

THE ARBITRARINESS OF ONTARIO'S ARBITRATION ACT: EXAMINING THE IMPACT ON WOMEN¹

By *Natasha Bakht*

In many parts of the world, religious groups have been working to implement policies that would influence the manner in which society is run. It has been argued that this use of religion for political influence threatens to undermine hard won entitlements to equality and basic human rights. In Canada, much media attention has recently been focused on the formation of arbitration tribunals that would use Islamic or Sharia law to settle civil matters in Ontario. Some journalists have succumbed to an anti-Muslim sentiment in reporting this issue. The colonialist stereotype of Muslims as barbaric and in need of "civilizing" has been perpetuated in certain media reports. This sensationalized essentialism does nothing to forward the cause of women's equality and the writer in no way supports these points of view.

NAWL, in partnership with the Canadian Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC), studied this issue by examining the implications of Ontario's *Arbitration Act* (the Act) on family law matters in particular. Preliminary research has identified several problems with the current Act that could potentially have a disparate impact on women.

Most troubling is that s. 32(1) of the Act allows parties to agree to have their family law disputes resolved using any "rules of law" with no consideration to the applicable standards of the *Family Law Act*, the *Divorce Act* or the *Children's Law Reform Act*. Indeed, as the Act currently stands, any conservative, fundamentalist or extreme right wing standard can be used to resolve family law matters and this resolution can, in turn, be filed and enforced by a court.

In arbitration, unlike mediation, once the parties have signed an agreement to arbitrate, they do not have the option of

withdrawing. This can be particularly problematic when an agreement to arbitrate is signed at the date of marriage, but the actual arbitration does not take place until years later, during which time a person may have changed her/his mind about the use of arbitration. Arbitration based on religious principles can pose problems for individuals whose religious beliefs may change over the course of time.

There is some protection against unjust arbitral awards dealing with custody, access and child support matters because the courts retain their *parens patriae* jurisdiction to intervene when necessary in the "best interests of the child". This tool of judicial oversight can, however, only be used if the matter is first brought to the attention of a court. Arbitrations and the awards that result from them are, by their nature, private. Women will not always have the emotional or financial resources required to pursue a matter in court, resulting in isolation and the privatization of oppression.

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NAWL is a national non-profit women's organization which promotes the equality rights of women through legal education, research and law reform advocacy. We recognize that each woman's experience of inequality is unique due to systemic discrimination related to race, class, sexual orientation, disability, age, language and other factors. In our view, a just and equal society is one which values diversity and is inclusive of it. We are committed to working collectively and in coalition with other groups to dismantle barriers to all women's equality.

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How a Wee Campaign Nudged a Law of Science

By Pam Kapoor

The principle of erosion holds that over time, forces of nature will erode even the most calloused of surfaces. Soft layers erode faster than hard layers. But the world and its atmosphere are unpredictable, the barriers to women's equality can hardly be deemed soft, and social justice does not adhere to any precise law of science.

In the spring of 2004, a determined group of national women's organizations undertook to tamper with nature to try to force some real political change. Making no assumptions about the inevitability of change, the Coalition for Women's Equality (CWE) launched a pan-Canadian campaign to call attention to women's equality issues during the federal election. Funded by Status of Women Canada and the Elementary Teachers' Federation of Ontario, the campaign seemed to tap into the political disenfranchisement and frustration of women and our struggling movement for equality. What resulted was an energetic, if not surprising, surge of support and activity right across the country.

While the polls bounced, the CWE campaign shook. For such a modest and brief campaign, it managed to cause quite a stir.

INFLUENCING THE DISCOURSE

Numerous studies have indicated that men favour tax cuts and military spending while women tend to support government investment in social programs and environment, politicians and pundits prefer to frame voting differences in terms of region, language, incomes or interests. So let us make no mistake, political discourse in Canada is indeed gendered. Many agree that the political gender gap in Canada is growing. Hardly remarkable, if this year's federal election is any indication: never has it been more apparent that an erosion of mind-sets has to occur before issues of importance to women become integral components of the overall political discourse.

INTERNET, AGENT OF CHANGE

Given limitations of time and resources, the CWE chose to make its website the hub of its campaign. The CWE information and communications strategies were primarily electronic, making the CWE campaign a key part of the virtual community mobilizing on-line to advance progressive agendas during the election.

