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## Access Barred: The Effects of the Cuts and Restructuring of Legal Aid in B.C. on Women Attempting to Navigate the Provincial Family Court System

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# **ACCESS BARRED: THE EFFECTS OF THE CUTS AND RESTRUCTURING OF LEGAL AID IN B.C. ON WOMEN ATTEMPTING TO NAVIGATE THE PROVINCIAL FAMILY COURT SYSTEM**

**Jaime Sarophim**

***Abstract:** Self-represented litigants are becoming an epidemic in the B.C. provincial court system. Litigants who lack legal training and knowledge about the formalities of the court often slow and disrupt the justice system. The cuts to legal aid and the Supreme Court of Canada decision in Christie have contributed to this epidemic. The purpose of this paper is to discuss some of the challenges that self-represented litigants pose to the family law justice system. The erosions to legal aid funding and services have had a disproportionately negative effect on women. It has forced women to become self-represented litigants, resulting in women's continued impoverishment and financial dependency on men, exposed women to violence and abuse by ex-spouses, and forced women to surrender child support, spousal support, custody and access rights. This paper addresses the current state of legal aid in B.C. It also discusses the adverse effects that the cuts and restructuring of legal aid in B.C. have had on women attempting to navigate the provincial family court system. The paper limits its discussions to the heterosexual experience for brevity and does not address child protection issues, as different legal rules apply in that context.*

## **INTRODUCTION**

Legal aid is a program that provides information, advice, and advocacy in family, immigration, and criminal matters to the economically disadvantaged. The federal and provincial

governments fund legal aid and it is administered at the local level. In 2002, the British Columbia (“B.C.”) provincial government cut funding to the program by 40 percent and since that year, legal aid services have been further eroded. Family law legal aid is one of the areas that has suffered the most from these cuts and restructuring. As the applicants for family law legal aid are women over 75 percent of the time, this social group has been severely affected by the changes.<sup>1</sup> Modernity in the B.C. legal aid system has forced women and their spouses to become self-represented litigants, resulting in women’s continued impoverishment and financial dependency on men, exposure to perpetuated violence and abuse by ex-spouses, and being forced to surrender child support, spousal support, custody and access rights. Consequently, equality and fairness have been eroded for women attempting to access the family justice system.

Since data on family law legal aid tends to focus on the heterosexual family, I do not address the experience of non-heterosexual families. However, the difficulties faced by minority families in accessing legal aid may be similar to the experiences of heterosexual families. I do not consider legal aid in the child protection system, because different rules apply in that context. This paper examines the effects of the cuts to legal aid on women participants in the B.C. provincial family court system who are faced with maintenance and custody and access issues. I discuss the current status of legal aid programming in B.C. and of the government’s attempts to justify limited access. I then address why access to legal aid is particularly important for women and point to specific challenges that women face when experiencing relationship breakdown. Finally, I examine critiques of the existing programming.

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<sup>1</sup> Alison Brewin, “Legal Aid Denied: Women and the cuts to legal services in BC” *West Coast Leaf* (September 2004), online: <[http://www.westcoastleaf.org/userfiles/file/legal\\_services.pdf](http://www.westcoastleaf.org/userfiles/file/legal_services.pdf)> [Brewin].

### THE CURRENT STATE OF B.C. LEGAL AID AND THE ROLE OF THE LEGAL SERVICES SOCIETY

The Legal Services Society (the “LSS”) is the body that administers and oversees legal aid programming in B.C. Currently, the LSS provides three types of legal aid services: public legal information, brief advice, and legal representation in court or before a tribunal for criminal, family, and immigration matters.<sup>2</sup> The LSS receives 90 percent of the funding for these services from the provincial government and the remainder from The Notary Foundation, The Law Foundation, and lawyers’ trust accounts and donations. In 1997 and 1998, the New Democratic Party, led by Glen Clark, initiated cuts to legal aid funding.<sup>3</sup> In 2002, the cuts were sharply exacerbated by the provincial government. Under the Liberal leadership of Glenn Campbell, the provincial government announced it would cut legal aid funding by 40 percent over a three-year period. A Victoria defence lawyer, Michael Mulligan, finds the cuts disturbing because B.C. is the only province that adds a seven percent tax to lawyers’ bills to fund legal aid programming.<sup>4</sup> This tax collects over 90 million

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<sup>2</sup> Legal Services Society, “Communications Service and Operational Changes at the Legal Services Society” *Backgrounder* (25 February 2009), online: Legal Services Society <<http://www.lss.bc.ca/assets/media/newsReleases/backgrounderServiceStaffChangesFeb25.pdf>> [Legal Services Society, “Changes”].

