

Turning Feminist Judgments into Jurisprudence: The Women’s Court of Canada on Substantive Equality

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Abstract

The Women’s Court of Canada project is unique in having chosen to focus its rewriting efforts in a specific area of law – constitutional equality cases. This strategy permits an assessment of the WCC jurisprudence to see if it yields a competing ‘theory’ of equality rights that might be used to systematically critique the real jurisprudence and perhaps produce lines of argument capable of redirecting the real law. This effort reveals the pervasive importance of attention to and representation of context to bringing to life the abstract commitments of an account of substantive equality. While not a new discovery, this demonstration of the work context can do across an array of linked cases is illuminating.

Key words

Equality; substantive equality; context

Resumen

El proyecto del Tribunal de Mujeres de Canadá (WCC, por su nombre en inglés, Women’s Court of Canada) es único en el sentido de que se ha centrado en reescribir, sobre todo, sentencias de un área específica del derecho – casos de igualdad constitucional –. Esta estrategia permite una valoración de la jurisprudencia del WCC para ver si brinda una *teoría* alternativa de derechos de igualdad que se pueda usar para producir argumentaciones capaces de redirigir el derecho real. Este esfuerzo revela la importancia general de la atención al contexto, y la representación de éste, a la hora de dotar de vida los compromisos abstractos de igualdad sustantiva. Si bien no se trata de una novedad, es esclarecedora esta demostración de lo que el contexto de trabajo puede hacer en un número de casos relacionados.

Palabras claves

Igualdad; igualdad sustantiva; contexto

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1. Introduction

The first round of judgments from the Women's Court of Canada (WCC) dealt with six key cases in the history of Canadian equality rights jurisprudence.¹ They deal with a range of issues, but all from the perspective of how s. 15(1) of the Canadian Charter of Rights and Freedoms (1982)² guides law and policy. The WCC project seems to be unique in having chosen to rewrite judgments in a single area of law. The focus on the constitutional guarantee of equality has narrowed our scope, but it has also created an opportunity to use the judgments to develop a parallel jurisprudence on s. 15 of the Charter. Canada's Charter is young; s. 15 has been in force only since 1985. The Supreme Court of Canada (hereinafter, SCC) was virtually painting on a blank canvass when it began to articulate an approach. This gave the WCC licence also to start from scratch, adhering to general standards of constitutional adjudication, but not facing dense doctrinal constraints on the possible.

It was impossible to predict at the outset whether a comprehensive parallel approach would emerge, but my tentative conclusion is that there is a great deal to be learned from analyzing feminist judgments as a body of jurisprudence in just the way we do with real judgments. Taken together, the WCC judgments constitute a counter-jurisprudence that has the power to inform arguments in real cases. The judgments yield lessons for s. 15 and something like a compelling theory of substantive equality – at least the start of one. If there is a theory in these judgments, fleshing it out is an interpretive enterprise, just as with real judgments. I expect, and indeed hope, that multiple interpretations are possible, just as with real judgments, and that there is something to be learned in making the effort to work up one's own interpretation and discuss it with others, just as with real judgments. I hope to start that process here.

The exercise can yield valuable insights both into the idea of shadow judgment writing and how it differs from the real-life enterprise, and into the substance of equality rights themselves. Here, I explore two basic themes: the importance of context in the WCC judgments, and the 'theory' of substantive equality that they might yield. The two themes are linked in that a more robust exploration of context grounds an analysis of what substantive equality requires. My conclusions about the latter are especially tentative. It was not a conscious part of the WCC project collectively to develop a theory of substantive equality. Rather, each judgment writer just provided her own analysis of the case she had chosen. So, the WCC judgments were never expected to produce a theory that could simply be taken out of the box and put to work. If I am right that an interpretive engagement with the judgments yields theoretical insights, the effort may help advocates get out in front of equality litigation rather than being trapped in a perpetual rearguard effort to respond to the frequently obfuscating lines of argument emanating from the Supreme Court of Canada (McIntyre and Rodgers 2006, Faraday *et al.* 2009b, Réaume 2013, Koshan and Watson Hamilton 2013).

¹ Published as a special issue of the Canadian Journal of Women and the Law (2006), the Supreme Court of Canada decisions reconsidered by the Women's Court of Canada are as follows:

Symes v Canada, [1993] 4 S.C.R. 695;

Native Women's Assn. of Canada v Canada, [1994] 3 S.C.R. 627;

Eaton v Brant County Board of Education, [1997] 1 S.C.R. 241;

Law v Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497;

Gosselin v Quebec (Attorney General), [2002] 4 S.C.R. 429;

Newfoundland (Treasury Board) v NAPE, [2004] 3 S.C.R. 381.

A second set of judgments is forthcoming, Canadian Journal of Women and the Law (2018).

