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# Canada's Failure To Act: Women's Inequality Deepens

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Submission of the  
Canadian Feminist Alliance for International Action  
to the  
United Nations Committee on the Elimination of Discrimination Against Women  
on the Occasion of  
the Committee's Review of Canada's 5th Report

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## **I. The Feminist Alliance For International Action (FAFIA)**

1. This Report on Canada's compliance with the *Convention on the Elimination of All Forms of Discrimination Against Women* has been prepared by the Feminist Alliance for International Action.

2. FAFIA is an alliance of forty Canadian women's equality-seeking organizations founded in February 1999. The Fourth World Conference on Women held in Beijing in 1995 led to new developments and perspectives within the Canadian women's movement. Experience in Beijing made many women organizations eager to improve their capacity to intervene effectively and strategically at the international level in order to promote the advancement of women in Canada. Canadian women are increasingly aware of the impact on their lives of the globalization and liberalization of trade, and of internationally developed policies and agreements. Now, for Canadian women, it is clearly necessary to work at both the domestic level and the international level to improve our conditions. FAFIA's goals are:

- to develop the capacity of women's organizations to work at the international level;
- to make links between international instruments and agreements and domestic policy-making; and
- to hold Canadian governments accountable to the commitments to women that they have made under international human rights treaties and agreements, including the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Platform For Action*.

## **II. Introduction to FAFIA's Report: Commitments and Practice, Canada 2001**

### **Interpretive Principles Under the Convention**

3. FAFIA submits that Articles 1, 2, 3 and 4 must be read together in order to understand fully the obligations which States Parties who are signatories to the Women's Convention have undertaken. Article 1 emphasizes that discrimination can be either direct or indirect (purpose or effect-based). Article 2 imposes an obligation on State Parties to take into account the possible impact of their laws on women. Laws framed in sex-neutral terms may nevertheless discriminate against women if their operation negatively affects women.

4. A finding of discrimination in relation to a facially-neutral law is not dependent upon the finding that only women are affected by the law. Nor is it necessary that all women be equally affected by the law. It is sufficient to show that the law negatively affects women, despite the fact that some men are affected and not all women are affected. Violations of women's equality must be assessed in the context of States Parties' social, political, historical, and legal actions.

5. Articles 2, 3, and 4 require that States Parties must not accept, cause or exacerbate the inequality of women, must regulate and control the conduct of private actors in order to prevent and eliminate discrimination, and must take "all appropriate measures" to ensure the full development and advancement of women, including measures that will accelerate that advancement. In other words, the obligation "to eliminate discrimination against women" includes a range of obligations, from the obligation to prevent discrimination to the obligation to redress the many forms of disadvantage caused by long-standing and entrenched subordination.

6. It is clear that the Convention is based on a substantive rather than a formal idea of equality. That is, the Convention takes for granted that equality for women means equality in real conditions, equality in material outcomes, not merely facially neutral treatment in law.

### **Commitments**

7. The substantive idea of equality that is inherent in the *Convention* fits well with the development of Canadian human rights and constitutional jurisprudence of the last twenty years. Canadian courts and governments have rejected the idea of formal equality as insufficient to solve the problems of discrimination against women and other disadvantaged groups in Canada. The Supreme Court of Canada has recognized that certain groups in society, including women, suffer historical, legal, social and political disadvantage and that the purpose of legal equality guarantees is to address and overcome that disadvantage.

*R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1333.

8. In addition to being a signatory to CEDAW, Canada is also a signatory to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of Racial Discrimination*, the *Convention Against Torture*, and the *Convention on the Rights of the Child*. Canada has been an active participant in the development of rights instruments at the United Nations, and it has committed itself to complying with them.

### **Practice**

9. However, Canada's many commitments to women's human rights and women's equality in both international and domestic legal instruments, and its understanding that equality requires more than formal equality on the face of laws, stand in sharp contrast to current practice. Women in Canada, as this Alternative Report documents, are still far from enjoying equality in their society. Current policies and practices, rather than advancing women, are, in fact, ignoring women's entrenched disadvantage and pushing women backwards.

### **Poverty and Violence**

10. In *A Report Card on Women and Poverty*, Monica Townson, a leading feminist economist, notes that women remain the poorest of the poor in Canada and that little has changed with respect to women's poverty in thirty years. She says this:

Over the past two decades, the percentage of women living in poverty has been climbing steadily. As Canada enters the 21<sup>st</sup> century, almost 19% of adult women are poor – the highest rate of women's poverty in two decades....

When the Royal Commission on the Status of Women issued its report, some 30 years ago, 47% of women under 65 who were on their own were considered low-income. In the three decades since then, the poverty rate of this group has scarcely changed...

The Royal Commission reported that almost 52% of families with children headed by sole-support mothers were poor. Today, that percentage, which went as high as 62% in 1984, now stands at 56%. In fact, the rate has been consistently above 50% since the early 1980s.

As for older women, there has been little change there either. In 1967, the Royal Commission said about half of all women aged 65 or older who were on their own were in the low-income group. Thirty years later, the percentage remains the same: 49% of unattached women, aged 65 or older have low incomes....

Addressing women's poverty no longer seems to be a high priority among policy-makers – if indeed it ever was. But while Canadians are justifiably concerned about the increasing numbers of children growing up in poverty, we have tended to overlook the fact that children are poor because their parents are poor. And it is the poverty of women that is behind the poverty of so many of our children.

Monica Townson, *A Report Card on Women and Poverty* (Ottawa: Canadian Centre for Policy Alternatives, 2000) at 1.

11. Instead of designing policies that will address and reverse the entrenched patterns of poverty and economic inequality for women, federal and provincial governments have adopted a neo-liberal economic agenda that deepens women social and economic disadvantage. In this period, governments have cut social programs and services, cut women's "good" jobs, diminished social assistance benefits, and tightened eligibility rules for social assistance and unemployment insurance. For women, who are the majority of the poor, the majority of social assistance recipients, and major users of social programs and social services, the impact of this diminished commitment to social development and economic fairness has been harsh.

12. Nor is there improvement in the labour force picture. Work remains heavily sex-segregated, and equal pay for work of equal value is not required in all jurisdictions. An increasing number of women are working in non-standard jobs – part-time, temporary, casual jobs, and self-employment – without union protection and without benefits, including sickness and pension benefits.

13. Violence against women continues unabated. Like poverty, it is a marker of women's inequality in the society. These conditions are outlined in detail in this Report.

### **Aboriginal Women**

14. Canada has been first on the United Nations list for the highest quality of life in the world for the past six years. In contrast, according to a federal Department of Indian Affairs study, Aboriginal peoples living "on-reserve" in or near their traditional lands ranked approximately 63<sup>rd</sup> on the UNDP scale.

*Measuring the Well-Being of First Nation Peoples* (Ottawa, Canada: Department of Indian Affairs, 1998)

15. But severe poverty, low school completion, poor health, high rates of suicide, and lower life expectancy are also characteristics of all Aboriginal people – Indian, Status and non-Status, Metis and Inuit - whether they are living on or off reserves.



16. As this Report shows, Aboriginal women are the poorest of the poor and are even poorer than Aboriginal men. They are also extremely vulnerable to violence, and do not enjoy the same protections in law that non-Aboriginal women do. Aboriginal women living on reserves do not have the same matrimonial property rights as other women, nor can they seek protection and redress under human rights legislation when they are discriminated against by Band Councils and Band officials. Aboriginal women have been disenfranchised from self-government discussions, and Canada has failed to follow the recommendations, made in the report called *Gathering Strength*, to address this systemic issue by funding Aboriginal women's groups to strengthen their involvement in self-government negotiations

17. Many women who prior to 1985 lost their Indian status because they "married out" have still not been restored to full status in their Bands. Nor can they, even though their Indian status has been restored, pass on their Indian status to their grandchildren on the same basis as men who "married out" prior to 1985.

18. While self-government agreements are being negotiated, women are not equal participants with Aboriginal men and governments. Consequently, their interests are not being adequately protected, and their recourse to legal protections of equality, once self-government is established, is not clearly guaranteed.

19. The situation of Aboriginal women in Canada is extreme. Governments at all levels continue a pattern of neglect and overt discrimination.

### **Women of Colour, Immigrant Women, and Refugee Women**

20. Access to opportunities and income equality are limited for many Canadian women because of their race. Human rights laws have not, so far, been effective at addressing and eliminating systemic racism, which results in under-representation of women of colour in political office, academia, senior management positions, and media. Canada often seems unwilling to admit that there is a problem of racism, and has made no aggressive efforts to counteract it. Government employment equity programs, where they exist, have been weak and mainly ineffective. By default, responsibility for tackling racism and its effects is left to non-governmental organizations, which have too little power and too few resources for the job.

21. In addition to Canada's failure to effectively address the multiple manifestations and multiple impacts of racism on Canadian women, the treatment of particularly vulnerable groups of women who seek to enter Canada to live and work, many of whom are women of colour from developing countries, exemplifies entrenched sexist and racist attitudes on the part of Canadian authorities. The impact of immigration and refugee law and policy on these women is outlined in this Report.

### **Women with Disabilities**

22. Women with disabilities have been hit particularly hard by cuts to social programs, including services on which they are directly reliant, such as home care. For women with disabilities, access to employment is tenuous, and consequently social programs, such as social assistance, are a vital support. Canada has not enacted strong legislation that requires buildings and services to be accessible, and so women with disabilities must file human rights complaints, which often take years to resolve, in order to deal with the forms of discrimination which they encounter daily, such as inaccessible washrooms, and

building entrances, and communication and transportation systems that were designed for hearing, sighted, and physically mobile persons only. Women with disabilities are poorer than their male counterparts, and every barrier is higher for them.

### **Gender-based Analysis**

23. The federal government made a commitment to undertake gender-based analysis in its 1995 Report entitled *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*. This Plan was announced as “the cornerstone for the implementation, in Canada, of the *Beijing Platform for Action*. In 1996 Status of Women Canada also produced a *Guide to Gender-based Policy Analysis*, “to challenge assumptions that everyone is affected the same way by policies and legislation. In fact, change affects women differently, because their social, political, physiological and economic circumstances are different from those of men.”

Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995)

Status of Women Canada, News Release, *New Guide to Achieve Equality To Be Launched During International Women’s Week*, March 4, 1996.

24. The Federal Plan for Gender Equality states that the federal government is committed to ensuring that all future legislation and policies include, where appropriate, an analysis of the potential for different impacts on women and men. The federal government also undertook to perform a gender-based analysis of all economic and socio-economic legislation and policy development, as a means of addressing gender inequalities.

Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995) at 17 and 21.

25. These commitments have not been implemented. There is no evidence that gender-based analysis is being performed regularly and competently by all government departments. There is no requirement that gender-based analysis be performed inside every department, and no accountability or quality control system to ensure that it is done regularly and competently. The Plan itself makes it clear that “individual departments and agencies will assume responsibility for undertaking gender-based analysis as appropriate.” The role of Status of Women Canada is to help to train officials in the departments to undertake this analysis. In other words, the federal government’s plan for gender-based analysis is based on a “trickle-up” theory. The assumption appears to be that if, incrementally, officials are trained to undertake gender-based analysis, then, incrementally, gender-based analysis will be done.

Status of Women Canada, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality* (Ottawa: Status of Women Canada, 1995) at 18.

Canada has also failed to implement meaningfully implement 1999 *Guide to Gender Equality Analysis Policy* of Indian and Northern Affairs Canada.

26. Gender-based analysis was supposed to be done when amendments to the unemployment insurance scheme were being considered. The changes that resulted, as this Report documents, have penalized women rather than assisted them, and many women are challenging the negative impact of the new legislation on the grounds that it violates their *Charter* right to equality.

27. Further, at virtually the same time that this commitment to gender-based analysis was made, the federal government introduced the most drastic change to social programs of the last forty years through the 1995 budget. This profound change to Canadian social policy, which has had a predictably harsh impact on Canadian women, was introduced and rationalized as a matter of economic policy, unrelated to the rights of women.

### **Resources**

28. FAFIA submits that the Committee's assessment of Canada's compliance with its treaty obligations should take into account Canada's ample resources. Canada is one of the wealthiest countries in the world. Resources are needed to address and reverse women's entrenched disadvantage. Canada has these resources.

29. There is no legitimate excuse in a country with Canada's wealth for the high rates of poverty among women, for homeless women and children, for high use of food banks by women and children, for the lack of a national child care program, and for high tuition fees in post-secondary institutions, which stand as a barrier to education for poor young women.

### **Mechanisms for Vindicating Women's Human Rights**

#### **Human Rights Legislation**

30. Canada has human rights legislation in every jurisdiction that prohibits discrimination based on sex, race, disability, marital status, sexual orientation, and age, among other grounds with respect to employment, housing, public services, contracts, union membership and membership in professional associations. These laws apply to public and private actors. Individual women, or groups of women, can file complaints when they believe that they have been discriminated against, and, in most jurisdictions, Human Rights Commissions have the responsibility to investigate complaints, settle them, and where warranted, refer complaints to specialized tribunals for hearing.

31. Unfortunately, this important system has fallen into disrepute in a number of Canadian jurisdictions, because of the significant delays involved in getting cases resolved or referred to hearing (2 – 10 years). Also, because the Human Rights Commissions have the authority to act as gatekeepers, most complaints are disposed of by the Commissions without hearing. Complainants do not control their own complaints, and are not entitled to take their claims directly to court, because under Canadian common law there is no tort of discrimination. All complaints of discrimination must be dealt with under anti-discrimination statutes.

Shelagh Day and Gwen Brodsky, "Screening and Carriage: Reconsidering the Commission's Functions", Commissioned Research for the Canadian *Human Rights Act* Review Panel, (Ottawa: Department of Justice, 2000).

Joanna Birenbaum and Bruce Porter, "Screening Rights: The Denial of the Right to Adjudication under the Canadian *Human Rights Act* and How to Remedy It",

Commissioned Research for the Canadian *Human Rights Act* Review Panel,  
(Ottawa: Department of Justice, 2000).

32. Other UN treaty bodies have noted the problems with Canada's machinery for dealing with human rights violations. The Committee on Economic, Social and Cultural Rights noted in 1998 that it was:

[C]oncerned about the inadequate legal protection in Canada of women's rights which are guaranteed under the Covenant, such as the absence of laws requiring employers to pay equal remuneration for work of equal value in some provinces and territories, restricted access to civil legal aid, inadequate protection from gender discrimination afforded by human rights laws and the inadequate enforcement of those laws.

33. The Committee also urged federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status. Moreover, enforcement mechanisms provided in human rights legislation need to be reinforced to ensure that all human rights claims which are not settled through mediation be promptly determined before a competent human rights tribunal, with the provision of legal aid to vulnerable groups.

Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 04/12/98. E/C/12/1Add.31, paragraphs 16 and 51.

34. The Human Rights Committee made a similar observation in 1999. It said:

The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination

Concluding observations of the Human Rights Committee: Canada. 07/04/99.  
CCPR/C/79/Add.105, paragraph 9.

35. In 1999, the federal government appointed an expert Panel, chaired by a former Justice of the Supreme Court of Canada, Gerald LaForest, to examine the *Canadian Human Rights Act* and make recommendations for change. In a Report entitled *Promoting Equality: A New Vision* the Canadian *Human Rights Act* Review Panel recommended a complete reshaping of the human rights system that would remove the gatekeeper role from the Human Rights Commission, and give all complainants an entitlement to have their complaint heard by a tribunal.

Canadian *Human Rights Act* Review Panel, *Promoting Equality: A New Vision*,  
(Ottawa: Department of Justice, 2000) at 46 – 75.

36. Despite the clear and urgent recommendations made in June 2000 for systemic change to the human rights system, the federal government has not responded to this Report. It has neither commented nor acted.

## **The Charter**

37. The other domestic law available to women to vindicate their human rights is the *Charter of Rights and Freedoms*, with its constitutional equality rights guarantee, which came into force in 1985. The *Charter* does not apply to private actors, but does apply to governments at all levels, as well as to agencies that have been delegated by governments to discharge a public duty.

38. In responding to women's equality claims under the *Charter*, federal and provincial governments consistently argue before the courts in favour of a more restrictive and purely formal approach to the equality rights under the *Charter*. For example the government of British Columbia has recently said in relation to its appeal of a Court of Appeal case which found that....: "This expansion of constitutional principles constitutes a serious and unprecedented intrusion into government's policy and spending priorities."

British Columbia Information Bulletin, "Government Appeals Autism Decision",  
2002AG0090-001049

39. The federal government has established one of the most innovative social justice initiatives in the world in order to ensure that Canada's constitutional equality rights guarantee is accessible to the most economically and socially disadvantaged groups in Canadian society, including women. The Court Challenges Program stands as a unique recognition that rights are not meaningful unless people can exercise them. By providing funding to support test cases of national significance, the Program ensures that the most vulnerable individuals and groups actually benefit from the constitutional protection of their equality rights.

40. However, the Program's mandate is limited. As a term of its funding from the federal government, the Court Challenges Program is restricted to funding equality test cases which challenge *federal* laws, policies and practices.

41. Because of the constitutional division of powers between the federal and provincial governments, the restriction to challenges in federal jurisdiction alone means that certain areas of law fall outside of the scope of the Program. The Program can fund challenges regarding criminal law, citizenship and immigration, divorce, interprovincial transport, telecommunications, taxation, and Aboriginal peoples. But, in general, it cannot fund challenges regarding health care, education, income assistance, social services, family law, legal aid, and provincial labour law, which affects the majority of workers in Canada. These are vital areas of law to women because they have direct and tangible effects on their conditions and opportunities.

42. Although a Standing Parliamentary Committee and the UN Committee on Economic, Social and Cultural Rights, as well as many human rights experts and non-governmental organizations working in the human rights field, have recommended that the mandate of this important Program be expanded so that it can fund challenges to provincial laws, programs, and policies, this has not been done. The effect is that women's access to the exercise of their equality rights is severely curtailed.

Paying Too Dearly, Report of the Standing Committee on Human Rights and the Status of Disabled Persons, Parliament of Canada, (Ottawa, House of Commons, 1992) at 11 –13, and 20.

Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 04/12/98. E/C/12/1Add.31, paragraph 59.

### **Compliance with Treaty Obligations**

43. Further, Canada suffers from having no national machinery for monitoring or ensuring compliance with its treaty obligations. Although all levels of government are bound by the obligations in the treaties that Canada has signed, the federal government's position is that it has no authority to require other levels of government to comply. There is some co-ordination among the federal, provincial, and territorial governments for the purposes of agreeing on ratification and signing of new treaties, and for the purposes of preparing reports to UN treaty bodies. However, there is no co-ordination with respect to implementation of treaty obligations, monitoring of compliance, or response to the treaty bodies' Concluding Observations.

44. A recent example of this problem can be seen in the federal government's response to the ruling of the Human Rights Committee in the case of Waldman (ICCPR/c/67/D/694/1996, Human Rights Committee, Sixty-seventh session, October 18 to November 5, 1999). The federal government "brushed off" the ruling contending that it was not responsible for matters within provincial jurisdiction. The Human Rights Committee found that Ontario's system of providing public funding to Catholic schools but not to other religion-based schools violated Article 26 of the International Covenant on Civil and Political Rights.

45. This "brush-off" has led prominent human rights experts to call for a change in Canada's treaty-making processes, and for a serious revision to the "Canadian approach" to its international undertakings.

Ken Norman, "Taking Human Rights Lightly: The Canadian Approach" (2001) 12:2 National Journal of Constitutional Law, at 292.

46. Not surprisingly, UN treaty bodies have expressed concern about Canada's approach to its international treaty obligations. In 1998, the Committee on Economic, Social and Cultural Rights noted that:

The Committee heard ample evidence from the State Party suggesting that Canada's complex federal system presents obstacles to implementing the Covenant in areas of provincial jurisdiction. The Committee regrets that, unless a right under the Covenant is implicitly or explicitly protected by the Charter, through federal-provincial agreements, or incorporated directly into provincial law, there is no legal redress available to either an aggrieved individual or the Federal Government where provinces have failed to implement the Covenant.

47. The Committee was not convinced, however, that these jurisdictional problems could not be solved. Nor was it convinced that the federal government did not bear a leadership responsibility. The Committee urged the federal government to

...take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.

Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 04/12/98. E/C/12/1Add.31, paragraphs 12 and 52.

48. The Human Rights Committee also expressed concern in its 1999 Concluding Observations, as follows:

The Committee is concerned that gaps remain between the protection of rights under the Canadian charter and other federal and provincial laws and the protection required under the Covenant, and recommends measures to ensure full implementation of Covenant rights. In this regard the Committee recommends that consideration be given to the establishment of a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.

Concluding observations of the Human Rights Committee: Canada. 07/04/99. CCPR/C/79/Add.105, paragraph 10.

49. Canadian women, seeking the compliance of their governments with the terms of CEDAW, face enormous obstacles. The domestic machinery that has been established to give life to women's right to equality – human rights legislation and the *Charter* – is currently ineffective. Individual human rights complainants face long delay in obtaining remedies, and statutory human rights machinery has not shown itself to be capable of dealing with the major systemic problems that women face. *Charter* rights are inaccessible to disadvantaged women who wish to bring claims regarding the unequal impact of laws, policies and practices regarding work, education, health, social assistance, and policing. There is no machinery for overseeing and monitoring the implementation of treaty rights.

50. It is FAFIA's submission that Canada is violating commitments that it undertook when it signed the Convention on the Elimination of All Forms of Discrimination Against Women. In central ways, as this Report outlines, Canada is either stalled, or moving backwards with respect to the fulfillment of the rights of women.

### **III. Violations of Articles 2 and 3 of CEDAW**

#### **Women's Poverty**

51. The higher rate of poverty among women in Canada, and women's higher vulnerability to poverty is, in and of itself, evidence of Canada's contravention of Articles 2 and 3.

52. A disproportionate number of the poor in Canada are women. The latest statistics show that, using Statistics Canada's Low-income Cut-offs (LICOs) as a measurement of poverty, 17.9 percent of Canadians live in poverty. In 1997, 2.8 million women, 19% of the total female population were living in low income situations, compared to 16% of the male population. At all ages and stages of their lives but one, women's poverty rates are higher than men's. The differences between the sexes are most pronounced in the youngest and oldest groups.

53. Single mothers and other "unattached women" are most likely to be poor, with poverty rates for those groups reaching as high as 57.2 percent for single mothers under 65, and 43.4 percent for unattached women over 65 years of age. The poverty rates for single mothers are much worse when the figures are disaggregated by their ages and the ages of their children. Single mothers with children under seven had poverty rates as high as 82.5 percent in 1995, and single mothers under age 25 had a poverty rate of 83 percent. Poor single mothers are also living in the deepest poverty, with incomes \$8,851 below the poverty line in 1995. Poor mothers have poor children. In 1995, 20.5 percent of all Canadian children under 18 were poor, the highest rate in 16 years. Roughly, two-thirds of poor children live in families on welfare. The poverty rate among children with single mothers was 62.2 percent. There has been little improvement in the incidence of low income among female-headed lone parent families in recent years. The percentage of these women with low incomes in 1997 (56%) was only 1% lower than it was in 1980 when the figure was 57%.

54. Between 1970 to 1995, average family incomes in Canada increased by 32 percent. This increase, however, has affected only the richest 30 percent of families. The other 70 percent of families have experienced a decline in family income. Hardest hit are families headed by single mothers. Such families have almost doubled in the past 25 years and approximately 40 percent of the bottom 10 percent of income earners are single-mother families, as compared to 24 percent in 1970.

55. Aboriginal women, immigrant women, visible minority women, and women with disabilities are more likely to be poor than other women. In 1995, 37% percent of visible minority women, and 27% percent of immigrant women were living below the low-income cut-off. In 1996, 43% of Aboriginal women were living below the low-income cut-off.

56. The most recent statistics for women with disabilities show that as many as 26.7% are persistently poor compared with 16.2% of men with disabilities. Women with disabilities aged 35-54, have an average income of \$17,000 per year which is 55% that of men with disabilities in the same age range.

57. Without government transfer payments, such as income assistance, more than half a million families would have no income. More adult women than men rely on social assistance. 38% of adult recipients are women, while men are 32%. Also 42 per cent of single mothers received social assistance in 1994. Single mothers account for more than double the number of other family types (single father and couples with children) on welfare.

Statistics Canada, *The Daily*, March 3, 1999

Katherine Scott, *Women and the CHST: A Profile of Women Receiving Social Assistance in 1994*, (Ottawa: Status of Women Canada. 1998) at pp. 17 and 19.



National Council of Welfare, *Poverty Profile 1995*, (Ottawa: Supply and Services Canada, 1997) at 2, 34, 52, 75, 76, 84, 85,

Statistics Canada, *Women in Canada 2000, A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2000) at 137, 139, 205, 233, 259

National Council of Welfare, *Welfare Income 1995* (Ottawa: Supply and Services Canada, 1997) at 44.

National Council of Welfare, *The 1995 Budget and Block funding* (Ottawa: Supply and Services Canada, 1995) at 4-5.

Fawcett, G., *Living with a Disability in Canada: An Economic Portrait*, (Ottawa: Human Resources Development Canada, 1996) at 131.

Scott, C., *Women and the CHST: A Profile of Women Receiving Social Assistance in 1994* (Ottawa: Status of Women, 1998) at 16.

Morris, M., *Women and Poverty* (Ottawa: Canadian Research Institute for the Advancement of Women, 2000) at 3.

Government of Canada, National Council of Welfare, Arnold Brun, Vice-Chairperson, "Notes for a Presentation to the Standing Committee on Finance", 28 April 1998.

National Council of Welfare, *Profiles of Welfare: Myths and Realities*, (Ottawa: Spring, 1998) at 8\

58. As well as being poorer than men, and more reliant on social assistance and other government transfers, women are more vulnerable to becoming poor. Women's income from all sources is about 58 percent of men's income, and there is an equivalent gap in pension benefits, with women receiving only 58.8 percent of the Canada Pension Plan/Quebec Pension Plan pension benefits that men receive. As of 1994, 40 percent of women, compared to 27 percent of men, held non-standard jobs, that is, they were self-employed, had multiple jobs, or jobs that are temporary or part-time. Many of these jobs are minimum wage jobs. These jobs are unlikely to be unionized and unlikely to provide pensions or benefits. Also, at the time of marriage breakdown, women become poorer, while men's income increases. This means that many women are on one non-standard job, or one marriage breakdown, away from needing government income assistance.

Statistics Canada, *The Daily*, October 9, 1998

Statistics Canada, *The Daily*, August 25, 1998

*Women in Canada: A Statistical Report*, 3d. Ed. (Ottawa: Industry, 1995) at 153, 123, and 138.

Canadian Advisory Council on the Status of Women, *Work in Progress: Tracking Women's Equality in Canada* (Canada: Canadian Advisory Council on the Status of Women, 1994) at 44.

Monica Townson, "Non-Standard Work: The Implications for Pension Policy and Retirement Readiness" (unpublished paper prepared for Women's Bureau, Human Resources Development Canada, 1996) at 11.

59. Women's persistent poverty and economic inequality are caused by a number of interlocking factors: the social assignment to women of the unpaid role of caregiver and nurturer for children, men, and old people; the fact that in the paid labour force women perform the majority of the work in the "caring" occupations" and this "women's work" is lower paid than "men's work"; the lack of affordable, safe child care; the lack of adequate recognition and support for child care and parenting responsibilities that either constrains women's participation in the labour force or doubles the burden they carry; the fact that women are more likely than men to have non-standard jobs with no job security, union protection, or benefits; the entrenched devaluation of the labour of women of colour, Aboriginal women, and women with disabilities; and the economic penalties that women incur when they are unattached to men, or have children alone. In general, women as a group are economically unequal because they bear and raise children and have been assigned the role of caregiver. Secondary status and income, and - for millions of women - poverty, go with these roles.

