

WOMEN'S COURT OF CANADA: FUTURE DIRECTIONS

1. Background

The Women's Court of Canada (WCC) is an innovative project bringing together academics, activists, and litigators in order literally to rewrite the *Canadian Charter* equality jurisprudence. Taking inspiration from Oscar Wilde, who once said "the only duty we owe to history is to rewrite it", the WCC operates as a virtual court, and 'reconsiders' leading equality decisions, rendering alternative decisions. The aim is to articulate fresh conceptions of substantive equality in judgment form.

The WCC grew out of a LEAF-sponsored colloquium entitled "In Pursuit of Substantive Equality", held in September, 2003 and February, 2004. The idea to rewrite the Canadian case law on equality came out of that discussion and the initial membership of the Women's Court came from the participants in that colloquium who agreed to take on reconsidering an equality-related case.¹ The WCC is a newcomer in a well-trodden path of Canadian women who "have found alternative routes to enable us to raise our voices when we come up against judicial interpretation that fails to accord women the full and equal rights of personhood."²

The initial phase of the WCC has focused on the reconsideration of six Supreme Court of Canada cases and their publication in the *Canadian Journal of Women and the Law* in early 2008.³ These decisions affect the lives of Aboriginal women, women with disabilities, poor women, women with children, and women workers. The initial judgments are:

Symes v. Canada

Eaton v. Brant County Board of Education

Native Women's Association of Canada v. Canada

Law v. Canada

Gosselin v. Quebec

Newfoundland (Treasury Board) v. NAPE

The "Rewriting Equality" Symposium serves both as a public launch for the WCC and as an opportunity to consider potential future directions for this initiative as an ongoing enterprise. The final plenary session will provide an opportunity for Symposium participants to provide feedback on the Women's Court of Canada Project and its place in the equality rights movement. What should be our collective next steps? Which directions hold the most promise for the WCC to become a dynamic and sustainable project that fosters innovative equality rights theory and

¹ A list of the existing 'members' of the Court as well as its Co-ordinating Committee is appended.

² Diana Majury, "Introducing the Women's Court of Canada" 18 *CJWL* 1 (2006) at 4.

³ A seventh judgment in *Baker v. Canada* is underway.

practice? This short discussion paper has been prepared to stimulate a discussion on these topics at the symposium.

The WCC is engaged in an ongoing critique and re-envisioning of Canadian case law. The purpose of this enterprise is to invigorate the equality debate by bringing new voices to the debate and encouraging new thinking about equality issues to the benefit of legal education and the broader public across Canada. We aspire to comprehensively ‘rewrite’ equality jurisprudence as a form of ongoing critical engagement with the work of the courts. The WCC is about ideas and the power of these alternative ideas to have legal and political effect.

In choosing to structure our critiques in the form of judgments, we aim to illustrate the doctrinal feasibility of more substantive approaches to equality within the parameters of accepted constitutional argument. The WCC is a collection of individuals rather than a collectivity. Our objective is to stimulate the 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. At this stage, we are eager to pause and explore with you the value of the judgment format and to consider other methods (beyond their publication in the current format) to disseminate the ideas developed within them. What impact could the WCC decisions have? What types of collaborative initiatives should we focus on?

Over the course of the past four years as we struggled with the format and content of the initial decisions, the members of the WCC have had some stimulating discussion about the nature of the enterprise that we are engaged in and how it could be expanded. This paper contains an overview of these conversations as a starting point for a broader debate that will carry us into the next phase of this initiative.

In conversations to date, we have talked about whether we are in the process of starting a new institution. While some members are wary of calling the WCC an “institution”, there is an emerging consensus that the WCC should focus on having a voice and a presence that enables us together to respond with new strategies to what is facing the equality rights movement. We would like to explore with you the tenor of this ‘voice’ and about what kind of public presence we would like this project to have. We need also to think about audiences and objectives and some strategies and specific initiatives to move forward with following this symposium. Some initial thoughts on these issues are set out below under the following topics:

- expanding the number and scope of judgments
- exploring pedagogical possibilities
- broadening dissemination
- establishing international linkages
- re-envisioning the process of constitutional litigation.

2. Expanding the Number and Scope of “Judgments”

We plan to continue recruiting new ‘members’ to the WCC in order to carry on ‘rewriting equality’, producing new reconsiderations of equality-related cases periodically. The objective is to create a comprehensive alternative body of equality jurisprudence covering all the major equality-related cases in Canadian law, including future equality cases as they are handed down. The Canadian Journal of Women and the Law has agreed to continue including future WCC decisions in a new section of the Journal. Arrangements have been made with thecourt.ca to post the decisions online where they would be easily able to be downloaded by students, law teachers, high school law teachers and members of the public.