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WOMEN'S RIGHTS AND FREEDOMS: 20 YEARS (IN) EQUALITY

NAWL & West Coast LEAF National Conference • April 28 – May 1st, 2005

West Coast Legal Education and Action Fund (West Coast LEAF) and the National Association of Women and the Law (NAWL) are hosting a national conference in Vancouver from April 28 to May 1, 2005 at the Hilton Vancouver Metrotown Hotel. The Conference will be bilingual and will strive towards accessibility.

The focus of the Conference will be the 20th anniversary of the equality requirements ("section 15") of the *Canadian Charter of Rights and Freedoms*. Section 15, which is part of the supreme law of Canada, prohibits discrimination by Government on the basis of race, national or ethnic origin, colour, religion, sex, age, disability, sexual orientation, and other grounds. The Conference will include discussions on how the *Charter* affects women and our rights.

The Conference is expected to provide information on the law and discrimination, as well as a unique opportunity to meet, strategize and share information with activists, community workers, lawyers, and others from across the country about what actions we can take to advance women's rights.

Mark your calendars and check the NAWL website at www.nawl.ca for updates.

For more information, please contact the Conference Planning Committee at:

Phone: 604-684-8772, Toll Free in BC only: 1-866-737-7716 • Fax: 604-684-1543 • Email: conference@westcoastleaf.org

Should Feminists Care About Equal Marriage for Same-Sex Couples?

By Karen Busby

Equal marriage for same sex couples developed as the wedge social issue in the June 2004 federal election. We witnessed Liberal politicians proudly waving the rainbow flag, a sharp contrast to a year earlier when most of them had trouble saying "lesbian and gay" without first interjecting an "um" or taking in a little breathe of courage. (Cynics might say that the Liberals' recent reaction is a response to opinion polls which have shown consistent and steady increases in public support for equal marriage. Close to 60% of Canadians are now in favour of equal marriage.) The new Conservatives tried to avoid the issue but this strategy did not float as the socially conservative undercurrents of the party kept surfacing--or, perhaps it can be said that they were pushed out of the closet where they might have preferred to stay, at least during the election.

In all likelihood, equal marriage will still be front and centre on the political agenda when the next federal election occurs, probably within the next year. When the government in power is claiming to support, indeed cherish, constitutional equality rights, we need to ensure that this support is developed and maintained. Other equality issues will "piggy back" on this issue and, for this reason alone, feminists need to care about and support equal marriage.

Many feminists have cogently argued that marriage is not a good institution for women because, among other things, it establishes and sustains women's dependency on men. Yet I am not aware of any large feminist advocacy group taking the position that marriage should be abolished, probably because they recognized that this position would have little support. With the possible exception of women in Quebec, most heterosexual feminists get married at some

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Pay Attention to Pay Inequity

Upcoming campaign to push government to reform federal pay equity system

By Patricia Harewood

Despite over twenty-five years legislation, women living in Canada still earn less than men regardless of their occupation, age or education. On average, a woman earns 72.5 cents for every dollar that a man earns.¹ This wage gap is even greater for Aboriginal women, immigrant women and women of colour.

Over the next few months, the National Association of Women and the Law (NAWL) will be collaborating with partner organizations to draw attention to the federal pay equity system and recent efforts by women's groups and trade unions to improve it. In May 2004, the federally appointed Pay Equity Task Force released its final report, *Pay Equity: A New Approach to a Fundamental Right*², with over 100 recommendations to reform the federal pay equity system. The report adopted several of NAWL's recommendations which were submitted to the pay Equity Task Force in December 2002.

PAY EQUITY IS THE LAW

Pay equity is the right to equal pay for work of equal value. If you are a woman, this means that you have the right to be paid just as much as a man for work that has comparable working conditions and requires a similar level of skill, effort and responsibility. As a fundamental right, pay equity is constitutionally protected by the equality provision in section 15 of the *Canadian Charter of Rights and Freedoms*.

The *Canadian Human Rights Act*³ promotes pay equity by prohibiting differences in wages between female and male employees working in the same establishment and doing work of "equal value". This law applies to employees who are working in the federal public sector or in private sector businesses, which fall under federal jurisdiction, such as banks, CN Rail and Canada Post. Several provinces, such as Quebec, Ontario and Manitoba also have specific pay equity legislation which applies to the provincial public sector and/or to private sector businesses within provincial jurisdiction.

PROBLEMS WITH PAY EQUITY

The federal pay equity system is plagued with several problems, including inaccessibility, unclear litigious terms in the legislation and an ineffective complaints-based model. This model places the responsibility to make pay equity work on the shoulders of the more vulnerable party – individual women workers – rather than on independent oversight agencies or employers.

