

**SUBMISSION OF WEST COAST LEAF ASSOCIATION
TO THE MINISTRY OF SOCIAL SERVICES
BRITISH COLUMBIA**

**ON THE DISCRIMINATORY EFFECTS OF THE GUARANTEED
AVAILABLE INCOME FOR NEED (GAIN) ACT ON WOMEN**

PART I

February, 1996

1.0 West Coast LEAF Association

West Coast LEAF Association is the British Columbia branch of the national Women's Legal Education and Action Fund (LEAF). LEAF is a federally incorporated, non-profit organization founded in 1985 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms (the Charter). To this end, LEAF engages in test case litigation, equality research, and public legal education. Through such work, LEAF has developed expertise regarding the interaction between equality and many areas of law having a particular impact on women. This submission represents the views of West Coast LEAF and has been endorsed by National LEAF.

1.1 Executive Summary

This submission first addresses a number of concepts basic to women's achievement of substantive equality, including the concepts of societal stereotypes, redress of power imbalances and the recognition of substantive, effects-based discrimination as they relate to the Guaranteed Available Income for Need Act, R.S.B.C. 1979, c.158, as amended (GAIN Act).

The next section discusses six ways in which the GAIN Act, GAIN Regulations, and Ministry of Social Services policies have a discriminatory impact on women.

* The Ministry's policy of including as "income" money awarded for pain and suffering under the Criminal Injuries Compensation Program has an adverse impact upon women and children, who constitute the vast majority of survivors of sexual assault.

* The broad definitions of "spouse" and "dependent" under GAIN legislation have an adverse impact on women by tying the receipt of benefits to the existence of an intimate relationship.

* The Ministry's policy of excluding family members from eligibility for compensation under the homemaker placement program discriminates against women, whose work in the family is devalued, and against persons with disabilities by depriving them of the

benefit of having a family member act as caregiver.

* The requirement that non-custodial parents pursue maintenance from their former partners has an adverse impact on women who receive GAIN benefits by perpetuating relationships of dependency and control.

* The deduction of lump sum maintenance payments made in arrears from GAIN benefits, without pro-rating such payments over the period for which they are paid, adversely impacts on the single mothers who are most affected by the policy.

* GAIN legislation disentitles women with equity in the family home from receiving regular benefits, even when such women are fleeing from violent relationships.

Many of these provisions discriminate in a number of intersecting ways. Each of the provisions is discussed separately, and recommendations are offered for reform.

1.2 Process

This review of the discriminatory effects of GAIN provisions on women was accomplished by West Coast LEAF in consultation with other members of the community. This was of great assistance in determining issues of importance to women on income assistance, and in identifying some of the problems with the Act, regulations and policies. The points addressed in this submission were raised repeatedly by the consultees. The groups consulted with include:

- B.C. Public Interest Advocacy Centre
- B.C./Yukon Society of Transition Houses
- B.C. Coalition of People with Disabilities
- Community Legal Assistance Society
- Doug Traill Memorial Law Centre, Nanaimo
- End Legislated Poverty
- Fort Nelson Legal Information Services Society
- Front Line Advocacy Workers
- Legal Services Society
- Newton Advocacy Group
- Port Alberni Family Centre Advocacy Project
- Society for Independent Living
- Vernon Community Advocates

2.0 Equality

The equality sections of the Charter provide as follows:

s.15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

s.28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The Supreme Court of Canada has identified equality as one of the fundamental values of our society, against which all legislation and government action must be measured. The overriding purpose of the right to equality is to increase the substantive equality of groups previously excluded from power and full participation in society. Put another way, the equality provisions of the Charter must be interpreted so as to ameliorate disadvantage in its many and intersecting forms.

The right to equality addresses the distribution of burdens and benefits in our society. In the past, differences between groups were used to justify an unequal sharing of resources, respect, power and other valued social interests. For example, women in the paid work force were routinely disadvantaged because of their ability to bear children. Continuous participation in the work force, a work pattern which suits the social role of men but conflicts with childbearing and women's traditional responsibility for the care of children, the elderly and others, was the standard to which women were unfairly held. The male standard was regarded as the norm and deviations from it indicated different and unequal treatment regardless of social expectations and values.

The courts now recognize that the needs of different groups must be met for equality to be realized. Identical treatment does not always result in equality. Women and other groups have been socially, politically and legally disadvantaged. These groups have been excluded from structural power and yet are judged by the norms which reflect the reality of those with power. To treat these groups identically rather than responding to their disadvantages would be to perpetuate their inequality.

In addition, violations of the right to equality need not be intentional. As the Supreme Court has written, the main consideration must be the impact of the law on the individual or group concerned. Adverse, even if unintended, effects of legislation or government action may amount to a violation of equality. The *results* of government action and legislation, rather than any stated intention, are subject to s. 15 scrutiny.

Equality rights must also be approached on a contextual basis. The government must consider not only who legislation such as the GAIN Act intends to affect, but which group or

groups *will be affected*, and whether the legislation discriminates on the basis of group based characteristics protected under the Charter. The state must also consider that groups are complex -- individual members of a disadvantaged group may be identified by multiple characteristics, and discrimination may arise out of the intersection of group characteristics. Discrimination does not occur in discrete categories. This is particularly relevant to social welfare legislation, because poverty itself is often a result of many intersecting factors of race, class, sex, age and disability.

