

## **Why the Pursuit of Equality for Women Still Matters**

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### **Introduction**

I graduated from the University of Alberta law school in 1972, 40 years ago. This evening I have been asked to reflect on the broad topic of gender and justice, an issue that has been important to me throughout my career. My conclusion is that today, while the questions of equality for women and equal access to justice still very much matters, it has for the most part been ignored or marginalized in the legal and policy discussions about the effective administration of justice and the allocation of resources.

This is so in spite of the legal requirements that exist in B.C., Canada, and internationally to provide equality for women. For example, Canada is a party to the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*.<sup>3</sup> By signing the *Convention* Canada has agreed to condemn discrimination against women in all its forms, and has agreed to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

The reason often stated is that women in Canada are equal and we don't have to be concerned. Some would go so far as to say that Canada's approach to equality for women provides an excellent example to the rest of the world of how to "get it right". Canada as a country has many good reasons to celebrate the 30<sup>th</sup> anniversary of our *Charter of Rights and Freedoms*<sup>4</sup> and its equality provisions, and many reasons to be

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<sup>2</sup> A Public Discussion presented by Simon Fraser University's Vancity Office of Community Engagement and the Pivot Legal Society.

<sup>3</sup> Can. T.S. 1982 No. 31, entered into force on September 3, 1981.

<sup>4</sup> Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982, in force 1985.

proud of advancements with respect to women's equality brought about by the hard work of both women and men. Section 15(1) says that:

*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.*

But, Canada is not yet in a position to take international pride in the state of women's equality in this country.

I of course agree that what we want to achieve is a society in which everyone has the equal benefit and protection of the law – men, women, boys and girls. There are equality issues that men and boys face. My particular focus now though is on the situation facing women; there cannot be equality for everyone if there is not equality for women.

I will briefly consider the historical context of women's legal inequality, as the access to justice problems we face today are deeply rooted in the way women's roles and nature have been viewed and the way laws and policies reflected those views. I will then explain why I say that in spite of the significant progress we have made, there is much left to be done.

### **Historical Context**

When I was at law school: there were all male judges, all male professors, and almost no female lawyers; family law was not taken at all seriously as an important field of law; and law school social events were advertised in the law school building by posters containing pictures of nude women.

Many laws were highly discriminatory against women. Women has almost no rights to property or pensions, most of which were in the man's name, and a very limited right to support for themselves and the children. Violence was viewed as a private matter; those cases which did come to court were not dealt with in criminal courts but in family courts, which were not viewed as dealing with "real" crime.

There were highly discriminatory laws and attitudes about women and their credibility, especially if they alleged sexual assault. For example, a man could not be convicted on the testimony of a woman alone as it was said by the male law makers that it was dangerous to do so. Supporting evidence was needed, a requirement only applied to women in these cases.

A textbook on the law of evidence, still in use at the time I went to law school, emphasized the need for this requirement:

*Modern psychiatrists have studied the behaviour of errant young girls and the women coming before the courts in all sorts of cases. Their psychic complexes are multifarious and distorted. One form taken by these complexes is that of contriving false charges of sexual offences by men.<sup>5</sup>*

The author concluded that charges should not proceed to court unless a psychiatrist testified as to the woman's ability to tell the truth.

When I went to law school it was not a crime for a husband to rape his wife.

Yes, you may say, but what about the *Charter of Rights and Freedoms* and its equality provisions? Many laws were formally changed, often becoming gender neutral. However, deeply ingrained views about women, their roles and their credibility that had informed the law so pervasively and for so long, do not change overnight. For the most part a gendered application of the law continued.

Justice Bertha Wilson, the first women judge on the Supreme Court of Canada, said it best in her famous lecture, *Will Women Judges Really Make A Difference?*<sup>6</sup> Speaking in 1990, and pointing to relevant studies, she said that there was overwhelming evidence that gender based myths, biases and stereotypes were deeply embedded in the attitudes of many male judges and in the law itself.

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<sup>5</sup> J. Wigmore, *Evidence* 3<sup>rd</sup> Edition 1940

<sup>6</sup> (1990) 28 Osgoode Hall L.J. 507.

I agree with one legal academic, now a judge, who said around that time that continuing myths created a new stereotype, the Superwomen, who needed little support for herself and her children:

*Persistent societal myths appear to influence the perception and responses of some judges in family law cases – myths that have introduced that new stereotype of the “Superwoman” – a woman who can return to work outside the home anytime and at any age, a woman who can give her all to her career while juggling two kids and a dog.<sup>7</sup>*

Support orders for women and children continued to be dismally low.

All of this resulted in what has been accurately described as the feminization of poverty in the 80s and 90s; there was a new class of poor – divorced women and their children.<sup>8</sup>

With respect to custody cases in that time frame, several problems arose, including: the lack of acknowledgment of women’s parenting roles; the continued indifference to violence against women and children, with its power and control issues; and the fact that violence against a mother was thought to be irrelevant to parenting, a view we now know to be completely misguided. This led a group of BC advocates for women’s equality to publish, in 1996, a well-researched, insightful book outlining the problems aptly called *Women and Children Last*.<sup>9</sup>

At the same time, many women in the legal profession were having difficulty being accepted into the profession.

