WOMEN'S DIVERSITY: LEGAL PRACTICE AND LEGAL EDUCATION – A VIEW FROM THE BENCH

Wendy Baker*

The topic today is Women's Diversity: Legal Practice and Legal Education. I should probably tell you, immediately abandoning the literary device of suspense, that I consider myself to be a feminist. I know that the organizers of this year's Viscount Bennett Lecture and Seminar are aware of this and will not be surprised to hear it publicly confirmed. There are, of course, both male and female feminists and I doubt that many members of this audience believe feminism to be antithetical to judicial impartiality. However, I am conscious that there are those who consider feminism to be an alarming form of judicial bias. In fact, my Chief Justice once received a letter of complaint about me from an unhappy litigant, following a trial in which he and his sister had disputed entitlement to their brother's estate. In the letter, I was described as a "female Robin Hood" and the writer, mistakenly assuming the news would come as a dreadful shock to the Chief Justice, declared that, prior to my appointment, I was known to have been a "feminist". The implication was clear: a feminist judge cannot be an impartial judge.

Feminism in a judge is not evidence of judicial partiality nor a threat to judicial independence. All judges come to the job with life experiences and information which they have incorporated into their system of values and into their beliefs about how the world works, and how it should work. Judges are not blank slates. As Justice Rosalie Abella of the Ontario Court of Appeal has said:

> ...[N]eutrality and impartiality do not and cannot mean that the judge has no prior conceptions, opinions or sensibilities about society's values. It means only that those pre-conceptions ought not to close his or her mind to the evidence and arguments presented.[1]

Because there are often misperceptions and misunderstandings about what someone means when they talk about feminism, I find it useful to offer a definition of feminism with which I identify, borrowed from the 1992 report of the British Columbia Law Society Gender Bias Committee, of which I was a member:

> A feminist is a person who believes women and men should be equal participants in society regardless of race, ethnic origin, economic background, gender, sexual orientation, or disability. A feminist believes women have not yet achieved equality in our society and that steps should be taken to correct this situation.

---

*The Honourable Madam Justice Wendy Baker of the Supreme Court of British Columbia. Viscount Bennett Memorial Lecture, delivered at the Faculty of Law, University of New Brunswick (Fredericton) 16 November 1995.

[1]The Hon. R.S. Abella J.A., "Appellate Judicial Law Making: Ten Realities of the Judicial Role" (Address given at the Canadian Appellate Court Seminar, Québec City, 27 April 1995) [unpublished].

> Lastly, a feminist believes the world should be a comfortable place for women, men, and children, free of stereotypes and myths which restrict the roles each may assume.[2]

In this address, I will develop two related themes. The first is that to practise law in Canadian courts today, and to be a Canadian judge, is to experience first-hand the diversity of women in Canadian society and the diversity of that society – economic, racial, religious, cultural and sexual. The second theme is the necessity for all institutions of legal and judicial education, but particularly law schools, to incorporate and emphasize the theme of respect for diversity and the goal of substantive equality into all curriculum designed for participants in the justice system.

The Canada in which I work as a judge today is much different from the Canada I knew growing up in the 1950s and 1960s. I was raised and attended elementary and high school in a very small town in rural west central Saskatchewan with a population of 250. My home town – in fact the whole surrounding area – was highly homogeneous even by Canadian standards of the time. Nearly everyone was of European descent, mostly second or third generation immigrants from Germany. In my village, I was actually considered a member of a disadvantaged minority group because my family is not of German origin and because we were one of only three or four families in the area who were not Roman Catholics. Cultural diversity in most small prairie towns in those days was represented by a Chinese-Canadian family, by Hutterite colonists, or by members of the Cree Nation, most of whom lived on reserves. A shortage of doctors, teachers, dentists, and nurses in rural Saskatchewan communities in the mid 1960s did result in a small influx of professionals from India, Pakistan, and the Philippines, and some of my first experiences of multi-culturalism involved these families.

