

## Impact of the Feminist Judgment Writing Projects: The Case of the Women’s Court of Canada

JENNIFER KOSHAN\*

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### Abstract

The first feminist judgment writing project, the Women's Court of Canada (WCC), published its initial set of judgments ten years ago in 2008. Although the WCC has led to feminist judgment projects in several other jurisdictions, research shows that the WCC judgments have not been cited very extensively by other academics, let alone by courts, tribunals or lawyers. This article explores whether this lack of citations is cause for concern, raises some possible explanations, and discusses strategies for giving feminist judgment projects broader and deeper impact.

### Key words

Feminist Judgment Projects; Women’s Court of Canada; equality rights

### Resumen

El primer proyecto feminista de redacción de sentencias, el Tribunal de Mujeres de Canadá (WCC son sus siglas en inglés), publicó su primer conjunto de sentencias hace diez años, en 2008. Aunque el WCC ha liderado proyectos de tribunales feministas en otras jurisdicciones, la investigación demuestra que las sentencias del WCC no han sido frecuentemente citadas por otros académicos, mucho menos aún por tribunales y abogados. Este artículo analiza si esta ausencia de citas debiera preocuparnos, propone algunas posibles explicaciones y debate estrategias para dotar a los proyectos de sentencias feministas de un mayor y más profundo impacto.

### Palabras claves

Proyecto de sentencias feministas; Tribunal de Mujeres de Canadá (WCC); derechos de igualdad

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\* Jennifer Koshan is a Professor in the Faculty of Law, University of Calgary, and founding member of the Women’s Court of Canada. Murray Fraser Hall, 2500 University Drive NW, Calgary, AB, Canada. T2N 1N4. Email address: [koshan@ucalgary.ca](mailto:koshan@ucalgary.ca).



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## 1. Introduction

It has now been ten years since the inaugural feminist judgment project (FJP), the Women's Court of Canada (WCC), published its first set of six "judgments" in 2008. Since then, the WCC has spawned FJPs in a number of other jurisdictions and contexts, which have built on the WCC project in interesting and important ways [Hunter *et al.* 2010 (England and Wales); Douglas *et al.* 2014 (Australia); Enright *et al.* 2017 (Ireland and Northern Ireland); Hodson and Lavers, forthcoming (International Law); McDonald *et al.* 2017 (Aotearoa New Zealand); Stanichi *et al.* 2016, Crawford and Infanti 2017 (USA)].<sup>1</sup> Critical judgment projects written from other perspectives have also emerged (see e.g. Appleby and Dixon 2016, Rogers and Maloney 2017). We might take the presence of WCC progeny as a success of the project in and of itself. However, it is also instructive to examine the impact of the WCC at a more granular level. Citation data on the initial phase of the WCC shows that while this FJP has been cited fairly generously as a project, there has been less engagement with the judgments themselves than we might have hoped, either by academics, courts or advocates – they are for the most part not being treated as akin to case comments with analytical insights to be referenced, analysed, relied upon or disagreed with.

This article reflects on whether this lack of specific engagement with the WCC judgments is a cause for concern, and explores the potential reasons for this finding with a view to identifying how FJPs might make our work more accessible and impactful. Although a comparison of the impact of different FJPs would also be worthwhile, I focus on the WCC as a case study given its unique attributes – publication of its judgments in a journal rather than a book, the focus on one area of law, constitutional equality rights, and the relatively small numbers of WCC judgments and authors – as well as the fact that the first WCC judgments have had ten years in which to generate citations.

Part 2 provides a brief description of the WCC project that is the focus of this article, including the genesis of the project, its first and second set of judgments, and our efforts at disseminating the WCC's work. Part 3 reflects on the utility of measuring citations and then undertakes the measurement exercise for the first set of WCC judgments. The results reveal that the judgments have been fairly well cited in general reviews of feminist judgment writing projects (including explorations of the FJPs as teaching tools), but the individual WCC judgments have not been cited to a very great extent by those external to the projects. Part 4 raises some possible explanations for these findings, and explores strategies for giving our work broader and deeper reach.

## 2. The Women's Court of Canada Project

As noted in Diana Majury's (2006) introduction to the Women's Court of Canada, the WCC project arose organically in the midst of an equality rights workshop in 2004. Frustrated with the Supreme Court of Canada's progress in interpreting and applying equality rights, a number of workshop participants decided over dinner one night to form a shadow court that would rewrite the Supreme Court's decisions from feminist perspectives. We would, as much as possible, try to replicate the judicial form and voice in our judgments and follow the same rules about evidence and precedent. We wanted to show that the Court's decisions could legitimately have been written differently, and that feminist judgments could stand alongside and perhaps even surpass the judgments they re-wrote in their persuasiveness.

The Women's Court of Canada published its first set of six judgments, along with an introduction to the project, in a special volume of the Canadian Journal of Women

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<sup>1</sup> Feminist judgment projects are also underway in India and Scotland.

and the Law released in 2008 (Women's Court of Canada 2006).<sup>2</sup> The first iteration of the WCC project focused on judgments analysing Canada's constitutional equality rights guarantee, section 15 of the Canadian Charter of Rights and Freedoms (Charter). We did not include an open call for authors, instead allowing the enthusiasm of the initial workshop attendees to unfold, with each judgment representing the decision the author(s) were most compelled to re-write. An ad hoc group coordinated the process to ensure there was no duplication of judgments, to manage the peer review process, to obtain funding, and to publicise the WCC project.

