

The Women's Court of Canada: Reflections on a Radical Experiment

Denise Réaume
Faculty of Law, University of Toronto
Visiting Professor, Oxford University

What can one do when one thinks that the courts are making a fundamental mistake about a certain issue or in their approach to a particular area of law? A standard response is to turn to the legislature and the political process to try to achieve whatever objective the courts are obstructing. Or perhaps, if one is a died in the wool litigator, one might step back from the fray of the latest case and try to work out what might be a better long term litigation strategy to lead the courts from the easy cases to the right conclusions in the more challenging ones. Both are possible strategies; each has its risks and benefits; each is more suitable or feasible in some circumstances than others.

This panel has been set up to tell you about a different kind of response to this sort of situation. We're all involved in an initiative called the Women's Court of Canada. The WCC is a loose collection of academics, litigators, and activists who came together over a shared concern that the Supreme Court has lost its bearings in working out an approach to *Charter* equality issues. Our response has been to form a virtual court that reconsiders equality-related SCC decisions. We have taken on the task of rewriting Canadian equality jurisprudence. The first six judgments have been published in the Canadian Journal of Women and the Law¹, and are available on the WCC website – www.womenscourt.ca. These first six are:

- *Symes v. Canada*,
- *Native Women's Association of Canada v. Canada*,
- *Eaton v. Brant County Board of Education*,
- *Law v. Canada*,
- *Gosselin v. Quebec (Attorney-General)*,
- *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees*.²

We hope to continue producing new judgments. In fact, we are currently working on a project based around two key equality cases – *Andrews v. Law Society of British Columbia*³ and *R. v. Kapp*.⁴ Instead of producing just one rewrite of these cases, we have several people working on rewrites of each judgment so that they can be examined and rethought from all possible perspectives.⁵ *Andrews* is obviously a judgment that deserves this treatment since it was the start of the equality jurisprudence and was thought, initially, to hold out promise. Based on where we have ended up 20+ years later, it is important to go back and rethink the building blocks provided by *Andrews*. *Kapp* has been yet another attempt to reconstruct the house of equality and it has many people worried; so it seems fitting to use it as an occasion to allow for an exploration of where this turning point in equality jurisprudence could have taken us.

Before I explain the project further, a word about our name – the Women’s Court of Canada. The idea for this project happened at a LEAF colloquium⁶ and all those initially involved are women and have long been interested in sex equality. However, the work of the WCC is to develop alternative approaches to thinking about equality generally, albeit informed by our commitment as individuals to women’s equality.

It would be understandable is the reaction of some to this initiative was something like “what cheek! Who do these people think they are?” Well.... Although we mean to stir the pot a little bit with this project, there is no frivolity in the exercise (though we have had a lot of fun). Nor are we cocking a snoot at the courts, though we have been critical of much of what the SCC has had to say. To begin with, we took some inspiration from Oscar Wilde, who once said that “the only duty we owe to history is to rewrite it”. We also follow a long line of feminist activists who have pushed the envelope by refusing to accept the *status quo*. In other words, we take the view that the responsibility to shape our legal culture, especially where important constitutional values like equality are concerned, is a collective one, not the exclusive preserve of the courts. Indeed, the fact that substantive equality as a

concept does not have deep roots in Canadian legal culture makes it all the more important that we draw on insights from as many quarters as possible.

The enactment of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms* created an opportunity to develop a conception of equality suitable to the demands of contemporary Canadian social conditions. The starting points were sparse. Amidst the debate and contention surrounding the drafting of the *Charter*, only two clear points of consensus emerged: a desire to move away from the narrow formalism of the *Bill of Rights* jurisprudence, yet a sense that the most obvious alternative model – American equal protection doctrine – would not provide the answer to dealing with Canada’s equality issues. In other words, we started off with a vague sense of what *not* to do, but not a highly developed picture of what the alternative possibilities are. Canadian judges were effectively on their own in crafting a conception of equality worthy of the *Charter*, with few exemplars here or abroad on which to rely. The task was and is enormous. In this respect, the equality provisions of the *Charter* are unlike much of the rest of the *Charter* project which deals with principles and rights about which we have had a longer and richer history of debate. With the benefit of hindsight we perhaps should not be surprised that everything has not gone as smoothly on the equality front as some of us would have liked. Legal cultures typically take a long time to absorb new ideals, work out their implications, and convert them into workable doctrine. From this perspective, 20 years is not a long time. And, of course, the SCC had a few other matters on its plate in the same period.