Even my law school class at the University of Saskatchewan from 1975 to 1977 was relatively homogeneous – mostly young, mostly white and mostly male – although around the time I enrolled, women began to enter law schools in larger numbers. In 1975, there was only one woman on the faculty of my law school. Although I had professors from a variety of racial and cultural backgrounds in my undergraduate commerce classes, I can recall no professors from visible minorities in the law faculty. Although issues of gender and racial equality certainly were discussed by law students, I can recall no courses dedicated to feminist legal theory. A fledgling "women in law" group formed at my law school, but for reasons I do not now recall, likely apathy, I never joined. There was some consideration of Aboriginal justice issues, and the University of Saskatchewan Law School has been instrumental in promoting access to legal education for Aboriginal

---

[2]British Columbia Law Society Gender Bias Committee, *Gender Equality in the Justice System* vol. 1 (Vancouver: Law Society of British Columbia, 1992) at 1.3.

students through its Native Law Centre. Although I cannot be sure, I expect that my law school experience does not differ in a significant way from that of most judges of my age. My older colleagues experienced a law school environment that was even more homogeneous, with only a handful of female students.

I know that the composition of the faculties and student bodies, as well as the curriculum, of Canadian law schools have changed a great deal in the eighteen years since I graduated. In part, I know this because I have had the opportunity to participate in programs at the University of British Columbia and University of Victoria law schools designed to introduce first year law students to feminist legal theory. Participation in recent "call to the bar" ceremonies in my home province demonstrates how the face of the legal profession is changing. In British Columbia, it is not unusual for half, or even a majority, of the newly-admitted lawyers to be women. Nearly one in three British Columbia lawyers is female and the number of Chinese-Canadian, Aboriginal, and Indo-Canadian lawyers has increased significantly.

The extent to which the law itself has changed may be illustrated by the fact that, like me, almost all federally-appointed judges graduated from law school before the repatriation of the Canadian *Constitution* and before there was a *Canadian Charter of Rights and Freedoms*. The constitutional law cases most judges studied in law school dealt with the division of powers, not intervention by the courts to constrain legislative or executive action inconsistent with the rights and freedoms of individual Canadians.

Like law students and the profession, the judiciary is gradually becoming more representative of gender and cultural diversity, although the rate of change is affected by the formal requirement that federally appointed judges have at least ten years experience at the bar and the view of many lawyers that even greater experience at the bar prior to appointment may be beneficial. On my court, fifteen of the eighty-five full-time judges are women, and six members of the British Columbia Court of Appeal are women. Achieving representation on the bench for women and men of colour or other minority constituencies has been slower but progress has been made, and as the pool of judicial candidates with ten or more years at the bar expands this imbalance will be reduced.

I know from personal experience that you cannot sit as a trial judge in Canada for very long without recognizing how the diversity of the Canadian population is reflected both in the business of the courts and in the backgrounds of lawyers and litigants who come before the courts. At a recent workshop organized for members of British Columbia courts, we were told that English is the language spoken in the homes of only 42% of elementary and secondary school students in Vancouver; 31% speak one of the Chinese languages. Every week in our courthouse, trials are conducted with the services of an interpreter for one or both

of the parties and several of the witnesses. It is now a routine occurrence for the judge and all counsel involved in a case to be female. Like Alberta's Court of Appeal, appeals in our highest court have been heard by all-female panels.

I am proud and pleased that law schools, legal educators, the profession and the judiciary have demonstrated recognition of increasing diversity in Canadian society, and have begun to respond to the need to adapt Canadian legal institutions to accommodate diversity. Few professions, in my view, have demonstrated the courage and openness exhibited by the legal profession who, at not inconsiderable expense to members of the profession, have established committees and task forces to examine gender and racial bias in the profession and in the justice system, and to recommend ways to remedy historic and persistent inequities. In addition to the studies commissioned by law societies and bar associations, law students, law teachers, lawyers and judges have participated in federal and provincial studies and projects aimed at eradicating the vestiges of gender and racial bias in the Canadian justice system. In a recent address to the Australian Legal Convention – the Australian equivalent of the Canadian Bar Association – Alberta Chief Justice Catherine Fraser pointed out that:

> There have been no less than fifty-seven national, provincial and territorial reports, studies, and articles on gender bias and the law, sixteen which document the concerns of the Aboriginal communities about the justice system and eight which investigate the effects of racial bias in the Canadian legal system.[3]

Much has been accomplished, but much remains to be done. It would be naive to suggest that legal educators, lawyers or judges have universally accepted the conclusions or the recommendations contained in these studies. In fact, the strength of denial of the problems may actually explain the number of studies.

There has been some active, but mostly passive, resistance to some of the changes proposed or the means by which change is implemented. This should not be surprising. Change is difficult and threatening and the pace of change demanded of Canadian legal institutions, like that demanded of all Canadian societal institutions – political, religious, social and economic – has been rapid and relentless. The profession and members of the courts are wounded by what they perceive to be, and often is, uninformed or unfair criticism of a system working hard to adapt, in difficult circumstances, to a society in rapid transition. More change will come but we should not forget that many recommendations made by these studies and task forces have been accepted, and many of them have been acted upon – by legislators, law schools, lawyers, law societies and bar associations, and judges.