King-MacBride, Judith L. *Work and Family: Employment Challenge of the '90s* (Ottawa: Conference Board of Canada, 1990).

Statistics Canada, *General Social Survey, Initial Data Release from the 1992 General Social Survey on Time Use* (March 1993), (Ottawa: Statistics Canada) Table 1.

Statistics Canada, *1990 General Social Survey, Cycle 7: Time Reports*, (Ottawa: Statistics Canada) at 12-13.

60. Women's poverty and economic inequality restrict women's enjoyment of their civil and political rights. They severely reduce their likelihood of voting, standing for public office, and influencing political decision-making. They also restrict women's access to the exercise of their legal rights, and increase their likelihood of being jailed. They hamper women's ability to leave violent domestic situations, and to protect themselves and their children from intimidation, abuse and physical harm. Poor women are also subject to different laws because welfare regulations and practices subject them to invasions of their privacy not experienced by others. Some laws and rules respecting public housing also rob them of due process rights available to others.

61. FAFIA submits that the equality rights of women can only be recognized when the gendered nature of poverty is acknowledged and addressed.

### **The Budget Implementation Act and the Canada Health and Social Transfer**

62. In 1995, through the Budget Implementation Act, structural adjustment came to Canada. The restructuring and cuts to social programs at both the federal and provincial levels have exacerbated the pre-existing economic and social disadvantage of women. This stands as central evidence of Canada's neglect of its obligations under Articles 2 and 3 of the Convention, as actions have been taken which deepen the economic inequality of Canadian women.

63. In 1995, the federal government repealed the Canada Assistance Plan *Act* and replaced it with the Canadian Health and Social Transfer by means of the Budget Implementation *Act* and the Federal-Provincial Fiscal Arrangements Act. These are the mechanisms through which the federal and provincial governments share the cost of central social programs, namely health, post-secondary education, social assistance (welfare) and related social services.

Budget Implementation *Act* 1995, S.C. 1995, c. 17

Federal-Provincial Fiscal Arrangements Act, R.S.C. 1985, c. F-8, as amended

64. There are four problems with the *Budget Implementation Act*. This legislation:

- eliminated key rights;
- ended 50-50 cost-sharing for social assistance and social services;
- rolled funds for health care, post-secondary education; social assistance and key social services into one undifferentiated block transfer; and
- cut the total amount of the transfer from the federal government to the provincial governments.

*Budget Implementation Act* 1995, S.C. 1995, c. 17

*Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8, as amended

### **Elimination of Key Rights**

65. Under the *Canada Assistance Plan* provinces were required to respect and protect certain rights as a condition of receiving federal funds. These rights included: 1) the right of any person in need to receive welfare; 2) the right to an amount of welfare sufficient to meet basic needs; 3) the right to appeal when social assistance is denied; and 4) the right not to have to work for welfare. Of the national guarantees imposed under *CAP*, only the prohibition against provincial residency requirements remains in force under the CHST.

66. These were essential rights that women relied on because of their vulnerability to poverty. They were Canada's most explicit guarantees in domestic law of economic and social rights, and were of particular importance to women, given women's high poverty rates. The National Council of Welfare, a citizen's advisory group to the federal Minister of Human Resources Development established by federal law, has called the Canada Health and Social Transfer (*CAP*'s replacement) "the worst social policy initiative undertaken by the federal government in more than a generation".

National Council of Welfare, *Another Look at Welfare Reform*, (Ottawa: National Council of Welfare, Autumn 1997).

## Elimination of 50-50 Cost Sharing

67. Under the *Canada Assistance Plan*, the federal government provided 50 percent of the real cost to provinces of providing welfare, legal aid for family and non-criminal matters, and designated social services. This cost-sharing provided an incentive for provinces to provide these services because for every 50 cents they spent, they could provide one dollar's worth of services. Now, 50-50 cost-sharing is gone and all of the services traditionally funded under *CAP* compete for provincial funding priority, along with health care and post-secondary education. The federal government transfers money in one block fund to the provinces for all of these social programs to be spent however each province chooses.

68. The welfare related services that were designated under *CAP* for cost-sharing included:

- homemaker services for the elderly;
- attendant services for people with disabilities;
- child care services;
- services to unemployed people to assist them to enter the workforce;
- child welfare services to assist children who are neglected or abused;
- shelters and other services for women fleeing male violence;
- counseling services;
- information and referral services;
- respite services to assist parents caring at home for children with severe disabilities;
- assistance in covering the costs of medically prescribed diets, wheelchairs, special eyeglasses, and prostheses for people unable to purchase these necessities on their own.

69. While the provinces may continue to provide some of these services, there is no certainty that they will do so. Now, actual provincial spending has no effect on the amount the federal government transfer to a province. The transfer amount remains the same whether a provincial government reduces, keeps at the same level, or increases relevant service provision. An important incentive for enhanced provincial service levels has been removed by the federal government.

Torjman, S., *The Let-Them-Eat-Cake Law* (Ottawa: Caledon Institute of Social Policy, 1995)

## Move to Block Funding

70. Instead of the previous cost-sharing scheme in use under *CAP*, the federal government now uses a block-funding formula. Federal monies are transferred to the provincial governments in block grants, with no stipulation as to what the money must be spent on. Thus, more stigmatized social programs, such as social assistance, compete for funding out of the same general pool of money with more popular programs such as health care and post-secondary education. In establishing such a funding formula, the federal government has abrogated its influence over provincial health, social service and post secondary spending.

## Reduction in Federal Transfer Levels

71. The *Budget Implementation Act* cut 6.389 billion dollars from the money transferred by the federal government to the provinces for health, post-secondary education and social assistance and social services. This is a reduction in payments by 35.1 percent between 1996 and 1999.

*Budget Implementation Act* 1995, S.C. 1995, c. 17

72. Since 1999, the federal government has increased the yearly amount put into the CHST. However, transfers have not returned to the 1993-1994 fiscal level.

73. In the 1999 budget, the federal government added \$3.5 billion to the CHST, with the money targeted for provincial health care. The money can be used by the provinces over the following three years, but only for health services. It did not therefore address cuts to other social services such as legal aid, women's shelters, transition houses, or social assistance. Nor did it fully address the health care funding crisis at the provincial level.

Impact of the *Budget Implementation Act* and Provincial Restructuring of Social Programs

74. The federal government of Canada bears direct responsibility for this new legislation and the new regime of federal funding it imposes. However, provincial governments are responsible for the ways in which they have chosen to restructure provincial programs, whether in response to the changes in federal cost-sharing or not. In general, provincial governments have chosen to cut or reduce funding to programs which benefit the most socially and economically vulnerable, a group, as we have already noted, that is disproportionately female in its composition. The federal government, through exercise of its spending power, and the provincial governments, through direct structuring of programs, both bear responsibility for reductions in service and program provision at the provincial level.

The *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), Part VI, ss. 91, 92

75. The particularly harsh impact on Canadian women of the restructuring and cutback of federal and provincial programs is starkly evident in relation to a number of specific circumstances.

### **Increase in Women's Unpaid Responsibilities**

76. Cuts to social services of the kind traditionally funded under *CAP* negatively affect women both because they are services that low-income women need, and because, when these services are cut, women become the "shock absorbers" in their families, relied upon to fill the gaps with unpaid care-giving. Cuts in services thus mean that women's unpaid responsibilities increase. As a result, these cuts affect women more than men, in more ways

Hollie Shaw, "Cuts Unfair to Women, Study Says: Friends, Family Expected to Fill Social-Service Gaps, Report Finds", *The Globe and Mail*, 4 December 1997.

### **Reduction in Women's "Good" Jobs**

77. The over 6 billion dollar cut in federal transfer payments has also resulted in cuts to jobs in the health and social service sectors. This hits women hardest because these are jobs that have traditionally been held by women and they tend to be women's "good" jobs, that is full-time jobs with security, union protection, pensions and benefits (primary sector jobs). For example, women currently outnumber men four to one in the health occupations. The effect of these job cuts is also to push more unpaid care-giving onto women. This increases women's workload, constrains their participation in paid work, and makes them more economically dependent.

Bakker, I., "Introduction: The Gendered Foundations of Restructuring in Canada" in Isabella Bakker, ed. *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at 13-14.

Pat Armstrong, "The Feminization of the Labour Force: Harmonizing Down in a Global Economy" in Isabella Bakker, ed. *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at 29.

Scott K., and Clarence Lochhead, "Executive Summary" *Are Women Catching Up in the Earnings Race?* (Ottawa, Canadian Council on Social Development, 1997).

Statistics Canada, *The Daily*, March 17, 1998

### **Increased Risk to Women's Safety**

Provincial governments have responded to the reduction in federal transfer payments by cutting social programs and services. Welfare rates have been reduced in some provinces - in Ontario, for example by 22% - putting poor women at even greater risk of being unable to house and feed themselves and their families. A 1996 survey of women's shelters by the Ontario Association of Interval and Transition Houses found that workers in 66 percent of the shelters reported that some women were returning to abusive relationships because they cannot receive sufficient social assistance to meet the basic needs of themselves and their children. Further, women in Ontario note that there has been a rise in the incidence of spousal murders from 68 in 2000 to 86 last year. The Ontario Association of Interval and Transition Housing, the largest shelter association in Canada, blames the rise directly on ongoing cuts to social services, which make women unable to afford to leave violent relationships, especially if children are involved.

Ontario Association of Interval and Transition Houses (OAITH), *Report to the Special Rapporteur on Violence Against Women*, (Toronto: OAITH, 1996) at 22

"Ontario rise in spousal murders sign of things to come in B.C.: activists", Sandra Thomas, Vancouver Courier Newspaper, October 16, 2002

"Warning to Women of B.C.!" Eileen Morrow, Ontario Association of Interval and Transition Houses (OAITH) <http://www.rapereliefshlter.bc.ca/issues/warningwomen.html> (last accessed December 20, 2002).

78. In addition, interval and transition houses for women in Ontario have lost provincial funding and been forced to cut jobs and services. The combined effects of these cuts to services with cuts to rates for welfare, which women rely on in order to have resources to leave abusive situations, means that more shelters are being used as a temporary escape rather than as a place to make a new beginning. Dramatic cuts in social assistance and services are jeopardizing women's safety. The latest Report from the Ontario Association of Interval and Transition Houses points to a rise of spousal homicides in Ontario in 2001 and blames the rise on ongoing cuts to social services: "Women can't afford to leave violent relationships, especially if children are involved." Anti-violence workers in British Columbia fear a similar trend in that province because of drastic cuts to income assistance by the British Columbia government.

Ontario Association of Interval and Transition Houses (OAITH), *Report to the Special Rapporteur on Violence Against Women*, (Toronto: OAITH, 1996) at 15 and 22-23.

"Ontario rise in spousal murders sign of things to come in B.C.: activists", Sandra Thomas, Vancouver Courier Newspaper, October 16, 2002

### **Impact on Women With Disabilities**

79. Cuts to services previously designated for cost-sharing, combined with cuts to social services jobs, and tightening of welfare eligibility rules are having a profoundly negative effect on women with disabilities, who have a higher rate of poverty than men with disabilities. Cuts in home care and home-making services are leaving women with their basic needs unmet. Women who depend on life support systems are being left alone for long periods of time, always with the risk of power failure. There is no help for child care, and very young children are performing services that were previously provided under government programs. Women with disabilities fear losing their position as parents as the roles reverse and children become the caregivers.

80. Also the lives of women with disabilities who are in institutions have become increasingly difficult. With cuts to staff there are incidents of abuse and neglect. Women wait long periods for care; this problem is worst for women who have communication difficulties.

81. As psychiatric services in hospitals disappear, the care for women with psychiatric disabilities has been transferred to the community. Now community support services are being cut. Women in psychiatric institutions are being released with nowhere to go. Many of these women end up living on the street.

82. Women with disabilities report that they now live in fear of being cut off from welfare and welfare disability benefits. It is more difficult to qualify and in some provinces, for example in British Columbia, assessments are now being conducted to determine continued eligibility.

83. Cuts to social services violate the right of women with disabilities to an adequate standard of living, and to access to appropriate and needed health care services.

Masuda, S., *The Impact of Block Funding on Women with Disabilities* (Ottawa: Status of Women Canada, 1998) at vii-viii.

## Cuts to Welfare

84. In a number of jurisdictions, welfare rates have been cut and eligibility rules narrowed. For example, in 1995 the Ontario government announced spending cuts in the amount of \$1.9 billion dollars, including a 21.6 per cent cut to social assistance benefits. The total spending reduction for social assistance benefits for 1996-1997 was 938 million. While social assistance benefits only constituted 12 per cent of provincial spending in Ontario, it was the target of 25 per cent of the cuts announced. The almost one quarter cut to social assistance means that a single woman with one child receives \$7.76 a day per person. The impact of such a severe cut on poor women, particularly poor single mothers, is as follows:

- Increased use of food banks. 54% of food bank users report their main source of income is social assistance;
- Increased use of shelters. In 1999 4,713 families with children sought emergency shelter; 40% of these had been evicted;
- Increased likelihood that abused women will return to violent relationships. With little help or assistance, abused women are left to fend for themselves and their children.

Social Planning Council of Metropolitan Toronto, *Welfare Cuts in Ontario: Punishing the Poor*, 1995: 14(1) Social Infopac at 1.

Ontario Association of Food Banks, *Hunger in Ontario in the Year 2000: Common, but Senseless* (Toronto: OAFB, 2000)

City of Toronto, *Housing in the City* (Toronto: Community and Neighbourhood Services)

Novac, S. at al., *Women on the rough edge: A decade of change for long-term Homeless Women* (Canadian Mortgage and Housing Corporation, 1999) at 22-23.

Ontario Association of Interval and Transition Houses (OAITH), *Locked In, Left Out Impacts of the Budget Cuts on Abused Women and Their Children* (Toronto: OAITH, 1996)

Lenon, S., "Living on the Edge: Women, Poverty and Homelessness in Canada" 2000 (20)(3) *Canadian Woman Studies* 123

Metro Toronto Committee Against Wife Assault & Metro Woman Abuse Council, "Before and After A Woman's Story with Two Endings" in L. Ricciutelli et al., *Confronting the Cuts: A Sourcebook for Women in Ontario* (Toronto: Inanna, 1998)

In B.C. in 2001 - 2002 the B.C. government has made similar cuts. (See B.C. CEDAW Group Report).



85. In 1995, a group of social assistance recipients brought a constitutional challenge before the courts based on the above 21.6% cut. The recipients argued that the Ontario government's cut to welfare benefits violated the federal-provincial welfare cost-sharing agreement under the *Canada Assistance Plan Act* as well as both section 7 and section 15 of the *Canadian Charter of Rights and Freedoms*. The Court described the effect of the cuts as follows:

The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependents will suffer in some way from the reduction in assistance. Many will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless.

*Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4<sup>th</sup>) 20 (Ont. Div. Ct.)

86. Despite making this finding of fact regarding the effect of the cuts, the Ontario Court of Justice dismissed the application and found for the Ontario government on all issues. The Court commented that there was no minimum standard of social assistance below which the rates could not fall. Leave to appeal to the Ontario Court of Appeal was denied. This holding is inconsistent with Canada's obligations under international treaties. Anything short of providing social assistance in an amount that allows women access to adequate food, shelter and clothing violates section 3 of this *Convention*, as well as Article 11 of the *International Covenant on Economic, Social and Cultural Rights* that requires Canada to ensure an "adequate standard of living" for its citizens.

*Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4<sup>th</sup>) 20 (Ont. Div. Ct.)

International Covenant on Economic, Social and Cultural Rights, *UN Doc., A/6316* (1966)

87. In December 2002, the Supreme Court of Canada released their judgment in *Gosselin v. Quebec (Attorney General)*, a *Charter* challenge initially launched in 1989. In 1985, the Quebec government adopted a Regulation that reduced the social assistance of those recipients who were employable, under 30 and not engaged in work or training programs from \$466/month to \$170/month. At this time, the Statistics Canada Low-Income Cut-Off rate, commonly used as the poverty line, for urban-based individuals was \$737/month. This reduced rate was insufficient to allow recipients to meet basic needs for food, housing and clothing. At trial the applicants presented evidence about the effect of this reduction on young people, including:

- extreme stress, anxiety, low self-esteem and psychological damage;
- having to resort to degrading and criminalized survival strategies such as theft and begging;
- hunger, inadequate nutrition and malnourishment;
- homelessness;
- suicide and suicide attempts.

88. For the young women in this group there were additional gender-related harms, including:

- engagement in prostitution in order to survive;
- exchanging sexual availability for food and shelter;
- increased exposure to sexual harassment, sexual assault and rape;
- becoming pregnant and giving birth in order to become eligible for benefits at the regular rate.

National Association of Women and the Law, Factum submitted to the Supreme Court of Canada on *Gosselin v. Quebec (Attorney General)* at 1-4.

89. Three levels of courts have now rejected the claim that this failure to provide an adequate standard of living is contrary to the rights of equality and security of the person protected in the Canadian *Charter of Rights and Freedoms*. The trial judge commented that poverty is the result of internal causes such as lack of education and psychological vulnerability. The Quebec Court of Appeal upheld this trial decision. The Supreme Court split five-to-four against finding an infringement of the *Charter*. The majority decision, written by the Chief Justice, ruled that the below-subsistence welfare rate did not violate the equality or security of person of young welfare recipients. The majority took the position that young people *per se* are not a group that is especially vulnerable or undervalued, and therefore this specifically targeted cut was not damaging to the human dignity of young welfare recipient. The majority refused to qualify its assessment of the young people at issue by taking into account their economic status as poor, unemployed, and dependent upon social assistance. The majority also failed to discuss the gender specific effect on young women such inadequate rates had. The majority stated “workfare” programmes such as the one implemented by the Quebec government had a positive, remedial purpose and therefore were constitutionally legitimate, regardless of the actual hardships experienced by the recipients. This majority decision can be contrasted to the dissenting judgments which had no trouble finding that the existence of the training and employability programs did not legitimate below subsistence welfare rate and that the claimant’s equality rights were unjustifiably infringed. The programs had varying eligibility rules, and not all of the young people qualified for them. There were only 30,000 spaces for the 85,000 young people who needed access to them and the scheme was based on a stereotyped notion that young people would have to be coerced into participating in the programs through deprivation. Eight-eight per cent of the 18 to 30 group did not get access to a subsistence welfare rate through these workfare programs. Further, the dissenting judgments recognized that the harms experienced by the young people who were trying to live on \$170 per month were extreme. They could not meet their basic needs for food, clothing and shelter. They experienced serious psychological and physical stress. They were often homeless and malnourished. Some attempted suicide. The reduced rate also detracted from their chances of actually finding a job or participating in employability programs. The majority also rejected the claim that the indignities and hardship the claimants experienced from attempting to survive on \$170 month resulted in a breach of the right to security of person.

*Gosselin v. Quebec (Procureur general)*, [1992] R.J.Q. 1647 (Q.L.) (C.S.)

*Gosselin v. Quebec (Procureur general)*, [1999] R.J.Q. 1033 (Q.L.) (C.A.)

*Gosselin v. Quebec (Attorney General)*, 2002 SCR 84 (SCC)

90. The Supreme Court of Canada ruling in this case puts in doubt the ability of the Canadian women to rely on Canada's judicially enforced constitutional rights when government policies and regulations exacerbate their social and economic disadvantage.

91. Another case, that of Kimberly Rogers, reveals the extreme problems experienced by women who need to rely on welfare, and who attempt to find ways to better their conditions.

92. In the fall of 2002, the Government of Ontario conducted an inquest into the death of Kimberly Rogers, a poor, pregnant 40 year old woman who died during a heat wave, while imprisoned in her own home, as a result of a conviction for welfare fraud. Ms. Rogers was found guilty of fraud and sentenced to house arrest because she had accepted student loans while also receiving welfare, contrary to welfare regulations. Ms. Rogers was an "A" student, and was described as an excellent advocate with a bright future.

93. Because Kim Rogers received student loans while she was receiving social assistance, the government of Ontario chose to prosecute her for receiving \$13,300 in welfare payments. She entered a guilty plea, and received a 6 month conditional sentence and a restitution order to repay the provincial government the full \$13,300 in welfare that she had received. Knowing she would be unable to seek any employment, not only because she was pregnant, but, most significantly, because one of the conditions of her sentence was that she could not leave her house -- Ontario then also terminated her welfare payments.

94. Although a legal challenge resulted in the reinstatement of her welfare "benefits", the Ontario government continues to enforce its policy to terminate benefits and permanently disentitle from receiving welfare anyone convicted of welfare fraud. Other provinces, including British Columbia, are now instituting the same policy.

95. However, not only did the government fail to help and then prosecute Ms. Rogers, the courts also contributed to Ms. Rogers extreme deprivation, and her death. As the transcript of her sentencing reveals, the judge, prosecutor and defence counsel all knew that not only would Ms. Rogers be cut off welfare, but they also determined that even if she did receive welfare, after she paid her rent and mandatory repayment, she would be left with \$18 per month with which to feed, clothe and otherwise support herself.

96. The judge and lawyers recognized this was impossible, and essentially concluded that she would have to obtain resources elsewhere. However, anyone placed under house and arrest who leaves home to obtain work or any other means of support may be subject to a further criminal charge of breaching the conditions (i.e. the confinement part of house arrest) of the conditional sentence. Such a breach can automatically result in a jail sentence.

97. Ms. Rogers paid the ultimate penalty for the policies of the Ontario government: death. She was confined to her house, isolated, alone, with inadequate support, and pregnant.

98. On December 19, 2002, the coroner's jury released its findings and recommendations. The jury found that Ms. Rogers died of an overdose of anti-depressants. It recommended that lifetime and temporary bans on eligibility for welfare should be eliminated. It also recommended that "the Ministry of

Community, Family, & Children's Services ...should assess the adequacy of all social assistance rates. Allowances for housing and basic needs should be based on actual costs within a particular community or region. In developing the allowance, data about the nutritional food basket prepared annually by local health units and the average rent data prepared by Canada Mortgage and Housing Corporation should be considered.”

Verdict of Coroner’s Jury in the Death of Kimberly Ann Rogers, [http://.www.povnet.org](http://www.povnet.org)

### **Poor-Bashing and Stigmatization of Single Mothers on Welfare**

99.As programs that are of particular importance to poor people are cut, criticism of governments is deflected by “poor-bashing,” that is, by characterizing poor people as undeserving, unwilling to work, a drag on the society at large. Single mothers are a particular target for poor-bashing; they are characterized as socially and sexually irresponsible and as bad mothers. One example of this is Ontario’s revocation on May 1, 1998 of the pregnancy and neo-natal allowance previously available under the provincial income assistance program. The Premier of Ontario, Mike Harris, in announcing the legislative change, stated: “What we’re doing, we’re making sure that those dollars don’t go to beer...”. Prior to this date, an allowance of up to an additional \$37 per month for six months was provided in benefits to pregnant women and new mothers. The purpose of these extra monies was to enable new and expectant mothers to meet expanded nutritional needs and other expenses associated with neo-natal care.

Subsection 2(1) of Ontario Regulation 138/98; Proclamation Order in Council repealing the *General Welfare Assistance Act*, 4 April 1998, Ontario Gazette, vol. 131-14 at 498

Philp M. and Richard Mackie, “Beer Gibe Earns Harris a Blast”, *The Globe and Mail*, 17 April 1998 A1

Paragraph 12(5)5 of Ontario Regulation 366, pursuant to the *Family Benefits Act*, R.S.O. 1990 c. F.2, paragraph 13(4)6 of Ontario Regulation 537 pursuant to *General Welfare Assistance Act*, R.S.O. 1990 c. G.6

By repealing this allowance, the Ontario government is in deliberate default of its obligations under Article 3 and Article 12(2) of the *Convention*.

100.Further evidence of the ongoing stigmatization of poor mothers on welfare can be found in recent Ontario decisions that have found provincial welfare regulations to be discriminatory against sole support mothers receiving social assistance. The majority for the court noted that there is evidence of historical disadvantage for sole support parents on social assistance who often “face resentment and anger of others in society, who see recipients as freeloading and lazy.” The court went onto find “significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole support mothers.”

*Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2000), 188 D.L.R. (4<sup>th</sup>) 52 (Ont. Sup. Crt of Just.) at 86-87.

## “Spouse-in-the-House” Welfare Regulations

101. Spouse-in-the-house rules, in a variety of forms, appear in the income assistance regulations of many provinces.

See, for example, British Columbia *Employment And Assistance Act*, Section 1(1), <http://www.mhr.gov.bc.ca/PUBLICAT/VOL1/Part 3/3-2.htm>, accessed December 13, 2002

102. The Ontario version of spouse-in-the-house rules is particularly problematic and provides a good example of government refusal to deal with the sex discrimination inherent in these rules. Ontario’s social assistance regulations impose a legal presumption that if a recipient of, or applicant for, provincial social assistance benefits lives in the same dwelling as a person of the opposite sex, the recipient or applicant will be presumed to be the spouse of that other person. This presumption pertains even where the individuals do not consider themselves “spouses”, have no legal obligation to support each other, and are not financially interdependent. They are presumed spouses if the “social and familial aspects” of their relationship amount to “cohabitation” and if they have “a mutual agreement or arrangement regarding their financial affairs”. The regulations treat single parents on social assistance differently from all other individuals who may be deemed “spouses” under provincial law.

O. Reg. 134/98. s. 1(1)

103. Ninety per cent of single parents on social assistance in Ontario are female. Ninety-five per cent of single parents receiving family benefits in Ontario are female.

104. Roughly 50 per cent of women receiving social assistance have experienced domestic violence involving physical or sexual abuse. For these women, an independent source of income provides both the financial and psychological security necessary to rebuild their lives and their children’s lives, free from violence.

105. The high rate of poverty of Canadian single mothers and their children has been noted by other United Nations bodies.

United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada under Articles 16 and 17 of the Covenant*, Doc E/C.12/1/Add.31 (10 December 1998).

106. The consequences of being found to be in a spousal relationship by virtue of the Ontario Regulations are significant and severe for these single mothers. Single mothers are denied assistance under the family benefits once they have been deemed to be in a spousal relationship. Instead, they must apply for general welfare benefits. This disentitles them from a number of special “family” benefits. Additionally, the single mother will only be able to apply for general welfare benefits if her “spouse” consents and is himself eligible for benefits. The “couple’s” eligibility is based on the total household income, regardless of whether or not the single mother receives any actual economic support from the man. If the male “spouse” has an income that is too high to qualify for income assistance, the single mother is also ineligible for any benefits.

107. These provincial regulations have historical root in previous legislative and social stereotypes which regard single mothers as undeserving of social assistance. The regulations continue the history of structuring single mothers' access to social assistance in a manner that fails to consider individual need and circumstances. The Regulations perpetuate highly damaging stereotypes about women's economic dependence, including the myths that any involvement with a man necessarily implies economic dependence, and that single mothers are more likely to commit welfare fraud than other recipients. Moreover, the regulations result in forcing women into economic dependence on men who have no legal obligations of support to them. It leaves women vulnerable to economic coercion and control by men with whom they may wish to have no financial relationship. This latter result is particularly harmful to women who have already experienced abusive relationships.

Mosher, J., "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family and the Undeserving Other", in Neysmith, S., ed, *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Oxford University Press, 2000) at 30.

Leighton, M., "Handmaids' Tales: Family Benefits Assistance and the Single-Mother-led Family" (1987) 45 University of Toronto Faculty of Law Review 324.

