

## Women's Court of Canada Act and Rules

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### Abstract

This paper explores the issue of how a feminist court could operate through the device of a model statute and rules for the Women's Court of Canada. The Women's Court of Canada is a feminist legal project bringing together academics, activists, and litigators to 'rewrite' Canadian Charter of Rights and Freedoms equality jurisprudence. Over the course of more than a decade, the members of this virtual 'court' have reconsidered leading equality rights decisions, rendering alternative judgments with the aim of articulating fresh conceptions of substantive equality in judgment form. Here, the author takes a step away from the substance of equality rights law to focus on legal institutions and procedure.

### Key words

Constitutional rights; civil procedure; access to justice

### Resumen

El presente artículo profundiza en la cuestión de cómo podría funcionar un tribunal feminista mediante unos estatutos tipo y unas normas para el Tribunal de Mujeres de Canadá. El Tribunal de Mujeres de Canadá es un proyecto jurídico feminista que reúne a académicas, activistas y abogadas, quienes 'reescriben' la jurisprudencia sobre igualdad de la Carta Canadiense de los Derechos y las Libertades. Durante más de una década, los miembros de este 'tribunal' virtual han cuestionado sentencias con el objetivo de articular concepciones nuevas de igualdad sustantiva en forma de sentencia. La autora de este artículo se distancia de lo sustantivo de las leyes sobre derecho a la igualdad y se centra en las instituciones jurídicas y el procedimiento.

### Palabras clave

Derechos constitucionales; procedimiento civil; acceso a la justicia

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## 1. Introduction

How would a feminist court operate? This paper explores the issue of how a feminist court could operate through the device of developing a model statute and rules for the Women's Court of Canada. The Women's Court of Canada is a feminist legal project bringing together academics, activists, and litigators to 'rewrite' Canadian Charter of Rights and Freedoms equality jurisprudence. Over the course of more than a decade, the members of this virtual 'court' have reconsidered leading equality rights decisions, rendering alternative judgments with the aim of articulating fresh conceptions of substantive equality in judgment form. This project provides a structure for exploring institutional and procedural issues from a feminist perspective. How would a court operate if its goals were to contribute to the lived reality of substantive equality for women?

Almost 40 years ago, Canadian courts and human rights tribunals recognized that conceptions of formal equality were inadequate and had to be set aside for more robust conceptions of substantive equality. While formal equality is concerned with sameness and difference in treatment, substantive equality recognizes and addresses relations of dominance, subordination, and material disparities between groups. And yet, much work remains to be done to ensure women's substantive equality. The same is true of other groups which continue to experience structural inequalities and discrimination. The decision to focus on women, defined inclusively and with attention to both identity and class components of gender and the intersectional experience of inequality, is not to diminish the claims of other oppressed groups. It is a choice designed to recognize the value of specificity in institutional purpose. At the same time, it is acknowledged that this project could be pursued from a more generalized perspective of substantive equality for all.

In Women's Court Canada decisions to date the focus has been on the substantive law but several decisions rely on fictional rules such as court powers to seek additional evidence in constitutional cases, to reconsider on its own motion decisions of lower courts and refer to imaginary guidelines on the roles of interveners (Buckley 2007, 2017). This paper addresses issues of court practice and procedures in a more comprehensive, though by no means complete, way. Procedural and substantive justice are inextricably connected yet, for the most part, Canada has taken a problematic 'one size fits all approach' to civil litigation. We have not established a constitutional court nor developed specific procedures for constitutional or other public interest cases. This institutional inflexibility is not a given and is an important site for feminist challenge.

This paper is styled as a model statute and rules for the Women's Court of Canada containing formal provisions and commentary. It draws on access to justice research, theories of civil procedure, builds on innovative experiences in courts and human right tribunals in other jurisdictions and international justice institutions. It is informed by Iris Marion Young's concept of deliberative democracy (Young 2000). Deliberative democracy is a useful analogy for the delineation of an ideal process for equality rights litigation in which a reason-giving dialogue takes place among free and equal persons and decisions are public, purposeful, accessible, and dynamic. The model statute and rules attempt to describe deliberative practices that are consistent with both Young's theory of deliberative democracy and an enlarged but still recognizable conception of legal processes for the protection and promotion of constitutionally-protected equality rights. The model postulated here is, of course, a partial, provisional one written in the hope of inspiring deliberation.