---

[3]The Hon. C. Fraser C.J., "Judicial Awareness Training" (Address to the the Australian Legal Convention, 25 September 1995) [unpublished].

Law firms have moved to address issues of gender equality for a variety of reasons. Some of those reasons are purely commercial. Many of the best law school graduates are female. Law firms anxious to hire the best and brightest, male and female, have been subjected to scrutiny about their employment practices. Prospective articling students want to know if firms have written policies on parental leave, flexible working arrangements and sexual harassment. They want to know about opportunities for promotion; they want to know if a firm has a good track record for hiring and retaining female associates. They want to know how many female partners a law firm has, how files and clients are assigned, and about mentoring and client succession. Law firms also realize that many corporate clients have women in senior decision-making roles, including banks and other financial institutions. They know these clients expect law firms to reflect the diversity increasingly found in the corporate culture. To remain competitive in a demanding marketplace, law firms realize that offering high-quality legal services means that all their lawyers must demonstrate the ability to adapt and succeed in an increasingly diverse economy, where more than 50% of new businesses are started by women. Litigators must be prepared to prosecute and defend lawsuits in an increasingly complex and global marketplace.

Like lawyers, judges recognize the need to adapt to new legal realities. Too little is said publicly about the extent to which the judiciary have participated in comprehensive and in-depth education programs on social context issues. Judiciary-sponsored conferences and seminars with titles like "Judging in a Multicultural Era" and "Equality and Human Rights Issues in Superior Court Practice" have been attended by Canadian judges for more than a decade. Courses designed to promote judicial awareness of and sensitivity to issues affecting women, racial and cultural minorities and people with disabilities have enjoyed high levels of interest and participation. As Professor Martin Friedland has stated in his recent report, "[j]udicial education in Canada has been taken seriously by the judiciary."[4]

In fact, the Canadian Judicial Council sponsored a course entitled "Aspects of Equality: Rendering Justice" in November 1995, largely in response to a recommendation contained in the report on Gender Equality in the Justice System prepared by the Canadian Bar Association Task Force headed by the Honourable Bertha Wilson.[5] The faculty for the three-day event included not only judges, but also law deans, law professors, journalists and human rights activists.

---

[4]Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada* by M.L. Friedland (Ottawa: Canadian Judicial Council, 1995) at 171.

[5]Canadian Bar Association Task Force on Gender Equality in the Justice System, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

There is, of course, an ongoing debate about mandatory judicial education on "social context" issues. Without entering into that debate, I note that Professor Friedland reported that the National Judicial Institute has been unable to obtain funding from government to achieve the objectives, set by judges themselves, of ten days of intensive judicial education on appointment and ten days per calendar year of continuing judicial education.[6] In addition to lack of financial resources, the overwhelming case load in many courts makes it difficult for judges to be freed up to attend courses and seminars that are offered.

Although great progress has been and continues to be made in addressing inequity wherever it is found within the Canadian justice system, I have been disheartened over the past two years to hear from students and colleagues in law schools in many parts of Canada that some law students and some law professors remain of the view that incorporating issues of diversity and equality into law school curriculum is a waste of time – superfluous to basic legal education. I am told that courses on feminist legal theory and equality theory are still considered by some to be "soft law", not "hard law" like torts, contracts, and evidence. I am dismayed to hear reports from some law schools that students and faculty members who promote the integration of equality theory and feminist legal theory into the curriculum of so-called "hard law" courses are sometimes ostracized and marginalized.

I am troubled to learn of this short-sighted attitude because I know that judicial education, as well as legal education, begins in law school. Every judge was once a lawyer, and every lawyer was once a law student. I am concerned about a lack of interest in or even resistance to legal education about diversity and equality because I know, from my own experience as a civil-commercial litigator and partner in a large law firm, and from the perspective gained in two and a half years on a trial court, that issues raised by sexual, racial, religious, and cultural diversity are before the courts every day. These concerns do not arise only in *Charter* litigation or in criminal cases; issues of diversity and equality also arise in family law cases and in civil lawsuits of every kind. Sometimes diversity is a central theme; sometimes it is only a relevant part of the context in which issues are litigated. Judges recognize this and that is why, for example, a paper entitled "Equality Issues in Private Law", prepared by Professor Jamie Cassels of the University of Victoria Faculty of Law, was featured at a Canadian Judicial Council Seminar in July 1993.[7]

I will illustrate what I have said with an example. One of the earliest trials I was assigned after my appointment in 1993 was a family injuries compensation

---

[6] *Supra* note 4 at 172-173.

