the claim. Each of the other WCC judgments provides a similar array of useful -and often publicly available- sources, appropriate for citing in support of an equality-oriented claim.

### **3.0 Conclusion**

WCC judgments, not to mention the wealth of commentary now posted on its new official website, clearly have a lot to offer any lawyer who wishes to address the substantive equality aspect of one or more of their files. This was likely obvious for Charter cases and, hopefully is now for those involving statutory human rights. When I consider the central place the value of equality occupies in Canadian law, due to the paramount status of the Charter and human rights legislation and the need to respect equality as a value when interpreting statutes or developing the common law, the possibilities become endless. *Any lawyer* could take an active role in advancing the work and the promise of the WCC and, through these efforts, contribute to a more equitable application of the law. All you need to do is remain vigilant for equality issues in your practice, use the tools the WCC offers to advance equality in innovative and effective ways, and, if you have a few minutes, post your thoughts and experiences on the WCC's blog!

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<sup>1</sup> D. Pothier, Reconsideration of *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [hereinafter *Brant County*]. The WCC version of this and the following reconsideration judgments can be found at (2006) 18 C.J.W.L. and on-line at the WCC's website.

<sup>2</sup> G. Brodsky, R. Cox, S. Day, and K. Stephenson, Reconsideration of *Gosselin v. Quebec (Attorney-General)*, [2002] 4 S.C.R. 429 [hereinafter *Gosselin*].

<sup>3</sup> D. Rhéaume, Reconsideration of *Law v. Canada*, [1999] 1 S.C.R. 497 [hereinafter *Law*].

<sup>4</sup> M. Eberts, S. McIvor, and T. Nahanee, Reconsideration of *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 62 [hereinafter *NWAC v. Canada*].

<sup>5</sup> M. Buckley, Reconsideration of *Symes v. Canada*, [1993] 4 S.C.R. 695 [hereinafter *Symes*].

<sup>6</sup> J. Koshan, Reconsideration of *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381 [hereinafter *NAPE*].

<sup>7</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 at para. 43 [hereinafter *Meiorin*]

<sup>8</sup> *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 15.

<sup>9</sup> *Supra* note 8.

<sup>10</sup> *Ibid.*, at para. 48 ff.

<sup>11</sup> *Supra* note 3.

<sup>12</sup> *Supra* note 5.

<sup>13</sup> Buckley's judgment would also be a great starting-place for anyone seeking to argue that a particular statute must be interpreted in accordance with the Charter value of equality.

<sup>14</sup> *Supra* note 1.

<sup>15</sup> *Supra* note 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6 paras. 54-55.

<sup>18</sup> *Supra* note 2.

<sup>19</sup> *Supra* note 6.