

CEDAW REVIEW

By Shelagh Day

Dear Friends,

Canadian women's organizations set the agenda for the review by the United Nations Committee on the Elimination of Discrimination Against Women of Canada's 5th report (http://www.canadianheritage.gc.ca/progs/pdp-hrp/docs/cedaw_e.cfm). The national report, prepared by the Feminist Alliance for International Action (FAFIA), and the B.C. report, prepared by the B.C. CEDAW Group, provided Committee members with a detailed picture of the situation of women in Canada. (Look for the national and B.C. reports on the FAFIA Web site at www.fafia.org. The B.C. Report is also on the povnet Web site at www.povnet.org).

Officials from Status of Women Canada, including Florence levers, who was the head of Canada's delegation, praised the high quality of our reports, and indicated that they found them very informative and useful to their own review of current policies.

The CEDAW Committee members, who were at first somewhat daunted by the size and thoroughness of the Canadian NGO reports, became highly interested in the situation of Canadian women. CEDAW Committee members are, of course, familiar with the negative impacts that structural adjustment programs and the implementation of the neo-liberal agenda are having on women in countries around the world, as governments are down-sized, markets are deregulated and social programs are cuts. Therefore, though the particularities of the changes to Canada's federal-provincial funding arrangements and the effect of this on social programs in all Canadian jurisdictions are new to them, they recognize as a known pattern the negative impacts that flow to women from cuts to services that increase their unpaid work, remove "good jobs", and elimi-

nate or diminish the availability of services that women rely on to fill gaps, and to support them when they are abused.

What surprised CEDAW Committee members was the extent of poverty among women in one of the wealthiest countries in the world. The figures that both women's NGOs and the Canadian government gave them are shocking. A number of CEDAW Committee members were also surprised by decisions taken recently by governments which clearly worsen conditions for the most disadvantaged women, including cuts to welfare benefits, the NCB claw back, cuts to already inadequate childcare, and cuts to already thin legal aid provision for family law and poverty law.

Many of the CEDAW Committee members were confounded by the federal government's failure to deal with obvious inequalities in law for Aboriginal women – including the unresolved and continuing discrimination against Bill C-31 re-instatees, the provision of the *Canadian Human Rights Act* that bars women from making complaints of discrimination against Band Councils, and the lack of any guarantee for Aboriginal women living on reserve to an equal division of matrimonial property at the time of marriage breakdown.

CEDAW Committee members were also concerned by the evidence of the impact of racism on women in Canada that can be seen in the high rates of poverty and lower employment incomes of women of colour and immigrant women, as well as by the blatant sex discrimination inherent in the *Immigration Act*, and by the weakening of employment standards which have particular importance to marginalized women.

Many of the members of the CEDAW Committee know Canada in international fora as a key supporter and promoter of initiatives to advance women's human rights, such

Continued on page 2

JURISFEMME

Volume 22, N°1
Winter 2003

Jurisfemme is a publication of the National Association of Women and the Law (NAWL), 1066 Somerset West, Suite 303 Ottawa, Ontario K1Y 4T3, Telephone: (613) 241-7570, Fax: (613) 241-4657, E-mail: info@nawl.ca, Web site: <http://www.nawl.ca>

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.

Editors

Marlène Dubuisson-Balthazar, Kecia Podetz, Ros Salvador

Jurisfemme Co-ordinator
Sharmila Biswas-Mistry

Publication Co-ordinator
Sharmila Biswas-Mistry

Contributions of articles, notices and resource information are encouraged. We reserve the right to edit submissions.

NAWL gratefully acknowledges the financial support of the Women's Program, Status of Women Canada.

ISSN 0835-0892

NAWL Staff and National Steering Committee

Executive Director
Bonnie Diamond

Director of Legislation & Law Reform
Andrée Côté

Office Administrator
Pam Mayhew

Communications Officer
Sharmila Biswas-Mistry

National Steering Committee

Kim Lewis, Ottawa, ON
Kim Brooks, Kingston, ON
Claudine Barabé, Montréal, QC
Catherine Meade, Ottawa, ON
Kecia Podetz, Ottawa, ON
Patricia Doyle Bedwell, Halifax, NS

Regional Representatives

Ontario
Ruth Magenda Goba, Toronto, ON

Atlantic
Janice Brown, Halifax, NS

West/NWT
Yvonne Peters, Winnipeg, MB

Quebec
Marlène Dubuisson-Balthazar, Montreal, QC
(BC/Yukon)
Ros Salvador, Victoria, BC

Continued from page 1

as the Declaration on Violence Against Women and the appointment of a Special Rapporteur on Violence Against Women. Committee members are also aware of money provided by the Canadian International Development Agency that is specifically earmarked for women's projects in developing countries. The Committee expressed both their congratulations to Canada for its leadership in the international arena, and their dismay about the situation of women in Canada.