[7] J. Cassels, "Equality Issues in Private Law" (Paper presented to the Canadian Judicial Council Seminar, July 1993) [unpublished].

action. A young husband and father had been killed in a car accident. His widow and young child came before the court as plaintiffs in an action to recover damages for loss of the deceased's support as income earner, husband and parent. The young man had come with his parents and siblings from India to Canada when he was a child; his widow was a recent immigrant. All were adherents of Sikhism. The assessment of liability was relatively straightforward, but the assessment of damages was anything but. Fortunately, both the plaintiffs and the defendants were represented by capable counsel, who identified the legal issues in their pleadings and presented the evidence necessary to allow the court to apply the law in a way which took into account the gender, religion and culture of the litigants. Among the issues identified by counsel and presented for decision were these:

- Should the award to the widow for loss of her husband's future financial support be reduced to reflect the contingency of divorce or remarriage or both?
- If yes, should the court minimize the deduction for the remarriage contingency in light of expert evidence that in a traditional Sikh household, the widow will not remarry without the consent of her father-in-law?
- If the widow's award for loss of future financial support was reduced to account for the contingency of divorce, should the deduction be reduced in light of expert evidence that divorce is relatively rare in the traditional Sikh community?
- Should the award of damages to compensate the widow for the loss of her husband's parenting and homemaking support be reduced in light of expert evidence that, in traditional Sikh households, child-rearing and housekeeping are almost exclusively the preserve of women?
- Should the award of damages to compensate the widow for the loss of her husband's parenting and homemaking support be increased because of expert evidence that traditional division of tasks in Sikh households means that contact with the external world of doctors, teachers, repairers and government is almost exclusively the preserve of men?
- Since the evidence was that the widow would be expected to live with her father-in-law or a male relative of her husband, and that they would exercise control over any money she had, should the court decline to award a sum for professional financial management services?
- Finally, what effect should the court give to expert evidence that over time, assimilation into Canadian society would be likely to modify adherence to the traditional cultural and religious practices about which the expert witness had testified?

The case I have been discussing is representative, in my experience, rather than exceptional. Other examples include a recent case in which a British Columbia court awarded $90,000 in damages for loss of future support to parents whose twenty-three year old son was killed as a result of the defendant's

negligence. The court accepted evidence that the Canadian family of Chinese origin adhered to the doctrine of filial piety, a tradition whereby adult children pay 10% to 20% of their income to their parents. The court also awarded the parents $7,700 in damages for the cost of a traditional Chinese funeral banquet.

Even in what may be described as purely corporate or commercial cases, issues of cultural diversity do arise. In a recent case one of two partners brought applications under the *Partnership Act* and the *Company Act* to dissolve a partnership and wind-up a company. On the hearing of the petitions, respondent's counsel argued that the court should not dispose of the matters summarily, but should order a trial of the action. The respondent argued that because he and the petitioner were related and both were members of the small British Columbia Ismaili community, only a full trial, with oral evidence, would allow him to save face as the head of his family and preserve his reputation in the community.

Many equality issues arise in the assessment of damages for personal injuries, including the assumptions to be brought to bear in determining pre-injury earning capacity in the case of young female plaintiffs. In a number of cases, including *Arnold* v. *Teno*,[8] courts have struggled with the choice of a statistical base to be used to assess an award of damages for future loss of earning capacity for an infant female plaintiff. Professor Cooper-Stephenson explored this issue in his article "Damages for Loss of Working Capacity for Women",[9] and it has been addressed more recently by Professor Jamie Cassels.[10] The controversy arises because statistics reveal that the average earnings of Canadian women in the labour force are less than the average earnings of men. To the extent that the discrepancy may be attributed to discriminatory employment practices, the use by courts of this statistical information to assess damages for female plaintiffs may perpetuate systemic discrimination. On the other hand, defendants argue that inequality created by systemic discrimination should not be remedied at the expense of an individual defendant with the accompanying risk of over-compensating an individual plaintiff. Another current issue in personal injury cases is the assessment of damages for lost or impaired capacity to be a homemaker and parent.

While I am an enthusiastic proponent of judicial education, particularly education which includes a focus on "social context", I cannot emphasize too strongly that judicial sensitivity and training cannot compensate for a failure by counsel to properly analyze, plead and prove matters concerning gender or racial

---

[8](1978), 83 D.L.R. (3d) 609 (S.C.C.).