It is the responsibility of individual employees to bring forward pay equity complaints to the Canadian Human Rights Commission (CHRC). The CHRC is an independent agency that reports to Parliament and is responsible for supervising the implementation of the *Canadian Human Rights Act*, the *Equal Wages Guidelines* and the *Employment Equity Act*. After investigating a complaint, the CHRC decides whether or not to refer the file to the Canadian Human Rights Tribunal for adjudication.

Few women are able to successfully bring forward a complaint; the entire process is too long, too costly and extremely frustrating, especially for non-unionized women. Although the CHRC claims it has successfully reduced processing times for complainants, many women never even make it to the complaint stage due to a variety of obstacles: poverty, a lack of legal assistance or an overriding fear that filing a complaint may result in the loss of employment.

ADOPT A PROACTIVE PAY EQUITY FRAMEWORK

The Pay Equity Task Force was established in June 2001 by the federal government, under the direction of the Minister of Justice and the Minister of Labour. Its mandate was to review and propose changes to the current federal pay equity framework. The Task Force consulted a variety of stakeholders including employees, employers, trade unions, researchers and women's organizations. Many working for women's equality saw the appointment of the Task Force as a measured response to the effective lobbying of women's groups and trade unions. It was also a clear acknowledgement that aspects of the federal system needed to be revamped.

One of the most important recommendations from the final report urges the federal government to adopt a new

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Women's Voices in the struggle for Family Law Legal Aid: A Matter of Justice

By Alison Brewin, Program Director
West Coast LEAF

“IT IS A MATTER OF JUSTICE! LEGAL AID FOR WOMEN IS NOT ONLY A MATTER OF EQUALITY AS IT IS ONE OF RIGHTS.”

Claire L'Heureux-Dubé,
Recently retired Justice of the Supreme Court of Canada

Many years ago, West Coast Legal Education and Action Fund (LEAF) identified access to legal aid in family law matters as a key component to achieving women's equality in B.C. The inability to assert her rights when her marriage breaks down can have a devastating impact on a woman and her family. The strength of the 'father's rights' perspective in family law has allowed our legal system to ignore some fundamental realities in women's lives: women remain the primary caregivers of children; women are more likely to abandon professional and economic benefits in order to facilitate that relationship; and women are far more likely to end up in poverty after marriage breakdown than their former male partners.

The budget cuts introduced by the B.C. government in the spring of 2002 exacerbated this reality for the women of the province. Amidst massive cuts to social services, women's centers, childcare and education programs, and

income assistance, the government slashed legal aid services by 40%. The bulk of the cuts were managed by the Legal Services Society (LSS) through the elimination of all poverty law services, virtually all family law services, and the closing of over thirty community and Native community law offices; leaving only seven regional offices.¹

LSS was stripped of its independence from government and directed to provide legal aid services only in situations that were established government obligations under the *Charter* – criminal, young offenders and child apprehension – ignoring a number of papers and studies describing women's need for family law services. In addition, the government created a new requirement to access any family law service: the presence of publicly recognized domestic violence. However, even if violence is present in the relationship, it is only possible to access up to eight hours of legal representation for the purposes of getting a restraining order or varying a custody order for safety reasons.

In response to these changes and cuts, West Coast LEAF recognized the vital importance of building the opportunity to establish, in law, the constitutional obligation of governments to provide civil legal aid. But the piece that seemed to be missing, for the government and the public, was the actual evidence that this was a gendered reality; that cutting family law and poverty law

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Law Students Research Legal Aid

By Andrée Côté

A team of Pro Bono Students Canada from the Law Faculty at the University of Ottawa will be monitoring different provincial legal aid regimes as they relate to family law.

After a decade of cuts and restrictions, there is definitely a legal aid crisis across Canada. Women going through separation and divorce proceedings are often left without any legal representation or advice. This is particularly

difficult in a context of custody and access litigation, and in cases where violence or power imbalances are involved. This cut in family law legal aid has been accompanied by a push in favour of mediation and other alternative dispute resolution mechanisms. The ADR mechanisms often place women in a very vulnerable position, where they “agree” to bargain away their rights without knowing what their entitlements are in reality. This research will help NAWL in its pan-canadian campaign in favour of increased federal funding for civil legal aid.