In a series of cases the Supreme Court of Canada has also recognized that an effects-based approach to equality rights applies to women's experiences of social and economic disadvantage, and specifically that s. 15 applies to claims of inequality in social and economic legislation.¹ B.C.'s GAIN Act, regulations and policies raise a number of equality issues in this regard.

2.1 Historical Context of the GAIN Act

It is important to be aware of the historical context of welfare legislation in order to appreciate both the overt and subtle ways in which the GAIN Act has a discriminatory impact on women. Until the introduction of the Canada Assistance Plan in 1966, the provincial legislative approach to the welfare of the poor was piecemeal and compartmentalized. Individuals in need could access the system only if they fit into one of the relevant categories -- categories which were based on whether the individuals falling within them were seen to be "deserving" or "undeserving" of benefits. For example, employable men and single women were expected to work to support themselves and their families; married women were expected to care for their families and to be supported by their husbands. If a man or single woman was unable to find or keep work that paid a living wage it was perceived that they were too lazy or otherwise at fault. Married women had no choice but to tolerate sometimes intolerable marriages because leaving their husbands made them and their children "undeserving" of public assistance. The focus was on individual merits and deficits rather than on how more structural factors created conditions of poverty.

Because public assistance was tied to the perceived moral worth of the individual, the first categories of people to qualify for public assistance were those who were viewed as already having contributed their share to society, and/or as not being at fault for their present inability to support themselves: the elderly, the blind, injured workers, and deserted mothers. Even within these categories, otherwise eligible individuals could be disqualified if they failed to live up to societal expectations of "deserving" behaviour. For example, in some provinces needy mothers were required to produce "good conduct" certificates to prove they "deserved" public

¹ *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219, per Dickson C.J. at 1242-1244; *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, per Dickson C.J. at 1290; *Symes v. Canada*, [1993] 4 S.C.R. 695, per Iacobucci J. at 756 and 753.

assistance.²

The notions that poverty is the fault of the individual rather than the result of a combination of more structural and systemic factors, and that a distinction should be made between deserving poor and undeserving poor persist in the modern welfare system. For employable men, being deserving usually means actively seeking training and employment. For women, the situation is more complicated. Deserving women must often actively seek training and employment, care for their children and other dependents, seek maintenance from former partners regardless of the circumstances of the separation, and avoid close involvement with those who are unable or unwilling to provide adequate support for the women themselves and their children. Persons with disabilities may be seen as "deserving", but this label often brings with it great personal costs when it comes to being a full participant in society.

2.2 The Impact of GAIN on the Equality of Women

In a myriad of ways, social welfare legislation continues to convey and enforce discrimination against women. Problems arise from women's already unequal position in society as unpaid and underpaid workers, as victims of violence, and from the continued impoverishing effects of marriage breakdown on women. Compounding these problems is a state enforced policy of dependency on private relationships.

Despite major shifts in family patterns since B.C.'s GAIN Act was introduced in the mid-1970's, the Act still assumes a breadwinner/homemaker model of the family. In its policies regarding the allocation and pursuit of maintenance, its definition of conjugal relationships, and its exclusion of women family members from compensation for care work, the GAIN Act perpetuates the devaluation of women's work and their dependency on their intimate partners. However, rising divorce and separation rates, unabated levels of violence against women in relationships, and the increasing necessity for women to raise children on their own defy state efforts to maintain the breadwinner/homemaker model. Women, not men, and not society as a whole, have increasingly carried both the financial and social burden of caring for children, the elderly, and persons with disabilities. The result has been what is now commonly referred to as the feminization of poverty. According to the National Council of Welfare, "women face a significantly higher risk of poverty overall than men", particularly single mothers.³

The traditional breadwinner/homemaker model, with its implications of dependency for

² Robert D. Bureau, Katherine Lippel and Lucie Lamarche, "Development and Trends in Canadian Social Law, 1940-1984", in Ivan Bernier and Andree Lajoie, eds., *Family Law and Social Welfare Legislation in Canada* (Toronto: University of Toronto Press, 1986) at 83.

³ National Council of Welfare, *Poverty Profile, 1980 - 1990: A Report by the National Council of Welfare* (Ottawa, 1992) at 68. The rate of poverty for single-mother led families in 1990 was 60.6 percent.

women, was discriminatory twenty years ago. Today, it is both discriminatory and wholly impracticable given that post-war assumptions about gender roles and relationships no longer hold true, if in fact they ever did.

The GAIN Act in British Columbia reinforces the traditional and stereotypical roles of men and women: it fails to acknowledge and compensate women for their contribution to child-raising and care of the family, and exploits the undervaluation of women's work; it forces women into relationships of dependency and then it ignores the prevalence of violence against women that these dependency relations reinforce. This exacerbates the effects of violence and undermines programs with the purpose of ameliorating this systemic incident of women's inequality.

These issues arise again and again in the GAIN policies discussed below.

2.3 The Purpose of GAIN

Section 1 of the GAIN Act explicitly states that the purpose of the Act is to relieve poverty, neglect or suffering. Justice Parrett of the British Columbia Supreme Court held in *Atchison v. BC (Minister of Social Services and Housing)* that this is "more than a mere definition, it also represents the underlying philosophy of the legislation."⁴ The explicit words of the Act and the judicial significance attributed to them make it clear that the focus of the Act is on need, and the purpose of the Act is to eliminate or ameliorate that need. The purpose of the Act is not to reinforce the dependency of women, or to set behavioural requirements for receipt of public assistance which are unrelated to financial need. It is the view of West Coast LEAF that nonetheless, some of the GAIN Act provisions, regulations, and Ministry policies discussed below have precisely these effects.

