THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

REPORT OF THE MAY 13, 2002 CONFERENCE

ON

CIVIL LEGAL AID

TORONTO, ONTARIO

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INTRODUCTION

On May 13, 2002, the Women's Legal Education and Action Fund (LEAF) held a conference at Osgoode Hall in Toronto with approximately 60 attendees on the subject of access to civil legal aid. Bringing together grass roots activists, lawyers and academics, the objectives of the conference were to share information from across the country and to develop strategies about court challenges, law reform initiatives and front-line efforts to expand access to civil legal aid. In particular, the conference agenda posed the following questions:

- **What are the federal and provincial Government's obligations to ensure adequate levels of civil legal aid?**
- **What are the impacts of inadequate civil legal aid?**
- **How can the Charter be used to deliver access to justice for all?**

This report is a summary of the consultation and provides a general overview of civil legal funding across the country, and a feminist legal analysis of the problems associated with the lack of availability of civil legal aid, and options for reform, both in terms of legislative reform and litigation strategies. The report will also address the impact of inadequate funding for civil legal aid, as well as the impact of any proposed reforms, on marginalized groups, including women of colour, immigrants, and the poor. Finally, the report will also include the results of the consultation workshops on lobbying and front-line strategies, as well as litigation strategies.

The conference was generously funded by the Court Challenges Program of Canada through its Case Development Fund.

BACKGROUND TO THE CONFERENCE: GENERAL OVERVIEW OF CIVIL LEGAL AID FUNDING ACROSS THE COUNTRY

The approach of the federal and provincial governments to the delivery of legal aid services over the last decade can be characterized as one of indifferent neglect. Overall government contributions – both federal and provincial – reached a plateau in 1992/93 and starting in 1995/96 began to diminish. Legal aid expenditures (adjusted for inflation) have decreased by 31% since 1994/95.[1] In 2000/01 for example, the provincial and territorial government contribution to legal aid plans decreased by 3% from the previous year. The number of approved civil legal aid applications in 2000/01 was 284,779, a 30% drop from the approval rate of 396,204 for civil legal aid applications in 1992/93.[2] On a per capita basis, provincial and territorial expenditures on legal aid varies greatly, from a low of $5 in Prince Edward Island and New Brunswick, to a high of $104 in Nunavut. The high cost of providing services in remote, sparsely populated areas contributes to the territories' highest per capita spending.

Data is not available on approval and refusal rates for legal aid applications disaggregated on the basis of sex. No data has been published since 1996 – when the Canada Assistance Plan ("CAP") was repealed and the Canada Health and Social Transfer ("CHST") introduced – regarding the reasons for the refusal of applications. Nor is national data available, which might provide some insight regarding the consequences for applicants who are refused legal aid. This impoverished information gathering has made it difficult to assess to a national extent the breadth of the impact of legal aid cuts on women.

[1] Statistics Canada. *Legal Aid in Canada: Resource and Caseload Statistics 1999-2000.* p. 10-11.
[2] Statistics Canada. *Legal Aid in Canada: Resource and Caseload Statistics 1999-2000.* p. 14. Statistics Canada. *Legal Aid in Canada: Resource and Caseload Statistics 1992-93*. p. 19.

Although the current sweep of restrictions 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.[3]

The reports provided at the conference make clear that the current delivery of legal aid services has fallen far short of meeting the needs of people requiring subsidized legal services.

British Columbia

Professor Marina Morrow, co-author of "Access to Justice Denied: Women and Legal Aid in B.C."[4], described the current and impending cuts to legal aid services within an historical framework of service reduction that began in 1993. Cuts sustained in 1993-97 in B.C. included the elimination of flexibility for clients whose incomes were marginally above the financial eligibility criteria, the elimination of funding for the "Do Your Own Divorce" program, and the elimination of funding for maintenance orders. Family applicants started being diverted to Family Court Counselors as an alternative to referral to a lawyer. Financial eligibility was restricted to eliminate legal aid services for single people who work full time even at a very low wage. Steep holdbacks were imposed upon tariff lawyers. The decline in approval rates for family applicants was significantly steeper than the decline in the approval rate of criminal applications.[5]

Two publications have documented the impact of these cuts on women: "Where The Axe Falls: The Real Cost of Government Cutbacks to Legal Aid", published by the Law Society of B.C. in 2000 and "Access to Justice Denied: Women and

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[3] Addario, Lisa. *Getting a Foot in the Door: Women, Civil Legal Aid, and Access to Justice.* 1998. Ottawa: Status of Women Canada. 33.
[4] *Access to Justice Denied: Women and Legal Aid in BC* by Penny Bain, Shelley Chrest, and Marina Morrow (Vancouver: Women's Access to Legal Services, 2000).
[5] Trerise, Vicki. *Where the Axe Falls: the real cost of government cutbacks to legal aid. British Columbia: The Law Society of British Columbia. 2000.* 9-14.

Legal Aid in B.C.", written by Penny Bain, Marina Morrow, and Shelley Chrest of the Women's Access to Legal Aid Coalition (WALS) in 2000. The WALS report documented the extent to which women were disproportionately disadvantaged by inadequate legal aid coverage. They noted, for example, that while the approval rate for legal aid applications declined between 1992/93 and 1998/99, the number of rejected applications was much greater for family law matters – of which women are the primary clientele – than it was for criminal law matters.[6]

British Columbia is in the throes of implementing extensive and rapid reductions to legal aid services once again. Marina Morrow reviewed the extent of the current cuts. All legal aid for human rights cases and funding for the Family Advocate program which provides for the independent legal representation on children in judicial proceedings have been cut. Cuts to 40% of existing legal aid services have been announced. Sixty legal aid offices are scheduled to be closed and replaced by seven regional centres. One hundred and fifty lawyers and paralegals have been laid off. Twenty-four courthouses in the province are scheduled to be closed.