LEAF and Women's Economic Equality Rights

Reflections on a Pay Equity Case and an Equality-Rights Conference

By Fiona Sampson

On May 12th of this year, the Women's Legal Education and Action Fund (LEAF) appeared before the Supreme Court of Canada to argue in support of the need to protect and advance women's equality rights in the context of a pay equity case, *Newfoundland Association of Public Employees (NAPE) v. Newfoundland* [2004]. At issue in the case is whether the Newfoundland government can pay women less than men for work of equal value. This case affects 5,300 female employees of the Newfoundland government, and has the potential to establish a precedent that will affect female employees across Canada.

LEAF argued that the Newfoundland government admitted that it had violated the equality rights of its female employees when it agreed to compensate them for the unequal wages they'd been paid in the past, and that the government violated the equality rights of the women when it reneged on its agreement to provide the employees with pay equity. The government's position was that it could not afford to implement the agreement to provide for pay equity. LEAF argued that while it is always cheaper to discriminate, the government's budgets cannot be balanced on the backs of the disadvantaged in society and that the guaranteed equality rights of women must be respected.

The Court seemed quite interested in the discrimination experienced by the women in this case, and in the effects of the pay inequity. However, they also seemed concerned about the costs involved in providing the pay equity compensation at issue. In response to the Court's concern about costs, LEAF argued that the costs involved should not be characterized exclusively as costs to the government. Indeed, the costs involved were the costs owed to the female employees for the wages they'd been denied and the discrimination they faced from the lack of recognition of the value of their work.

LEAF was represented by Karen Schucher and Fiona Sampson. The Court reserved its decision; a decision from the Court is not expected for at least several months.

ROLE OF THE CHARTER

On a related matter, LEAF recently hosted a conference examining the role of the *Charter* in securing social and economic rights for all Canadians, particularly women and other vulnerable groups. The conference was held in Toronto on May 7-9, 2004. The conference was hosted by LEAF and several anti-poverty advocacy groups, including the Income Security Advocacy Centre, the Charter Committee on Poverty Issues, the National Anti-Poverty Organization and the Together Against Poverty Society.

The conference brought together an impressive group of lawyers, activists and academics whose work focuses on using the law to improve the material well-being of those who are most marginalized in our society. We were particularly pleased to have a number of representatives from Quebec, where the anti-poverty movement has succeeded in having the provincial legislature pass a statute aimed at preventing poverty.

The conference was part of LEAF's "Impact Study" of the case of *Gosselin v. Canada* [2002] 4 S.C.R.. *Gosselin* was the first case in which the Supreme Court of Canada was asked to apply section 15 of the *Charter* to a welfare provision that denied full benefits to a specified group (in this case, persons under age 30). Ms. Gosselin was a young woman who was allowed only \$170 per month under the program and consequently endured much hardship.

LEAF and other equality-seeking groups were extremely disappointed when the SCC found that this treatment was not discriminatory. Much of the discussion at the conference focused on the reasons that the section 15 case failed, and strategies for improving the prospects for success in the future.

This conference was part of the larger "Law Project" in which LEAF has been examining and strategizing about the state of equality jurisprudence in Canada post the Supreme Court of Canada decision in *Nancy Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. case.

Fiona Sampson is the Director of Litigation at LEAF.

Jurisdiction over maternity benefits and parental benefits lies with the provinces: a decision of the Quebec Court of Appeal creates turmoil

By Rachel Cox

On January 27, 2004, the Quebec Court of Appeal ruled that the maternity benefits and parental benefits provisions of the *Employment Insurance Act* encroach upon provincial jurisdiction and are beyond the jurisdiction of the Parliament of Canada.¹ This decision calls for action by us, since the funding of maternity leaves and parental leaves is a crucial issue in the fight for women's social and economic equality. Following pressure by, *inter alia*, the Network on Women's Social and Economic Rights, a coalition of Canadian feminists, the federal government appealed the Quebec decision. The case has provisionally been set down for hearing by the Supreme Court on January 11, 2005.

The Court of Appeal decision has aroused strong feelings within the women's movement in Canada. The possibility that the decision will be upheld worries women outside Quebec who fear that the transfer of responsibility from the federal government to the provinces will result in much less beneficial programs of maternity benefits and parental benefits.

Ironically, the questions put to the Court of Appeal by the Government of Quebec were part of a political strategy aimed at forcing the federal government to negotiate a funding agreement with Quebec on the province's own parental insurance plan. The product of a hard-fought battle by a very broad coalition, the *Regroupement pour un régime québécois d'assurance parentale*, this plan is much more inclusive and generous than the federal scheme. Among other things, it covers all mothers (and all fathers) with an annual income of at least \$2,000, irrespective of whether they are employed or self-employed. The income replacement rate (between 70% and 75%) is higher than the federal 55% and the maximum insurable income – in 2003, \$53,500 indexed annually – compares to the federal government's \$39,000, unindexed.