3.0 Specific Provisions and Policies Identified by LEAF as Discriminatory

3.1 The policy of the Ministry to include as "income" money awarded by the Criminal Injuries Compensation Program (CICP) for pain and suffering has a discriminatory effect on women and children.

(a) Relevant Law and Policy

The GAIN Act distinguishes between "earned" and "unearned" income. Criminal Injuries Compensation (CIC) awards fall within the definition of "unearned income" in the Regulations to the GAIN Act (s.8). Most types of unearned income are deducted from income assistance payments. However, in the case of CIC awards, the director of Social Services has discretion to "authorize all or a portion of these to be excluded as income."

⁴ (1990), 70 D.L.R. (4th) 705 at 715 (B.C.S.C.).

The Ministry's policy with respect to CIC awards provides:

- * The claimant can keep any portion of the award specified as compensation for destroyed property or for medical, drug or ambulance costs
- * The remaining portion of the award will form part of the claimant's assets to the maximum asset exemption level in the Regulations and, if the maximum is reached, the rest of the award will be totally deducted from GAIN benefits.

(b) Sex Equality Issues

The 1994 Annual Report of the CIC Program indicates that just under 40% of all awards in 1994 were made to survivors of sexual assaults and other sexual offences. The vast majority of these survivors are women and children. The Report also indicates that awards for pain and suffering constituted almost one half (49%) of the CIC benefits paid out in 1994.⁵ Furthermore, because the CICP, unlike the civil courts, is highly accessible it represents one of the very few ways in which survivors of crime living in poverty can gain access to compensation and recognition of their victimization.

The social policy underlying the CICP is to recognize and validate the suffering of survivors of crime and to acknowledge the state's responsibility to protect the community from crime. A person's source of income is irrelevant to her need for such recognition, and irrelevant to the state's responsibility to protect its members from crime. A claimant's income level and income source are similarly irrelevant to the decision-making process of the CICP -- the rich and the poor are equally entitled to compensatory awards (although compensation for lost wages is tied to income level).

Applying the GAIN asset maximum to a payment that is intended to represent the state's concern and responsibility for victims of crime negates the purpose of the CICP. The current policy permits GAIN officials to exclude those victims of crime who are GAIN recipients from receiving the full benefit of pain and suffering awards solely on the basis of their source of income. This creates a second class of crime victim in this province, made up largely of women and children already living below the poverty line.

The problem is further exacerbated by the disproportionate number of multiply-disadvantaged women who are more likely both to live in poverty and to be survivors of sexual assault. For example, studies show that approximately 40% of women with disabilities⁶ and 80% of Aboriginal women⁷ have experienced assaults or abuse, that both

⁵Ministry of the Attorney General, *23rd Annual Report of the Criminal Injury Compensation Act of British Columbia: January 1 - December 1, 1994* at pp. 7, 33.

⁶ Ridington, Jillian, *Beating the Odds; Violence and Women with Disabilities* (Vancouver:DAWN Canada, 1989).

groups of women experience much higher levels of poverty than the population as a whole, and that both groups are disproportionately represented among GAIN recipients. By reducing GAIN benefits by the amount of any CICP pain and suffering awards, the Ministry is further exacerbating the hardship and victimization already experienced by these women, and deprives them of a token of societal concern for their well-being that is available to financially independent women. The exclusion only adds to their disadvantage and deepens their poverty at a time when a cash award is desperately needed to compensate for the effects of criminal abuse.

(c) Discrimination

The vast majority of pain and suffering awards are made to women and children victims of sexual assault. Only one class of women loses the benefit of a CIC award payment: GAIN recipients, those most in need of financial resources and societal expressions of concern for their well-being. While receipt of welfare benefits is not an enumerated ground under s.15 of the Charter, it is arguably an analogous ground which merits protection.⁸ The exclusion of GAIN recipients from receiving the equal benefit of CIC pain and suffering awards thus amounts to direct discrimination against such recipients. At the same time, this provision of the GAIN Act impacts adversely on women, particularly those with disabilities, and Aboriginal women. The disparate impact of the Ministry's policy also constitutes discrimination contrary to s.15 of the Charter.

(d) Recommendation

West Coast LEAF recommends that Criminal Injuries Compensation pain and suffering awards should not be treated as income, and should not be taken into consideration in determining the asset level of the GAIN recipient.

Comments: CIC pain and suffering awards are intended to be compensation --they are to "replace" something that has been lost by the recipient because of the victimization. They are not intended as additions to the accumulated assets of the recipient, and should not be treated as such.

⁷Ontario Native Women's Association, *Breaking Free: A Proposal for Change to Aboriginal Family Violence*, 1989.

⁸*Sparks v. Dartmouth/Halifax County Regional Housing Authority* (1993), 119 N.S.R. (2d) 91 (C.A.).

3.2 The broad definitions of "spouse" and "dependent" in the Regulations to the GAIN Act have a discriminatory impact on women.

(a) Relevant Law and Policy

Section 2 of the Regulations to the GAIN Act defines "spouse" to include legally married and common-law couples, as well as any individual who resides with another individual and represents him or herself as the spouse of that person, and any individual who lives with another individual in a conjugal relationship, whether or not the individuals share their respective incomes. This is the case even where such a relationship is not recognized in other laws of the Province. As a result, one person may be considered to be the spouse of another person for the purposes of excluding benefits under the GAIN Act, despite the fact that they would not be considered spouses for the purposes of legislation conferring benefits, including the Income Tax Act, the Old Age Security Act, the Criminal Injuries Compensation Act, the Estate Administration Act, the Family Compensation Act, the Property Transfer Tax Act, and the Workers Compensation Act.

