

**GETTING A FOOT IN THE DOOR:  
WOMEN, CIVIL LEGAL AID  
AND  
ACCESS TO JUSTICE**

National Association of Women and the Law  
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Status of Women Canada is committed to ensuring that all research produced through the Policy Research Fund adheres to high methodological, ethical and professional standards. The research must also make a unique, value-added contribution to current policy debates, and be useful to policy makers, researchers, women's organizations, communities and others interested in the policy process. Each paper is anonymously reviewed by specialists in the field, and comments are solicited on:

- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected;
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy makers, researchers and other target audiences.

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## PREFACE

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. In order to determine the structure and priorities of the Policy Research Fund, Status of Women Canada held consultations from March to May 1996 with a range of national, regional and local women's organizations, researchers and research organizations, community, social services and professional groups, other levels of government and individuals interested in women's equality. Consultation participants indicated their support for the Fund to address both long-term emerging policy issues as well as urgent issues, and recommended that a small, non-governmental external committee would play a key role in identifying priorities, selecting research proposals for funding and exercising quality control over the final research papers.

As an interim measure during the fiscal year 1996-97, consultation participants agreed that short-term research projects addressing immediate needs should be undertaken while the external committee was being established to develop longer-term priorities. In this context, policy research on issues surrounding the Canada Health and Social Transfer (CHST) and access to justice was identified as a priority.

On June 21, 1996, a call for research proposals on the impact of the CHST on women was issued. The proposals were assessed by Status of Women Canada and external reviewers. The research projects selected for funding in this area focus on women receiving social assistance, economic security for families with children, women with disabilities, the availability and affordability of child care services, women and health care, and women's human rights.

The call for research proposals on access to justice was issued on July 18, 1996. Also assessed by Status of Women Canada and external reviewers, the selected policy research projects in this area include a study of abused immigrant women, lesbians, women and civil legal aid, family mediation and the implications for victims of sexual harassment as a result of the Supreme Court ruling in *Béliveau-St. Jacques*.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy-development process. We believe that good policy is based on good policy research. We thank all the authors for their contribution to this objective.

A complete list of the research projects funded by Status of Women Canada on issues surrounding the Canada Health and Social Transfer and access to justice is provided at the end of this report.

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This work is dedicated to the memory of Bonnie Agnew. Bonnie was member of the collective at Vancouver Rape Relief and Women's Shelter. Her dedication to the struggle for women's equality was fierce, and continues to instruct and inspire me.

# TABLE OF CONTENTS

<b>Executive Summary</b> .....	i
<b>Introduction</b> .....	1
<b>Part One: The Evolution of Legal Aid Services and the Treatment of Women’s Legal Needs</b> .....	3
Judicare .....	3
The Introduction of Community Clinics.....	5
The Failure to Take Gender into Account .....	6
The Contribution of Feminist Legal Theory .....	7
<b>Part Two: Contemporary Assessments of Legal Aid Services for Women</b> .....	11
Accessibility.....	11
Coverage and Financial Eligibility.....	12
Quality of Service .....	14
<b>Part Three: Quantitative Data</b> .....	17
<b>Part Four: Findings from the Qualitative Research</b> .....	19
Introduction.....	19
Accessibility.....	22
Coverage and Financial Eligibility.....	24
Quality of Service .....	26
Summary of Trends Identified by the Data .....	30
<b>Part Five: A Principled Approach</b> .....	33
Introduction.....	33
The Entitlement to Substantive Equality .....	33
The Political Context: The Introduction of the CHST.....	34
The Economic Context: The State’s Treatment of the “Undeserving” Poor .....	36
The Social Context: Public and Private Arrangements .....	37
<b>Conclusion</b> .....	43
<b>Summary of Principles</b> .....	45
Accessibility.....	45
Coverage and Financial Eligibility.....	45
Quality of Service .....	47

<b>Appendix</b> .....	49
Legal Aid in Manitoba .....	49
Legal Aid in Ontario .....	50
Focus Group Information.....	51
<b>Bibliography</b> .....	55
<b>Endnotes</b> .....	59

## EXECUTIVE SUMMARY

Historically, the provision of legal aid services to low income people in Canada was premised on the notion that poor people required legal services for the same kinds of legal problems that a paying clientele had. Legal aid services were delivered through the judicare system. The ‘low income’ person with a legal problem would obtain a legal aid certificate, permitting that person to obtain the services of a lawyer. Eventually, those responsible for providing legal aid services recognized that coverage of traditional legal problems fell short of providing the coverage for the array of legal problems which poor people have, often as a result of their frequent interaction with the welfare state. Moreover, the judicare method of delivery was inappropriate for the poor individual. This, in part, contributed to the establishment of community legal clinics.

While the access to justice movement sought improvement to the provision of legal aid services for low-income people, it did not take the legal needs of women — as a diverse and distinct constituency — into account. Consequently, certain deficiencies have resulted in our current legal aid problems. Coverage categories do not reflect women’s needs at different phases of their lives nor do they reflect women’s legal needs based on their diversity. This failure to take gender and diversity into account has meant that low income women have not received substantive equality of access to the justice system. Feminist legal scholars have since critiqued this inequity and have established an agenda for redressing these omissions in the design and delivery of legal aid services.

Contemporary assessments of legal aid services for women confirm that women do not find legal aid services easy to access. Women with disabilities, immigrant and refugee women, abused women and Aboriginal women encounter additional difficulties trying to access legal aid. Women, in their diversity, also have experienced difficulty getting legal aid coverage for their legal problems. Financial eligibility criteria have created additional hardships for women.

The qualitative research we conducted indicated similar trends in the provision of civil legal aid services to women. Women found the legal aid system to be confusing and intimidating; women also reported that they were unable to locate lawyers who were taking legal aid certificates. They found the coverage criteria bizarre and frustrating, and reported that they were unable to obtain legal services for their legal problems. Some women found that the restricted financial eligibility criteria disentitled them to the subsidized legal service they needed for incomprehensible reasons. While women understood that many of the problems they encountered with legal aid staff and lawyers were reflective of the larger complexities of the justice system, many also felt the legal aid services they received were of poor quality, and reported that their lawyers were frequently disrespectful toward them.

A principled approach to the delivery of legal aid services — one that upholds the equality guarantees set forth in the *Canadian Charter of Rights and Freedoms* — should consider the claim to civil legal aid services in a political, economic and social context. The introduction of the Canada Health and Social Transfer has meant that the allocation of resources for civil legal

aid is diminished and unstable. The absence of a legally recognized entitlement to civil legal aid has also made the provision of civil legal aid services vulnerable. Women's experiences of economic inequality and dependency make them less able to pay for civil legal aid services at a time when they have a heightened need of such representation. Failure of the substantive law to take account of women's experiences has further entrenched their disadvantage in the provision of civil legal aid services.

An interpretation of section 7 of the *Charter*, consistent with the equality guarantees under section 15, would expand the definition of "liberty" to take women's experiences into account and extend coverage to permit women to pursue their legal claims for support from former spouses on marriage breakdown in order to maintain their families. The section 7 guarantee of "security of the person" would include legal aid coverage to permit women to defend themselves from state action, as in child apprehension cases.

Finally, the *Federal Plan for Gender Equality* sets out the mandate for the federal funding policy to take account of the unequal treatment accorded to civil legal aid services and take corrective action.



## INTRODUCTION

The purpose of this report is to articulate principles that can be used to design and deliver civil legal aid services. We have started with the premise that legal aid is an essential element in the administration of justice and have based this report on the knowledge that the clientele for legal aid services in civil matters is overwhelmingly female: approximately two thirds of civil legal aid certificates are given to women, primarily for family law matters.<sup>1</sup>

We also take the position that decisions affecting both the delivery and the funding of legal aid should be subjected to an equality analysis. This obligation derives from the entitlements guaranteed by the *Canadian Charter of Rights and Freedoms*<sup>2</sup> as well as from federal commitments set forth in the *Federal Plan for Gender Equality* (SWC, 1995). The governmental obligations contained in these documents have established the expectation that civil legal aid services will be delivered in a manner that advances *Charter* values, as well as the goal of equality of access to the courts.

Part One of the report contains a literature review of low income women's legal aid needs, and describes the evolution of legal aid services and the manner in which women's legal aid needs have historically been addressed by legal service providers. It also clarifies the factors that have contributed to the design and delivery of civil legal aid services in Canada today.

Part Two of this report summarizes assessments of legal aid services provided to women in different regions of Canada. These sources of information confirm that the legal aid needs of Canadians, and of Canadian women in particular, are neither well understood nor well met. Part Three contains quantitative data regarding the usage and delivery of civil legal aid services in Canada.

To improve our understanding of women's legal aid needs, we undertook qualitative research into women's experiences with civil legal aid in Manitoba and Ontario. The objectives were twofold. First, we wanted to gain a better understanding of women's civil legal aid needs from a perspective that reflects the diversity of women's experiences. Second, through our qualitative research, we wanted to establish the information which needs to be considered if significant decisions surrounding delivery of legal aid services are to take gender into account. In Part Four, we report on the results of these focus group discussions.

The information that we derived from all these sources is integrated into the final section of the report which considers the principles which should inform the design and delivery of legal aid services for women. We wanted to set forth the social, political and economic realities that, to a profound degree, influence women's legal needs, so these might be taken fully into account by those who are providing or reforming civil legal aid services. Moreover, the *Charter* establishes the need to take these circumstances into account when considering whether, in the provision of civil legal aid services, substantive equality has been achieved. The companion guarantees of sections 7 and 15, it is argued, transform the legal aid needs

identified in the literature and in our research, into a legal entitlement to the requisite civil legal aid services for low income women in Canada.

## **PART ONE: THE EVOLUTION OF LEGAL AID SERVICES AND THE TREATMENT OF WOMEN'S LEGAL NEEDS**

### **Judicare**

The provision of legal aid services in Canada in the first half of the 20th century can be characterized as an ad hoc movement. Lawyers who provided legal aid services to low income clientele did so as an act of largesse. There was no legal entitlement to legal aid services. Nor did any organization exist to ensure that all those who needed subsidized legal services would receive them (Hoehne, 1989: 81).

However, as need outstripped the number of lawyers providing legal aid, it became clear that the haphazard delivery of legal aid services was insufficient. By the early 1950s, legal aid services were being organized in most provinces (Hoehne, 1989: 85). In 1951, Ontario passed legislation that established, by statute, the first legal aid plan in the province. More significantly, it was the first provincially funded legal aid plan in Canada (Reilly, 1988: 102). The primary feature of the plan included providing those requiring subsidized legal services with the same kinds of services available to paying clientele, and delivering those services through a private lawyer. This was known as the “judicare” method of delivery. While the delivery of legal aid services continued to grow in Canada, the breadth of the service that was available varied greatly throughout the country. Low income clients in Eastern Canada, for example, had far less access to legal aid services than poor people in the West (Hoehne, 1989: 92).

At the federal level, the government had demonstrated a commitment to alleviating poverty through the creation of the Canada Assistance Plan (CAP) as early as 1966,<sup>3</sup> yet it was not until 1972 that the federal government acknowledged that meeting the needs of the poor included the provision of a national legal aid program (Hoehne, 1989). During the initial stages of the debate regarding the federal obligation to establish a national legal aid program, the government's rhetoric focused on its constitutional obligation for criminal law and criminal procedure.<sup>4</sup> Legal assistance for the poor was therefore characterized as an essential element of an obligation to provide a poor clientele with the necessary access to the criminal courts. However, by the time the national program was implemented in 1972, the government had acknowledged that its financial support for subsidized legal services was an important component of an overall strategy of social reform (Hoehne, 1989: 113). In 1968, Prime Minister Trudeau outlined the government's vision of social reform in the Speech from the Throne (as quoted in Hoehne, 1989: 179, fn 24). “My government is deeply and irrevocably committed to the objective of a just society and a prosperous economy in a peaceful world.... My government is deeply concerned to provide and ensure increased justice, dignity and recognition to the individual.”

Legal aid, it appeared, was part of the agenda to create this just society. Through its acceptance of this responsibility, the government recognized that a national program was

needed in order to avoid a two-tiered system of justice in Canada: one for those who could pay, another for those who could not (Alberta, 1994: 185).

The introduction of federal funding for legal aid widely extended the provision of legal aid services to low income Canadians. However the *judicare* method of delivery proved to be demanding for the client: an individual was required to confirm that the problem he or she was experiencing was a legal one and go to a legal aid office. Once a certificate was granted, the client required the initiative to bring the problem to a lawyer who would provide legal aid services during office hours within the often intimidating surroundings of a law office. The lawyer, who was not required to have any particular expertise in the legal problems which are uniquely common to poor people, would then leave the client with the ultimate decision of how to proceed (Cappelletti et al., 1975: 101).

Putting these responsibilities on a low income person was considered onerous by those who wanted to extend access to the justice system to include disadvantaged individuals. Critics were skeptical whether this *judicare* model, given the burdens it placed on the non-paying clientele, could meet its objective of providing an effective guarantee of access to justice. In the book, *Toward Equal Justice*, the authors (Cappelletti et al., 1975: 100) summarized the prevailing critique of this model.

The individual responsibility on the applicant is heavy. This task [of identifying a legal problem] may never have been easy for the poor man whose cultural background may alienate him from the norms of the law, but it is far more difficult for him in the modern welfare state where his life is closely affected by a tangled skein of legislation.