Commencing April 2002, the Legal Services Society of B.C. phased out legal representation for all family law cases where there is no history of violence, all summary advice services and all poverty law matters. Service fees will be implemented to partially recover costs. At the same time that subsidized legal representation will be reduced, mediation will be expanded. Finally, there will be reduction in the fees paid to legal aid lawyers, a move that, in Ontario, has resulted in defence counsel striking en bloc for higher tariffs.

As a consequence, it will be more difficult for women to obtain custody and access orders. Without legal services, women will encounter more barriers leaving abusive relationships, and will be less able to get child support orders.

[6] WALS report.

The cuts will impact in an especially harsh manner, women who are economically marginalized, and whose experience of discrimination goes beyond that of gender, particularly Aboriginal and racialized women, and women with disabilities. As well, rural women and senior women will be less able to access services due to the closure of legal aid offices and courthouses, as well as due to increased transportation costs.

The level of literacy required to participate in court proceedings, to understand legal documents and to start a court application is very high.[7] Women who speak limited English will be less able to access all services, due to cuts to translation services in legal aid offices.

Youth will be less able to leave or avoid abusive situations due to the requirement that they leave foster care at age 17, and become independent from parents for two years before qualifying for social assistance.

Aboriginal people will find it more difficult to find lawyers to take family cases, notwithstanding the need for more Aboriginal lawyers and more culturally informed lawyers to do child apprehension cases and family legal work for Aboriginal people.[8]

Cuts to women's centres will mean that at a time when women have less access to legal aid services, they will also have less direct support and advocacy from front-line workers.

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[7] Trerise, Vicky. *Where the Axe Falls: the real cost of government cutbacks to legal aid.* Law Society of British Columbia. (2000), p. 20.

[8] In her report, Kelly Macdonald summarized focus group discussions she held with Aboriginal women in British Columbia whose children had been apprehended by the state. Women reported that they were unaware of their legal rights, that their lawyers were unresponsive to their instructions, and that they felt poorly represented by them: Macdonald, Kelly. *Missing Voices: Aboriginal Women Who Have Been at Risk of or Who Have Had Their Children Removed From Their Care. Vancouver.: National Action Committee on the Status of women. 2002.*

Professor Morrow spoke of the need to document the effect of the most recent cuts on women, particularly the worrisome trend toward diversion and mediation in family law cases. Research into the impact of mediation processes in Nova Scotia has confirmed that abused women in mediation and conciliation frequently feel intimidated by their abusive ex-partners and found that their interests were compromised during the process by mediators who demonstrated an inability to detect or handle abuse issues, and by a lack of legal representation.[9] Because of language obstacles and lack of knowledge of Canadian law and rights, immigrant women perceived that they were at a great disadvantage trying to negotiate conciliation and mediation. Researchers recommended that women have access to legal advice before and during any court-connected ADR process, and that culturally appropriate support should be available to all women.[10]

Alison Brewin, Program Director at West Coast LEAF, reviewed the current context in which people will experience these most recent cuts to legal aid services. Cuts to legal aid are one dimension of the evisceration of our social safety net. It is likely to fall into greater disrepair in the hands of a provincial government that is implementing an ideologically-driven agenda to reduce deficits at the expense of equal access to necessary services.

The scope of the reductions to social services includes reductions to welfare and disability benefits, the elimination of a range of tenant protections, and a reduction in human rights protections and employment standards.

She also highlighted the legislative and administrative initiatives that will shape the future of how legal aid services are delivered. The new legislation is devoid of substantive objectives in respect of legal aid services. Rather, the objectives for

[9] Transition House Association of Nova Scotia. *Abused Women in Family Mediation: A Nova Scotia Snapshot.* January 13, 2000.
[10] Transition House Association of Nova Scotia. *Abused Women in Family Mediation: A Nova Scotia Snapshot.* January 13, 2000. p. 27.

the provision of legal aid services are deliberately flexible, subject to available funding.

The Board of the Legal Services Society has been fired and the majority of the new Board members will be appointed by the Attorney General. The Legal Services Society budget must be approved by the A.G.

Currently, the BC Coalition of Women's Centres is joining other provincial non-governmental organizations in a call to the United Nations regarding the harms that the Government of British Columbia's planned changes to social assistance and legal aid will cause.[11]

Manitoba

Mona Brown summarized the study she wrote for the Manitoba Association of Women and the Law entitled "Women's Rights to Public Legal Representation in Canada and Manitoba" that was released in June 2002.[12] A deficit created by legal aid expenditures that are greater than the federal and provincial contributions to legal aid has resulted in a steady increase in the number of people who have been refused assistance by Legal Aid Manitoba. As a result:

- The Amicus programme for children in custody and access disputes has been eliminated. Mona Brown observed that this runs counter to the legal principle of considering the best interests of the child in custody and access proceedings.
- Certificates may not be issued in the future in domestic cases involving property matters.[13]

[11] http://www.campaignbc.ca/index.cfm/fuseaction/news.article/article_ID/2435/index.cfm accessed at May 23, 2003.
[12] Manitoba Association of Women and the Law. *Women' Rights to Public Legal Representation in Canada and Manitoba.* 2002. Accessed at May 23, 2003: www.nawl.ca/MAWLpt1.htm.
[13] ibid., Part 3. P. 2.

- The Child Protection Centre was recently disbanded.

- The Poverty Law Centre may be eliminated. [14]

- Civil legal aid applications were rejected to a greater extent than criminal: 41% of rejected applications were criminal, 59% were civil.[15]

- Increasingly, there are fewer lawyers who will accept a domestic legal aid certificate in Manitoba.

- Despite Manitoba's proud tradition of private bar contributions to legal aid, the Executive Director of Manitoba Legal Aid has reported that rural women's access to lawyers who will accept legal aid certificates for family law matters is extremely limited.