² S. 15(1) provides:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (Canadian Charter of Rights and Freedoms 1982)

2. Context, context, context

One feature of the WCC judgments that stands out instantly is the common investment in situating the cases in a broader context of patterns of social, political, and economic inequality to illuminate how the concrete denial or exclusion in a particular case sits in that broader context and contributes to those patterns. Understanding “the dynamic reproduction of inequality and exclusion over time”, in Colleen Sheppard’s words, is crucial to legal analysis (Sheppard 2010, p. 4). This attention to context reflects the emphasis in feminist academic literature generally on taking account of the processes that create and sustain inequality. The Canadian equality literature (Monture 1986, Majury 1987, 1990, 2002, Sheppard 1990a, 1990b, 2010, Rioux 1994, Hughes 1999, Pothier 2001, Greschner 2002, Brodsky and Day 2002, Gilbert 2003b, McIntyre 2006, Young 2006, 2013, Lawrence 2006, Faraday *et al.* 2009a, Froc 2010, Koshan and Watson Hamilton 2011), in this respect, fits into a wider feminist tradition (Minow and Spelman 1990, Radin 1990, Abrams 1991, Williams 1993, Conaghan 2000).³ The Supreme Court has often pronounced on the importance of context in adjudicating equality claims (*Miron v Trudel*, 1995; *Egan v Canada*, 1995; *Law*, 1999; *Lavoie v Canada*, 2002; *Withler v Canada*, 2011), but has just as often failed to examine it thoroughly, even as it claims to do so (McIntyre 2006). Indeed, one might say that when the Supreme Court does take context seriously the claim is usually upheld, and when it does not, its retreat into abstractions signals the claim’s imminent failure.

It is, therefore, no accident that the cases taken up by the WCC were all ones in which equality claims failed and in which the retreat from context was all too evident in the Supreme Court judgments. One might go so far as to conclude that the linchpin in these decisions – both real and shadow – is the decision maker’s understanding of the real-life context more so than legal doctrine.⁴ When judges ‘get’ the human problem they are dealing with, including the array of forces that shape it, they can usually find a way of making the law do the right thing. Or at least they can identify clearly what the legal impediment is to a decision that *would* be responsive. When they don’t understand, and cannot sympathize with, the situation of the claimant, the doctrine turns into empty words. This is not a new lesson, but it seems it must be constantly relearned, and one virtue of shadow judgment enterprises may well be to provide a compelling vehicle for teaching it. The fact that the body of case law under consideration was not embedded in a deep and dense doctrinal history perhaps highlights the importance of context to the shaping of doctrine.

One example of the foundational importance of context emerges from linking three of the WCC judgments. Taken together, the judgments in *Symes v Canada* (Buckley 2006), *Law v Canada* (Réaume 2006), and *Newfoundland v NAPE* (Koshan 2006) paint a comprehensive picture of how past policies and practices have created a dense network of enduring obstacles to women’s participation in the paid workforce. This tableau sets the scene for considering the legal issues at hand: the state’s approach to tax deductions for child care expenses, the provision of income support on the death of a spouse, and pay equity agreements between a province and its public employees, respectively. Each judgment draws the links between the gendered

³ This is, of course, just a small selection of works theorizing the importance and uses of context. That wider tradition also demonstrates that attention to context is transformative in all areas of law, not just equality law.

⁴ An indicator of how important an understanding of context is is the contrast between the Supreme Court of Canada’s jurisprudence on the rights of common law spouses and same sex couples and its decisions on most other equality claims. From *Miron v Trudel* (1995), through *M v H* (1999), *Reference re Same-sex Marriage* (2004), *Canada (Attorney General) v. Hislop*, (2007), and *Quebec (Attorney General) v A.* (2013) there has been a critical mass of judges on the court who were well versed in the ways in which traditional marriage laws have been oppressive, and these judgments show a subtlety about context that is often missing. This contrast means that a sustained analysis of how context is sometimes highlighted and sometimes suppressed should be especially illuminating. It is possible, of course, that sometimes the judges do understand the contextual features that support a finding for the claimant but lack the political will to act on them.

division of family labour and women's marginalized role in the labour market, using them to inform the legal analysis. The effects of the law, which are crucial to the equality issue, hinge on these background social forces. The judgments excavate the ways in which the challenged policies trade in gendered expectations or ignore their continuing effects to the detriment of working women in diverse situations. The contextual story essentially makes the argument; the doctrinal steps simply fall into place in its wake.

This is true of all the WCC judgments. Most members of the WCC undertook the project with deep concerns about the 'test' then prevalent for finding a Charter s. 15 violation.⁵ Nevertheless, none had any trouble using even what was assumed to be a flawed test to articulate an equality-affirming result. This may indicate that the problem is not the test, opening up further issues about how to foster meaningful legal change. If the test is not forcing particular outcomes, replacing it with a new one will not guarantee better ones. It may be impossible to reduce to a rule what contextual analysis should mean, but it can be demonstrated, and this is one strength of the WCC judgments.