In preparing the first set of judgments, we thought long and hard about how closely to track formal judgment style. In the end, we decided that the rigour and the discipline of the judgment format were essential to achieve our goals even though we recognize that this format does place limitations on the accessibility of these critiques. Our goal was to create alternative judgments on the basis of accepted legal principles but written from a new perspective – one that is “outside the box” of the mainstream while respecting the constraints of legal decision-making. We aimed to imagine plausible, creative alternatives to the SCC decisions. We consider issues of dissemination and making the WCC decision more accessible below, but we are also interested in feedback on the format of the first six judgments. One suggestion is to leave the constraints of current practice behind and engage in a more thorough ‘visioning’ of what a women’s court might look like and how this truly alternative court would write judgments if not restrained by our legal system and jurisprudence. We imagine that there is much to be learned from such novel and unrestricted approaches.

In moving forward, we would like input on which decisions would make good material for reconsideration and on steps that should be taken to ensure that the WCC presents a wide variety of perspectives in its decisions over time. One suggestion that has arisen is the value of rewriting the same decision over and over again. Other possibilities include inventing cases that have not yet gone to court, particularly in the form of reference cases where the government asks the court for its opinion on the constitutionality of a matter. A further suggestion is that we carry out a comprehensive audit of women’s equality rights cases as a basis for the selection process. Our initial focus has been on Supreme Court of Canada jurisprudence and cases that engage s.15 of the *Charter*, but what should be on our horizon – decisions from lower level courts and tribunals? Should we move beyond the *Charter* and s.15 to other cases with major impacts on women? Ultimately, individuals will undertake the writing of a decision because they *want* to do that decision. At the same time, we feel that it is stimulating and helpful to have a conversation about which decisions could most fruitfully be reconsidered because there is an important dimension of the case that warrants this attention.

Issues also arise about the process for recruiting authors and editing cases. For the first set of cases, all WCC members read and gave feedback to the first drafts of all decisions and the Coordinating Committee served as editors and sought out several external readers for successive drafts of the decisions.

- Is the reconsideration format work a good one? What improvements could be made to the format of the decisions?
- What other decisions would make good material for consideration? Are there issues that should be prioritized?
- Should the focus remain on Supreme Court of Canada cases?
- Should we consider encouraging “dissenting judgments” as a form of feedback on published decisions?
- How can we ensure we are capturing as diverse a range of perspectives as possible?
- What suggestions do you have for the process or recruiting authors and editing WCC decisions?

3. **Exploring Pedagogical Possibilities**

The WCC has enormous educational value. Each WCC decision constitutes full and comprehensive contrasting reasons to those offered by the Supreme Court of Canada. Engaging with these contrasting judgments is an excellent way to give law students the analytical and conceptual tools necessary to think creatively and deeply about the pursuit of equality as a constitutional goal. One of the WCC decisions in draft form was used in classes in two Canadian law programs during the drafting process and one of the main aspects of the *Rewriting Equality* Symposium are the student workshops on the six initial decisions of the WCC. We look forward to receiving feedback from the workshop participants. In addition, the student participants will be encouraged to make presentations to their colleagues at their respective law schools following the symposium and this experience will also be instructive for future efforts.

We would like to explore possible next steps for incorporating the WCC decisions into law school curricula. Some of the ideas that have been generated in discussions to date include a moot court program and a “road show” approach wherein the WCC decisions could form the basis of a program developed to engage law students. This program could travel to law schools across Canada.

- Were the student workshops sessions useful?
- How can the WCC decisions be used as an educational tool in the law school setting?

4. **Broadening Dissemination: Website and Alternative Formats**

The broad goal of the WCC project is to give social justice and substantive equality concrete meaning in the lives of disadvantaged Canadians. It is our intention to use the WCC to work with communities of social activists and members of the public to reinvigorate debate about what the

protection of equality should mean. The Symposium is an important opportunity to forge this partnership and to obtain the views of community members concerning how the WCC can act as a catalyst and support to their justice initiatives.

The WCC decisions will be posted on a thecourt.ca website in order to facilitate access. We also plan to prepare plain language versions of the WCC decisions for circulation to, and use by, community organizations, and are seeking advice on the best ways to do this. We are also keen to explore alternative formats to popularize the content and approach of the WCC decisions focusing on the exercise of modelling the possibilities of substantive equality approaches. In contradistinction to the heaviness of the judgments themselves, we crave a catchy way of getting more people involved in this re-imagining of these legal scenarios. One possibility is a satirical or dramatic presentation. Another suggestion is for the WCC to have an ongoing presence and react to actual court decisions when they are released using the media to reach members of the public. The purpose of these approaches would be to engage the public in equality rights decisions and extend the conversation about the meaning and import of the Canadian Constitution.