- Legal aid administration often has to call ten to twelve lawyers in order to locate a private bar lawyer who will accept a civil legal aid certificate.[16]

Manitoba family law lawyers who were left without an agreement on their hourly legal aid rate announced in February 2003 that unless the province came up with a plan to adequately fund legal aid lawyers in family matters, private lawyers would be withdrawing all services. Such a scenario would be devastating for women who are victims of domestic violence and have no other alternative other than legal aid.[17]

[14] Ibid., part 3. P. 3
[15] ibid. Part 2. P. 8.
[16] ibid., part 3. P. 5.
[17] See http://www.newwinnipeg.com/news/d03-03-03maws.htm

Ontario

Lisa Addario reviewed the results of her 1997 focus group research with women receiving civil legal aid in Manitoba and in Ontario.[18] Women were asked about their experiences accessing legal aid, the coverage criteria and the financial eligibility criteria for receiving legal aid and the quality of services they received from their legal aid lawyers. Focus groups were held with women who were survivors of intimate violence, single mothers, urban Aboriginal women, refugee women, rural women and older women.

Women reported that they found the process of applying for legal aid intimidating and confusing and were sometimes ill equipped to persuade legal aid personnel of the merits of their application. They had difficulty finding lawyers who were prepared to take their legal aid certificates.

Many women who were assessed by legal aid personnel to be financially ineligible for legal aid were still unable to afford a lawyer. The law and policies that divide up people's life experiences to determine eligibility have resulted in uneven legal aid coverage for interconnected legal problems. This meant that women did not receive effective legal aid services.

Women reported that they frequently found that their lawyers provided them with effective, sensitive representation. Just as frequently however, women found their lawyers inaccessible, ineffective and abusive toward them.

[18] Addario, Lisa. *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice.* Ottawa: Status of Women Canada. 1998.

Finally, women identified that the problems they encountered were part of bigger systemic defects in the justice system, and many felt that they would have been better off had they never interacted with legal aid, lawyers or the justice system.

Legal aid rates in Ontario remained stagnant from 1987 until 2002. The Ontario government recently announced a five per cent tariff increase, effective April 1, 2003. This brings the total increase for lawyers who do legal aid certificate work to 10 per cent, and for duty counsel to 28 per cent.[19]

Prince Edward Island

Laurie Ann McCardle and Andy Lou Somers, coordinators of the Prince Edward Island Women's Centre outlined the report of a women's coalition examining women's access to legal aid entitled, "Legal Aid and Social Justice for Women in P.E.I."[20] Andy Lou coordinated focus groups, which included senior women and women who are working poor. Ten stories were collected and summarized in the report.

Legal Aid administration in P.E.I. prioritizes family legal aid in civil matters. However, all access to family legal aid is contingent on the involvement of a child. Consequently, older women are particularly vulnerable. Women who are working and living in poverty won't qualify for legal aid unless they are receiving social assistance. The focus group participants included:

- A mother of four children with family law problems who turned her life savings over to a lawyer. It barely covered the lawyer's retainer. Her lawyer advised her to get a job and "join the real world".

[19] http://www.legalaid.on.ca/en/info/tariff_increase.asp. accessed May 23, 2003.
[20] PEI Women's Centres. *Legal Aid and Social Justice For Women in P.E.I.* accessed May 23, 2003: www.wnpei.org/calwn4.htm.

- A senior woman whose spouse lost most of the family money due to an addiction. She has tried to access legal advice to find out how to freeze the remaining joint assets and get a legal separation. She is ineligible for legal aid.

- A woman facing a custody hearing whose spouse was represented by legal aid counsel from Nova Scotia. She had to represent herself as she was not eligible for legal aid.

Since the conference, the P.E.I. Women's Centre has created a strategic plan to improve access to family law legal aid.[21]

Newfoundland

Joyce Hancock and Elaine Condon provided an overview of their research into legal aid services in Newfoundland. In 1999, they held focus groups as well as personal interviews and telephone interviews with women about their experiences with legal aid. Women were also able to call a toll free number and recount their experiences. This research formed the basis of "Gender Matters: A Gender Equity Analysis of Legal Aid in Newfoundland and Labrador".[22] The report documents the inequitable impact of gender-neutral policies implemented by the Legal Aid Commission of Newfoundland.

The Legal Aid program in Newfoundland has no stated goals or objectives. There are no written policies or procedures for staff to follow in determining eligibility. There is a lack of accurate data kept in respect of the usage of legal aid services disaggregated by sex.

There is no legal aid available for child support matters. Legal aid for custody matters is only available if the opposing party has engaged a private lawyer.

[21] http://www.wnpei.org/legalaidstrategicplan.pdf. accessed May 23, 2003.
[22] Gander Status of Women Council Justice Issues Committee, *Gender Matters: A Gender Equity Analysis of Legal Aid in Newfoundland and Labrador.* 1999.

However, legal aid is available for issues of access, largely a man's need. While legal aid will not provide lawyers to assist with peace bond applications, it will provide representation to persons accused of assaulting their intimate partners - largely men. Women recounted having to sell their assets in order to pay for a lawyer, and sometimes having to go on social assistance to survive. They also agreed to custody being awarded to their partners in order to avoid participating in a lengthy court process.

The Legal Aid Commission views the family home as an asset which must be sold in order to pay for a private lawyer for family law matters. The same policy does not issue for criminal law matters; persons charged with a criminal offence are entitled to representation if they are likely to be incarcerated, and are not required to sell their homes.

Women living in remote areas of Labrador found access to legal aid lawyers seriously limited and expensive.

Even after going through an experience with Legal Aid, focus group participants had no common understanding about either the issues that Legal Aid covers or the financial criteria to be applied. Most legal aid applicants were screened by the receptionists at Legal Aid rather than by lawyers.