Although the six judgments centre on what might appear to be a narrow area of law, they cover a broad range of subject areas intersecting with constitutional equality rights and a wide range of identity factors intersecting with gender. Melina Buckley's (2006) judgment explores the impact on working mothers of the inability to fully deduct child care costs as taxable expenses in *Symes v Canada* (1993); Mary Eberts, Sharon McIvor, and Teressa Nahanee (2006) discuss the implications of failing to include a representative Indigenous women's organisation in constitutional negotiations between the Canadian government and Aboriginal peoples in *Native Women's Association of Canada v Canada* (1994); Dianne Pothier's (2006) judgment considers the constitutional obligation of a school board to accommodate rather than segregate a girl with disabilities in *Eaton v Brant County Board of Education* (1997); Denise Réaume (2006) assesses the role of dignity as a marker of equality in a case involving death benefits for dependent spouses in *Law v Canada* (1999); Gwen Brodsky, Rachel Cox, Shelagh Day and Kate Stephenson (2006) critique the denial of an adequate standard of living to women living in poverty in *Gosselin v Quebec* (2000); and Jennifer Koshan (2006) analyses a government's attempt to justify the denial of pay equity to women workers during a so-called fiscal crisis in *Newfoundland v NAPE* (2004).

Each judgment is accompanied by a note detailing the authors' motivations for rewriting the judgment in question, any stylistic licenses they took (for example the addition of interveners or evidence), as well as any connection to the case that the authors had. The judgments were workshopped at a retreat for WCC members funded by the Social Sciences and Humanities Research Council conference fund in 2005 and were subjected to external peer review before being published. Unlike some of the other FJPs that came after, the WCC did not include formal commentary on each judgment.

As Majury (2006) and Réaume (2018) have argued, the judgments collectively provide the starting point for a theory of constitutional equality rights, or at least an equality "counter-jurisprudence" that courts, other decision makers and those arguing before them or critiquing their decisions actually might use. The judgments also reveal the particular challenges that may obtain when judges seek to apply equality rights in particular factual contexts, and hence the importance of a contextual, effects-based approach to the interpretation and application of equality rights (Réaume 2018). While they focus on equality, the judgments explore the ways in which equality rights may intersect with other constitutional norms, including the rights of Indigenous peoples, freedom of expression, security of the person, and the government's power to place reasonable limits on rights under section 1 of the *Charter*, thus extending the breadth of the judgments' scope.

Prior to releasing the judgments, the WCC participated in a conference marking the twentieth anniversary of section 15 of the *Charter* in April 2005, which was organised by two of Canada's leading equality rights groups, the National Association of Women and the Law (NAWL) and the Women's Legal Education and Action Fund (LEAF). Members of the WCC sat as a "court" and orally presented excerpts from some of the judgments in a plenary session. This was the first introduction of the WCC project to

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<sup>2</sup> Although 2006 is listed as the publication date, the special volume of the CJWL was not released until early 2008 because of a backlog at the journal.

the feminist and equality rights communities in Canada; an international introduction to the project was made at a Gender and Judging session at the Law and Society conference in Berlin in July 2007 (Koshan 2007).

Once the judgments were published, the WCC project was launched at an event in Toronto in March 2008, *Rewriting Equality / Recrire l'Egalité*. This multi-day event included panels on feminist judging, *Charter* equality litigation, and access to justice; equality-themed spoken word, dance and song performances; workshops on the six judgments with law students; and discussion of the future directions of the WCC project (Women's Court of Canada 2008). A WCC "road show" followed in March 2009, with events at Western Canadian law schools in Victoria, Vancouver, Calgary, Edmonton, Saskatoon, and Winnipeg, each taking a different format depending on the vision of local organisers in collaboration with WCC members. Funding for these events was provided by various provincial law foundations having a mandate to fund public legal education, showing the utility of including student engagement as a constitutive element of FJPs. Amongst other activities, the WCC introduced its project to the broader Canadian legal community at a Canadian Bar Association conference in Niagara, Ontario in 2010 (Réaume 2010) and participated in a roundtable comparing FJPs from different jurisdictions at a Law and Society conference in Vancouver in June 2013 (Hunter *et al.* 2013).

In addition to the print version of the *Canadian Journal of Women and the Law*, which is available to subscribers and in law and other libraries, all of the WCC judgments are available on the legal database Hein Online and in open-access format on the blog The Court.ca; some also have been posted on SSRN's Legal Scholarship Network. The WCC maintained its own website and blog for a period of time, but this site is now inactive due to a lack of resources. Unlike some of the other FJPs (see e.g. Moran 2012, Roberts and Sweeney 2015, Kyneswood 2016), there has been no book review or other review essay of the WCC project or judgments to date.