## 2. Women's Court Of Canada Act

### Preamble

Whereas the aspirations of all Canadians is for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law;

And whereas it is of vital importance to promote respect for and observance of human rights in the Canada, including the rights and freedoms protected under the Canadian Charter of Rights and Freedoms, and rights and freedoms protected under international human rights instruments, while at the same time promoting respect for, and the observance of, the rights and freedoms of Aboriginal peoples that are recognized and affirmed under the Constitution of Canada;

And whereas Canada has committed to protecting and promoting the substantive equality of women in sections 15 and 28 of the Canadian Charter of Rights and Freedoms, human rights statutes, and under numerous international human rights instruments;

And whereas under the Convention on the Elimination of All Forms of Discrimination Against Women, Canada has committed to establishing tribunals and other public institutions to ensure the effective protection of women against discrimination and to promote their equality including through access to effective remedies;

And whereas women continue to experience many forms of discrimination and Canadian society remains marked by structural inequalities between the sexes in political, economic, social, cultural, civil and other fields;

The Parliament of Canada, with the advice and consent of the Provincial and Territorial Legislative Assemblies and the National Assembly of Quebec, enacts as follows:

### Purpose

1. The purpose of this act is to extend the law in Canada to give effect to the substantive equality of women. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

### The Court

2. The Women's Court of Canada is established as a general court of appeal for Canada and as an additional court for the better administration of the laws of Canada consistent with the protection and promotion of equality of the sexes, and is a court of record.

### The Judges

#### *Constitution of the Court*

3. The Court shall consist of twenty-one justices. The justices will elect from amongst their number a member to preside as Chief Justice for a tenure of three years.

#### *Appointment of judges*

4. The Prime Minister shall establish a committee for the appointment of judges to the Court. The Committee will consult with organizations and community groups dedicated to the advancement of women's equality and maintain a list of highly qualified candidates, updated on an annual basis. The Prime Minister shall appoint judges from among this list to fill vacancies on the Court consistent with section 7.
5. The judges must have a demonstrated record of understanding equality rights law, commitment to the advancement of women, and experience in unlearning the dynamics of power and privilege.

6. The judges must be 35 years of age, state in writing that they are willing to become a member of the Court, and not have held political office within the past seven years.

#### *Diverse representation*

7. The judges shall be representative of the diversity of women, defined inclusively, in Canada and its three legal cultures. At least three of the justices will be Aboriginal<sup>1</sup> Canadian and have knowledge of Aboriginal law and legal traditions and five will be from Quebec.

#### *Tenure of office*

8. The term of office shall be twelve years, notwithstanding the age of retirement.
9. Immediate or subsequent re-appointment of justices shall not be permissible.
10. Upon expiration of their office, a justice shall continue to fulfill their functions until a successor is appointed.

#### *Panels and sessions*

11. The Chief Justice will establish three Hearing Panels of seven justices to hear. The Court shall sit in three sessions per year and two Hearing Panels will sit in each session. Justices will carry out other court functions during sessions when their panel is not assigned to the hearing of matters.

### **Registry and Judicial Officers**

12. The Court will establish a registry and staff. The senior staff will have the same general qualifications as candidates for judicial appointment in section 6. Senior staff will include four quasi-judicial officers: the Registrar, the Pre-Hearing Officer, the Public Dialogue Officer, and the Outcomes Monitoring Officer.
13. The functions of the *Registrar* include: assisting parties and interveners with the leave application process, providing case management, and maintaining a registry of cases.
14. The functions of the *Pre-Hearing Officer* include: managing the pre-hearing process and working with parties, interveners and other interested parties to design inclusive processes and participation on equal terms. The Pre-Hearing Officer will make recommendations to the Hearing Panel hearing the appeal, claim or reference concerning the format of the hearing.
15. The functions of the *Public Dialogue Officer* include: contributing to public dialogue about the nature, types and extent of discrimination and inequalities experienced by women, the work of the Women's Court, its decisions, and progress made toward substantive equality including through the collection of statistics on the status of diverse groups of women in Canada.
16. The functions of the *Outcomes Monitoring Officer* include: assisting parties, interveners and other interested parties to implement the Court's remedial orders and carrying out follow up evaluations in the short, medium and long term outcomes of the Court's decisions and the effectiveness of remedies in contributing to women's substantive equality.