Most women spoke well of the service they received when they obtained lawyers. Overall however, the Report's authors observed that "while there is no clear picture of Legal Aid's mandate, women do know that issues that are vital to them are most often not covered."[23]

[23] Condon, Elaine and Gander Status of Women Council Justice Issues Committee, *Gender Matters: A Gender Equity Analysis of Legal Aid in Newfoundland and Labrador.* 1999. P. 38

Summary

While the specific details of each legal aid plan vary across the different provinces and territories, the themes that regional participants expressed in their presentations were strikingly similar. Financial cutbacks in the area of family law have dramatically reduced coverage for legal matters that affect women; women whose experience of disadvantage goes beyond gender are particularly negatively affected by this reduction in service as well as by reductions in social assistance and other social welfare programming; and the current tariffs paid to legal aid lawyers are sufficiently inadequate that women across the country are having difficulty finding lawyers who will take Legal Aid cases.

A FEMINIST LEGAL ANALYSIS OF THE PROBLEMS ASSOCIATED WITH ACCESS TO CIVIL LEGAL AID

In *R. v. Turpin,* Madame Justice Bertha Wilson considered the equality entitlements set forth in Section 15 of the *Charter* and wrote:

> "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."[24]

Within the context of women's access to legal aid services, this sort of examination reveals a confluence of events that have worked to greatly disadvantage women's access to subsidized legal services in the areas of family and poverty law matters.

[24] *R. v. Turpin* [1989] 1 S.C.R. 1296, 1331-2.

The replacement of the Canada Assistance Plan (CAP) with the Canada Health and Social Transfer (CHST) in 1995 amounted to the evisceration of a broad range of social services, including funding for civil legal aid.[25] Programmes and services that were offered under CAP were critical to women's physical and economic security. Martha Jackman wrote:

> "For many women, such as those escaping domestic abuse, those seeking support and counselling to deal with sexual assault, those relying on homemaker 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."[26]

The repeal of CAP also corresponded to the loss of important national standards in respect of the delivery of social services. Because the administration of justice is a provincial/territorial responsibility, each provincial legal aid plan establishes its own organizational structure and eligibility requirements. The loss of national standards has meant a wide variation in the civil legal aid services available across the country.

The introduction of the CHST also corresponded to a massive reduction in transfer payments from the federal government to the provinces. The reduced

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[25] Civil legal aid was targetted because it was funded out of the Canada Assistance Plan administered by Human Resources Development Canada (HRDC). Criminal legal aid was unaffected by the replacement of CAP with the CHST. It is funded by the federal Department of Justice and coverage is, in part, established under federal, provincial and territorial cost-sharing agreements which set standards for minimum legal aid coverage for criminal matters throughout Canada.

[26] Jackman, Martha. "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform." *Canadian Journal of Women and the Law.* 8. (1995) 372, 376.

amount of funding coupled with the fact that the provincial government was no longer accountable for the manner in which the funds were spent, has meant that less money is now available for all of the services previously funded under CAP. Moreover, the money that is available has been the object of fierce competition: civil legal aid must now compete with medicare post-secondary education, social assistance and social services for priority in funding.[27]

Subsequent to the introduction of the CHST, welfare rates dropped in several regions in the country. Ontario, for example, reduced welfare rates by 21 percent for most social assistance recipients. This was complemented by a zealous commitment on the part of the government to, in the words of cabinet minister John Baird, "help people escape from welfare dependency" through the criminalization of welfare fraud. The vulnerability many women experienced as a result of this new policy direction was heightened by the concurrent reduction in services for abused women, as well as drastic reductions in subsidized housing. As was predicted, the consequences have been grim:

> "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."[28]

This diminished commitment to state support for people living in poverty has a pronounced effect upon women. Women comprise 57% of all persons living in poverty, according to 1998 data.[29] 54% of all single parent families headed by mothers live in poverty. Moreover, women are more likely to be poor relative to

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[27] Addario, Lisa. *Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice.* (1998) Ottawa: Status of Women Canada. 34-5.
[28] Morrison, Ian and Janet Mosher. " Barriers to Access to Civil Justice for Disadvantaged Groups". *Background Paper for the Ontario Civil Justice Review.* (1995) 7.
[29] National Council of Welfare. *Poverty Profiles1998.* Ottawa: Minister of Public Works and Government Services. (2000) 38-94.

men at every stage of their lives with the exception of ages 45 to 54, at which time they experience poverty to the same extent.

The gap between men and women widens with age, with women 65 and older comprising 22% of all persons living in poverty, compared to 6% of men in the same age category. Women's poverty is also more difficult for them to alleviate. For example, single-parent mothers under 65 with children under 18 had average incomes more than $9,000 below the poverty line.

Poverty rates are also relatively higher for immigrants. In 1998, the poverty rate for heads of families born in Canada was close to 11.9%. The rate for heads of families born elsewhere was 16.7%. Poverty rates were lower for families who immigrated to Canada prior to 1980, and higher in the last twenty years.[30]

Aboriginal people are 4 times more likely to report ever experiencing hunger than the non-Aboriginal population. Among all Aboriginal households (owners and renters), an estimated one-third have 'core needs'; that is, their housing does not meet today's standards for adequacy, suitability and affordability. These households do not have sufficient income to afford rental accommodation that meets minimum standards, and they spend or would have to spend more than 30 per cent of their income to obtain adequate and suitable accommodation. Such rates of core-need among Aboriginal households are disproportionately high compared to the rate of 11 to 12 per cent of all Canadian households.[31]

People with disabilities are much more likely to live in poverty than are other Canadians. Of adults with disabilities, 43% had an individual income of less than $10,000 per year and 26% had an income of less than $5,000. Adults with

[30] Ibid. p. 53.
[31] http://www.campaign2000.ca/rc/unsscMAY02/un8.html accessed May 23, 2003.

severe disabilities are much more likely to be poor than are those with milder disabilities.[32]

Given this relative poverty, women experience disadvantage in their ability to pay for legal services at the same time as the reduction in social assistance has increased the range of legal problems that are bound up with poverty. In addition to the problems which accompany the receipt of any state support and the inevitable state scrutiny, women living in poverty have additional problems such as tenancy issues, consumer complaints, discrimination in respect of employment or services, child apprehension matters, and an increased criminalization of such activities as supplementing government support with additional income.