The authors noted that the lives of poor people were regulated by the state to an extensive degree. Certainly, this was the case in Canada. By 1966, the federal government had begun to mediate the consequences of disadvantage through the Guaranteed Income Supplement for low income people 65 and older, and through the CAP which provided welfare to individuals who were otherwise unable to provide for their own needs (NCW, 1995). The provision of benefits established new relations between the state and those who were in receipt of benefits. An individual's receipt of such assistance often gave rise to a legal claim to entitlement in cases where the state had denied some aspect of the person's entitlement. These kinds of legal problems and the frequency with which they occurred, were unique to a low income clientele; the clientele who could afford to pay for legal services had infrequent contact with the law, and used lawyers for such matters as real estate/mortgage transactions, wills and estates, and other discrete occurrences (NCW, 1995b: 10).

However, the responsibility this system placed on poor persons to make sense of their situation was more than just burdensome. According to critics, the *judicare* system most probably meant that effective equality of access to the courts was unattainable. The Poor People's Conference in 1970 described the dissatisfaction of low income clients: "Legal aid in Canada is a system by the legal professional for the legal professional with total indifference to

the client — the poor...we recommend that neighbourhood law offices be opened for the use of poor people in order to ensure accountability and accessibility” (HWC, 1970).

### **The Introduction of Community Clinics**

Prodded by critiques of the judicare method of delivery, the policy on “legal needs” evolved from a belief that poor people needed the same services as paying clients, to a recognition that the state of being impoverished had specialized implications for the programming of subsidized legal services (Wexler, 1970). Consequently, clear initiatives were required which addressed the legal needs of low income persons. To encourage access, critics urged consideration of different methods of delivery, different services, a more holistic approach to providing legal aid and broader coverage. The poverty law scholarship also advocated a public legal education strategy which targeted the poor, and a law reform agenda which sought to influence the political and legislative attitudes responsible for poverty.

The community clinic model was pioneered in the United States as part of a strategy to eliminate poverty. In their influential article, “The War on Poverty: A Civilian Perspective,” Jean and Edgar Cahn expressed their support for the provision of poverty law services as an important component of the agenda to eliminate poverty. They cautioned, however, that direct input from low income clientele was necessary to ensure that subsidized legal services were responsive to their concerns.

To date the silence of the poor has deprived us of a major relevant source of information and insight. We have paid for the lack of this information in other social experiments — public housing, urban renewal, welfare programs — in large part because we have not taken steps to assure that the censorial power was effectively vested in the people who were the subjects of such experiments.... The need to avail ourselves of the views of the poor and to promote and subsidize the articulation of their felt needs and grievances becomes all the more critical in the context of comprehensive planning and monopoly power, where the commitment of resources is greater, the sources of dissent more readily silenced, and the scope of potential error increased many fold (Cahn and Cahn, 1964: 1330).

This passage reflected the broader concern that social programming designed to alleviate poverty had, to date, placed the locus of control for welfare state programs beyond the reach of the very people it was intended to assist. By “silencing” their voices, such programming was not likely to be responsive to the legal needs of poor people. More than that, however, the authors took pains to refer to “felt needs,” making a distinction between needs as subjectively experienced by members of impoverished communities and needs as analyzed and diagnosed by educators, social workers and other trained professional personnel.<sup>5</sup> By validating the subjectively experienced concerns of poor individuals, the authors signalled a new willingness to accept the contextualized nature of knowledge, one based on perspective and experience.<sup>6</sup>

In response to this American initiative and to calls for more geographically accessible legal services in Canada, a model of delivery was developed in the early 1970s that supplemented the *judicare* method of delivering legal services with “neighbourhood” or community clinics (Hoehne, 1989: 103). These clinics were mandated to address the specific legal problems of the poor and to take account of the extent to which the poor person’s interaction with the welfare state informed his or her legal needs. Engaging in more creative “lawyering” was now seen to be an essential prerequisite to designing appropriate legal strategies to access the justice system.<sup>7</sup> The clinics adopted a more expansive approach to legal needs because they emphasized “the potential role of legal services in the resolution of disputes between recipients and the machinery of the welfare state” (Canadian Bar Association, 1987: 118). By doing so, clinics were able to address the unique consequences of poverty for poor clientele requiring legal services.

In Canada, the Department of Health and Welfare nurtured the development of community clinics. This was no accident: Health and Welfare viewed the provision of legal aid services as a vital component of its welfare service, just as the Canada Assistance Plan was created as part of the government’s strategy to eliminate poverty. Clinics came to be seen as the forum which would expand the strategic boundaries for delivering services on behalf of a poor clientele. One of the primary goals for advocates working in this milieu became the transformation of the basic process of decision making into an empowering experience for the user of legal aid services. Such reforms were thought to provide affirmation of the dignity and worth of individual claimants.

### **The Failure to Take Gender into Account**

However, the access to justice movement — and the poverty law scholarship that reflected it — failed to differentiate clearly the compounding disadvantage experienced by low income people when differing forms of oppression intersected and multiplied. Thus, while there was great debate in Canada regarding whether the *judicare* model or the clinic model should be used to deliver subsidized legal services, less thought was given to the heterogeneity of the clients and the ways in which race, gender, age, sexual orientation, citizenship, geographical location, mental or physical ability might converge to affect their legal problems and, accordingly, their needs.<sup>8</sup>

In their review of the access to justice literature in Canada from 1977 to 1987, Mary Jane Mossman and Heather Ritchie (1990: 53) confirmed that academics paid less attention to expanding the concept of “access to justice” for women by creating new avenues of access, than to measures designed to increase the efficiency of the court process and for speedy resolution of disputes. Certainly, improvements in the technical administration of justice would benefit all people who come into contact with the justice system, including women. However, the theory behind this approach and the resulting commitment of resources to it, was not based on an equality analysis which identified the differential impact of race, class and gender on people’s legal problems and, accordingly, on their legal needs. The implicit focus seemed to be a male legal aid client and his problems. Reforms sought to make access to the justice system effectively available to all who required legal services, but were not

preoccupied with whether substantive justice — “results that are individually and socially just” (Cappelletti and Garth, 1978: 185) — would actually result.

This exclusive and narrow vision of the needs of the legal aid client is, in part, attributable to the source of the poverty law scholarship — academics and professionals who were “observers” of the justice experience rather than clients themselves. As a consequence, certain deficiencies tended to result: legal aid programmers never bothered to assess the legal needs of low income women nor the fact that their experiences would necessitate a different approach to the delivery of legal aid services and to eligibility and coverage criteria in order to provide them with effective access to the justice system. Furthermore, even when the concept of “access to justice” eventually expanded to include subsidized legal services for new groups of litigants, the focus of this broader approach was not a commitment to gender equality, but better representation in matters of environmental standards and consumer protection (Cappelletti and Garth, 1981: xii).

Even when programmers did turn their attention to providing legal aid services which women would predominately use, their attitudes were informed not by empirical evidence of poor women’s legal needs but by an intention to provide the same legal services that were available to paying clientele.<sup>9</sup> As a result, the access to justice movement has not taken into account the uniquely stark economic reality of women as a result of their societally gendered roles as “unwaged” workers in the home or as poorly remunerated workers outside the home. It also has not examined the linkage between women’s experiences of poverty and their experiences as victims of discrimination based on age, race, citizenship, sexual orientation, and mental or physical ability. The failure to take these factors into account has meant that legal aid programming continues to fall consistently short of meeting the needs of the constituency of low income women.

Other sources confirm that the consequences of historical inattention to the legal needs of women resonate to this day. In 1993, the Federal/Provincial/Territorial Working Group of Attorneys-General (1993: iii) began its report, *Gender Equality in the Canadian Justice System* with the following quote from former Supreme Court of Canada Justice Madame Bertha Wilson: “I think that a distinctly male perspective is clearly discernible [in the law] and has resulted in legal principles that are not fundamentally sound and should be revisited as and when the opportunity presents itself...”

In detail, the report confirmed the breadth of discrimination that women encounter in the justice system: substantive law bias, procedural law bias and, notably, bias in respect of women’s ability to access the justice system.

## **The Contribution of Feminist Legal Theory**

Feminist scholarship exploring the quest for equality before the law has accepted, as a premise, many of the classic problems confronting low income clientele. For example, a persistent theme of the literature considering access to justice is the manner in which the law tends to regulate the lives of people who have had no voice in the law’s creation. This

description also characterizes the manner in which women's experiences have been regarded, or rather disregarded, by the law. However, what is unique about women's experiences in this regard, according to feminist legal theorists, is the extent to which the silencing of women's voices in respect of their legal needs and the judicial disregard of their experiences is attributable to the systemic bias — substantive as well as procedural — present in the law. For example, traditional legal methods developed to respond to the experiences of men have placed much of women's lives beyond the reach of a rights-based jurisprudence.<sup>10</sup>

Former Madame Justice Bertha Wilson (1992: 140) described the reason for this lack of recognition in the following way: "I think we are now forced to recognize that family privacy has proved a two-edged sword. It has served the male members of the society well but it has done untold harm to those dependent on them."

This comment suggests that the silencing of women's voices is closely linked to notions of privacy in the law which have historically left family relationships largely unregulated. Other experiences that give rise to legal problems not traditionally experienced by men — discrimination on the basis of sex, for example — have similarly received inadequate legal attention. This omission is largely attributable to legal categories designed to accommodate causes of action constructed by and for men. Women's experiences within the home, for example, have not been recognized as entitling them to wages and, thus, the corresponding array of employment protections and pension entitlements do not accrue to this work.

In their book, *The Hidden Gender of Law*, Jenny Morgan and Regina Graycar (1990: 3) wrote: "Legal practitioners have always known that people's lives did not readily fit into legal categories, but this has not often been reflected in a legal system which fragments its treatment of people's problems into categories such as tort, crime, family law etc."

Women whose experience of discrimination includes factors in addition to gender are also disadvantaged by the practice of fitting people's problems into discrete categories. In commenting on the dangers of treating the experience of discrimination this way, Nitya Iyer (1993: 181) wrote: "The categorical approach to equality fails to comprehend complex social identities. It therefore cannot accurately describe relationships of inequality, which is a precondition both for redressing particular rights violations, and for succeeding with the larger project of social reform."

Thus, she warned, women should not be required to speak in an abstract or unitary voice. Nor should they be required to speak in words other than their own, or fit themselves into predetermined and simplistic categories. Doing so would have the effect of denying, rather than making known, their experiences.<sup>11</sup>

The application of an equality analysis to the question of poor women's legal aid needs has been considered most frequently in the feminist academic scholarship of Mary Jane Mossman. In her writing, Mossman (1993: 40) challenges those responsible for the design and provision of legal aid services to consider the extent to which gender has a bearing on the delivery of legal aid services and, further, the extent to which current legal aid arrangements satisfy the



policy and legislative objectives of equality for men and women. For example, she questions the usefulness of categories for legal aid coverage in view of the fact that they were constructed without women's experiences in mind, and without women's participation. She has also taken issue with the "neutrality" of decisions to grant certain legal aid matters priority and to allocate more stable resources consistently for criminal legal aid matters. This last decision, she points out, perpetuates the priority given to "public" criminal matters rather than those which arise in the "private" realm of the family (Mossman, 1994; Gavigan, 1995; Hughes, 1995).

Such critiques are based on an ideal of substantive equality for women: a system of justice that is equally responsive to women's legal problems, and that recognizes that any attempts to improve access to justice and to ensure that the law improves their lives must be rooted in an equality analysis which takes the circumstances of their situation — in its diversity — into account. The most recent calls to take gender into account in the design and delivery of civil legal aid services have established an agenda for action: they seek to redress women's "voicelessness," the failure of the legal process to attend to the diversity of women's legal needs, and the delivery of legal aid services which continue to remain inaccessible to large numbers of women.



## **PART TWO: CONTEMPORARY ASSESSMENTS OF LEGAL AID SERVICES FOR WOMEN**

A number of provinces have recently assessed their legal aid services from a perspective that takes gender into account. They have focused on:

- accessibility — the extent to which legal aid services are user-friendly and sensitized to the diverse communities which they serve;
- coverage and financial eligibility — whether the client has been able to access legal aid for specific problems and whether the client met the financial eligibility criteria; and
- quality of service — how the client perceived the quality of service received from legal aid personnel and lawyers.

### **Accessibility**

In many provinces in Canada, basic issues of accessibility have yet to be resolved. In Alberta for example, women cannot make appointments with a legal aid counsellor, but must physically go to the legal aid office and wait to be seen. Women have reported that if they arrive by 7:00 a.m. they will probably see a counsellor the same day (LEAF-NB, 1996: 35). For battered women, this means waiting for an entire day, often with children, at a time of exceptional emotional, financial and psychological distress. In New Brunswick, women are not always entitled to see a legal aid counsellor; for eligibility is sometimes assessed over the telephone (LEAF-NB, 1996: 120).

Abused women in Ontario who were surveyed in 1991 knew very little about the types of legal matters covered by the province's legal aid plan, nor did they know how to apply for services or the financial criteria that must be met to qualify (ABT Associates, 1991: 191). Shelter workers were sometimes able to provide abused women with some information about the process of applying for legal aid. However, the rapid pace of change to Ontario's legal aid plan has meant that shelter workers are unable to provide abused women with current information.<sup>12</sup> Recent statistics compiled for the Ontario Legal Aid Plan suggest that people may not even be applying for legal aid because they believe that there is no more legal aid (Law Society of Upper Canada, 1997: 4).