In the first round of questioning, 17 of 23 CEDAW members asked questions. Here is a sample of those questions:

1. Why was Canada's 5th report, which documents initiatives taken between 1994 - 1998, not provided to the CEDAW Committee until 2002?
2. When will the federal government introduce "social condition" into its human rights legislation, and what is the government's attitude towards the inclusion of this ground?
3. Is gender analysis mandatory for all parts of the federal government and for the provincial governments? Why was a gender analysis of the impact of the *Budget Implementation Act* (BIA) of 1995, which restructured federal-provincial relations with respect to social programs, not done? The BIA could not have been designed and implemented in the way it was if gender analysis had been done. Why has the federal government given up the conditioning of monies it provides to provincial governments since this permits inconsistencies in implementation of CEDAW obligations?
4. Why does the *First Nations Governance Act* not address the residual discrimination against Bill C-31 women, and provide for the equal division of matrimonial property at the time of marriage breakdown for on-reserve Aboriginal women?
5. How will Canada achieve harmonious implementation of the Convention, given the different responsibilities of the federal and provincial governments, and the lack of a mechanism for ensuring consistency?
6. How does Canada justify the high levels of poverty among women when Canada is one of the wealthiest countries in the world? These high levels of poverty were commented on by the CEDAW Committee in 1997, by the Committee on Economic, Social and Cultural Rights in 1998, and by the Human Rights Committee in 1999. The CEDAW Committee recommended in 1997 that social assistance be restored to adequate levels. Please explain why this has not been done?
7. What is the rationale for the elimination of the Human Rights Commission in B.C. and the elimination of the Ministry of Women's Equality? What is the justification for the long list of cuts and closures in this province – to health care, welfare, legal aid, courts and judicial services, and employment standards protections?

Continued on page 3

Continued from page 2

8. Is there political recognition in Canada that the figures regarding women living in poverty are shocking? Is there a political will to address this situation? The governments will need NGOs to help them address this serious situation. How do Canadian governments envisage cooperation with NGOs in the future?
9. Why are poverty eradication strategies focussed on children but not on women?
10. The Immigration Act has a male bias, favouring – in the economic immigrant class – those with high skills and/or investment income. What system is there for monitoring the situation of immigrant and migrant women?
11. What rationale does Canada provide for the Live-In Caregiver Program? The women who come to Canada under this program are treated unequally and lack adequate social protections.
12. Regarding the “third safe country agreement” for the return of refugees, does Canada consider a country “safe” if an asylum seeker will be detained in that country?
13. Regarding the *Immigration and Refugee Protection Act*, what provisions are there to deal with victims of trafficking? What is the position of a woman who is a victim of trafficking?
14. Regarding refugees and gender-based persecution, how many women have been admitted as refugees based on a finding of gender-based persecution? What facilities and programs are made available to these women?
15. The current situation of Aboriginal women does not reflect Canada’s commitment to equality. Their high incarceration rates, lower educational attainment, poorer health, and unequal status at law are all concerns. Will Canada, at the time of its next report, provide a compilation of information regarding Aboriginal women, as well as an evaluation of federal and provincial programs to address their inequalities?

Some of the responses of the Canadian delegation were uninformative and defensive. But Florence Levers, as head of the Canadian delegation, was direct and open. She indicated in her remarks that no gender analysis of the *1995 Budget Implementation Act* (which changed the funding relations between the federal and provincial governments and removed conditions for receipt of federal transfer pay-

ments) was done and that this did “mark a regression in the condition of women.” Ms. Levers also indicated, at the conclusion of the review session, that Canada “would endeavour to meet the recommendations of the Committee.”

CONCLUDING OBSERVATIONS

We can expect the Concluding Observations on Canada within the next month. The CEDAW session ended Friday, January 31, 2003 but the concluding observations on the countries reviewed during this session must be translated before they are issued. There is no fixed date for their release.

The concluding observations will be couched in diplomatic language, and, inevitably, some issues that merit commentary will be overlooked. However, we can expect that the major concerns reflected in the CEDAW Committee’s questions will also be reflected in its concluding observations.

THE CEDAW COMMITTEE

The CEDAW Committee is composed of 23 members. They are nominated by their countries because of their expertise in the area of women’s rights. They are elected by the members of the United Nations Economic and Social Council. Following the election in August 2002 of nine new members, the Committee’s current members are: Ayse Feride Acar (Chairperson), Turkey; Sjamsiah Achmad, Indonesia; Meriem Belmihoub-Zerdani, Algeria; Huguette Bokpe Gnacadja, Benin; Maria Yolanda Ferrer Gomez (Vice-Chairperson), Cuba; Cornelis Flinterman, Netherlands; Naela Gabr, Egypt; Françoise Gaspard, France; Aida Gonzalez Martinez, Mexico; Christine Kapalata (Rapporteur), United Republic of Tanzania; Salma Khan, Bangladesh; Akua Kuenyehia, Ghana; Fatima Kwaku, Nigeria; Rosario Manalo, Philippines; Goran Melander, Sweden; Krisztina Morvai, Hungary; Pramila Patten, Mauritius; Victoria Popescu Sandru (Vice-Chairperson), Romania; Fumiko Saiga, Japan; Hanna Beate Schopp-Schilling, Germany; Heisoo Shin (Vice-Chairperson), Republic of Korea; Dubravka Simonovic, Croatia; and Maria Regina Tavares da Silva, Portugal.

CANADA’S DELEGATION

Canada sent 26 official representatives to the CEDAW review, in a delegation headed by Florence Levers, Coordinator of Status of Women Canada. The other members of the delegation were: Michelle Williams (Observer

Continued on page 4

Continued from page 3

on behalf of the Secretary of State, the Honourable Jean Augustine); Martha Wilson, Jackie Claxton, Sheila Regehr, Teresa Edwards, and Ann Schroeder from Status of Women Canada; Gilbert Laurin, Ambassador, Permanent Mission of Canada to the United Nations in New York; Beatrice Maille, Louise Holt, and Nell Stewart, Department of Foreign Affairs and International Trade; Mary Quinn, Human Resources Development Canada; Monica Mavrak, Health Canada; Elizabeth Eid and Gillian Blackell, Justice; Sandra Harder, Citizenship and Immigration; Calie McPhee, Canadian Heritage; Sandra Ginnish, Indian and Northern Affairs; Gail Erickson and Rachel Whissell, Agriculture and Agri-food Canada; Susan Christie Hatt, British Columbia; Brigitte Neumann, Nova Scotia; Robert MacNevin, Prince Edward Island; Pauline Gingras, Sophie Niquette, and Marie-Jose Desmarais, Quebec.