Moreover, the access to justice movement that first advocated for subsidized legal services in the early 1960's, failed to differentiate clearly the compounding disadvantage experienced by low income people when differing forms of oppression intersected and multiplied.[33] Thus, while there was great debate in Canada at the time regarding the relative merits of the judicare and the community clinic model, 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.

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 womens' experiences of poverty and their experiences as victims of discrimination based on age, race, citizenship, sexual orientation, and mental or physical ability. The

[32] http://www.parl.gc.ca/disability/issues/disability_issues_3_e.asp accessed May 23, 2003.
[33] Addario, L. *Getting a Foot in the Door,* p. 7.

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.

Moreover, the access to justice movement was historically pre-occupied with restrictions to liberty as the trigger for subsidized legal services. This resulted in attention and resources focussed on criminal law matters, of which men are the primary clientele, literally at the expense of family law matters of which women are overwhelmingly the primary clientele. This is another reason why availability of civil legal aid is a gender issue.

THE UNDERPINNINGS OF A POSITIVE OBLIGATION TO PROVIDE LEGAL AID

At the conference**,** Professor Martha Jackman considered the judicial approach to the question of whether the Charter imposes positive obligations on government, to provide legislative and social protections and benefits by reviewing the Supreme Court's treatment of the claim for social assistance under the Charter. Like legal aid, social assistance is another dimension of social and economic rights, for which Canada has responsibility under the International Covenant on Economic, Social and Cultural Rights.[34]

This international commitment, coupled with Canadians' entitlement under Section 7 of the Charter to "life, liberty and security of the person" provide a strong theoretical basis for the claim of entitlement to an adequate level of social assistance, and the right to participate in any hearing that might affect that entitlement.

[34] 16 Dec. 1996, 993 UNTS3, Canada TS 1976, No. 46. Article 11, Section 1.

However, few cases have been successful in this area. The Courts have rejected claims that health care, housing, unemployment insurance and social assistance should be included in the right to "life, liberty and security of the person" under Section 7.[35] The Courts have consistently held that they must not encroach on the government's responsibility to establish and administer social programs, stating that weighing in on issues of social and economic policy is the role of democratically elected officials, not the courts.

However, the Court's growing ease with international instruments as a guide to Charter interpretation**,** coupled with its judgments in the cases of *Vriend* [36]and *Eldridge*[37] should be viewed as possible openings for enforcing social and economic rights.[38] In *Vriend*, the Court found that the Alberta government's failure to ensure that gays and lesbians have equal protection of the provincial human rights legislation, violated section 15 of the Charter. The Court rejected the claim that the Charter couldn't address government inaction in the context of social programs. Significantly, the court in *Vriend* signaled that whether the Charter imposes positive obligations on Parliament or the legislature to provide services or ameliorate systemic inequality, is an open question.

In *Eldridge,* the Court held that social disadvantage borne by persons who are deaf was directly related to their inability to benefit equally from services provided by government. It found that the government's failure to provide interpreter services within the provincial medicare system violated section 15 of the Charter. In the words of the Court, it was a "thin and impoverished view" of section 15 that permitted governments to provide benefits to the general population, without ensuring that disadvantaged members of society had resources to take full advantage of those benefits.

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[35] Jackman, Martha. "From National Standards to Justiciable Rights: Enforcing International and Social Economic Guarantees through the Charter of Rights" (1999) 14 Journal of Law and Social Policy. 69 at 80.
[36] *Vriend v. Alberta* [1998] S.C.J. No. 29.
[37] *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.
[38] See also *Baker v. Ministry of Citizenship and Immigration [1999] 2 S.C.R. 817.*

In the *Gosselin* case, the Charter Committee on Poverty Issues argued that Canada's international obligations as well as section 7, guarantee an adequate level of social assistance. Moreover, excluding poor people from participating in decisions that affect their rights was argued to be contrary to the principles of fundamental justice**,** in violation of section 7 of the Charter.[39]

Martha Jackman cautioned that as with the right to social assistance, the initial entitlement to state-funded legal counsel across the board has not been established. While the claim for an initial entitlement to legal aid is a challenging argument, the Charter requirement for governments to terminate entitlement in accordance with principles of fundamental justice, and to ensure equality of access to the entitlement, might be an easier claim to make.

Bruce Porter, Director of the Centre for Equality Rights in Accommodation, and member of the Charter Committee on Poverty Issues reviewed the significance of the *Vriend* and *Eldridge* decisions.

In *Vriend* and *Eldridge**,*** the majority of the Court found, for the first time, that Section 15 of the Charter guarantees "substantive" as well as "formal" equality. This means that governments have a positive obligation under Section 15 to take action to remedy disadvantage and inequality. These two decisions invoked the spirit of the 1989 *Andrews*[40] decision, in which the Court viewed the role of the judiciary as protecting "those groups in society to whose needs and wishes elected officials have no apparent interest in attending."

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[39] While a majority of the Supreme Court allowed that "one day s. 7 (the right to life, liberty and security of the person) may be interpreted to include positive obligations," the Court found insufficient evidence in this particular case to support such an interpretation. Thus, the Court left undecided the critical question of whether governments have positive obligations under Canada's Charter to ensure adequate financial assistance for food, clothing housing and other necessities: *Gosselin v. Quebec (Attorney-General) [*2002] SCC 84. File No.: 27418 at para. 83.

[40] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143.