In the context of last summer's federal election and after several years of unproductive bargaining, the two govern-

ments signed an agreement in principle on the funding of the Quebec plan. In principle, the Quebec parental insurance plan is to come into force on January 1, 2006. However, there is still some uncertainty as to jurisdiction over maternity benefits and parental benefits. On the one hand, if the Supreme Court of Canada overturns the Court of Appeal decision, Quebec might very well end up the loser in terms of its autonomy to develop social programs. And we know that, all things considered, Quebec's social programs are often progressive and rather favourable to women. On the other hand, if the decision is upheld, the big losers will be the mothers (and fathers) outside Quebec.

The Quebec Court of Appeal decision has created some personal and political rifts between feminists in Quebec and Canada. The legal tangle surrounding this decision illustrates the importance, in fact the urgency, of developing progressive strategies that take account both of Quebec's autonomy and the importance of having cross-Canada standards for social programs outside Quebec. Maternity and parental benefits are just one among other issues such as health or child custody services.

The challenge is to articulate a vision of an asymmetrical federalism that could unite feminists and all progressive forces in Quebec with those in Canada. All too often the demands of progressive federalists in the area of social programs have foundered because the feminists and other progressive forces in Quebec cannot relate to calls for the adoption of "national standards". And *de facto* asymmetrical federalism – for example, the distinct Canada and Quebec Pension Plans or the agreement to rebate Quebec workers' employment insurance contributions in order to finance part of the Quebec parental insurance plan – do not represent an acceptable solution for Quebecers, either. It forces Quebec to make do on a case-by-case basis, and its effectiveness is subordinate to the political will to negotiate on the part of the federal government, which has so far proved rather fickle.

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The inability to foresee what approach courts will take in their review of arbitral awards exacerbates these problems. Firstly, it is likely that parties will contract out of their appeal rights in arbitration agreements, resulting in very limited judicial oversight through the mechanism of judicial review. Secondly, the judicial tendency towards upholding parties' private bargains is worrisome, especially where the agreement is found to be unfair and/or deviates from the statutory matrimonial property regime. The purported rationale is that a court should be reluctant to second-guess the arrangements on which people reasonably expected to rely.² Where a party has received independent legal advice, it is even more likely that a court will show deference to an arbitrator's decision.

NAWL, CCMW and NOIMWVC are most concerned about the impact of the arbitration regime on groups of women who are already marginalized in society. New immigrant women are vulnerable because they may be unaware of their rights in Canada or may accept arbitral decisions that seem equal to or better than what might be available in their country of origin. A battered woman does not have the autonomy needed to negotiate the terms of an arbitration agreement in a way that is fair because of the control an abuser has over her.³ An immigrant woman who is sponsored by her husband is in an unequal relationship of power with her sponsor, making consent to arbitration illusory.⁴ Linguistic barriers also disadvantage women who must depend on family or community members for translation.

One of the consequences of the "privatization of justice" is that social inequities may be reproduced in privately ordered agreements, and yet remain hidden from the public eye.⁵ With no legal aid or mandatory legal representation, there are serious concerns about whether women will be truly free in their choice to arbitrate. Women may be susceptible to subtle but powerful compulsion by family members or may be the targets of coercion and pressure from religious leaders for whom there may be a financial interest in parties seeking arbitration.⁶ The *Arbitration Act* threatens to undermine the beneficial developments made for women in family law by providing no safeguards whatsoever to ensure women's equality.

NAWL, CCMW and NOIMWVC presented these and other concerns to Marion Boyd who was appointed by the Attorney General of Ontario and the Minister for Women's Issues to review the province's arbitration process, with specific reference to faith-based arbitration.

Though CCMW and NOIMWVC took the position that Ontario, like Quebec,⁷ ought to prohibit the use of arbitration for family law purposes, NAWL was of the view that further consultation was needed before appropriate law reform options could be considered. Ms Boyd will be presented with the research done to date. Her recommendations are expected to be released in the fall 2004.

Natasha Bakht was the principal researcher and writer for our working group of partners (NAWL, CCMW, NOIMWVC) which is examining the impact on women of family law arbitration which uses sharia law. She is currently pursuing her LL.M as a Hauser Global Scholar at New York University.