108. The Ontario Regulations also stipulate that in order to claim benefits on her own, a single parent must have "no prospect of reconciliation" with any past "spouse". This requirement forces women to end relationships which are beneficial to them and their children, forecloses reconciliation efforts for relationships which may otherwise be saved, and affects women's ability to maintain healthy co-parenting relationships with the fathers of their children.

Mosher, J., "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family and the Undeserving Other", in Neysmith, S., editor, *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Oxford University Press, 2000) at 30

109. Because of these underlying social, economic, and historical conditions, the impact of the regulations is quantitatively and qualitatively different for women, as compared to men. The result is that disproportionately it is single mothers who are disentitled by virtue of the regulations and the effect of disentitlement is particularly damaging for women given the background conditions which shape Canadian women's lives.

110. The Ontario Regulations have been successfully challenged at three tribunal levels. Both the Ontario Social Assistance Review Board and the Ontario Court of Justice-General Division found that the Regulations were discriminatory under the Canadian Charter of Rights and Freedoms. Most recently, the Ontario Court of Appeal found these regulations to be contrary to the Canadian *Charter of Rights and Freedoms*. At all levels, the Ontario government has defended these regulations vigorously, despite continued and strong curial condemnation of the rules. The government has now asked for leave to appeal the Court of Appeal decision to the Supreme Court of Canada.

111. Women's efforts to deal with and to point out the sex discrimination inherent in spouse-in-the-house rules have been on-going for more than 20 years. This reflects a persistent and adamant refusal of successive Ontario governments to recognize women's autonomy and to remedy discriminatory stereotypes implicit in income assistance regulation. Despite consistent and repeated defeats in court, government continues to defend and attempt to retain the policy, forcing women, at their own expense, to continue their challenges. Since the equality provisions of the Canadian *Charter* came into force, government resistance has taken the form of constitutional arguments against interpretations of the equality rights which would recognize the sexism of these rules.

*Falkiner v. Director, Income Maintenance Branch, Ministry of Community and Social Services et. al.* (SARB Decision of the Constitutional Challenge, August 13, 1998)

*Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (1996), 140 D.L.R. 4<sup>th</sup> 115 (Ont. Gen. Div. Ct).

*Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2000), 189 D.L.R. (4th) 765 (Ont. C.A.)

## **National Child Benefit**

112. The federal government provides a Canada Child Tax Benefit and National Child Benefit Supplement as part of their National Child Benefit Initiative for low and modest income families. Maximum benefits go to those with net family incomes under \$22,397. As a family's income increases, benefit payments are reduced correspondingly. The benefit is administered by Revenue Canada (individuals must file a tax form to apply). The stated objective of this program is the amelioration of child poverty and the provision of incentives to move from welfare to work. However, there are several reasons to question the program's efficacy, particularly as it deals with single mothers and their children.

Revenue Canada, "Your Canada Child Tax Benefit", T4114(E) Rev. (10/98) 3264

113. First, the National Child Benefit will do nothing to reduce poverty among the nearly two-thirds of poor children in welfare families (an estimated 1 million poor children live in welfare families, compared with about one-half million children in low-income working families). This is the case because provincial governments are permitted to reduce their monthly payments to welfare families by the amount of the benefit received. This federal benefit can thus be clawed back from welfare families by provincial governments (all but three of the provinces do this.) In British Columbia, for example, the National Child Benefit Supplement is renamed and delivered as the B.C. Family Bonus and the B.C. Earned Income Benefit. Only working families are eligible to receive the B.C. Earned Income Benefit and, while all families (both the welfare and working poor) receive the B.C. Family Bonus, families receiving welfare have the amount of their monthly social assistance benefit reduced by the amount of their Family Bonus payment. In effect, then, these two provincial benefits (which incorporate the federal benefit) are of value only to the working poor. Provinces have committed themselves to reinvest the money "freed-up" in this manner in programs aimed at improving work incentives and supporting families in low income, (mostly) working families. Thus, only the working poor directly receive and

keep the federal benefit and the working poor will, as well, disproportionately benefit from the programs funded by the monies redirected away from families on income assistance. This new federal program, as administered by the provinces, is based on a work-test and disenfranchises parents and their children whose source of income is welfare.

The National Anti-Poverty Organization, "Poverty and The Canadian Welfare State: A Report Card", (Ottawa: National Anti-Poverty Organization) 27 January 1998

F. Stairs, "The National Child Benefit Clawback: An Update", (Oct.1998) 21 *Social Safety News* 10

J. Pulkingham, G. Ternowetsky & D. Hay, "A New Canada Child Tax Benefit: Eradicating Poverty or Victimizing the Poorest", (1997)4 *The Monitor*

114.The second problem with this benefit scheme is that, even in the case of working poor families, the impact of the National Child Benefit Initiative in reducing poverty is likely to be minimal. The amount of funding is relatively small and the real value of the benefit will erode over time as the benefit is not fully indexed against inflation. Moreover, the program grants benefit levels which, for many families, are less than the government has committed itself to in previous budgets.

The National Anti-Poverty Organization, "Poverty and The Canadian Welfare State: A Report Card", (Ottawa: National Anti-Poverty Organization) 27 January 1998

F. Stairs, "The National Child Benefit Clawback: An Update", (Oct.1998) 21 *Social Safety News* 10

J. Pulkingham, G. Ternowetsky & D. Hay, "A New Canada Child Tax Benefit: Eradicating Poverty or Victimizing the Poorest", (1997) 4 *The Monitor*

115.This benefit scheme, in its provincial administration, and due to the federal government's failure to set national standards with respect to provincial administration, discriminates against single mothers. Single mothers are, as already discussed, disproportionately represented among families on welfare and more likely to need income assistance to maintain their families. The impact of the provincial clawback of these federal benefits from welfare recipients is that single mothers are again stigmatized as undeserving and subject to financial disincentives as welfare recipients. The responsibilities of single mothers for child care go unrecognized or valued and they are denied desperately needed income supplements otherwise available to the working poor.

The National Anti-Poverty Organization, "Poverty and The Canadian Welfare State: A Report Card", (Ottawa: National Anti-Poverty Organization) 27 January 1998

F. Stairs, "The National Child Benefit Clawback: An Update", (Oct.1998) 21 *Social Safety News* 10



J. Pulkingham, G. Ternowetsky & D. Hay, "A New Canada Child Tax Benefit: Eradicating Poverty or Victimizing the Poorest", (1997) 4 *The Monitor*

116. The Committee on Economic, Social and Cultural Rights made the following observation in relation to its November 1998 review of Canada's report under *the International Covenant on Economic, Social and Cultural Rights*:

The Committee notes with concern that in all but two provinces (New Brunswick and Newfoundland), the National Child Benefit (NCB) introduced by the federal government which is meant to be given to all children of low-income families is in fact only given to children of working poor parents since the provinces are allowed by the federal government to deduct the full amount of the NCB from the amount of social assistance received by parents on welfare.

Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada. 04/12/98. E/C/12/1Add.31 at para 22.

### **Legal Aid Crisis for Women**

117. Legal aid for family and non-criminal matters, also a designated service for cost-sharing under the *Canada Assistance Plan*, has suffered during this period of restructuring because of federal and provincial cutbacks. If legal aid is the recognition of the right of the poor to equal access to justice; then legal aid for family and non-criminal matters is the recognition of the right of poor *women* to equal access to justice. As the Law Society of British Columbia's 1992 Gender Equality Report noted in relation to its study of family law:

The most serious problem facing the justice system in British Columbia is the lack of equal access for women, many of whom are single parents who have custody of their children. These women see two different justice systems: one for those with sufficient economic resources to hire competent legal counsel, and another for those who do not. Aboriginal women, lesbians, immigrant women, and women of colour also face racial, gender or homophobic barriers to achieving equal access to justice

Law Society of British Columbia Gender Bias Committee, Executive Summary and Recommendations, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee* (1992) at 2.

118. The unique socio-economic vulnerabilities of women determine that women's legal aid needs lie disproportionately in the area of civil and family law. For example, women's traditional role as unwaged caregivers along with their historical reality as the poorest of the poor has meant that women have a significant need for legal aid to assist with poverty-related legal problems, such as landlord and tenant issues, discrimination and harassment claims, social assistance appeals, disability benefits, unemployment insurance benefits, and pension benefits. Equally important, women have a

disproportionate need for legal aid in family law matters to deal with divorce, child and spousal support, custody and access applications.

Mossman, M.J., “Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change” (1993) *Sydney Law Review* 30 at 35.

Mossman, M.J., “Gender Equality, Family Law and Access to Justice” (1984) 8 *International Journal of Law and the Family* 357 .

Gavigan, S., “Poverty Law and Poor People: The Place of Gender and Class in Clinic Practice” (1995) 11 *Journal of Law and Social Policy* 165.

Hughes P., “Domestic Legal Aid: A Claim to Equality” (1995) Vol. 11 No. 2 *Review of Constitutional Studies* 203 .

National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Supply and Services Canada, Winter 1995) at 10-11.

119. However, legal aid continues to be substantially reserved for criminal law matters and directed away from those areas of the justice system - civil and family law - used disproportionately by women. Although coverage varies across the provinces, it is fair to say that in most provinces there is no automatic entitlement to civil and family legal aid. While the federal government provides, through the Ministry of Justice, specific and targeted funding for provincial provision of criminal legal aid, which is primarily used by men, it does not do so for civil legal aid. The federal contribution to provincial spending on civil legal aid is, rather, part of the CHST undifferentiated block transfer out of which funding for a broad range of social programs and services must come. Simply put, federal and provincial governments continue to provide a stable and discrete allocation of money for criminal legal aid matters while failing to do so for civil legal aid.

Addario, L., NAWL Report (June 1997), “Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice at 25, 46.

The Women’s Access to Legal Services Coalition, “Working Draft to the Legal Services Society of B.C.: The Impact of Cuts to Legal Aid on Women in British Columbia” 18 February 1998

Jackman, M., “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform”, (1995) 8 *Canadian Journal of Women and the Law* 372, at 376.

120. The Canadian Bar Association, Canada’s national professional association of lawyers, has expressed concern about the failure of legal aid delivery to provide adequately for the needs of women. A recent resolution passed by the Association states the following:

- WHEREAS cuts to civil legal aid target already disadvantaged groups, especially:
- women and children in family law matters;

- and people with low incomes who require assistance with poverty law disputes, which has a disproportionate impact on racialized communities and Aboriginal people;...

121.BE IT RESOLVED THAT the Canadian Bar Association build coalitions with other organizations committed to social justice to maximize the effectiveness of efforts to lobby for national standards and improvements to the funding and delivery of civil legal aid and, together with such organizations, pursue appropriate test cases where injustice has been suffered as a result of inadequate civil legal aid funding.

“Legal Aid Strategy”, Canadian Bar Association, Resolution 25-05-A, August 2002.

122.It is also true that even in relation to the criminal law needs of women, legal aid coverage discriminates against women. The offences women are more likely to be charged with are not ones for which incarceration is the usual penalty. Yet, it is the threat of incarceration which triggers entitlement to criminal legal aid. The penalties women tend to face--loss of their children, loss of ability to find work, and the prospect of almost certain incarceration if they come into conflict with the law again--can be as significant but do not result in entitlement.

Addario, L., NAWL Report (June 1997), “Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice at 25, 46.

123.Governments at both the federal and provincial levels justify their different treatment of criminal and civil legal aid, by pointing to the importance of the liberty interests at stake in criminal cases. Unrecognized are the equally serious consequences attached to civil cases typically faced by women. These consequences are made evident in the case of *J.G. v Minister of Health and Community Services et al.* Ms G. was faced with a state-initiated proceeding seeking to remove her three children from her care and place them in temporary wardship with the Minister of Health and Community Services of New Brunswick. Ms G. applied for legal aid. She met the financial eligibility criteria since she was receiving social assistance. However, she was denied legal aid on the basis that legal representation was only available for permanent wardship hearings. Her children were removed temporarily from her care. It should be noted that during the three day custody hearing all other parties, including the Minister of Health and Community Services, the children and the father of one of the children were represented by paid counsel.

124.While the Supreme Court of Canada found that the provincial government in question was under a constitutional obligation to provide the appellant with state-funded counsel, it characterized this entitlement in a manner that was narrow in the extreme. In the particular circumstance of this case, the court found that the threat of losing one’s children in a guardianship application was sufficient to trigger Ms. G’s entitlement to legal aid services. The court did not however, establish a priori entitlement to legal aid in all guardianship cases, or even in all permanent guardianship cases. “The right to a fair hearing” the court wrote, “will not always require an individual to be represented by counsel when a decision is made affecting an individual’s right to life, liberty and security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing.”

New Brunswick (Minister of Health and Community Services) v. G.(J.) [1999] 3 S.C.R. 46.

125. The Court held that in the future, when an unrepresented parent in a custody application wants a lawyer but is unable to afford one, the judge should exercise his or her individual discretion to determine whether the parent can receive a fair hearing. This remedy, rather than guaranteeing an entitlement to legal services, requires each woman who seeks legal representation to make her own case for legal aid services in court before a judge, and to argue on her own the complex matter of her constitutional entitlement to legal aid. Further, the entitlement will only be triggered once a woman has come before the court. The vast majority of people who come into contact with the justice system require legal representation long before the proceeding reaches the court. For this reason, the decision in J.G. is limited to an inequitable degree.

126. As a task force, chaired by Madam Justice Bertha Wilson, former Supreme Court of Canada Justice, has stated:

The low status of family law pervades all facets of our justice system and is reflected in a lack of public resources devoted to resolving conflicts in this critical area... Our legal system is based on the standard of male life experience and exclusively male values and priorities, on the gendered division of labour inherent in our society which privileges male activities and denigrates women's work, and on the traditional separation of private and public spheres of action.

Task Force on Gender Equality in the Legal Profession *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993), p. 211

127. The result is that great numbers of women are technically ineligible for legal aid but without resources to pay for their own lawyers to deal with matters critical to their equality, their economic and social well-being, and their safety. The consequences are extremely serious. Inadequate access to legal aid forces women in abusive relationships to remain in unsafe conditions. Women facing legal challenges from ex-spouses over maintenance enforcement forego entitlement so as to avoid retributive custody battles without legal representation. Women are forced to either forego applying for favourable variation of maintenance or face an intimidating procedure without assistance. Domestic workers whose exploitative working conditions provide reasonable cause to leave their jobs are denied Employment Insurance benefits because of lack of legal representation at the appeal hearing. Immigrant women whose sponsorship is withdrawn by a spouse (often an abusive spouse) are denied coverage for an application to vary the terms of their immigration status and as a consequence are deported.

Federal/Provincial/Territorial Working Group of Attorneys General, *Gender Equality in the Justice System* (Ottawa, 1993)

The Women's Access to Legal Services Coalition, "Working Draft to the Legal Services Society of B.C.: The Impact of Cuts to Legal Aid on Women in British Columbia" 18 February 1998.

## Women's Access to Housing

128. In its December 13, 2002 additional report to the CEDAW Committee, Canada reports that the Government of Canada provides over \$1.9 billion in housing subsidy assistance annually, to some 640,000 lower-income households in Canada, mainly through social housing programs, and that federal, provincial and territorial housing expenditures in 2000-01 totaled \$3.6 billion.

129. Unfortunately this account does not describe the federal and provincial government's record of withdrawal from the social housing field or the facts that 1) homelessness in Canada has been declared a national emergency by the municipal governments of the largest cities, and 2) that the lack of affordable housing is of crisis proportion.

130. From the mid 1980s the federal government started making cuts in allocations to assisted rental housing. This culminated in the 1993 freeze in federal contributions to social housing. The federal government has reduced expenditures on assisted rental housing from 4% of GDP in the mid 1980s to under 3% in the late 1990s, amounting to a cumulative loss of about 325,000 subsidized units. Had expenditure on new social housing supply not been reduced and then terminated, the federal government would be providing an additional 1 billion dollars in subsidy to an additional 325,000 households.

Centre for Equality Rights in Accommodation, *Women and Housing in Canada: Barriers to Equality* (March 2002) at pp. 17-18.

131. Because provincial expenditures on social housing were commonly tied to federal expenditures through cost-sharing programs, by 1997 provincial spending on social housing had been cut back by over 90% to just over \$100 million annually. Taken together cutbacks in allocations to social housing in the last decade have meant a reduction of about \$2 billion a year in government spending on assisted rental housing.

*Barriers to Equality*, at p. 18.

132. Women are more likely than men to meet income qualifications for assisted housing and therefore more adversely affected by cuts to assisted housing. Women-led households are more likely to be renters than men and women are more likely to be paying high percentages of their income toward rent.

133. In 1997, 71% of single mothers in Canada were renters compared to 48% of single fathers and 22% of two spouse families with children. 60% of sole support mothers who rented paid more than 30% of income toward rent compared to 40% of sole support fathers and 29% of two spouse families. 39% of households in core need in Canada are lone parents. (Canada Mortgage and Housing Corporation defines core housing need as follows: "A household is said to be in core housing need if its housing falls below at least one of the adequacy (does not require major repairs), suitability (has enough bedrooms), or affordability (shelter costs are less than 30% of before-tax household income) standards AND it would have to pay more than 30% of its income to pay the average rent of alternative local market housing that meets all three standards." (CMHC, *Special Studies on 1996 Census Data: Housing Conditions of Native Households*)).

*Barriers to Equality*, at p. 19.

Statistics Canada, *Women in Canada 2000: A Gender-based Statistical Report* (Catalogue No. 89-503-XPE) at 161, 163.

Canadian Council on Social Development, *Housing Canada's Children* at 18-19.

134. Cuts to federally funded social housing have forced low income women to rely more extensively on existing and new private market rental units. In turn, women are more vulnerable to the discriminatory marketing (e.g.: adult-only lifestyle condominiums) and allocation (e.g.: policies which preclude women from renting an apartment if they will be paying more than 30% of their income on rent) of private market rental housing.

*Barriers to Equality*, at p. 20.

135. Not only is the funding for social housing inadequate, but the restructured program delivery is having an adverse effect on women. Since 1993, the federal government has been actively devolving the administration of social housing to provinces which, in turn, have been downloading to municipalities. Under "Social Housing Agreements" with the provinces, the federal government hands over the administration and financial responsibility of federally funded social housing to the provinces. Under these Agreements, there is virtually no monitoring of who gets the benefit of these subsidies nor any consideration of how different allocation systems may affect women and other groups at risk of homelessness. As it stands subsidized units are targeted at anyone paying more than 30% of their income on rent, rather than on those most at risk of homelessness or those most in need.

*Barriers to Equality*, at pp. 22 - 23

136. The December 13, 2002 Canada report also states that the November 2001 federal-provincial-territorial framework for a new \$1.36 billion affordable housing initiative will benefit women. However, budget allocations introduced in November 2001 for financial assistance toward affordable rental housing supply represented the first such expenditure since the 1993 elimination of funding for new social housing. The federal government has agreed to spend \$680 million over five years to build 80,000 new units of rental housing. None of this money will go toward housing subsidies. Also noticeably absent from the agreements with the provinces are preconditions ensuring that a minimum proportion of units will be allocated to core need households. All that is stipulated is that funded units should be "modest in size and amenities."

*Barriers to Equality*, at pp. 21-22.

137. Also, women with children are concerned that the unit size of new rental supply will in fact be too small in terms of the number of bedrooms. Within both the private and social housing sectors, there is an acute shortage of two and three bedroom units for women with children. The proposed federal grant is based on a flat amount per unit (\$25,000), independent of unit size, developers will likely be inclined to build small units rather than the two, three and four bedroom units that women with children so desperately need.

*Barriers to Equality*, at p. 22.

138. It is also of concern to women that the new supply initiatives in the private market are not linked to any initiatives addressing widespread discrimination that prevents women from accessing the more affordable units. Important regulatory legislation such as rent control and rental housing stock protection is being rolled back in many provinces, so there is little assurance that new rental supply will remain affordable or will even remain as rental accommodation.

*Barriers to Equality*, at p. 22/

139. In its December 13, 2002 report to CEDAW, Canada states that the federal government has responsibility for on-reserve housing, and notes its investments in new and existing housing stock. The report recognizes that “many First Nations still face a large backlog of substandard and overcrowded houses.”

140. There are three constitutionally recognized Aboriginal peoples in Canada: First Nations, Metis and Inuit. Inuit are currently facing the worst housing crisis in Canada. Inuit are living in severely overcrowded, inadequate and unsafe housing conditions. Because Inuit do not have “status” under the *Indian Act*, they are compelled to compete with other non-aboriginal Canadians for social housing. In 1993, the federal government eliminated its portion of cost-shared funds to the Government of the Northwest Territories (GNWT), the Government of Quebec and the Government of Newfoundland and Labrador for the construction of new social housing units. The high cost of private rental market housing in Arctic regions where Inuit live coupled with the high percentage of Inuit living in poverty, makes the need for social housing acute. As it stands, for Inuit across Canada, demand for social housing far exceeds supply and Inuit are kept on long waiting lists for subsidized housing.

*Barriers to Equality*, at p.35

141. Only 21% of Aboriginal households live on reserve. Because of abject poverty in Métis and Inuit communities and on reserves and because many Aboriginal women cannot access on-reserve housing, and their experiences of discrimination, violence and disempowerment on-reserve, Aboriginal women outnumber Aboriginal men in urban centers. The vast majority of Aboriginal women - 72% - live in non-reserve communities, most in urban areas and are in core housing need: 68% of Métis women, 46% of First Nation women and 30% of Inuit women are living in cities and towns.

*Barriers to Equality*, at pp. 34, 41, 43

142. Federal funding for new units under the Urban Native Non-Profit Housing Program (UNH) (social housing owned and operated by Aboriginals) ceased in 1993 and waiting lists are extremely long. Moreover, most of the housing stock is quite old and repair and maintenance of existing units is a real concern. With social housing not really being an option for Aboriginal women, they are compelled to turn to the private rental market where they experience discrimination based on race, sex, family status, and poverty on a regular basis.

*Barriers to Equality*, at p. 42.

143. The December 13, 2002 report to CEDAW notes that in December 1999, the Government of Canada announced that it would invest \$753 million in the National Homelessness Initiative to help alleviate and prevent homelessness across Canada. It acknowledged that single women and families headed by women account for an increasing proportion of the homeless population and spousal violence and poverty are key factors underlying homelessness.

144. However, the National Homelessness Initiative as a whole has been predominantly focused on “absolute” or street homelessness and on short-term solutions aimed at enhanced services and increased emergency housing supply. Though there are increasing numbers of women living on the streets, street homelessness it is not representative of most women’s experiences of homelessness. For women with children, living on the street is an impossible option that is almost certain to mean losing their children. For single women, increased vulnerability to violence and sexual assault make street life something to be avoided at all costs. And so, while the NHI focus is important in addressing the emergency housing

needs of women, we believe there must be an equal emphasis on addressing the systemic causes of homelessness.

*Barriers to Equality*, at pp. 1, 31-32

145. Counting the numbers of women in shelters is not a particularly useful insight into women's homelessness. Like the street, shelters are a last resort for women. The increasing numbers of women in shelters is only a small fraction of the number of women across Canada experiencing housing crises and homelessness in diverse ways – living with the threat of violence because there are no other housing options; living in unsafe or unhealthy accommodation with family or friends; or losing custody of their children because of inadequate housing. Most of these individualized “housing crises” do not show up in homelessness counts or media portrayals of homelessness, but they increasingly define the lives of lower income women in Canada.

*Barriers to Equality*, at p. 1.

146. Some of the government-funded projects do include initiatives that attempt to address systemic issues related to homelessness, but it is unclear the extent to which women's issues will be addressed. The government's research agenda includes an examination of the structural/systemic issues in Canada that contribute to homelessness but has not identified women as a group requiring particular attention within this (or other) research areas. The research budget has been almost fully allocated and no monies have been earmarked for a real consideration of, or action on, the systemic causes of women's homelessness.

*Barriers to Equality*, at pp. 31-32.

### **Women's Equality and the Deficit**

147. Federal and provincial restructuring has increased the social and economic vulnerability of Canadian women, who have a higher risk of poverty and who rely on social programs and services to counterbalance the powerful dynamics of patriarchy that keep them poorer, dependent and marginal to decision-making. Social programs and social services are a central means of assisting women to contend with conditions of social and economic inequality.

148. The 1995 6 billion dollar cut to the federal transfer payments to the provinces has been justified on the grounds that social program costs were responsible for the deterioration of the country's fiscal health, and that cuts were necessary to reduce the federal deficit. This justification cannot withstand careful scrutiny.

149. Numerous economists, spanning a range of philosophical viewpoints, have concluded that the federal deficit was not caused by “excessive” social spending. Rather, high interest rates and the low employment and economic growth they helped bring about were by far the most significant causes of Canada's deficit. Nor were spending cuts primarily responsible for eliminating the deficit. Lower interest rates and the increased revenues flowing from stronger economic growth have been far more significant factors. These facts cast grave doubt on whether the degree of spending cuts made since 1995 was ever needed to balance government budgets. In fact, the Finance Minister's original goal of balancing the budget by 1999-2000 could have been achieved without any program cuts whatsoever.



Dungan P. and T. Wilson, "Altering the Fiscal-Monetary Policy Mix: Credible Policies to Reduce the Federal Deficit" (1985) *Canadian Tax Journal* 309

Gillespie, *Tax, Borrow and Spend: Financing Federal Spending in Canada, 1867-1990* (Ottawa: Carleton University Press, 1991)

Kneebone, R.D., "Deficits and Debt in Canada: Some Lessons from Recent History" (1994) 20 *Canadian Public Policy* 152

Bakker, I., "The Politics of Scarcity: Deficits and the Debt" in M.S. Whittington and G. Williams, eds. *Canadian Politics in the 1990's*, 4th ed. (Scarborough: Nelson Canada, 1995)

Osberg L. and P. Fortin, eds., *Unnecessary Debts* (Toronto: Lorimer, 1996)

Stanford, J., "Growth, Interest and Debt: Canada's Fall from the Fiscal Knife-Edge" in *Alternative Federal Budget Papers 1997* (Ottawa: Canadian Centre for Policy Alternatives, 1997)

*Alternative Federal Budget Papers 1998* (Ottawa: Canadian Centre for Policy Alternatives/ Choices: A Coalition for Social Justice, 1998) at 13.

150. For the past few years, Canada has been in a surplus, not a deficit position. However, the billions of dollars of surplus currently accumulating have not been channeled back into Canada's depleted social programs. The current priority of the federal government and a number of provincial government is not to re-invest in social programs and services now that the deficit has been eliminated, but rather to cut taxes. Tax cuts have the effect of freezing in place the cuts to the social safety net; they make the harms done to women more difficult to reverse.

### **UN Treaty Bodies' Observations**

151. Federal and provincial restructuring of social programs has had a regressive impact on the living standards and conditions of many Canadians. Most relevantly, Canada's failure to guarantee to all individuals in Canada adequate living conditions has been experienced disproportionately and particularly harshly by Canadian women. As mentioned already, this has been so both because of women's disproportionate poverty and because of women's particular reliance on social programs for services and jobs.

152. Both the United Nations Committee on Economic, Social and Cultural Rights (CESCR) and the United Nations Human Rights Committee (HRC) commented on the harsh impact on women of social program restructuring and cuts in their 1998 and 1999 reviews of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

153. The CESCR Concluding Observations state:

The Committee notes with grave concern that with the repeal of CAP and cuts to social assistance rates, social services and programmes have had a particularly harsh impact on women, (in particular single mothers), who are the majority of the poor, the majority of adults receiving social assistance and the majority among the users of social programmes.