- Would plain language versions of the WCC decisions be useful? What is the best way to prepare and disseminate them?
- What other alternative formats and methods of dissemination should be considered?

5. Establishing and Maintaining International Linkages

We would like to spread of idea of Women's Court to other countries and to establish and maintain linkages with sister projects of this type.

A *Feminist Judgments Project* is underway in the United Kingdom lead by Rosemary Hunter, Clare McGlynn, and Erika Rackley of the Universities of Kent and Durham. The aim of this three-year project is:

... to bring together a group of feminist legal scholars to engage in the process of drafting feminist judgments of cases in English law, across a broad range of substantive topics. Judgments may be written either by individual authors or jointly by two or more authors. The cases chosen will be significant decisions for feminist legal scholarship. This means that they need not be recent cases, but must be important decisions that would benefit from a feminist analysis. The cases can be from any level, but the judgments would be written as if they were opinions of the House of Lords.

The work on these judgments will be assisted through a series of workshops on conceptual, theoretical and practical issues in relation to feminist judgment writing and to review the draft judgments. The WCC is excited about the Feminist Judgments Project and eager to collaborate with those engaged in this initiative.

The WCC is also particularly keen to engage women in the South with this type of project. The most natural linkages would be with other nations that have constitutional litigation, such as South Africa. One specific proposal is to hold an international conference on the idea of women's courts.

- What steps could the WCC take to foster a sister project in a developing country?
- What steps should be taken to establish and maintain linkages with related projects internationally?

6. Re-envisioning the Process of Constitutional Litigation

In this initial phase of the WCC, the focus has been on rewriting the substantive equality analysis and outcomes of SCC decisions. However, we have found it important to also engage in some of the process issues that arise in constitutional litigation that are inextricably linked to the substance of the cases. For example, in some of the decisions we have commented on the SCC practice with respect to procedures to ensure an adequate evidentiary record and the role of interveners in the appellate process. On this front, the WCC has tried to model novel or expansive approaches on procedural questions. We are keen to see some of these issues addressed even more directly in future decisions. In addition, we have raised the possibility of drafting a *Women's Court of Canada Act* with related practice notes to more comprehensively re-envision the process of constitutional litigation and address access to justice concerns.

We are hopeful that the decisions themselves will become resources for those engaged in litigation and legal advocacy and are open to suggestions of what steps could be taken to make these constitutional resources more helpful.

- What steps should the WCC taken to assist in re-envisioning the process of constitutional litigation? Would drafting a *Women's Court of Canada Act* be a worthwhile endeavour?
- What steps should the WCC take to resource legal advocacy?

7. Conclusion

At its one in-person meeting, the current members of the WCC had the opportunity to express their wishes or dreams for this collective enterprise. Many of the ideas expressed during this closing roundtable discussion are contained in this paper. Two of the overriding desires expressed were the twin hopes that the project will continue for a long time and that we can have a strong diverse core of women holding things together and moving this project further along. Once we have refined a vision and objectives for the WCC, we will need to engage in practical planning related to issues of mandate, institutional structure and funding. We aspire to establishing the WCC as a strong entity that is able to carry out the work of rewriting equality while maintaining an organic quality that is true to its spontaneous origins. We look forward to working with you to fulfil these aspirations.

Members of the Women's Court of Canada:

Gwen Brodsky, Director of the Poverty and Human Rights Project
Melina Buckley*, Lawyer and Legal Policy Consultant, Vancouver
Marie Chen, African Canadian Legal Clinic, Toronto
Rachel Cox, Lawyer, Montreal
Shelagh Day*, Director of the Poverty and Human Rights Project
Mary Eberts, Law Office of Mary Eberts
Avvy Go, Metro Chinese and South Asian Legal Clinic, Toronto
Jennifer Koshan*, Law, University of Calgary
Louise Langevin*, Law, Université Laval
Sonia Lawrence, Osgoode Hall Law School
Diana Majury*, Law, Carleton University
Sharon McIvor, Lawyer
Teresa Nahanee, Lawyer
Margaret Parsons, African Canadian Legal Clinic, Toronto
Dianne Pothier, Law, Dalhousie University, Halifax
Denise Réaume*, Law, University of Toronto
Kate Stephenson, Weir Foulds, Toronto
Margot Young, Law, University of British Columbia

* Members of the WCC coordinating committee.