In the intervening years between *Andrews* and *Eldridge*, the Court has never found that Section 15 requires that disadvantaged groups be treated differently in order to meet the Section 15 guarantee of equality.[41] The question then becomes what the Court means by "substantive equality".

In *Eldridge,* the Court didn't decide the issues of the right to services ab initio, but said that the violation of section 15 rested both in the government's failure to meet the need where it was within the government's authority to do so, and because the government provided for unequal access to the benefit, a formal equality approach, in Bruce Porter's view. A reasonable allocation of need can't ignore needs of disadvantaged groups protected by Section 15.

Bruce Porter viewed this latter point as a useful starting place to argue for an entitlement to civil legal aid. As long as there is legislative authority to act, the argument would go, the government can't opt out of meeting the need required to ameliorate the disadvantage. Additionally, the cases affirming the right to maternity benefits help to delineate an ab initio obligation to provide benefits in the first place.

Vince Calderhead's paper outlined the usefulness of section 36(1) of the Constitution Act, 1982 to enforce an entitlement to civil legal aid. Section 36(1) requires the federal and provincial government to provide essential public services of reasonable quality to all Canadians. There is some case law to support the position that this section was intended to create enforceable rights. For courts unconvinced about the justiciability of section 36(1), the remedy could be a declaration that the government is in violation of its Charter obligations rather than requiring the government to take a specific action.

[41] Porter, Bruce. "Beyond *Andrews: Substantive* Equality and Positive Obligations After *Eldridge* and *Vriend*" (1998) Constitutional Forum 9:3 71.

The key issue is what constitutes "essential public services" and what is "reasonable quality". It can be argued following the *J.G*. decision that civil legal aid should be extended, not just in child apprehension cases, but whenever child custody is at issue.[42] The need for civil legal aid may be an important corollary for enforcing the right to other essential public services. With respect to what constitutes "reasonable quality", this obligation would likely not be met by the kind of "no strings attached" funding that exists under the CHST.

Dean Patricia Hughes and constitutional lawyer Joe Arvay offered complementary approaches to the challenge of expanding the entitlement to publicly funded legal representation subsequent to the *J.G.* decision. In this case, the Minister of Health and Community Services was granted custody of J.G.'s children on a temporary basis. The Minister applied for an extension of that custody. J.G.'s application for legal aid was denied as such applications were not covered under the provincial legal aid plan.[43]

On appeal the Supreme Court of Canada found that the right in section 7 to security of the person applied to parents who could be relieved of the custody of their children. Section 7 guaranteed such parents the right to a fair hearing. J.G.'s right to a fair hearing, the Court held, required that she be represented by counsel due to the seriousness of the interests as stake, the complexity of the proceedings, and J.G.'s capacities.[44] The case is significant because it demonstrated the Court's willingness to establish procedural safeguards within civil proceedings, and its willingness to make the right to those safeguards contingent on the provision of subsidized legal services.

According to Dean Hughes, there are three different approaches to arguing that the right to civil legal aid should be expanded beyond the child protection context:

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[42] *New Brunswick (Ministry of Health and Community Services) v G. (J))* [1999] 3 S.C.R. 46.
[43] *Ibid*. at para. 3-5.
[44] *Ibid*., paras 69-75.

1) using the comparator group of criminal legal aid, bringing civil legal aid levels up to levels of criminal legal aid ,
2) establishing minimum national standards in respect of the provision of civil legal aid services to avoid provincial variations, and
3) extending the *JG* decision to other social benefits.

Dean Hughes based her argument for an expanded right to civil legal aid on the Rule of Law. The Rule of Law requires that all citizens have meaningful access to participate in the legal system. Fundamental principles of the Rule of Law aided by the interpretation of sections 7 and 15 of the Charter, mean that our ability to vindicate ourselves through the law requires that we have legal representation.

Although family cases outside the child protection context may be characterized as "private" in the sense that they involve disputes between individuals, there should still be recognized a positive obligation to provide access to justice in such cases. Support for this argument is found in the *Dunmore* case.[45] In that case, the Court found within the context of labour relations, that even if disputes are private, the government is responsible to protect the disadvantaged party, where the other party is using the legal system to its advantage.

Dean Hughes noted the importance of empirical research into the cost to the legal system of unrepresented litigants, in order to respond to government claims that civil legal aid will be too costly to justify.

Joseph Arvay reviewed the manner in which the courts have decided the issue of costs in public interest and other constitutional cases. As a constitutional lawyer, he initially funded cases by absorbing the costs of the litigation himself. The clients were asked to pay but often couldn't. His experience was that if he took the case on a pro bono basis, the courts didn't award costs at the end of the

[45] *Dunmore v. Ontario (Attorney General) [*2001] S.C.C. 94

day. He observed that, when the provisions of the Ontario Social Assistance legislation that imposed a three- month ban on recipients who are convicted of welfare fraud were constitutionally challenged**,** the judge at the interlocutory injunction stage awarded costs, an order that serves to encourage lawyers to pursue pro bono cases.[46]

Generally, the courts have acknowledged that the individual litigant should not bear the costs of Charter litigation because of the important public interest in the determination of constitutional issues.[47] In the *Little Sisters* case the applicant, while not completely successful, was awarded costs**,** based on:

- The importance and complexity of the case,
- Cost,
- The imbalance between the parties, and
- The inability of litigants to pay.[48]

When he represented the UBC students who took action against the conduct of the federal government and the police at the 1997 APEC conference,
Arvay did not receive costs in advance, but was awarded them even though he argued the case and lost. In *William*, an Aboriginal title case, the court was persuaded that, although in theory the Crown represents everyone, in this case, their statement of defence was the same as the statement of defence of the Corporation, and that they were more properly characterized as representing the interests of non-Aboriginal people. The poverty of the Aboriginal peoples came about in part because of the Crown, and as such they should have their costs borne by the Crown. [49]

These cases support the position that legal representation should be funded in

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[46] *Rogers v. Sudbury (Administration of Ontario Works) [*2001], 57 O.R. (3d) 460 (SCJ).
[47] Arvay, Joseph. "Constitutional Right to Legal Aid" in *Making the Case: The Right to Publicly Funded Legal Representation in Canada.* (2002) Ottawa*:* Canadian Bar Association. P. 44E.
[48] *Little Sisters Book & Art Emporium* v. *Canada (Minister of Justice)* [1996] 18 B.C.L.R. (3d) 319 (S.C.), affirmed [2000] 2 S.C.R.
[49] *Roger William et al v. Riverside Forest Products Limited et al, [* 2001] B.C.S.C. 1641.

cases in which the law is being challenged for violating a section 7 interest. The alternative argument put forward by Arvay was that poverty should be recognized as an analogous ground under s. 15 of the Charter.