<sup>3</sup> Lorne D Bertrand et al, *A Profile of Legal Aid Services in Family Law Matters in Canada* (Ottawa: Department of Justice Canada, 2002, online: <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03\\_la12rr03\\_aj12/rr03\\_la12.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la12rr03_aj12/rr03_la12.pdf)>.

<sup>4</sup> *British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] SCJ No 21, [2007] ACS No 21, 2007 CSC 21, [2007] 1 SCR 873, [2007] 1 RCS 873, 280 DLR (4th) 528, 361 NR 322, [2007] 8 WWR 64, JE 2007-1072, 240 BCAC 1; 66 BCLR (4th) 1, 155 CRR (2d) 366, 2007 DTC 5225, 2007 DTC 5229, 2007 GTC 1488, 2007 GTC

dollars each year, but only 65 percent of it went to legal aid in 2009.<sup>5</sup> These cuts, combined with the decline in real estate transactions (the bulk of notary work) and the drop in interest rates from the recession have decimated the legal aid budget.<sup>6</sup>

The diminished budget has forced the LSS to restructure the way the services are administered, eliminate them, or place stricter thresholds on access to them. In 2010, the LSS will eliminate 58 jobs and replace remaining regional centers with privately contracted lawyers and a province-wide call center.<sup>7</sup> The LawLine, a telephone advice service, dispute resolution services, and five regional centers were eliminated on March 26, 2010.<sup>8</sup> In a one to four member household, in order to obtain a family legal aid lawyer, you must have a net salary of less than \$36,696 per year<sup>9</sup> and a serious matter to litigate. Serious matters involve emergency situations where there is physical violence and concern for the safety of a litigant or child or when a parent is leaving the jurisdiction with a child.<sup>10</sup> Litigants that do not meet this threshold may access

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1493, 156 ACWS (3d) 1061, EYB 2007-119921, 2007 CarswellBC 1117 [*Christie* cited to SCC].

<sup>5</sup> Ministry of the Attorney General, “Legal Aid Funding in British Columbia” (15 January 2009), online: Province of British Columbia <[http://www.gov.bc.ca/fortherecord/legal/la\\_people.html?src=/people/la\\_people.html](http://www.gov.bc.ca/fortherecord/legal/la_people.html?src=/people/la_people.html)> [Ministry of the AG, “Funding”].

<sup>6</sup> Legal Services Society, “Changes”, *supra* note 2.

<sup>7</sup> Ministry of the AG, “Funding”, *supra* note 5.

<sup>8</sup> Legal Services Society, “Changes”, *supra* note 2.

<sup>9</sup> Legal Services Society, “Do I Qualify for Legal Advice?” (2009), online: Legal Services Society <[http://legalaid.bc.ca/legal\\_aid/doIQualifyAdvice.asp](http://legalaid.bc.ca/legal_aid/doIQualifyAdvice.asp)> [Legal Services Society, “Qualify”].

<sup>10</sup> Legal Services Society, “Legal Representation by a Lawyer” (2009), online: Legal Services Society <[http://legalaid.bc.ca/legal\\_aid/familyIssues.asp](http://legalaid.bc.ca/legal_aid/familyIssues.asp)>.

duty counsel for 45 minutes of preliminary advice or gain information from online publications.<sup>11</sup>

The restructuring and the budgetary restrictions have also resulted in a disturbing trend: fewer law students are becoming family lawyers and fewer family lawyers are accepting legal aid referrals. This trend is making it difficult for women who qualify for family legal aid representation to find it. West Coast Leaf reports that one of the major deterrents to family law legal aid practice is low financial compensation because of under-funding to the program.<sup>12</sup> Kathryn Ferriss, a part-time legal aid family lawyer, echoed students' sentiments in the report that family law legal aid work is often viewed as pro-bono work, because much of the time spent on a file is unpaid or under-paid and is done out of moral obligation rather than as a fruitful career choice. A family lawyer will receive about one-third of the compensation for work done on a legal aid file than they would receive from a private client.<sup>13</sup> Increased funding to legal aid alone will not be sufficient to remedy the inadequacy of services if there are no lawyers willing to take on legal aid cases. In rural communities, this concern is of particular importance, because of the already limited number of lawyers and other resources. However, restoring funding to legal aid at levels it received before the cuts began in 1997 is one way to indicate to lawyers the importance of individual legal rights for the impoverished and may encourage lawyers to become more involved or to consider legal aid law as a career rather than a philanthropic endeavour.

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<sup>11</sup> Legal Services Society, "Qualify", *supra* note 9.

<sup>12</sup> West Coast Leaf, News Release, "Not with a ten-foot pole: Perceptions of Family Law" (March 2009), online: <<http://www.westcoastleaf.org/userfiles/file/Not%20with%20a%20ten.pdf>>.