The Women's Court recently published its second set of judgments in a special volume of the *Canadian Journal of Women and the Law*, following on an equality rights symposium in Victoria, British Columbia in 2010 (Women's Court of Canada 2018). These judgments continue to pursue the theme of constitutional equality rights by rewriting the Supreme Court of Canada's first decision under section 15 of the *Charter*, *Andrews v Law Society of British Columbia* (1989), and the Court's more recent decision in *R v Kapp* (2008), which attempted to review and consolidate the Court's approach to equality rights. *Andrews* established the Court's substantive equality approach in a case involving the right of non-citizens to practice law, and *Kapp* purported to return to *Andrews* in a context raising issues about the scope of race-based discrimination, Indigenous peoples' fishing rights and self-government, and the protection of affirmative action programs under section 15(2) of the *Charter*. The new volume contains six judgments, including a reference opinion in *Andrews* (Buckley 2018), three separate concurring judgments in *Kapp* (McGill 2018, Govender and Sheldon 2018, and Lawrence 2018), a judgment rewriting the *Kapp* test for discrimination in the context of adverse impact religious discrimination (Koshan and Watson Hamilton 2018) and the republication of a WCC judgment that departs from the equality rights context and includes a post-script [see Koshan 2016 and 2018, rewriting the Supreme Court's decision in the sexual assault case *R v JA* (2011)].

### 3. Citations of the WCC in the Academic Literature

#### (a) Why measure citations?

Before describing my methodology for assessing the impact of the first set of WCC judgments and discussing the results, it is necessary to ask why we should care about citations. Citations in scholarly literature are of course only one measure of a FJP's reach and importance. We might also evaluate the success of the WCC by looking to the other FJPs it inspired, the attention given to the project by traditional and social

media (Lawrence 2015), and the use of WCC judgments as teaching tools (though the latter is often only discoverable via citations in the literature, as I will discuss below).

Another significant measure would be the citation of WCC judgments in judicial / tribunal decisions and legislative debates. As the WCC noted in its Discussion Paper (WCC 2008 at 2), “[t]he WCC is about ideas and the power of these alternative ideas to have legal and political effect.” Indeed, when the WCC was first conceived, we dreamed of a time when our judgments might be mistaken for actual judicial decisions and cited as such, and were delighted when, at our first workshop, staff at the venue seemed to think we *were* real judges. While a search on the Canadian database Can LII indicates that WCC judgments have not yet been cited by any courts, tribunals, or legislative bodies, recently retired Chief Justice Beverley McLachlin has suggested that the Supreme Court of Canada would be open to considering feminist judgments. At the 2017 conference of the International Society of Public Law, feminist law professor Beverley Baines asked the then-Chief Justice what it would take for the Court to consider the feminist judgments projects. The Chief Justice replied that she was not aware of the projects, but in an adversarial system, it is up to lawyers to raise the material, and the Court will “consider anything they put forth” (McLachlin 2017, Kapralos 2017).

Members of the WCC are not aware of any instances to date where our judgments have been cited in legal arguments before courts, tribunals or legislative bodies. There is potential for this form of engagement given that many WCC members are involved in the work of LEAF, the predominant feminist intervener in equality rights litigation in Canada, and NAWL, Canada’s primary feminist law reform advocate. However, to avoid the risk of appearing self-serving, feminist academics outside the WCC who work with LEAF, NAWL and similar equality rights organisations must embrace the WCC project in order to credibly advocate for the adoption of its approaches to equality. Citations are one way of measuring this sort of acceptance within the scholarly community. At the same time, we must be mindful of the fact that courts and scholars often approach citations by relying on work or authors they (or their clerks or research assistants) are already familiar with. There also is a risk that because we have used the master’s tools by writing in judgment format (Lorde 1984) – and in the case of the WCC judgments, often at great, relatively inaccessible length – other feminist scholars may avoid referencing the FJPs (Majury 2006, Nelson 2006, Koshan *et al.* 2010). Additionally, it may be that because feminist judgments are a new form of writing, involving a reimagination of real judgments, courts and scholars do not quite know what to do with them. It is worth noting that FJP authors envision the judgments being used in the same way as case comments, other academic articles, or indeed the same way we often use the dissenting opinions of actual judges to support our arguments.

It also must be recognised that citations in scholarly literature are a controversial metric in light of the critique of the increasing trend to quantify academic work as a sign of the corporatisation and privatisation of the academy (see e.g. Thornton 2008, Boyd 2011). This critique raises important questions about the “space (...) within the new paradigm for the pursuit of feminist, critical, and theoretical knowledge that lacks market value” (Thornton 2009, 375), as well as the space available for other outsider perspectives (Bakht *et al.* 2007). Focusing on citations as a measure of impact, particularly for work that is a relatively new form of feminist critique, may risk supporting this neoliberal paradigm and stifling future feminist and outsider innovations.

It is therefore important to recognise that measuring citations is an incomplete and potentially risky way of evaluating the impact of FJPs. Some of the risks of counting citations can be moderated by taking a more in-depth approach to the exercise, however. Beyond a simple enumeration of citations, my exploration of impact categorises and reviews the different forms and levels of engagement that scholars

have undertaken with the WCC project and first six judgments. To paraphrase a comment by Denise Réaume at the Oñati workshop (2018), it is one thing to establish a FJP as “cool”, which a simple citation count may accomplish (albeit incompletely), but in order to assess actual impact, a deeper approach is required.