### **Appellate Jurisdiction**

#### *Jurisdiction throughout Canada*

17. The Women's Court shall have and exercise an appellate jurisdiction within and throughout Canada in all important matters affecting the substantive

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<sup>1</sup> I use the term *Aboriginal* rather than *Indigenous* to be consistent with the Constitution of Canada.

equality of women. The Court has sole jurisdiction to decide which matters are deemed important.

18. Appeals are heard on any opinion pronounced by the highest court of final resort in a province or by the Federal Court of Appeal where in the opinion of the Women's Court the appeal is one that ought to be submitted to the Court for decision.
19. Appeals can be initiated by leave of the Court on the application of one of the parties or interveners with standing in the matter.
20. Appeals can be initiated by the Court's own motion for the purposes of clarification of a question of law where none of the parties or interveners with standing in the matter seek leave to appeal within the appeal period in which case the decision takes the form of an advisory opinion.

#### *Appeals per saltum*

21. An appeal to the Women's Court lies on a question of law alone with leave of that Court, from a final judgment of any court or any final decision of any tribunal in Canada.

### **Special Jurisdiction**

#### *Direct access*

22. Every woman or group of women has the right to apply for leave to the Women's Court claiming that their right to equality has been denied, violated or infringed, or is threatened and there is no better court or forum to hear their case.

#### *Referring certain questions for opinion*

23. The Governor in Council and Lieutenant Governors in Council may refer to the Court for hearing and consideration important questions of law or fact concerning the substantive equality of women including:
  - (a) the interpretation of the Constitution Acts;
  - (b) the constitutionality or interpretation of any federal or provincial bill or statute;
  - (c) the extent of their procedural and substantive duty to accommodate women in all laws, policies, practices, and actions with respect to all matters within their jurisdiction.

#### *Opinion of Court*

24. Where a reference is made to the Court under section 23, it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council or Lieutenant Governors in Council, for their information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

### **Procedure**

25. The Court will employ non-adversarial, participatory deliberative practices in all matters. Procedures will be tailored to individual matters to ensure fairness in process and outcomes. The Court will take active steps to ensure that procedures are inclusive, to equalize power imbalances between parties, and to ensure that all available evidence is before the Court.
26. Unless ordered by the Court, all procedures will be accessible and public.

## Judgments

### *Appeal may be dismissed or judgment given*

27. The Women's Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

### *Appeal may be remanded*

28. The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

### *Direct access claims*

29. The Court has all the powers of a superior court of inherent jurisdiction to pronounce judgement and provide effective remedies in direct access claims.

### *Effective remedies*

30. The Court shall provide effective and proportionate remedies, including by:
- (a) developing the law to the extent that it does not give effect to women's substantive equality;
  - (b) adopting the interpretation that most favours the promotion of women's substantive equality;
  - (c) recognizing that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights of women; and
  - (d) setting standards to achieve the progressive realization of women's substantive equality.
31. In any proceedings, the Court may grant appropriate relief, including:
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) an order of mandamus;
  - (d) a conservatory order;
  - (e) a declaration of invalidity of any law that denies, violates, infringes, or threatens women's substantive equality;
  - (f) an order of judicial review;
  - (g) an order that a party or parties take measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by women because of past or ongoing discrimination; and
  - (h) an order for compensation.

### *Retention of jurisdiction*

32. The Women's Court will maintain jurisdiction in all matters until the Court certifies, on the advice of the Outcomes Monitoring Officer, that the remedies have been fully implemented and the case is closed.

## Judgments final and conclusive

### *Exclusive ultimate appellate jurisdiction*

33. The Court shall have and exercise exclusive ultimate appellate jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive.