The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other.

154. In its recommendations, CESCR stated:

The Committee encourages the State Party to adopt the necessary measures to ensure the realization of women's economic, social and cultural rights, including the right to equal remuneration for work of equal value.

The Committee also recommends that a greater proportion of federal, provincial and territorial budgets be directed specifically to measures to address women's poverty and the poverty of their children, affordable day care, and legal aid for family matters. Measures that will establish adequate support for shelters for battered women, care-giving services and women's non-governmental organizations should also be implemented.

*Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada. 04/12/98. E/C/12/1Add.31, paragraphs 23, 28, 53, 54.*

155. The HRC was concerned that:

... many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.

*Concluding observations of the Human Rights Committee: Canada. 07/04/99. CCPR/C/79/Add.105, paragraph 20.*

156.Despite these strongly worded Concluding Observations from both Committees, no action has been taken by Canada to respond to the Committees' concerns and recommendations.

157.Before the HRC Canada made a commitment, that was recorded by the Committee in its Concluding Observations, to "ensure effective follow-up in Canada of the Committee's concluding observations and to further develop and improve mechanisms for ongoing review of compliance of the State Party with the provisions of the Covenant." Canada also made a commitment to "inform public opinion in Canada about the Committee's concerns and recommendations, to distribute the Committee's concluding observations to all members of Parliament and to ensure that a parliamentary committee will hold hearings of issues arising from the Committee's observations."

158.No action has been taken to date on any of these commitments.

Concluding observations of the Human Rights Committee: Canada. 07/04/99.  
CCPR/C/79/Add.105, paragraph 3.

### **Violence Against Women**

159.Violence against women remains a serious problem in Canada. The majority of assaults are not reported to the police: in 1993, 57% of women who were injured, 51% of women who were assaulted more than 10 times, and almost half of all abused women who feared for their lives did not call the police.

160.Of the assaults that were reported to the police in 1996 (almost 22,000 cases), 89% involved women as victims. Almost three-quarters of women (72%) were assaulted by a current spouse and 28% by an estranged or former spouse. With respect to violence against seniors, women account for at least two-thirds of those abused. Older women also experienced violence most often at the hands of their spouses (42%).

161.Women who face multiple forms of discrimination, such as Aboriginal women, women of colour, lesbians, young girls and older women, are at a higher risk of violence. For example, 80% of women with disabilities will experience sexual assault in their lifetime.

162.In 1996, 80% of stalking victims were women. The majority of women were stalked by ex-husbands, acquaintances or ex-boyfriends (90%).

163.On one night in May 1995, 2,361 women accompanied by 2,217 children were living in shelters across the country. In the year prior to this, 405 shelters recorded over 85,000 admissions. Of those women living in shelters on this date, 80% used the shelters to escape abusive situations involving spouses (85%). One-third of women living in shelters also reported the incidents to the police, however even though shelter residents are likely to be among the most severely assaulted, charges were only laid in 56% of the cases.

164.Between 1977 and 1996, almost 75% of spousal homicides were committed by men against their spouses. The risk to women of serious violence, including murder, is elevated immediately after separation. For example, in 1996, women who were separated from their partners were 26 times more

likely than their married counterparts to be killed by a spouse (79% versus 3% respectively). Women in common-law relationships were 8 times more likely than their married counterparts to be killed by a spouse.

165. Domestic violence that increases in frequency and severity over a long period of time risks becoming lethal. Spousal killings, in particular, are often preceded by a history of violence. Between 1991 and 1996, in over one-half of all spousal homicides (56%), police had knowledge of prior incidents of domestic violence.

Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Ministry of Industry, 1998)

Status of Women Canada, *Some Facts on Violence Against Women* (Ottawa: Status of Women Canada, 1998)

Health Canada, *Family Violence Against Women with Disabilities* (Ottawa: Health Canada, 1992)

Status of Women Canada, *Questions and Answers about Violence Against Women* (Ottawa: Status of Women Canada, 1998)

166. FAFIA submits that federal and provincial governments laws and policies do not adequately address this serious problem. They fail to do so in a number ways:

- First, cutbacks to funding of women's shelters and transition houses limit the options available to women victimized by spousal violence. And while existing shelters are seeing their support cut, there are not enough shelters to serve the women who need them. For example, there are few, if any, shelters specifically for Aboriginal women, and for Aboriginal women living in remote communities there are no shelters. This is especially dangerous for Aboriginal women, because police do not come quickly to these communities. Police may appear days later in response to a call reporting domestic violence.
- Secondly, cutbacks to the levels of support available under income assistance programs limit the ability of women to leave abusive spousal relations. Many women are forced to remain in abusive situations for economic reasons and because of the failure of income assistance programs to provide adequate levels of support for women and their children.
- Additionally, one of the systemic problems in dealing with violence against women is the attitude of the police towards women and sexual assault.

167. This was starkly revealed by the Ontario case of *Jane Doe*. In 1986, Jane Doe was sexually assaulted in her apartment by a serial rapist. She was his fifth victim. No warning was issued by the Metro Toronto Police Force even though they were aware of the existence of the rapist, knew which type of women he was likely to attack, and knew the area in which his attacks were occurring. Jane Doe sued the police for negligence for their failure to warn women about the rapist. On July 3, 1998, 12 years after the rape, judgment was issued against the Police Force. In the judgment, Justice MacFarland stated that the "the police failed utterly in their duty to protect these women who were raped and the plaintiff in

particular from the serial rapist the police knew to be in their midst, by failing to warn so that they may have had the opportunity to take steps to protect themselves.” She also found that “the conduct of this investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped. The plaintiff therefore has been discriminated against by reason of her gender and as the result the plaintiff’s rights to equal protection and equal benefit of the law were compromised.” The Court also found that Jane Doe’s right to security of the person was violated “by subjecting her to the very real risk of attack by a serial rapist - a risk of which they were aware but about which they quite deliberately failed to inform the plaintiff”.

Jane Doe v. Toronto (Metropolitan) Commissioners of Police, [1998] O.J. No. 2681 (Gen. Div.)

168. The Court also held that there were many problems with respect to the investigation of sexual assaults in general. Namely that: survivors of sexual assault are not treated sensitively; there is a lack of effective training for officers engaged in the investigation of sexual assault; including a lack of understanding of rape trauma syndrome and the needs of survivors there is a lack of co-ordination of sexual assault investigations; some officers are not suited by personality or attitude to investigation of sexual assault; too many investigators are coming into contact with victims; there is a lack of experienced investigators investigating sexual assault; there is a lack of supervision of those conducting sexual assault investigations.

Jane Doe v. Toronto (Metropolitan) Commissioners of Police, [1998] O.J. No. 2681 (Gen. Div.)

169. Following Jane Doe’s victory in her suit against the Toronto Police force, the Toronto City Council established a committee to implement the recommendations contained in the court ruling. The Council eventually instructed the City Auditor to conduct an audit of police protocols and practices. The Auditor’s report identified key areas where significant change was needed and listed 57 recommendations for change regarding police investigation into the crime of sexual assault. The report also recommended that a committee consisting of both police and community representation oversee the implementation process. The recommendations of the Auditor have been met with hostility from the Toronto Police leadership.

Ontario Women’s Justice Network, Important Jane Doe v. Toronto Police Service Developments (Toronto: OWJN, 2001).

### **Violence Against Aboriginal Women, Poor Women and Women of Colour**

170. While governments have, in general, not addressed the problem of violence against women adequately, Canada has also failed to address the racism and bias in the criminal justice system which is evident when violent crimes are committed against Aboriginal women and women of colour.

171. The trial of the murderers of Pamela George stands as a stark example. On April 17, 1995 in Regina Saskatchewan, Pamela Jean George was beaten to death by two young white men. One of the men convicted of her murder received parole on November 10<sup>th</sup>, 2000. Pamela George was 28 years old, a

single mother of two and a member of the Saulteaux First Nation. On the night of her death, George was approached for a “date” by one man and later attacked by the man as well as his friend. The two men demanded oral sex from George, and then began to beat her. George died of cerebral hemorrhaging. The men were charged with first degree murder. Two friends of the accused provided evidence that one of the men stated “....she deserved it. She was an Indian.”

172. In December 1996, both men were convicted not of murder but of manslaughter, and sentenced to 6 and a half years each by Justice Ted Malone. Justice Malone instructed the jury to remember that George was “indeed a prostitute” when considering whether she consented to sexual assault. These comments reflect a devaluation of Pamela George as a person due to her involvement in prostitution. Following Justice Malone’s comments, women’s groups filed a complaint to the Canadian Judicial Council. Justice Malone’s decision was appealed by the Crown on the grounds that the judge’s instruction amounted to a direction to acquit the accused of murder.

173. However, the Saskatchewan Court of Appeal held that the instruction to the jury was proper and declined to review the sentence. The federal government went on to grant one of the accused parole after he served less than four years of his sentence. Prior to considering him for parole, the Board questioned him about his participation in a violent gay-bashing police that occurred prior to George’s death.

Rowe, Diane, *Update on the Pamela Jean George Case* (Toronto: Ontario Women’s Justice Network, 2001).

174. In September 1996, the federal government amended the Criminal Code to include hate crime sentencing provisions. Section 718 (1)(a) provides that a sentence should be increased to take into account relevant aggravating circumstances relating to the offence or the offender, such as state evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or other similar factors. Although these provisions came into effect three months before the conviction in Pamela George’s case, neither court applied the provisions. Moreover, to FAFIA’s knowledge section 718 (1)(a) has never been applied in a case involving the sentencing of an accused for a violent crime against an Aboriginal woman or a woman of colour.

175. Further evidence of the federal justice system’s inadequate response to violence against women who are Aboriginal, poor, young, and/ or engaged in prostitution can be found in the number of missing women cases across the country, including the 67 women missing from Canada’s poorest urban neighbourhood, Vancouver’s Downtown Eastside. This issue is dealt with in greater detail in the B.C. CEDAW Group report.

## **Law and Order Policies**

176. In recent years Canada has embraced a law and order approach to violence against women. The underlying assumption of this approach is that more laws and more police will solve the problem. Canadian women’s organizations have rejected this approach, since it ignores and refuses to address the root cause of violence against women, namely women’s subordinated social, political, legal, and economic status. Women are victims of violence by men, including the men with whom they are most

intimate, because they are economically dependent and have less status and power in Canadian society. Violence against women is a result of women's inequality.

177. The law and order agenda has not improved the response of the police and the justice system to violence against women. On the contrary, it has resulted in more battered women being charged if they defend themselves. It has also resulted in tougher laws for juveniles, dangerous offender legislation, which allows judges to extend periods of incarceration without trials when a prisoner is already serving a term, and calls for longer sentences, and no parole for offenders. While women are looking for responsiveness from police and the justice system to crimes perpetrated against them, they are not looking for revenge. Women's organizations in Canada are not supporters of the "get tough" government stance and do not view it as offering any solution to the violence they experience.

178. The law and order approach is also gender neutral. Rather than supporting women's rape crisis centres and shelters for battered women, these women-led, non-governmental services have had funds cut, while public money is being given to "victim's assistance" programs, which do not recognize that violence against women is a problem caused by women's inequality. "Victims' assistance" programs and "victims' assistance" organizations are not focused on violence against women, but rather on the needs of the surviving family members of women and men who have been killed or abused.

179. Women in Canada are in a difficult position. Governments claim to take the issue of violence against women seriously. December 6, the day on which Mark Lepine killed fourteen young women engineering students at the Ecole Polytechnique in Montreal because they were "all a bunch of feminists", is marked by many public bodies as a day of public mourning and remembrance for the many women who are victims of male violence. But real political will to deal with the husbands, male partners, brothers and fathers, who are the principal sex abusers and principal assaulters of women, is lacking, as is real political will to deal with the sexism and racism that is inherent in the Canadian justice system.

Lakeman, L., "Why 'Law and Order' Cannot End Violence Against Women; and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" 2000 (20) (3) *Canadian Woman Studies* at 24 – 33.

Aboriginal women are concerned that the federal and provincial governments are advocating a transition towards community-based restorative justice models, particularly for Aboriginal offenders. Many of these diversion programs, which lack any Aboriginal gender analysis, risk Aboriginal women and children who are victims of crimes of abuse to further harm as victims within the criminal justice system.

W. Stewart, A. Huntley and F. Blaney, "The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia. Prepared for Aboriginal Women's Action Network, July 2001.

### **Évaluation de l'action du gouvernement du Québec en matière de lutte contre la violence conjugale**

180. En 1995, le gouvernement du Québec rendait publique sa politique d'intervention en matière de violence conjugale *Prévenir, dépister, contrer la violence conjugale* dans un contexte de compressions

budgétaires et de restructuration importante (transfert des responsabilités en matière de santé et de services sociaux à de nouvelles régies régionales non imputables devant la population). Chaque région doit maintenant choisir ses priorités d'action. À partir de ce moment, des iniquités se sont produites à cause d'un manque de leadership provincial et régional, d'une organisation de services déficiente et d'une mise en œuvre de la politique différente d'une région à l'autre.

181. Le gouvernement refusait ainsi de renouveler, sur une base provinciale, le plan triennal de financement des maisons d'aide et d'hébergement, qui venait à échéance en mars 1995 ; il renvoyait les maisons à ses instances régionales avec pour résultat d'importantes différences dans le support financier alloué aux maisons par les régies régionales et une inégalité dans la disponibilité et l'accessibilité des services pour les femmes violentées. (paragraphe 617, 623)

182. Malgré la qualité de la politique, de ses objectifs en matière d'égalité des femmes et de lutte contre la violence conjugale, de la cohérence qu'elle mettait de l'avant, un plan d'action comprenant 57 engagements des divers ministères ne fixait ni priorité, ni interrelation entre l'ensemble des engagements, ni mesure et échéancier d'évaluation quant à l'impact de ces actions. (parag. 628)

183. En matière de prévention, la majorité des initiatives restent tributaires d'un financement contractuel qui n'assure pas la pérennité des actions et les rend souvent inefficaces faute d'avoir duré assez longtemps pour produire de réels changements de mentalité, spécialement en ce qui concerne la promotion de rapports égalitaires entre les hommes et les femmes. (parag. 633)

184. Sur le plan du dépistage de la violence conjugale, le gouvernement a constaté que les employés des agences gouvernementales de services sociaux (CLSC) étaient incapables d'identifier les victimes de violence conjugale qui demandaient des services autres parmi leur clientèle, et donc de leur offrir des services adéquats. Des ressources ont été investies pour former tout le personnel des CLSC à partir de 1998, mais, faute de suivi, le dépistage n'est toujours pas une pratique systématique. Plusieurs victimes ne sont pas identifiées et restent dans l'isolement puisque l'intervention précoce pour les aider à sortir de la violence conjugale est déficiente. (parag. 634)

185. Une des clés de voûte de la politique était la cohérence et la compréhension commune de la problématique et des actions à mettre en place. Seulement quelques actions, comme des activités régionales de formation de toutes les organisations visées, ont été réalisées (parag. 631). Le gouvernement souhaitait augmenter la cohésion de l'intervention et affirmait que plus de services étaient nécessaires. Toutefois, malgré un engagement visant à soutenir les ressources communautaires dont les ressources d'urgence pour les femmes, le budget investi a été quasi nul. De ce fait, seuls les services d'urgence et de crise sont disponibles dans toutes les régions. Et faute de services de suivi psychosocial, plusieurs femmes subissent cette violence pendant de longues années. Ces femmes et leurs enfants développent des problèmes de santé physique et psychologiques importants. (parag. 632)

186. Malgré quelques efforts en ce sens, l'adaptation des services à des clientèles particulières et minoritaires comme les femmes autochtones, les femmes des communautés culturelles, les femmes handicapées est un échec (parag. 635). Les ressources d'aide actuelles ne disposent même pas des budgets suffisants pour répondre aux besoins des femmes victimes de violence conjugale du groupe majoritaire et cela en dépit du fait que, dans la *Politique d'intervention en matière de violence conjugale*, le gouvernement reconnaissait que " les organismes où s'adressent les femmes ne disposent



pas toujours des moyens suffisants pour répondre à leurs besoins ” et que de ce fait “ l’accessibilité aux services de soutien demeure actuellement limitée ”(parag. 636).

GOUVERNEMENT DU QUÉBEC, *Prévenir, dépister, conter la violence conjugale*, 1995, p. 52

187. En effet, à partir de 1993, l’augmentation des budgets consentis par le gouvernement pour les ressources d’urgence a été dirigée vers l’augmentation du nombre de places d’hébergement sécuritaire. Entre 1992 et 2000, 25 ressources ont démarré ou se sont consolidées.

188. En 1996, le gouvernement demandait aux instances régionales d’ajouter 2M\$ à l’enveloppe globale des maisons d’hébergement Or, même si la politique mettait de l’avant l’idée que la lutte à la violence conjugale doit d’abord viser à assurer aide et protection aux victimes, l’amélioration de la gamme et de la qualité des services pour les femmes violentées a, de façon générale, été impossible. Seuls les besoins d’hébergement sécuritaire et d’intervention d’urgence ont été reconnus. Les services complémentaires pour aider les femmes à faire face à la complexité de la situation qu’elles vivent (harcèlement persistant du conjoint, problèmes de santé physique et psychologique, enfants terrorisés par la violence de leur père, difficultés à avoir accès à la justice, appauvrissement, difficultés d’accès à des logements, etc.) ont jusqu’à maintenant été ignorés.

189. Ainsi, si on compare l’évolution (1992-2000) du financement des 73 ressources considérées en phase optimale en 1992, en tenant compte de l’augmentation de l’indice des prix à la consommation, en 2000 :

- 39 % recevaient, une subvention inférieure à ce qu’elles recevaient en 1992 ;
- 5 % recevaient une subvention équivalente ;
- 20 % recevaient une subvention supérieure de quelque 10 % ;
- 10 % recevaient une subvention supérieure de plus de 10 %.

190. La maison la mieux financée recevait une subvention équivalant à 60 % du montant jugé nécessaire par les groupes de femmes comme un minimum pour répondre à l’ensemble des besoins des femmes victimes de violence conjugale. En 2001, un ajout de 3,5M\$, suite à la Marche mondiale des femmes, qui est une initiative de la Fédération des femmes du Québec qui a vite recueilli l’adhésion de près de 6000 groupes de femmes de 161 pays du monde, permettra à la plupart des maisons de retrouver le pouvoir d’achat qu’elles avaient en 1992. Une grande partie des services repose sur l’engagement bénévole des travailleuses. (parag. 636, 642 à 644)

191. Cette stagnation des budgets a eu des impacts importants pour les femmes victimes de violence conjugale et pour les travailleuses des ressources d’aide. D’une part, la disponibilité des services offerts et les actions de lutte contre la violence conjugale est extrêmement variable d’une maison à l’autre, ainsi toutes les Québécoises violentées n’ont pas accès aux mêmes services, et donc à la même protection de l’État. D’autre part, les travailleuses des services d’aide aux femmes sont discriminées en emploi : en tant que travailleuses dans le milieu communautaire et en tant que femmes, elles bénéficient de conditions de travail inéquitables par rapport aux autres travailleurs engagés dans les services psychosociaux.

192. Par ailleurs, plusieurs protocoles d’entente entre les différentes ressources (policiers, services d’aide, milieu hospitalier, etc.) ont été mis en place pour rendre les services plus accessibles, mais le gouvernement ne dispose d’aucun outil pour connaître le nombre, la nature (collaboration, référence,

etc.) l'état de mise en œuvre et l'impact de ces protocoles sur l'amélioration du niveau de service et de sécurité des victimes. (parag. 638)

193. De plus, les services d'accompagnement à la cour ne sont pas disponibles dans tous les palais de justice du Québec. Plusieurs femmes hésitent à porter plainte ou demandent que les procédures soient abandonnées faute d'information et de support adéquat. À Montréal, une proportion importante des plaintes déposées se soldent par une procédure privée où le conjoint prend l'engagement de ne pas troubler la paix de la victime (article 810). Ce genre de procédure est peu efficace et donne souvent lieu à des récidives. ( parag. 628 et 638)

194. Les critères d'admissibilité trop stricts et d'une restructuration de services à l'aide juridique augmentent les délais pour les procédures de séparation, de divorce et d'attribution de garde d'enfants. Dans certaines régions du Québec, notamment en milieu rural, les femmes à très faibles revenus doivent souvent attendre plusieurs jours pour rencontrer un avocat du système d'aide juridique. Pour les femmes à faibles ou moyens revenus qui n'ont pas droit à l'aide juridique, les frais d'avocats sont trop élevés.

195. En 1995, le gouvernement du Québec confiait au comité interministériel de coordination en matière de violence conjugale le soin de produire des bilans périodiques de la mise en œuvre de la politique en matière de violence conjugale. En 2002, un bilan complet du premier plan d'action se fait toujours attendre. On sait toutefois que ce bilan ne permettra pas de mesurer l'impact des différents engagements parce qu'une telle évaluation n'a pas été prévue depuis le début.

196. D'ailleurs, en 2002, le ministère de la Santé et des Services sociaux invoquait cette absence de mesure efficace d'impact pour diminuer l'accent mis sur la prévention de la violence faite aux femmes dans le cadre de l'élaboration de sa Politique nationale de santé publique.

197. Dans le cadre de la Marche mondiale des femmes en 2000, les groupes de femmes du Québec revendiquaient que leur gouvernement alloue les ressources nécessaires pour soutenir les femmes violentées et réviser l'application des lois afin qu'elles aient un réel accès à la justice. (parag. 628) En réponse à ces revendications, le gouvernement du Québec a alloué 10 % des montants demandés et il a mis en place un comité de travail réunissant des représentants des ministères de la Justice et de la Sécurité publique et des groupes de femmes (ONG) afin d'améliorer le traitement judiciaire des actes de violence faite aux femmes. Toutefois, les questions relatives au droit de la famille échappent à l'examen de ce comité. Or, à l'heure actuelle, les décisions prises par les tribunaux de la famille ne tiennent pas toujours compte de la sécurité et des intérêts des femmes et de leurs enfants. Le traitement des litiges familiaux hors du système de justice (privatisation) via la médiation familiale se conclut souvent par des ententes dangereuses pour leur sécurité et où, faute d'information, les femmes renoncent aux droits qui leur sont octroyés par certaines lois visant l'égalité (partage du patrimoine familial par exemple). Les femmes et leurs enfants s'appauvrissent.

198. En bref, en 1998, et encore en 2002, les maisons d'hébergement qui sont les ressources spécialisées d'aide aux femmes victimes de violence conjugale ne disposent toujours pas des budgets suffisants pour aider les femmes violentées, pour jouer un rôle de défense de leurs droits face aux politiques et aux législations. Elles n'ont pas non plus les moyens suffisants pour instruire les professionnels sur les pratiques à adopter pour assurer la sécurité des femmes et les aider à sortir du cycle de la violence conjugale.

199. Cet état de fait a un effet discriminatoire direct sur les femmes victimes de violence conjugale. À l'heure actuelle, le gouvernement du Québec ne rend pas disponible et accessible toute l'aide nécessaire pour leur permettre de vivre à l'abri de la violence. De plus, il ne profite pas pleinement de l'expertise des groupes de femmes spécialisés au sein de la société civile pour mettre en place les actions et politiques nécessaires pour mettre fin à cette discrimination.

### **State Imposed Violence Against Women**

200. As well as having obligations under the *Convention* to take all appropriate measures to prevent and remedy the violence that women experience at the hands of private actors, governments are also responsible for ensuring that violence against women is not practiced by public authorities. However, women in Canadian prisons are vulnerable to such violence.

CEDAW, *General Recommendation No. 19* (Eleventh session 1992) at para 8.

201. On 26 April 1994, at the federal Prison for Women, which at that time was the only federal prison for women who are serving sentences of more than two years, the Warden of the Prison for Women called in an all-male Institutional Emergency Response Team ("IERT") to conduct a cell extraction, that is to forcefully remove from their cells, and conduct a strip search of eight women in segregation. Six of the women had been placed in segregation following a confrontation with prison officials four days prior on April 22. After the lengthy cell extraction, which finished in the early morning of April 27<sup>th</sup>, the eight women were left in the Segregation Unit wearing paper gowns, and in restraints and leg irons.

151. The cell extraction was videotaped and when the videotape was released to the Canadian public, Canadians were outraged and horrified by the violence and brutality of the incident. Many called for a public investigation. On April 10, 1995, a Commission of Inquiry was appointed to review the events that took place at the Prison for Women headed by the Honourable Madam Justice Louise Arbour.

202. After an extensive and thorough examination of the events at the Prison for Women, Justice Arbour released a report of her findings and recommendations. Some of her findings of fact are paraphrased below:

- a brief but violent altercation took place between six women and a number of correctional staff on April 22, 1994. The women were immediately placed in segregation;
- tensions were very high following this incident. On April 24, 1994, three inmates who had not been involved in the April 22 incident, but had already been in segregation, variously slashed themselves, took a hostage, and attempted suicide;
- on April 26, 1994, an all-male emergency response team was brought in upon request of the Warden and forcefully removed and strip searched eight of the women in segregation;
- the segregated women were neither advised of their right to counsel, nor given access to counsel for a period of 4 days from April 22-26, 1994;
- all women in segregation were denied daily exercise for over a month;

- all women in segregation were denied telephone calls to others, books and activities, showers, cleaning, and the removal of garbage accumulation. Requests for socks, clothing, ice, lights, pop and toilet paper were often refused;
- some of the correctional staff on duty during this time were overworked and overstressed;
- the women inmates left in their cell at the completion of the IERT intervention were left covered only by paper gowns, on a cement floor in an empty, small cell while the windows were left open for a considerable time. They were left in body belts, shackles and leg irons. There was no evidence to suggest these conditions were necessary because of a serious security concern;
- body cavity searches were conducted on seven of the eight women. Women who consented to the searches were given showers, a security gown, cigarettes, and had their restraints removed. The woman who did not consent did not receive any of these benefits.

Arbour, Lousie, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 25, 41, 45, 51-54, 88, 92

203. With respect to the emergency response team, Justice Arbour describes it as follows:

- The IERT is male. It is generally deployed in male institutions. It came into existence in large measure in response to incidents in male institutions. There is no variation in the techniques that it uses when it is deployed, as it occasionally has been, at the Prison for Women. Members of the team are uncomfortable with being deployed in a female institution, but they do respond when called. Their training dictates that there be no variation from the standard techniques when the inmates against whom those techniques are deployed are female.
- Before they were summoned to the Prison for Women in April of 1994, the IERT had never been asked to strip search a female....
- The process was intended to terrorize, and therefore subdue. There is no doubt that it had this intended effect in this case. It also, unfortunately, had the effect of re-victimizing women who had traumatic experiences in their past at the hands of men. Although this consequence was not intended, it should have been foreseen.

Arbour, Louise, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 68, 88.

204. With respect to the video recording of the incident and the legality of the strip searches, Justice Arbour states:

In any event, what is particularly disturbing in watching the video is not only the men “witnessing” the naked inmates, it is the combination of the inevitable brutality of this type of intervention, combined with the necessary physical handling of individual women by several male IERT members, while each woman is completely naked for a period of time, and then very improperly covered by a paper gown or bib. When properly understood in its full context, these events raise

a legal and moral question much more basic than merely whether it technically constituted a “strip search”. It raises the question of whether the treatment of the inmates was cruel, inhumane, and degrading. I think that it was.

Arbour, Louise, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 83.