A brief survey of the judgments reveals the centrality and power of context in the Women's Court of Canada's approach.

Symes considers whether denying a tax deduction from business income to cover the cost of child care is consistent with the commitment to equality (SCC 1993, Buckley 2006). The WCC judgment finds the traditional view that child care expenses are "personal" and thus non-deductible to be grounded in a tradition of interpreting the distinction between business and personal expenses with the male business owner in mind. Because most men traditionally could rely on their female spouses to stay home with the children, business men typically had no need to pay for child care to free themselves to engage in business. But as Justice Buckley points out, the situation is very different for female business owners. Because of intractable social expectations that child care is women's responsibility, women typically cannot rely on their male spouse for child care, and women typically shoulder the burden of making child care arrangements. Thus, a business woman with children simply cannot operate her business and earn income unless she pays for childcare. Justice Buckley tracks the comprehensive negative effect on women's earning capacity of their responsibility for childcare, including those who are self-employed. She also dispels the notion that the benefit of a tax deduction will accrue only to economically privileged business women, showing how female entrepreneurs span the income spectrum, but share a common experience of having to pay for child care in order to be able to conduct business.

⁵ That test, articulated in the Supreme Court decision in *Law v Canada* (1999, para 39), was as follows:

"... a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics,

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds, and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?"

The third step in particular was said to be required by the purpose of s. 15, "to prevent the violation of essential human dignity and freedom" (*Law*, 1999, para 51).

In *Law*, the challenged provision denied a survivor pension to a spouse who was under 35 years of age at the death of her husband (SCC 1999, Réaume 2006). The provision explicitly conditioned eligibility on age, not sex, but Justice Réaume demonstrates how focusing exclusively on age to adjudicate the equality challenge fails to take account the socio-economic history of the creation and development of the Canada Pension Plan (1985; hereinafter, CPP), as well as contemporary data about women's situation in the workforce. Although the survivor pension under the CPP was originally conceived, in 1964, as a response to the traditional absence of many women from the paid work force, eligibility criteria evolved over time to include men, and gradually to scale down the value of the pension for younger spouses, finally cutting off eligibility for those under 35. In light of the data on women's workforce participation, though, the effects for women were likely to be more severe than those experienced by men. The scheme seemed to adopt a male image of younger workers, apparently assuming that those under 35 would be able readily to bounce back, economically, from the death of a spouse. However, women's position in the paid workforce continues to be more precarious than men's, even for the relatively young (Statistics Canada 2006, cited in Réaume 2006).⁶ This gender dimension to the case had been completely ignored by the courts (*Law*, 1999); indeed, even by the claimant, making it easy to accept the idea that younger spouses had no legitimate need for income support.⁷

In *Newfoundland v NAPE* (SCC 2004, Koshan 2006), the decision of the government of Newfoundland and Labrador to renege on its pay equity agreement with the union representing public sector workers was at issue. Partially relieving itself of these obligations was part of a broader austerity program in the wake of an alleged fiscal crisis. Although the Supreme Court of Canada found an infringement of the equality provision, it accepted the government's argument that its failure to implement the agreement was justified under s. 1 of the Charter.⁸ Justice Koshan convincingly makes the case that the Supreme Court's failure to delve into pay equity's key role in overcoming the historic tendency to undervalue women's work paved the way for its too easy acceptance of the province's fiscal excuses.

Indeed, Justice Koshan shows the province's willingness to sacrifice female employees' interests participates in the very same kind of devaluing of women that pay equity is meant to rectify. The government treated the scheduled pay equity payments not as a matter of living up to its human rights obligations, but as akin to a discretionary bonus. This characterization is implicit in the worry expressed that other (mostly male) workers would be irritated at their wages being frozen while female co-workers receive a pay boost. At best, this stance lets the gender-biased views of male employees justify the government going back on its word; at worst, it indicates government duplicity – giving with one hand while cavalierly taking with the other. The result, as Justice Koshan points out, was that female public employees bore a disproportionate share of the government's austerity program. Their wages – suppressed by past discrimination – were frozen too, and they bore the same share of the other cutbacks in government services that the restraint legislation enacted.

⁶ Ironically, the male model is unlikely to apply to many men since men are unlikely to find themselves in the situation of wanting to apply for a survivor pension at all given that the deceased spouse must have been making contributions to the CPP for 20 years at the time of death. Indeed, this may have been part of the reason for thinking there was no need for such a pension for those under 35.

⁷ Because the gender dimension of the case was not raised at trial, one cannot fault the Supreme Court for not doing justice to the issue. One lesson, then, from the WCC reconsideration of *Law* is about how to shape the theory of a case from the outset, looking for *all* the equality angles involved. The Supreme Court is not immune from criticism, however, for taking a 'sleeper' of a case as an opportunity to rework the section 15 test without benefit of academic discussion of the case as it was working its way through the courts, and without input from intervenors (Baines 2000).