This is not to say that the courts have been the only ones struggling with the meaning of equality for the last twenty years. There has developed, of course, a lively literature about equality rights, and this, too, is a form of participation in the task of developing our thinking on equality. So why have we chosen alternative judgment writing as our means of participation in the debate? I do not want to take anything away from the equality literature, to which some members of the WCC have themselves been contributors, but the academic enterprise is different from the judicial one. Academics can pick and choose the issues on which they wish to

focus, and this can end up illuminating, however well, only part of the picture. They can also legitimately refuse to be constrained by real world requirements and practicalities for the sake of freely exploring the contours of a particular idea. They can also adopt a particular theoretical perspective *on* the law rather than working from within it – some might say that too much academic literature these days has this quality. As interesting and illuminating as these debates may be from an academic perspective, judges and lawyers can be forgiven for not finding them the most helpful source of ideas for their own enterprise.

In choosing judgment writing as our format, the WCC is participating in the creation of a new form of engagement with legal doctrine and its underlying principles aimed at furthering the discussion about equality in the legal community and the wider society. In this way, we aim to illustrate the doctrinal feasibility of more *substantive* approaches to equality within the parameters of accepted constitutional argument. Thus, the project is aspirational without being utopian, in the sense of unrealistic. We are imagining an alternative world, but one that is fully accessible to us if we would only reach for it. Rewriting an existing judgment requires one to grapple with all the complexities of the issues in a truly fine-grained way, to fit all the pieces of the puzzle together, really testing abstract theories against the realities of actual cases. The objective is to create a comprehensive alternative body of equality jurisprudence covering all the major equality-related cases in Canadian law, including, we hope, future equality cases as they are handed down. We approach the enterprise with humility rather than hubris, aware of the difficulty of the task. Indeed, I think it is fair to say that we all came away with more respect for the enterprise of judging, having tried to walk a mile in the judges' shoes.

From the beginning, we thought of the WCC judgments as potential teaching tools; indeed, this was one of the main reasons for launching the initiative. And the judgments have since been used by several people in very different contexts and have been received enthusiastically. Each WCC decision constitutes full and comprehensive contrasting reasons to those offered by the Supreme Court of Canada. Comparing and contrasting the two sets of reasons is an excellent way for

law students to develop the analytical and conceptual tools necessary to think creatively and deeply about the pursuit of equality as a constitutional goal. My own experience of teaching from the WCC judgments has been a very good one. Most of the students have said that their view of equality doctrine and of the authority of the Supreme Court has been transformed by working through the alternative universe created by the WCC. Whereas they had been inclined to take much of what the courts say as given, they came away from the course with a much more critical mindset, having peeled away the layers of reasoning and the reconstruction of the facts and witnessed those building blocks being put together in a different way.

But we hope that the WCC's work may be useful to litigators as well in deconstructing the existing jurisprudence, examining its underlying assumptions, and suggesting new lines of argument. In writing a full judgment in response to a Supreme Court judgment, one can scarcely help noticing and articulating the central fork, or forks, in the road that lead one down a different path – the different understandings of context, the alternative interpretation of doctrine, the different notions of the politically and legally possible. The judgment form gives all of these issues a full airing, and through putting together the whole argument from the standpoint of these differences, allows us all to understand better what is at stake and what is possible.

I do not necessarily anticipate that a discrete argument in a WCC case will be directly citable in a real case – after all, the WCC judgments have no authority in the technical legal sense; our say-so counts for nothing. But I know how time-consuming and difficult it is for busy litigators to carefully deconstruct the existing case law to identify how the various moves in the jurisprudence might derail the argument in a current case. This seems particularly true of equality cases, which tend to have an odd gestalt quality – if you look at the case this way, you see a rabbit; look again and you see a vase. If the rabbit is formal equality and the vase is substantive equality, we are operating in a climate in which judges and lawyers are much more prone to see the rabbit rather than the vase, but worse still, are prone to fasten upon aspects of the picture that change from case to case in order to discern

the rabbit. This can create a situation in which litigators can anticipate a bad outcome and yet be surprised almost every time by *how* the bad outcome was constructed. I hope the WCC judgments may be useful to litigators because each case does try to wrestle down how the actual decision went wrong as well as offering an alternative way to think about the case. Collectively, they are producing a database of the doctrinal moves that have so far pulled a rabbit out of a vase, so to speak. I won't claim we have identified all these moves – I fear the Supreme Court is capable of further surprises – but I think the WCC jurisprudence makes a good start. So I recommend our work to litigators for this reason, and we welcome feedback on whether it is useful to the litigation enterprise. Perhaps busy litigators would find it unrealistic to imagine sitting down with the WCC decisions to mine them for this kind of insight – that would be understandable. But there may be other ways to make our work accessible to the profession – workshops like this one, but devoted to a specific aspect of equality rights doctrine for a specialized audience, perhaps – and we welcome any and all suggestions.