NGO REPORTS AND REPRESENTATIVES

Canadian women's organizations submitted four reports to the CEDAW Committee – 1) a national report prepared by FAFIA; 2) a B.C. report prepared by the B.C. CEDAW Group; 3) a Quebec report prepared by the Regroupement provincial des maisons d'hébergement et de transition pour femmes victimes de violence conjugale, focussed on funding for women's shelters in Quebec, and

4) a submission prepared by the Canadian Association of Elizabeth Fry Societies (CAEFS) on the treatment of federally sentenced women. (The information contained in these latter two reports is also included in the national FAFIA report.) Amnesty International also made a submission to the Committee.

FAFIA and the B.C. CEDAW Group were represented at the CEDAW review by Sharon McIvor, Margot Young, and Shelagh Day. Regroupement provinciale was represented by Louise Riendeau. Kim Pate represented CAEFS, and Cheryl Hotchkiss represented Amnesty International. Adeena Naizi and Asma Ibrahim represented the Afghan Women's Organization (Canada). Marilou McPhedran, co-author of the first CEDAW Impact Study (2000), accompanied Adeena Naizi and Asma Ibrahim in joining members of the Canadian NGO delegation.

FAFIA and the B.C. CEDAW Group acknowledge with gratitude the support of Status of Women Canada, the Poverty and Human Rights Project, the B.C. Law Foundation, the B.C. Government and Service Employees' Union, the Women's Committee of the B.C. Federation of Labour, and individual donors.

Shelagh Day is a human rights expert and advocate. She is the Special Advisor on Human Rights to NAWL.

From Custody and Access to Parental Responsibilities? What does Bill C-22 offer to Women and Children?

By Susan B. Boyd

In December 2002, the federal Minister of Justice introduced Bill C-22. If enacted, the Bill will significantly change the child custody and access provisions of the *Divorce Act*. Women's groups, including NAWL, have long called for changes to the *Divorce Act* to acknowledge the ways in which power imbalance, caregiving responsibility and woman abuse influence the dynamics of custody disputes. These calls have been answered to some extent in Bill C-22. However, some of the proposed changes are cause for concern and reflect the lobbying of fathers' rights advocates over recent years. Although a presumption in favour of shared parenting or joint custody has

not been introduced, certain aspects of the Bill may allow such a presumption to become entrenched in practice, threatening the well-being of some children and their mothers.

The proposed changes should be considered carefully and cautiously by those who are concerned with both the best interests of children and with women's equality interests. Despite the government's focus on a child-centred family justice strategy, evidence from other countries with similar legislation suggests that Bill C-22 may not result in less acrimonious disputes over children. Nor will it necessarily resolve many of the problems facing women and children in custody disputes, particularly those related to economic insecurity, power imbalance, and unequal responsibility for childcare. We need to consider

Continued on page 5

Continued from page 4

whether the Bill offers tools with which to redress women's inequality within family law or further "tilts" the family law system against women and children, as two Australian family law professors, John Dewar and Stephen Parker, have suggested. If family law does not contribute to women's equality, it will not ensure the best interests of children.

CHANGING THE LANGUAGE TO PARENTAL RESPONSIBILITIES

Bill C-22 introduces radical changes to the language and framework for determining disputes about children when parents divorce. Following the lead of England and Australia, Bill C-22 would eliminate the concepts of "custody" and "access" from the *Divorce Act*. Judges would no longer award custody or access to parents, but rather would make "Parenting Orders". These orders would regulate the "exercise of parental responsibilities". As in England and Australia, the aim of the change to the language of parental responsibilities is to create a new normative standard of co-operative parenting behaviour for separated couples with children. The idea is to focus parents' attention on children's needs and to reduce conflict.

No one could disagree with these goals, but the key question is whether the proposed changes will generate improved behaviour by those parents who seem unable to focus on children's needs. Studies of the effects of similar legislative changes in England and Australia indicate that litigation has actually *increased* over the meaning of parental responsibility and the extent of parental rights. This has occurred largely because the new wording generated an expectation of equal parental rights, regardless of where actual responsibility for children rested (still typically with mothers). Ironically, the language of custody and access continues to be used in practice by many parents, lawyers and judges in Australia.

Similar uncertainty and increased litigation might arise in Canada, given that Bill C-22 contains no guidelines for how parenting orders should be made. Nor does it caution parents or judges or other decision-makers not to make particular orders in certain circumstances, for instance, where high conflict between parents or spousal abuse is at issue. Increased litigation will create considerable hardship for mothers, especially given the cuts to legal aid and women's difficulty in accessing legal advice and the legal system. In contrast to England and

Australia, Bill C-22 does not even direct judges to make orders for "residence", "contact" and "specific issues". Rather, it leaves the content of parenting orders vague and grants judges considerable discretion. "Parental responsibilities", and therefore parenting orders, would include "parenting time, by way of a schedule unless a schedule is unnecessary in the circumstances" and *decision-making responsibilities*, including responsibility for making major decisions about health care, education, religious upbringing and responsibility for making decisions relating to a specific matter.

Bill C-22 does address two points that might cause confusion, given the new terminology. First, unless otherwise specified, any person with "parenting time" will be deemed to have rights of custody for the purposes of the *Hague Convention on the Civil Aspects of International Child Abduction*. The Bill thus indicates that both parents will be presumed to have "joint custody", making it potentially harder to limit international kidnappings by "access" parents, and easier for "access parents" to invoke the *Convention* against the parent with "custody".