1 This article is a shortened version of longer paper written by Natasha Bakht for NAWL, CCMW and NOIMWVC. See Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's *Arbitration Act* and its Impact on Women" (2004) <www.nawl.ca>.

2 *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 at para. 36.

3 B. Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7 *Mediation Quarterly* 317 at 321.

4 A. Côté, M. Kérisit & M. Côté *The Impact of Sponsorship on the Equality Rights of Immigrant Women* (Ottawa: Status of Women Canada, Canadian Heritage and Centre of Excellence for Research in Immigration and Integration, 1999) at 14.

5 Goundry S.A. et al., *Family Mediation in Canada: Implications for Women's Equality* (Ottawa: Status of Women Canada, 1998) and R. Mandhane, *The Trend Towards Mandatory Mediation in Ontario: A Critical Feminist Legal Perspective* (Ottawa: Ontario Women's Justice Network, 1999) at 34.

6 Religious leaders who become arbitrators will have a financial interest in people seeking arbitration since the parties pay for their services.

7 Article 2639 of the *Civil Code of Québec*, S. Q., 1991, c. 64, s. 2639 provides: "Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration."

HOW A WEE CAMPAIGN... – Continued from page 2

Launched on June 2nd, the CWE campaign website rapidly became one of the most popular electoral resources in Canada, receiving nearly 125,000 “hits” in its first two weeks. On the day of the English-language leaders’ debate, the site received 21,000 hits, roughly double the average number of daily hits to a website of a typical non-governmental organization. By the end of the short campaign, the total volume of traffic had climbed to a startling half-million hits. Remarkably, traffic to the site continues at a steady pace long after the ballots were destroyed.

A pan-Canadian media strategy was run through the website, with wildfire effects that had dozens of groups around the country simultaneously issuing similar or identical press releases at several points during the campaign.

In addition, a wealth of links provided supporters with portals to allied organizations, campaigns and electoral resources.

A core amount of original material was made available on-line while supplementary resources were sought and promoted through the CWE site. The CWE produced a series of media documents, party platform analyses, and of course, “Still in Shock”, a long-awaited follow-up to the “Shocking Pink” paper, a popular mobilizing and lobbying tool during the 1993 federal election. “Still in Shock” showcased fourteen key issues affecting diverse women throughout Canada, including poverty, discrimination, pay equity, custody and access, political representation, immigration and refugee issues, violence, technology, Aboriginal women and housing.

“Still in Shock” made its way into all-candidate debates in communities around Canada, into the hands of national party leaders and their esteemed campaign staff, as well as to journalists on the election beat. It may be small, but the booklet has the potential to make a sizeable impact as an historic document symbolizing the steps made toward women’s equality in Canada and the long way yet to go.

MORE TO DO

The member organizations of the CWE are presently engaged in discussions as a coalition, as well as with sister groups, about how to honour and build upon the momentum created by the campaign.

Whatever comes next is coming fast. Why? Two urgent reasons: (1) the renewed energy among equality-seeking women’s groups and supporters is ripe and primed; and (2) timing is everything, and the precarious nature of the political landscape implores our swift and strategic political action.

Feedback and involvement is welcome. For further information, visit www.canadaelection.net or contact NAWL or any of the CWE member organizations (a full list is available on the website).

They say that the only thing one can count on is change. And when change is so long overdue in terms of women’s equality and full enjoyment of women’s rights in Canada, is it any wonder that we would attempt to hurry it along?

Pam Kapoor was the coordinator of the 2004 CWE election campaign and freelances as a campaigner and communications consultant.



point in their lives and, I suspect, most who marry believe that their marriage will not develop into the patriarchal quagmire their academic sisters write about. These women are marrying for the psychological, social, religious or legal benefits of the institution. The decision to marry is, for most people, one of the most profound personal decisions they will ever make.

Lesbians and gay men want the ability to marry not only to obtain the benefits of the marriage but also because exclusion of these relationships sends and reinforces a powerful message that our choices about relationships are not valuable or worthy of support. This message is one that is communicated, sometimes loudly, often insidiously, always painfully, to us everyday. Giving us the choice to marry sends a different message. A quick review of the arguments made by religious opponents of equal marriage reveals their belief that such marriages undermine what they call “traditional marriages.” There is a grain of truth in this argument in that marriages between same-sex couples destabilize patriarchal conceptions of marriage. Along with the pragmatic political reasons described above, these equality-based reasons provide solid ground for feminists to support equal marriage.