⁸ Section 1 provides:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Canadian Charter of Rights and Freedoms 1982)

Back payment for discriminatory wage levels was treated as a frill, a modern equivalent of old-fashioned ideas that women just work for 'pin money'.

The significance of this attention to context has been evident, in my experience, from the reactions of students when reading the WCC judgments (Koshan *et al.* 2010).⁹ They commonly remark upon how the exploration of context changes their understanding of the issue. This is all the more important in opening students' eyes in situations in which a court renders a unanimous decision that obscures crucial aspects of context. Students, in particular, but all non-experts on the concrete issue at stake, are in danger, given only part of the story, of simply swallowing the half-truths on offer. After all, courts are usually pretty good at assembling their facts and arguments to make them look like they arrive at the only sensible conclusion.

This, too, is not news. Every law teacher values the robust dissenting judgment for the sake of illuminating both sides and fully engaging students in the debate. It is much harder to foster that debate when the judges all line up on one side. Of course, the law teacher can always draw on academic literature and other expert reports to tell the other side. But shadow judgments may be a particularly effective way of teaching the lesson that there are usually two sides of every story and that sometimes judges are trying to hide as much as illuminate in their rendering of a legal issue. The shadow judgment has done the filtering work, pulling together the data and academic insights relevant to the case. And then it goes one better, by applying that knowledge to the actual facts. As a way of modelling critical legal analysis, this is as rich as it gets.

The shadow judgment can be an effective tool precisely because it adopts the conventions of argument accepted by real judges. By sounding like a judge, and marshalling the argument like a judge, we may enable students to get inside a competing argument and, once inside, to judge it and its real-life competitor for themselves. In something like the way in which a fictional rendering of a social problem can open minds to unfamiliar aspects of human experience, 'playing' a judge may enable readers of a shadow judgment to engage more deeply with the argument than they might with comparable academic literature. If this is right, it may also tell us something about the increasingly rarified atmosphere that much academic literature inhabits. The audience imagined when writing a judgment is likely to be very different from the one in mind when writing a conventional academic article. And the typical law student is a considerable distance from the latter, as is the typical member of the bar or bench. Thus, shadow judgment writing may be a more accessible form of doctrinal critique.

Attention to context was a unifying feature of the Women's Court of Canada judgments. I concentrated above on three judgments in particular because they overlap in their attention to women's disadvantages in the paid workforce and the connection between that phenomenon and the gendered division of labour in the family as it is complicated by other disadvantaging forces such as racism, ableism, and class bias. That these judgments link up so effectively is no surprise. There is a long and rich feminist literature on how family and workplace norms confine women's options in mutually constitutive ways (Neysmith 2000, Williams 2000, Lewis 2006, Scott *et al.* 2012), and this literature clearly shapes the world view of the WCC justices. One can see how, if these were real court decisions, they would create a foundation to build on in dealing with other issues related to the work/family nexus. This could, in turn, affect a range of other equality cases, and open the door to new claims. However, it is equally apparent that this taken for granted background in the WCC judgments is unknown territory to many real judges. Seeing how understanding the social and economic forces that create and reproduce inequality shapes

⁹ Koshan *et al.* (2010) gather the reflections of several academics and students on the pedagogical uses of the WCC judgments.

understanding of legal issues, therefore, highlights the challenge of bridging this knowledge divide.

The rest of the WCC judgments did an equally compelling job of situating the issue at hand in a broader historical, social, and economic context that brought the equality implications to life. This backdrop drove the legal analysis. A brief account of the role of context in these judgments will suffice to illustrate the continuity in the WCC jurisprudence.

Native Women's Association of Canada v Canada (Eberts *et al.* 2006) situates the Native Women's Association of Canada's (NWAC) claim to be included in constitutional discussions aimed at furthering the self-government agenda of First Nations, Inuit, and Métis in a rich analysis of the ways in which women's traditional position of equality in these communities before contact was systematically undermined by federal legislation that stripped women of their membership rights and created governance structures for Indian Act communities borrowed from patriarchal Victorian ideology (Indian Act 1985). Having reduced First Nations women to subordinate status and instilled in First Nations men a taste for patriarchal authoritarianism, the federal government then chose four male-dominated Aboriginal organizations as its exclusive interlocutors in constitutional negotiations. Against this backdrop, it is hard to see the government's actions as anything other than the continued suppression of women's voices (Froc 2010).

Likewise, the WCC decision in *Eaton v Brant County School Board* (Pothier 2006a) draws out the history of children with disabilities being hidden away from society and denied education altogether. It also situates a school board decision to place a disabled child in a segregated educational setting against her parents' wishes in the context of the longstanding debate about whether separate can ever be equal. The evocative comparison with American debates about rules enforcing separate facilities based on race makes the Supreme Court's easy acceptance of the school board's arguments seem troublingly complacent.