From a more academic perspective, these judgments may have another value. Academics have long debated the role of perspective in judgment. This is what lies behind the fanatical interest in America in whether judicial nominees are pro-choice or pro-life; this is what lies behind questions about whether more women judges would make a difference, or more judges from racialized communities. In the real world it is difficult verging on impossible to tell whether a particular judge's politics or perspective influence his or her judgments. The WCC, because it is a women's court and its members share a particular set of egalitarian commitments, gives us a chance to see what difference sex/perspective makes to judging in a sustained and systematic way. I don't claim to know yet what answers this will produce, but I think the experiment will be interesting.

I've outlined the ways in which the WCC mirrors the actual courts – we have tried as much as possible to operate under the same sorts of doctrinal and institutional constraints that real judges operate within. But there are some respects in which we deviate from real world practices. Chiefly – and these are linked – we

have do not purport to act as a corporate entity, and we do not consider ourselves bound by our own precedents. The WCC is a collection of individuals rather than a collectivity. Our objective is to stimulate debate about what equality means for constitutional purposes; we have therefore not striven to speak with a single voice, but rather aim to let diversity of approach flourish in order to foster discussion about the possibilities of equality doctrine. We do not offer our judgments as the final word, the answer to all the problems; instead we welcome new participants in the project who will add dissenting or concurring judgments to the current body of work. The point is to open up the discussion about equality, not close it down.

My own contribution to the work of the WCC was the rewriting of *Law v. Canada*.⁷ Now, one might well think this rather a waste of time, since the Supreme Court seems now to have said it didn't really mean it, whatever the 'it' was; nevertheless, rewriting the decision was a fascinating project from which I learned a great deal, including more than I ever wanted to know about the Canada Pension Plan. To close, I thought I would concentrate on two lessons I took away from the experience.

The first lesson concerned the importance of taking gender seriously in thinking through cases, even if it does not seem an obvious issue. When a claim is framed as a sex discrimination claim, gender is obviously relevant to understanding the issue. But it can also be relevant in cases that seem more obviously grounded in another form of discrimination. To generalize the point, whatever the most obvious ground of discrimination complained of, it is important to consider whether it intersects with other grounds to produce effects that might be less than obvious. As everyone knows, *Law* was argued as an age discrimination case, pure and simple. As I read the Pension Appeal Board decision, this began to seem odd to me, since it is clear that the history and development of the survivor benefit is bound up with differences in male and female participation in the work force. Things have changed in respect of women's experience since the CPP was introduced, but have they changed enough to justify ignoring the gendered dimension of work, I wondered. So, I decided to open the question up and ask not just whether the age cut-off in the CPP

discriminated against younger surviving spouses, but whether it discriminated against younger *widows*. Given the continuing disadvantages women face in the work force – even young women – it seems fair to say that the consequences of being denied a pension would affect a widow much more than a widower, and yet this systemic disadvantage and its consequences had been ignored. The result was to impose a male norm on younger women – the assumption was that younger survivors could fend for themselves, but the image of the younger spouse was effectively male. Women are expected to be as self-sufficient as men, despite the greater obstacles they face as women. The assumption that all younger survivors are equally able to manage the loss of a spouse's income turns out to be an instance of equality with a vengeance.

That the decision turned out this way was something of a surprise to me, since I began the rewriting not terribly sympathetic to Nancy Law's plea. Ultimately, that this turn surprised me was itself surprising, since I have spent many years trying to get students to see the importance of looking for gender angles in cases in which they may not be obvious. This, in turn, made me realize how important it is that these issues be thought through as a case is constructed from the beginning. In this way, the WCC decisions can be a useful reminder to litigators that such issues can make a real difference to the analysis of a case, especially if they inform thinking from the ground up. I'd like to think that if sex discrimination had been argued in *Law*, the case might have come out differently. And this raises interesting questions about how far appeal courts can go to make up for a failure of imagination at the first stage. Having worked through one of these cases myself and participated vicariously in the similar process undertaken by my colleagues, I have come to the conclusion that the dominant model of public interest litigation – something like intervenors on white horses charging in to save the day before the Supreme Court – is ill-suited to the equality context. Laying the proper ground work is crucial in a successful equality case – the construction of the issue often determines the outcome – and much of this is done at the trial level and is very hard to undo later on. To return to my gestalt analogy, if a case is initially constructed around the

rabbit image, it will make it harder and harder for anyone to glimpse the vase as the case proceeds.

Second, rewriting the decision made me realize how interconnected all the issues in an equality analysis are. When *Law* was released, criticism focused on the Court's invocation of a third step in the section 15 test, and the use of human dignity as the touchstone of "discrimination". The "problem" with the judgment was located here, at least in most people's minds. I undertook the rewriting of *Law* with the aim of reworking the concept of dignity so that the third step – which has, after all, always been there, though its presence was not so strongly trumpeted – was not simply a convenient cover to dismiss claims. As I took apart the Supreme Court's reasoning, I concluded that the dignity test was not nearly as crucial to the outcome as the Court's willingness to accept uncritically the government's description of the survivor benefit as designed to address long-term need. This characterization allowed the rest of the argument to unfold apparently seamlessly: whatever need Nancy Law could legitimately claim, it wasn't long-term, and this was a program meant to deal with long-term need, so she could be excluded. Since *Law* I think the case law has made it more and more evident, that it is moves like this – the characterization of the legislation's objective – that have been doing the work in denying equality claims rather than the requirement that plaintiffs show a violation of human dignity.