205. On the subject of the validity of consent to body cavity searches, Justice Arbour states:

The absence of a culture respectful of individual rights is perhaps nowhere more disturbing than on this issue. A body cavity search is the most intrusive form of searching a person, short of surgical intervention. As a result, the law requires that it be performed only pursuant to a request in writing of the Warden, that it be performed by a qualified medical practitioner, and the consent of the person subjected to the search must be obtained. The concept of informed, free and voluntary consent is well established in law, particularly in criminal law. Threats or inducements held out by a person in authority would clearly vitiate the voluntariness requirement that is implicit in the notion of consent. Yet in this case, many CSC [Correctional Services of Canada] witnesses who testified on this issue expressed the opinion that an offer of cigarettes, shower, or the removal of restraints to follow the body cavity search did not affect the validity of the consent that was given....

206. There can be no ambiguity as to what the legal requirements of a valid consent are. In light of all the evidence presented in this case, I find it inconceivable that such a profound deficiency in the understanding of the Correctional Service officials as to the basic legal requirements could be remedied simply by the issuance of a more detailed directive from the Commissioner, even if coupled with some training session.

Arbour, Louise, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 83.

207. Justice Arbour’s final report contained more than 90 recommendations to improve the operations of women’s prisons. The recommendations made by Justice Arbour include:

- men may not strip search women. The only exception is where the delay in locating women to conduct the search would be dangerous to human life or safety, or might result in the loss of evidence. No man may witness the strip search of a woman except as above.
- that inmates be given the right to counsel before expressing their consent to a body cavity search and that inmates be advised of that right at the time their consent is sought.
- that body cavity searches only be performed in surroundings that are appropriate for consensual, non-emergency medical examination or intervention.

- that a body cavity search be performed only by a female physician, if the inmate so requests, and the physician ensure to her satisfaction, that the consent was not obtained as a result of inducement or coercion.
- that the women who were the subject of the cell extractions conducted by the male IERT on April 26/27, 1994 and who were kept in prolonged segregation afterwards, be properly compensated by the Correctional Service of Canada for the infringement of all their legal rights as found in this report, commencing on April 22, 1994.

Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 251-9.

208. Few of the recommendations have been implemented. Although a Deputy Commissioner for Women has been appointed as Arbour recommended, other recommendations concerning the Deputy Commissioner's mandate and responsibilities have not been implemented. The result of the federal government's failure to follow the recommendations of the Arbour report is the continued violation of the rights of women in custody under Articles 2 and 3 of the *Convention*. The Canadian Association of Elizabeth Fry Societies, an umbrella organization of community-based agencies dedicated to working with and on behalf of women in conflict with the law, note the following continued violations, as summarized below:

- women are being strip-searched in ways and at times not permitted by legislation and policy;
- women are being strip-searched in a mandatory routine way wherever the Correctional Service of Canada policy permits strip-searching for cause;
- women are being stripped, shackled and left chained naked to a metal bed frame, without a mattress, in segregation;
- minimum security women are being sent into the community in shackles for various forms of temporary absences;
- many women are being classified unnecessarily as maximum security prisoners and placed in segregated "enhanced security units";
- medium and maximum security women are being placed in provincial remand centres, and all federally sentenced women classified as maximum security prisoners -- many with mental health and capacity concerns -- are being placed in segregated maximum security units in men's prisons;
- security and razor wire fences, additional alarms, cameras -- including infra-red, 360 degree capability, zoom lens, eye-in-the-sky models -- have been installed at new regional centres, thereby eliminating minimum security prison conditions for federally sentenced women imprisoned in the regional prisons;

•despite the provisions of the *UN Minimum Standard Rules for the Treatment of Prisoners* and the recommendation of the Cross Gender Monitors, appointed by the Correctional Service of Canada itself, that men not be permitted to work on the front line with women prisoners, CSC has placed men in front-line positions in women's prisons across the country.

Pate, Kim, *50 Years of Canada's International Commitment to Human Rights: Millstones in Correcting Corrections for Federally Sentenced Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 1998) at 2-3.

Canadian Association of Elizabeth Fry Societies, *Annual Report 1997-1998*

### **Discrimination against Women Prisoners**

209. In March 2001, the Canadian Association of Elizabeth Fry Societies (CAEFS) registered a complaint with the Canadian Human Rights Commission regarding the discriminatory treatment of federally sentenced women at the hands of the federal government. CAEFS is requesting a broad-based systemic review under s.61(2) *Canadian Human Rights Act* with respect to the treatment of women prisoners. The complaint centres on discrimination based on sex, especially for those women who are housed in segregated maximum security units in men's prisons. However, the complaint also alleges discrimination on the basis of race because of the treatment of Aboriginal and other racialized women, and discrimination on the basis of disability because of the treatment of federal women prisoners with cognitive and mental disabilities.

Canadian Association of Elizabeth Fry Societies, *Letter from Kim Pate,*

*Executive Director of the Canadian Association of Elizabeth Fry Societies, to Chief Commissioner, Canadian Human Rights Commission, 8 March 2001.*

210. Federally sentenced women (FSW) compose less than 3% of the federally sentenced inmate population in Canada. Minimum and medium security FSW are incarcerated in five regional women's institutions. Maximum security FSW are incarcerated in separate units in four men's medium security institutions. There are three major issues: security classification, facilities and programs.

211. To determine a woman's security classification, Correctional Service of Canada (CSC) assesses each prisoner's probability of escape, level of risk to the safety of the public if s/he were to escape, and the degree of supervision and control required in the penitentiary setting. Part of the assessment of risk conducted by the CSC involves the review of the prisoner's social history. Prisoners with a limited employment history, low education level, little or no vocational training, who have been victims of violence, physical problems, mental illness or disabilities are identified as having high needs. These needs seem to be converted into risks by CSC. Prisoners that are high need and therefore considered to be high risk are assigned a maximum security classification.

*Position of the Canadian Association of Elizabeth Fry Societies Regarding the Classification and Carceral Placement of Women Classified as Maximum Security Prisoners. p. 2.*  
(<http://www.elizabethfry.ca/maxe.htm>.)

212. In this system of classification, women who are most disadvantaged received the highest security classification regardless of the crime committed. It is then not surprising that many Aboriginal women

are given a maximum security designation. 41% of federally sentenced women who are classified as maximum security women are Aboriginal, whereas Aboriginal women represent only 18.7% of the total population of federally sentenced women, and less than 2% of the population of Canada. Rather than viewing the needs of these women critical issues to be addressed, the CSC sees them as risks and places these women in unnecessarily highly restrictive conditions for confinement.

213.Regarding facilities, currently maximum security women are in male medium security institutions. While this was to be a temporary arrangement, such a decision suggests that those in positions of authority in the CSC do not understand the rights of maximum security women. These FSW may suffer disproportionate punishment for their crimes because they are incarcerated in institutions where they have limited access to gender-specific programs and services and live in close proximity to men when many of these women may have suffered violence or abuse at the hands of men.

*Correctional Investigator Annual Report 2000-2001 p. 38.*

214.The CSC has, and is building, maximum security units in the regional institutions for women. Movement of FSW to women's institutions is positive, however, these units will place maximum security women in a prison within a prison. They will be housed in separate units from the minimum and medium security women. In order to access the programs and resources within the prison, maximum security women will be given a second level of security classification which will define by their access to the rest of the institution. As well, the static security surrounding these institutions has been heightened to ensure that prisoners with the highest security classification are secure. These measures will place minimum and medium security women in an unnecessarily highly secure environment. We are concerned about the emphasis on 'higher security' and 'secure units' for a prisoner population that has the lowest rate of escape.

Solicitor –General MacAulay's response to a letter from Amnesty International regarding maximum security FSW.

*Position of the Canadian Association of Elizabeth Fry Societies, p. 2.*

215.Regarding programs, FSW often have little job training, little education, suffer from drug and alcohol abuse, have low incomes and have experienced significant traumas in their lives. The services and program available to federally sentenced women are designed primarily for male inmates and have been slightly adapted to suit the needs of women. Programs including drug and alcohol abuse rehabilitation are often supported and delivered by CSC staff who have little if any expertise in supporting and rehabilitating women.

216.Federally sentenced women have a right to have access to programs and services designed for women specifically. They must also be supported and delivered by female staff and volunteers that have been educated and trained to deliver women specific programs. Former FSW have also stated that many programs exist on paper only and are not actually available.

*Position of the Canadian Association of Elizabeth Fry Societies, p.4.*

217.Those with mental health illnesses or disabilities find themselves with higher security classifications because their illness or disability is seen as a risk. Equating mental illness or disability with risk and assigning a higher security classification is discriminatory. Such discrimination has an impact on their access to all necessary resources for their rehabilitation and health. FSW with mental illness and



disabilities have been marginalized and isolated within the Corrections Service because of discriminatory attitudes and practices.

218. To be successfully rehabilitated and prepared for their return to their communities, Aboriginal FSW must have access to programs that are created and facilitated by people from their cultural communities. Aboriginal women are not a single unified grouping. Aboriginal FSW come from different tribes and regions of Canada. Geographic isolation denies them access to their communities and families which prevents many Aboriginal FSW from receiving the care they require. CSC has attempted to provide limited services for Aboriginal women prisoners but a recent report (the Morin report) suggests that there is considerable room for improvement. Given that Aboriginal women represent a small portion of the Canadian population (less than 2%), but are over-represented in the corrections system (24.6% [2001 stats from CSC] of FSW are Aboriginal), their needs must be addressed in a culturally appropriate manner.

219. Numbers of reports and articles have documented the discriminatory treatment of federally sentenced women within the CSC. It is essential that the federal government ensure that:

- 1) the Correctional Service of Canada immediately implement all recommendations made by the *Creating Choices* report, *Arbour Commission* and the Correctional Investigator's Annual Reports for 2000-2001 and 2001-2002 in cooperation with relevant organizations and cultural communities;
- 2) more alternative community facilities and community release programs be made immediately available to minimum security women to prevent them from being even further negatively impacted by the high degree of security that will be implemented when maximum security FSW return to regional facilities. This will also go some way towards preventing maximum security women from being isolated and living in unreasonably restrictive environments;
- 3) FSW have regular and reliable access to female doctors, mental health practitioners, and other program and service personnel;
- 4) FSW have regular and reliable access to women-centred and culturally sensitive programs and services, including women only in the front-line correctional officer positions [per Cross Gender Monitor Report recommendations and in keeping with the UN Minimum Standard Rules on the Treatment of Prisoners].
- 5) the government, but not the male-dominated CSC research department, create a security classification system create solely for women in consultation with experts in the field of female offenders, and the Aboriginal community;
- 6) all FSW, particularly Aboriginal women, have easy access to community release options to enable them to have direct access to community resources of healing;
- 7) FSW with mental illness and disabilities be incarcerated in facilities that enable safe interaction with others and be provided with women-centred and culturally sensitive support services which allow them to access non-correctional mental health and psychiatric or forensic resources on either an in-patient or out-patient (escorted) basis, pursuant to the principles of the *Corrections and Conditional Release Act*.
- 8) all CSC staff who work with FSW receive regular and intensive training on issues of gender sensitivity, racism, and supporting women with mental illnesses and disabilities. This training must be supported and given with experts and members of the relevant Aboriginal and health communities.

9) the government of Canada immediately implements provides adequate redress mechanisms and remedies for prisoners whose *Charter* and human rights have been violated.

Canadian Association of Elizabeth Fry Societies, *Letter from Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, to Chief Commissioner, Canadian Human Rights Commission*, 8 March 2001.

220.FAFIA submits that Canada violates the rights of federally-incarcerated women inmates under Articles 2 and 3 of the *Convention* by treating women prisoners incarcerated in federal institutions in ways that are inhumane and that deny to such women respect for their inherent dignity.

### **Aboriginal Women and Section 67 of the Canadian Human Rights Act**

221.Section 67 of the *Canadian Human Rights Act* currently provides that: “Nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to that *Act*.”

222.This section was originally passed in order to protect decision-making by Band Councils, and to prevent non-Aboriginal persons from claiming that the provision of Aboriginal-specific benefits discriminated against them.

223.However, section 67 has had the effect of immunizing Band Council from challenges when their decisions are discriminatory. Currently, many Band Councils deny services and access to benefits to “Bill C-31 women” that is, to Indian women who originally lost their Indian status because they “married out” and who regained their Indian status under Bill C-31. These women cannot seek a remedy for this discrimination under human rights legislation, because section 67 bars their complaints.

224.The Native Women’s Association of Canada says this about section 67:

...That section proclaims that the Government of Canada and the government’s creations, the Band Councils, are permitted to discriminate at will against Aboriginal people on the basis of race, gender, and other characteristics, as long as their discrimination has a formal connection to the *Indian Act*. It proclaims that Aboriginal people are entitled to less protection of their human dignity than are other Canadians

Canadian Human Rights *Act* Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights *Act* Review Panel, 2000) at 130.

225.The Canadian Human Rights *Act* Review Panel recommended removing section 67 from the *Canadian Human Rights Act* in June 2000. The Panel stated that the *Act* should apply to self-governing Aboriginal communities, until such time as an Aboriginal human rights code applies, as agreed by the Federal and First Nations governments.

Canadian Human Rights *Act* Review Panel, *Promoting Equality: A New Vision* (Ottawa: Canadian Human Rights *Act* Review Panel, 2000) at 132.

226. While the government has made a proposal to change this provision in the *First Nations Governance Act*, as noted in Canada's December 13, 2002 report to the CEDAW Committee, that proposed legislation is the subject of hot dispute by a number of Aboriginal organizations, and has not moved ahead. FAFIA submits that s. 67 of the *Canadian Human Rights Act* violates Article 2 of CEDAW by denying protection from discrimination to Indian women, and that the government should move to correct this injustice immediately.

### **Immigration Legislation and Systemic Discrimination**

227. In February 2001, the federal government introduced Bill C-11, An *Act* respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger. Bill C-11 appears to have as its overall objective to tighten immigration rules and to protect Canada's borders. The Minister of Citizenship and Immigration Canada has described the Bill as "tough". Bill C-11 has become the new *Immigration and Refugee Protection Act*.

Canadian Council for Refugees, Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies. In Preparation for the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. (Montreal: CCR, 2000) at 12.

228. In FAFIA's submission, this new *Act* has not been drafted in keeping with the government's commitment to draft policy based on a gendered analysis. In 1995, the federal government adopted the Federal Plan for Gender Equality in preparation for the Fourth World Conference on Women. This policy required federal departments and agencies to conduct gender-based analysis of any future policies and legislation. In 1995, the federal government also endorsed the "Beijing Platform for Action" (PFA) that sets as goals, gender equality, development and peace, and more specifically engages states to consider the gender impact of laws, policies and programs. Most recently, Canada participated in the Special Session of the United Nations General Assembly on the further actions and initiatives to implement the Beijing Platform for Action. In the final outcome document that was adopted by the General Assembly on June 10, 2000, states commit to themselves to "mainstream a gender perspective into national immigration and asylum policies". The government has failed to comply with the above commitments in the context of the drafting of the *Act*.

229. Moreover, the legislation does not make explicit reference to Canada's obligations under CEDAW, in particular its obligation to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" as per Article 2. FAFIA therefore submits that the current *Immigration Act* infringes Articles 2 and 3 of the Covenant.

230. Current immigration law, policy and practices violate Articles 2 and 3 of CEDAW by not adequately taking into account the context of women's lives both inside and outside of Canada. In June 2002 Canada's new immigration legislation came into effect. Despite being preceded by almost a decade of public consultations, the new legislation does not alter the basic components of Canada's immigration framework, including the biases against women that it contains.

231. The two principal categories of permanent immigration to Canada are economic immigration and family reunion immigration. Each of these categories is structured in a way that encodes women's dependence on men.

232. Economic migration has been the largest component of Canada's immigration policy since 1995. Each of the principal subgroups in this category – skilled workers, investors, entrepreneurs and self-employed persons – is structured so that men are more likely to qualify than women. Through this category Canada is seeking to attract individuals who are well-educated, who have labour market experience, who speak English or French, and who are wealthy. These indicators favour men over women even within Canada. Framing migrant selection this way ensures that gender disparities from outside Canada are imported.

233. The new legislation has altered the selection system so that some of the economic subcategories explicitly value the contributions of a migrant's partner (three partnerships are now recognized in the law: spouses, common law partners and conjugal partners) by awarding points based on a partner's education and language skills at one fourth or one fifth the rate they are awarded for the primary migrant. These additional points will most often be applied to women and represent an official devaluing a women's contribution to family well-being.

234. Canada's live-in caregiver program has also been reframed as part of the economic migrant category and is the one sub-program which will be dominated by women applicants. Foreign domestic workers are a particularly vulnerable group of women workers, whose circumstances should be considered by this Committee. Most of these workers are women of colour from countries that have been severely hurt by globalization and economic restructuring policies. Compared to the conditions for entry for independent immigrants (the other category of entry for persons filling long term or chronic labour gaps), the criteria imposed on live-in caregivers clearly exposes a racialized and gendered inequality of treatment, contrary to the anti-discrimination provisions in CEDAW. The live-in requirement has been widely criticized because of the vulnerability of these women workers to abuse in the homes of their employers. The combined effect of temporary migrant status and the compulsory live-in requirement for these workers create circumstances that promote economic, physical and psychological exploitation.

235. The paper on immigration issued by the federal government in 1998, *Not Just Numbers: A Canadian Framework for Future Immigration*, recommended that the live-in requirement be eliminated. This recommendation has not been adopted. In a reform agenda which the government has touted as easing the hurdles for economic migrants, this category has been made less hospitable. The route from work in Canada as a live-in caregiver to full Canadian citizenship has been made longer, arguably twice as long, under the new *Act*.

236. Specifically there are two restrictions associated with the temporary immigration status under the LCP which potentially lead to abuse and a violation of workers rights. First the possibility of permanent resident status is directly tied to and conditional upon a good work record. Second, living with one's employer produces extra pressures and restrictions on the work and life of a domestic worker and creates specifically oppressive power dynamics in the relation between employer and employee. Live-in caregivers experience non or under-payment of wages, unremunerated overtime work, lack of food, privacy, or proper accommodations, and violence and abuse.

National Association of Women and the Law et al. Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration at 24-25.

Intercede, Caregivers Break the Silence A Participatory Action Research on the Abuse and Violence, including the Impact of Family Separation, Experienced by Women in the Live-In Caregiver Program (Toronto: Intercede, 2001) at 36-58.

237. It should be noted that not only do employers benefit from the undervalued labour of live-in caregivers, but the Canadian government, which continues to resist responsibility for ensuring affordable, accessible childcare to Canadians, also reaps economic and political benefits from facilitating a supply of migrant women to furnish inexpensive, private child-care to a certain segment of Canadian parents. In FAFIA's submission, the federal government's refusal to admit domestic workers as permanent residents or to remove the live-in requirement from the criteria for the program violates Articles 2, 3, 11, and 13 of the *Convention*.

National Association of Women and the Law et al. Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration at 25.

238. Family category migration has been dominated, and will continue to be dominated, by the arrival of female partners of male Canadian residents. The new aspects of this category include formal recognition of common law, including same-sex, partnerships and raising the age of some eligible dependent children to 21.

239. Family category migration continues to be based on the principle of sponsorship. When a sponsor applies to have his partner and children or other family members come to Canada, he must undertake to ensure that they will not take social benefit payments from the state for at least three years. In this way, sponsorship formalizes a relationship of dependence of the migrant on the sponsor. Sponsors are no longer required to demonstrate that they are able to financially support their partners [this requirement is still relevant for family members beyond partners and children]. However, in this category of immigration – where women dominate the statistics – wealth, education, skills and experience are not counted.

240. The much maligned fiancé visa has been eliminated from family class migration. In its place is a provision for sponsoring conjugal partners in a relationship of at least one year. Presumably many of the women who previously arrived in Canada as fiancés will now arrive as conjugal partners, free from a legal obligation to marry. This category will require close attention as the definition of conjugal is opaque. If the term is not interpreted to allow the arrival of fiancés in arranged marriage situations the end result will be that women who could previously come to Canada will now not be prohibited.

241. Another significant change in the *Act* is a tightening of the test for bona fides in marriage. It will now be harder to establish that a marriage is valid for Canadian immigration purposes. Those who will be affected by this provision are predominantly women.

242. In sum, little in the new legislation would alter the assessment by Dr Roxana Ng in 1998:

This classification system ignores the fact that the wife may have comparable education and work experience to the husband, and may have made an essential contribution to the family income before immigration...the increasing necessity for Canadian families to survive on at least two incomes, means that in fact, most immigrant wives join the paid labour force as wage earners. Yet the assignment of family members according to the classification of “independent” and “family class” negates this reality. The official view of the immigrant family, according to Canadian immigration policy, is that of one “independent” member on whom others depend for their sponsorship, livelihoods and welfare...the immigration process systematically structures inequality within the family by rendering one spouse (usually the wife) legally dependent on the other.

Roxana Ng, “Gendering Policy Research on Immigration” in *Gendering Immigration/ Integration Policy Research* (Ottawa: Status of Women, 1998)

Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21<sup>st</sup> Century: New Directions for Immigration and Refugee Policy* (Ottawa: Minister of Public Works and Government Services Canada, 1998)

National Association of Women and the Law et al. Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration at 15-17.

### **Immigrant and Refugee Women and Documentation**

243. Currently, the *Immigration Act* requires Convention Refugees to produce a valid passport or travel document or a “satisfactory” identity document on application for permanent residence. Women refugees are less likely to be able to produce identity documents because women are often not in control of these documents and/or they are unable to retrieve them. These requirements further discriminate against women who come from countries where marriage, birth and adoptions are not registered. For example, an estimated six thousand Somali Convention Refugees and their dependents have been affected by the requirement of “satisfactory” identity documents and have been denied permanent residence in Canada. An estimated 80% of these people are women and children. For many of these women, the inability to produce such documents results in delay or denial of needed services such as education, training or employment.

Canadian Council for Refugees, *Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies*. In Preparation for the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. (Montreal: CCR, 2000) at 7-11.

Inter-Church Committee for Refugees, *Information Kit on Refugee-Migrant Rights* (Montreal: Canadian Council for Refugees, 1998) at 2-3.

## Refugee Women and Detention

244. The *Immigration Act* provides broad authority to order detention where a person poses a danger to the public or is “unlikely to appear” - criteria which permit a wide scope for arbitrary and selective application of the law. In the summer of 1999, four ships carrying 599 Fujianese people arrived in Vancouver, British Columbia. Of the 599, ninety were women. Many of the women had suffered extreme violence as a result of forced sterilization, debt bondage, the one-child policy, religious persecution, displacement and poverty. Following arrival, the Canadian government detained and imprisoned the Fujianese migrants in jails. A large number were held in a jail in Prince George in B.C.’s interiors, hundreds of miles away from Vancouver, where there is a substantial Mandarin-speaking population and active non-governmental organizations willing to provide support and services to the Fujianese refugee claimants. Women experienced anxiety, hopelessness and severe depression while imprisoned in Canada, some for as long as 18 months. As of April 2001, twenty-six had been granted refugee status, eleven were still in prison and the remainder had been deported. Those deported back to China were placed in Chinese prisons and fined.

Direct Action Against Refugee Exploitation (DAARE), *Movements Across Borders: Chinese Women Migrants in Canada* (Vancouver: DAARE, 2001) at 7-10, 14-15.

245. The UN Special Rapporteur on the Human Rights of Migrants recently commented on the special difficulties experienced by some of the women of Chinese origin subject to long term detention in British Columbia since their arrival in 1999 – noting:

some worrying psychological situations, which affected the physical health of some of the women detainees owing to their extended stay in detention and the uncertainty surrounding their future, leading to actual crises of anxiety.

UN Special Rapporteur on the Human Rights of Migrants, *Report to UN Economic and Social Council*, E/CN.4/2001/83/Add.1 21 at para. 49.

246. The new *Act* introduces even broader powers of detention than those already present in the former *Immigration Act*. Apart from the partial protection afforded to minor children (who may be detained “only as a measure of last resort” (s. 60)), the *Act* introduces new powers which will arguably result in a serious erosion of fundamental civil liberties for all non-citizens. The *Act* extends the authority of immigration officers to detain persons who are inadmissible, even where they are not about to be removed. The *Act* gives immigration officers the power to detain at the port of entry on the basis of administrative convenience, mere suspicion of inadmissibility on grounds of security or human rights violations or if they fail to establish their identity for *any* procedure under the *Act*.

National Association of Women and the Law et al. Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration at 36.

247. The United Nations High Commissioner for Refugees has submitted to the Standing Committee on Citizenship and Immigration that the detention of asylum seekers and refugees is inherently undesirable and should normally be avoided as the right to liberty is a fundamental human right. The UNHCR commented:

[W]here asylum-seekers have not committed crimes, their detention raises significant concern. This concern is heightened in the case of unaccompanied women, children.....Detention should not be imposed as part of a policy to deter future asylum-seekers or to discourage those who have commenced asylum procedures from pursuing them.

United Nations High Commissioner for Refugees, *Comments on Bill C-11 "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger"* submission to the House of Commons Standing Committee on Citizenship and Immigration (Ottawa: UNHCR, 2001) at 28-30.

### **Immigrant and Refugee Intolerance**

248. Female refugees are often subjected to racialized and sexualized stereotyping to justify preventive detention. Media coverage of immigration and refugee issues has fanned xenophobic, racist and sexist sentiments against women migrants. A recent review in an article entitled, *600 Is Too Many: How the press used four boatloads of Chinese migrants to create an immigration crisis* notes that "newspaper coverage...reveals not only blatant inaccuracies and misconceptions but also decidedly xenophobic undertones." The federal government has done little to address this misinformation and has contributed to a climate of heightened discrimination by not actively countering negative public opinion.

Canadian Council for Refugees, *Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies*. In Preparation for the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. (Montreal: CCR, 2000) at 13-14 citing Beth Clarkson "600 Is Too Many: How the press used four boatloads of Chinese migrants to create an immigration crisis", 2000 *The Ryerson Review of Journalism* at 6.

### **Immigrant and Refugee Women and Access to Social Benefits**

249. The federal government has isolated and marginalized refugees and migrants from participation in society and has shifted the work of immigrant integration onto immigrant and ethnic minority communities and community-based organizations. The federal government has successfully structured the immigrant/multiculturalism sector as a separate, parallel and marginalized sector of publicly-funded social services. This sector has become primarily responsible for the settlement of newcomers into Canada. In essence, the federal government has developed a two-tier system for accessing welfare, health and social benefits, one that streams immigrants and refugees onto a different track from other Canadians. Newly arrived immigrants and refugees are essentially forced to rely on the services of



community-based organizations for interpretation, translation and benefit information before being able to effectively access various social benefits. In addition, many of the services of these community-based organizations are performed by immigrant women workers receiving little or no pay.

Lee, J., “Immigrant women workers in the immigrant settlement sector” 1999 19(3)  
*Canadian Women Studies* at 97-103.

250. In addition to the federal government not addressing the settlement needs of refugees and recently arrived immigrants, the Canadian government has permitted Convention refugees, refugee claimants, refused refugee claimants, those under a removal order, and those without permanent residency status to be denied the enjoyment of many key human rights. There is evidence of discrimination in access to housing, education, training, and medical and health benefits.

*Kearney v. Bramalea Ltd.* (No.2) (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.)

Inter-Church Committee for Refugees, *Information Kit on Refugee-Migrant Rights* (Montreal: Canadian Council for Refugees, 1998) at 1-7.

#### **IV. Violation of Article 6: Exploitation of Women**

##### **Bill C-11 and Human Trafficking and Smuggling**

251. A recent study (J. Morrison, *The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy*, for the UNHCR, Pre-Publication Edition, July 2000, hereinafter the “Morrison Report”) has established that a large percentage of refugees who claim asylum in Europe have been trafficked or smuggled. The Morrison Report confirms that a significant percentage of migrants who have been trafficked or smuggled are from countries of origin that have attracted the highest rates of asylum recognition or other humanitarian status within Europe (including Iraq, former Yugoslavia, Afghanistan, Somalia and Sri Lanka).