Both *NWAC* (1994) and *Eaton* (1997) are unanimous Supreme Court of Canada decisions that, through their obscuring of context, normalize inequality and make it seem just sensible. Someone reading only the Supreme Court decisions could be forgiven for wondering what all the fuss is about; who do these claimants think they are, making these excessive demands? The WCC judgments interrupt this all too easy reaction.

Finally, *Gosselin v Quebec* (Brodsky *et al.* 2006) takes on poverty as an equality issue and reveals the many layers of inequality that are obscured by the Supreme Court's (2002) majority judgment that an age-based restriction on eligibility for social assistance does not discriminate on the basis of age but rather affirms the greater capacity for self-sufficiency of young adults. When this reading is situated against the backdrop of the history of bias against, and suspicion of, able-bodied social assistance applicants as lazy and undeserving, it becomes clear that the government (and the Court) are re-enacting these traditional biases to the detriment of the group most vulnerable to being tarred with this brush. Rather than not really in need, young adults are represented in the WCC's s. 15 analysis as convenient scapegoats for a government desperate to lower the cost of income support in bad economic times. "Better able to support themselves" is revealed as a euphemism for 'sturdy beggar', a traditional epithet used to disparage the able-bodied poor (Brodsky *et al.* 2006, p. 208 citing Handler). The WCC analysis also exposes the way gender compounds the effects of extreme poverty as integral to its finding of a s. 15 violation. For women, poverty can bring violence and sexual abuse in its train, in addition to hunger, homelessness, anxiety, and illness (Jackman 2005).

3. Is There a Theory of Substantive Equality in the WCC Jurisprudence?

The holy grail of Canadian equality rights doctrine is the concept of 'substantive equality'. The Supreme Court has loudly proclaimed its adherence to a substantive ideal (*Law*, 1999; *Withler*, 2011); however, its vision has often disappointed (McIntyre and Rodgers 2006, Faraday *et al.* 2009b). A significant 'test' for the WCC judgments, therefore, might be whether they give life to this concept in a way that stands to inform the ongoing debate and perhaps even nudge the courts in a better direction. I want to sketch the substantive equality related themes that thread through the WCC jurisprudence in order to illustrate how one could undertake an exercise of this sort. This exercise ultimately links up with the analysis of the importance of context above. To the extent that the WCC jurisprudence brings something to an account of substantive equality, it flows in large part from its use of context.

First, a word about what the Supreme Court of Canada seems to mean by 'substantive equality'. Though the Court did not start using the term at the outset of its equality jurisprudence, by the time of *Law* (1999), it was repackaging *Andrews v The Law Society of British Columbia* (1989), the Court's first s. 15 case, as grounded in substantive equality (Sheppard 2010). The Court in *Andrews* did clearly distinguish "mere equality of application to similarly situated groups or individuals" (*Andrews*, 1989, p. 167) from an approach that takes account of the "impact" of the law on those affected (*Andrews*, 1989, p. 168), and this seems to be part of what has later been branded as 'substantive'. The judgment also describes the accommodation of differences as "the essence of true equality" (*Andrews*, 1989, p. 169). So far, so good. This establishes that treating everyone the same does not necessarily mean they have been treated equally. The Court has labeled the same treatment approach as "formal equality" and rejected it; thus, the Supreme Court's version of "substantive equality" takes its meaning from the contrast with its formal cousin.

It is, of course, a necessary condition of developing a meaningful conception of equality that it do more than guarantee equal treatment under an existing rule. Otherwise all cases of 'adverse effect' or 'indirect' discrimination fall outside the constitutional protection (Sheppard 1990b, Majury 1990). It was important in *Andrews* that the Court admitted adverse effects cases under the rubric of potential equality rights violations, but after a promising start, the Court never has gone beyond a simplistic distinction between formal and substantive (Majury 2002). It paid lip service to the importance of accommodating difference without doing much to act on it. In fact, the 'substantive' ambition of s. 15 has been gradually invoked more often to uphold the equal application of an existing rule against challenge than to invalidate or temper a rule because it failed to take differences into account.

Two examples will serve to illustrate the almost perverse ways in which the Supreme Court has deployed the idea of substantive equality. In both, rhetoric outstrips results. In *Eaton* (1997), Sopinka J. did a reasonably competent job of outlining how discrimination against disabled persons is often a matter of failing to take difference into account:

[An] equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. (*Eaton*, 1997, para 67)

However, he then went on to hold that *because of her differences* from other school children, the claimant, Emily Eaton, was properly excluded from the regular classroom and relegated to a segregated environment for special needs children against her parents' wishes. Difference warranting accommodation shaded effortlessly into difference warranting exclusion, all under the guise of the ideal of substantive equality (Young 1997-98, Pothier 2006b).