Second, Bill C-22 indicates that if no order states to the contrary, any person with parenting time will have exclusive responsibility for making day-to-day decisions affecting the child during that parenting time. This section is intended to address problems that have arisen from lack of clarity under the Australian legislation. However, advocates for abused women have suggested that abusive men may be empowered to make inappropriate decisions in relation to children during their parenting time. Clearly a mother can request an order modifying this rule, but the starting presumption will be for day-to-day decision-making power during parenting time.

In general, Bill C-22 leaves the allocation of parental responsibilities – such as parenting time and decision-making – up to parents and, where they cannot agree, to those who assist them in making decisions such as judges or mediators. This flexibility may be beneficial in circumstances where parents are able to relatively easily arrive at a constructive framework for post-divorce parenting. But, it may pose considerable challenges for those cases where agreement is difficult and where power imbalance exists. It may also raise difficulties in the application of the federal *Child Support Guidelines*, since they are structured around the concepts of custody and access.

Continued on page 6

Continued from page 5

DEFINING FACTORS TO GUIDE DETERMINATION OF “BEST INTERESTS”

Women’s groups have for years recommended that changes to the *Divorce Act* include cautionary provisions, for instance, that in cases of woman abuse, the access rights and decision-making rights of the abusive parent be limited. Bill C-22 addresses these concerns to some extent through its list of 12 “needs and circumstances of the child” that *shall* be considered by judges when determining what is in the best interests of the child (including a child’s cultural, linguistic, religious and spiritual upbringing and heritage).

One factor that must be considered is “any family violence”. Laudably, the Bill includes the impact of family violence on (i) the safety of the child and other family members, (ii) the child’s general well-being, (iii) the ability of the person who engaged in the family violence to care for and meet the needs of the child and (iv) the appropriateness of making an order that would require the spouses to cooperate on issues affecting the child. This provision demonstrates some appreciation of the dynamics of abuse, albeit in strictly gender neutral terms. Importantly, “acts of self-protection or protection of another person” are excluded from the definition of family violence, and family violence need only be established on the civil burden of proof. The Bill also eliminates the current ban on consideration of past conduct, which has been an impediment to considering the impact of spousal abuse on children.

Of concern, however, is the definition of “family violence”, which focuses on causing or attempting to cause *physical* harm. The definition does not specifically include psychological or economic abuse, although it does refer to causing a child or other family member to “reasonably fear for his or her safety or that of another person”, which might include some types of psychological abuse.

Under the Australian and English parental responsibility schemes, the ability of the legal system to take abusive conduct into account has been compromised. John Dewar has said that the new language of parental responsibility requires abuse victims to negotiate with their abusers every step of the way, because the starting point is that contact is the child’s right. Studies show that in both England and Australia, judges have in practice developed a presumption that contact or access is in the child’s best

interests. As a result, other concerns about a child’s well-being have been rendered less significant and contact has taken on an increasingly rigid and dogmatic form. In Australia, for instance, there is now effectively a presumption operating in favour of contact when interim orders are made, even though the legislation does not mandate such an approach. Therefore, it has become more difficult to obtain interim orders suspending contact in the face of domestic violence of the parent who seeks contact.

On the good news side, unlike the Australian legislation, Bill C-22 does not explicitly make this principle of contact its starting point. The question is whether this principle will nevertheless be “read into” the statute, given the removal of the language of custody and access in favour of “parenting orders”, which effectively levels the field between custody and access parents. Many Canadian judges already take as their starting point that contact is in a child’s best interests, including sometimes where abusive behaviour is an issue.

Much has been made of the fact that Bill C-22 would remove the “maximum contact” section (sometimes referred to as the “friendly parent rule”) currently in the *Divorce Act*, something that women’s groups have recommended. However a version of a maximum contact principle reappears within Bill C-22, specifically as a factor that judges must consider in determining the best interests: “the benefit to the child of developing and maintaining meaningful relationships with both spouses, and each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse”. This emphasis on contact is not qualified by wording such as “except where this relationship is not in the best interests of the child”. When read with another factor under the best interests section – “the ability of each person ... to communicate and cooperate on issues affecting the child” – it seems difficulties might arise for mothers who have struggled within a high conflict or abusive relationship and resist communication or cooperation over children for good reason. Mothers may not obtain the sort of order needed to protect themselves or the children from interference or exercise of power and control by the other parent. Together these provisions may suggest that contact is always beneficial for children, whereas studies indicate to the contrary.

Another recommendation that women’s groups have made is that women’s historic, disproportionate responsi-

Continued on page 7

Continued from page 6

bility for child care be taken into account in custody legislation. Bill C-22 has done so to a limited extent in that it directs judges to consider “the history of care for the child” when determining what order will be in the best interests of the child. A child’s “need for stability” is also mentioned as a factor, in conjunction with a child’s physical, emotional and psychological needs. However, the Bill does not direct attention to the continuing gendered nature of care work.

It is certainly laudable that family violence and other factors, such as “the history of care for the child”, have been listed as key to determination of the best interests of a child. However, the Bill does not contain any direction to judges as to how to weigh the various factors. Nor does the Bill contain any additions to the *Divorce Act*, e.g. a preamble, that point out either the prevalence of violence against women and children or women’s ongoing, socially reinforced role as caregivers in families. This Bill continues the growing trend in the field of custody reform debates to render this area of law gender-blind.