Melina Buckley outlined the challenges of a successful section 15 argument in the context of civil legal aid. As a strategy, the main disadvantage to litigation is the amount of time it takes as well as the cost. Considering litigation requires us to turn our minds to the kind of evidence that is currently available, the kinds of stories that would be most supportive of a section 15 argument, and the kind of legal argument we want to make.

While the changes to legal aid in B.C. have had an adverse impact on women, cases alleging adverse impact on the basis of sex are challenging. Courts and tribunals have had a hard time understanding differential treatment on the basis of sex, when not all women are affected, or where women and men are both affected. When faced with this scenario, the courts have tended to redefine the groups. They've also had trouble shaping a remedy where the benefits would be experienced by men and women.

However, the *Law* decision may support arguments that section 15 includes recognition of inequality, based on personal circumstances (rather than personal traits), that courts should be flexible in looking at analogous grounds, and are more open to a layered multi-faceted approach to discrimination and intersecting disadvantage.[50]

If section 15 is used in a claim respecting civil legal aid, it will be important to carefully consider the comparator group. Courts appear to be more comfortable with a finding of direct discrimination rather than a finding of adverse impact discrimination. On the other hand, the Court found in the *Meiorin* case, that the

[50] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

employer had an obligation to build equality norms into the workplace.[51] Similarly it can be argued that the government has an obligation to build equality norms into the legal aid provisions.

Patricia MacDonald of the Public Interest Advocacy Centre in British Columbia agreed that the cuts to legal aid in B.C. seem to lend themselves to a section 7 and 15 analysis. The key issue in a Charter challenge will be: What do legal services mean? Additional questions to be resolved include:

- The practical problem of bringing a claim for access to civil legal aid before the court when there is no legal aid;
- Whether poverty can be presented as an analogous ground under Section 15,
- The impact of the Supreme Court decision in *Gosselin* in view of its unwillingness to find a violation of Section 7 based on the facts in that case.

As part of its efforts to restore legal aid in B.C, West Coast LEAF will launch an Affidavit Campaign in the summer of 2003, to collect convincing evidence from across the province that reflects the true impacts of the cuts to legal aid programs on women and others most affected. The majority of those affected include women, single mothers, and people with disabilities. The goal is to make a case for the restoration of the services through law reform efforts or via test case litigation. West Coast LEAF is working with the CBA Legal Aid Committee and several community organizations on this campaign.

As a lobbying strategy, there is a need to educate the Attorney General and members of the Bar about what poverty law services are and of the need for these services.

[51] *British Columbia (Public Service Employee Relations Commission) v. BCGEU* [1999] 3 S.C.R. 3.

Summary

A range of speakers advanced their perspectives regarding how best to structure a claim to subsidized legal services for civil legal aid matters. The possible sources of support for this argument include international covenants and the *Canadian Charter of Rights and Freedoms.* There is a good deal of case law from which one might extrapolate an argument grounded in the rule of law for example, or the right to life, liberty or security of the person or the equality entitlements contained in Section 15. However, to date the Supreme Court of Canada has held forth very tentatively in the domain of social and economic policy. The courts have shown more interest in arguments that the state should bear the costs of individuals litigating the constitution.

RESULTS OF THE CONSULTATION SESSIONS

In the afternoon, the conference broke into groups designed to explore different strategies to respond to the inadequate provision of civil legal aid. One group focused on litigation strategies, the other with law reform and front-line strategies.

Litigation Strategies:

Barbara Billingsley, who could not attend the conference, provided a written paper on remedies which was summarized in the litigation strategies workshop. According to Billingsley, unconstitutional omissions are generally more difficult for the courts to cure, given the range of options the court might take, and their likelihood of deferring to the legislature in this context. There are two kinds of cases involving omissions. The more common category is where the legislature already provides a benefit program, but does so in an unconstitutional way. In such a case, the court can order that the excluded group be included, as in

Vriend, and *Eldridge*. There are relatively few cases in the second category, where the court finds that the *Charter* imposes a positive obligation on the government to provide a benefit program. Billingsley included *New Brunswick v. G(J)* in this category, as it involved the argument that "with or without the existing legal aid program, the government was failing to provide the applicant with her constitutionally guaranteed right to paid legal counsel" (at fn 15). While this category of case will entail a s. 24 remedy for an individual claimant, it might still compel governments to provide relief to affected persons more broadly. This sort of systemic remedy will be most likely where the court's finding of a positive obligation is stated in broad terms. In cases where the obligation is framed more narrowly, individuals will bear the burden of seeking s. 24 remedies. In a context like civil aid, this has negative practical effects -- applications will clog the court system, and claimants will often require counsel to compel the government to pay for counsel, exacerbating the initial problem. Still, this is incremental progress, and it may impel governments in fulfilling their obligations in the future.

The discussion in the workshop focussed on potential approaches to take in B.C., where litigation is planned to challenge the most recent civil legal aid cuts and the changes to the mandate of the Legal Services Society. The participants expressed a range of views about the impact of the *J.G.* decision and its usefulness.[52] Most participants believed that it would be important to continue to argue the manner in which the cuts violate rights to life, liberty and security of the person under section 7 as well as the equality entitlements under section 15.