Withler (2011) provides a second example. The Supreme Court chose a case in which a group of elderly women sought to gain access to a benefit provided to younger participants in a pension scheme to, in effect, chastise the claimants for adopting a "formalistic" equality approach by insisting that they be treated like other benefit recipients:

... the [equality] analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation. (*Withler*, 2011, para 37)

The shift in adjective from 'formal' to 'formalistic' seems clearly meant pejoratively. Instead of making an effort to understand how the claimants' needs were comparable, even if not identical, to those of other beneficiaries, the Court emphasized and exaggerated the differences between the claimants and others in order to justify their exclusion from the benefit (Réaume 2013). Again, difference warranting accommodation shaded effortlessly into difference warranting exclusion, under the guise of avoiding a 'formalistic' equality analysis.

The point is that it is easy to bandy labels about: formal=bad; substantive=good; it is easy to say that it is impact that matters, and not the form of the rules, and that a contextual analysis is necessary. However, the space between abstract rule formulation and concrete application is enormous. It turns out to be easy to ignore or suppress obvious negative impacts of a law or scheme or treat them as the appropriate upshot of actual differences instead of the basis for constitutionally mandated accommodation efforts. Having declared itself against formal equality and in favour of substantive equality, the Court is bound to describe whatever it decides to do in a given case as instantiating substantive equality. If the proof of the pudding is in the eating, however, the Court has served us up a very dry dish indeed. Using abstract labels without giving them a consistent and tangible meaning is at least part of the reason that advocates complain of the unpredictability of section 15 jurisprudence. The WCC jurisprudence's greater fidelity to contextual analysis gives the lie to the Supreme Court's pretensions.

Most of the WCC judgments explicitly sign on to the substantive equality ideal, so it is worth contrasting the WCC treatment of this idea with the implicit conception at work in the Supreme Court's jurisprudence. There is clear overlap with the Supreme Court approach, in that many of the same abstract elements of 'substantive equality' are at play, but two judgments in particular are more comprehensive in developing an account of substantive equality. The *Symes* judgment (Buckley 2006, p. 46) lays out a definition, quoting the 'extra-judicial' work of Shelagh Day and Gwen Brodsky (1998), both involved in the WCC *Gosselin* decision. The key elements of the Buckley account of substantive equality might be described as follows: the mere fact that a rule treats everyone the same and is therefore formally equal does not guarantee equality because differences in circumstances can produce different effects, whether symbolic or material; those differences in circumstances may be the product of historical patterns of disadvantage, including through 'private' structures within the family and the market; revealing patterns of advantage and disadvantage is a matter of keeping track of effects on groups, not individuals as such; finally, substantive equality requires government action to dismantle the deep-rooted practices that construct inequality and remedy or counter their ongoing effects.

The WCC decision in *Law* goes about the task of outlining a general approach somewhat differently, accepting part of the framework for the s. 15 test under the

Charter laid down by the Supreme Court of Canada, but augmenting and reworking it in key respects (Réaume 2006). Justice Réaume accepts that mere differential consequences (whether through explicit targeting or in effect) connected to an enumerated or analogous ground does not constitute a violation of s. 15 and takes the Supreme Court's invocation of human dignity as an invitation to use the concept to incorporate many of the same ideas expressed in Justice Buckley's account of substantive equality. The WCC decision in *Law* identifies three forms of violation of human dignity already identified by the real-world case law and weaves them together into a systematic account of the sorts of differentiations that are relevant to an equality guarantee: those based on prejudice, those based on stereotype, and those that deny access to a group captured by a ground to a benefit that has a social meaning partly constitutive of the idea of a 'life with dignity' (Réaume 2006, pp. 163-170). The latter, in particular, provides space for investigating how incorporating norms reflecting dominant groups into law and policy implicitly excludes those whose lives have been shaped differently. Understanding each of these three forms of dignity violation requires attention to historic patterns of exclusion and devaluation and how bygone attitudes become cemented into social practices and laws in ways that perpetuate their effects. Situating current practices and behaviour in this context allows us to identify roots in old prejudices and stereotypes and understand how they are unwittingly reconstituted and perpetuated, as well as track how laws are shaped around the attributes and expectations of historically advantaged groups.