Most significantly, one person may be considered to be the spouse of another person for the purposes of excluding benefits under the GAIN Act, despite the fact that they would not be considered spouses for the purposes of the Family Relations Act, which sets out the legal obligations of support in spousal relationships. Under section 1(c) of the Family Relations Act, "spouse" means a husband or wife, and includes a man or woman not married to each other who lived together as husband and wife for a period of not less than 2 years. Only when spousal relationships meet these criteria are support obligations created.⁹

(b) Sex Equality Issues

This broad definition of spouse has a discriminatory impact on women. An underlying assumption in our society generally, and in welfare legislation in particular, is that women and their children are dependent upon and will be supported by the men with whom they form sexual relationships. Despite the fact that for many single women, and single mothers in particular, this has little basis in reality, it still underlies many Ministry policies and practices. The stereotype of women's economic dependence has played a fundamental role in creating and perpetuating women's inequality. This dependence has been created and reinforced by women's role as homemaker and caregiver, by the lack of employment opportunities for women, particularly those with children, and by substantial wage differences between women and men in the workforce.

This same sexual stereotype of women's economic dependence is still being used to deprive women of their right to GAIN benefits in their own right if they are found to be living with a "spouse". Even in circumstances where the alleged spouse provides no actual support and is under no legal obligation to do so, the regulation assumes that it is appropriate for a woman,

⁹Gostlin v. Kerqin, [1986] 5 W.W.R. 1 (B.C.C.A.).

simply by virtue of entering into an intimate relationship, to become automatically financially dependent on her lover.

The traditional stereotype of dependence has now been extended to cover same sex relationships. The GAIN Act is one of the few pieces of legislation which recognizes such relationships. Rather than being a progressive statement of support for same sex relationships, however, this "recognition" is simply a means of saving the Ministry money. It is no accident that provincial legislation classes lesbians and gay men as spouses when this will decrease welfare benefits, but not when it will result in eligibility for benefits under other legislation.

Moreover, by defining "spouse" in terms of whether a couple holds itself out as such, the GAIN legislation encourages lesbians and gay men to remain in the closet.

The broad definition of "spouse" in the Regulations to the GAIN Act is also in direct conflict with the stated purposes of the Act. Section 1 of the GAIN Act explicitly states that the purpose of the Act is to relieve poverty, neglect, and suffering. In the *Atchison* case, supra, it was held that this was more than a mere definition, that it also represented the underlying philosophy of the Act. Since the only legitimate purpose of the Act is to ameliorate financial need, it is appropriate that financial need be the only condition to receipt of public assistance.

The reality is that many cohabitants are unable or unwilling to support the women and children with whom they live. Moreover, under the Family Relations Act, they may be under no legal obligation to do so. Thus the financial need for income assistance is not necessarily altered by the presence of an intimate relationship.

A number of judges have recognized the injustice of denying women public assistance solely because of their social or sexual relationships. Justice Henry of the Ontario High Court of Justice stated the following in *Re Proc and Minister of Community and Social Services*¹⁰ at p.630:

We consider that, as a matter of law, the expression "lives with that person as if they were husband and wife" must be construed in the light of the over-all purpose of the statute, which is to prescribe the rules whereby persons are to be entitled to an allowance by reason of need. That expression ought therefore to be applied by reference to the economic relationship of persons who are living together.

In *Willis v. Ministry of Community & Social Services*,¹¹ the Court stated at p.293:

On the basis of the cases cited, there must be some evidence of cohabitation and consortium which includes the recognition of an obligation to provide support before it

¹⁰(1974), 6 O.R. (2d) 624 (H.C.J.).

¹¹(1983), 40 O.R. (2d) 287 (H.C.J.).

can be found that a woman is living with a man as his wife.

In *R. v. Rehberg*,¹² Justice Kelly of the Nova Scotia Supreme Court stated at p.355:

The man-in-the-house rule is essentially flawed...in focusing on the issue of residence rather than on financial contribution to the residential unit by the cohabitant. It is based on negative historical assumptions about the roles of fathers and mothers in the family. It furthers the stereotypical assumptions of a woman's dependency on the male in the residence, and the man's presumed obligation to financially provide for all members of the unit, even if he is not the father and is in only a temporary or brief sexual relationship with the mother.

Justice Kelly went on to hold that Nova Scotia's equivalent "spouse-in-the-house" rule had a discriminatory impact on single mothers, the group in society "most likely to experience poverty in the extreme", was therefore contrary to s.15 of the Charter, and could not be justified under s.1.

(c) Discrimination

All people are entitled to a minimum standard of living, and provision of state benefits for people in need has become a fundamental tenet of modern Canadian society. It is irrational to deny women and their children this minimum living standard simply because of the living arrangement the woman has made. Moreover, the GAIN definition of "spouse" has an adverse impact on women, as it perpetuates the stereotype of women's dependency and the feminization of poverty. The legislation also has an adverse impact on lesbians by encouraging them to hide their intimate relationships, perpetuating the heterosexist nature of society.