Subsidized legal services, it appears, have not kept pace with the heterogeneous society that requires legal aid for its problems. Many ethnic, racial and linguistic minorities have little or no awareness of the services provided by legal aid (Abt Associates, 1991: 196). Language barriers create additional difficulties for immigrant women wishing to use legal aid services for their problems.<sup>13</sup>

People with disabilities have identified difficulties physically accessing legal aid offices. When they have been able to do so, they have encountered legal aid personnel who are insensitive, impatient or awkward in their dealings with this clientele (Abt Associates, 1991: 207).

Aboriginal women, particularly on reserves, may lack the community support they require to access legal aid. Bands that do not want to acknowledge the problem of domestic violence may attempt to prevent a woman from physically leaving her community or may isolate the abused woman to discourage her from seeking legal aid. As a result, few abused Aboriginal women get to the stage of applying for legal aid. When they do, they encounter the same barriers as other abused women, compounded by their distinct status as Aboriginal people and their isolation in remote communities (Abt Associates, 1991: 194).

Women wishing to receive subsidized legal services for family law matters have encountered significant difficulties accessing lawyers willing to act on their behalf, even in urgent cases. Women not living in large urban centres frequently experience difficulty locating lawyers who are prepared to advocate on their behalf. This poses an insurmountable barrier for clients from rural regions who are required to use counsel outside of their community, since many legal aid recipients are on social assistance and cannot afford the transportation expenses associated with visiting their lawyer (Agg, 1992: 83).

Lawyers who can provide effective and sensitive representation to abused women are few in number, especially in rural regions. Lawyers who can provide effective representation to abused women whose first language is neither English nor French are even scarcer (OAITH, 1997: 8). Individuals with disabilities are sometimes labelled “difficult to work with” and, as a result, have similar difficulties finding lawyers sensitive to their experiences and prepared to represent them (Abt Associates, 1991: 211). These problems of accessibility are, in part, attributable to the poor remuneration provided to family law lawyers in legal aid cases, especially in contrast with funding for lawyers in criminal legal aid matters. In view of this, it is not surprising that the 1993 report of the Canadian Bar Association on gender equality in the legal profession recommended that the federal and provincial governments provide adequate and appropriate legal aid funding in family law cases throughout Canada. It further recommended that the federal government establish a national civil legal aid tariff, a suggestion designed to encourage lawyers to practice family law (1993: 213). These recommendations have yet to be implemented.

### **Coverage and Financial Eligibility**

Given women’s traditional roles as “unwaged” caregivers and their historical reality as the poorer of the poor in Canada (NCW, 1994: 69; Agg, 1992: 100; NCW, 1996: 34-35), it is not surprising that other assessments of legal aid programming in Canada have confirmed women’s need for coverage for poverty-related legal problems such as social assistance appeals, landlord and tenant matters, employment-related issues and pension benefits entitlements (NCW, 1995a: 10-11). Yet despite this need, many provinces do not provide legal aid coverage for the host of poverty law matters which the low income clientele encounter. For example, most provinces do not provide automatic coverage for tenancy problems, social assistance appeals or worker’s compensation matters.<sup>14</sup>

The coverage for family law matters is uneven. In New Brunswick, legal aid for family law matters is available only to women who have been the victims of domestic violence (Hughes,

1997: 18). In Ontario, as of April 1, 1996, coverage was limited to cases where it was necessary to protect the safety of a spouse or child, to protect an established parent–child bond and provide support for parents with no income and access in cases of abuse. Coverage has since been extended to include changes to custody and child or spousal support when custody has changed (Law Society of Upper Canada, 1997). In British Columbia, effective 1997, the Legal Services Society restricted coverage for changes in custody or access orders as part of a fundamental initiative to reduce costs by \$14 million (Legal Services Society of BC, 1997). Women in Newfoundland have reported difficulty accessing lawyers for custody and maintenance cases.<sup>15</sup>

The diversity of women’s experiences has a direct impact on the kinds of legal problems women have. These needs must be assessed and accounted for if legal aid services are to be provided in a non-discriminatory manner. To date, however, coverage has not been extended to respond to the legal needs of the diverse population of Canadian women. For example, many women have no children but require legal aid services to pursue non-custody-related claims. The legal problems of older women, for example, most often involve issues arising from decisions made on their behalf, either from the exercise of powers of attorney, or arising from decisions pertaining to their health care. Older women, who comprise the vast majority of old people, also require legal information and advice to assist them in exercising their rights in respect of their tenancies at residential care services, their entitlements to long-term care in hospitals and to community care, for example. They may also be subjected to financial abuse and, in this regard, may require representation to recover property and finances that have been taken from them by individuals exercising their powers of attorney in an abusive and illegal manner.<sup>16</sup> There is no comprehensive coverage for these kinds of matters in Canada.

There are other constituencies of women for whom it is neither practical nor culturally appropriate to leave a marriage and for whom custody and access issues are similarly irrelevant. For many of these low income women, particularly those who are in abusive relationships, legal aid services which would permit them to assume greater economic independence would be more useful. Legal aid for wrongful dismissal actions, and to appeal decisions pertaining to the eligibility for Employment Insurance for example, would be particularly meaningful.

Furthermore, women whose experience of discrimination goes beyond that of gender — including visible minority women, immigrant women, refugee women, women with disabilities and lesbians — have a heightened need for legal assistance to permit them to pursue anti-discrimination claims before human rights tribunals and in the courts.

While all individuals seeking residency in Canada may be disadvantaged when they are denied legal aid services to assist them with their claims, women’s experiences take on a unique gendered dimension. Women’s claims for permanent residence in Canada are often linked to their relationship to persons who have sponsored them and pledged financial assistance. Their claims for residence, therefore, depend on the continuing support of their sponsors.

However, a sponsored relationship may be fragile. Women who suffer abuse at the hands of their sponsors and who flee the abuse may see their sponsors withdraw support. Where the support has been withdrawn, an application must be made on humanitarian and compassionate grounds for permanent residence, a technical and paper-intensive procedure. In Ontario, for example, legal aid certificates are not available for assistance with such procedures.

Similarly, women who wish to claim refugee status on the basis of gender persecution also require legal aid services to argue such a claim. This need is particularly critical when the persecution is based on an experience of domestic violence — a challenging argument to make since the definition of persecution does not easily accommodate such experiences of persecution within the private realm of the home. It is an argument that an individual unfamiliar with the legal process is unlikely to be able to make without representation.<sup>17</sup>

Expanded eligibility and cost-recovery programs in many provinces have meant that low income women as well as those who live slightly above the poverty line (“the working poor”) have been able to access legal aid. Yet, repayment of legal fees can create extreme hardship for women, particularly those who have left abusive relationships and are struggling to establish their economic autonomy (LEAF-NB, 1996: 38).

If financial guidelines cannot be met, this can create extreme hardship for the woman who has no ability to borrow money from family or friends. Increasingly, women who cannot afford a lawyer are appearing in court unrepresented, in matters in which their former partner is represented by counsel (Law Society of Upper Canada, 1997: 4). The battered woman who cannot access funds to retain a lawyer privately may be forced to remain in the abusive relationship (Law Society of Upper Canada, 1997: 4).

## **Quality of Service**

Assessments of legal aid services confirm that women have expressed concerns regarding the quality of service they receive from the family law bar. Women complain about their lawyer’s inexperience, and their lack of empathy for the woman’s experience in question; in short, what women describe as “second-class service” (Agg, 1992: 85). The Ontario Association of Interval and Transition Houses (OAITH) reports, for example, that as a result of time restrictions imposed on lawyers practicing family law, some women have been abandoned by their counsel in the middle of court cases, because the maximum time permitted for such representation had expired. Women were left either to represent themselves or to rely on duty counsel who were similarly unprepared to step into complex cases (OAITH, 1997).

Following the recent reduction in the time permitted by lawyers to bill for family law cases in Ontario, some abused women have been told that they must personally serve legal papers on their abuser (OAITH, 1997: 3). Suffice it to say that such a suggestion demonstrates an astounding absence of good judgment and sensitivity on the part of the lawyer purportedly acting in the abused woman’s best interests. Given these and other acts of insensitivity on the part of lawyers identified by our research, it is apparent that women must be able to continue to exercise, in a meaningful way, their right to counsel of their choice (OAITH, 1997: 8).

This also suggests that lawyers need more specialized training in the dynamics of abuse so they are better able to represent abused women, and legal aid programmers need to monitor and screen lawyers to identify those who have received this training (OAITH, 1997: 8).

Clients with disabilities reported more positive experiences regarding their applications for legal aid when they had been able to avail themselves beforehand of a patient advocate who prepared them for the meeting at legal aid or accompanied them (Abt Associates, 1991: 207). In the absence of resources to provide women with specialized advocates who can accompany them to fill out legal aid applications, the solution clearly seems to be education of legal aid administrators to ensure they can accommodate the needs of this clientele.

Education is also required to enable legal aid personnel to address the needs of abused women more effectively. Advocates for abused women report that, in some instances, legal aid personnel have used various tactics to coerce abused women into mediation (OAITH, 1997: 4). Training, which would highlight the inherent power imbalance which makes abused women engaging in mediation clearly inappropriate, and which would emphasize women's rights not to be forced into mediation, is clearly needed.

Moreover, even when some thought has been given to making legal services and information accessible to the clientele who might use them, women who wish to avail themselves of subsidized legal services continue to encounter such barriers as not being understood in their language, insensitivity to their culture by those responsible for administering legal aid services, and feeling intimidated with respect to the application process (Abt Associates, 1991: 179-184).

Assessing the diversity of women's legal aid needs will provide effective, responsive legal aid services. It will also clarify, for legal aid programmers, the demography of the current and future clientele legal aid was created to serve.





## **PART THREE: QUANTITATIVE DATA**

Provinces are not required to keep data on usage of legal aid disaggregated by sex. Thus, we do not have current national information on the number of applications made by women for civil legal aid, or the number of these accepted or refused. Nor do we know the kinds of matters for which women sought and were rejected for legal aid. There is also no information available on the gender breakdown of civil legal aid applications that were accepted and rejected.

However, quantitative data available from Statistics Canada confirm that there is a substantial need for legal aid programming for civil legal matters. In 1995-96 a total of 975,577 applications for legal aid for criminal and civil matters were received (Canadian Centre for Justice Statistics, 1996: Table 9). Of that number, 642,742 were approved — 259,538 applications for criminal legal aid and 319,773 for civil legal aid.<sup>18</sup> The available data on refused applications indicate that civil legal aid applications were refused much more frequently than criminal legal aid applications: 103,522 rejected civil legal aid applications vs. 66,501 rejected applications for criminal legal aid (Canadian Centre for Justice Statistics, 1996: Table 10). Although data are not available to produce a national tally, what is available indicates that civil legal aid applications were rejected almost twice as often for reasons other than financial ineligibility (Canadian Centre for Justice Statistics, 1996: Table 12). The rejection of civil legal aid is most likely due to a reduction in the kinds of matters funded by legal aid plans (Canadian Centre for Justice Statistics, 1996: 74).

The judicare system continues to be the predominant method of delivering legal services in Canada today. Legal aid is delivered by private lawyers who bill on a fee-for-service basis or by staff lawyers who provide legal counsel. Overall, 27 percent of direct legal service expenditures in 1995-96 involved payment to staff lawyers, while 73 percent of payments went to private lawyers (Canadian Centre for Justice Statistics, 1996).



## **PART FOUR: FINDINGS FROM THE QUALITATIVE RESEARCH**

### **Introduction**

The government-authored *National Review of Legal Aid* (Alberta, 1994: 185) has confirmed the absence of an understanding on the part of governments of what the low income population requires of legal aid services. Research recently completed for The Ontario Legal Aid Review also identified the lack of information pertaining to legal needs as a significant drawback, and encouraged “extensive consultation and the setting of priorities regarding legal needs” (Bogart et al., 1997: 69). The failure of legal aid plans to meet the needs of low income women is attributable, in part, to a failure on the part of legal aid programmers to consult with those using legal services (see for example, Cahn and Cahn, 1964; White, 1988) to determine their needs. This suggests that the manner in which legal needs are determined — how they are defined and assessed — will inform, in a fundamental way, the kinds of subsidized legal services that are provided, and how they are delivered.

Mary Jane Mossman has advocated for an “experience-based” approach to evaluating women’s legal needs, which would assess whether the current legal aid coverage is meeting the objective of gender equality. She has also identified an approach to the design of civil legal aid services that would take, as a starting point for reform, the unique socio-economic vulnerabilities of women (Mossman, 1993: 35). We have accepted the value of using an approach to data gathering that permits personal accounts to be profiled and, to this end, we have chosen to broaden our understanding of women’s legal aid needs using qualitative research. This approach seemed particularly appropriate to the subject of legal aid needs, since it would permit women to speak out about their experiences with the legal aid system and provide us with the richness of detail befitting the diversity of women’s experiences. It would also, appropriately, use women’s voices as a starting point for assessment, rather than concepts of “access” and “justice” disassociated from women’s experiences.

A qualitative assessment of women’s legal aid needs was undertaken in January and February 1997. To maximize the opportunity to obtain a broad range of information, we chose to hold the focus groups in two different provinces: Manitoba and Ontario. These locations were chosen for a number of reasons: Manitoba was attractive because it has been the site of some of the most innovative legal aid reform in the country, and we were interested in how women experienced these innovations. Moreover, we were able to access a diversity of women in this province. We held two focus groups in Winnipeg with single mothers and Aboriginal women and one focus group in Brandon with rural women.