Many lesbians and gay men will never marry and some will resent the new social and familial pressure to marry. Feminists need to continue thinking about ways to respect and support diverse forms of inter-dependent relationships, mindful that marriage is but one form of relationship. The complexity of this work, however, does not give us a reason to reject support for equal marriage.

SO WHERE ARE WE NOW AND WHAT ELSE NEEDS TO BE DONE?

A primary goal is to ensure that the federal government passes legislation permitting equal marriage. Not only is this move of symbolic importance, but it will also ensure that all consequential amendments to federal statutes are made and it will ensure uniformity across the country. Keep lobbying your Member of Parliament on this issue, remembering that the anti-marriage forces are lobbying very heavily.

That having been said, it is unlikely that the current federal government will pass legislation before it falls, given that the shelf life of a minority government is about 18 months and it is unlikely that the Supreme Court of Canada will have

made its decision in the Marriage Reference case before then. An alternative strategy that can be pursued is to lobby provincial governments to agree to issue marriage licenses and register marriages between same sex couples or to seek court orders requiring this action.

90% of Canadians live in provinces or territories (B.C., Ontario, Quebec and the Yukon) where equal marriages are now being performed pursuant to court orders. The judge in the Yukon case was very critical of the territorial and federal governments for contesting the case and ordered that they pay all of the litigating couple’s legal costs, so there is a good chance other provincial and territorial challenges will be uncontested by governments. The federal Minister of Justice, Irwin Cotler recently stated that the federal government will no longer oppose these cases and some provincial ministers have taken or are moving towards this position. (Both federal and provincial governments have a role to play in marriage law because the federal government has the power to determine who can marry whereas the provincial governments are responsible for regulating the formalities of marriage like licenses and registration.)

If the change to the common law pronounced in these provinces is put into effect in the remaining jurisdictions, it will be, practically speaking, difficult for the federal government to introduce legislation prohibiting equal marriage. In other words, the lack of Parliamentary consensus will result in maintaining the status quo.

Equal marriage challenges were started in Manitoba and Nova Scotia in late August and, surprisingly, both were completed within less than a month because the Ministers of Justice in both provinces and the federal Minister of Justice agreed to consent to an order requiring the registration of marriages. Challenges in the other provinces and territories (New Brunswick, Alberta, Newfoundland, N.W.T., Nunavut, P.E.I. and Saskatchewan) can now also be expected. So if you live in an “unreformed” jurisdiction, you may want to see if you can facilitate litigation in your province or territory or simply write your provincial or territorial Minister of Justice asking them to start registering equal marriages.

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PAY ATTENTION TO PAY INEQUITY – Continued from page 4

proactive pay equity law which would be considered human rights legislation.⁴ Proactive elements of the legislation would include an employer's obligation to review pay practices and identify gender-based wage discrimination gaps. Employers would also have a duty to develop a pay equity plan to eliminate pay inequities within a definite time frame.

Equally significant is the recommendation that coverage against wage discrimination be expanded to groups facing additional forms of discrimination: Aboriginal people, persons with disabilities, people of colour.⁵ New pay equity legislation would create mechanisms to measure and eliminate systemic discrimination against these designated groups without duplicating the *Employment Equity Act*.

Pay inequity continues to hurt women and children by contributing to poverty, inadequate housing, poor health and general social exclusion. With a new and vibrant pay equity campaign, NAWL hopes to remind federal politicians that advancing women's equality requires that they pay attention to pay equity by implementing key recommendations.

You can read the full report of the Task Force on Pay Equity at the following sites:

<http://www.justice.gc.ca/en/payeqsal/6000.html> (in English).
<http://www.justice.gc.ca/fr/payeqsal/6000.html> (in French).

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- 1 Statistics Canada, "Women in Canada in 2000: A Gender-based Statistical Report" (Ottawa: Minister of Industry, 2000)
 - 2 Department of Justice, *Pay Equity: A New Approach to a Fundamental Right* (Ottawa: Pay Equity Task Force, 2004)
 - 3 *Canadian Human Rights Act*, R.S.C. 1985 c. H-6, ar. 11 (1)
 - 4 *Supra* Note 2 at 156.
 - 5 *Ibid* at p. 199

WOMEN'S VOICES IN THE STRUGGLE – Continued from page 5

legal aid was not only impacting women's right to equality, but was only made possible by a government that was prepared to ignore women's existing disadvantage.