Enforcement of the spouse-in-the-house rule may also result in serious invasions of privacy and personal dignity. Women are not only questioned extensively about the status of their intimate relationships, they are often subjected to Ministry surveillance and invasive "home visits," during which Ministry employees watch for and record any "comings and goings," question landlords and neighbours about the nature of the woman's living arrangements, and search clothes closets and medicine cabinets for any sign of male presence. Anecdotal evidence suggests that women are the primary, if not the only, targets of such harassment.

(d) Recommendation

West Coast LEAF recommends that the Ministry develop a more realistic definition of "spouse," one which acknowledges the range of intimate, non-spousal living arrangements that may legitimately be made by women, and one which can be enforced without invading the privacy of GAIN recipients.

¹²(1993), 127 N.S.R. (2d) and 355 A.P.R. 331 (N.S.S.C.).

Comments: Such a definition would strike an appropriate balance between the legitimate interest of the state in reducing unnecessary social benefit expenditures, and providing women the flexibility to become involved with another person without immediate fear of losing their sole source of income.

3.3 The Ministry's policy of excluding family members from eligibility for compensation under the homemaker placement program has a discriminatory effect on women.

(a) Relevant Law and Policy

Section 27 of GAIN Regulations provides that the Director may authorize the placement of a housekeeper or homemaker in a home where the applicant for the services is unable to provide necessary care for self, spouse, or children in his or her care. The terms of eligibility found in Schedule D of the Regulations state that family members are precluded from providing such services. Family is defined as a parent, spouse, child, sibling, or parent-in-law and includes any relative residing in the household. When assessing the need for homemaker services, the procedures require Ministry staff to "...consider the capacity of the family or individual to meet their own child-care or household needs and their ability to access alternative sources of support, such as family members." The Ministry emphasizes that before placing a homemaker, "every effort" must be made to use family resources.¹³

(b) Sex Equality Issues

These provisions have a detrimental effect on women on a number of levels. On a general level, the policy implications of this legislation perpetuate the devaluation of women's economic contribution to the family unit. In regarding such labour as essentially volunteer, the Ministry is exploiting "family resources", i.e., services performed primarily by women.

In recent years, the Supreme Court of Canada has begun to recognize the economic value of housework and the systemic discrimination of women that has resulted from the traditional devaluation of housework and child-care. For example, in *Peter v. Beblow*¹⁴, Mr. Justice Cory made the following statement at p.26:

The characterization of domestic services as gifts reflects a view of family relationships which is now out-dated and has a differential impact on women, since they are the main providers of such services. Women no longer work exclusively in the home. Those who do so sacrifice income that could otherwise be earned in paid work.

In her concurring judgment in this case, Madam Justice McLachlin stated at p.11:

¹³Family and Children Services, Vol. II, p.4(a) 3.7.

¹⁴(1993), 77 B.C.L.R. (2d) 1 (S.C.C.).

If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*... While that case arose under the *Divorce Act* the value of the services does not change with the legal remedy invoked (citations omitted).

By viewing the homemaking services provided by family members as non-compensable, the Ministry's policy fails to acknowledge the value of these services, and, in so doing, fails to acknowledge the value of much of women's traditional contribution to the economy and society.

This legislation has a discriminatory impact on an individual level as well. Numerous studies have documented the disproportionately long hours worked by women who take on paid employment and find themselves simultaneously maintaining primary responsibility for care of the home and family. Societal expectations require women to assume more than their share of responsibility for taking care of the home and family. The GAIN Act's assumption that family members will "volunteer" their services to care for family members who are unable to care for themselves must be viewed against the background of such societal expectations.

Where a family member is both willing and able to provide care for a person who is unable to care for him or herself, her work should not lose its economic value by virtue of her familial ties. To force a spouse or parent of a person with disabilities to decide between providing that person with the care he or she needs without any financial support, or working outside of the home and having a third party perform the services is a "choice" no individual in our society should have to make.

(c) Discrimination

The terms of eligibility for homemaker services found in Schedule D of the Regulations to the GAIN Act has a discriminatory impact on women's earning capacity, serves to reinforce the traditional role of women as unpaid caregivers, and contributes to the existing devaluation of women's contribution to the family economy.

This policy has an adverse impact on multiple levels: in addition to discrimination based on gender, the effects are compounded for those associated with other traditionally disadvantaged groups. Most notably, people with disabilities and those who are ill will bear the disproportionate impact of these policies. The policy effectively means that such persons are deprived of the benefit of having a family member act as caregiver. Where the disability or illness requires the caregiver to assist with or perform tasks of personal hygiene, this becomes a denial of personal dignity as well.

With regard to lower socio-economic groups, the effect of this policy is double-edged in that it exacerbates and perpetuates the impoverished state of women. In devaluing the economic functions traditionally performed by women, the Ministry is contributing to what is referred to by sociologists as the "feminization of poverty". This link was been recognized by the Supreme Court of Canada in *Peter v. Beblow*, supra, where Madam Justice McLachlin stated at p.10:

The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse... The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty, which this court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813... per L'Heureux-Dube J., at pp.853-854.

(d) Recommendation

West Coast LEAF recommends that family members be eligible for compensable homemaker positions when their spouse, parents, or children already qualify to receive such services.

Comments: This recommendation would involve only a minimal expenditure on the part of the Ministry, and may even reduce the overall cost to government of caring for individuals who are unable to care for themselves by, for example, allowing people who would otherwise require institutional care to remain in the home and be cared for by family members. Moreover, any amount paid to a family member for providing the services would be included within the income of the spouse with disabilities. As a result, the entitlement of the disabled spouse to benefits would decrease accordingly.