Ontario has recently implemented extensive cuts to its legal aid plan, and we wanted to assess women’s experiences during this critical time so we would be well positioned to make a contribution to the discourse regarding appropriate legal aid services. Toronto was chosen as the site of our focus group research in Ontario because we were able to access a good diversity of community organizations. It was also relatively economical. Three focus groups

were held in Toronto with older women, immigrant and refugee women, and women who had been abused by their partners.

To organize the focus groups, regional researchers in Manitoba and Toronto contacted community and advocacy organizations for women, legal aid lawyers and shelter workers to explain our project and to ask them for information regarding women who they thought might be willing to participate. In addition, flyers were prepared advertising the focus groups, and asking interested women to contact the regional researcher. In advertising the focus groups, women were told that their participation would be confidential, that child care would be available, and that the women would be modestly compensated for their participation. The number of women who indicated their interest in participation ultimately determined which focus groups were held.

Participation in the focus groups was limited to between five and 10 women in each group. Focus group participation was not restricted to those women who had received legal aid certificates since we were also interested to know how women coped when their legal aid applications were rejected. The regional researchers who led the focus groups raised, with the participants, the following issues.

- How accessible is the legal aid system?
- What are women's experiences with the coverage criteria and how well does it meet their legal needs? (They were also asked about the financial eligibility criteria, their views on the fairness of the criteria and how they coped when their application for legal aid was rejected.)
- What were the women's perceptions of the quality of the legal aid services they received, both from legal aid personnel and from their lawyers?

Toward the end of each focus group, the facilitator summed up, for the participants, the understanding of what the participants had said, and gave them the opportunity to correct the facilitator's understanding of their statements. A methodologist attended each focus group meeting and organized the information emerging from the groups.

A report of this research follows. It identifies the prominent themes recurring during the group meetings which seemed to be salient to the women. The strength of the report lies in the similarity of the experiences of the women: many who spoke to us had sought legal aid for family law matters. Many had been completely dependent economically on their husbands prior to marriage breakdown. Legal aid was, therefore, critical to their ability to obtain a lawyer to represent them in their legal disputes. The vast majority of participants had received legal aid certificates for their legal problems. The women with whom we spoke were all interested to share their experiences with us, and that made it possible for us to canvass a wide range of issues with them.

At the same time, the report has its limitations, significant in some cases. We did not fully exploit the wide variety of resources available to us to recruit participants, and older women and women who had experienced abuse were recruited from only one or two community organizations. We also did not adequately plan to hold additional focus groups in the event of a poor showing. A case in point is the focus group held with abused women. Prior to the date, a number of women had indicated their interest in attending the focus group. However, only one woman attended and so an interview was conducted with her. That women in the midst of profound personal, emotional and financial upheaval would not give priority to a focus group to discuss their legal aid experiences is not surprising. However, we did not anticipate this possibility and did not put aside additional time or resources to hold another focus group with this constituency.

The rationale for organizing focus groups based on common criteria, such as age or ethnic origin, was to facilitate ease among the participants in the group. This was intended to enhance the participants' comfort level; a participant would be among other women who had also identified themselves as Aboriginal or immigrant, for example. This common ground would also permit issues to be explored in greater detail, since the similarity of the participants' backgrounds could be easily established. However, important individual differences existed among these women, reflecting the broad diversity of experience and outlook within any group of women. We have been conscious of this in the report that follows, and we have sought to derive some commonality from the experiences while, at the same time, avoiding an oversimplification of the personal accounts. Where it was necessary to enhance our understanding of the existing legal aid services, we conducted interviews with legal practitioners, shelter workers and legal aid personnel.

Given the small number of focus groups and the limitations in the report, caution should be used in generalizing from these results. The results we have reported should not be taken as representative of the legal aid needs of the larger communities of women. Qualitative data's strength lies in the richness of detail that is not usually present in quantitative research. But, qualitative data do not permit broader conclusions to be drawn regarding the experiences of similar groups of constituencies as one may do with quantitative research. Rather, the participants' experiences with legal aid as reported in the following section, can be taken as trends that suggest the kinds of problems women are having with the legal aid system, problems that reflect their socio-economic reality.

This is not the comprehensive assessment of women's legal aid needs in Canada that needs to be undertaken, but it is a start. The qualitative research we have conducted reflects the reality of poor women's problems, and, therefore, puts their legal needs in context. We hope it will stimulate a further and more extensive examination of women's legal aid needs throughout Canada, in a manner that is grounded in the complicated experiences of women's lives.

The appendix to this report contains a description of the legal aid plans in Manitoba and Ontario as well as the community organizations and other individuals contacted, and additional details pertaining to the recruitment and composition of the focus groups.

Most of the women participating in the focus groups had accessed, or tried to access, legal aid for the following problems: separation, divorce, child custody, car accidents, tenancy evictions, restraining orders, division of personal property during separation and divorce, refugee claims and issues arising out of the temporary and permanent apprehension of children by authorities. There was also one charge of fraud and one traffic fine. Most women discussed their experiences as clients of the family law system.

Six focus groups were held:

- women abused by their partners (Ontario)
- older women (Ontario)
- single mothers (Manitoba)
- immigrant and refugee women (Ontario)
- rural women (Manitoba)
- Aboriginal women (Manitoba).

## **Accessibility**

Women were asked about their experiences applying for legal aid and the ease with which they were able to access the legal aid system in view of their culture, language, geographical location, etc.

The literature describing the evolution of access to justice for poor people has described the burden placed on the poor person who needs legal aid services. This person, it has been noted, is required to overcome reservations and feelings of intimidation in order to first apply for legal aid and then approach a legal aid lawyer.

The data we compiled confirmed that many of the women found the process of applying for legal aid quite confusing. For example, women did not easily understand the criteria used to assess their application for legal aid and, for some women, the feelings of discomfort that can accompany this experience can be insurmountable.

*[The legal aid lawyer] comes in once a week and I asked, like, just so I can see him, and they said, "What for?" And I said, "Well, it's concerning a driver's licence fine." And they said, "Well, he doesn't deal with fine option and stuff like that." Like, I just misunderstood her and I said, "Well, yeah. That's what it's for." And that was it. She didn't tell me I could come in and apply anyway, or just talk to him about some kind of advice or anything like that. Like, I wasn't offered anything like that. I was just, like, basically turned right down.... At the time also...I wanted to get child support from my baby's father and some kind of like, agreement or something. And after I was turned down for that, I was hesitant to go again because I didn't want to be turned down again (rural women, Brandon).*

The impracticality of requiring legal aid clientele to identify the nature of the legal problem, or that the problem is indeed a legal one, has been well documented (Cappelletti et al., 1975). In Ontario, administrators have responded with initiatives designed to make the process of applying for legal aid more transparent (Abt Associates, 1991: 186). Despite this effort, our data suggest that far more changes are required to make the application process truly accessible. One woman who had been refused legal aid four times for a refugee claim needed a lawyer to persuade legal aid personnel of the strength of her case.

*She worked on legal issues I didn't even know. So I guess that was the problem that I had in the beginning. If I knew those legal issues, I could have told them. But she talked with me for a long time. I know that this case was a case that was good enough to win. But she said, "Well, you didn't tell them... If we had known this, this, this, this, I don't think they would have turned you down (immigrant and refugee women, Toronto).*

The low tariff paid to family law lawyers who take legal aid certificates has made the practice of serving legal aid clientele financially problematic (Canadian Bar Association, 1993). This means that many women cannot access legal counsel who are trained to understand the complexities and dynamics of abuse, and able to serve the abused client. Other women may not be able to find a lawyer who will accept legal aid clients.

In Ontario, many family law lawyers have stated that they can no longer meet their professional obligations to provide the best legal advice possible, within the unreasonable confines of the reduced tariff limits. The result, not surprisingly, is a reduction in the number of family law lawyers willing to take legal aid certificates (LEAF-NB, 1996). Women in Manitoba also found this to be a problem. They reported that most lawyers in the smaller towns had stopped accepting legal aid cases since it was not financially worthwhile.

*But legal aid doesn't pay the lawyers enough for it to be worth their time, so it came down to a strictly business decision. She said "No more legal aid." So then these real women have nowhere to go. They have no transportation to get in here and, you know, they're stuck in custody battles and divorce, separation, and they've got nowhere to turn (single mothers, Winnipeg).*

*There's five lawyers just in Carmen. None of them will do domestic legal aid (single mothers, Winnipeg).*

## Coverage and Financial Eligibility Issues

Women were asked whether they were able to obtain legal aid for their particular legal problems. They were also asked about the financial eligibility criteria, their views on the fairness of the criteria and how they coped when their application for legal aid was rejected.

The law's failure to recognize women's experiences is also apparent in the kinds of matters for which legal aid is available.<sup>19</sup> For example, the failure of most plans to extend legal aid coverage to poverty law matters has a gendered impact on women who comprise the majority of poor people in Canada (NCW, 1994: 69). The women in this study reported that the denial of coverage for certain legal problems severely hampered their ability to resolve their problems effectively. They identified considerable overlap in the personal, social and legal aspects of their problems, yet encountered constraints on their ability to access legal aid for many of their legal matters (e.g., division of property matters and reimbursement for loss of personal property). This was equally frustrating for women in Ontario and Manitoba.

*One of the times that I was asking for my furniture was the same thing S. went through. She left in the night, on her own, just with nothing. And I had went...that's when I had went to the shelter. And when I went back to the house, everything was...the last time that I had asked for legal aid, and he had stolen all the furniture out of the house and burnt whatever he couldn't take. In the apartment, on the floor. And then when I had asked — I had two children at the time, um, or one — and I didn't have anywhere to live. I had no furniture. I had nothing and they just said, you know, they didn't take personal stuff (single mothers, Winnipeg).*

*But we talk about the lawyer's part in this, first of all, they can only apply for a certain thing. You can have \$1,500 for this, but for God's sakes don't look at this. You see what I'm saying.... So you can have part of your rights but you can't have them all (older women, Toronto).*

Legal aid is available for those accused of criminal offences for which there is a reasonable likelihood of incarceration. It is not, by contrast, available for accused persons where a conviction will not result in incarceration. This distinction has gendered consequences, since most women are not charged with offences for which incarceration is the penalty. Yet there are other serious consequences of a conviction. As one woman pointed out, the outcomes of custody disputes and child apprehension cases can turn on the presence of a criminal record. Women who are facing criminal charges and who are denied legal aid services for criminal offences challenge the view that jail is the most serious threat the state can offer.

*Because there's a lot of women who are single parents and shoplift in the night I know a lot, for a lot of women and a lot of time if they get caught with that, if they have that as an offence, and [Child and Family Services] is involved it becomes a bigger problem. I guess that's why I brought that one up (urban Aboriginal women, Winnipeg).*



There is little information in the literature and empirical reports about clients with legal problems who do not qualify for legal aid and yet are unable to afford a lawyer. One consequence appears to be that individuals appear in court unrepresented. In Ontario, the dramatic reductions in legal aid certificates have been devastating. According to the 1997 annual report of the Ontario Legal Aid Plan (Law Society of Upper Canada, 1997: 3-4).

The human cost of this decline in legal aid certificates has been staggering. People are going unrepresented in court in both criminal and family matters; in family law, they are now unrepresented as well in the preparation of the often complicated documents that must be filed with the court to get procedures started. These unrepresented people in family law are predominantly women, and many of them face former spouses who are themselves represented.

Many women in our focus groups were not on social assistance when they tried to access legal aid. They were either working outside the home, often in low paying jobs, or working inside the home where there may have been joint assets in the marriage. These women did not meet the financial criteria set by legal aid, but found themselves unable to meet the financial demands of hiring private lawyers.

*All I'm saying is that if you can get legal aid, it's only available to those people who have very, very low income. And I don't know what the problems are but I certainly was never able to use the service. And we're talking about four different issues (older women, Toronto).*

As one paralegal who participated in a focus group observed:

*I've worked with numerous women in this kind of situation, though, and if they have any resources at all they are quickly depleted (older women, Toronto).*

Most women fleeing abusive relationships, to protect themselves and their children are suddenly without possessions, assets or access to financial resources as a direct result of their legal problems. However, they too may find themselves ineligible for legal aid as they are still seen, for eligibility purposes, as part of that same family unit or as having the same financial resources as when they were in the matrimonial situation. Women in our focus groups indicated that the choices they were required to make exacerbated their struggle and, essentially, forced them into poverty to protect themselves and their children.

*What I would like to say is I tried not to [use legal aid] and many women...like, I even had no heat in my house. I was surviving and lots and lots of people knew it. Social workers, different people, you know. But, you know, rather than go...like, I was trying to pay for it myself. I was trying to survive and pay for it myself. That's what I was trying to do. And I did that until they cleaned me out (older women, Toronto).*

## Quality of Service

The women were asked about their perceptions of the quality of the legal aid services they received, both from legal aid personnel, as well as from their lawyers. The quality of services received from legal aid offices is often tied closely to accessibility issues.

The importance of training legal aid personnel to be respectful and to give the client's application full consideration was a major theme in our focus groups. Some participants found that legal aid personnel assessed their eligibility rather summarily.