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<sup>7</sup> Freda M. Steel, “Alimony and Maintenance Orders”, at 155 in Sheilah L. Martin & Kathleen E. Mahoney, eds, *Equality and Judicial Neutrality*, (Toronto: Carswell, 1987).

<sup>8</sup> Freda M. Steel, “Alimony and Maintenance Orders”, previous note.

<sup>9</sup> Georgina Taylor, Jan Barnsley and Penny Goldsmith, *Women and Children Last, Custody Disputes and the Family “Justice” System*, Vancouver Custody & Access Support and Advocacy Association, Vancouver, 1996.

## Today

### Definitely Not There Yet

Where are we now? There has no doubt been significant progress for some women in many areas. However, it is wrong to conclude that this means we have achieved equality for all women, and particularly the women who face combinations of disadvantages. In B.C. today these would include, for example, the many women living in poverty, aboriginal women, racialized women, women with disabilities; senior women; immigrant and refugee women, and sexual minorities.

I agree with the comments of Supreme Court of Canada Justice Rosalie Silberman Abella when, as a Justice of the Ontario Court of Appeal, she spoke about this question in 1994. In my view what she said then still applies today:

*But for every woman in the thousands whose glass ceiling has been melted, shattered or raised, there are women in the millions who think a glass ceiling is just one more household object to polish. There is still a huge gap between what the public thinks has happened to women, because several thousand have had the luck, guts, finances, friends, encouragement or supportive partners to break barriers, and what is really happening for the majority of women.<sup>10</sup>*

As Justice Abella put it, these women “are waiting for equality to hit home; they are waiting for the rhetoric of equality they can hear to turn into the reality of equality they can live.”<sup>11</sup>

### Canada's Legal Obligations and Responses

As I have noted, Canada is a signatory to the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*. The agreement of British Columbia, along with the agreement of all other provinces and territories, was obtained by the federal government before the Convention was signed. Article 1 says:

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<sup>10</sup> *Equality, Human rights and Women*, at 15, 1994 Jean Edmonds Lecture, Women and Work, Canadian Centre for Management Development, Winnipeg, Manitoba, March 7, 1994

<sup>11</sup> Previous note at 16.

*... the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

By signing the *Convention* Canada agrees with the principles embodied in it and agrees to give timely effect to them. The principles recognize that justice for women is a broad concept which, to be meaningful, requires legal, economic and social equality. The components of that equality, on a day to day basis in the lives of women, include:

- dignity and self-worth; living free from discriminatory treatment
- safety and security including freedom from control exercised by both physical violence and psychological abuse
- control of their own bodies
- economic security – adequate standard of living (living wage) which includes access to accessible, adequate daycare
- access to affordable housing
- access to education of all kinds
- access to health care, and
- the ability to raise one’s children without inappropriate interference, and in a way that provides these same benefits to the children.

The UN Implementation Committee for this *Convention* has expressed concerns about Canada’s compliance in several very important areas, including:<sup>12</sup>

- Violence against women in relationships (stating that it remains a significant problem)
- Treatment of murdered and missing aboriginal women and girls
- Women’s access to justice
- Social assistance payments for women
- Women and housing

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<sup>12</sup> <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-CAN-CO-7.pdf>

- Political participation of women, and
- Access to child care.

Instead of doing anything significant about these major concerns, both the federal government and the government of British Columbia have done just the opposite. There have been massive cuts to programs and services that disproportionately impact upon women, including the elimination of or marginalization of branches of government which were specifically designed to enhance women's equality.

By way of example only, massive cuts by the province to legal aid for family law, and the elimination of legal aid for poverty law have had a dramatic, negative and disproportionate effect on women, who cannot effectively access the courts. Legal aid should be available to assist those most vulnerable in our society. Yet it is the most vulnerable who have been excluded. The small amount of money recently provided by the province does not begin to solve the problem.

The federal government has essentially silenced advocates who work to ensure ongoing equality in the development of the law by eliminating the Court Challenges Program for new cases. That government has also eliminated funding for general advocacy work and for research relating to women's equality, a matter of great concern to me.

### *Political Participation*

Progress had been made; but the number of women who have been elected, and particularly the number of women in positions of real political power, is still woefully low overall. One of the many adverse consequences is that women have a very limited ability to influence the allocation of resources.

### *Access to the Legal Profession*

There are continuing issues for women's equality within the legal profession itself; women are leaving in record numbers, as this *Lawyers Weekly* article notes:

*Lawyers Weekly*

***Focus is on the decline among female lawyers***

*Jeremy Hainsworth*

*January 30, 2012*

*British Columbia law society Benchers have approved a \$12,000 project aimed at retaining women in the legal profession.*

*Appointment of Judges*

With respect to the appointment of judges, while as individuals the men and women who are judges in this province are capable, hardworking, dedicated people who strive to do justice in each case, there are systemic problems in the appointments process that disadvantage women and minorities. I will highlight some of them using recent news clippings.