Other potential strategies include suing the federal government as a co-respondent, but coverage is so uneven across the country that such a strategy may result in a further lowering of coverage in some provinces, rather than an overall increase in national standards.

[52] N*ew Brunswick (Ministry of Health and Community Services) v. G. (J) [*1999] 3 S.C.R. 46

The potential advantage of using international law standards on access to a trial/fair hearing, is that the jurisprudence on this protection is broader than Canadian jurisprudence under the Charter.

It was suggested that it would be useful to obtain evidence from retired judges about their experience with unrepresented litigants. Statistics are also required on the results of cases where litigants are unrepresented, as well as the time and the costs of these cases to the justice system.

Finally, family law cases and court procedures are increasingly complex, underscoring the need for legal representation in family law.

Law Reform and Front Line Strategies:

A number of initiatives are currently underway aimed at raising the public profile of the cuts to civil legal aid, including:

- Fact sheets published in B.C. by the Institute on Family Violence,
- A further phase of the social justice project in P.E.I.,
- A report to be published by the Manitoba Association of Women and the Law in June 2002 on women's rights to legal representation,
- An invitation by the Canadian Bar Association (C.B.A.) to other groups to work in coalition with the C.B.A. on the legal aid issue and to convey stories about impacts on the cuts to the media. The C.B.A. is also gathering stories as part of its strategy of test case litigation.

Earlier in the day, Daphne Dumont, Past President of the Canadian Bar Association, reviewed the history of the C.B.A.'s work to increase access to legal aid services. This includes a 1993 action plan, a Charter of Public Legal Services, a Legal Aid Advocacy Resource Kit, and a commitment to make legal

aid issues a priority for the organization. [53] The recent C.B.A. project *Making the Case* sets forth the constitutional basis for an argument for increased access to legal aid, and will be useful to support future litigation.[54]

The challenges to arguing successfully for an expanded right to subsidized legal services include:

- The absence of national standards due to the block funding formula in place under the CHST,
- The provincial responsibility for the manner in which legal aid services are delivered,
- The lack of profile of legal aid as a public issue,
- The absence of a national coalition of groups,
- The perception that lawyers advocating for enhanced legal aid are doing so out of self interest.

The CBA is exploring the development of a new Canada Access to Justice Act and wants to work with like-minded organizations regarding a national strategy on legal aid.

During the workshop, the following observations were made

- With respect to advocating for changes to legal aid: Data is required on the impact of the cuts on unrepresented persons. The federal government should be lobbied to collect this data.
- The current Justice Minister, Martin Cauchon has expressed an interest in improving legal aid services. As such, it seems timely to press for changes.
- Legal aid cuts have an impact on women serving organizations that have also been cut back but are still required to provide women with court support and sometimes, advocacy.

[53] The CBA website at: www.cba.org as well as the West Coast LEAF web site at: www.westcoastleaf.org contain updated information on legal aid issues.
[54] Canadian Bar Association. *Making the Case: The Right to Publicly-Funded Legal Representation in Canada*. 2002.

- While the loss of national standards precipitated the decline in legal aid services in many provinces, national standards have not been established or reinstated in other areas of social policy, and it may not be a productive strategy.

- The federal government could be encouraged to fund divorce cases, which are within their mandate.

- There is a need to better inform women of their rights.

- The federal or provincial governments could set up women's legal clinics that could address women's specific concerns.
- Differential fees for law schools will discourage graduates from doing social justice work.

- Any strategy must be multi-level and include coalition work.

- Information gathering might be funded by Status of Women Canada.

- Organizations like LEAF could play a role in the legal community by highlighting the range of legal needs of people in crisis.

- Clinics need to intersect with the private bar.

- Legal aid issues have a broader context within changes to family law that include custody guidelines and the increased use of mediation.

CONCLUSIONS

The conference participants were united in their quest for an ideal of substantive equality for women. Within the context of access to justice, this ideal includes a system of subsidized legal services that is equally responsive to women's legal problems. Any attempts to improve access to justice and to ensure that the law improves women's lives must be rooted in an equality analysis which takes the circumstances of their situations - in their diversity - into account.

It would be tempting to conclude, given the current Justice Minister's avowed interest in reviving legal aid, that a law reform strategy offers the better hope. The

recent federal budget of 2003 included a commitment to boost criminal legal aid contributions in each of the next two fiscal years. However, no such corresponding gesture was made to increase civil legal aid funding. Moreover, the federal government was mute on its responsibility for funding civil legal aid matters in the *J.G.* case.

Thus, a multi-pronged approach using lobbying efforts at the national as well as at the grass-roots level, and the prospect of litigation, should be encouraged to persuade federal and provincial governments to live up to their responsibilities to provide access to subsidized legal services.

The conference served several important functions: it gave participants the opportunity to share information about the status of civil legal aid programming across the country, important since civil legal aid programming varies across provinces and territories. Secondly, it enabled activists, academics and legal practitioners to network and make contacts that will be strategically important to future lobbying efforts. Finally, it gave conference participants the opportunity to advance their own thinking about the merits of respective arguments and strategies, to press the case for more secure funding.

Since the conference event of May, 2002, the Canadian Bar Association has launched a Legal Aid Coalition. Comprised of seventeen organizations, the Coalition has announced its intention to look for test cases to bring before the courts. Coalition members are sharing information in order to broaden their perspectives on problems associated with the provision of legal aid, to discuss potential strategies, and to determine the common ground to be put forward to government or to media. The National Association of Women and the Law (NAWL) is also canvassing equality-seeking women's organizations, regarding the scope of the crisis in legal aid services for women in Canada, as well as strategies to elevate the profile of this issue, and advocate for better access to legal aid services.