*What had happened was my husband had gone berserk and attacked me that Friday night. So I...that Friday night, instead of, like the kids were sleeping. I had run out of the house and I felt. And I went and I stayed at a friend's and I couldn't do anything until the Monday...*

*He basically told me right away that they weren't even going to bother looking at my application or anything because what he said was, "Well, I see you're dressed pretty well. Why are you applying for legal aid? You don't look to be the type to need legal aid, you know".... Like, that was really ignorant and really rude and, you know, I just left my husband. I didn't have the house. He had both vehicles. I didn't have anything, you know (single mothers, Winnipeg).*

Some women clearly had positive experiences with their lawyers. Facing the unmatched resources of the state can be overwhelming for the unrepresented client, and many women in our focus groups expressed relief that they had representation. One woman in facing an order from Child and Family Services to remove her children permanently from her care obtained a lawyer at the 11th hour. Although the Child and Family Service worker was already in court trying to obtain the order, her lawyer persisted.

*You know, so my worker took me aside and she goes, she goes, "What's with your lawyer." And I said, "I'm sorry, but I mean, I have to start sticking up for my rights here because...and I need somebody on my side because, you know, too much has been happening." And so I felt, I guess a little bit victorious, you know. It was a really good feeling to know that somebody was actually on my side and, you know, yeah, then I actually had hope (urban Aboriginal women, Winnipeg).*

Clients who can afford to pay a lawyer have the opportunity to exercise their right to counsel of their choice. Women who have experienced abuse and who cannot afford a lawyer have emphasized the importance of being able to exercise the same prerogative in order to access lawyers who are trained to be able to represent the abused client effectively. However, the low number of lawyers in Manitoba and Ontario who will take legal aid certificates for family law matters curtails this choice in practice. Moreover, Ontario has taken steps, as part of its

cost-cutting measures to restrict the right of the client to change lawyers unless there are special circumstances (Law Society of Upper Canada, 1995). And yet, women in our focus groups were able to offer tangible proof of the benefit of being able to change lawyers.

*Well, it took me two and a half years to finally get my kids home.... Wasn't seeing any major results. Child and Family Services got a real raunchy report done on me and it finally took this last week, well, this Wednesday, to finally get it done. I have gone through five and nobody really moved their butt to do anything for me...so my kids went back into care and I just got them. Took me six lawyers (urban Aboriginal women, Winnipeg).*

A woman who has experienced abuse often comes into contact with the justice system at a time of physical, emotional and financial upheaval. Abused women have been perceived by those offering legal service to them as difficult or needy clients (NCW, 1995; Abt Associates, 1991). The women in our focus groups in both provinces described the extent to which the relationship with their lawyers can become dysfunctional and in some cases, outright abusive.

*I found out that this thing called "cause" that you're not guaranteed support unless you can...unless there's this thing called "cause," and it's if your spouse either caused you to be injured or.... Now, I took that information, photocopied from a legal book...and he just started screaming and yelling at me not to quote him the law. And then he's not going to do anything about it (older women, Toronto).*

*And told to "shut up." That's the other [thing] that they do (older women, Toronto).*

*And when it got worse, he just said to me, "As far as I'm concerned, your case is closed" and hung up on me (single mothers, Winnipeg).*

This suggests that, notwithstanding efforts to educate legal aid personnel and legal aid lawyers about the dynamics of abuse, greater sensitivity training is required (Abt Associates, 1991: 186). One paralegal who participated in a focus group observed that:

*...being yelled at by your lawyer is common. Seems a very common thing. You get insulted, put down, and yelled at and refuse — now I'm not saying all lawyers do this, but I've noted that it's a lot higher than I ever thought it would get (older women, Toronto).*

Assessments of legal aid in Canada have revealed that the clientele using legal aid frequently believe that they have received an inferior quality of service from their lawyers. Clients have reported that their lawyers appear inexperienced and insensitive to their concerns. Women in both Ontario and Manitoba experienced difficulties with their lawyers, either in getting

meetings with them, feeling like their lawyers were indeed their advocates, or getting their issues dealt with.

*He's a legal aid. I've seen him actually in court. He don't speak very loud and he's not a very effective speaker either, you know what I mean? And I felt sometimes that he was trying to help the more...he had more sympathy for my ex-husband (rural women, Brandon).*

*I sure am having a lot of trouble with legal aid right now. One thing, I have a hard time getting contact with my lawyer and I finally did. He went...he arranged a meeting and then he cancelled on me. Right now he's going to be gone for a whole month. And I want to get these issues done...I don't know when I'm going to meet (my ex-spouse). And I need that restraining order and I feel scared to even think of going somewhere (urban Aboriginal women, Winnipeg).*

*See, our biggest problem is...is how do we get these lawyers to do work for us. That's the problem. They don't...they don't represent us (older women, Toronto).*

Women's expectations about what their lawyers could accomplish seemed linked to the receipt of accurate information.

*And I didn't know about changing lawyers. I was scared, I was very naive. And my lawyer quit the firm. They gave me another lawyer in her place. And I just said, "Oh, okay. Where are we at? How much longer is this going to take?" kind of thing. And you know, the next lawyer guaranteed me, like, two months or something like that. And I said, "Great, let's go, you know. Let's do this." And she was at it for a few years (single mothers, Winnipeg).*

Critics who have advocated for low income clientele to gain greater access to the justice system have recommended empowering clients so the system is more responsive to their needs (Wexler, 1970). The data drawn from our focus groups suggests that legal aid clients need better information about the legal process and their rights. One woman, when asked, felt that she did not have enough information to be able to assess the quality of service she received.

*I can't...I can't really answer that because, first of all, I don't know what information I needed...I am totally in the dark. I am a mother of six children and was home minding children. I paid money to a lawyer, the first lawyer I went to, and you assume they are going to tell you what you need to know and act in your best interest, okay, instead of selling your soul down the river (older women, Toronto).*

Women were often quite clear that the problems they experienced in their legal battles were reflective of how the legal system works more generally and served as a reminder

that legal aid services are part of a continuum of legal services provided to individual clients, and that improvements made to the legal system might also have positive effects on the delivery of legal aid services.

Notwithstanding these negative experiences, legal aid was recognized as crucial for many women in both provinces, who would otherwise have endured devastating consequences. Women in Toronto were clear about what legal aid provided them.

*[Without legal aid] I wouldn't be here to tell my story now. It's a blessing to get legal aid because from then on, when my lawyer took it on with legal aid, things moved faster. I actually got the decision on the same day, in less than three hours, because the Board was able to hear me out (immigrant and refugee women, Toronto).*

*How it would have impacted on me was I would have ended up in jail faster (older women, Toronto).*

*If it hadn't been for legal assistance, she would have remained the rest of her life as a victim of violence because she would have had to stay in the same home and because she didn't have money to go elsewhere. So until she was able to get the separation of the house and the assets so she could independently move on her own, she would have remained a victim of violence (translator for immigrant and refugee women, Toronto).*

One participant in Manitoba had been reluctant to challenge an application by the state to apprehend her child and would have acquiesced, had she not received legal aid.

*There was this one incident where we went to court and my worker was very adamant about getting a permanent order on my oldest child. And I had agreed because I didn't think there was anything...there was no other way, you know. And I wasn't explained by my worker that there were these different options that I could take, and my lawyer pointed that out to me. I didn't know that, you know, I agreed to this permanent order and I felt, because I had agreed to it, and then I was going to fight it, that I felt that Child and Family [Services] would use that against me with...saying that I wasn't in control of either my feeling or my heart, you know, and like, I just didn't really know what was best for my son (urban Aboriginal women, Manitoba).*

At the same time though, many women had such negative experiences with their lawyers, legal aid and the entire legal system that they felt they might have been better off had they found alternative solutions to their problems.

*If I knew what I know today, I would have taken my kids and gone as far away as I could. That's what I would have done, try to survive (older women, Toronto).*

*I would avoid going to a lawyer, period* (older women, Toronto).

*And one thing I want to tell you is most older women do not know they are being abused, okay. The second thing is, is when we live, when I lived for 14 years in this shit, of all the lawyers and the legal and running to court and all the whole bit they have you going in, what I was unable to do was nurture my children* (older women, Toronto).

### **Summary of the Trends Identified by the Qualitative Data**

1. Women found the process of applying for legal aid intimidating and confusing (all focus groups).
2. Women were sometimes ill equipped to persuade legal aid personnel of the merits of their application (immigrant and refugee women, Toronto and rural women, Brandon).
3. Women had difficulty finding lawyers who were prepared to take their legal aid certificates (rural women, Brandon and single mothers, Winnipeg).
4. The law and policies which divide up people's life experiences to determine eligibility have resulted in uneven legal aid coverage for interconnected legal problems. This has meant that women have not received effective legal aid services (older women, Toronto, urban Aboriginal women, Winnipeg and single mothers, Winnipeg).
5. Women who were in conflict with the law identified significant potential consequences of a conviction such as loss of their children. Yet, they were unable to obtain legal aid for their legal problems (urban Aboriginal women, Winnipeg).
6. Women were assessed by legal aid personnel to be financially ineligible for legal aid, yet were still unable to afford a lawyer (older women, Toronto).
7. Women found that they were discriminated against on the basis of their appearance (single mothers, Winnipeg).
8. Women frequently found lawyers provided them with effective sensitive representation. Just as frequently, women found their lawyers were inaccessible, ineffective and abusive (older women, Toronto, rural women, Brandon and urban Aboriginal women, Winnipeg).
9. Women did not have enough information to assess the quality of the service they received from their lawyers (older women, Toronto).
10. Women believed that their problems with their lawyers were, in part, attributable to the way the legal system works more generally (older women, Toronto, and immigrant and refugee women, Toronto).

11. Women believed that they would have been better off resolving their problems had they not interacted with legal aid, lawyers and the justice system (older women, Toronto).





## PART FIVE: A PRINCIPLED APPROACH

### Introduction

The objective of drafting principles to guide the design of civil legal aid services for women is to locate the discussion of women's legal aid problems within a broader reference to equality rights for women, and to suggest an approach to legal aid services which will make those services more reflective of women's lives and, therefore, responsive to their needs. The principles flow from information contained in the history of the evolution of legal aid services and the treatment of women's legal needs reported in Part One, and from the qualitative research reported in Part Two.

### The Entitlement to Substantive Equality

Legal aid services in Canada are currently in the throes of extensive and controversial reform. Although their delivery and, certainly, the current sweep of reforms, are marked by a desire to be fiscally conservative, any delivery system will also be measured by the extent to which it can respond to and meet the legal needs of various segments of the public. This suggests that the delivery of legal aid services throughout Canada would benefit from a principled approach, one that takes into account the equality entitlements under the *Canadian Charter of Rights and Freedoms*.

The concept of substantive equality has largely emerged from the jurisprudence seeking to clarify the equality entitlements set forth in the *Charter*. Section 15(1) provides that "Every individual is equal before and under the law and has the right to the equal protection and 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."

The Supreme Court of Canada has recognized that section 15 provides an entitlement to substantive, rather than mere formal equality. The objective of substantive equality is to assist disadvantaged groups in overcoming inequality, by providing protections against discriminatory attitudes, practices and rules.<sup>20</sup> Commenting on the test established by the Court to determine whether discrimination has occurred when equality rights are denied under section 15, Madame Justice Wilson wrote in *R. v Turpin*: "It is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context."<sup>21</sup>

Providing this context, she wrote, would prevent a mechanized and arid approach to the interpretation of rights and freedoms under the *Charter*. This suggests that a full examination of the context within which the alleged discrimination is occurring, must take place in order to determine whether *Charter* guarantees of substantive equality have been met. With this in mind, the political, economic and social forces that have informed the delivery of civil legal aid services are examined in turn.

## **The Political Context: The Introduction of the CHST**

The welfare state in Canada, which has been constructed over the last several decades to fulfill partially the state's responsibility for alleviating the circumstances of poverty, and which nurtured the development of state-subsidized legal aid services, can no longer be taken for granted (NCW, 1995b: 11; Hoehne, 1989: 92). The Canada Assistance Plan (CAP), created in 1966, marked the first coherent national strategy for protecting children, women and men who could not avail themselves of other sources of income, and who would otherwise face certain poverty. It established federal contributions to a welfare system for those who were unable to provide for their own needs, the largest segment of which were dependent children (NCW, 1995b: 4). The welfare portion of CAP provided funding to provinces for basic assistance, assistance for people with special needs and for legal aid in civil cases. These welfare contributions accounted for nearly two thirds of total spending on CAP (NCW, 1995b: 5). The remainder went to a wide range of social services.

The programs and services that were offered under CAP were critical to women's physical and economic security. As Martha Jackman (1995: 376) has pointed out:

For many women, such as those escaping domestic abuse, those seeking support and counselling to deal with sexual assault, those relying on home-maker services to continue living independently, and those in need of legal aid services in civil or family law matters, or requiring subsidized child-care to remain in the workforce, CAP-funded services make the difference between life with a modicum of autonomy and life without any meaningful choices. For many other women, CAP ensures access to the most basic necessities of life: food, clothing and shelter for themselves and for their families.

In the federal budget speech of 1995, the government announced its intention to alter fundamentally the way in which it provided funding for welfare and social services. It announced its intention to repeal CAP and replace it with the Canada Health and Social Transfer (CHST). Among the many consequences of this decision, two stand out as having particular significance for low-income women in respect of their ability to access the justice system.

First, the replacement of CAP with the CHST has meant that the contribution of the federal government for civil legal aid is no longer given to the province in the form of a discrete sum of money to be spent only on civil legal aid, but is now part of an undifferentiated block out of which provinces may choose to provide funding for a broad range of social services. Second, the introduction of the CHST has corresponded with a reduction in the overall amount of funds the federal government is providing for such purposes to the provinces.