Are these two 'theoretical' accounts of the basic framework for analysis consistent with one another or do they diverge in significant respects? If these are just two different ways of saying the same thing, what, if anything, militates in favour of one framework or the other? If there are points on which the two accounts might tend in different directions these might be explored to test for long term implications of adopting one or the other. Future WCC judgments may have to decide which approach to follow. My sense is that there is a great deal of overlap between the WCC *Symes* and *Law* frameworks – both treat effects as more important than superficial neutrality; both are alive to the web of rules and practices that must be dismantled to advance equality; both understand how those rules and practices disadvantage some by adopting norms that represent dominant groups – this is part of how facially neutral rules cause harm to those who do not fit the norm. *Law*, perhaps, pays more attention to analyzing prejudice and stereotype as phenomena that are instrumental in constructing inequality; *Symes* has a more robust sense of substantive equality as a value that should inform all aspects of state policy and practice; it treats it not merely as the content of one Charter provision, but as a foundational constitutional norm operating across the legal system. The *Symes* approach also emphasizes the responsibility of the state to be pro-active in eradicating inequality, even inequality created by private structures and practices.

Both approaches track some basic aspects of the Supreme Court's framework: that equal treatment does not guarantee equality; that difference in circumstances leads to different effects; that it is effects that matter. However, in highlighting historical patterns of disadvantage and the ways they infiltrate social life these WCC approaches make space in an abstract account to insert a meaningful contextual story and let it do some work. Where the Supreme Court tends to stay in the clouds, the general approaches adopted by Justices Buckley and Réaume invite and, indeed, require, a close consideration of the forces that produce and sustain disadvantage and inequality.

The rest of the WCC judgments seem to me to straddle the *Symes* and *Law* accounts. The common ground is echoed in all the judgments. They emphasize effects rather than form; all the judgments develop the intricate connections between the array of structural features that create and maintain inequality. Indeed, this is their singular strength. By so carefully contextualizing the consequences of the impugned law or practice, by tracing their sources, the WCC judgments bring to life, we might say, what it means to define discrimination in terms of effects. These are rich and robust

narratives of the sources of, and continuing damage wrought by, structures of inequality. By contrast, in failing to be clear about just what kinds of effects one means, the Supreme Court has turned “effects-based” into an empty mantra – a principle that is easy to subscribe to but can be manipulated at will to find – or not find – disadvantage that calls for rectification.

Situating a particular scheme in its historical context as part of a network of forces that produce a situation of disadvantage is the very exercise that reveals the effects – continuing, exacerbating, contributing to, or reinforcing historical forms of disadvantage – of the rule or policy. By contrast, the Supreme Court’s analysis rarely goes past looking for the most direct connection between rule or policy and immediate consequences. That a law, policy, or decision might affect a landscape already imbued with discriminatory forces seems to be a foreign thought to most of the judges most of the time. Perhaps the most vivid contrast in this regard is between the two *NWAC* judgments (*NWAC*, 1994; Eberts *et al.* 2006). The Supreme Court decision scarcely mentions the long colonial history of stripping First Nations women of standing and authority in their communities in service of an inequality-producing Victorian ideal of the division of roles between the sexes. The WCC justices set out this history in all its sorry detail precisely in order to present the Canadian government’s exclusion of First Nations women from constitutional negotiations as part of this tradition, not an isolated rejection of an excessive demand. The historical context guides our interpretation of this interaction; it reveals its true meaning.

There is one dimension along which the Buckley and Réaume approaches diverge somewhat, but in the final analysis this produces no inconsistency, and the rest of the WCC judgments illustrate this. The dominant thrust of the *Symes* approach (Buckley 2006) accentuates the material consequences of the law or policy in issue, tending to develop the idea of an effects-based approach in terms of material effects. The dignity focus of the WCC decision in *Law* (Réaume 2006), while not theoretically averse to attention to material effects, perhaps lends itself more to taking account of expressive harms. An understanding of the significance of both of these kinds of harm or effects turn out to be woven through most of the WCC judgments.

This focus on material effects is evident in many of the judgments. *Gosselin* (Brodsky *et al.* 2006) provides a vivid description of the devastating consequences of being unable to afford the basic necessities of life because social assistance is denied, including the gendered forms of violence and exploitation that entails. *NAPE* (Koshan 2006) is equally careful to record the income snatched from long-suffering public employees and the consequences of its loss, especially for those just retiring or newly unable to work because of disability. These women, having no chance to recoup any part of the loss imposed, faced a permanent threat of greater financial insecurity. *Symes* (Buckley 2006) explores the income and lost opportunity consequences of high child care costs. In all three judgments, material consequences are set in a broader social and economic context of ongoing deprivation to draw out the damage done. This is essential to avoid the trivialization of the harm by focusing on the marginal economic loss to particular individuals.

Yet, although not expressly using the label, the WCC cases also pay a great deal of attention to the expressive harm done by the state action at issue. Context is equally effective, indeed crucial, in this effort. *Gosselin* (Brodsky *et al.* 2006) also exposes the stereotypes at the heart of the restriction on social assistance and their demeaning and insulting nature. It connects material deprivation to denial of the very idea of membership in civil society to bring out the consequences for dignity. The *NWAC* judgment (Eberts *et al.* 2006) conveys the clear indignity of refusing to let First Nations women speak for themselves in constitutional negotiations to determine the governance structure for their communities and ties it to other forms of silencing women.