<sup>13</sup> Interview of Kathryn Ferriss (25 November 2009) at the Law Courts Inn [Vancouver Interview].

The high threshold to access and the lack of available representation results in more women acting as self-represented litigants. In the 2005-2006 West Coast Leaf Court Watch Report (the “CWR”), law student observers noted that in 86 percent of the cases that came before a judge, at least one party was not represented by counsel.<sup>14</sup> Self-represented litigants are dependent upon well-meaning judges, lawyers, and other court workers for information on their rights and obligations. Judges and opposing counsel are now taking on the role of being sources of information and referral agents. The system is being significantly slowed and disrupted by the uneducated, uncontrolled, and confused self-represented litigant.<sup>15</sup> Legal aid is meant to avoid a two-tiered system of justice: one for those who can pay and one for those who cannot. However, it is exactly this tiered system that is present today.<sup>16</sup>

#### THE PRIVATE/PUBLIC DIVIDE

For many Canadians, legal aid is synonymous with access to justice. Equality and fairness are seen as preconditions of social justice; therefore, the disproportionate effects experienced by women because of the changes to legal aid have been highly criticized. One way to justify the lacklustre contribution of funds to the program is by categorizing family law as a private realm between individuals. As criminal law is seen as an issue

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<sup>14</sup> West Coast Leaf, “Family Law Project: Court Watch Report 2005-2006” (April 2007), online: West Coast Legal Education and Action Fund <<http://www.westcoastleaf.org/userfiles/file/Court%20Watch%20Report%20Final%20April%202007.pdf>> [West Coast Leaf, “Court Watch”].

<sup>15</sup> *Ibid.*

<sup>16</sup> Melina Buckley, “The Legal Aid Crisis: Time for action” (June 2000), online: *Canadian Bar Association* <<http://www.cba.org/cba/advocacy/pdffiles/paper.pdf>> [Buckley].

between the state and citizen, it is categorized as being of public interest. These categorizations are one way that the government can legitimize its continuity in providing criminal legal aid funding while lessening family legal aid support. Such a position asserts that making the personal political threatens relationships based on trust, intimacy, and negotiation. It also limits the government's power to intervene in private lives.<sup>17</sup>

Funding family law legal aid at the same rate as criminal law legal aid would not solve the problem on its own. Although criminal law receives the greatest portion from the pool of legal aid monies, it is itself inadequately funded. In order to access criminal law legal aid, a person would need to be facing incarceration, a conditional sentence that would severely limit his or her liberty, lose his or her earning capacity, be Aboriginal and face losing his or her hunting and fishing traditions, or face immigration proceedings. Otherwise, unless the person has a disability making it impossible for them to represent themselves, they must pay or be self-represented.<sup>18</sup> Simply adjusting the pool of money to be equally apportioned to all types of legal aid would not solve the problem when that pool of money itself is inadequate to meet the demands on the system.

The public agrees that legal aid plays an important role in our legal system: 83 percent of low- and middle-income British Columbians have experienced a serious or difficult-to-resolve legal problem in the last three years.<sup>19</sup> Unresolved legal

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<sup>17</sup> Patricia McGee Crotty, *Women and Family Law: Connecting the Public and the Private* (New York: Peter Lang Publishing, 1997) at 26 [McGee Crotty].

<sup>18</sup> Legal Services Society, "Criminal Charges" (5 February 2011), online: Legal Services Society <[http://www.lss.bc.ca/legal\\_aid/criminalLaw.asp](http://www.lss.bc.ca/legal_aid/criminalLaw.asp)>.

<sup>19</sup> Ipsos Reid, "Legal Aid in BC" (March 2008), online: Legal Services Society



issues often spiral into additional problems that place an increased demand on other government-funded social services: 96 percent of British Columbians agreed that for low income people, family law legal aid is somewhat or very important, while 78 percent felt that it should get the same funding priority as other social services.<sup>20</sup>

While viewing privacy as valuable highlights the importance of individualism and freedom from interference, it obscures the dangers of loneliness and alienation.<sup>21</sup> To suggest that family law is a private matter ignores the role that government plays in the complex web of law that governs family breakdown and fails to recognize that these laws contribute to increased levels of conflict between litigating parties. A study of women from over 58 countries, including Canada, concluded that family law and the status of women are connected. The more equal women are treated by family law, the more equal their lives are to men. A change to family law precedes a change in status. Family law is not the sole determinate of positive status change for women, but it is one significant contributor.<sup>22</sup> Confining family law to the private realm also creates assumptions about the way parties negotiate disputes. It does not consider that women's primary experience of discrimination occurs within their private relationships.<sup>23</sup>

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<<http://www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf>>.

<sup>20</sup> Legal Services Society, "Changes", *supra* note 2.