Simply put, this means that less money is now available for all the services previously funded under CAP, and the money that is available will be the object of fierce competition: civil legal aid needs must compete with medicare, post-secondary education, social assistance and social

services for priority in funding (NCW, 1995b: 10). In light of this new reality, it is very likely that less money will be available for civil legal aid.

It also seems apparent that the federal retreat from a commitment to stable funding for civil legal aid services has occurred at a time when there continues to be a pressing need for such programs and services. Reports written for the federal Department of Justice suggest that the growth in demand for legal aid services has been nurtured by high unemployment, a widening gap between the rich and poor, and increasing conflict in interpersonal, family and other relations — factors which show no signs of abating in the near future (Alberta, 1994: 168). Perhaps not surprisingly then, the repeal of CAP and its replacement with the CHST has been described as “a giant step backward in Canadian social policy. Followed through to its most likely conclusion, it would dismantle a nation-wide system of welfare and social services that took a generation to build. Sadly, the policies of the 1990s would take us back to the 1950s.”<sup>22</sup>

The gendered impact of these changes should not be overlooked. While there has been a reduction in federal contributions to criminal legal aid — three percent over three years — there continues to be a recognition that criminal legal aid must be provided to all criminal accused who face a reasonable likelihood of incarceration. The federal and provincial governments continue to provide a distinct and stable fund of money for criminal legal aid matters. For example, the federal government contribution for criminal legal aid continues to be delivered as a discrete sum of money that is to be spent wholly on criminal legal aid matters. The vast majority of criminal legal aid certificates — approximately 80 percent — are given to men (Law Society of Upper Canada, 1997; DPA Group, 1998). In contrast, federal funding for civil legal aid services through the CHST is neither distinct nor stable. To the contrary, civil legal aid has experienced a volatile and most probably diminished commitment of resources. Its clientele, as has been noted, is overwhelmingly female.

The governmental decision to provide more stable resources for criminal legal aid has been justified on the basis that when an accused person’s liberty interests are at stake, it would be unfair for the accused to have to defend those interests against the overwhelming resources of the state. Significantly, this acknowledged obligation is not constitutionally explicit but is policy created by the federal and provincial governments because of the coexistence of the potential violation of a *Charter* value and the inequity of facing the state’s vast prosecution powers.

However, commentators have pointed out that this rationale should not go unchallenged in view of the fact that women in Canada regularly encounter the overwhelming resources of the state in civil cases with equally serious consequences, as for example, in cases of child apprehension by the state, mental committal proceedings or refugee cases. Yet, for them, no automatic entitlement to legal aid ensues.<sup>23</sup> By failing to extend the same right to legal aid services to individuals in these cases, the government has not only failed to eliminate the disadvantage women experience as a result of current funding arrangements, it has further entrenched it.

## **The Economic Context: The State's Treatment of the "Undeserving" Poor**

As a result of this retreat by the state from regulation of economic disparity through social welfare programming, the poor are losing ground in their struggle to make ends meet. Ontario, for example, used the occasion of the repeal of CAP in 1995 and the corresponding loss of national standards to reduce welfare rates by 21 percent for the vast majority of social assistance recipients. Furthermore, the decision by some provincial governments to put increased resources into prosecutions for welfare fraud, to deny single mothers social assistance based on the "spouse in the house" rule<sup>24</sup> and to make receipt of income assistance contingent on participation in a work or education program promises to make the lives of low income women, particularly single mothers, especially harsh.<sup>25</sup> In some provinces, the vulnerability women are experiencing is heightened by the state's concurrent reduction in services for abused women as well as drastic reductions in subsidized housing.<sup>26</sup> As certain observers (Morrison and Mosher, 1995: 7) have noted: "What the future holds is all too clear: far more poverty and insecurity, an explosion of hunger and homelessness, illness and family breakdown; and this will hit certain groups — single mothers, people with disabilities, visible minorities, aboriginal peoples, young families, to name a few — much harder than others."

This reduction in state support is taking place at a time when women comprise close to 60 percent of the poor (NCW, 1995a:12). In particular, older women and single mothers often find themselves in the most dire economic straits. Recent data confirm that 53.4 percent of unattached elderly females fell below the low income cutoff line compared to 33.3 percent of elderly males (Statistics Canada, 1996: 34-35). The rate of lone-parent mothers with children under 18 living below the cutoff line was 60.8 percent in 1996 (Statistics Canada, 1996).

Given their relative poverty, women experience disadvantage in their ability to pay for legal services at the same time as they have greater needs for such assistance because of the variety of legal problems that are bound up with poverty. As noted previously, these include the range of legal problems generated by an individual's receipt of state support. Additional legal problems that correlate with poverty include tenancy problems, consumer complaints and discrimination in respect of employment or services that individuals face because they are welfare recipients, parents or members of groups that are the targets of discrimination, including discrimination on the basis of sex. The specific legal problems of older women and women who face additional forms of disadvantage related to their race, culture, language, literacy, geographical isolation, physical or mental ability, sexual orientation and citizenship also require subsidized legal services for which there is, as yet, no automatic entitlement.<sup>27</sup>

Moreover, the Supreme Court has recognized that women's roles as unwaged workers in the home, and as unwaged caregivers have serious negative consequences for their economic autonomy. In the case of *Moge v. Moge*,<sup>28</sup> the Supreme Court affirmed the economic hardships women have experienced from marriage or its breakdown because of the traditional division of labour within this societal arrangement. Women's resulting inability to afford legal services on marriage breakdown is, therefore, directly attributable to their roles as "unwaged" workers in the home. Their need for subsidized legal services on marriage breakdown is

critical so they can pursue and defend their legal claims in such matters as custody and access applications, divorce applications, and applications for child and spousal support.

However, women's experience of poverty is not limited to their experience within the traditional family. Women's experience of discrimination in the workplace is well documented and has resulted in pay inequity and barriers to their pursuit of better remunerated types of employment.<sup>29</sup> Women who have experienced these kinds of disadvantage may similarly be unable to pay for their own legal services and will also require legal aid services to pursue such claims before the courts.

The manner in which rules for entitlement to family benefits assistance and general welfare assistance have been applied, as well as the renewed vigour with which the state is prosecuting individuals for welfare fraud,<sup>30</sup> reveals an insidious attitude about who the state believes to be deserving of its support. Family benefit recipients frequently experience differential treatment by the welfare bureaucracy, depending on the nature of the relationship which the women had or have with the men in their lives. It appears that widows and women with incapacitated husbands are among the "deserving" poor; women who are single mothers or who cohabit with a man are "undeserving" and are thus subject to more intense financial and moral scrutiny by the state (Hillyard, 1994).

Moreover, while the activities of all recipients of family benefits are subject to some review, women from visible minority communities have tended to experience racism along with this scrutiny. As anti-poverty activist Carolann Wright has said: "I've seen their [the workers'] racist attitudes. Women of colour say that they're treated poorly. The workers automatically assume you're not Canadian. You are not given enough information. They make disparaging comments. The women of colour have more trouble than white women getting the money and any additional benefits."<sup>31</sup>

The need for women to have stable access to subsidized legal services has become more critical than ever to enable women to challenge effectively the more legally questionable government initiatives, such as the "spouse in the house" rule, and workfare. In doing so, women will challenge the state's perpetuation of discriminatory attitudes toward poor women, as well as broader assumptions about the nature of work and other contexts that reveal inequality for women.

### **The Social Context: Public and Private Arrangements**

In her report on gender equality in the legal profession, Madame Justice Bertha Wilson (Canadian Bar Association, 1993: 211) said:

The low status of family law pervades all facets of our justice system and is reflected in a lack of public resources devoted to resolving conflicts in this critical area. This low status is rooted in the gender-related approach of our legal system. Our legal system is based on the standard of male life experience and exclusively male values and priorities, on the gendered division of labour

inherent in our society which privileges male activities and denigrates women's work, and on the traditional separation of private and public spheres of action.

This passage is significant because it suggests that the solution to the inadequate resources allocated to civil legal aid services lies in educating politicians and legal aid programmers about the significant role the law plays in resolving family law matters. But this first requires justice personnel, who have examined and recognized the bias present in the justice system (Federal/Provincial-Territorial Working Group of Attorneys-General, 1993), to acknowledge that this bias is rooted in the continuing attitude that women's lives and experiences and, therefore, their legal problems, are essentially private matters with which the justice system need have no concerns.

The popular adage that "a man's home is his castle" derives from the legal deference given to family relationships and to the concept of privacy within the home, and serves to demonstrate the extent to which physical abuse and other manifestations of power and inequality within the family have not historically been scrutinized by the law (O'Donovan, 1985). According to Frances Olsen (1983: 1500): "The dichotomy [between public and private realms] encouraged women to be generous and nurturant but discouraged them from being strong and self-reliant. This status quo of male domination benefits from the segregation of women in the private sphere."

As a result of having their experiences relegated to the private realm, women who turn to the courts to redress their claims often discover that their experiences are misunderstood, misrepresented or ignored (Federal/Provincial-Territorial Working Group of Attorneys-General, 1993). What this suggests is that women must have unfettered access to the courts to challenge this array of bias. Seen in this context, the test used by provincial legal aid plans to determine whether to fund a legal aid case: "Would a prudent person of modest means pay counsel privately to take the action for which they seek legal aid funding?" is not gender neutral.<sup>32</sup> The test, while using different language, essentially employs the standard of reasonableness, a standard that has historically been predicated on "male life experience and exclusively male values and priorities" (Canadian Bar Association, 1993: 211; Graycar, 1994). As such, it precludes the provision of subsidized legal services to women wishing to challenge "private" actions that are not considered legally significant. And while funding is present in some provinces to initiate such legal actions and engage in some law reform efforts, it is not present in every province.<sup>33</sup> The bias, by contrast, is.

### ***Expanding the right to "liberty" and "security of the person"***

In *Andrews*, Justice McIntyre emphasized that a violation of section 15 does not require an intention to discriminate. Rather, discrimination may be demonstrated if the effect of the legislation is to deny an individual an equality entitlement under section 15.<sup>34</sup> Reflecting further on the purpose of the equality guarantees, Madame Justice McLaughlin, writing for a majority of the court in *Miron v. Trudel* stated:

The grounds expressly mentioned in 15(1) reflect the overarching purpose of the equality guarantee in the *Charter* — to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of the presumed group characteristics rather than on the basis of the individual merit, capacity or circumstance.<sup>35</sup>

In *Morgentaler v. the Queen*, Madama Justice Wilson affirmed that the concept of human dignity, central to the equality values contained in section 15, is also fundamental to the guarantee of “liberty” contained in section 7. She wrote:

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.... Thus an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty.... In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.<sup>36</sup>

The “overarching purpose” accorded to section 15 suggests that all the rights set forth in the *Charter* and, in particular, the right to liberty and to security of the person set forth in section 7 must be interpreted in accordance with section 15. Thus the *Charter* entitlements are not to be read in isolation. Rather, they should be interpreted to complement each other. Section 15, it can be argued, should be read to assist in the interpretation of section 7.<sup>37</sup>

Section 7 of the *Charter* states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

As has been pointed out, section 7 has been interpreted to provide an entitlement to legal aid for those who have been charged with a criminal offence. It is however, a male experience, which informs this perspective of what constitutes a threat to “liberty” since it is men who overwhelmingly face the threat of incarceration. Patricia Hughes points out that the failure to extend resources equally to civil and criminal matters deprives more women of access to the legal system than it does men (Hughes, 1995: 203). For example, criminal legal aid is available when an individual is charged with assaulting his partner. However, when a woman wants civil legal aid for matrimonial legal problems so she can flee the abuse — in other words, so she can protect the “security of [the] person” — she does not receive the same entitlement (Hughes, 1995: 203). Hughes argues that the prevailing view of what constitutes “liberty” and what constitutes “security of the person” for the purposes of section 7 of the *Charter* is patently gendered, and provides a benefit to men which is withheld from women. Nothing less than the integrity of the administration of justice is at stake. She says (1995: 215): “The claim for more equitable access to legal aid or for a domestic legal aid program equivalent to the criminal legal aid program does not rest on an economic ground. Rather, it rests on a challenge to the integrity of the legal system itself and its ability to protect all members of society.”

The solution to preventing these and other forms of discrimination in the provision of civil legal aid services lies, in part, in a recognition by the state of what “liberty” means to women. In cases of marriage breakdown, for example, women’s liberty includes an ability to provide shelter and food for their families so they can nurture children and the elderly for whom they are most often responsible. Where a woman’s ability to make these provisions adequately is placed in jeopardy upon marriage breakdown, legal representation will be necessary so women can pursue their claims of support from former spouses.<sup>38</sup> Where they are not able to afford this legal representation, state-funded legal services are a fundamental prerequisite of women’s ability to maintain the integrity of their families, in other words, to preserve their “human dignity.” Similarly, where state support is required for women to meet the basic needs of their families, legal aid may be required to enable women to pursue such entitlements as social assistance benefits and services. Women’s entitlement to preserve their human dignity, their “liberty” as guaranteed by the *Charter*, requires that they have access to legal aid.

The Supreme Court has interpreted the right to “security of the person” under section 7 to incorporate a broad protection. Reflecting on this right in *Mills v. the Queen*, Chief Justice LaMer wrote:

...security of the person is not restricted to physical integrity; rather, it encompasses protection against “overlong subjection of the vexations and vicissitudes of a pending criminal accusation”.... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.<sup>39</sup>

The Court has since confirmed that these words entitle an individual to freedom from state-imposed psychological trauma.<sup>40</sup> This freedom can be interpreted to entitle women to subsidized legal services in actions in which women are forced into legal proceedings by the state: child apprehension matters, mental committal proceedings and refugee cases. It can also be argued that access to state-funded legal counsel is required to prevent state-imposed psychological trauma whenever women are facing a threat to their economic autonomy. The kinds of matters for which women would require subsidized legal services in this regard include challenges to the state’s denial of social assistance benefits, employment insurance and pension entitlements.