[9]K. Cooper-Stephenson, "Damages for Loss of Working Capacity for Women" (1978-79) 43:2 Sask. L. Rev. 7.

[10]J. Cassels, "Lost Earning Capacity: Women and Children at Last" (1992) 71 Can. Bar Rev. 445.

equality or cultural diversity arising in a lawsuit. Judges cannot substitute "judicial notice" for evidence or compensate, to any significant extent, for a failure by counsel to identify the issues and present the appropriate facts and law. As an illustration of this point, I recently attended an evening program organized by our Law Courts Education Society for judges of the British Columbia courts. The program included a tour of a Sikh temple, an informal presentation by a temple volunteer about Sikhism and formal presentations by a social worker and a provincial court judge, who are both Indo-Canadians, about the culture, religions and traditions of people from the Indian sub-continent. Participants were provided with written materials and audio-taped lectures to supplement these presentations. The program was very useful, but the information I received was no substitute for the presentation of expert evidence in the family injuries compensation case I described earlier.

If law students and lawyers are not offered, or decline to benefit from, early and ongoing training in identifying and analyzing issues presented by women's and increasing societal diversity, the courts and litigants will suffer. These issues are complex and difficult, and traditional methodology used in analyzing cases may not assist. Part of the complexity results from the fact that, in real lawsuits, issues of racial, gender or religious inequality do not separate themselves out into neat, water-tight compartments. Instead, legitimate aspirations are often in conflict and the courts must make choices between competing interests and competing claims brought about by diversity.

Another example, taken from an actual case, is of a woman of Euro-Canadian origin who entered into a relationship with a man who had recently immigrated to Canada as a refugee. She was a non-practising Christian; he was a practising Muslim. Their relationship was stormy. Both were abusive toward the other, but the man was the worse offender. When the woman became pregnant, she left the man and when their daughter was born, arranged for the child to be adopted by a Christian couple. In the custody action brought by the biological father against the adoptive parents, his lawyer argued that the father's cultural and religious beliefs should be respected, that blood ties are very important in his culture, and that it was in the child's best interests that she be raised in the religious tradition of her father's community. The biological mother supported the custody claim of the adoptive parents. Her lawyer argued that the father's negative attitudes about women, his stereotyped view of the role of women, and his history of violence meant that it would not be in the child's best interests to be raised by him.

This case illustrates that the equality-seeking of groups who have historically been legally disadvantaged sometimes conflicts not only with the desire of the advantaged to retain their advantages, but also with the aspirations of other equality-seeking groups. Similar problems often arise in sentencing for criminal offences where courts are concerned to condemn assaults on vulnerable women and children in our society, but also recognize that often the offender was himself

a victim of violence as a child. In other situations, where the victim is an Aboriginal woman, the offender may also be a member of a First Nation, victimized by racial and cultural oppression.

The messages I am trying to convey about women's diversity, legal practice and legal education are not profound. I simply want to emphasize, from where I sit on the trial bench, that equality issues are real; they present themselves every day in legal practice and in the courts, and they are important. They can and do arise in every kind of lawsuit and in every category into which we divide the law and the teaching of law – in tort law, contract law, tax law, administrative law, labour law, criminal law, family law, and certainly in the law of evidence and civil and criminal procedure.

Judges must continue to educate themselves to increase their awareness of and sensitivity to women's diversity and the context in which decision-making occurs in the society that is Canada today. Law schools and continuing legal educators must prepare students and lawyers to identify, analyze, research, plead and prove the facts and law necessary to permit courts to reach fair and just decisions in the context of a diverse society. To do this, legal education, like judicial education, will have to incorporate into every part of the law school curriculum a recognition of women's diversity. Equality issues do not arise in a vacuum and specific courses on feminist legal theory, racism or equality theory, while important and highly relevant, may prove to be insufficient if the theory is not also incorporated into the spectrum of curriculum – whether it is curriculum for judicial education, for continuing legal education or for law school.

The credibility of and public confidence in Canadian legal institutions depends on the creation and maintenance of a fair, equal and accessible justice system – one that welcomes, fosters and preserves respect for diversity and equality. Law schools play a vital role in this regard in preparing students to become the kind of lawyers, and judges, who will ensure that the legal profession and the courts continue to maintain the high standards that have made the Canadian justice system the envy of many. All Canadians are entitled to expect no less.