I had a chance to put this lesson to use recently in helping draft LEAF's factum in *Withler v. Canada*⁸, just heard by the Supreme Court in March 2010. Some of the initial discussion about our strategy focused on whether the case should be used as an opportunity to use the dignity concept to the plaintiff's advantage, or instead to further urge the Court to bury it. However, having worked through the gender issues underlying the CPP issues in *Law*, it seemed to me that the pension issues in *Withler* – civil service and military pensions, this time – were a mirror image of the issue in *Law*, and once again, dignity didn't have much to do with getting the right answer. At least, starting with dignity was unlikely to get one anywhere.

Without going too much into the technical details, the similarities and differences between *Law* and *Withler* are instructive. Whereas elderly surviving spouses were taken care of, however modestly, by the CPP, and younger spouses were left to fend for themselves, the civil service and military pension plan does a better job of taking care of needs arising out of bereavement at a younger age, but requires elderly couples to have planned for every contingency of retirement to provide fully for the needs of a surviving spouse over age 75. The younger spouse receives a “supplementary death benefit” to manage the transition to single status, but the benefit is progressively reduced for older surviving spouses until it reaches a nominal amount for those 75 and older. In both *Law* and *Withler*, one must first grasp the fact that some needs of some subset of those who suffer a particular kind of loss – who happen to be mostly women – are not met by the scheme. That the needs of the older and younger groups of women are not identical should not derail the analysis. I only raises the issue of whether it is legitimate for courts to compel greater coverage to deal with both variations of need experienced. If one thinks not, it is easy to express this by reaffirming the limited nature of the benefits plan and thus fall back into formalism – there’s that rabbit again; if one grasps the broader implications of the exclusion, both the dignity implications of exclusion and the legitimacy of responding to them become more obvious – the vase is revealed.

By questioning the Court’s refusal to subject to section 15 analysis the objective of the scheme offered by the government, and putting this together with the greater disadvantage that women of all ages are likely to suffer in each context, the issues in both cases are transformed. Or so I think. I invite you all to take a look at our decisions and see what you think. I think we’ll all develop a finer understanding of equality rights as a result of the debate.

The Women’s Court of Canada started out rewriting equality rights cases by happenstance, but the idea is not limited to that area of law. We had not been long underway before we started to talk about whether we could branch out into other areas of law – we are still hoping to move in that direction. A group of feminist academics and lawyers in England and Wales has already opened things up with an

initiative inspired by the WCC and called the “Feminist Judgments Project”. The participants in this collective have selected judgments from a wide variety of areas – family law, criminal law, administrative law, employment law – for rewriting to bring out gender dimensions and explore new ways of looking at the issues. The FJP has even included a case or two going back almost a century.⁹ Back in Canada, we’ve also talked about drafting Rules of Court for the Women’s Court and an intervention policy, even though we don’t hold court or hear intervenors. The point is that taking on a concrete instrument and redesigning it to enable it to be a more effective instrument of justice is a valuable learning experience, and possibly a better way of inspiring change in the real world. The possibilities are endless and we hope to keep exploring them.

¹ (2006) 18 C.J.W.L.

² *Symes v. Canada*, [1993] 4 S.C.R. 695; *Native Women’s Association of Canada v. Canada*, [1994] 3 S.C.R. 62; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Law v. Canada*, [1999] 1 S.C.R. 497; *Gosselin v. Quebec (Attorney-General)*, [2002] 4 S.C.R. 429; and *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, [2004] 3 S.C.R. 381.

³ [1989] 1 S.C.R. 143.

⁴ [2009] 2 S.C.R. 483.

⁵ This takes us in a direction pioneered in the United States focused on the iconic case of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). See Jack Balkin ed., *What Brown v. Board of Education Should Have Said* (New York: New York University Press, 2002).

⁶ See the introductory essay to the first six published decisions of the WCC by Diana Majury, *supra*, note 1 for an eloquent account of the birth of the WCC.

⁷ [1999] 1 S.C.R. 497. The WCC version can be found at (2006) 18 C.J.W.L. 143.

⁸ 2008 BCCA 539. The case was heard by the Supreme Court on March 17, 2010.

⁹ The published results of the FJP, *Feminist Judgments: From Theory to Practice*, edited by Clare McGlynn, Erika Rackley, and Rosemary Hunter, is due to be published in August/September, 2010 by Hart Publishing.