An integral component of women’s substantive rights to the security of their person is the right to be free of violence within the home, and on the street, a right that the state has an obligation to ensure.<sup>41</sup> The state’s failure to assure women’s physical safety from abusive partners, in particular, requires them to seek the protection of restraining orders and exclusive possession orders. Access to legal aid services to obtain such orders is necessary for women to achieve their entitlement to “security of the person” under section 7.



The right to “liberty” and “security of the person” under section 7 encompasses the right not to be deprived of these entitlements “except in accordance with the principles of fundamental justice.” The government-authored *National Review of Legal Aid* (Alberta, 1994: 179) has described legal aid as an essential element of the proper administration of justice and equal access to the judicial system as a basic condition for equality before the law. Moreover, a fundamental principle of the “rule of law” in our legal system is that all people should have equal access to the courts in order to have their claims adjudicated. There seems little doubt that the denial of legal aid services where women’s section 7 interests are at stake would not accord with principles of fundamental justice.

### ***The obligations under The Federal Plan for Gender Equality***

Notwithstanding the merits of a *Charter*-based claim for the right to civil legal aid services, there is an additional reason for undertaking a principled approach to the delivery of civil legal aid services: *The Federal Plan for Gender Equality* has confirmed the intention of the federal government to ensure that its policies and programs promote gender equality (SWC, 1995). The gender-based analysis contained in the plan is meant to be integrated into the development of policies, programs and legislation. Therefore, an approach to designing, delivering and funding legal aid services which incorporates such a gender-based or equality analysis will not only result in programming that is inclusive and consistent with the spirit and content of the *Charter*, it will establish the government’s obligations under the plan. The result will be better-informed policy making and good governance (SWC, 1996).

### ***The limitation of rights-based law and policy***

Finally, there is a spate of legislation and jurisprudence that has assumed that a right that is being created in law will be greeted with a corresponding avenue of access to the courts for potential claimants. For example, the child support reforms implemented April 1, 1997 were meant to provide a more equitable system of taxation and more realistic support guidelines. It now appears that the complexity of the changes is staggering, and has baffled experienced practitioners.<sup>42</sup> Women must have access to legal representation to pursue their amended and new claims for child support in the courts. However, several provinces have no mandatory legal aid coverage for applications for child support and variation applications. As a result, most poor women will not be able to avail themselves of these legislative reforms.

The recent Supreme Court of Canada decision in *A.(L.L.) v. B.(A.)*, provided for a direct appeal to the Supreme Court of Canada in cases where third parties wish to challenge a court order to produce records such as those kept by a women’s shelter or a rape crisis centre.<sup>43</sup> However, no province has mandatory legal aid coverage for such appeals.

More recent consultations suggest that government initiatives may be forthcoming to assist women fleeing abuse. The recognition that women assuming a new identity may need assistance with such matters as obtaining a new Social Insurance Number, a new driver’s licence or a mortgage is commendable. However, women have also identified a need for legal assistance to effect these goals.<sup>44</sup>

This analysis suggests that in order for the government to maintain its commitment to gender equality to uphold the equality guarantees and section 7 of the *Charter*, women who are otherwise unable to pay for legal assistance should have legal aid to pursue their legal claims. For those charged with administering legal aid, the challenge is clear: legal aid programmers should be examining legislation and Supreme Court jurisprudence to determine whether they have created a new legal context in which individuals must seek access to the courts.

## CONCLUSION

It is also important to understand that there are limits to the goals that can be achieved by increasing low income women's access to the justice system. Some have observed that, "For marginalized people, 'justice' requires fundamental social, economic and political change, including a dramatic about-turn in the current retrenchment of the welfare state" (Morrison and Mosher, 1995: 9).

This comment suggests that energy invested in law reform might be better directed to work which will effect social reform. Furthermore, encouraging women to see access to the courts for their claims may not result in an increase in their presence in the justice system because men and women may be socialized to use different methods of solving problems, with women using the courts less often to resolve their legal disputes (Howe, 1991).

However, the absence of a constitutional recognition of the right to state-funded counsel in civil cases, the recent changes to federal funding for civil legal aid which have seen the disappearance of a distinct civil legal aid fund, and the gender bias which women have encountered in the justice system would seem to suggest that low income women must be recognized as a distinct constituency — one whose legal aid needs and ability to access the legal system must be separately assessed and taken into account — if we are not to cede the hard-won legal entitlements of the last three decades, but are instead to move closer to a goal of substantive equality. An equality analysis of civil legal aid services throughout Canada, as outlined by this report, will establish an agenda for reform, and will clarify the challenge for all who seek to improve equality of access to the current and future system of justice.



## SUMMARY OF PRINCIPLES

### Accessibility

1. The process of determining whether legal aid applications will be accepted needs to be transparent. Better information is required about the criteria used to determine eligibility for legal aid, and how the criteria are applied by legal aid staff.
2. Legal aid personnel should monitor the ability of women in all communities, rural as well as urban, to access lawyers for their legal problems.
3. The recommendation from the Canadian Bar Association Task Force on Gender Equality in the Legal Profession for the creation of a national civil legal aid tariff should be implemented.
4. Legal aid personnel must better inform all women, particularly abused women, immigrant women and women whose first language is not English, about the availability of legal aid services.
5. Legal aid services must be more accessible to Aboriginal women, particularly on reserves.

### Coverage and Financial Eligibility

6. The definition of “liberty” under the *Charter* should be extended to take account of women’s needs to provide clothing, shelter and food for children and elderly relations for whom they are responsible. In order to obtain their “liberty,” legal aid services should be available to enable women to pursue legal claims for child support, custody, access, spousal support and support from the state for such matters as social assistance and tenancy problems.
7. The definition of “security of the person” under the *Charter* should include women’s right to be free from violence in their homes and on the street. Legal aid should be available to women to obtain restraining orders, peace bonds and orders for exclusive possession of the home in order for them to secure their physical safety. In order to secure their freedom from state-imposed psychological trauma, women should receive legal aid services when they are engaged in mental committal proceedings, child apprehension matters or refugee claims, and in proceedings against the state threatening their economic autonomy.
8. Federal funding for civil legal aid should be provided in the same stable manner as funding for criminal legal aid. A discrete fund should be provided to the provinces, separate from the CHST of which it is now a part.

9. The rationale behind the stable funding given to criminal legal aid should be extended to all matters in which there is a potential loss of “liberty” as redefined by this report and where the state is the adversary. Thus, funding should be extended to child apprehension cases, immigration and refugee cases, and mental committal proceedings.
10. Legal aid coverage should be extended to cover poverty law matters.
11. Women’s greater experience of poverty is linked to the economic devaluation of their work inside the home, and their experience of discrimination in the paid work force. They should receive legal aid coverage for those problems arising from this experience of disadvantage. In addition to the need for coverage for legal problems arising from marriage breakdown, they should also receive coverage to pursue employment-related claims of discrimination, such as sexual harassment, pay equity and employment equity.
12. Women have also experienced disadvantage in situations unrelated to their employment. They should receive legal aid assistance to challenge discrimination beyond workplace claims.
13. Legal aid should be available to permit women to challenge the bias present in the justice system, including substantive and procedural law bias. The “merit” test used to assess coverage for legal aid matters should be broadened to include such claims. Legal aid personnel responsible for applying the test should receive specialized training about women’s experience of gender inequality in the justice system.
14. New entitlements in law should ensure a corollary right to legal aid services to be able to access that right. Federal and provincial officials should assess the impact of new legislation and judicial decisions for their implications for legal aid coverage. An increased need for coverage should result in a corresponding increase in funding for civil legal aid.
15. Women’s legal aid needs should be addressed by legal aid services that don’t arbitrarily divide up their life experiences. For example, women fleeing abusive partners should be able to obtain legal aid to pursue claims to recover their property, or seek compensation for property that has been destroyed.
16. The federal government should closely monitor how the provinces spend funds provided under the CHST, and evaluate the adequacy of legal aid funding prior to, and after, the introduction of the CHST.
17. Provinces should collect and publish data pertaining to civil legal aid usage, the number of applications and the number of rejections, disaggregated on the basis of sex.
18. Provinces should collect and publish data regarding the legal outcomes of cases in which the litigants are unrepresented to assess the effect of legal aid cutbacks.

19. All levels of decision makers — federal, provincial, as well as plan administrators — should undertake extensive consultation to assess women’s needs for civil legal aid services. Such a consultation should take full account of the diversity of women’s experiences, and how it affects their legal aid needs.
20. The federal government should use the results of a consultation on women’s legal aid needs to guide the creation of enforceable national standards in respect of civil legal aid coverage.
21. There should be recognition that incarceration is not the only consequence for which legal representation for criminal matters should be available. The policy that provides legal aid for criminal matters only where there is a reasonable likelihood of incarceration should be assessed for its impact on women, and revised accordingly.
22. Older women should receive legal aid coverage for problems related to personal and property-related decision making.
23. Refugee women should receive legal aid coverage to assist them with claims of gender persecution.
24. Immigrant women should receive legal aid coverage for problems arising from sponsorship breakdown.
25. Women, particularly women with disabilities, lesbians, immigrant women, visible minority women, refugee women and Aboriginal women should receive legal assistance to challenge discrimination which they experience related to their diversity.
26. Legal aid administrators responsible for assessing financial eligibility should take into account that women may have only nominal ownership of assets, and if financial abuse is present in a relationship, women are not likely to have access to those assets.
27. Assessments of financial eligibility should not be made on an ad hoc basis or having regard to the outward appearance of a claimant.
28. Repayment schedules for legal aid expenses should take account of women’s income earning potential, including all factors contributing to a woman’s ability to pay. For example, caregiving responsibilities may mean that women will be unable to continue payments.

### **Quality of Service**

29. Women must be able to exercise their right to change counsel effectively.

30. Lawyers and legal aid personnel should receive training to better serve abused women, and legal aid personnel should publicize the names of lawyers who have undergone training to better serve abused women.
31. Lawyers and legal aid personnel should receive training to provide more effective, sensitive service to the multicultural community.
32. Lawyers and legal aid personnel should receive training to enable them to better serve women with disabilities.
33. Lawyers and legal aid personnel should receive instruction regarding the inappropriateness of mediation for abused women.



## APPENDIX

### Legal Aid in Manitoba

Legal Aid Manitoba (LEAF-NB, 1996) operates a mixed model delivery system, with 41 staff lawyers providing representation for about 30 percent of legal aid consumers. The remaining recipients are represented by several hundred private bar lawyers who are willing to accept legal aid certificates on a case-by-case basis. Private lawyers are paid according to a legal aid tariff, while staff lawyers are civil servants on government payroll.

Staff lawyers in Winnipeg operate specialty law centres: the Family Law Centre, the Aboriginal Law Centre, the Child Protection Law Centre, the Criminal Law Centre, the Youth Law Centre, the Public Interest Law Centre, as well as a general civil/domestic law centre and the Duty Counsel Criminal Law Centre. Outside Winnipeg, there are four community law centres which operate in all areas of the law covered by legal aid.

Legal Aid Manitoba is administered by area directors who decide on eligibility and authorize various expenditures. Recently, area directors have also been given responsibilities to review individual civil and domestic cases and make a determination whether or not Legal Aid will authorize proceeding to trial.

Legal Aid Manitoba is highly regarded as a model of legal aid which covers a very wide range of civil and criminal matters. While all civil/domestic legal aid is discretionary, there are very few areas where legal aid is denied as a matter of policy. Only wills and estates, real estate, and corporate and commercial law have been designated as areas for which legal aid is not available.

Virtually all areas of family law are covered, with discretion being carefully exercised in areas that involve marital property. In this regard, two criteria are considered. First, in the event that there is likely to be a substantial property settlement, applicants should be able to retain counsel privately on a fee from proceeds basis. Second, if the value of the property is so small that the cost of providing counsel would outweigh the benefit to the client, applicants are put to the test: "Would a prudent person of modest means pay counsel privately to take the action for which they seek legal aid funding?"

Legal Aid Manitoba has responded to pressure to reduce expenditures in numerous ways, all purportedly designed to minimize cuts to service. These include:

- imposing a 12 percent holdback on the criminal legal aid tariff;
- reducing the tariff for a number of civil procedures;
- reducing the number of interim procedures covered by a certificate;
- imposing case management criteria on practitioners (staff and private);
- holding financial eligibility guidelines at 1989 Low Income Cut-Off (LICO) levels;
- contracting out tender blocks of work to private lawyers;

- eliminating choice of counsel in certain criminal matters;
- expanding the availability and roll of legal aid duty counsel;
- implementing an expanded eligibility program, where recipients, whose income is above the guidelines, but less than a second established guideline, pay dollar for dollar the cost of providing coverage in monthly installments at legal aid rates.

At first blush, these solutions may appear more appealing than the staggering cuts other provinces have sustained; however, they are not without their impact and some may seriously erode the quality of service being provided. There is some fear that these measures may undermine the empowerment Legal Aid Manitoba should be giving to the poor and, in particular, the women and children caught up in the family law system.