*Enforcement of decisions*

34. The decisions of the Women's Court are binding on the judiciary and all persons and institutions of Canada.
35. All constitutional organs as well as all courts and authorities are obligated to respect, to comply with and to enforce the decisions of the Court within their competences established by the Constitution and law.
36. All physical and legal persons are obligated to respect and to comply with the decisions of the Court.
37. The Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Court.
38. The body under the obligation to enforce the decision of the Court shall submit information, if and as required by the decision, about the measures taken to enforce the decision of the Court.
39. In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Court about the measures taken, the Court may issue a ruling in which it shall establish that its decision has not been enforced.
40. The Attorney General for Canada shall be informed of all decision of the Court that have not been enforced and will take necessary steps to ensure enforcement.
41. The Outcomes Monitoring Officer, under the supervision of the Chief Justice Judge, shall follow up the implementation of the decision and, if necessary, report back to the Court with recommendation for further legal proceedings to be taken.

**Costs**

42. The Court will use the award of costs to facilitate access to justice and inclusion. A no-costs rule will apply in most cases. The Court may, in its discretion, order the payment of the costs to parties or interveners, include awarding advance costs, and in any event of the cause to further the interests of justice.

**Judges may make rules and orders**

43. The judges, or any eleven of them, may make general rules and orders:
  - (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;
  - (b) for empowering the Registrar and other Judicial Officers to do any such thing and transact any such business as is specified in the rules or orders, and to exercise any authority and jurisdiction in respect of the rules or orders as may be done, transacted or exercised by a judge sitting in chambers by virtue of any statute or custom or by the practice of the Court;
  - (c) for fixing the fees and costs to be taxed and allowed to, and received and taken by, and the rights and duties of, the officers of the Court; and
  - (d) for awarding and regulating costs in the Court in favour of and against the Crown, as well as the subject.
44. The rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act and the better attainment of the objects thereof.

*Copies to be laid before Parliament*

45. Copies of all rules and orders made under this section shall be laid before each House of Parliament on any of the first fifteen days after the making thereof on which that House is sitting.

**3. Commentary on Act**

The purpose of the Women's Court of Canada Act is to extend the law to give effect to the substantive equality of women. It is established on the basis of Canada's obligations under the Constitution of Canada and international human rights instruments and the recognition that existing courts, tribunals and other public institutions have failed to act decisively to eradicate discrimination against women and the structures which perpetuate the inequality experienced by women in political, economic, social, cultural, civil and other fields. For all statutory purposes, women is defined inclusively, and is attentive to both identity and class components of gender and the intersectional experience of inequality.

While justice institutions have contributed to a growing awareness of women's right to equality, they have been less successful at providing effective remedies that actively contribute to the lived experience of equality by women (Milieu 2011). Women who experience heightened vulnerability because of their marginalized status or insecure social and economic situation tend to have the least access to the legal mechanisms to remedy their situation of inequality. (Canadian Bar Association 2013). The Women's Court is a form of constitutional court and judicial agent of change designed to overcome these traditional limitations.

The Women's Court of Canada Act is enacted following a broad and inclusive public dialogue about the status of women facilitated by the Government of Canada over a two-year period. A consensus emerged from this dialogue that a new form of justice institution is required. One of the great central tasks of society is to work toward the fulfillment of human rights principles and particularly the foundational norm of substantive equality. The Women's Court will employ innovative mechanisms and build agreement about evolving substantive equality principles and their application in specific situations.

The Act is designed to make the Women's Court a highly accessible expert body utilizing a range of inclusive deliberative practices to provide effective remedies. The Court will operate consistent with inclusive democracy (Young 2000, 23-25) and access to justice principles and practices (Canadian Bar Association 2013). Four key features are: composition, jurisdiction, functions and procedures, and remedial powers.

The Women's Court justices will be appointed on the basis of a demonstrated record of understanding equality rights law, commitment to the advancement of women, and experience in unlearning the dynamics of power and privilege. The Act recognizes that formal legal training is not the only form of expertise required for decision-making and acknowledges that diverse perspectives and experiences strengthens and legitimizes decision-making processes. The appointment process is independent of the political process and is based on an inclusive, consultative process that engages the women's community. The justices will work closely with the Court's senior judicial officers who will share the same qualifications. The Act provides for the positions of Public Hearing Officer, Outcome Monitoring Officer and Public Dialogue Officer who will assist the parties, intervene and assist justices in pre- and post- hearing procedures.