<sup>21</sup> Ruth Gavison, "Feminism and the Public/Private Distinction" in John Eekelaar & Mavis MacLean, eds, *Family Law* (Ottawa: Oxford University Press, 1994) at 133.

<sup>22</sup> McGee Crotty, *supra* note 17 at 128.

<sup>23</sup> Brewin, *supra* note 1.

### WHY LEGAL AID IS IMPORTANT FOR WOMEN

Denying or severely limiting access to family law legal aid has implications for all members of a society that are subject to that society's laws. In criminal law, where the majority of funding is being directed, men are the primary users. Family law legal aid, which receives significantly less funding, is primarily accessed by women. The provincial government has created a situation where the vast majority of legal aid resources are being spent on male clients. The direction of funding does not explicitly discriminate against women, but the overall effect is discriminatory because men are receiving the vast majority of services.<sup>24</sup>

Liberal theorists posit that law can be a starting point and basic foundation for the attainment of equal rights by women. It can validate, deter, or redress injuries and help redistribute wealth and power.<sup>25</sup> Because family law directly affects the everyday lives of women, it provides an important avenue for advocates of change and a framework within which other rights can be achieved.<sup>26</sup> Restrictions on access to family law legal aid undermine women's struggle for equality.<sup>27</sup> Increasing funding will not automatically or on its own achieve equal rights for women, but it is one step in the right direction.

Women are still marginalized in society and receive unequal opportunity in their work, political, personal and social lives. An examination undertaken by the United Nations

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<sup>24</sup> Brewin, *supra* note 1.

<sup>25</sup> McGee Crotty, *supra* note 17 at 87.

<sup>26</sup> *Ibid* at 105.

<sup>27</sup> Suzanne Jay, "Cuts to Legal Aid Undermine Battered Women's Access to the Courts" (November 1998), online: *Vancouver Rape Relief and Women's Shelter* <[http://www.rapereliefshelter.bc.ca/issue\\_s/lacuts.html](http://www.rapereliefshelter.bc.ca/issue_s/lacuts.html)> [Jay].

Committee to End Discrimination against Women (“UNCEDAW”) reveals that almost half of single mothers, women of color, and women who are recent immigrants live in poverty. The committee members expressed a concern that cuts to legal aid have deepened women’s social and economic vulnerability and made them less able to leave abusive relationships.<sup>28</sup> The redistributing and minimizing of legal aid services will result in more women acting as self-represented litigants. Jenn McGinn, the MLA for the Vancouver-Fairview riding commented, in an address to Parliament, that “making cuts to legal services for women is putting a large number of people in danger and should not be taken lightly. To have access to defending our rights is a basic human right and should in no way be denied to anyone, especially women who are systematically more vulnerable.”<sup>29</sup> Aboriginal women and those living in rural or isolated communities are particularly vulnerable because there are often no services to help them with legal issues except for legal aid.<sup>30</sup>

A 2000 study conducted for the Law Society of B.C., *Where the Axe Falls - the real cost of government cutbacks to legal aid*, reveals that the cuts have impacted women and men differently. In most of the communities covered in the study, court registry staff reported that women in situations of domestic violence were appearing in court unrepresented on maintenance variation applications, custody and access matters and restraining order applications. Lawyers interviewed for the

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<sup>28</sup> B.C. CEDAW Group, “UN Singles out B.C. for its Treatment of Women” *CUPE News* (3 March 2003), online: CUPE <<http://cupe.ca/news/3778>> [B.C. CEDAW Group].

<sup>29</sup> Jenn McGinn, “Jenn McGinn Calls on Government to Keep Legal Aid Services Open” *Access to Justice* (24 February 2009), online: <<http://accesstojustice.ca/2009/02/25/jenn-mcginn-calls-on-government-to-keep-legal-aid-services-open/>>.

<sup>30</sup> Vancouver Interview, *supra* note 13.

study reported that self-represented women are more likely than men to abandon pursuing their interests.<sup>31</sup>

The cuts have also been problematic for women who are immigrants or refugees who lack English language skills and are faced with a judicial system that is foreign to them. In *Legal Aid Denied*, a West Coast Leaf project that incorporated the stories of women in the family law system, affiant fourteen described that after being denied legal aid in 2002, she was forced to represent herself twice in court. English was not her first language and she did not know how to communicate the abuse that her sons were suffering at the hands of their father. Based on what the lawyer for the father submitted, the judge awarded overnight visits to the father. The affiant remarked, “I had practiced going to court and representing myself, but this did not matter because I cannot argue with a lawyer. I am not a lawyer. I am just a mother.”<sup>32</sup> Transition house workers in Surrey, B.C. point out that women who do not have citizenship are especially vulnerable. Indo-Canadian women who are in arranged marriages are under tremendous cultural pressure to stay in abusive relationships. Unless these women know that there is money, housing, legal support, and police protection they will be too afraid to leave abusive spouses.<sup>33</sup>

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<sup>31</sup> The Law Society of British Columbia, Media Release, “Law Society of BC Study Reveals Social Costs of Legal Aid Cutbacks—Stakeholders Need to Discuss Next Steps” (3 October 2000), online: <[http://www.lawsociety.bc.ca/media/news/00-10-03\\_legalaid.html](http://www.lawsociety.bc.ca/media/news/00-10-03_legalaid.html)>.