In addition to allowing us to at least partially evaluate the “legal and political effect” of the judgments, scholarly attention is also important for attracting new participants to the WCC, particularly junior scholars. The length of time it takes to produce a volume of feminist judgments may deter junior scholars from joining this enterprise unless there are some tangible benefits in terms of scholarly impact.

Ultimately, it may only be possible to evaluate the utility of reviewing citations as a measure of impact by actually performing the exercise. I will describe and then undertake my approach next, and return to some of the issues surrounding the measurement of citations in Part 4.

### (b) Methodology

My approach was to conduct searches for citations of the WCC project, Majury’s introduction, and specific WCC judgments in the academic literature using Google Scholar and the terms “Women’s Court of Canada” and individual author names, as well as searching for citations and downloads for the introduction and each judgment on Hein Online and SSRN. Searches conducted on Can LII for citations of WCC judgments in judicial and tribunal decisions, and on Google and in the LEAF and NAWL databases for citations of WCC judgments in feminist factums and law reform submissions, produced no results. All searches are up to date to July 1, 2018.<sup>3</sup>

The citations of the WCC project in the academic literature fall into three broad categories: (1) general discussions of the WCC as a feminist judgment writing project and its place in the feminist legal literature, (2) exploration of the WCC (and other feminist judgment projects) as teaching tools, and (3) citations of / engagement with individual judgments. My observations of the references in each of these categories follows.

#### 3.1. General pieces on the WCC Project

As of July 2018, there were 33 articles, book chapters, books, book reviews, feminist judgments and academic blog posts by 30 different sets of authors citing the WCC project or Majury’s Introduction. These general pieces are listed in Appendix 1.<sup>4</sup> All of these works were published in 2010 or later, with nine new publications between 2017 and 2018.<sup>5</sup> This, and the fact that less than one third – eight – were published by authors affiliated with Canadian institutions (Pickering 2010, DeGreeve *et al.* 2010, Black *et al.* 2011, Bouclin 2011, Nedelsky 2011, Mossman 2016, Baines 2017, Boyd and Parkes 2017), indicates that the introduction of FJPs in other jurisdictions has had an influence on references to the WCC in the literature, which lately accompany references to the other FJPs.

This category of literature can be further broken down into (1) those pieces that examine feminist judgment writing as feminist theory / practice /performance (Black *et al.* 2011, Davies 2011, 2012 and 2016, Hunter 2012a, Rackley 2012, Rogers and Maloney 2014, Bonthuys 2015, McLoughlin 2015, Roberts 2015, Barker and Lenon

<sup>3</sup> Hein Online’s ScholarCheck function only “records and displays (for a rolling 12-month period) the number of times articles are accessed by other Hein Online users.” See *Hein Online Comprehensive User’s Guide* at 15, <https://www-heinonline-org.ezproxy.lib.ucalgary.ca/HeinDocs/HOLUserGuide.pdf>. This periodic record of access and citations thus creates an incomplete record of impact in Appendix 5. Other databases such as Can LII, Google Scholar and SSRN do track citations cumulatively.

<sup>4</sup> I do not include in this list those pieces that cite one of the individual judgments in addition to the introduction or WCC project more generally; those are included in Appendix 3.

<sup>5</sup> This figure is based on a comparison of search results from April 2017 when a draft of this paper was presented and July 2018 when the final search was performed. I exclude any papers from the Oñati workshop or the 2018 volume of new WCC judgments that cite the WCC project or individual WCC judgments.

2016, Cooper 2016, Douglas 2016, Kyneswood 2016, Sen 2016, Boyd and Parkes 2017, Berger *et al.* 2017 and 2018, Sharpe 2018); (2) articles on gender and judging, including explorations of the contributions of individual judges (Bouclin 2011, Baer 2013, Blizzard 2014, Chan 2014, Melville 2014, Hunter *et al.* 2016, Mossman 2016, Baines 2017); and (3) works that engage with specific areas of law (Pickering 2010, Moreland 2014, Appleby and Naffine 2015, Sauls Avolio 2017).

References to the WCC in the second two sub-categories tend to be quite brief, and are often accompanied by citations to the other FJPs. In contrast, the pieces in the first sub-category discuss or engage in feminist judgment writing (including the WCC) in some depth, and could be seen as making a useful contribution to the assessment of the FJPs as a feminist project. However, many of the authors in this sub-category have connections to the FJPs as authors of judgments or commentaries, as participants in FJP symposia, or as participants in other critical judgment writing projects (see e.g. Hunter 2012a, Rackley 2012, McLoughlin 2013, Davies 2014, Rogers and Maloney 2014, Douglas 2016, Sen 2016, Barker and Lenon 2016, Berger *et al.* 2017, 2018). We therefore might reasonably be concerned that their assessments are not entirely neutral on the import of the WCC and other FJPs. On the other hand, this sub-category also reflects the impact of the WCC (and other FJPs) in recruiting feminist scholars to the overall feminist judgment writing project.