The Women's Courts can be accessed through several routes but the Court will control which cases it will hear. It is a court of record. The Court will serve as a final court of appeal in all important matters affecting women's substantive equality. Appeals may also be brought *per saltum* that is by seeking resolution directly from the Women's Court and *hopping* past intermediate courts. Provision is also made for direct access to the court for equality claims brought by individual women or groups of women.

Leave must be sought for all appeals and claims and the Women's Court's determination of what it deems to be an important matter is final. Governments may also refer certain matters to the Court for an advisory opinion.

The Women's Court will be able to use its multi-faceted jurisdiction to create and advance a more effective dialogue about women's substantive equality by engaging courts, legislatures, governments and civil society using innovative deliberative practices. Dialogue is a continuous conversation rather than a moment in which issues are settled once and for all (Young 2000). The Women's Court stewards this public dialogue on the basis of equality, inclusion and mutuality (Clear and Karp 1999, 108-128). The Public Dialogue Officer will have the primary responsibility to contribute to public dialogue about the work of the Women's Court, its decisions, and progress made toward substantive equality.

The Government of Canada recognizes that adversarialism encourages speaking and penalizes listening, it is not aimed at developing understanding and discourages the exploration of a range of potential solutions. The Act empowers the Women's Court to utilize non-adversarial, deliberative practices and to ensure inclusion and overcome structural inequality so that processes can be equal. Proactive steps will be required to draw all social groups into the dialogue and safeguard full and diverse participation in the strongest terms through the positive valuing of difference. These steps will maximize the social resources available to the Court in making its decisions. The Pre-Hearing Officer will have primary responsibility for working with parties, interveners and other interested parties to design inclusive processes and participation on equal terms.

The Women's Court has been granted broad remedial powers in furtherance of the Canada's commitments under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Court's role is to provide wide-ranging guidance on the scope and nature of individual and systemic remedies followed by a structured process for implementation of the remedies by all affected parties. This process will be facilitated by the Outcomes Monitoring Officer and by continued supervision of the Women's Court. This remedial approach recognizes that structural inequalities create complex and overlapping systems, policies and behaviours. Collaborative models create greater opportunities to formulate, implement and enforce policy that accommodates diverse interests in a complex socio-economic environment (Buckley 2002).

Further details about the Court's procedures are set out in the Women's Court of Canada Rules and Procedures.

#### **4. Women's Court of Canada Rules of Procedure**

##### **General**

1. The Court will observe the rules of natural justice and shall not be unreasonably restricted by procedural technicalities. Formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum and procedural complexity is minimized wherever possible.

##### **Deliberative principles**

2. The Court's procedures are non-adversarial and will be designed to facilitate deliberation among participants and between participants and the Court.
3. Deliberations are inclusive. Inclusion means that all those affected by a decision are included in the process of discussion and decision-making through a continuous effort to reduce the marginalization of community members of subgroups.
4. Deliberations are reasonable. Reasonableness means that people enter discussions to solve collective problems with the aims of reaching agreements.

Procedures are designed to reach decisions and register dissent in the absence of agreement.

5. Deliberations transcend political, social and economic inequalities. All participants are encouraged to express their needs, interests and positions free from fear or domination. Participation is on the basis of reciprocity to the extent that each participant acknowledges that the interests of others must be taken into consideration in order for the Court to reach a conclusion.
6. Participation is on the basis of listening to others, treating all parties with respect and making an effort to understand and best efforts to continue the engagement.
7. Deliberations are public and a variety of forms of expression can be utilized. Participants can present their claims, arguments, appeals, stories and/or demonstrations in a way that is accessible and accountable.

### **Public nature**

8. The work of the Women's Court shall be transparent, open and accessible to the public to the greatest extent possible, consistent with the Constitution, the law and confidentiality requirements of the Court

### **Participation**

#### *Standing*

9. All directly affected parties will have party status.
10. The Court has the power to direct that any person interested or, where there is a class of persons interested any one or more persons as representatives of that class shall be notified of the hearing of a matter, and those persons are entitled to be heard thereon.