<sup>32</sup> West Coast Leaf, *Family Relations Act Review: Phase III Discussion Papers* (December 2007), online: <<http://www.westcoastleaf.org/userfiles/file/FRA%20Review%20Phase%20III%20-%20WCLEAF.pdf>> [West Coast Leaf, “Discussion”].

<sup>33</sup> Interview of Judge Raven, Olga Volpe & Carol Rosset, (24 November 2009) at Surrey Provincial Courthouse [Surrey Interview].

Our justice system is predicated on party participation with the assistance of legal advice and skilled, professional advocates. Family law situations are designed to be operated by lawyers and not laypersons.<sup>34</sup> A study on access to civil justice concluded that while lawyers are not always essential, “there are few forums in which the likelihood of success or the risk of failure is not strongly affected by representation.”<sup>35</sup> Court watchers from the CWR commented that represented parties were more successful in conveying their needs and interests and had shorter, more efficient appearances than their unrepresented counterparts.<sup>36</sup> A 2004 study on self-represented litigants in B.C. revealed that family law is the area of law in which litigants most often seek assistance.<sup>37</sup>

#### **SELF-REPRESENTATION AND SURRENDERING OF RIGHTS**

The court process is long, complicated, and can be very frustrating for women. This is particularly true where abuse or control was an issue in the relationship, where issues are complex or where the ex-spouse is represented by counsel. In three months of court watching during the externship program, I observed the same phenomena as the court watchers in the CWR.<sup>38</sup> Parties without representation tend to be confused

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<sup>34</sup> Buckley, *supra* note 16.

<sup>35</sup> Ian Morrison & Janet Mosher, “Barriers to Access to Civil Justice for Disadvantaged Groups” in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol 2 (Toronto: Queen’s Printer, 1996) 637.

<sup>36</sup> West Coast Leaf, “Court Watch”, *supra* note 14.

<sup>37</sup> West Coast Leaf, “Discussion”, *supra* note 32.

<sup>38</sup> Court Watching, (September-November 2009) UBC Externship Program. In the UBC Externship Program, a small number of selected UBC law students work as judicial interns for B.C. Provincial Court judges over the course of one semester. Students that participate in

about procedure, rely on duty counsel, opposing counsel, or judge to indicate the next steps, bring up legally irrelevant issues, expect that one appearance will deal with the entire case, fail to follow through with court orders because they did not understand them or how to follow through on them, are frustrated at their lack of knowledge and are less prepared and articulate of their concerns.<sup>39</sup>

The restrictions placed by the government on the amount of time a legal aid lawyer may bill or duty counsel may advise adds to the confusion, because clients receive only summary or piecemeal advice. Women with language barriers or disabilities who take longer to understand and process the advice are not given additional time.<sup>40</sup> Fragmented assistance can result in decisions being made without the proper opportunity to think things through. Frontline advocates working with women in the family law system have observed that many women forego some or all of their entitled maintenance in light of lack of representation, expended time and money and fear of retaliation by their spouse.<sup>41</sup> Affiant fourteen in *Legal Aid Denied* claimed that she was scared of the process, stating “I was physically sick, but I had to be strong because no one else would represent me. [It] was the most embarrassing experience. I felt like a nobody. I ask myself why do I fight and what can I do at this point?”<sup>42</sup>

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the program receive credit towards their law degree. The majority of the experience involves legal research, memorandum writing and court watching.

<sup>39</sup> West Coast Leaf, “Court Watch”, *supra* note 14.

<sup>40</sup> Surrey Interview, *supra* note 32.

<sup>41</sup> West Coast Leaf, “Discussion”, *supra* note 33.

<sup>42</sup> Brewin, *supra* note 1.