The number of women being appointed is decreasing:

*Lawyers Weekly*

***Gender equality in judiciary urged***

*Cristin Schmitz, Ottawa*

*April 6, 2012*

...

*As of March 1, 2012, 32% of Canada's federal judges are women.*

*[April 1, 2007 to March 2, 2012, of the 198 appointments 73% were men and 27% were women.]*

A significant majority of people who are appointed as judges are corporate and commercial litigators at large law firm, firms which don't as a rule practice family law, an area of particular importance to women:

*Lawyers Weekly*

*April 16, 2012*

***Typical appointment is male litigator***

*The most recent data on judicial appointments indicates that the typical lawyer appointed to the bench was a 53 year old male civil litigator practicing in a firm of more than 60 lawyers.*

Of the last 100 appointments, all but 2 are white:

*Globe and Mail*

***Of 100 new federally appointed judges 98 are white, Globe finds***

*Kirk Makin, JUSTICE REPORTER*

*April 18, 2012*

*In the past three and a half years, the federal government has appointed 100 new judges in provinces across the country – and 98 of them were white.*

What about B.C.'s Judicial Appointments Advisory Committee? The members of the Advisory Committee which recommends to the federal government applicants for appointment to the Supreme Court in British Columbia are appointed by the federal government. At this time, all of the members are men. The federal government says its appointments are based on merit and legal excellence. These are very subjective criteria and depend upon the particular views about what is important of the people recommending the appointments.

I respectfully suggest that diversity of background, experience and perspective of those who are judges makes for a more effective judicial system for everyone and assists in making everyone feel that there is justice for all.

***Violence Against Women***

Violence against women is a pervasive problem in British Columbia. Violence has always been, and remains, gendered. While it is true that women do assault men, the

overwhelming evidence is that in cases where serious harm and death are caused, it is almost always involves situations where men assault women.

While it is a serious issue for all women, it has a particularly negative impact on those women with multiple vulnerabilities who I have already described, making them even more at risk. One only has to look at what has been acknowledged about the treatment of aboriginal women and girls by the justice system at the B.C. Murdered and Missing Women Inquiry to understand the extent of and depth of the problems.

It is shocking to me that though we know both the nature of and extent of the problems, and the solutions, based on the many recommendations that have been made, we continually see women subjected to violence by men, including death after death. While much hard work has and is being done by dedicated advocates for women's equality and some others in this area, there is still no comprehensive, well-resourced system wide approach in place to protect these women.

It is important, when speaking about violence, to recognize the very good work done by British Columbia's Justice Ministry in enacting the new *Family Law Act*,<sup>13</sup> which will, hopefully, come into effect next year. Among other things, the new legislation recognizes the significance of violence to the issue of parenting, a very important step. But, unless the financial and other resources necessary to make it work effectively are made available and unless the legislation is accompanied by system wide, comprehensive education in this area, it will be very difficult to implement.

### *Treatment of Women's Credibility*

The final issue I want to speak about is the ongoing problem of how women's credibility is assessed, particularly in relation to sexual violence.

Myths and stereotypes about women's credibility are still with us in the justice system. After the laws were changed, there has continued to be efforts to inappropriately bring these myths and stereotypes into the criminal and family justice processes. It was

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<sup>13</sup> Bill 16 – 2011, B.C. Legislature, received Royal Assent November 24, 2011, and is expected to come into force within 12 – 18 months of that date.

necessary for then SCC Justice Claire L'Heureux-Dubé to refer to several of them just 13 years ago in the Ewanchuk case:

*Myths of rape include the view that women fantasize about being rape victims; that women mean 'yes' even when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually 'innocent'); that women often deserve to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance...<sup>14</sup>*

BC Women's Hospital and Health Centre in Vancouver has a sexual assault service. The service providers became concerned about the way in which these women and their cases were being dealt with by the criminal justice system. They recently conducted a study which showed that of 568 sexual assault files opened over a two year period, 291 women decided to report to the police. Of those, the conviction rate was only 6%.<sup>15</sup> Only 48 of the 291 women who reported to the police entered the criminal justice system and of those 48, there were:

- 18 convictions (8 guilty pleas at or close to trial and 10 findings of guilt).
- 25 stays of proceedings by the Crown (decisions by the Crown not to proceed)
- 2 acquittals
- 2 arrest warrants, and
- 1 trial in progress.

This very low conviction rate is of considerable concern, and may relate to continuing negative views about women's credibility. There may be other reasons as well, but it is certainly worthy of further research, a result that is unlikely, given research funding cuts.

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<sup>14</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 82.

<sup>15</sup> The Sexual Assault Service at VGH (Vancouver General Hospital), BC Women's Hospital and Health Centre, Unpublished Study.

## **Conclusion**

There are many more issues I could raise, but I am now going to turn the discussion over to the real experts in this area. They include the day to day advocates for women who too often have their views either not listened to or dismissed as being the views of special interest groups as opposed to what I prefer to call special knowledge groups, as if they are somehow lobbying for the right to build a pipeline as opposed to advocating for the rights of all women to justice and equality.

Thank you.