#### *Interveners*

11. The Court facilitates inclusion by welcoming any individual or group to intervene in appeals and referrals. Interventions in direct access claims shall be by leave of the Court.
12. The Court recognizes two types of interventions:
  - (a) party intervention: where interveners, though not directly affected, are primarily interested in the outcome of particular appeal, claim or referral and all issues have an impact on them; and
  - (b) public interest intervention: where interveners are interest in the legal issues raised by the case and advocate a position.

#### *Amicus curiae*

13. The Court may, if it considers it necessary for the proper analysis and determination of the case, appoint one or more amicus curiae who serves as neutral legal adviser.

#### *Nature and extent of participation*

14. The nature and extent of the participation of interveners and amicus curiae in the Court hearing will be determined at the conclusion of the Pre-Hearing process.

### **Equalization of parties**

#### *Evidence-gathering*

15. The Court will take all available steps to ensure that its decisions are based on a robust evidentiary record including by appointing independent experts or

otherwise receiving further evidence on any question of fact, either by oral examination, by affidavit or by deposition, as the Court may direct.

#### *Appointment of counsel by court*

16. The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses may be paid by the Minister of Finance out of any moneys appropriated by Parliament for this purpose.

#### *Other steps*

17. The Court will take other steps to equalize the parties to ensure a fair hearing.

### **Initiation Procedures**

#### *Application for leave to appeal*

18. All appeals are initiated by way of application for leave. The applicant shall be on a case stated by the applicant who will serve notice of the application on all parties directly affected. Parties who are directly affected have the opportunity to respond to the application for leave to appeal or to a claim for direct access.
19. The Registrar shall assist parties with their applications for leave and fulfillment of the requirements of notice and responses to these applications. The Registrar will ensure the completeness of the application file and provide it to the Court for decision.
20. A Leave Review Panel consisting of one justice from each Hearing Panel will review the application file and reach a shared determination of whether leave should be granted on the basis the appeal raises important matters affecting the substantive equality of women.

#### *Application for direct access*

21. An application for direct access must be supported by an affidavit which sets out:
  - (a) the facts upon which the applicant relies for relief;
  - (b) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
  - (c) the nature of the relief sought and the grounds upon which such relief is based.
22. A Direct Access Review Panel consisting of one justice from each Hearing Panel will review the application file and reach a shared determination of whether leave should be granted on the basis the appeal raises important matters affecting the substantive equality of women.

#### *Registry of referrals*

23. The Registrar will review a referral for an advisory opinion for content and form and register all satisfactory referrals for the Pre-Hearing Process.

### **Pre-Hearing Procedures**

24. The Pre-Hearing Officer manages the pre-hearing procedures.
25. The Pre-Hearing Officer will confer with the parties and interveners and facilitate preliminary dialogue among the parties and interveners with a view to fostering shared understanding and knowledge.

27. The Pre-Hearing Officer shall provide the Chief Justice with a pre-hearing report setting out:
  - (a) a description of the facts of the appeal, claim or referral and identification of any additional measures to ensure that the Court has access to a full evidentiary record;
  - (b) a presentation of the legal arguments presented by all parties and identification of any legal issues not fully canvassed;
  - (c) any additional recommended measures required to ensure the hearing is inclusive and that appropriate steps are taken to equalize power imbalances between the parties, if any; and
  - (d) any recommendations concerning the appropriate format for the hearing, including whether interveners should participate by written and/or oral submissions.

### **Hearing Procedures**

28. The Court will tailor hearing procedures to each individual appeal, claim or referral.
29. The first phase of the hearing will consist of an exchange of greetings, recognition and acknowledgment between and among the Court and all participants.
30. The second phase of the hearing will consist of narrative procedures through which justices will have the opportunity to listen, engage with and truly hear the voices of affected parties. Non-dominant forms of communication and participation are recognized and valued.
31. The third phase of the hearing will involve presentation and examination of evidence on disputed facts.
32. The final phase will involve the presentation and examination of legal arguments.

