Symes v. Canada

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Author's Note

The result in *Symes v. Canada* is troubling on a number of levels. The failure to challenge the long-standing social norms associated with gender roles and the division of labour in the household and the lack of acknowledgment of the public good of caring for children continue to cast a long shadow on the struggle for women's equality. At the same time, the tax rules at issue in the case afford only a narrow opportunity to recognize the important connection between women's inequality and society's continued failure to ensure that women do not bear unfair burdens as an incident of motherhood. Nor does the claim give rise to a comprehensive solution to the urgent need for publicly funded high-quality childcare and the undervaluing of the work of childcare providers. The case was controversial within the women's movement in Canada for precisely these reasons. My aim in re-casting *Symes* was to fully address the substantive equality concerns in this case, which I see as a limited but important opportunity to press for the reconstruction of tax systems and employment systems so that they fully reflect women's realities as well as men's.

I have a personal interest in *Symes* because I served as co-counsel with J.J. Camp, Q.C., to the intervenor, the Canadian Bar Association, in the Supreme Court of Canada. It was my first major equality rights case. The Women's Court of Canada project has provided me with an opportunity to explore my initial sense of outrage at, and long-simmering dissatisfaction with, the majority decision in a concrete, disciplined fashion. More importantly, it was a chance to develop an equality analysis that can discern and address the structural, as opposed to the biological, dimensions of women's inequality. I took seriously the structure and authoritative voice necessitated by the judgment format. While I wrote with a heightened sense of responsibility for every word, I thoroughly enjoyed the exercise.

At a conceptual level, I wanted to explore the role of Canadian courts in advancing social justice through the adjudication of equality rights claims. My starting point is that Canadian governments have repeatedly committed themselves to equality through ratification of international human rights instruments and the adoption and gradual strengthening of domestic human rights legislation. The Canadian Constitution is the cornerstone to this commitment to equality. While these equality guarantees have an aspirational character, they also embody Canada's practical commitment to social justice.

CJWL/RFD
doi: 10.3138/cjwl.18.1.27

I wanted to further develop the concept of transformative human rights practices, which I define as practices that interrupt the dynamic through which inequalities are created and re-created and substitute practices that create and re-create equality on an ongoing and daily basis. Constitutional review is one important, but by no means the only, avenue both for uncovering the structures of inequality as they manifest themselves in government actions, laws, and policies and for initiating steps towards the creation of equality. In this reconsideration of *Symes*, I highlight two features of transformative human rights practices in constitutional litigation: the need for judges to employ a substantive rather than an abstract conception of equality and the need to pay attention to the narrative and voices of women. More particularly, I wanted to employ Patricia Hughes's idea of substantive equality as a fundamental constitutional principle in order to carry out statutory interpretation fully infused with equality norms.

A second focus is on exploring the government's positive duty to promote equality. I was also intent on clarifying the correct approach to analyzing adverse effects discrimination and the evidence required to substantiate this type of equality rights claim. Finally, at the end of my reconsideration, I introduce a remedial twist in which the Women's Court of Canada orders that the Canadian government initiate an inquiry into the broader issues raised by Ms. Symes's claim. In a society truly committed to achieving equality, such an institutional arrangement by which a court takes greater jurisdiction over the unresolved issues of the discrimination borne by women due to inadequate governmental childcare policies would not be controversial. I introduce this idea as a reminder of the essential openness of our justice system and court procedures. It serves as a hint of the glimmering possibilities of novel approaches to equality rights litigation