252. While comparable data are not publicly available for Canada, the Morrison report makes a compelling case for the need to ensure that government initiatives to combat smuggling and trafficking activities as transnational crime do not add to the abuse experienced by the victims of these activities. There is an inherent contradiction between promoting the right of all individuals to seek asylum and at the same time enforcing a broad range of interdiction measures that make it next to impossible for *bona fide* refugees to gain access to asylum countries such as Canada. In this regard, efforts to clamp down on the perpetrators of smuggling and trafficking in the absence of concomitant measures to provide safeguards and migration alternatives for refugees and other vulnerable persons can only result in the abrogation of Canada’s stated commitment to the 1951 *Geneva Convention*.

National Association of Women and the Law et al. Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration at 32-33.

253. Although the media and some policy makers treat refugees and smuggled/trafficked migrants as mutually exclusive categories, there are documented cases where refugees can become involved with

traffickers or where involvement in the trafficking process can give rise to an asylum claim. Women and children can be particularly vulnerable. For example, in CRDD V95-02904, 26 November 1997 (Neuenfeldt), the Immigration and Refugee Board determined a Ukrainian woman trafficked into prostitution by Ukrainian organized criminals to be a member of a particular social group, namely impoverished young women from the former Soviet Union. The Board stated that,

the recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and abhorrent violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection of persons finding themselves in the claimant's position.

National Association of Women and the Law et al. *Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration* at 33.

254. Bill C-11 expands the offences related to organizing entry into Canada and increases the penalties associated with these offences (ss. 117-121). The Bill also adds a new inadmissibility category for engaging, in the context of transnational crime, in people smuggling and trafficking (s. 37 (1)(b)). The Bill's preoccupation with "improperly documented travelers", its emphasis on criminalizing smuggling and trafficking, together with the increased measures of interdiction announced in the April 2000 *News Release* accompanying proposed new immigration legislation, will have a differential and disadvantageous impact on women. Migrants often risk their lives in undertaking dangerous journeys organized by transnational criminal networks. Women and children are frequently at risk of sexual exploitation, enforced prostitution and other forms of indentured labour.

National Association of Women and the Law et al. *Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration* at 34-35.

255. Although the vast majority of the world's refugees are women and children, they are (and, under *Bill C-11*, will continue to be) systematically disadvantaged by Canada's overseas refugee resettlement process. Only a small fraction of this population are able to undertake the hazardous and expensive journey to seek asylum abroad. Most continue to languish in refugee camps in unsafe conditions - both in terms of basic health and personal security. Further criminalizing trafficking and smuggling activities will only lead to higher prices as the smugglers pass on the higher costs of doing business to their clients. The likely result is that even fewer numbers of women and children attempting to flee persecution, armed conflict and other forms of human rights violations will be able to do so. For them, and for other women and children seeking reprieve from harsh and desperate life circumstances, the spiraling cost of escape will be paid to traffickers in bonded labour, sexual violations, and other forms of abuse. Canada should not further exacerbate their suffering by criminalizing these people as 'illegal immigrants'.

National Association of Women and the Law et al. *Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration* at 34-35.

United Nations High Commissioner for Refugees, Comments on Bill C-11 “An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger” submission to the House of Commons Standing Committee on Citizenship and Immigration (Ottawa: UNHCR, 2001) at 30-31.

256. As recently emphasized in the twenty-third special session of the United Nations General Assembly, it is imperative that any anti-trafficking strategy include measures to address the root causes of trafficking in women and girls while ensuring appropriate protection for victims.

United Nations General Assembly “Women 2000: gender equality, development and peace for the twenty-first century” *Further actions and initiatives to implement the Beijing Declaration and the Platform for Action* at paras. 104a-e

National Association of Women and the Law et al. *Draft Brief on the Proposed Immigration and Refugee Act (Bill C-11) submitted to the Standing Committee on Citizenship and Immigration* at 35.

## **V. Violation of Article 7: Political and Public Life**

### **Women’s Political Equality**

257. Although women constitute more than half the population in Canada, their representation in the political realm is much lower. In fact, 62 of 301 (20.5%) seats in the elected House of Commons are held by women, 33 out of 104 (31.7%) seats in the appointed Senate are held by women for a total 95 out of the 405 positions in the House of Commons and the Senate being held by women (23.4%).

258. Women’s representation in provincial politics is just as unequal. In fact, the highest representation across provinces is in the Legislature in Quebec where 30 out of 125 (24%) seats are held by women. In the Legislatures of Nova Scotia and Prince Edward Island women hold a mere 11 percent of the seats.

259. The numerical under-representation of women holding public office in Canada is the result of many factors. Women often bear a larger share of the family responsibilities, including care of children and parents. They often have reduced access to funds and to powerful connections, which often play a large role in access to political candidacy. Political structures, political party activities and practices also affect women’s political expectations and therefore their participation in government.

260. Although it is the political parties that must ultimately nominate women for public office, the government can further this objective by providing regulations or incentives for parties to nominate and elect more women. In a country where fifty percent of women have after-tax incomes ranging from zero to \$13,786, and only 11% earn after-tax incomes over \$32,367, campaign spending limits are necessary to level the playing field for women candidates. Women do not have the fundraising capacities that men do. A ban on corporate party donations is also required, as are re-integration programs for politicians returning to civilian life after election losses. The Royal Commission on Electoral Reform and Party finances recommended in 1991 that incentives be provided via the election expenses reimbursement

system to encourage parties to elect more women. No government in Canada has adopted such measures.

261. Canada is one of only three countries with populations of over 8 million which have retained a “first past the post” electoral system. India holds fast to it, where women have achieved eight percent representation, as does the United States which has achieved thirteen percent female representation: Sweden, Germany, South Africa, New Zealand, Wales and Scotland have now changed their electoral systems to some form of proportional representation.

262. Women and children in this country make up over seventy-five percent of all those living in poverty. One in four women has experienced criminal violence from her marital partner. One in seven families is a sole support family headed by a woman, and fifty-seven percent of these families live below the poverty line. Women between the ages of forty-five and sixty-five earn fifty-one percent of what men earn. Women need to be able to participate equally in Canada’s political life in order to change these entrenched patterns. Canadian governments violate *CEDAW* by maintaining electoral systems that perpetuate women’s under-representation in political life.

Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*. Volume 1 of the research studies of the Royal Commission on Electoral Reform and Party Financing (Ottawa and Toronto: CERPF/Dundern, 1991)

Dahl, J., “Gender Parity in Nunavut?” in *Indigenous Affairs*, July-December 1997 issues no. 3 /4 (Copenhagen: International Work Group for Indigenous Affairs, 1997)

Linda Erickson, “Entry to the Commons: Parties, Recruitment, and the Election of Women in 1993” in *Women and Political Representation in Canada*, eds. Manon Tremblay and Caroline Andrew (Ottawa: University of Ottawa, 1998)

Dale, L., *Who's Left? A Proposal for the Elimination of the Segregation of Women* at <http://www.arts.mcgill.ca/programs/misc/socdem/dale.htm>.

### **Unequal Political Participation for Aboriginal Women**

263. During negotiations between federal, provincial and territorial governments regarding possible revisions to Canada’s Constitution in 1992, a process of governmental consultation took place with the Aboriginal community of Canada. The federal government provided \$10 million to fund participation of four national Aboriginal organizations, none of whom identified as specifically representative of the concerns of Aboriginal women. The Native Women’s Association of Canada, a national group established in 1974 to advance Aboriginal women’s issues, was not one of the four which received direct funding. Some portion of the original \$10 million had been earmarked for women’s issues, with the result that NWAC received \$260,000 from the other groups. NWAC also later received a further \$300,000 separately from the government for the purposes of funding a study of the *Charter of Rights and Freedoms*. In total the full amount of funding received by NWAC amounted to only 5% of the total funding received by Aboriginal groups for constitutional purposes.

Sharon McIvor, *Aboriginal Self-Government: The Civil and Political Rights of Women*, thesis submitted to the Faculty of Law in conformity with the requirements for the degree of Master of Laws (Kingston: Queen's University, 1995)

*Native Women's Association of Canada v. Canada*, [1994] S.C.J. No. 93

264. NWAC was also excluded from participation in a multilateral process of constitutional discussion which took place subsequent to March 12, 1992, the purpose of which was to prepare a constitutional amendment that could be presented to Canada as a consensus package.

Sharon McIvor, *Aboriginal Self-Government: The Civil and Political Rights of Women*, thesis submitted to the Faculty of Law in conformity with the requirements for the degree of Master of Laws (Kingston: Queen's University, 1995)

*Native Women's Association of Canada v. Canada*, [1994] S.C.J. No. 93

265. In a challenge to this exclusion, heard at the Supreme Court of Canada, NWAC asserted that the national Aboriginal organizations were male-dominated and would not represent adequately the concerns of the Aboriginal women in NWAC, particularly NWAC's concerns regarding the continuing relevance of the equality rights of the *Charter of Rights and Freedoms*. NWAC claimed that their rights to equality and free expression under the Canadian *Charter of Rights and Freedoms* were violated.

266. The Supreme Court denied their claim for relief, stating that the *Charter of Rights and Freedoms* does not place a positive obligation upon the government to ensure expression or to provide a platform for expression. The Court also stated that there was no evidence to support the contention that the funded groups were less representative of the viewpoint of Aboriginal women with respect to the issues central to NWAC mandate.

Sharon McIvor, *Aboriginal Self-Government: The Civil and Political Rights of Women*, thesis submitted to the Faculty of Law in conformity with the requirements for the degree of Master of Laws (Kingston: Queen's University, 1995)

*Native Women's Association of Canada v. Canada*, [1994] S.C.J. No. 93

267. Although the federal government opposed NWAC in court, it has recently included NWAC in some discussions regarding new self-government agreements. However, this participation is still incomplete, underfunded, and less than that available to male-led Aboriginal groups. Other Aboriginal women's organizations representing distinct groups, namely Pauktutuit, representing Inuit women, and the Metis National Council of Women, representing Metis women, also continue to struggle to be included in important governmental discussions, such as those respecting national and regional agreements on job creation programs and health services for Aboriginal people.

268. FAFIA submits that the federal government's exclusion of NWAC from direct funding for constitutional matters and from direct participation in the constitutional discussions violated Articles 7 and 15. Additionally, the federal government's continuing failure to include NWAC and other

Aboriginal women's organization in the levels of funding and political participation offered to male-led Aboriginal groups violates Aboriginal women's rights under these Articles.

269. Currently, there are ongoing negotiations to put in place self-government agreements with many Bands across Canada. However, Aboriginal women are not equal participants in these negotiations, and are not in a position to secure adequate protections for themselves and their children as these agreements are put in place. As the federal government turns over more powers to Aboriginal peoples, it must ensure that Aboriginal women can be equal participants in self-governance and in the processes which lead to it.

270. The Canadian government has failed to follow through with recommendations, made in the Gathering Strength report, to fund (capacity build) Aboriginal women's groups in order to strengthen their involvement in self-government negotiations.

J. Sayers, K.A. MacDonald, A Strong and Meaningful Role for First Nations Women in Governance. In First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports. Status of Women Canada, November 2001.

Canada, INAC (Indian and Northern Affairs Canada). 1999. Gathering Strength: Canada's Aboriginal Action Plan. Ottawa: Ministry of Indian Affairs and Northern Development.

271. The right to self-determination for Aboriginal peoples cannot be used by the federal government as a defence for its failure to take responsibility for the continuing sex discrimination against Aboriginal women by individual Aboriginal men, by male-led Aboriginal organizations, by Bands, and by the government itself. The government has *Convention*-based obligations to prevent and remedy discrimination against Aboriginal women as well as similar obligations under the Canadian Constitution. The federal government must ensure that Aboriginal women have adequate mechanisms and resources to guarantee their full and equal participation in their communities. Failure to do this clearly violates Article 7 of the *Convention*.

## **VI. Violation of Article 10: Education**

### **Inequality of Educational Opportunity Amongst Aboriginal Women**

272. It is FAFIA's submission that Canada is not fulfilling its obligations under Article 10 of the *Convention* with respect to Aboriginal Peoples, and that this failure has compounded the already difficult life circumstances of many Aboriginal women.

273. School completion rates for Aboriginal children and youth are much lower than they are for non-Aboriginal children and youth. For example, in British Columbia 38 per cent of Aboriginal students graduate from high school, compared to 77 per cent of non-Aboriginal students.

British Columbia Human Rights Commission, *Equality Through Access*, Annual Report, 2000-2001, at 3.

274. This is very disturbing since the Aboriginal population is the only population group in Canada that is growing. It is also a population group that is disproportionately a young one, with approximately 70 percent of the population now under 15 years of age. Unless the education needs of Aboriginal students are met successfully, the pattern of poverty and unemployment among Aboriginal people will be perpetuated. Aboriginal women, who are the group with the highest poverty rate in Canada - 43 percent - need successful school completion to change their futures.

B.C. Ministry of Education, *How Are We Doing? An Overview of Aboriginal Education Results in BC* (Victoria: Government of BC, 1998) at 4 and 11.

## **VII. Violation of Article 11: Employment**

### **Women's Wage and Employment Gap**

275. Statistical data makes it starkly evident that Canada is not fulfilling its obligations under Article 11 of the *Convention*. Canadian women's involvement in the paid labour force is marked by structural inequalities and discrimination. Inequality cuts deeper for women with child care responsibilities, for Aboriginal women, for women with disabilities, for immigrant women, for women of colour, and for lesbian women.

276. Though women have moved into the paid labour force in ever-increasing numbers over the last two decades, they do not enjoy equality in earnings, or in access to non-traditional jobs and managerial positions, or in benefits. The gap between men's and women's full-time, full-year wages, is, in part, owing to occupational segregation in the workforce that remains entrenched, and to the lower pay that is accorded to traditionally female jobs. Though the wage gap has decreased somewhat in recent years, with women employed on a full-time, full-year basis now earning about 73 percent of the amount earned by men in comparable jobs, part of this narrowing of the gap is due to a decline in men's earnings as a result of job restructuring, not to an increase in women's earnings.

277. Aboriginal women, women of colour, women with disabilities, and immigrant women earn less than the female average. Aboriginal women earn 15 percent less, women of colour earn 8 percent less, and women with disabilities earn 17 percent less than the average for all employed women. Immigrant women and women of colour are employed mainly in low-wage sectors (factories, domestic work, hotels restaurants, clerical work). Aboriginal women, women of colour and women with disabilities also have much higher unemployment rates than women overall.

278. The average annual income of women from all sources is about 58 percent of men's income. This significant gap in annual income is due, in part, to the wage gap, but also to the fact that women work fewer hours in the paid labour force than men. They work fewer hours because they cannot obtain full-time work, and because they carry more responsibility for unpaid care-giving duties.

279. About one-third of all jobs in Canada are now estimated to be non-standard: temporary, casual, seasonal, or part-time jobs. The number of women in non-standard work has grown over the past decade. In 1999, 41% of employed women aged 15-64 had a non-standard employment arrangement, compared with 35% in 1989. While the male percentage has also risen, women are still more likely than men to have non-standard employment, 41% to 29%. Part time work is still the most common form of

non-standard work. In 1999 28% of all employed women worked less than 30 hours per week as compared to 10% of employed men.

Statistics Canada, *The Daily*, October 9 , 1998

Statistics Canada, *The Daily*, August 25, 1998

Statistics Canada, *Women in Canada 2000, A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2000) at 103, 141.

Canadian Advisory Council on the Status of Women, *Work in Progress: Tracking Women's Equality in Canada* (Canada: Canadian Advisory Council on the Status of Women, 1994) at 44, 66

Townson, M., "Non-Standard Work: The Implications for Pension Policy and Retirement Readiness" (unpublished paper prepared for Women's Bureau, Human Resources Development Canada, 1996) at 11, 98-100

Ghulam, N., *Women in the Workplace*, 2d ed. (Ottawa: Statistics Canada, 1993), cat. No. 71-534E, at 22

Isabella Bakker, "Introduction: The Gendered Foundations of Restructuring in Canada" in Isabella Bakker, ed. *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at 13-14.

Pat Armstrong, "The Feminization of the Labour Force: Harmonizing Down in a Global Economy" in Isabella Bakker, ed. *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at 29.

National Action Committee on the Status of Women, *Women in Canada: A 1998 Snapshot* (Toronto: NAC, 1998).

Philp, M., "Women Climbing Wage Ladder", *The Globe and Mail*, May 13, 1998, A4.

280. Women still experience widespread discrimination, and structural inequality in the labour market because of sex segregation, the lesser pay accorded to "women's work," inadequate childcare to support women working in the paid labour force, and lack of employer recognition of the fact that women carry the major share of unpaid caregiving in their families. In Canada, women still undertake the majority of unpaid work, an estimated 65% of all hours spent on those activities.

Statistics Canada, *Women in Canada 2000, A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2000) at 97.



281. Women in Canada do not enjoy the right to equal remuneration, nor do they enjoy equal access to work enclaves that are traditionally male. This affects their social security, particularly their pensions. Women receive 58 per cent of the Canada/Quebec Pension Plan benefits that men receive.

### **Immigrant and Refugee Women and Systemic discrimination**

282. The 1996 Canadian Census reveals patterns of systemic discrimination against immigrant and refugee women. Many immigrant and refugee women are highly educated but are unable to find work. Despite being more highly educated than their Canadian-born counterparts, recent immigrant and refugee women, those arriving between 1990-1995, were less likely to be working or able to find work. Among those aged 25-44, 17% of recent immigrant women had a bachelor's or first professional degree compared with 13% of Canadian-born women; 9% had a master's degree or doctoral degree compared with 4% of Canadian-born women who had an advanced degree. Nonetheless 12% of all immigrant women, and 19% of recent immigrant women aged 25-44 were unemployed at the time of the Census compared to 9% of Canadian-born women in the same age group.

Chard, J., et al., *Women in Canada*. (Ottawa: Statistics Canada, 2000) at 197,199.

283. Higher levels of education do not assist immigrant women to enter the labor market to the same extent that they assist Canadian-born women. University educated women aged 25-44 who immigrated to Canada in the five years before the Census have a higher rate of unemployment than Canadian-born women of **any** educational background. Immigrant women aged 25-44 who held a bachelor's degree or higher were four times as likely to be unemployed as similarly educated Canadian-born women (17% compared to 4%). Only Canadian-born women in this age group with less than Grade 9 education had higher rates of unemployment.

Chard, J., et al., *Women in Canada* (Ottawa: Statistics Canada, 2000) at 201.

284. Immigrant women work longer hours, for lower pay in lower skilled jobs compared to Canadian-born women. Compared to Canadian-born women who were working, immigrant women were more likely to be working full-time. However, most employed immigrant women were concentrated in administrative, clerical, sales and service jobs and a disproportionate number were manual workers (12% of all employed immigrant women and 17% of recent immigrant women, compared to 6% of Canadian-born women). Highly educated recent immigrant women are only about half as likely as Canadian-born women to be employed as professionals or managers.

Chard, J., et al., *Women in Canada* (Ottawa: Statistics Canada, 2000) at 201-202.

285. A race, class, gender, language interaction is evident in immigrant women's barriers to integration into Canadian society and the situation is worsening. Racialised immigrant and refugee women experience more barriers and difficulties integrating into Canadian society than their male counterparts.

Chard, J. *Women In Canada* (Ottawa: Statistics Canada, 2000) at 219-246

286. Immigrant women who do not speak either of the official languages experience more difficulty integrating than those who do speak these languages (an unemployment rate of 26% compared to 19%

for those who speak either official language). Unemployment rates for immigrant women are almost doubled compared to the previous decade, rising from 10% to 19%. In comparison, unemployment rates for Canadian born women increased only slightly from 8% to 9%. Immigrant women are disproportionately absorbing the negative impacts of structural adjustments in the economy.

Chard, J., et al., *Women in Canada* (Ottawa: Statistics Canada, 2000) at 199-200.

287. There is growing poverty among racialised immigrant and refugee women. Given their economic prospects, it should not be surprising that immigrant women earn less compared to Canadian-born women and men and immigrant males. Racialized immigrant women are more dependent on government assistance and three in 10 immigrant women live below the Statistics Canada low-income cutoff. Elderly immigrant women are among Canada's poorest.

Chard, J., et al., *Women in Canada* (Ottawa: Statistics Canada, 2000) at 199-200.

### **Immigrant and Refugee Women Documentary Discrimination**

288. There are now several reports that have recorded documentary discrimination against immigrant and refugee women. Foreign credentials, training and work experiences are not recognized by employers, educational institutions and professional and trade associations. The failure to produce "acceptable" documents and credentials is used to exclude immigrant women from employment and training opportunities commensurate with their education, training and work experiences.

Basran, G. & L. Zong. "Devaluation of foreign credentials as perceived by visible minority professional immigrants," 1998 30(3)*Canadian Ethnic Studies*. 30(3) at 6-24.

Calleja, D. "Right skills, wrong country. Why is Canada making it next to impossible for talented newcomers to practice in their fields of expertise?" 2000 73 (12) *Canadian Business* at 34-39.

Mojab, S., "Deskilling immigrant women," 1999 19(3) *Canadian Women Studies* at 123-128.

National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC). A survey of immigrant and visible minority women on the issue of recognition of foreign credentials. (Ottawa: NOIVMWC, 1996)

Canadian Council for Refugees, *Report on Systemic Racism and Discrimination in Canadian Refugee and Immigration Policies* (Montreal: CCR, 2000) at 11.

289. Credentialing barriers force highly trained professionals to work in low-skilled jobs, providing employers with an ongoing pool of high-skilled labor for low pay. Government offices often require documents to be provided in English and do not provide translation services, placing additional financial burdens on immigrant and refugee women.

Ng, R. & das Gupta, T., "Nation builders? The captive labour force of non-English speaking immigrant women," 1989 3(1) *Canadian Woman Studies* 3 at 83-89.

290. There is little interest on the part of professional associations, trades or employers to change, and governments are doing very little to address this problem. There is no national system for assessing immigrants' prior learning or foreign credentials. Only BC, Alberta and Quebec have a credential assessment service and these are very expensive and time consuming; and there are no programs to encourage self-regulating professions and trades to permit foreign-trained professionals and tradespeople to practice their profession or trade with minimum disruption. There are no legal structures to address the exclusionary, recalcitrant practices and attitudes of self-regulating professions and trades even where accreditation is obtained.

291. Delays in accreditation and assessment of credentials, denial of overseas work experiences, lack of upgrading and training affect immigrant women most severely because of their domestic responsibilities for child care and family settlement. Each year of delay increases the deskilling of professionally trained women.

### **Inadequacy of Governmental Response to Structural Inequalities**

292. The current ineffectiveness of laws and programs designed to protect women from discrimination in the workforce, such as human rights legislation and employment equity programs mean that women are increasingly without adequate protections to address the discrimination and inequality that they encounter. Ontario repealed its employment equity legislation in 1995. A review of the federal *Employment Equity Act* by a Special Committee of Parliament in 1992 confirmed that the record of employment equity initiatives in the federal sector is distinctly lacklustre. Employers are reproducing the traditional patterns of inequality for women. In 1996, amendments to the *Employment Equity Act* broadened the scope of employers to whom it applies but weakened federal anti-discrimination legislation by taking away the power of human rights tribunals to order the implementation of an employment equity program as a remedy for systemic discrimination. All human rights commissions have backlogs and are processing complaints slowly, and turning away many, including meritorious complaints.

Lum, Janet N. "The Federal Employment Equity Act: Goals vs. Implementation" (1995) *Can. Pub. Admin.* Vol. 38 at 45.

293. In 1997, following passage of the new *Act*, the Canadian Human Rights Commission began conducting formal employment equity audits of all federal public service departments. As of March 2000, only one department, Status of Women Canada, was found to be in compliance with the *Act*.

Bakan, A., and A. Kobayashi, *Employment Equity Policy in Canada: An Interprovincial Comparison* (Ottawa: Status of Women, 2000) at 16.

294. In terms of representation in the federal public service, Aboriginal women and women with disabilities have made little to no gain. Moreover, visible minority women are extremely under-represented. In 1999 the public service-wide population of visible minority women was 5.8%. In addition, out of the 3, 421 executive positions within the federal public service, only 919 are women

and a mere 23 of those are visible minority women. In 1999, a task force was set up to consider the issue of lack of participation of visible minorities in the federal public service. The Task Force explained shortcomings in the federal government's implementation of the *Act* as follows:

- there is a lack of government-wide commitment to employment equity;
- many managers do not see employment equity as an important part of their jobs.

295. Human resource personnel often occupy junior positions and have few means at their disposal to influence the employment equity performance of managers. Moreover visible minorities are under-represented in the human resource community.

296. Individuals responsible for employment equity coordination in departments have little clout, and their turnover is high. During the Task Force's tenure, the interdepartmental Consultative Committees on Employment Equity, constituted for each of the four designated groups and under the responsibility of the Treasury Board Secretariat were disbanded.

Task Force on the Participation of Visible Minorities in the Federal Public Service,  
*Embracing Change in the Federal Public Service* (Ottawa, 2000) at 23-25.

297. The *Canadian Human Rights Act* prohibits paying women less than men for work of equal value. In 1984, the Public Service Alliance of Canada (PSAC), on behalf of nearly 200,000 current and former federal civil servants, launched a pay equity complaint against the federal government. The Canadian Human Rights Commission ordered a tribunal hearing of the issue. On July 29, 1998, after 262 days of hearings during which extensive pay-equity and statistical expert testimony was heard, the Human Rights Tribunal ruled that the federal government, because of its discrimination against female-dominated job classifications, owed up to 13 years back pay to each of the complainants. The Tribunal specifically stated that equal pay for work of equal value is a fundamental human right. Affected civil servants are secretaries, clerks, data processors, hospital workers, librarians and education assistants, 80 percent whom earned under \$30,000 a year in the lowest-paid categories in the civil service. Eighty-five percent of the claimants are women. PSAC estimates that the average annual pension of workers from these groups is only \$10,000 per year. The pay equity settlement makes an important difference in the standard of living for affected workers.

Canada Human Rights Act, R.S., 1985, c. H-6 July, 1996

Daniel Leblanc, "Union Greets Liberal Appeal With Protests", *The Globe and Mail*, Friday, August 28, 1998 A4

Government of Canada, National Council of Welfare, "A Statement by the National Council of Welfare on Pay Equity for Federal Public Service Workers", November 1998

298. The Government has indicated that it is able to pay the costs of the pay-equity ruling. Estimates of the cost of the Tribunal's ruling range from \$C1 billion to \$C6 billion. In the Government's first official reaction to the Tribunal decision, Federal Treasury Board President Marcel Masse said: "I'm confident that if there is a conclusion that the award should be paid, the government will pay it without bringing

undue hardship to its finances.” Additionally, it is important to note that the Supreme Court of Canada has long held that violations of human rights cannot be justified on the basis of cost. The expense of guaranteeing human rights cannot justify their infringement or curtailment. Moreover, in 1993, Prime Minister Jean Chretien, then leader of the Official Opposition, pledged to abide by the Tribunal’s decision.

“Pay Equity Ruling Costly for Ottawa”, *The Globe and Mail*, August 1, 1998.