### 3.2. *Exploration of the WCC / FJPs as a teaching tool*

As noted, the WCC launch at the Rewriting Equality Symposium in Toronto and the Western road show included workshops on the six initial judgments of the WCC, where students met with authors and contrasted the WCC judgments with the Supreme Court of Canada judgments in the same cases. Pedagogical use of the judgments has always been part of the vision of the WCC project (Women's Court of Canada 2008, Réaume 2018).

The literature in this category (listed in Appendix 2(a)) includes two articles exploring the WCC (and other FJPs) as teaching tools; both were written by contributors to FJPs (Koshan *et al.* 2010, Hunter 2012b).<sup>6</sup> There is also a special volume of *The Law Teacher* dedicated to using feminist judgments in the classroom, with contributions from several authors affiliated with the England / Wales FJP (Auchmuty 2012, Carr and Dearden 2012, Gear 2012, Hunter 2012b, Hunter and Fitzpatrick 2012).

I also attempted to find course outlines and syllabi documenting the use of the WCC project or specific WCC judgments as readings. I found very few such documents online, likely because most are on password protected websites (see the list in Appendix 2(b)). Interestingly, few of the available syllabi are for law school courses. However, the use of the WCC judgments in Canadian law school curricula is discussed in an article exploring their pedagogical use (Koshan *et al.* 2010), revealing a number of different approaches from mainstreaming to stand-alone courses on the WCC. This article also documents an exercise undertaken by students of Catherine Frazee in a Disability Studies course at Ryerson University, where they rewrote the *Eaton* judgment into plain language (Koshan *et al.* 2010, Appendix 1). In addition, members of the WCC anecdotally are aware of several instructors who have used the WCC judgments in feminist legal theory / gender and the law classes in law schools, and in law and philosophy / gender studies classes in other faculties. My own daughter read Margaret Davies' (2012) article on FJPs in a Philosophy of Law class at her university in New Brunswick, and was both surprised and excited to learn that I have been part of the WCC – showing perhaps that better communication about the FJPs can begin at home.

<sup>6</sup> See also DeGreeve *et al.* (2010), describing a presentation by Professor Beverley Baines to Canadian law librarians on equality rights which included discussion of the WCC. This reference could be seen as falling into the category of FJPs as teaching tools.



I further explored the use of the WCC judgments as teaching resources by contacting feminist teaching colleagues in Canada via the Fem-Prof list-serve. Six colleagues who are not affiliated with the WCC project responded that they have assigned the WCC judgments as readings in their classes or would consider doing so, or that they have referred students to the judgments for their research papers. The literature therefore gives only a partial picture of the extent to which the WCC judgments are being used as teaching tools and promoted as sources for course-based student research.

### 3.3. Individual WCC Judgments

Searches on Google Scholar, Hein Online and SSRN found thirteen citations to the first set of WCC judgments by authors unconnected to the FJP projects (See Appendix 3 for the list of citations by non-affiliated authors and Appendix 4 for citations by affiliated authors). All six of the first WCC judgments are represented in this set of citations, with some references citing more than one judgment. Searches on Hein Online and SSRN were also conducted to count downloads and abstract views for each judgment (See Appendix 5).

Within this small group, just under half of the citations to WCC judgments are by Canada-based authors in publications with a legal or socio-legal focus (Froc 2010, Malhotra and Hansen 2011, Bay 2011, Bouclin and Sala 2013, Snyder 2014, Cochran 2017).<sup>7</sup> The remaining citations are from socio-legal scholars in other jurisdictions (Kruger 2011, Bernstein 2015) and / or scholars in other disciplines, including religious studies (Martikainen and Gauthier 2013, Dickey Young 2015), history (Strong-Boag 2014), Indigenous law and literature (Suzack 2011) and literary studies (Quéma 2015). These references show the multi-disciplinary and international reach of the WCC project.

Approximately half of the publications referencing the WCC judgments, whether socio-legal or otherwise, largely do so briefly in the text or footnotes, with limited engagement or elaboration. In her introduction to the biography of a judge, Bernstein (2015) makes brief reference to the WCC judgment in *NAPE* as an example of a feminist judgment purporting to overturn a judicial decision; Dickey Young (2015) and Kruger (2011) cite the WCC judgment in *Law*, as well as other work by Réaume, to evaluate the connection between human dignity and equality, and Martikainen and Gauthier (2013) mention *Law* in the bibliography of their book; Froc (2010) notes the WCC judgment in *NWAC* and its reliance on s 35.1 of the Constitution Act 1982 in a footnote in what is otherwise an extended discussion of that case, Snyder (2014) references *NWAC* in a footnote as one of several examples of research on indigenous women and the law, and Strong-Boag (2014) cites *NWAC* in a footnote to a general discussion of the role of the Native Women's Association of Canada in constitutional negotiations. There is relatively little discussion in this category of the legal analysis in the individual judgements.