The CWR study reveals that men and women respond differently to stressful situations in the courtroom. Women are more passive to obstacles, accepting the judicial process, whereas men are aggressive and loud. Women appear anxious and fearful when pressed by judges or another party.<sup>43</sup> It also noted a difference in judge's attitudes towards women. When women ask questions in court, judges are more likely to deny their requests or to act impatiently. Non-Caucasian women were three times as likely to be denied the ability to communicate their interests.<sup>44</sup>

Fairness is central to our justice system. Our adversarial system is dependent upon a contest between two roughly equal parties. Disparity in power balance between the parties erodes fairness of procedure and leads to an uncertain outcome. Concerns over fairness arise whenever one party is represented in legal proceedings while the other is not, or when a large imbalance of resources is available to one of the parties and not the other.<sup>45</sup> Expecting women to represent themselves and to participate in dispute resolution processes without access to comprehensive, long-term services, places them in a vulnerable and potentially dangerous situation and sacrifices fairness.<sup>46</sup> Statistics document high rates of violence and abuse against women during separation. It follows that such experiences will affect women's ability to negotiate for maintenance, custody, and access. One Philadelphia study of 129 women reported that 30 percent of women indicated that they were fearful when negotiating child support payments. Their fears caused them to either give up their requests for

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<sup>43</sup> West Coast Leaf, "Court Watch", *supra* note 14.

<sup>44</sup> *Ibid.*

<sup>45</sup> Buckley, *supra* note 16.

<sup>46</sup> West Coast Leaf, "Discussion", *supra* note 32.

maintenance or to accept lower amounts than they believed they were entitled to.<sup>47</sup>

### PERPETUATED VIOLENCE AND ABUSE

Family law issues that eventually end up in court are mostly identified as high conflict files, 30 to 60 percent of the time involving male violence against women.<sup>48</sup> The threshold for family legal aid attempts to address this statistic by allowing access to those who are fearful for their safety or that of their children. It is wholly inappropriate to use the presence of violence as a threshold for eligibility given the complexities and underreporting of domestic violence.<sup>49</sup> The coalition of B.C. anti-violence groups expressed concern that women, fearful of repercussions by their husbands or with language or cultural barriers, will be reluctant to disclose their experience with violence during the intake process and be denied legal aid. They claim that women are now left open to allegations that they are making false claims of abuse in order to access the services. Women are required to provide medical corroboration of the abuse and this is not always possible. It is also counterproductive to use legal aid reactively rather than proactively. Women need tools, such as no contact orders, afforded by the legal system to protect themselves before the abuse escalates to the point where it can be medically documented.<sup>50</sup>

One of the respondents (“N”) to *Legal Aid Denied* shared her experience with an abusive partner in the family law

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<sup>47</sup> Sandra A Goundry, *Final Report on Court-Related Harassment and Family Law* (Ottawa: National Association of Women and the Law, 1998) at 32 [Goundry].

<sup>48</sup> West Coast Leaf, “Discussion”, *supra* note 32.

<sup>49</sup> Brewin, *supra* note 1.

<sup>50</sup> Jay, *supra* note 27.



system. N reported physical and sexual abuse toward both her and her children to the police after fleeing to a shelter with her children. No charges were ever laid. When she left, her partner drained her bank account and used up all of her credit. Alone, she was able to attain multiple restraining orders against him, but it took many attempts over an eight year period before she was granted access to legal aid. The court battle was long and her time with legal aid representation quickly expired. Her husband hired counsel and was awarded joint custody. N claims that her and her spouse's legal conflict escalated the abuse and resulted in her being diagnosed with depression and Post Traumatic Stress Disorder. N warns that the system does not understand or acknowledge the way abuse works.<sup>51</sup>

Domestic violence is complex because the control and power exerted by the abusive spouse extends beyond the life of the relationship. When violent relationships dissolve, an abused woman is much more likely than a non-abused woman to require restraining, no contact and no access or supervised access orders. Abusive ex-spouses can and do use the legal system to control and manipulate women. The high threshold placed on access to legal aid has resulted in unprecedented numbers of self-represented litigants. If women try to settle their disputes out of court, they are put in the position of negotiating with partners that have perpetually abused and controlled them. Alternative dispute resolution processes falsely assume that parties are more or less on equal footing.<sup>52</sup>

The 1992 B.C. Task Force on Family Violence concluded that "once a battered woman leaves her abusive husband, one effective way for him to maintain power and

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<sup>51</sup> West Coast Legal Education and Action Fund, "The Stories of Women and Family Law," online: West Coast Leaf <<http://www.westcoastleaf.org/index.php?pageID=118&parentid=2>>.