Daniel Leblanc, “Union Greets Liberal Appeal With Protests”, *The Globe and Mail*, Friday, August 28, 1998 A4

Government of Canada, National Council of Welfare, “A Statement by the National Council of Welfare on Pay Equity for Federal Public Service Workers”, November 1998

299. Despite these reassurances, in August 1998, the federal government announced that would appeal the Tribunal’s decision to the Federal Court of Canada, thus continuing to obstruct the efforts of women civil servants to be paid equitably. The federal government based its appeal of the Human Rights Tribunal ruling on the fact that a decision in another case, *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, supported a different wage assessment methodology than the one endorsed by the Tribunal. However, the Federal Court, Trial Division which decided the *Bell Canada* case, in fact, heard no evidence regarding wage assessment methodology. The decision to appeal prolonged the dispute and flouted long-standing commitments to equality for all women contained within federal law and within the *Convention*. It pitted the government of Canada with its substantial legal and financial resources against the ruling of the Canadian Human Rights Tribunal and the human rights of the poorest of its own employees.

Daniel Leblanc, “Union Greets Liberal Appeal With Protests”, *The Globe and Mail*, Friday, August 28, 1998 A4

Treasury Board Secretariat of Canada, Press Release, “Government of Canada to Appeal Pay Equity Ruling and Move Quickly to Implement Pay Equity in the Public Service”, August 1998

Treasury Board of Canada, Press Release, “Pay Equity: The Government’s Response Press Conference”, Speech by Marcel Masse, President of the Treasury Board, August 1998

300. The federal government’s appeal was heard in 1999 in the Federal Court, Trial Division. The court upheld the Tribunal decision. No further appeals were filed by the Public Service Alliance of Canada and the federal government negotiated a settlement based on the Tribunal decision which was ordered by the Tribunal in November 1999, worth an estimated -4 billion dollars.

301. While many of the payments have now been made to the 230,000 current and former employees affected by the decision, there are outstanding issues regarding equal pay for federal civil servants. In

short, getting to this point has been hard and long, and pay equity has not yet been achieved for all women employees of the federal government.

302. On June 24, 1988, the government of Newfoundland entered into a Pay Equity Agreement with the Newfoundland Association of Public Employees (NAPE) to achieve pay equity by redressing systemic gender discrimination in compensation for work performed by employees in female dominated classes. No payments under this agreement were possible until July 1991 when computation of the requisite wage adjustments was finalized. At this date the government refused to honour the terms of the agreement for payments due up until March 1991 on the basis that provincial fiscal restraint legislation passed after the Agreement prohibited and voided retroactive pay equity agreements. The government position that the restraint legislation extinguished its obligation under the Pay Equity Agreement was recently upheld by the Newfoundland and Labrador Court of Appeal and a constitutional challenge to such government action based on the equality provisions of the *Charter* dismissed by the same court. The result of such government action, evaluated by the provincial Court of Appeal as legally and constitutionally valid, is to deny to female employees of NAPE full redress for acknowledged gender discrimination by the government.

*Newfoundland Assn of Public Employees v. R.*, 2002 NCLA 72

303. It is also worth noting that the existence of pay equity policy or legislation in Canada varies from jurisdiction to jurisdiction. In fact in 2002, only four jurisdictions in Canada provide full protection against wage discrimination. The provinces of Ontario, Quebec, the Yukon territory, and the federal government have legislation requiring public and private sector employers to pay equal pay for work of equal value. Of the remaining provinces and territories, Manitoba provides this protection for public sector workers only. Saskatchewan, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Northwest Territories and Nunavut provide only the guarantee of equal pay for similar work.

### **Disadvantage and Discrimination: Employment Insurance and Maternity and Parental Leave**

304. On March 22, 2001, an Umpire hearing an appeal of a decision by the Board of Referees of the Canada Employment Insurance Act, found that two eligibility requirements of the *Employment Insurance Act* (the “Act”) violated the right of the complainant, Ms. Lesiuk, to be free of discrimination on the basis of sex. In the view of the Umpire, the “eligibility requirements demean the essential human dignity of women who predominate in the part-time labour force because they must work for longer periods than full-time workers in order to demonstrate their work force attachment.” Kelly Lesiuk was denied maternity and parental leave benefits in 1997 because she had not worked sufficient hours in her part-time employment to meet the 700 hour threshold set by the Act. While the Umpire found the relevant sections unconstitutional, he had no jurisdiction to declare the sections invalid. Despite this, the case sends a strong message to the Canadian government that the unemployment insurance system in Canada is discriminatory. This decision reinforces what women and women’s organizations have argued for years, that the system is incapable of providing a reasonable level of income support; that restrictions in accessibility to benefits are unacceptable; that it is discriminatory on the basis of gender, race, disability and other grounds of discrimination; that it does little to offset gender imbalance in the workplace or the home; and it is no longer an “essential public service of reasonable quality” as is required by s. 36 of the Canadian *Constitution*.

*Lesiuk v. Canada (Employment Insurance Commission)* [2001] C.U.B..D. No. 1, CUB 51142, March 22, 2001, at para. 64.

Phillips, P. and Erin Phillips, *Women and Work: Inequality in the Canadian Labour Market* (Toronto: James Lorimer and Publishers, 2000) at 147.

305. In January 1997, the way in which unemployment insurance was delivered in Canada was fundamentally altered. The federal government repealed the *Unemployment Insurance Act*, replacing it with the current Act, and changed entitlement to benefits from a system based on weeks of work to one based on hours of work. Under the old scheme, an individual needed 12 - 20 weeks (depending upon where that individual lived) of insurable earnings within the qualifying period to become eligible for full benefits (including maternity benefits). A week of insurable earnings was a week in which at least 15 hours were worked (or a week in which the claimant had earned at least 20 percent of the maximum weekly insurable earnings).

306. A claimant now needs a minimum of 700 hours of insurable earnings within the qualifying period. This is equivalent to twenty 35-hour weeks or approximately 46.6 15-hour weeks. For most individuals who work less than 35 hours a week, eligibility requirements are significantly more stringent now than they were before. Indeed, the more part-time an individual's work is, the longer it will take for that worker to meet eligibility requirements. Whereas, previously, individuals working between 15 and 34 hours per week qualified for benefits after twenty weeks, these same individuals must now work between 20.5 and 46.6 weeks in order to accumulate the required 700 hours, and anyone working less than 14 hours a week cannot accumulate the required number of hours because it must be done within the qualifying period of 52 weeks.

307. The Act also erects obstacles for people who have been out of the labour force for a long period. The new rules stipulate that such individuals need 910 hours of paid employment (the equivalent of 26 weeks of full-time work or a much longer period of part-time work) to qualify for benefits.

Iyer, N., "A Re-examination of Maternity Benefits", in Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168, at 171-172.

Paul Phillips and Erin Phillips, *Women and Work: Inequality in the Canadian Labour Market* (Toronto: James Lorimer and Publishers, 2000) at 142, quoting from Jane Pulkingham, "Remaking the Social Divisions of Welfare: Gender, 'Dependency,' and UI Reform" (1998) 56 *Studies in Political Economy*.

308. These changes in eligibility requirements have hit working women disproportionately hard. Women, more than men, work in those temporary, part-time, seasonal, and/or unstable work situations—the secondary labour sector—where meeting these eligibility requirements is most difficult. They are also those employees especially vulnerable to work reduction and lay-offs. Additionally, the increased qualifying hours mandated for people returning to the labour force after a long absence from it disproportionately impact women. Women are excluded from benefits they would have had under the previous legislation because they take time off to raise children. Women's child rearing and caregiving

responsibilities often result in precisely the kind of workforce absences and working patterns penalized under these rules. As well, the expansion in female self-employment in Canada is also responsible for an increase in the number of unemployed women ineligible to receive benefits.

Phillips, P., and Erin Phillips, *Women and Work: Inequality in the Canadian Labour Market* (Toronto: James Lorimer and Publishers, 2000) at 144.

309. Aboriginal women, women of colour, immigrant women, and women with disabilities are overrepresented in the “marginal” labour force. Thus, changes to unemployment insurance—as they affect both unemployment insurance benefits and maternity benefits—have exacerbated inequities already present in these women’s involvement in the paid labour force.

Iyer, N., “A Re-examination of Maternity Benefits”, in Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 173.

National Association of Women and the Law, *Bill C-12: An Act Respecting Employment Insurance in Canada: The Impact on Women* (Ottawa: National Association of Women and the Law, 1996)

310. In addition, the benefit rate or percentage of insurable earnings paid out in benefits is 55 per cent. This is the lowest percentage in the history of the unemployment insurance in Canada, and is particularly hard for women and men taking maternity and parental leave which also imposes a cap on the level of benefits one is able to receive.

311. Maternity and parental leave is also administered under the Act. On June 29, 2000 *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on 28 February 2000* (Bill C-32) received Royal Assent. Amongst other provisions flowing from the February 28, 2000 Federal Budget (the “Budget”), Bill C-32 included changes related to *Employment Insurance* maternity, parental and sickness benefits. These changes came into force December 31, 2000.

312. The key changes are as follows: parental benefits were increased to 35 weeks for both biological and adoptive parents. In addition to the 15 weeks of maternity leave (which remains unchanged), a maximum of 50 weeks of combined benefits are now available. The hours required to qualify for benefits will be reduced to 600 hours in the previous 52 weeks for parents of a child born or placed in their care for adoption on or after December 31, 2000. If the parents share parental benefits, only one two-week waiting period without benefits must be served. Parents will be able to retain some work attachments while receiving parental benefits. The recipient can earn the greater of \$50 or 25% of their weekly parental benefits without incurring any deduction. If the benefits are shared, they may be taken at the same time, consecutively or on alternating weeks, and may be spread out over the 52 week period following the birth or adoption.

Benefits World, *Parental Benefits and the Employment Standards Act*. at: [http://www.benefitsworld.com/AA/GovBen/EmpIns/Parental\\_Leaves.asp](http://www.benefitsworld.com/AA/GovBen/EmpIns/Parental_Leaves.asp) (19 March 2001).



Human Resources Development Canada, “Changes to Maternity and Parental Benefits December 31, 2000” at : <http://www.hrdc.gc.ca/insur/claimant/10-00.shtml> (19 October 2000).

313.Despite the positive changes this amendment brings about, the system remains flawed. First, these changes have been brought into force without corresponding changes in the workforce. The gendered imbalance in pay, division of paid and unpaid work and responsibility for care-giving remains unaffected. There is nothing to encourage parents to share the parental leave provisions. Second, the benefit level of 55 per cent remains in place, making it difficult for anyone but a person with a partner with substantial earnings to be able to stay at home for the duration of the benefit period. Third, the change supports family care of children and has not been accompanied by new supports for public child care provision.

314.In addition, extended leave is only available to those who qualify for benefits under the Act. All of the eligibility difficulties remain in place. Fewer women qualified for maternity benefits in 1997, the first year these changes took effect, than in 1996, when the old legislation was still in place.

315.The regime remains profoundly gendered. There is no reason in Canada to keep benefits for maternity and parental leave tied to employment. If the goal is really that “nothing is more important than for parents to be able to spend the maximum amount of time with newborn children in the critical early months of a child’s life” then a program to support all mothers and fathers, natural and adoptive, of new-borns must be devised.

McIlroy, A., “Mothers who work part time lose benefits under UI changes”, *The Globe and Mail*, 19 March 1999.

316.Recent government statistics, released March 18, 1999 by the federal Department of Human Resources Development, document the discrimination inherent in the *Act*, confirming the legislation’s negative gender-specific impact on women. The Report shows that the number of women who successfully claim unemployment insurance benefits has gone down by 20 percent while the number of men has been reduced by only 16 percent. In its 1999 report *Left Out in the Cold: The End of UI for Canadian Workers*, the Canadian Labour Congress showed that only 32 percent of unemployed women got unemployment insurance benefits in 1997. Only 11 percent of women under 25 are receiving unemployment insurance benefits compared to 18 percent of men. Part-time female workers continue to pay premiums but, the data show, are disproportionately not able to claim unemployment benefits.

Greenspon, E., “UI changes hit youths, women”, *The Globe and Mail*, March 18, 1999, A1.

McIlroy, A., “Mothers who work part time lose benefits under UI changes”, *The Globe and Mail*, 19 March 1999, A3.

Canadian Labour Congress, *Left Out in the Cold: The End of UI for Canadian Workers* (Ottawa, 1999)

317. Meanwhile, the Employment Insurance Account has an accumulated surplus—reported to reach 40 billion dollars in 2003. Instead of increasing benefits to unemployed workers, who pay into this fund, the government is now considering cutting premiums for both employees and employers. Inadequate provision of unemployment insurance benefits by the federal government has placed a huge strain on provincial social assistance programs since individuals unable to collect federal unemployment insurance are forced to rely on provincial income assistance programs. Provincial income assistance programmes have considerably lower benefit rates and are more punitive and regulatory of their recipients. Thus, unemployed women, who are those disproportionately shuffled to reliance on provincial income programmes, face inadequate income levels and social stigmatization.

The National Anti-Poverty Organization, *Canada Gets a Failing Grade*, 16 June 1998.

Statistics Canada, *The Daily*, October 9, 1998

Statistics Canada, *The Daily*, August 25, 1998.

## **VIII. Violation of Article 12: Equality in Access to Health Care**

### **Women, Poverty, Race and Health**

318. Gender, poverty and race are major determinants of health and also affect access to health care in Canada. As previously submitted, poverty in Canada is neither gender, nor race, nor disability-neutral. Any attempt to address women's health must recognize this structural inequality. Canadian women living in poverty are more likely to experience acute and chronic ill health, are more susceptible to infectious and other disease, have an increased risk of heart disease, arthritis, stomach ulcers, migraines, clinical depression, stress, breakdown, and are more vulnerable to mental illness and to violence and abuse.

Morris, M., *Women, poverty and Canadian public policy in an era of globalization* (Edmonton: Canadian Research Institute for the Advancement of Women, 2000) at 1-3.

319. The structural inequality women face in Canadian society has had a particularly harsh effect on the health of Aboriginal Women. Aboriginal people are more likely to face inadequate nutrition, substandard housing and sanitation, poverty, discrimination, racism, violence and high rates of physical, social and emotional injury, disability and premature death.

Report of the Royal Commission on Aboriginal Peoples, Volume 3, *Gathering Strength* (Ottawa: Government of Canada, 1996) at 107, 120.

### **Aboriginal Women's Health**

- First Nations women suffer from reproductive tract and breast cancers at rates at least double the national average;

- Life expectancy for First Nations women is 11 years less than that of the general Canadian female population;
- 75% of Indigenous girls under the age of 18 have been sexually abused and 80% of Indigenous women have experienced violence;
- Infant mortality rates for First Nations are twice the national average and post-neonatal mortality rates (which are more sensitive to socioeconomic and environmental factors) are three times the national average;
- Overall, the number of AIDS cases in Canada has leveled off, but it has risen steadily among Indigenous Peoples in the last decade – the proportion of Indigenous women among the adult AIDS cases is almost twice as high as non-Indigenous women (12.6% vs. 6.9%).

Lea Nicholas-MacKenzie, *Forest Maidens: Myth, Racism and Indigenous Women in Canada*, unpublished paper, 2001.

320. First Nations women continue to receive piece-meal services because of the lack of clarity and competing interests of federal, provincial and territorial governments regarding their constitutional, moral and financial responsibilities for health care. Roy Romanow in his recent Royal Commission inquiry into health care identified this unwillingness to assume jurisdiction and responsibility on the part of both levels of government as a continuing problem affecting the health of Aboriginal people.

R.J. Romanow (Commissioner), *Commission on the Future of Health Care in Canada*, Chapter 10 “A New Approach to Aboriginal Health”, at 212.

321. There is also growing evidence that the experience of racism can have a pervasive and negative impact on the health and well being of Canadian women of colour. The failure to deliver healthcare services in a culturally appropriate, anti-racist manner contributes to poorer health for this group. The failure is particularly apparent in the context of the need for sensitive and appropriate care for Black women and women of color who face the multiple oppressive forces of racial and sexual discrimination.

322. In general, health care services in Canada are directed toward the achievement of improved health, disease prevention, addressing injury, controlling threats to one’s life and influencing social conditions in order to ensure access to healthcare. These goals enable the general community to realize optimal health and quality of life as well as guide healthcare professional in the provision of health programs and services most appropriate for the clients they serve. However, many women of colour from different communities face barriers when seeking access to health services. Many of these women’s needs do not fit easily into Canada’s systems of healthcare delivery, which is based primarily on a bio-medical, mono cultural model. Due to this fact, Black women and women of color are utilizing healthcare services less and receiving critical diagnosis and treatment significantly later than other populations. This is due in large part to the cultural, linguistic, racial, gender and class barriers embedded within this system.

Women’s Health in Women’s Hands, unpublished Report on Racism and Women’s Health (Toronto, Women’s Health in Women’s Hands, 2001)

## **Cuts to Health Care**

323. In Canada, provincial governments provide health care under provincial health insurance systems. The federal government provides financial support to the provinces in exchange for compliance with the national standards set out in the *Canada Health Act*. The *Act* binds the federal government, by defining the conditions which must be met before provinces receive funding. The *Act* requires provinces to ensure these standards:

- accessibility: provide reasonable access to health care without financial or other barriers;
- comprehensiveness: cover all medically necessary hospital and medical services;
- universality: cover all legal residents of a province (after a three-month residency);
- portability: entitle residents to coverage when temporarily absent from their province or when moving between provinces; and
- public administration: administer health plans by an agency of the province on a non-profit basis.

324. Although the *Act* specifies that Provinces “must” satisfy the conditions, the *Act*’s enforcement clause is discretionary. The federal government has discretion to provide funds even in cases of non-compliance. The federal government has never withheld funds for provincial non-compliance with the conditions, despite the Auditor General’s 1999 report which found there to be suspected cases of provincial non-compliance. As noted below in the case of access to abortion services, there is a need for the federal government to enforce the standards of the *Act*.

Choudhry, S., “Bill 11, The Canada Health *Act* and the Social Union: The Need for Institutions” 2000(38)(1) *Osgoode Hall Law Journal* 39 at 43-59.

Day, S., and Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women, 1998) at 13.

325. In 1995, the Federal Government announced major reductions in the federal cash transfers for health care, education, and social services. As a result, many provinces introduced major cuts in health spending. Some provinces cut back services or increased user fees; other provinces de-listed certain health services by removing them from coverage under the public health insurance system (for example, eye care, home care). In September 2000, the Federal Government announced new investments in the Canadian Health and Social Transfer (CHST). However, to date federal transfer payments have not risen again to 1994 levels.

326. Women are most affected by the government cutbacks and increased personal expenditures related to health services, because they do not have the same financial resources. They are also less likely to have supplementary health insurance coverage through their paid employment. As a result, women face greater financial barriers when health care costs are shifted to users.

Statistics Canada, *Low-Income Persons, 1980 to 1997*, Table 5.

National Council of Welfare, *Poverty Profile 1996*, 1998.

Status of Women Canada, Women and Men in Canada, A Statistical Glance, at 15

327. There have been some developments that support women's health, including the development of the federal government's *Women's Health Strategy* in 1999, which includes the funding of Centres of Excellence for Women's Health and the Canadian Women's Health Network. However, although Health Canada recognizes gender as a determinant of health, and the *Strategy* claims to promote an understanding of gender as a critical variable in health, in reality, there has been little effective impact on attitudes or policy.

328. A decade of reduced federal funding, provincial reforms to the health system, and increased privatization of health delivery services, has been detrimental to women's well-being. Key pieces of health reform which negatively impact women include:

- reducing hospitalization and institutional care
- shifting from hospital care to home and formal/informal community-based care.
- devolving health care — first from the federal to provincial level - and then from the provincial to regional levels. Voices of women are not usually well represented on boards or in senior management at the regional level.
- privatization of the delivery of health care services. The federal government's decreasing commitment to health funding over the past decade is a factor that has motivated privatization. The move to private funding appeals to the provinces that struggle to maintain the services and programs they previously cost-shared with the federal government.

National Coordinating Group on Health Care Reform and Women, *Women and Health Care Reform*, 2000 at 4-5.

Armstrong, P. and H. Armstrong., *Women, Privatization and Health Care Reform: The Ontario Case* (Toronto: National Network on Environments and Women's Health, 1999).

### **Women and Caregiving**

329. There has been limited analysis of the additional care-giving burden that cuts to health care spending and privatization of health care spending will have on women. Women are the majority of paid institutional health care workers, paid community care workers, and unpaid family caregivers. The health care system continues to be subsidized by the notion that caregiving is an extension of women's "natural" role. The assumption that women family members will unquestioningly take on the work involved when hospital care is reduced and other health care services are cut reinforces traditional gender roles and can have a negative impact both on those needing care and those providing it.

330. The issues related to women and caregiving are complex. Women who are informal caretakers are more vulnerable to poverty, isolation and declining health. The Canadian Women's Health Network reports that two-thirds of unpaid Canadian caregivers work outside the home. Twenty percent of these caregivers report health effects, and forty percent incur personal expenses. Employees who are informal caregivers can experience career and financial losses, fewer opportunities for workplace advancement, and loss of benefits and pensions.

Canadian Women's Health Network, 2000

Janzen, B. *Women, Gender and Health: A Review of the Recent Literature*, Prairie Women's Health Centre of Excellence, 1999.

331. Women's burden as paid and unpaid caregivers has been increased under health reform. Paid caregivers are expected to perform a greater number of tasks with fewer staff in workplaces characterized by stress and uncertainty. This pressure is aggravated by the demands of balancing work in the paid labour force with unpaid work in the home. Paid home care workers are often immigrant women who are members of visible minority groups. The work is low-paying and provides few opportunities for advancement. The work of these women is devalued because of their sex and their race.

Prairie Women's Health Centre of Excellence, Action Plan for Women's Health in Manitoba and Saskatchewan, 2000.

### **Access to Abortion**

332. The fundamental right to found a family or to choose to have no children can be, for women, a matter of life and death. Laws, social attitudes and traditional values that impair women's reproductive decisions reduce their right to protect their own lives and health, and those of their children. Women's reproductive rights embrace not only the right to decide the number and spacing of their children, but also the right to the highest standard of physical and mental health, including sexual and reproductive health, and the right to make decisions about their reproductive and sexual lives without the threat of discrimination, coercion, or violence.

333. However, in a society still dominated by male legislators and medical professionals, Canadian women continue to experience social pressures to fit into the accepted gender roles regarding their fertility. As a result, women face a range of restrictions, even under existing laws and regulations, in exercising their reproductive freedom and more restrictions continue to arise in the form of proposed anti-choice legislation.

334. For Canada to comply with *CEDAW* rights it must accept that reproductive choice includes access to safe legal abortion, as an integral part of reproductive health. The inability of women to exercise choice during her reproductive years is a direct threat to her health and well being.

### **Canada's Non- Compliance**

335. In January of 1988, the Supreme Court of Canada struck down the existing abortion law in *R. v. Morgentaler*. Until that time, the *Criminal Code* prohibited abortion unless it was authorized by a committee of three doctors on the basis of the physical or mental health of the woman. The Supreme Court of Canada found this provision to be a violation of s. 7 of the *Charter* which guarantees that no person shall be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. Abortion was considered to be a decision to be made by a woman and her doctor on the same basis as any other required medical procedure under the *Canada Health Act*.

336. However, to-day, abortion is the only medical procedure in Canada that does not meet the most basic requirements of the *Act* in terms of compliance with the five standards of accessibility, comprehensiveness, universality, portability and public administration.

337. P.E.I. offers no abortion services to women except in extreme cases where it threatens the life of a woman. The women of that province face considerable hardship in seeking abortions in other provinces.

338. New Brunswick requires the consent of two doctors for a hospital abortion although the use of Therapeutic Abortion Committees in the 1969 abortion law, was struck down by the Supreme Court Decision of 1988.

339. The funding of medical services under medicare is determined by provinces in conjunction with the physicians by ruling certain treatments as 'medically required'. In the case of abortion, the procedure is deemed medically required and is covered under medicare when performed in hospitals but not in private clinics. This is a direct violation of Health Canada policy, governing the implementation of the *Canada Health Act*, when it states that all "medically required procedures" are to be covered under medicare, whether performed in a hospital or a free standing clinic. As a result, in cases of long waiting lists and unavailability of services locally - women who can afford clinic services can obtain them and those who cannot are denied care.

340. Access to clinic funded abortion in Nova Scotia, New Brunswick and Manitoba and Quebec is restricted to women with the means to pay, as the governments of these provinces continue to refuse to cover costs under medicare. In addition, Alberta and Ontario impose quotas on the number of abortions they will pay for under medicare in private clinics.

341. Abortion care is listed as an excluded service, i.e. deemed not medically required along with cosmetic surgery, in almost all provincial and territorial reciprocal billing agreements, forcing women to pay personally for their care in another province.

342. There is a marked decline in trained medical personnel in abortion care. The majority of Canadian medical schools do not include training in abortion procedures, relegating it to optional training at the residency level.

343. Hospitals are currently allowed to set their own policies around providing abortion care. Such care is now largely limited to urban centres, which means that rural and northern women have to travel long distances at considerable expense. Rural women therefore, are especially disadvantaged in their attempt to access abortion.

344. Growing anti-abortion control over public hospitals through mergers with religious institutions has precipitated the removal of not only abortion care, but also reproductive health services including birth control and family planning counseling.

345. Harassment and intimidation of abortion providers by anti-choice demonstrators at clinics and hospitals is on the increase. Doctors and clinic staff are being targeted with death threats. An anti-abortion web-site boasts a "hit list" of doctors who have been killed, wounded or who are working as abortion providers. The site lists the doctors license numbers, the names of their children, and their private home addresses. Clinics across the country have been forced to take out private injunctions to ensure the protection of their staff and clients and in British Columbia, provincial legislation had to be put in place to protect pregnant women and abortion providers from constant anti-choice harassment and attacks at women's health centres.

346. Anti-abortion pregnancy counseling centres are springing up in communities across Canada. These centres attract unsuspecting women seeking information on abortion options. False and damaging medical information about abortion is given to these women and in addition, they are often subjected to unnecessary tests, which pushes them further into their pregnancy. These centres are being allowed to flourish and in some cases receive government funding, despite laws regulating medical practice.

Canadian Abortion Rights Action League, *Special Report to FAFIA*, (Toronto: CARAL, 2001)

347. The federal and provincial governments can ensure that all Canadian women have equal and adequate access to abortion service, and that Canada is in compliance with Article 12 of *CEDAW* by taking the following actions:

- ensuring that each province and territory has fully insured therapeutic abortion services, whether performed at hospitals or free-standing clinics.
- striking abortion from the list of procedures excluded from the reciprocal billing agreement. It is intolerable that women who move within Canada cannot access abortion services in the first three months of residency in their new province/territory. Similarly, women who must travel outside their province/territory of residence to access appropriate abortion services should also be fully covered within reciprocal billing agreements.
- moving quickly to protect the rights of women to access abortion, and of physicians to provide abortion, by putting an end to the picketing of clinics and harassment of physicians, staff and clients. To this end strictly enforced "bubble zones" must be placed around abortion facilities and doctors' offices and homes in every community where these are needed. Such zones must be sufficiently large to allow women unimpeded access to hospitals and clinics, and physicians unimpeded access to their place(s) of work and homes.
- assigning adequate resources to ensure the arrest of any and all persons responsible for the violence against abortion providers and enforce laws pertaining to hate literature.