3.4 The requirement to pursue maintenance in order to be eligible for income assistance violates women's rights to privacy and self-determination and reinforces some women's dependence on men even after relationship breakdown.

(a) Relevant Law and Policy

According to the GAIN Act, an individual to whom or on behalf of whom income assistance is paid *may assign* to the Crown the right to bring a proceeding to obtain, vary or enforce a maintenance order, enter into or enforce an agreement, forgive arrears, defend a proceeding, etc. (s. 19.2, emphasis added). In *FAPG et al. v. A.G. B.C.*¹⁵, the former provisions of s. 19.2, which required the automatic assignment of rights to the Crown, was subject to a Charter challenge. The litigation proved unnecessary when the government amended the Act in 1992 so that the language was made permissive, stating that the recipient "may" rather than "shall" assign rights to pursue maintenance.

However, GAIN regulations provide that a person is eligible for income assistance only if(s)he makes and continues to make reasonable efforts to seek out, pursue, and take full advantage of every source of income that is or might be available to the recipient and his/her dependents (Regulations, s.3(10)).

¹⁵ (1992) 70 B.C.L.R. (2d) 325 (S.C.).

The Ministry Policy Manual, in relation to the Family Maintenance Program, requires a mandatory referral from a financial assistance worker to a family maintenance worker. The client is obligated to pursue maintenance, and if she refuses her eligibility is "reviewed." While the client's personal safety is said to be the primary consideration here, this is a discretionary matter without guidelines defining "safety" (pp. 9.2.1 to 9.2.13). For example, it is unclear whether the safety of children would be considered sufficient reason to relax the obligation to pursue maintenance.

(b) Sex Equality Issues

While neutral on its face, this policy of withholding income assistance from single parents who do not wish to or cannot pursue maintenance impacts almost exclusively on women and their children. Over 90% of single parents on income assistance are women. The effect of this law and related policy is to force these women to disclose personal information to the Ministry and, in some cases, to have unwanted contact with former partners. This is done under threat of having their income assistance withheld, making it more difficult for single mothers, already over-represented among the poor, to receive money needed for subsistence.

Some women do not know, or have good reason for not wanting to disclose, the name of the father of their child. Making their ability to support themselves and their children contingent on such disclosure is a violation of their personal dignity, and in some cases is simply impossible. For example, a woman who does not know who is the father of her child cannot conform to the policy. The inquiry itself is degrading and invasive. In at least one instance Ministry workers have denied income assistance to a woman who admitted she did not know who was the father of her child. Other reasons may exist for not wanting to disclose paternity. Survivors of incest or rape, women impregnated by artificial insemination, and Aboriginal women concerned about status issues may be reluctant to justify their refusal to disclose paternity or pursue maintenance.

Frequently women have left a relationship to escape domination or abuse of their partner. Requiring these women to re-enter a maintenance relationship reinstates their dependency and gives back former partners a considerable amount of control. The assumption inherent in the Act and reinforced by its requirements is that women must depend on a breadwinner, even when that person is no longer present in their daily lives. The notoriously sporadic and unstable support of the now absent breadwinner further aggravates the vulnerable and dependent position of single mothers, while providing their former partners with an effective and powerful means of control.

Still other women have made arrangements with their former partners for access to their child(ren), or for support in kind. Pursuing maintenance in these cases may cause the non-custodial parent to avoid contact with the children, or to make further demands on the custodial parent. It should be recognized that for some women, the goal of facilitating a good relationship between their former partner and their children may take precedence over monetary support. This is of particular relevance for women whose ex-partners are also poor.

In requiring single mothers to pursue maintenance, under threat of being denied income assistance, the state is using coercive means to interfere with the way low income women choose to live and raise their children. Maintenance is unlike other sources of income -- it is loaded with the complex sexual, emotional and financial implications of domestic relationships. By requiring women on income assistance to pursue maintenance, the GAIN Act reinforces the dependencies of domestic relationships. If a woman chooses not to pursue maintenance, it is often for a good reason. Women on income assistance, like financially independent women, should be able to make this choice.

While requiring non-custodial parents to meet their financial obligations and to contribute to the cost of child-raising is an important goal, this society must recognize that in some cases pursuing maintenance puts a single mother at a disadvantage. A single mother's refusal to pursue maintenance must be taken seriously. By doing so she foregoes much needed income (generally \$100 per month is allowed under the GAIN Act, as discussed below). Such a choice should be hers to make, and not the government's.

(c) Discrimination

The sections of the Ministry's policy manual that require a mandatory referral to the Family Maintenance Worker and a review of GAIN eligibility if the woman refuses to pursue maintenance puts women, and particularly single mothers, at a distinct disadvantage under the Act. This policy violates their privacy, takes away their right to choose, and often recreates or perpetuates dependent relationships with their former partners. The GAIN Act thus imposes a second level of dependency on these women -- first upon the state, and second upon their former partners. A woman's subsistence rights are conditional on her willingness to conform to the traditional role of dependency, most often on a man.

The adverse impact of this policy on women amounts to discrimination on the basis of sex. Moreover, the policy directly discriminates against custodial parents receiving income assistance, primarily women, who are denied the benefit of deciding for themselves whether to pursue maintenance from their former partners.

(d) Recommendation

West Coast LEAF recommends that the pursuit of maintenance should be voluntary for women on income assistance as it is for financially independent women.