<sup>52</sup> Brewin, *supra* note 1.

control may be through the children. Batterers can use the legal system to achieve maintained power and control by initiating and challenging court orders. Increasingly, battered women are losing custody of their children to their abusive former partner. Others are given joint custody, which enables the batterer to have ongoing contact and to continue the abuse.”<sup>53</sup> Qualitative research suggests a correlation between the experience of abuse and women’s subsequent subjection to a wide range of abusive tactics and behaviours by their ex-husbands, including repeated court applications, custody blackmail, failure to pay maintenance, verbal and physical assaults during access exchanges, criminal harassment, and threats of child abductions. Women perceive the family justice system as being complicit in the extension of the abusive relationship into the courtroom.<sup>54</sup> Perpetuated abuse through the misuse of the family law system is termed “separation assault” by American literature and “court harassment” by the B.C. Ministry of Women’s Equality.<sup>55</sup>

Legal protection is particularly important for women post-separation, because the most likely time for a woman to be the victim of spousal homicide is during separation. In fact, 35 percent of women who experienced abuse during their relationships reported that it escalated upon separation.<sup>56</sup> Further, women are three times as likely as men to be killed by intimate partners during separation.<sup>57</sup> Intimate homicides have

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<sup>53</sup> Penny Bain, Shelley Chrest & Marina Morrow, “Access to Justice Denied: Women and Legal Aid in BC” *West Coast Leaf* (July 2000), online: <[http://www.westcoastleaf.org/userfiles/file/wals\\_final\\_report\\_sept\\_00.pdf](http://www.westcoastleaf.org/userfiles/file/wals_final_report_sept_00.pdf)>.

<sup>54</sup> Goundry, *supra* note 47 at 1.

<sup>55</sup> *Ibid* at 4.

<sup>56</sup> *Ibid* at 9-11.

<sup>57</sup> Statistics Canada, “Women in Canada: A Gender-based Statistical Report,” *Canadian Centre for Justice Statistics* (2009), online:

been the focus of much media attention. Fragmentation of services is at least partially responsible for the 2007 stabbing death of Yong Sun Park by her ex-spouse Peter Lee in Victoria. She had accessed all of the available resources in her area for protection from her abuser, but did not qualify for legal aid. The services she did access did not have any mechanism of communication among them.<sup>58</sup> Karen Beck's family also pleaded for continuity of service and communication among service providers when she was murdered by her ex-spouse, Richard Beck, whom she had a restraining order against, in November 2007. Every week in Canada at least one woman is murdered by her ex-partner.<sup>59</sup> Not only will access to adequate, quality, continued legal representation based on need, not violence, help to ensure women's safety and security, but it will also contribute to their economic well-being.

#### ECONOMIC DISADVANTAGE

Economic abuse is another problem faced by women when they are financially insecure and have depleted their assets and resources pursuing maintenance and custody and access. The CWR found that women were more likely than men to raise economic hardship in court and that they are more likely to experience such hardship following a family breakdown. Fathers are much more likely to refuse to pay child or spousal support than mothers. Men may use the family justice system to drain the mother of all financial resources.<sup>60</sup> Litigation is

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Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/89-503-x2005001-eng.htm>>.

<sup>58</sup> Surrey Interview, *supra* note 33.

<sup>59</sup> West Coast Leaf, Media Releases, "Women and Children at Risk for Their Lives in Family Law Disputes" (11 April 2008), online: <[http://www.westcoastleaf.org/userfiles/file/MediaReleaseMerritt\\_Apr08.pdf](http://www.westcoastleaf.org/userfiles/file/MediaReleaseMerritt_Apr08.pdf)>.

<sup>60</sup> Goundry, *supra* note 47 at 11.

expensive, any savings or assets are quickly dissipated by legal fees or disbursements. A long-standing feature of custody and access issues is that there is never closure because either party can go back into court to vary or reverse previous custody, access, or child maintenance orders. An applicant need only show “a material change in circumstances” to be heard again by the judge. The open-ended approach preserves flexibility, but can result in excessive litigation where one or both parties are intractable and determined to harass the other.<sup>61</sup>

A report on court harassment cited the initiation of multiplicity of applications, non-payment of maintenance, accumulation of arrears followed by applications for their cancellation, applications for reductions of maintenance, irregular payment of maintenance, filing of bankruptcy papers and non-disclosure of assets as tactics and strategies employed by ex-husbands to maintain financial control over their ex-wives.<sup>62</sup> The Family Maintenance Enforcement Program (“FMEP”) funded by the Ministry of the Attorney General, monitors and enforces maintenance orders for child and spousal support. Men with outstanding orders comprise 98 percent of litigants appearing in FMEP proceedings. Such a statistic highlights the continual challenges women and children face in having maintenance orders enforced.<sup>63</sup> Affiants 16 and 17 of *Legal Aid Denied* reported that drafting their own court documents, doing research and representing themselves in court consumed so much time that it became a part-time job. They kept late hours and could not hold down jobs resulting in less money for food and to meet their family’s general needs.<sup>64</sup> Without counsel, parties are more likely to settle for inadequate

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<sup>61</sup> *Ibid* at 38.

<sup>62</sup> *Ibid* at 26.