CONCLUSION

In the weeks since Bill C-22 was introduced, several women have pointed out that saying a parent has “parental responsibilities” does not mean they will take responsibility for their children’s needs and well-being. Bill C-22 regards a parent as having “parenting responsibility” regardless of the amount of parenting time and, in some cases, even if they only have decision-making responsibility. Parents may well expect – and be awarded – considerable decision-making power, regardless of their actual parenting responsibility. How this type of legal regime will play out for mothers who take primary responsibility for children’s well-being, often in difficult circumstances, is unclear. The default position is likely to be that joint parental responsibility is presumed, requiring mothers to argue against this starting point. This situation resembles joint legal custody, with the attendant problems identified over the years.

It will ultimately be up to judges and others who assist parents in resolving disputes to create frameworks that appropriately acknowledge factors such as the history of care for a child and any history of family violence. In the end, any system will only be as good as the people who work within it: greater attention to educating

these people – lawyers, judges, mediators, counselors – about the sexual division of labour and the dynamics of abuse is absolutely essential. A preamble in the *Divorce Act* that acknowledges these societal issues – as well as the overarching importance of ensuring the safety and well-being of children and their caregivers – would assist in prompting this education.

WHAT CAN YOU DO IF YOU WANT TO LEARN MORE ABOUT THESE ISSUES?

- Bailey-Harris, R., Barron, J. and Pearce, J., “From utility to rights? The presumption of contact in practice”, (1999) 13 *International Journal of Law, Policy and the Family* 111-131.
- Dewar, John, “Family law and its discontents”, (2000) 14 *International Journal of Law, Policy and the Family* 59-85.
- Dewar, John and Parker, Stephen, “The Impact of the new Part VII Family Law Act 1975”, (1999) 13 *Australian Journal of Family Law* 96-116.
- Helen Rhoades, “The Rise and Rise of Shared Parenting Laws: A Critical Reflection” (2002) 19(1) *Canadian Journal of Family Law* 75-113.
- Check the website of the Ontario Women’s Network at www.owjn.org
- The Bill will be considered by a parliamentary committee in the near future. If you have concerns, contact the Minister of Justice and your Member of Parliament.
- Contact NAWL at info@nawl.ca.

Susan B. Boyd is Professor of Law and Chair in Feminist Legal Studies at the University of British Columbia. Her book *Child Custody, Law, and Women’s Work* was published by Oxford University Press Canada in 2002.

Majority Embraces Stereotype of Poor

By Shelagh Day

There are good news elements in the Supreme Court of Canada's decision in *Gosselin v. Québec (Attorney General)* <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/gosselin.en.html>. Justice Arbour has written an important and fresh decision on section 7, finding that it creates a positive obligation on governments to deal with economic deprivation. In addition, the majority on the discrimination issue is a slim one, five judges of nine, and the four minority judges have written strong dissents, rejecting not just the result of the majority, but the reasoning.

The decision is nonetheless a disturbing one – disturbing because the majority of the Supreme Court of Canada has embraced stereotypes of poor people, and perpetuated an image of the poor as socially irresponsible.

At issue in *Gosselin* was a 1984 Quebec welfare scheme that cut the welfare rate for thousands of 18 to 30 year old welfare recipients from the regular rate of \$470 per month to \$170. At the same time, the Quebec government established training and education programs, and 18 to 30 year old recipients who participated in these programs could increase their welfare rates, though not necessarily to the regular rate. Louise Gosselin claimed that this scheme was discriminatory on the basis of age, and violated the s. 7 right to security of the person.

In previous cases, the Court has decided, that in order to qualify as discrimination, differential treatment must be harmful to human dignity. In this case, the majority, led by Chief Justice Beverly MacLachlin, held that the differential treatment of under 30s, far from harming dignity, was a well-intentioned attempt to provide an incentive to undertake training and education programs. The majority accepted the Quebec government's statement of its good intentions as determinative, and rejected as insufficient the evidence that the training and education programs were unable to provide a meaningful and ongoing opportunity for all those aged 18 to 30 to participate and to secure the regular rate of welfare.

By contrast, the four minority judges found that the programs had eligibility rules that disqualified some, there were only 30,000 spaces for 85,000 young people, and there were times when people in the group had to wait to get into pro-

grams. They accepted evidence that, over the life of the scheme, only 11 per cent of the young recipients got access to the regular rate. Others had to try to live on the admittedly below subsistence rate of \$170 per month.

The minority also accepted evidence that the harm caused by the below subsistence rate were harsh. The young welfare recipients experienced serious psychological and physical stress. They were often homeless and malnourished. Some attempted suicide. The minority had no difficulty finding ample evidence that Charter rights were violated.

However, what is centrally disturbing is that five judges sanction a government decision to use extreme poverty as an 'incentive' for education and training. Their reasoning buys directly into the stereotype that under 30s on welfare are lazy, unwilling to work, and must be coerced into productive lives. To avoid giving life to the stereotype, the government of Quebec would have had to show some faith in the willingness of young people to do whatever they could to gain skills and find employment. To consign them to extreme poverty unless they participated in (flawed) training and employability programs was to endorse the stereotype with a vengeance.

In allowing extreme poverty to be used as an incentive, the majority has sanctioned a particularly high-risk form of "tough love." It permits the government to knowingly endanger the physical and psychological health of young people, and to jeopardize their safety, just because of who they are.

While it must be acknowledged that the Court is only just beginning to explore the human rights implications of poverty, and so is bound to make some mistakes, there is a world of difference between honest mistakes and unexamined, or undeclared, prejudices. In upholding the Quebec scheme, the majority upheld, indeed embraced, the prejudices inherent in that scheme.

Thanks are due to David Wiseman, Assistant Professor in the Faculty of Law at the University of Windsor, for his collaboration on this article.