Comments: While still giving women on income assistance the opportunity to pursue maintenance through the Family Maintenance Program, Ministry policy should recognize the validity and diversity of the reasons some women may refuse to pursue maintenance, including disruption of custody and access arrangements, coercive relationships, and privacy concerns.

3.5 Lump sum maintenance payments made in arrears are currently deducted from GAIN benefits, resulting in discrimination against women.

(a) Relevant Law and Policy

GAIN Regulations allow recipients of income assistance to keep up to \$100 of their maintenance payments each month (classified as "unearned income") above their GAIN benefits (s.14(1) of Schedule B). As of April 1, 1996, recipients will also be allowed to keep 25% of earned income each month, however earned income is to be deducted in the month it is received with no allowance for pro rata deductions. Until recently, the Act and the Regulations were silent about the treatment of lump sum maintenance payments made in arrears. Ministry practice was to disallow pro rata allowances when maintenance arrears were paid to an income assistance recipient. As a result, recipients would receive only \$100 for the past period of maintenance for their children, a period of perhaps many months when the non-custodial parent failed to make regular payments and the family went without.

This issue was considered by the B.C. Supreme Court in the cases of Clark v. Minister of Social Services et al; Bartok v. Minister of Social Services et al.¹⁶ In these cases, Madam Justice Dillon held that s.14(1) should be interpreted to allow maintenance recipients to keep the \$100 per month exemption for each of the months for which the maintenance arrears were paid. This interpretation was said to be consistent with both the wording and the purpose of the maintenance exemption, which is "to help single parents defray the costs of enforcing maintenance orders and to provide monetary incentive to single parents to invest the time and effort necessary to have the maintenance orders enforced".¹⁷

In December, 1995, these cases were superseded by Order in Council 1591, which amended the GAIN Regulations to provide that the maintenance exemption "applies only in the month in which the family maintenance is actually received and must not be applied retroactively or prorated prospectively" (s.14(3)).

(b) Sex Equality Issues

While neutral on its face, this regulation impacts almost exclusively on women, who make up over 90% of the single parents on income assistance. The regulation ignores the unique nature of maintenance payments, which are relied on to provide for the support of children. The costs of child raising for women and in particular single mothers are well documented. Upon relationship breakdown, women's role as primary caregiver forces them to sacrifice their careers, their leisure, and whatever income they have to support their children. Women must arrange employment around the responsibilities and costs of day care. In many instances, women

¹⁶Unreported decisions of the B.C.S.C, August 25, 1995, Vancouver Registry Nos. A943572 and A943717.

¹⁷Ibid. p.5.

cannot find employment which provides enough income for rent, food, and day care costs. For women with disabilities, the high cost of seeking employment is itself an added burden. This forces some women to forgo paid employment and seek support from the state.¹⁸

Maintenance payments rarely compensate for the loss of an income, but they do provide for some of the daily expenses of raising a child. As such they are distinct from other types of earned income. The costs of raising children do not go away when maintenance payments are delayed, instead necessities are foregone and debts are incurred. The deduction of lump sum maintenance payments from welfare benefits not only fails to compensate women for their work in child-rearing and the inevitable career opportunities they forgo, but also contributes to the problem of children being left without adequate or stable support from their non-custodial parent.

The practice of deducting the entirety of arrears payments in the month they are made also allows former partners, usually men, to exercise power and control over custodial parents, usually women, by providing maintenance in lump sums rather than in stable or regular payments. This is a fundamental problem with any maintenance arrangement, but is compounded by the Ministry's complicity, and women's poverty.

A recent case involving a woman on income assistance who relied on the FMEP to collect her maintenance payments provides a good example. As is common with this program, it had collected a few months worth of payments and then paid this in arrears, in a lump sum, to the recipient. The recipient had all but \$100 deducted from her social assistance cheque for that month. Thus not only the payment schedule of former partners, but also of the Family Maintenance Enforcement Program itself may result in hardship to women with the custody of their children. By providing payments on such a basis, the FMEP is in effect conspiring against the needs of women on income assistance and their children.

(c) Discrimination

The deduction of lump sum maintenance payments from single parents' income assistance has an immediate and detrimental effect on women and in particular on single mothers -- it reinforces the dependent position of women, continues to undervalue women's childrearing work, and contributes to the feminization of poverty. This amounts to adverse effects discrimination against women on income assistance, contrary to s.15 of the Charter. Given that women with disabilities and Aboriginal women disproportionately find themselves collecting income assistance, the policy also has adverse effects on these grounds.

The effect of this practice also conflicts with Government policy in other areas. One of

¹⁸ In 1990, according to a Report on the Family Maintenance Enforcement Program (FMEP) from the Government of B.C., there were an estimated 71,700 single parents with dependent children in B.C.. Fifty % of these were on income assistance, and almost all of them were women. In 1992 58:4% of single mother led families lived in poverty. See National Council on Welfare, *Poverty Profile 1992* (Ottawa: Minister of Supply and Services, 1994).

the stated goals of the Family Maintenance Enforcement Program is to increase the emotional and financial stability of families by collecting their maintenance payments. However, by not permitting mothers and children to obtain the benefit of payments made in lump sums, the GAIN Act removes the benefit of stability from the FMEP and enables non-custodial parents who wish to manipulate their former partners to simply reserve their payments for a few months.

(d) Recommendations

(A) West Coast LEAF recommends that lump sum maintenance payments made in arrears be treated on a pro rata basis by the Ministry. In other words, recipients should be permitted to keep that portion of the payments that equals the number of months for which it was paid, multiplied by the monthly exemption rate.