<sup>63</sup> West Coast Leaf, “Court Watch”, *supra* note 14.

<sup>64</sup> *Ibid*.

or inappropriate support orders, which has serious economic consequences for women and children who, statistically, are economically disadvantaged by separation and divorce.<sup>65</sup>

### ENSURING EQUALITY

Women's equality, as contemplated by section 15 of the *Canadian Charter of Rights and Freedoms* ("Charter"), human rights codes, and international declarations, is meaningless if women are prevented from enforcing their rights. Canada is a signatory to the *International Covenant of Civil and Political Rights* which includes Article 23(4): "State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."<sup>66</sup> True equality requires barriers, whether financial, social, or cultural, to be removed for all women. Legal aid is the primary government mechanism designed to overcome these barriers.<sup>67</sup> In *JG*, a case about access to child protection legal aid, Madam Justice L'Heureux-Dubé concluded that "access to domestic legal aid is one of the means by which women are able to attain equality before the law; without it, they do not have the equal protection or equal benefit of the law."<sup>68</sup>

Section 15 of the *Charter* guarantees that everyone is equal under the law and everyone has the right to equal protection of the law. Governments must ensure, in enacting

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<sup>65</sup> Buckley, *supra* note 16.

<sup>66</sup> Brewin, *supra* note 1.

<sup>67</sup> Buckley, *supra* note 16.

<sup>68</sup> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] SCJ No 47, [1999] ACS No 47, [1999] 3 SCR 46, [1999] 3 RCS 46, 177 DLR (4th) 124, 244 NR 276, JE 99-1756, 216 NBR (2d) 25, 26 CR (5th) 203, 66 CRR (2d) 267, 1999 CanLII 653, 50 RFL (4th) 63, 1999 CanLII 653, 90 ACWS (3d) 698 [*JG*].

policies and laws, that they do not explicitly discriminate against women. However, governments are also obligated to ensure that policies and law do not discriminate against either sex in practice.<sup>69</sup> Legislators who vet legislation and policies to guarantee compliance with the *Charter* may not be attuned to the particular challenges faced by women in society. They are often more keen to ensure that the piece of legislation or policy is gender neutral so that both sexes are afforded protection under it. The approach does not always account for the fact that the legislation may in practice adversely affect one sex more than another.<sup>70</sup> In the Supreme Court of Canada decision in *Christie*, the court held that there is no right to general access to legal services in relation to court and tribunal proceedings. However, the Court left open the possibility that in other “specific and varied situations” the right to counsel may be recognized.<sup>71</sup> The Court in *Christie* has kept open the possibility for courts to acknowledge the unconstitutionality of the disbursement of legal aid funding, because of the adverse affect it has on the equality of women.

Criticism against the current B.C. legal aid policies has also been levied by the UNCEDAW. The UNCEDAW asserts that programming since 2002 is not in compliance with the *Convention on the Elimination of Discrimination Against Women* to which Canada is a signatory. They assert that women’s equality has taken a step backwards due to the severely restricted availability of family legal aid.<sup>72</sup> UNCEDAW urges the B.C. government to make funds available for equality test cases to ensure that sufficient legal

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<sup>69</sup> Brewin, *supra* note 1.

<sup>70</sup> Susan B Boyd, “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 Can J Fam L 314.

<sup>71</sup> *Christie*, *supra* note 4 at para 23-27.

<sup>72</sup> B.C. CEDAW Group, *supra* note 28.

aid is available to women seeking redress in maintenance and custody and access issues.<sup>73</sup>

### CONCLUSION

The current state of the family law legal aid programming in B.C. is having an adverse effect on women in our society, who are its primary applicants. The system and current budget is not even able to manage referrals that meet the threshold requirements. In 2008, referrals for emergency family services were 21 percent over budget and the LSS expects the numbers to increase in future.<sup>74</sup> Women, forced into self-representation, are surrendering their maintenance, custody and access rights, are susceptible to perpetuated abuse and are becoming more financially vulnerable. Family legal aid is in a state of crisis in B.C. because fairness and equality in the justice system are being sacrificed by a provincial government who is deferring designated legal aid monies to other sources. The provincial government, in accordance with the findings of the UNCEDAW, needs to re-examine its policies in this area and restore pre-2002 funding to ensure compliance with the guarantee of equality for women in the *Charter*, human rights legislation and international covenants. Family law legal aid will not solve the problem of women's perpetuated inequality on its own, but it is one fundamental tool in achieving that goal.

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<sup>73</sup> Committee on the Elimination of Discrimination against Women, *Fifth Periodic Report*, UN CEDAWOR, 28<sup>th</sup> Sess Supp No 38, UN Doc A/58/38 (2003).

<sup>74</sup> Legal Services Society, "Changes", *supra* note 2.