Shelagh Day is a human rights expert and advocate. She is the Special Advisor on Human Rights to NAWL.

SURREY BOOK BANNING CASE

**“Tolerance is always age-appropriate,” Supreme Court rules.
Egale Canada delighted at victory for diverse families in the classroom**

Egale Canada reacted with delight at the release of the Supreme Court decision in the Surrey Book Banning case. By a 7-2 majority, Canada’s highest court unequivocally rejected the Surrey School Board’s attempt to ban from the classroom three books depicting same-sex families: *Belinda’s Bouquet*, *Asha’s Mums*, and *One Dad, Two Dads, Brown Dads, Blue Dads*. The Court referred the question of whether the books should be approved for use in the classroom back to the Board to be determined according to “the broad principles of tolerance and non-sectarianism underlying the School Act.”

“The court today has affirmed the right of children in same-sex parented families to see themselves and their families reflected in the school curriculum,” said John Fisher, Egale Canada’s Executive Director. “This is an unequivocal victory not only for lesbian, gay, bisexual and transgender Canadians and their families, but for all Canadians, in that it affirms the right of children to a bias-free curriculum that teaches the values of equality, tolerance and respect for diversity that we as a society hold so dear. The Supreme Court sent the clear message to educators across the nation that families come in many diverse forms, and that all are equally entitled to be treated with respect. Ultimately, the Court has recognized that children benefit from learning respect for those who are different. In the words of the Chief Justice, “tolerance is always age-appropriate.”

Supreme Court Chief Justice McLachlin, writing for the majority, addressed the core argument of the Surrey School Board. “It is suggested that, while the message of the books may be unobjectionable, the books will lead children to ask questions of their parents that may be inappropriate for the K-1 level and difficult for parents to answer. Yet on the record before us, it is hard to see how the materials will raise questions which would not in any event be raised by the acknowledged existence of same-sex parented families in the K-1 parent population, or in the broader world in which these children live. The only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate” (para 69).

For further info, contact:

*John Fisher, Executive Director,
Egale: 613-230-1043 (w); cell: 613-291-5187*

Cynthia Petersen, Co-Counsel for Egale: 416-979-6440

Ken Smith, Co-Counsel for Egale: 604-683-4176

*James Chamberlain, Appellant: 604-596-1537 (school);
604-873-2303 (home)*

Nancy Knickerbocker, BC Teachers’ Federation: 604-871-1881

WHAT’S NEXT: Recommendations from the Kim Rogers Inquest

By Kim Brooks

December 2002 was a most significant month for women’s equality seeking organizations. The Supreme Court of Canada released three important decisions (*Gosselin*, *Walsh*, and *Chamberlain*), the federal government tabled Bill C-22 in the House of Commons, proposing major changes to the Divorce Act in the area of custody and access, and NAWL submitted an extensive brief to the federal Pay Equity Task Force, that was endorsed by NAC, DAWN, CRIAW and the Fédération nationale des femmes canadiennes-françaises. In the middle of

this, on December 19, 2002, the jury of the Kimberly Rogers inquest released its recommendations.

The Fall 2002 edition of *Jurifemme* set out Kimberly’s story and briefly discussed NAWL’s involvement in a coalition that intervened in the inquest into her death. This piece provides the next installment of the story.

At the Kimberly Rogers inquest, the jury listened to testimony about Kimberly’s death for two months. They heard evidence about how hot her apartment was, how little she had to live on, and how difficult the conditions of her six-month sentence

Continued on page 10

Continued from page 9

of house arrest were. Those conditions were all exacerbated by her pregnancy. The jury found that, while serving a conditional sentence for welfare fraud, Kimberly took her own life with an overdose of antidepressants. A suicidologist at the inquiry testified that the conditions of Kimberly's sentence were crucial factors leading to her suicide.

The jury released 14 recommendations including recommendations that the government of Ontario eliminate the zero tolerance lifetime ban on social assistance for welfare fraud and that the adequacy of social assistance rates be assessed. The Honourable Brenda Elliot, Ontario's Minister of Community, Family and Children's Services, was quick to defend the government's policies, and immediately indicated that the government would not consider the recommendations made by the jury.

As a coalition of interveners, we were pleased by some of the recommendations and disappointed that the recommendations did not explore some of the more systemic explanations for Kimberly's death. Some of the recommendations, like the two described above, are positive, although they have not resulted in any change in policy by the government of Ontario. The ban on social assistance after a finding of welfare fraud creates disastrous consequences for people living in poverty, and social assistance rates are embarrassingly low.

Although those recommendations are of critical importance, we had hoped that the jury would have been able to hear evidence of the systemic nature of the discrimination faced by Kimberly Rogers. This evidence was, however, precluded by a ruling issued by Dr. Eden, the coroner. That ruling denied us the opportunity to call evidence that demonstrated that the failure to consider the unique needs and

circumstances of people charged with welfare fraud disadvantages marginalized members of society, and constitutes a form of systemic discrimination against women and people on social assistance.

As Kim Pate, executive director of the Canadian Association of Elizabeth Fry Societies, summarized, "[t]he coalition believes that the jury issued the limited recommendations that it did, in large part because they were prevented from hearing key evidence and then they were subsequently discouraged from addressing the very real issues that Kimberly's death challenges us all to deal with."

Minister Elliot's quick response, which asserted that the Ontario government was not going to heed even the more limited recommendations of the jury, was shocking. However, despite the Ontario government's initial response, equality-seeking groups and individuals have been active in lobbying for the adoption of the jury's recommendations. The Committee to Remember Kimberly Rogers has a "Post Rogers Inquest Action Kit" that can be accessed at the DAWN Ontario website http://dawn.thot.net/Kimberly_Rogers

Hopefully, with enough political pressure, the government will be forced to change its approach. There are also other avenues currently being pursued by equality advocates to change some of the most severe government policies. In particular, there is a constitutional challenge to the lifetime ban on receiving social assistance, noted in the previous piece.