### **Post-Hearing Procedures**

33. The Court shall release its decision and reasons to the participants and the public. The decision shall be made available in a range of accessible formats.
34. The Outcomes Monitoring Officer shall confer with the parties and interveners and facilitate the collaborative implementation of any remedies ordered, included the formulation of specific remedial steps within the guidelines contained in the Court's decision.
35. The Outcomes Monitoring Officer shall report to the Court on the progress of implementation of remedies. The Court remains seized of the matter and parties can seek additional guidance to assist in the implementation process.
36. The Outcomes Monitoring Officer shall gather information about the short, medium, and long term outcomes of cases and their impact on women's substantive equality.
37. The Public Dialogue Officer shall promote broad understanding of Court decisions and facilitate public dialogue aimed at preventing sex discrimination and proactive working towards women's substantive equality.

### **Evaluation and review of rules**

38. The Court will carry out biennial evaluations of its rules and procedures including through research, user satisfaction surveys and other methods for obtaining input from interested parties, organizations and members of the

public and through exchange of information and best practices with other courts and equality bodies in Canada and other jurisdictions.

39. The Court will take into account input received through evaluations in revising its rules on a periodic basis.

## 5. Commentary on Rules

The Women's Court of Canada Act consciously adopts an innovative litigation model to meet the purposes of the act to extend the law of Canada to give effect to the substantive equality of women. The Women's Court has enacted these Rules of Procedure to give effect to this new non-adversarial model of consisting of deliberative, participatory and reflective practices. The procedures are designed to facilitate consideration of the underlying causes of women's inequalities and to work toward processes and outcomes that are fair and consistent with equality norms.

The Women's Court will develop flexible procedures tailored to individual matters and the rules consist of flexible principles rather than categorical rules. This approach is consistent with research demonstrating the negative impact that rules of procedure have had in terms of enhancing adversarialism and a culture of rule avoidance (Muller *et al.* 2013) and as a barrier to access to justice (Canadian Bar Association 2013). The level of institutionalisation and technical expertise required to act before many courts imposes difficulties for social movements, thus inhibiting them from participation in this arena. (Vieira and Annenberg 2013). Observance of the rules of natural justice will ensure procedural fairness but the shift away from rigid, technical rules allows for a more even emphasis on both fair process and fair outcomes.

The Women's Court registry and staff will work with and assist all interested parties throughout the initiation procedures, pre-hearing, hearing and post-hearing procedures. The Court will be accessible to all interested parties through liberal rules concerning party and intervener standing. The Court sees interventions as vital part of a mature constitutional adjudication system and will forge a facilitative approach to the adjudication of women's equality rights matters, where the emphasis is on enabling all possible stakeholders to contribute meaningful inputs (Thiruvengadam 2013). Deliberative practices encourage a *bottom up* approach to litigation that encourages substantive change. This approach continues throughout the remedial phase of litigation, wherein the Outcomes Monitoring Officer will facilitate implementation of the Court's decision through a mediation process under the Court's supervision and monitor the short, medium and long term outcomes of cases and report back to the Court on the effectiveness of remedies (OECD and Open Society Foundations 2016).

The Public Dialogue Officer will engage a wide range of deliberative practices to 'work on the basic consensus' (Häberle 2006) of the Canadian community toward effective implementation of women's substantive equality. Strategies can include various formats of large group learning processes (e.g. learning circles, listening projects) (Young 2000). The Women's Court will learn from good practices of other courts, including the Supreme Court of Mexico which has taken upon itself to be a main player in the endeavour to communicate the law to a general audience (Bengoetxea and Jung 2011) through, among other things, having its own television channel. The Women's Court of Canada Act conceives of the Court as not only a court of justice in individual cases but as a motor for the promotion of women's substantive equality in the country.

The Women's Court is a 'learning institution' and will regularly evaluate the effectiveness of its work by seeking advice from court users and members of the public and through research and exchange with other courts and equality bodies in Canada and internationally. Learning institutions are committed to evidence-based practices and ongoing innovation. (Canadian Bar Association 2013, 65, 88).

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