The other half of the publications engage with the WCC judgments in more detail. Odelia Bay (2011), a PhD student at Osgoode Hall law school, deeply engages with the analysis in the WCC judgment in *Gosselin* in an article on gendered disability discrimination. Similarly, law professor Patricia Cochran's book on "the intersection of common sense, legal judgment, and the injustices of poverty in Canada" (Cochran 2017, 188) – which uses *Gosselin* as a "touchstone" – provides a detailed discussion of the WCC judgment in that case and the way it "open[s] our minds to other possibilities" (Cochran 2017 at 190). In their analysis of Dianne Pothier's scholarship on discrimination as applied to street-involved people, Suzanne Bouclin (a law professor) and Joëlle Pastora Sala (a public interest lawyer) (2013) discuss Pothier's WCC judgment in *Eaton* at length. They also cite to the WCC judgment in *Law* for a critique of the Supreme Court decision in that case, and reference Majury's

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<sup>7</sup> Kerri Froc is now affiliated with the WCC but was not at the time of her article citing *NWAC*.

introduction for the point that sexism is prevalent in law. Law professors Ravi Malhotra and Robin Hansen (2011) rely on the *Eaton* judgment in their analysis of the implications of the *Convention of the Rights of Persons with Disabilities* for the educational integration of students with disabilities. Anne Quéma (2015), an English professor, analyses the WCC judgments in *Gosselin* and *NWAC* for their use of the rule of law in her book on law, culture, and literature. In her analysis of Eden Robinson's novel *Monkey Beach* (2000) as a counter-narrative to the Supreme Court of Canada's decision on Aboriginal title in *Delgamuukw v British Columbia* (1997), Cheryl Suzack – a member of the Batchewana First Nation and an Associate Professor of English and Indigenous Studies – quotes from the *NWAC* judgment to show how “legal contexts impinge on the gender identities of [A]boriginal women” (Suzack 2011, 450).

These are exactly the kinds of engagement with the WCC judgments that we had hoped for, but it bears repeating that they are few in number despite ten years of availability of the judgments in a relatively accessible feminist law journal. It is perhaps no coincidence that scholars of literature are amongst those who have deeply engaged with our texts – they may be more comfortable using the judgments as discursive sources than are legal scholars and other legal actors.

It is interesting to compare references to the WCC judgment in *Gosselin* – a case about discriminatory social assistance benefits – with citations to a case comment on *Gosselin* by one of the same authors, which was published in the same journal as the WCC judgments a few years earlier (Brodsky 2003). As of July 1, 2018, Brodsky's case comment on *Gosselin* had been accessed 18 times on Hein Online, compared with 22 times for the WCC judgment (16 in English and six in French).<sup>8</sup> Although the download numbers are not starkly different, twelve articles, book chapters or books cite the case comment (Boyd and Young 2004, Young 2005, McIntyre 2006, Cochran 2007, 2017, O'Connor *et al.* 2008, Watson Hamilton and Koshan 2010, Lamarche 2011, Froc 2012, O'Connell 2012, Siddiqui 2012, McColgan 2014), while the WCC judgment in *Gosselin* has been cited only three times (Bay 2011, Quéma 2015, Cochran 2017). This is only one example, but it does present an interesting contrast between the engagement with a case comment and with a feminist judgment in the same case. As noted earlier, the new and unique nature of feminist judgments may detract from their use by scholars, courts and other legal actors, even though the authors intend their judgments to be taken up similarly to case comments and other legal analyses of cases. It may also be the case that comments written closer in time to the judicial decision they are analysing are seen as being more timely as reference material than feminist judgments written some time after the original decision.

#### 4. Discussion

It is certainly a positive finding that the WCC project is being cited in academic literature in a range of disciplines and jurisdictions, and that the judgments are being downloaded, read and studied. Nevertheless, it is disappointing and somewhat surprising that the analyses in the individual judgments are not being engaged with more often and more deeply. If we wish to see FJPs have as much impact as possible, and to attract new participants – especially junior scholars for whom citations can really matter – it is worthwhile to think about why scholarly engagement with the WCC authors' legal analysis is relatively minimal and how we might remedy that problem.

One reason the WCC judgments might be cited infrequently is the relatively small number of authors and judgments, and their relatively narrow focus on Canadian equality rights. There is a small number of Canadian scholars working in the equality rights context who might engage with the judgments. Moreover, the critique of the

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<sup>8</sup> Neither the case comment nor WCC judgment are published on SSRN. When the research for this article was originally conducted in April 2017, Brodsky's case comment on *Gosselin* had been accessed 40 times on Hein Online compared with 30 times for the WCC judgment.

governing test for equality rights that animated several of the first WCC judgments has now been acknowledged by the Supreme Court of Canada (*Kapp*, 2008; *Withler*, 2011), and the Court has reformulated the test for discrimination, making some of the original judgments less current in their focus (see *Quebec v A*, 2013; *Kahkewistahaw First Nation v Taypotat*, 2015; *Quebec v Alliance du personnel professionnel*, 2018; *Centrale des syndicats du Québec v Québec*, 2018). Feminist judgment projects that rewrite a broader range of decisions and are less tied to a particular area of law may stand a better chance of being cited and engaged with more broadly – and indeed, such a project is currently planned in Canada. Feminist judgments may also be considered more worthy of scholarly attention when they are written close in time to the original decision, as they then provide timely source material for case comments in more traditional formats by other scholars. As noted earlier, it is also possible that the unique nature of feminist judgments may be perplexing to other scholars and legal actors. However, as the feminist judgment projects proliferate, the view of FJP authors that the judgments should be treated like case comments or other academic articles may become more widely accepted.