## **Legal Aid in Ontario**

Ontario has two different systems for delivering legal aid services. The judicare system covers criminal, family and some civil and immigration matters. Administered by the Law Society, the judicare system screens clients for eligibility for legal aid at centralized legal aid offices. If the clients are eligible, they are issued a legal aid certificate which is a guarantee of payment by the legal aid plan to participating lawyers.

Additionally, 72 community legal aid clinics deliver such poverty law services as landlord and tenant, social assistance, and worker's compensation. Clinics, which are provided with fixed grants from funds from the Law Society and the Attorney General, deliver services with paid permanent staff and are run by elected boards. Each clinic determines the areas of law covered and the mix of casework, law reform, public legal education and community organizing that is delivered. Ten percent of the legal aid budget is dedicated to clinics.

There is no freedom in Ontario for clients to choose between judicare or clinic services. The two systems handle cases in different areas of the law, the only exception is immigration law, where some clinics provide services, and certificates are also available (LEAF-NB, 1996).

Since 1995, a funding crisis has precipitated deep and devastating cuts to services. In April, 1995, legal aid coverage was eliminated for wrongful dismissal actions, uncontested divorce actions and variations for spousal support. In April 1996, a priority system was implemented which resulted in a restriction of legal aid in non-criminal matters to child protection and custody and access applications where the safety of a spouse or child was deemed to be at risk. Restrictions on the number of hours a lawyer can bill for these matters have prompted many family law lawyers in the province to stop taking legal aid certificates as they feel they can no longer meet their professional obligations to provide the best legal advice possible, within the unreasonable confines of the reduced tariff limits.

On April 1, 1997, the Ontario Legal Aid Plan extended coverage to many matters which had previously not been covered including a wide range of custody and access-related matters as well as applications for support. Exclusive possession orders and restraining orders in cases of abuse are also available. In addition, lawyers have been allocated more time to work on cases.

## Focus Group Information

1. Abused Women - February 17, 1997, Toronto. Only one woman attended this group, so a one-to-one interview was conducted, in the presence of a Spanish interpreter.
2. Older Women - February 18, 1997, Toronto. Eight women attended, mostly recruited from the Older Women's Network (OWN). Most of the women were part of the OWN's Family Law Group, which focuses on issues of separation and divorce.
3. Single Mothers - February 21, 1997, Winnipeg. This group included eight women who identified themselves as low income women, including one shelter worker. Most of the participants in this group were on social assistance.
4. Refugee and Immigrant Women - February 26, 1997, Toronto. Approximately eight women (including one community worker) from various agencies, including the Jamaican Canadian Association, St. Christopher House (shelter for Portuguese women) and two interpreters (one Spanish and one Portuguese).
5. Rural Women - February 20, 1997, Brandon, Manitoba. Nine women.
6. Aboriginal Women - February 21, 1997, Winnipeg, Manitoba. Nine women.

The following is a list of the groups contacted in Toronto in order to invite women to participate in the focus groups.

(\* marks those who agreed to help locate participants)

Aboriginal Legal Clinic\*  
Access to Justice Worker Advocates  
Advocacy Center for the Elderly\*  
African Canadian Legal Clinic\*  
Anduhyan Shelter  
Association of Jewish Seniors  
Barbra Schlifer Clinic\*  
Bill Sullivan, LLB\*  
Canadian Center For Victims of Torture  
Canadian Pensioners Concerned  
Carole Curtis, LLB  
Center for Spanish Speaking Peoples  
Central Neighborhood House  
Chinese Family Life Services  
Community Legal Aid Support Program (CLASP)\*  
Doug Lehrer, LLB\*  
Education Wife Assault  
Elizabeth Fry Society

Ernestine's Shelter\*  
Gail Cadieux, LLB  
Geraldine Sadaway, LLB\*  
Immigrant Women's Health Center  
Jane Finch Community and Family Services  
Ketryn Pereira, LLB\*  
Low Income Families Together  
Marie Chen, LLB  
Mary Eberts, LLB\*  
Metrac  
Metro Chinese and South Asian Legal Clinic  
Metro Woman Abuse Council\*  
Neighborhood Legal Services\*  
Neil Cohen, LLB\*  
Nicole Tellier, LLB  
Older Women's Network\*  
Ontario Coalition for Senior Citizens Organizations\*  
Parkdale Community Legal Services  
St. Christopher House\*  
Susan Ursel, LLB  
Susan Woolner, LLB \*  
Toronto Rape Crisis Center\*  
United Senior Citizens of Ontario  
Willowdale Community and Legal Services\*  
Women in Transition Shelter  
Women's Counselling, Referral, and Education Center  
Women's Health in Women's Hands  
Woodgreen Community Center\*  
Worker's Information and Action Center

The following is a list of organizations in Manitoba who were contacted to invite women to participate in the focus groups. Save where indicated, all of the following organizations agreed to help locate participants:

The Brandon Friendship Centre - Brandon  
Elizabeth Fry Society - Winnipeg  
Fort Garry Women's Resource Centre - Winnipeg  
Ikwewitjittivan - Winnipeg  
Immigrant Women's Association - Winnipeg  
Indigenous Women's Collective - Winnipeg  
Ma Mawi - Winnipeg  
Manitoba Action Committee on the Status of Women - Brandon  
Manitoba Action Committee on the Status of Women - Winnipeg  
Native Women's Transition Centre - Winnipeg  
Nor'West Women's Health Centre - Winnipeg

North End Women's Resource Centre - Winnipeg  
Osborne House - Winnipeg  
The Westman Women's Shelter - Brandon  
The Women's Advocacy Program - Brandon (declined to assist)  
Winnipeg Education Centre - Winnipeg



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## ENDNOTES

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<sup>1</sup> The data required to produce a national tally on the gender breakdown of civil legal aid certificates are not available, since most provinces do not collect the disaggregated statistics. However, where those statistics are kept, it appears that women use at least three quarters of all family legal aid certificates. For example, an evaluation of legal aid in Saskatchewan revealed that, in 1985-86, women accounted for 79 percent of approved family legal aid applications (DPA Group Inc., 1988). In Ontario, 77 percent of all civil legal aid certificates in 1997 were issued to women (Law Society of Upper Canada, 1997). Family law certificates comprise the vast majority of civil legal aid certificates which are granted. According to the National Council of Welfare (1995a: 44), they are granted at an average rate of 6.5 certificates per 1,000 population in 1992-93. Other civil certificates, by contrast, were granted at a rate of 3.6. This average does not include the provinces of New Brunswick and Newfoundland, for which data were not available.

<sup>2</sup> Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act (1982) (U.K.)*, 1982, c. 11.

<sup>3</sup> The Canada Assistance Plan, which established state funding for welfare and social services, was introduced in 1966.

<sup>4</sup> Section 91(27) of the *British North America Act* assigns the federal government responsibility for “Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

<sup>5</sup> Reflecting on these two differing perceptions of justice 25 years later, Andrew Roman (1990: 190) wrote: “Justice is the preoccupation of ordinary citizens and philosophers; legal justice is the preoccupation of lawyers and judges. Whose concept should be used in considering access?”

<sup>6</sup> For further academic scholarship about these evolving concepts, see White, 1988.

<sup>7</sup> Wexler 1970, 1056: “Four ways in which a lawyer can help his clients use his knowledge are (1) informing individuals and groups of their rights, (2) writing manuals and other materials, (3) training lay advocates, and (4) educating groups for confrontation.”

<sup>8</sup> Wexler, 1970: 1053: “Poor people have few individual problems in the traditional sense; their problems are the product of poverty, and are common to all poor people.”

<sup>9</sup> In her report, Mary Jane Mossman wrote: “Seeking to provide ‘equal’ services for both legal and paying clients, the (Ontario) Joint Committee Report stated that there was ‘no logical reason’ for excluding representation before administrative tribunals from legal aid coverage. On this basis as well, the Committee concluded that there was no principled difference between matrimonial proceedings and other civil actions...” (Department of Justice, 1990: 6).

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<sup>10</sup> Graycar (1994) points to the “reasonable man” standard, the use of exclusionary language, and public/private distinctions which have excluded women from seeking legal remedies for their claims.

<sup>11</sup> In the U.S. context, see also Harris, 1990.

<sup>12</sup> Interview with Eileen Morrow, Ontario Association of Interval and Transition Houses (OAITH), October 29, 1996, on file with the researcher.

<sup>13</sup> Abt Associates, 1991: 178. For a U.S. analysis, see also Bach, 1994.

<sup>14</sup> For example, Prince Edward Island, New Brunswick, Saskatchewan and the Yukon do not provide coverage for social assistance-related matters. Newfoundland, Nova Scotia, Ontario, Manitoba and Alberta provide it on a discretionary basis. Quebec and British Columbia regularly provide coverage (Alberta, 1994: Table 3).

<sup>15</sup> Letter from W. Williams, President, Provincial Advisory Council on the Status of Women Newfoundland and Labrador, to E. Roberts, Minister of Justice October 12, 1995, on file with the researcher.

<sup>16</sup> Interview with Judith Wahl, Executive Director of the Advocacy Centre for the Elderly, June 12, 1997, on file with the researcher.

<sup>17</sup> Interview with Ivana Petreconi, Rexdale Community Legal Clinic, June 7, 1997, on file with the researcher.

<sup>18</sup> Canadian Centre for Justice Statistics 1996, Table 12. However, the data for approved and refused applications may not reflect the total of the provincial and territorial count of applications approved for two reasons. First, a decision to accept or reject an application may not occur in the time period the application is made. Second, the approved application counts refer to full service applications only and do not include summary service applications.

<sup>19</sup> See Part One of this report.

<sup>20</sup> *Andrews v. Law Society of British Columbia* (1989) 1 S.C.R. 143.

<sup>21</sup> *R. v. Turpin* (1989) 1 S.C.R. 1296 at 1331-32.

<sup>22</sup> NCW, 1995b: introduction. See also Morrison and Pearce (1995: 3): “This wholesale abandonment of any responsibility for income redistribution or alleviation of need is literally unprecedented in Canadian history.”

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<sup>23</sup> Mossman, 1994: 366. As well, the Supreme Court of Canada is scheduled to hear an appeal from a decision of Legal Aid New Brunswick to deny legal aid to a woman who wished to challenge an interim custody application by the Minister of Health and Community Services to apprehend her three children. The children were ultimately placed in state custody for 14 months. The appeal is scheduled to be heard in the fall of 1998.

<sup>24</sup> The “spouse in the house rule” occurs when the state sometimes terminates social assistance if there is evidence that the female recipient has had a male living there even where the “spouse” has no legal obligation to support the woman or her children.

<sup>25</sup> Alberta, New Brunswick, Quebec and Ontario currently have “workfare”-like schemes.

<sup>26</sup> In Ontario, for example, women’s shelters have had their budgets reduced by five percent cuts in 1995 and 1996. In addition, the government has also moved to eliminate all funding for second-stage transition houses. Such supports not only provide safe spaces for women, they provide assistance to women who require help to apply for legal aid (Abt Associates, 1991: 178).

<sup>27</sup> See Part Two of this report.

<sup>28</sup> *Moge v. Moge* (1992) 3 S.C.R.813 at 854.

<sup>29</sup> For judicial recognition of inequality within the domain of paid employment, see, for example, *Action travail des Femmes v. C.N.R.* (1987) N.R. 161.

<sup>30</sup> A statistical overview demonstrates that women are twice as likely to be charged with welfare fraud than men (Adelberg and Currie, eds., 1993; Martin, 1992).

<sup>31</sup> Proceedings from Women for Economic Justice conference, Toronto, Ontario, December 3, 1991.

<sup>32</sup> This is the wording used by Legal Aid Manitoba to determine the merit of a legal aid claim. Virtually all provinces and territories, except for the Yukon, use some version of this merit test (Alberta, 1994: table following page 191).

<sup>33</sup> Ontario, Manitoba, Nova Scotia and Quebec engage in some form of law reform (NCW, 1995a: 48).

<sup>34</sup> *Andrews* 1985, 165.

<sup>35</sup> *Miron v. Trudel* (1995) 2 S.C.R. 418.

<sup>36</sup> *Morgentaler v. the Queen*, (1988) 1 S.C.R. 30.

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<sup>37</sup> *R v. Big M Drug Mart Ltd.*, (1985) 1 S.C.R. 295.

<sup>38</sup> This interpretation of “liberty” is of interest because the right to nurture a child and care for that child’s development has received support from the Supreme Court of Canada in the decision of *B. et al. v. Children’s Aid Society of Metropolitan Toronto*, (1995), 122 D.L.R. (4<sup>th</sup>) at p. 40.

<sup>39</sup> *Mills v. the Queen*, (1986) 1 S.C.R. 863 at 919-20.

<sup>40</sup> *R v. Morgentaler* (1988) 1 S.C.R. 30 at 55. See also Jackman, 1995: 388-9.

<sup>41</sup> For an example of the argument that women deserve state protection from violence within the home, see *Jane Doe v. Metropolitan Toronto Police Force*, judgment reserved in Ontario Court General Division, Court File No. 21670/87Q.

<sup>42</sup> National Association of Women and the Law 1997 conference proceedings, on file with the national office.

<sup>43</sup> *A.(L.L.) v. B.(A.)* (1995) 4 S.C.R. 536 at 556.

<sup>44</sup> Recent consultations have been organized by Human Resources Development Canada, Revenue Canada and Status of Women Canada to canvass the need for such initiatives: interview with Darlene Jamieson, National Association of Women and the Law, June 18, 1997, on file with the researcher.