For more information, please contact Kim Brooks at brooksk@qsilver.queensu.ca.

Kim Brooks teaches torts and tax at Queen's University, Faculty of Law and is a co-coordinator of NAWL's National Steering Committee.

Walsh v. Bona

By Lara J. Morris

Releasing its decision in *Walsh v. Bona* on December 19, 2002, the majority of the Supreme Court of Canada ruled that it is not discriminatory for the *Nova Scotia Matrimonial Property Act (MPA)* to exclude common law couples from the definition of "spouse."

Individuals will continue to face the increased burden of proving equitable claims in order to achieve a division of

assets on the dissolution of their common law relationships. Katherine Briand, counsel for the claimant, fears the negative impact of this decision. "I think there's going to be a lot more poverty for women and children," she says.

Susan Walsh and Wayne Bona lived together in a common-law relationship for approximately 10 years. The couple had two sons together who continued to reside with their mother when the parties separated in 1995.

Continued on page 11

Continued from page 10

After the relationship ended, Walsh sought child and spousal support. She also brought a *Charter* challenge to the definition of “spouse” in the MPA, which is limited to married couples. The MPA provides for the division of matrimonial assets on the dissolution of marriage, or on the death of one spouse. It also establishes interim remedies such as exclusive possession of the family home. Walsh claimed that the similarities between common law couples and married couples are such that the exclusion of common law couples from the definition of spouse violates her human dignity.

Walsh lost at trial, but was successful in her appeal to the Nova Scotia Court of Appeal. The Nova Scotia provincial government successfully appealed to the Supreme Court of Canada.

There were two constitutional questions before the Court. First, whether the definition of spouse violated the s.15(1) equality provisions in the *Charter of Rights and Freedoms* by discriminating against heterosexual unmarried cohabitants. If the answer to that question was yes, then the Court had to decide whether the discrimination could be saved under s.1 as demonstrably justified in a free and democratic society.

Writing for himself and six other justices, Bastarache J. found that the dignity of unmarried persons living in common law relationships was not affected by their exclusion from the operation of the MPA.

Bastarache J. applied the three-part test set out by the SCC in *Law v. Canada (Minister of Employment and Immigration)* ([1999] 1 S.C.R. 497) to find there was no discrimination under s.15(1). The Crown conceded that the first two parts of the test were met by acknowledging that the MPA results in differential treatment of common law couples based on their marital status, which the Court has found is an analogous ground of discrimination under s.15(1).

This left the Court to decide whether the differential treatment was discriminatory. Bastarache J. framed the question as “whether a reasonable heterosexual unmarried cohabiting person, taking into account all the relevant contextual factors, would find the MPA’s failure to include him or her in its ambit has the effect of demeaning his or her dignity.” The majority boiled the answer to this question down to one main element: choice. That is, the choice whether or not to marry.

The majority found that because common law couples are free to choose whether to marry (and have the MPA apply to their relationship) their exclusion from the operation of the MPA is not discriminatory. In fact, the requirement to choose to marry before the MPA applies was seen by the majority as enhancing a person’s autonomy and self-determination. This upsets Briand, “One thing that really irritates me about it is that the freedom of choice thing is even admitted by the majority decision to be illusory in a great deal of the cases. Nevertheless that’s what they hung their hat on.”

The majority’s approach in *Walsh v. Bona* is the opposite to that taken in earlier decisions such as *Miron v. Trudel* ([1995] 2 S.C.R. 418) where the Court recognized discrimination on the basis of marital status when a common law partner was denied spousal insurance benefits after a car accident. The insurance policy was based on a standard automobile policy prescribed by the *Ontario Insurance Act*.

Bastarache J. distinguished *Miron v. Trudel* because that case involved the relationship of the common law couple (as a unit) to a third party (the insurer), rather than to one another. The only way for the couple to access automobile insurance benefits was to marry.

Walsh v. Bona represents a significant departure from the Court’s recent expanding view of families, as seen in decisions such as *Miron v. Trudel* and *M. v. H.* ([1999] 2 S.C.R. 3). The question is why?

The answer appears to be related in part to the subject matter of the MPA: property rights. Bastarache J. stated that the MPA significantly alters “the status quo of an individual’s proprietary rights and obligations.” Briand notes the special treatment accorded property rights: “I think property has always had a much more protected status in the common law than any other aspect of people’s lives.” Briand says that this decision might be a carry over of that view.

The fact that other remedies are available to common law couples also played a role in the majority’s decision. Bastarache J. noted the availability of maintenance or support through provincial legislation, as well as equitable remedies such as the constructive trust. “In my view, where the multiplicity of benefits and protections are tailored to the particular needs and circumstances of the individuals, the essential human dignity of unmarried persons is not violated,” he wrote.

Continued on page 12

Continued from page 11

Briand was surprised by the majority's decision. She had hoped that gains made in earlier decisions such as *Peter v. Beblow* ([1993] 1 S.C.R. 980) and *Pettkus v. Becker* ([1980] 2 S.C.R. 834) would have continued. "Those constructive trust cases were breakthrough cases because it was the first time that the Supreme Court ever recognized that you could, as a common law partner, have a claim on property." The question left outstanding from those decisions was whether or not it would amount to an equal share of property. Briand viewed Walsh's claim for half to be the next logical step for the Court.