Another possible factor is that unlike some of the other FJPs, the WCC project did not include formal commentary by other authors on each judgment. The inclusion of commentary models how other scholars might engage with feminist judgments, and expands the number of people involved with the projects, which may have beneficial impact in terms of spreading the word about FJPs.

Another difference between the WCC and the other FJPs, as noted earlier, is that there has been no critical review of the WCC project as there has been for other FJPs published as books. Such reviews might lead to more awareness and more citations in the scholarly literature. The WCC had a series of launch events in multiple locations with multiple constituencies, but this approach may not be able to match the power of written commentary and reviews when it comes to attention in the literature.

Some of the strategies for increasing citations to FJPs in the literature flow directly from the observations made here. Focusing on a breadth of subject areas and authors, including commentary on the judgments, and soliciting book reviews may all contribute to greater engagement with the FJPs. FJPs might also actively recruit dissents or concurring reasons in relation to existing judgments as a way of encouraging others to write critiques of the judgments. Encouraging FJP authors and commentators to cite to the judgments, and across the different projects, may have a snowballing effect – especially in light of the proliferating number of FJPs. Another obvious strategy is making the judgments available on open access databases such as SSRN or on dedicated FJP websites. A website including all of the FJPs and regularly presenting new content (e.g. in blog format) would be ideal, although there are resource issues in maintaining such a website. Websites could also include a tracking of citations, again with potential snowballing effects. Presenting on FJPs at academic conferences may also help inform other scholars about the scope, intent and utility of FJPs.

Beyond encouraging academic citations, given the fraught nature of this measure, other strategies may be undertaken to increase the impact of FJPs. We might use social media such as Facebook, Instagram and Twitter to disseminate and popularise the judgments, and extend their interdisciplinary reach and caché by working with artists who can add visual, auditory, kinetic, and other elements to the judgments. Teaching with feminist judgments in law classrooms may contribute to their use by future lawyers in their legal arguments, whether working for clinics, NGOs or other clients. However – and in spite of the comments of Canada's former Chief Justice McLachlin – we also need to be realistic about the likelihood of having lawyers cite explicitly feminist work to courts and tribunals that may be hostile to or uninterested in hearing such perspectives. On the other hand, to the extent that some lawyers already rely on feminist scholarship in their legal arguments, is there anything truly different about citing a feminist judgment? In the international law realm, the work

of respected scholars is a recognised source of law, so this may be a particularly good forum for using feminist judgments as authoritative. Collaborative judgments written by multiple authors across multiple jurisdictions may also extend the reach of the FJPs in a variety of forums.

Including judges as participants in FJPs, either as interviewees (as in Australia), or as authors of judgments (as in Aotearoa New Zealand) or forewords (as in England/Wales), may be useful in sensitising judges to the use of feminist judgments in their own decisions. Proactively approaching judges about having the authors of feminist judgments participate in judicial education sessions could contribute to the impact of FJPs amongst legal decision makers as well.

The creation of plain language versions of the judgments that are more accessible to a wider audience also might expand the terrain of engagement with FJPs. This strategy was envisioned by the WCC in its 2008 discussion paper, but apart from the initiative undertaken by Catherine Frazee with her students to rewrite *Eaton*, it has not yet been implemented.

As argued by Rosemary Hunter (2018), there also may be value in expanding FJPs to include procedure as well as substance, and rewrites of a broader range of judicial decision-making. Melina Buckley's Rules of Court for the WCC (2018), which provide a more humane and inclusive context for judging, are an excellent starting point for feminist procedural law. Within the realm of substance, there is scope for feminist judgments in evidentiary decisions (e.g. those invoking rape shield provisions) and other interlocutory decision-making, as well as in jury instructions (Hunter 2018, and see the feminist judgment on jury instructions in sexual assault cases written by actual judges of the Alberta Court of Appeal in *Barton*, 2017). There is also scope for feminist rewrites of legislation (for an early example, see Hughes 1995).

These strategies, alone or in concert, may be useful in increasing the impact of the FJPs in terms of scholarly attention and more broadly. However, even if FJPs are not being cited or used extensively, perhaps we can see this sort of feminist risk-taking as creative and productive nevertheless, as the FJPs push the boundaries of feminist legal scholarship and activism (Hunter 2018).

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## Appendix 1 – General Citations of the WCC Project or Majury's Introduction in Academic Articles<sup>9</sup>

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<sup>9</sup> This and the subsequent lists do not include Masters or Doctoral theses. See also these citations to the WCC Blog: Harell and Panagos 2013 (citing Day and Green 2010); Osborne-Brown 2014, and Shilton 2014-2015 (both citing Day 2010).