(B) West Coast LEAF further recommends that the Ministry recognize the real costs of caring for children by allowing an additional \$100 in unearned income to be kept if it is available, raising the monthly exemption rate to \$200.

Comments: Recommendation (B) supports the Ministry's Income Assistance Advisory Council recommendation that the basic family maintenance exemption be raised to \$150 per month for a spouse and one child, and to \$200 per month for a spouse with more than one child. This would mean a great deal to a person on subsistence income, and could make the difference in being able to provide adequate food and clothing for the recipient's children.

3.6 Women fleeing violent relationships who have equity in the family home are ineligible for regular assistance, placing them at a disadvantage based on sex.

(a) Relevant Law and Policy

The GAIN Act makes no provision for women who may have equity in a house, or other assets, but who do not live in that house because they have left a violent relationship. Such matters are included in the calculation of assets even though they may be intangible for the foreseeable future. Instead, women fleeing violent relationships are entitled to hardship assistance, and only where the assets are not immediately available to meet basic needs, and every effort has been made and continues to be made to sell the assets (GAIN Regulations, s.49). The discretionary nature of hardship assistance, its lower quantum, and the fact that it is a one time grant make it an inadequate response to a systemic problem (See Schedule J).

(b) Sex Equality Issues

Women's unequal status in society makes them particularly susceptible to violence. In failing to recognize and make allowances for women in violent relationships the GAIN Act reinforces and exacerbates women's victimization. The B.C. Government's Violence Against

Women in Relationships Policy¹⁹ states:

In Canada during 1990, an average of two women every week were killed by their partners. Researchers and professionals working with assaulted women estimate that each year one in eight women, living in a relationship with a man, will be assaulted. In addition, research indicates that as many as 35 violent episodes may have occurred before a woman seeks intervention.

The prevalence of this problem, and its impact on women's equality, requires a more appropriate response to women seeking income assistance because they have had to escape a violent relationship.

Hardship assistance, the only assistance available to women in this situation who have assets, is meant as a temporary measure for those expecting some other form of assistance imminently. It does not cover medical or counselling costs, which are often gravely required. It provides a lesser amount of support than regular income assistance, and does not include the child tax credit. Monthly reapplications are required, making it burdensome and unreliable. This assumes that the financial needs of a survivor of intimate violence are temporary; however accessing her assets often takes a woman years of court battles and negotiations. In the meantime she must cope with her abuse, raise her children on less money than is available to regular GAIN recipients, and begin a new life for herself and her children.

The effect of this policy is devastating to many women. End Legislated Poverty reported in *The Long Haul*, November 1994, that a woman who had recently left her abusive common law spouse was refused regular assistance. Disabled from a motor vehicle accident, the woman was unable to work, but because she had equity in the family home, only hardship benefits were available. On hardship assistance her children were ineligible for camp fees, GST was deducted from her cheque, and less assistance was available. The woman's representative was told that there have been efforts to change this law for twenty years with no effect.

LEAF is concerned that women in abusive relationships are discouraged from leaving them precisely because they are financially dependent and are unable to rely on public support for themselves and/or their children.

(c) Discrimination

Violence against women is a result of and perpetuates the unequal position of women in Canada. The multiply disadvantaged position of Aboriginal women, immigrant women, and women with disabilities may make them even more vulnerable to violence. By failing to provide adequate assistance to such women, the GAIN legislation discriminates on the basis of sex in

¹⁹Ministry of the Attorney General, *Policy on the Criminal Justice System Response to Violence Against Women and Children: Part I -- Violence Against Women in Relationships Policy* (Victoria: Queen's Printer, 1993), at 2.

intersection with these other grounds. Worse, by potentially discouraging women from leaving violent relationships for lack of financial support, it perpetuates not only women's dependency, but also violence against women, the most destructive form of women's inequality.

(d) Recommendations

West Coast LEAF recommends that the GAIN Act be amended, in consultation with battered women's service organizations, to allow for regular income assistance when assets and housing equity have been made inaccessible to women due to the abuse of a partner. Further, the government should revisit the availability of income assistance for all women who leave the family home for whatever reason, regardless of whether they have equity in their home.

4.0 Summary of Recommendations

- 1) Criminal Injuries Compensation pain and suffering awards should not be treated as income, and should not be taken into consideration in determining the asset level of the GAIN recipient.
- 2) The Ministry should develop a more realistic definition of "spouse," one which acknowledges the range of intimate, non-spousal living arrangements that may legitimately be made by women, and one which can be enforced without invading the privacy of GAIN recipients.
- 3) Family members should be eligible for compensable homemaker positions when their spouse, parents, or children already qualify to receive such services.
- 4) The pursuit of maintenance should be voluntary for women on income assistance as it is for financially independent women.
- 5) (A) Lump sum maintenance payments made in arrears should be treated on a pro rata basis by the Ministry. In other words, recipients should be permitted to keep that portion of the payments that equals the number of months for which it was paid, multiplied by the monthly exemption rate.

(B) The Ministry should recognize the real costs of child care work by allowing an additional \$100 in unearned income to be kept if it is available, raising the monthly exemption rate to \$200.
- 6) (A) The GAIN Act should be amended, in consultation with battered women's service organizations, to allow for regular income assistance when assets and housing equity have been made inaccessible to women due to the abuse of a partner.

(B) The government should revisit the availability of income assistance for all women who leave the family home for whatever reason, regardless of whether they have equity in their home.