Likewise, *Eaton* (Pothier 2006a) draws evocatively on the analogy between segregated schooling for children with disabilities and the history of racially segregated schooling. This makes the analysis turn less on the actual quality of education provided, which seems to be the Supreme Court's exclusive focus, and more on avoiding the stigma of being shuffled aside, out of sight and out of mind of the able-bodied school population. Finally, *NAPE* (Koshan 2006) repeatedly comes back to the meaning of a decision to renege on pay equity commitments – that women's labour is less valued, that fairness to women counts for less than protecting the sensibilities of male employees more concerned with their own pocket than fairness to their female colleagues.

When one stitches together all these accounts of the indignities inflicted on these claimants, they amply validate and illustrate a point made in the abstract in the WCC version of *Law*. One of the correctives *Law* (Réaume 2006) seeks to offer to the Supreme Court's approach is to reorient the notion of human dignity away from any concern about hurt feelings and toward the objective social meaning of the treatment meted out to people. Not paying women what they are owed, refusing them a seat at the constitutional negotiating table, assuming the poor are just lazy, and hiding disabled children out of sight isn't wrong because it makes people feel bad – even though it may do so – but because it carries the message that these people don't matter (as much), their well-being and contributions to society don't count (as much). A fully contextualized account of the assumptions underlying such action and how it fits into past patterns of neglect and disrespect is crucial to telling the dignity story to reveal the objective harm. Without the back story, these actions can be presented as isolated decisions that are mere instances of group members just not getting everything they would like. The grievance can be subjectivized and dismissed with platitudes about governmental good intentions which should make a reasonable person feel better. Placed properly in context, the implication of disrespect and lesser worth is not so easily denied.

I doubt that the development of this expressive harm theme was a conscious part of the project for the WCC bench. The notion of human dignity has been given such a bad name by the Supreme Court's abuse of it that few have overtly sought to re-appropriate the idea. In fact, at least partly because of an academic hue and cry, the Supreme Court has stopped using the label 'dignity' to explain its equality judgments (*R v Kapp*, 2008). That, however, has been something of a pyrrhic victory, since the Court has not disavowed any of the normative judgments that lay behind the conception of the notion that it was itself responsible for creating. There is, thus, still plenty of rewriting required by the Women's Court of Canada. And, rather than lending support to the campaign to excise the language of dignity from the jurisprudence, it seems to me that the WCC judgments so far can be read as implicitly contributing toward making that concept truly meaningful by contextualizing the abstract idea.

4. One Last Thought

The theme of this attempt to create a jurisprudence out of WCC judgments has been that its contribution to an understanding of substantive equality is a function of careful and rich attention to context. I close by suggesting that there might be one other feature of Canadian equality doctrine that could be illuminated and redirected by a similar attention to context.

One of the key features of the Supreme Court's approach to equality cases for a long time was its treatment of equality as essentially comparative in nature (*Andrews*, 1989; *Law*, 1999; *Hodge v Canada*, 2004). The Supreme Court has done a great deal of damage through its choice of comparator group to determine whether the claimant group has been discriminated against. As with the concept of 'dignity', this aspect of the jurisprudence has attracted a great deal of academic criticism (Pothier 2001, Gilbert 2003a, Gilbert and Majury 2006, Young 2006, Sheppard 2010, pp. 44-46,

Réaume 2013). And, again, the Supreme Court appears to have retracted its initial approach on this issue (*Withler*, 2011), but its actions tell a different story. One might argue that ideas about comparison continue to do damage in the case law, though we no longer talk about the right comparator group.

And so, it might be worthwhile to investigate whether there is a competing understanding of the role of comparison operating in the WCC judgments. Some of the WCC judgments express skepticism about the need for comparison, and none directly tackles the challenge of criticising the Supreme Court's approach. However, I suspect that there are comparisons operating under the surface in the WCC judgments, but ones that guide or perhaps are guided by the depiction of context. Done well, I suspect that comparison can help illuminate the harms caused by law or policy rather than clumsily disguising a resort to formalistic reasoning, as has been too common in the Supreme Court jurisprudence. Here, too, situating a claim fully in the context of the web of past practices and patterns that shape outcomes may turn out to make all the difference. If so, a better understanding of the role of comparison and how it should operate might enrich equality analysis rather than undermining it.

That context should be crucial to an analysis of substantive equality capable of actually dismantling legally supported inequality will be unsurprising to anyone acquainted with any feminist judgments project (Hunter 2010). A virtue of the WCC judgments, though, is that they systematically demonstrate this truth across a range of judgments in the same area of law. In that demonstration lie the seeds of an alternative approach to constitutional equality rights. Is it too much to hope that this might entice others to take up the Canadian model and mount a new shadow judgments project that concentrates on a different specific area of law?

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