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## Appendix 2 – WCC (and FJPs) as Teaching Tools

### (a) Literature

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### (b) Syllabuses / Other Student resources

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- Boyd, J., 2012. *LAWS 3001 A – Women and the Legal Process*. Carleton University (assigning the *Symes* judgment).
- Braleigh-Rattai, A., 2014. *POLC68 – The Constitution of Canada and the Charter of Rights and Freedoms*. University of Toronto, Scarborough (assigning the *Gosselin* judgment).
- NAWL Charitable Trust for Research and Education, 2011. *The Gender and the Law Manual: An Introductory Handbook for Law Students*. Ottawa: The National Association of Women and the Law Charitable Trust for Research and Education (citing *Majury* introduction).
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### Appendix 3 – Citations of Individual WCC Judgments

- Bay, O., 2011. In the Matter of the Female Mind: An Analysis of the Supreme Court of Canada's Approach to Women and Mental Health. *Critical Disability Discourses / Discours critiques dans le champ du handicap* [online], 3, 1-17. Available from: <https://cdd.journals.yorku.ca/index.php/cdd/article/view/31553> (citing *Gosselin*) [Accessed 15 November 2018].
- Bernstein, A., 2015. The Feminist Jurisprudence of Judge Jack B. Weinstein. *DePaul Law Review* [online], 64 (2), 341-372. Available from: <https://via.library.depaul.edu/law-review/vol64/iss2/6> (citing *NAPE*; also refers to the FJPs in the UK, Ireland and Australia) [Accessed 15 November 2018].
- Bouclin, S., and Sala, J.P., 2013. Une analyse de la réglementation des personnes itinérantes selon une perspective pothienne de la discrimination. *Canadian Journal of Women and the Law* [online], 25 (1), 1-30. Available from: <https://doi.org/10.3138/cjwl.25.1.001> (citing *Eaton; Law; Majury* introduction) [Accessed 15 November 2018].
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Suzack, C., 2011. The Transposition of Law and Literature in "Delgamuukw" and "Monkey Beach". *South Atlantic Quarterly* [online], 110 (2), 447-463.  
Available from: <https://doi.org/10.1215/00382876-1162534> (citing *NWAC*)  
[Accessed 15 November 2018].

## Appendix 4 - Citations of WCC Project / Introduction / Judgments by FJP members

### Majury Introduction:

Koshan, J., 2008. The Persons Case: The Origins and Legacy of the Fight for Legal Personhood (review). *Canadian Journal of Women and the Law* [online], 20 (2), 343-351. Available from: <https://muse.jhu.edu/article/266657/pdf> [Accessed 16 November 2018].

Koshan, J., and Watson Hamilton, J., 2011. Meaningless Mantra: Substantive Equality after Withler. *Review of Constitutional Studies*, 16, 31-62.

### Eaton:

Watson Hamilton, J., and Koshan, J., 2013. The Supreme Court, Ameliorative Programs, and Disability: Not Getting It. *Canadian Journal of Women and the Law* [online], 25 (1), 56-80. Available from: <https://doi.org/10.3138/cjwl.25.1.056> [Accessed 16 November 2018].

Pothier, D., 2010-2011. Tackling Disability Discrimination at Work: Toward a Systemic Approach. *McGill Journal of Law and Health* [online], 4 (1), 17-37. Available from: <https://mjlmcgill.files.wordpress.com/2017/07/pothier.pdf>

### Law:

Watson Hamilton, J., and Koshan, J., 2010. Courting Confusion? Three Recent Alberta Cases on Equality Rights Post-"Kapp". *Alberta Law Review* [online], 47 (4), 927-958. Available from: <https://www.albertalawreview.com/index.php/ALR/article/viewFile/174/174> [Accessed 15 November 2018].

Koshan, J., and Watson Hamilton, J., 2011. Meaningless Mantra: Substantive Equality after Withler. *Review of Constitutional Studies*, 16, 31-62.

### NAPE:

Koshan, J., 2013. Redressing the Harms of Government (In) Action: A Section 7 Versus Section 15 Charter Showdown. *Constitutional Forum* [online], 22 (1), 31-46. Available from: <http://dx.doi.org/10.21991/C9D962>

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### Symes:

Watson Hamilton, J., and Koshan, J., 2014. Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter. *Review of Constitutional Studies*, 19, 191-235.

Ramshaw, S., 2016. Commentary on Family Planning Association Of Northern Ireland v The Minister For Health, Social Services And Public Safety. In: M. Enright, J. McCandless and A. O'Donoghue, eds., 2017. *Northern / Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*. Oxford: Hart.

**Appendix 5 – Citations / Downloads / Abstract Views of WCC Judgments<sup>10</sup>****Eaton:**

Google Scholar – 0 citations; Hein Online – Cited by 2, Accessed 6 times; SSRN – available since August 2012 with 49 downloads and 245 abstract views.

**Gosselin:**

Google Scholar – 3 citations; Hein Online – Accessed 16 times in English, 6 times in French; not posted on SSRN.

**Law:**

Google Scholar – 2 citations; Hein Online – Cited by 3, Accessed 10 times; SSRN – available since July 2008 with 76 downloads and 826 abstract views.

**NWAC:**

Google Scholar – 6 citations; Hein Online – Accessed 30 times; not posted on SSRN.

**NAPE:**

Google Scholar – 2 citations; Hein Online – Cited by 1, Accessed 6 times; not posted on SSRN.

**Symes:**

Google Scholar – 1 citation; Hein Online – Cited by 1, Accessed 17 times; not posted on SSRN.

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<sup>10</sup> The difference in citation numbers across databases also shows the problems with citation checking.