To begin building this argument and the evidence, West Coast LEAF has been collecting the sworn affidavits of women who have been affected by the lack of adequate legal aid.²

A common theme in the affidavits is the presence of domestic violence and abuse, though often not in the form recognized by LSS, or even of the nature that would allow women to access legal aid. Most of the affiants have received some legal aid over the years, and some have gone into bankruptcy and poverty paying for legal representation. All of them have dealt with the court system without a lawyer; two women provided affidavits swearing they have not acted on their rights to support and maintenance simply because they cannot get legal representation. One woman is still with her husband because she realizes that if she leaves him, she and her disabled son will not be able to afford a home.

The following quotes are from the affidavits we have collected so far:

"I do not know the law well enough to challenge what is said and done by my ex-spouse's lawyer. I am able to read and understand the case law and a lot of the concepts in family law, but I do not understand the technical or procedural aspects... On several occasions, my ex-spouse's lawyer has served me with materials and documents minutes before going into court... I am not sure what legal options are available to me when my ex-spouse's lawyer fails to obey the Rules of Court." Affiant #16.

"No one in the courtroom recognized that I was representing myself or that English is not my first language. I was standing there alone trying to protect the boys. This new judge... disregarded the other judge's decision. She said that my children could go back to overnight visits. The judge said my ex-partner's actions were "just different parenting". 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." Affiant #14

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JURISDICTION OVER MATERNITY BENEFITS... – Continued from page 7

NAWL is exploring ways in which to end the current impasse in maternity and parental benefits and in other areas as well. Among other things, we are studying the possibility of situating our demands for certain social program standards within an international human rights framework, which would have the advantage of obviating the issue of the distribution of powers.

Five provinces will be intervening in the appeal before the Supreme Court: Newfoundland and Labrador, Nova Scotia, New Brunswick, Ontario and Saskatchewan. The

Canadian Labour Congress and the Income Security Advocacy Centre have also applied for leave to intervene in this case. To follow the developments in the case, check out the information on docket 30187 at the Supreme Court web site, www.scc-csc.gc.ca.

Rachel Cox is an independent researcher and lawyer specializing in human rights. She has been doing research and action research for ten years in the area of labour, particularly with women's groups. She works with the NAWL working group on maternity benefits and parental benefits.

I In the Matter of the Reference by the Government of Quebec ... regarding the Constitutionality of Sections 22 and 23 of the Employment Insurance Act, CAQ 500-, January 27, 2004 [200-09-003962-021].

WOMEN'S VOICES IN THE STRUGGLE – Continued from page 11

"It is a part time job for me, costing me approximately 20 hours per week." Affiant #2

"This case has been addressed in court approximately thirty-eight times. Of those, I appeared on my own approximately twenty-five times... I am not a lawyer. Not only is it difficult to spend hours getting ready, but the children suffer, I am a nervous wreck, and then the judge demands to know if this is all I have." Affiant #15

"In order to pay legal fees (she has had a mix of legal representation and self-representation) I have had to sell all my assets and borrow money from friends and family. I have recently declared bankruptcy. My total debt for legal fees incurred during these divorce proceedings is upward of \$72,000... My continual attempts to find legal representation has been emotionally and physically draining. I have trouble sleeping and eating, especially now that I know I have to represent myself... I am unable to adequately care and provide for my children." Affiant #6.

"My legal situation has had a profound effect on my family back in India, though we still speak. However, all my friends and community members who spoke with me before do not

... speak to me now. I have no friends or close community members I can turn to because of this situation. I have no separation agreement in place with my husband, and receive no support from him, which I desperately need, I was forced to flee my home because of threats and violence and have struggled to survive on my own with little income. I have not been able to assert any rights of support because of my inability to file any court documents because of my lack of legal aid and support." Affiant #10.

"I had a nervous breakdown around Christmas time... On top of the health problems I have and trying to put my life in order, this has added to my worries. I spent three days crying last week. Instead of doing things to help with other problems in my life I must worry about the court proceedings. I feel stupid because I am unable to represent myself... Sewing is all I can do for employment, I do not even know how to use a computer." Affiant #3.

"Not having a lawyer was terrible. I could not sleep. I was taking anti-depressants. I had to go to my doctor who prescribed me with anti-depressant and sleeping pills. I was on medication for a month." Affiant #4.

"I feel devastated by the situation; it is like a wound that never heals." Affiant #12

*1 For a full description of the legal aid cuts, please see *Legal Aid Denied: Women and the Cuts to Legal Services in B.C.* at www.policyalternatives.ca/bc.*

2 For a full description of the campaign and more quotes and information on family law legal aid, please go to www.westcoastleaf.org.