Unfortunately the Court's decision now leaves an inconsistent approach to common law couples. Briand thinks that this will lead to more litigation, "Now that the Supreme Court of Canada has said governments have no right or place to force spousal obligations of this sort on people who have chosen, consciously chosen, not to be spouses, how soon is it going to be before somebody challenges the *Income Tax Act*? That would be my first thing to do." Briand feels that provincial spousal maintenance or support obligations are at risk too.

Gonthier J. wrote concurring reasons focussing on the role of marriage in society and its contractual nature, including the choice of whether to marry. Gonthier J. found a distinction between provincial spousal support legislation, which applies to common law couples, and property division based on their different objectives. Spousal support has social objectives and is meant to address need and dependency, whereas the division of assets pursuant to the *MPA* is the result of parties choosing to enter a specific regime. Gonthier J. also found distinctions between married and common law couples such that they are not appropriate comparator groups under s. 15(1) of the *Charter*.

Briand says that anybody who wants to know what the case was about will have to read Justice L'Heureux-Dubé's dissent. "She's the only one who really addressed any of the other issues." L'Heureux-Dubé J. reviewed numerous legal, social and historical factors to conclude that the exclusion of common law couples from the application of the *MPA* is discriminatory and not saved by s.1 of the *Charter*.

Notwithstanding the recent gains for common law couples, L'Heureux-Dubé J. found that they are still a disadvantaged group. She reviewed the inadequate remedies available to Walsh and others like her at the end of com-

mon law relationships, noting the lack of access to the most expedient property remedies under the *MPA*. Her conclusion was that this lack of access violates Walsh's human dignity.

L'Heureux-Dubé J. followed the Court's approach in *M. v. H.*, finding the under-inclusiveness of the *MPA* problematic even though its purpose is ameliorative. She also found that the nature of interests at stake (meeting one's financial needs after the breakdown of a relationship of intimacy and economic interdependence) are the same as those enumerated by the Court in *M. v. H.*, which dealt with access to spousal support for same-sex couples. She concluded that common law couples and married couples are similar, with similar needs on the dissolution of their relationships.

Most interesting is Justice L'Heureux-Dubé's review of the development of family law legislation in Canada and its remedial nature. In *Murdoch v. Murdoch* ([1975] 1 S.C.R. 423) the Court applied the common law doctrine of separate property and prohibited a wife of 25 years from obtaining any interest in her husband's property. Responding to public pressure, provinces across the country introduced legislation ensuring the equal division of property in recognition of the contribution made by each person to the relationship and family.

L'Heureux-Dubé J. questioned the Crown's argument that choice is the main factor affecting the structure of people's relationships. Noting that "most people are not lawyers", she rejected the notion that when people are deciding whether to marry they are fully aware of the legal consequences. Further, she accepted that the choice to marry or not is often illusory. Briand calls the majority ruling a reactionary decision, "It opens the door for a lot of people to make a lot of claims that are going to adversely affect women and children – they can say what they want about things being gender neutral, but the fact of the matter is that's who it's going to effect." Briand calls on women's groups across the country to pressure provincial governments to take action where the majority of the Court failed to do so.

Lara J. Morris is a lawyer and freelance writer living in Halifax.

Coalition of Stolen Sisters

By *Bonnie Diamond*

NAWL is a member of the National Coalition for our Stolen Sisters, led by the Native Women's Association of Canada. To date, other member organizations include the Canadian Research Institute on the Advancement of Women (CRIAOW), Womenspace, the Canadian Federation of University Women, the Women's Legal Education Action Fund (LEAF), and the Mother of Red Nations. Other groups are encouraged to join the Coalition and to support our work.

The Coalition's goal is to conduct public education and to raise public awareness about women in Canada who disappear and are often listed as "missing." Their friends, families and communities know that they are not "missing" – which implies that they may not want to be found – but that they are "stolen" and murdered. Aboriginal women are highly over-represented in this stolen group of women;

colonial attitudes, racism and sexism contribute to the vulnerability of Aboriginal women. The Coalition wants to expose these facts, and to publicly highlight the realities of these women as daughters, mothers, aunts, sisters, lovers, neighbours, friends and citizens.

A solidarity rally was held on Parliament Hill in Ottawa on February 14, 2003, Valentines' Day, to draw national attention both to the tragic dimensions of stolen women and to the urgency of the situation. The day was chosen in solidarity with the B.C. Coalition, who held a rally at the Picton Farm where the murdered bodies of many stolen women have been discovered.

If you are interested in joining the Coalition of Stolen Sisters, please contact Terri Brown of NWAC at (613) 722-3033.

Bonnie Diamond is the Executive Director of NAWL.



WINNERS OF THE NAWL'S TRUST 16TH ESSAY COMPETITION

On the theme of: Women and Globalization

We are pleased to announce the winners of the 16th Annual Essay Competition organized by NAWL's Charitable Trust for Research and Education:

First prize (\$750):

*THE IMPACT OF GLOBALIZATION ON SOCIAL PROGRAMS IN CANADA:
Gender, Social Reproduction and Benefits for Maternity and Parental Leave*
by Gillian Calder

Sponsored by Stikeman Elliott, Toronto, ON

Second prize (\$350):

*LES FEMMES, LE DROIT ET LES NOUVELLES TECHNOLOGIES DE LA
REPRODUCTION : l'urgence d'une législation efficace*
by Valérie Lessard

Sponsored by Scott & Oleskiw, Toronto, ON

Third prize (\$125):

MIGRATIONS FÉMININES DU TRAVAIL ET MONDIALISATION
by Rosanne Luciano

Sponsored by Susan Gahrns Law Office, Toronto, ON