## IX. Violations of Articles 15 and 16: Equality Before the Law and Equality in Marriage and Family Law

### Women's Rights Upon Dissolution of Marriage

348. One factor which contributes to the economic inequality of women is the financial consequences of the dissolution of marriage. In 1991, over 80% of single parent families were headed by women and 57% resulted from divorce or separation. In 1995, single mothers under the age of 65 had a poverty rate as high as 57.2%. In 1990, the Canadian Department of Justice conducted a survey which revealed that after divorce, 46% of women lived below the poverty line compared to 10% for men. Men generally maintain their standard of living post-divorce, whereas women and children often experience an immediate drop. Despite the 1992 decision of the Supreme Court of Canada in *Moge v. Moge*, in which the Court acknowledged the economic disadvantage of women that resulted upon dissolution of marriage, assessment of the actual quantum of spousal support is still a question of judicial discretion, and the pattern of women's post-divorce economic inequality has not substantially changed.

349. In a detailed study of case law since the *Moge* decision, Carol Rogerson notes that spousal support awards have been more generous. Nonetheless, confusion exists amongst judges with respect to the basic principles for determining spousal support. The compensatory message of *Moge* with respect to "the value of women's work in the home and their entitlement to compensation from their husbands" seems to have been diluted. Moreover *Moge* demonstrates how litigation focuses on individual relationships rather than the larger societal context of women's economic insecurity. While *Moge* was generally considered a victory that recognized the gendered division of labour within the family, more is required to change the financial consequences of women's roles and their entrenched economic dependence and inequality.

Justice Claire L'Heureux-Dubé, "Economic Consequences of Divorce: A View from Canada" (1994) 31:2 *International Journal of Law and the Family* 451  
*Moge v. Moge*, [1992] 3 S.C.R. 813

Rogerson, C., "Spousal Support After Moge" (1997), 14 (3) C.F.L.Q. 280, 283, 303-304, 385-387.

350. In any case, the *Moge* decision affects only those divorces which are contested. Typically only 5% of divorces are contested; the rest are settled through a negotiated agreement. And, only 7 per cent of women without children receive support payments while 35% of women with children receive support (child and spousal) payments. Thus the issue of economic support post-separation demands a more systemic approach. Privatized obligations will never address the endemic poverty of Canadian women and children: more comprehensive socio-political changes are needed. As well, as one academic expert suggests, the negotiation process disadvantages women, and this disadvantage is exacerbated by the way in which legislation interacts with negotiations:

...spousal support provisions of the Divorce Act, 1985, together with the courts' approach to the issue, will systematically operate to place the support claimant in a disadvantageous position in negotiations. The law does so by characterizing support as a redistribution of the respondent's income at the court's discretion, by

placing an onus on the claimant to move the court to order such redistribution, and by the vagueness of its provisions and heavy reliance upon judicial discretion to decide individual cases. This vagueness of formulation and uncertainty of outcome, in distinct contrast to the legislative provisions and settlement patterns on issues of property division, leads the parties to view the status quo as the reference point for negotiations – that is, with support at zero and each spouse in full control of his or her own income. The result is that the support claimant will be in the domain of gain and the respondent in the domain of loss for any amount that is greater than zero. By being placed in the domain of gain with respect to spousal support, the support claimant is put at a significant disadvantage in negotiations. It makes her more risk-averse, and at the same time less loss-averse and more likely to make concessions. The respondent, being in the domain of loss, will be more loss-averse, more risk-seeking, and more concession-averse. This by itself will likely lead to the respondent exacting favourable outcomes. But the risk preferences so determined also operate to the disadvantage of the claimant in other ways.

...In sum, the support claimant's bargaining power will be significantly weakened in systemic ways by the structure and operation of the law. Such disadvantage could be prevented or reduced by a reformulation of the support provisions in such a way as to provide a very clear formula conferring a time-limited entitlement to a percentage of the future income of the primary wage earner in the family, in line with the notions of economic partnership espoused in the *Act* and in accord with the compensatory model.

Craig Martin, "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56(1) U.T. Fac. L. Rev. 135

D. Galarneau and J. Sturrock, "Family Income after Separation", 1997) 9(2) Perspectives on Labour and Income 18 at 21-22.

D. Galarneau, "Income after Separation – People without Children", (1998) 10(2) Perspectives on Labour and Income 32 at 35

351. While the *Divorce Act* provisions regarding the custody and access of children after a divorce are drafted in gender neutral language, the interpretation of these provisions by legal professionals, mediators and judges also has a discriminatory impact on many women that is in violation of Article 16(1)(c).

352. Section 16 of the *Divorce Act* provides that a court may, on application by either or both spouses make an order respecting the custody of or the access to any or all children of marriage. Paragraph 16(8) provides that the court shall "take into consideration only the best interest of the child of the marriage". However par. 16(9) provides that in making this order "the court shall not take into consideration the past conduct of any

person unless the conduct is relevant to the ability of that person to act as a parent". Further, par. 16(10) provides that in making an order, "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interest of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact".

353. Widespread criticism of the "maximum contact" presumption and the "friendly parent" rule has been raised. Indeed, they are based on the inaccurate assumption that maximum contact with both parents is always beneficial for all children, and that children always suffer if they do not have extensive contact with the non custodial parent. A recent study done by Bernardini and Jenkins for the Department of Justice indeed concludes that there is little support for the assertion that children experience maladjustment following divorce because of the absence of their non-resident parent alone. Troubled parent-child relationships and lowered family income following divorce have a negative impact on child adjustment, and the researchers conclude that the association between parental conflict and child maladjustment is unequivocal. And as many experts have observed, promoting contact with both parents can often, especially in high conflict cases, expose children to increased levels of parental conflict. Recent research reveals that children exposed to wife abuse are at greater risk of suffering various types of physical harm (Edelson, 1999) and psychological, behavioural, academic and emotional problems, as well as problems with social functioning (Dauvergne and Johnson, 2001). Thus, here are some cases where no access may be appropriate, such as situations where there is sexual abuse of children, violence against the mother, or such high conflict between the parents that continued contact is toxic for the child. Indeed, the impact on women and children of the maximum contact presumption has been very negative in cases where there is spousal violence, child abuse or incest. As these authors write:

"It is undeniable that where there is violence in the home, the maximum contact principle places women and children at greater risk . It does so, we argue, by placing a greater emphasis on the rights and the interests of the perpetrators than the rights and the interests of the victims of violence" (Cohen and Gershain, p 129)

Silvia Bernardini and Jennifer Jenkins, "An Overview of the Risks and Protectors for Children of Separation and Divorce' Department of Justice Canada, 2002-FCY-2E.

Dauvergne, M. and Johnson H., (2001) "Children witnessing family violence". Juristat (Statistics Canada, 21(6).

Edelson, M (1999) "Children witnessing adult domestic violence" Journal of interpersonal violence 14(8):839-870.

Jonathan Cohen and Nikki Gershain, "For the Sake of the Fathers? Child

Custody Reform and the perils of Maximum Contact", (2001)19.1 Family Law Quarterly 121.

354. In addition, women who object to joint custody or frequent or unsupervised contact by the other parent, in cases where a father has a history of abusive behaviour, risk being labeled as "unfriendly" and losing custody. The friendly parent rule, by giving legislative endorsement to the pre-eminence of continued contact with the non custodial parent serves to reinforce the difficulties that parents - most often mothers- have in protecting their children from sexual abuse. As one author writes:

" In the case of child sexual and/or physical abuse, the prioritizing of paternal access rights has had devastating effects. Mothers attempts to restrict paternal access are consistently viewed as selfish and vindictive, or based on exaggerated or unfounded claims. The best interest of the child" become the rights of the father to exercise authority over his children and subsequently, his former spouse/partner. In many situations, this authority or control can be far more pervasive after separation than during the spousal relationship. Even in spousal relationships relatively free from patriarchal organization, upon dissolution, the present custody and access regime has created the opportunity for paternal/patriarchal authority and control to flourish". (Bourque, 1995: 24)

Dawn Bourque, "Reconstructing the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada", 10 CJLS/RCDS 1

355. The provision of the *Divorce Act* that prohibits evidence of "past conduct" is also often used to screen out evidence of wife abuse in child custody and access proceedings. A recent report found that although research shows that between 40% and 60% of separating partners disclose abuse, the information is not included in most files. The author concluded that information about abuse and irresponsible parenting is excluded or omitted at each stage in the legal process: during the lawyer-client interviews, during legal interpretation of those interviews, during preparation of court documents, during negotiations between lawyers, and during the presentation of evidence to judges. Thus by the time cases reach judges for decision or confirmation of consent" orders, much of the evidence of abuse and irresponsible parenting has been screened from the process (Neilson, 2001).

Linda C. Neilson (2001) "Spousal Abuse, Children and the Legal system", Muriel McQueen Fergusson Center for Family Violence Research, University of New Brunswick.

356. In a review of Canadian family law cases published from 1997-2000, Shaffer and Bala concluded that judges routinely grant abusive men unsupervised access to their children. They state that in some of the cases in which unsupervised access orders were made, the decision to allow unsupervised access seemed problematic because it appeared to subject the child to the same risks of harm that exist when an abusive man is granted

custody. This not only endangers the children, but it forces women to maintain ongoing relations with an abusive ex-spouse, thereby exposing them to further risks of control, coercion or violence.

357. These decisions are being taken by Canadian courts in the context of a rising emphasis on the rights of the fathers, and an increasing preference towards joint custody or shared parenting. Indeed, while joint custody was awarded in 14% of custody awards in 1990, that proportion was up to 30% in 1998, and it has reached 37% in the year 2000. This trend reflects in part the increased use of mediation, as mandated by the 1985 *Divorce Act* (section 9). Indeed, studies have shown that parents who attend mediation are four times more likely to opt for joint legal custody than those using the purely legal process (Richardson, 1988). Another factor explaining this tendency are the loud and ubiquitous claims presented by the "fathers rights" advocates, who have been arguing that mothers selfishly deprive fathers of contact with children, and that fathers are discriminated against by judges (Boyd and Young, 2002). Although there is no research to support this claim, members of the Special Committee on Custody and Access of the House of Common and the Senate were persuaded by the fathers rights groups to recommend harsh penalties (including criminal sanctions) for mothers who interfere with fathers' access rights, or who raise "false" allegations of abuse. Most importantly, the Special Committee recommended that the *Divorce Act* be radically modified by including a presumption of shared parenting (Special Committee, 1998).

James Richardson, (1988) Court-based Divorce Mediation in Four Canadian Cities: an Overview of Research Results (Ottawa: Min. of Supply and Services Canada).

Susan B. Boyd and Claire F.L. Young, (2002) Who Influences Family Law Reform? Discourses on Motherhood and Fatherhood in Legislative Reform Debates in Canada", *Studies in Law, Politics and Society* 26.

Special Joint Committee on Child Custody and Access (1998) For the Sake of the Children (Ottawa: Parliament of Canada).

Statistics Canada (1998) Divorces, 1998, cat. No. 84F0213XPB

Statistics Canada, "Divorces, 1999 and 2000" , *The Daily*, Dec 2, 2002.

358. The increasing focus on joint custody or shared parenting relies on a discourse that posits the formal equality between fathers and mothers, but it disregards the very real, ongoing social and economic inequality of women within the family and in society. As Susan Boyd writes, this approach has a discriminatory impact on women:

The gendered impact of this type of formal equality approach to parenting after parents of a child separate is significant - in particular it's impact on women. Mothers tend to retain responsibility for childcare labour, whilst fathers retain the ability to make or veto decisions affecting the child) As Delorey argued in 1989,

the 'increasing acceptance of joint legal custody ... focuses on the legal right to control women and children rather than the legal obligation to care for children. In addition, once a joint legal custody arrangement such as this is in place, it becomes more difficult for the parent with primary responsibility for the children to make decisions concerning their children or to move to another geographical location.

Susan B Boyd, (2003) *Child Custody, Law and Women's Work*, Don Mills, Oxford University Press.

359. It is ironic that the most recent trends in child custody law, that have such a discriminatory against women, have been justified on the basis of formal equality arguments. As these authors write:

"In an attempt to overcompensate for potential maternal bias, courts and the helping professions have developed an aversion to valuing the qualities that women bring to parenting- particularly the nurturing role. Thus, when applying the best interest test, factors that are seen to result in awarding custody to mothers are looked upon with suspicion. This suspicion has the ironic effect of creating a pro-father bias in the law. This fetish of equality of result stems from a failure to distinguish "sexist" applications of the best interest standard from "gendered" ones. A sexist application of the test would intentionally grant custody to mothers simply because they are women. A gendered application of the test, by contrast, would grant custody to mothers not because they are women, but because their primary caregiving role warrants this result". (Cohen and Gershbnain, 2001: 155-156)

Jonathan Cohen and Nikki Gershbnain, "For the Sake of the Fathers? Child Custody Reform and the perils of Maximum Contact", (2001)19.1 Family Law Quarterly 121

360. Even the government of Canada, in its law reform process, seems to have completely avoided any form of gender based analysis, or any careful examination of how current trends in family law impact on women (Boyd, 2003; OWNCCA 2001). This is done despite the fact that the Canadian government has specifically and formally committed itself to doing a gender based analysis of all law reform initiatives, in its 1995 Federal Plan for Gender Equality, and despite repeated requests to this effect from women's groups, such as the National Association of Women and the Law (NAWL, 1998). As a consequence, current trends in family law have had the effect of entrenching women's inequality and, often, exacerbating women's vulnerability to male control and violence in the family. As one author puts it:

"And so at the end of the 20th century, women in Canada find themselves generally poorer; afraid to raise allegations of sexual abuse for fear of losing custody of their children; less financially able to litigate custody,

support or property issues, either privately or through dwindling legal aid programs; facing the possibility of mandatory mediation over custody and other issues with spouses, regardless of whether there has been emotional or physical abuse in a relationship; generally unable to relocate without the agreement of their ex-spouse or a full-scale custody fight; unable, as primary caregivers, to make major decisions about their children, without permission and approval of non-custodial parents; and for some, the prospect of raising children without the assistance of a non-custodial parent and without any child support payments" (Gordon, 2001: 96).

Susan B Boyd, (2003) *Child Custody, law and Women's Work*, Don Mills, Oxford University Press.

Ontario Women's Network on Child Custody and Access, Brief to the Federal Provincial Territorial Family Law Committee on Custody, Access and Child Support, (2001) Ottawa, National Association of Women and the Law, June 2001, available online at: [www.owjn.org](http://www.owjn.org) <<http://www.owjn.org>>.

National Association of Women and the Law, *Custody and Access: A NAWL Brief to the Special Joint Committee on Child Custody and Access*, March 1998.

Pamela A. Gordon, (2001) "Child custody: the right choice at the right price" 26 *The Colorado Lawyer* 1997 at 67.

361. Finally, cuts to legal aid and trends that increasingly favour mandatory mediation are preventing women from having access to the mechanism of justice, and are increasingly "privatizing" family law. With less access to justice, women are placed in a more vulnerable position vis-à-vis their spouses, and are more apt to be under his power and control. As this author writes:

Recent custody case law, as well as the relevant legislation that guides it, indicate a movement toward a re-privatization of "family". For separated and/or divorced women with children, these privatizing tactics serve to perpetuate and even create situations whereby women/mothers and their children remain bound to their former male partners and, to a large extent, subject to their control. Through the re-privatization of the family, women's forced dependence is manifest economically, socially, emotionally and physically and translates into serious limitations on women's freedom.

Dawn Bourque, "Reconstructing the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada", (1995) 10 *CJLS/RCDS* 1, at 3

## **Inequities Between Common-law Couples and Married Couples**

362. Despite the promise of the equality provisions of the Canadian *Charter*, these rights continue to be interpreted by the Supreme Court of Canada in a restrictive and limited manner. In the recent Supreme Court of Canada decision, *Nova Scotia (Attorney General) v. Walsh*, the failure of provincial law [in this specific case the Nova Scotia *Matrimonial Property Act*] to provide the presumption, applicable to married spouses, to common law couples of an equal division of matrimonial property upon dissolution of the relationship was found not to be in violation of the *Charter*. A majority of the judges held that unmarried cohabitants maintain their respective proprietary rights and interests throughout the duration of their relationship and at its end. The Court argued that a decision not to marry should be respected because it also stems from a conscious choice of the parties. The Court, while acknowledging that the freedom to marry is sometimes illusory and that inequities may exist in certain unmarried cohabiting relationships which may result in unfairness on relationship breakdown, maintained that there is no constitutional requirement that the state extend matrimonial protections to those persons. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. As the dissent in this judgment pointed out, this ruling runs directly counter to fact that individuals are often unaware of their legal rights and obligations and do not organize their personal lives in a manner to achieve specific legal consequences. Furthermore, many heterosexual unmarried cohabitants cohabit not out of choice but out of necessity: choice is denied them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation. And this exploitation is particularly salient for women whose economic disadvantage upon dissolution of relationships is well-documented. This decision also fails to take account of women's economic invisibility and dependence in many heterosexual relationships—both married and common law. The extension of the presumption of equal division of matrimonial property to married couples rests on such a recognition. With an increasing number of Canadian heterosexual couples choosing not to marry, the failure to extend a similar protection to common law couples leaves women in these relationships unprotected from the same sort of exploitation and inequality that motivated the protection for married couples. The result is continuation and exacerbation of women's economic inequality, bolstered by the judicial conclusion that the equality provisions of the *Charter* will not address the situation.

*Nova Scotia (Attorney General) v. Walsh* 2002 SCC 83

## **Current Inequities Resulting From Historic “Marrying-out” Provisions**

363. Since the middle of the 19<sup>th</sup> century, Canadian law has defined who is entitled to be registered as an Indian under the *Indian Act*. The federal Department of Indian Affairs and Northern Development maintains the Indian Register, the official list of status Indians. A status Indian is entitled to the benefits of the *Indian Act* and subject to its liabilities. The consequences of such colonial law have been, and continue to be, discrimination against both Aboriginal women and Aboriginal men, but the situation of Aboriginal women has unique, gender-specific and egregiously harmful characteristics.

364. In order to understand how provisions of registration under the *Indian Act* currently discriminate against Aboriginal women, some history is necessary. Prior to 1985, section 12(1)(b) of the *Indian Act*



stipulated that Aboriginal women lost their Indian status if they married non-status men. Such women also lost the right to confer Indian status on their children. By contrast, status Indian men who married non-status women retained their status and, additionally, were able to confer that status on their wives and children. Thus the basic entitlement provision in the pre-1985 *Indian Act* was based on descent through the male line, subject to special rules for illegitimacy and marriage.

*Indian Act*, R.S.C. 1970, c. I-6

365. Because of s. 12(1)(b) of the *Indian Act*, prior to 1985, many Indian women and their children lost the rights and benefits that flow from Indian status. They were no longer entitled to receive treaty payments, could not vote in Band elections, and ultimately, could be forced to leave the reserve. Today, Indian status entitles an Aboriginal person to benefits such as on-reserve schooling, financial support for higher education, health services, and housing.

Report of the Royal Commission on Aboriginal Peoples, Volume 4, *Perspectives and Realities* (Ottawa: Government of Canada, 1996), “Chapter 2: Women’s Perspective” at 24-30.

366. Legal challenges by Aboriginal women to the sex discrimination inherent in these “marrying out” provisions were rejected by the Supreme Court of Canada in 1974. Sandra Lovelace, an Aboriginal woman who lost status by marrying a non-Aboriginal man, brought her case to the United Nations Human Rights Committee alleging a violation of her civil and political rights under the *International Covenant on Civil and Political Rights*. In a decision released in 1981, the Committee held that Canada had violated section 27 of the *Covenant* by denying Lovelace’s right as a person belonging to an ethnic minority to enjoy her culture and language, since the loss of her Indian status meant the removal of her and her children from her reserve community.

Report of the Royal Commission on Aboriginal Peoples, Volume 4, *Perspectives and Realities* (Ottawa: Government of Canada, 1996), “Chapter 2: Women’s Perspective” at 27-33.

*Canada (A.G.) v. Lavell*, [1974] S.C.R. 1349

*Lovelace v. Canada*, [1981] 2 H.R.L.J. 158 (U.N.H.R.C.)

367. In 1985, Canada amended the *Indian Act* and restored status to the Aboriginal women who had lost status through the old legislation’s “marrying out” provisions. As of June 1995, the amended *Act* allowed for the reinstatement of 95,429 persons, more than half of whom were women (57.2%).

Bill C-31, *An Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1<sup>st</sup> Supp. 1985)  
*Indian Act*, R.S.C. 1985, c. I-5

368. However the current legislation still discriminates against certain Aboriginal women, as compared to Aboriginal men. The discrimination results from Section 6 of the current *Indian Act* and is known as the “second generation cut-off” rule. Women who lost status by marrying non-Aboriginal men before 1985 and who are now reinstated under section 6(1) can pass status on to their children, but not

necessarily to their grandchildren. Only if these women's children themselves marry status Indians will the women's grandchildren have status. Thus, only if the grandchildren of women reinstated under the 1985 amendments to the *Indian Act* have two status parents, will the grandchildren themselves be status Indian. By contrast, men who married non-Aboriginal women before 1985 did not lose status and, upon marriage, passed status onto their non-status wives. Their children thus did not need to be reinstated under the new legislation but, instead, had status from birth. Because of this, the status of these men's grandchildren does not depend upon both parents being status Indians. These men's grandchildren will be status Indians even if only one of their parents is a status Indian.

369. In this manner, the current federal law structuring the ability of some women to pass on their Indian status remains premised on past sexist practices favouring descent through the male line and thus continues to discriminate against Aboriginal women.

*Indian Act*, R.S.C 1985, c. I-5

*Report of the Royal Commission on Aboriginal Peoples, Volume 4, Perspectives and Realities* (Ottawa: Government of Canada, 1996), "Chapter 2: Women's Perspective", pages 33-34.

370. Additional problems for Aboriginal women have resulted following the 1985 amendments. As part of the amendments to the 1985 *Indian Act*, Aboriginal bands can now control their own membership through the establishment of a membership code (although the Canadian government retains control of determining "Indian" status). Although initial membership codes have to include those Aboriginal persons, principally women and their children, who were reinstated through the 1985 amendments, bands can subsequently change these codes to exclude such persons. Despite the fact that some Bands have adopted membership codes that disenfranchise and perpetuate discrimination against Bill C-31 reinstates, the Canadian government has chosen not to intervene in disputes about Band membership, stating that these are questions between individuals and their respective Bands. In the name of its respect for self-determination, the Canadian government has refused to *Act* to prevent discrimination against these Aboriginal women, despite their fiduciary duty to Indian people, and despite the fact that Band discrimination against Bill C-31 reinstates results from prior government discrimination.

371. Due to the large number of persons re-instated under the 1985 amendments, some Bands have expressed concern about the lack of a corresponding increase in resources provided by the federal government to meet the needs of such an increase in population for on-reserve housing, health and education. The result is that many women and children who have been reinstated have not been able to move back to their reserves nor have they been able to access the benefits that flow from Indian status.

372. By being forced to live off-reserve, many of the women reinstated under the 1985 *Indian Act* amendments are denied the right to vote in Band council elections because of residency requirements either in the *Indian Act* (section 77(1)) or in Band custom. The denial of participation in Band's political process disproportionately impacts those Aboriginal women who lost their Indian status under the pre-1985 discriminatory provisions of the *Indian Act* and who have been reinstated under the 1985 amendments.

373. In addition, Bill C-31 reinstates are being denied the right to participate in the negotiation of self-government agreements, and to benefit monetarily and otherwise from settlements of land claims. In short, Bill C-31 reinstates are still subject to discrimination that affects their participation in Band governance and community life, and their access to benefits, including education, health, child care, and housing. Women who dispute Band decisions are vulnerable to threats and violence.

*Indian Act*, R.S.C. 1970, c. I-6, sections 77

*Report of the Royal Commission on Aboriginal Peoples, Volume 4, Perspectives and Realities* (Ottawa: Government of Canada, 1996), “Chapter 2: Women’s Perspective,” at 43-50.

374. The Supreme Court of Canada has found that section 77(1) of the *Indian Act* violates the equality provisions of the Canadian *Charter of Rights and Freedoms* by denying to off-reserve members the right to vote in Band elections.

*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

375. However, this decision of the Court has not lead to any perceptible change in Band practices.

376. The UN Human Rights Committee made the following observation at the time of its April 1999 review of Canada’s report under the *International Covenant on Civil and Political Rights*:

The Committee is concerned about the ongoing discrimination against aboriginal women. Following the adoption of the Committee’s views in the Lovelace case in July 1981, amendments were introduced to the *Indian Act* in 1985. Although the Indian status of women who had lost status because of marriage was reinstated, this amendment affects only the woman and her children, not subsequent generations which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.

*Concluding observations of the Committee on Civil and Political Rights: Canada*. O7/04/99. C/79/Add.105 at para 19.

377. The federal government’s failure to ensure and support the full re-incorporation into their Bands of Aboriginal women who have had their status restored has the effect of denying to Aboriginal women their right to participate in Aboriginal self-governance and violates their rights under both Article 15 and 16 of the *Convention*.

### **Aboriginal Women and the Division of Matrimonial Property**

378. FAFIA submits that the current failure of the federal government to provide for fair division of matrimonial property and the possibility of temporary exclusive possession of the matrimonial home upon marriage breakdown for on-reserve Aboriginal women contravenes Articles 16 of the *Convention*. More specifically, the federal government has failed to ensure adequate housing for on-reserve

Aboriginal women and their children by denying them protections available to off-reserve women and children.

379. Under the Canadian Constitution, provincial law governs the division of marriage assets upon marriage breakdown. However, section 91(24) of the *Constitution Act, 1867* confers exclusive legislative authority on the federal government in all matters coming within the subject “Indians, and lands reserved for the Indians.” Thus, with respect to the division of on-reserve property upon marriage breakdown, a court is governed not by provincial family law but by the federal *Indian Act*, which contains no provisions for distribution of matrimonial property upon marriage breakdown.

380. While the land possession system in the *Indian Act* does not prohibit women from possessing reserve property, the cumulative effect of a history of federal legislation which has denied Aboriginal women property and inheritance rights has created the perception that women are not entitled to do so. Moreover, most Aboriginal women live on their husbands’ reserves (until recently this was mandatory by federal law). Thus, it is a matter of historical and current fact that it is more likely to be the male partner who, under law, possesses on-reserve properties. The consequences of this for Aboriginal on-reserve women are significant and twofold.

*The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), Part VI, ss. 91, 92

*Indian Act*, R.S.C. 1970, c. I-6, Section 20

381. Provincial family relations statutes typically provide that each spouse is entitled to an undivided half-interest in all family assets, regardless of which spouse holds title to such assets, upon an order for dissolution of marriage. Property used for a family purpose, for example, the matrimonial home, is such a family asset. These provisions, however, are not applicable to reserve lands. In 1986, the Supreme Court of Canada held that, as a result of the federal *Indian Act*, a woman cannot apply for one-half of the interest in the on-reserve properties for which her husband holds Certificates of Possession. At best, a woman may receive an award of compensation to replace her half-interest in such properties. Since possession of on-reserve land is an important factor in individuals’ abilities to live on reserve, denial of interest in family on-reserve properties upon dissolution of a marriage is a serious disadvantage to aboriginal women.

*Indian Act*, R.S.C. 1970, c. I-6, Section 20

*Derrickson v. Derrickson*, [1986] 1 S.C.R. 285

*Report of the Royal Commission on Aboriginal Peoples*, volume 4, *Perspectives and Realities* (Ottawa: Government of Canada) at 51-53.

382. Provincial family relations statutes also allow for interim exclusive possession of the matrimonial home by one of the spouses. Such a provision recognizes the importance of temporary exclusive possession for women, many of whom also retain primary custody of children, who are seeking to escape an abusive relationship. However, again because of the federal *Indian Act*, such provincial provisions are inapplicable to women whose matrimonial home is on-reserve. The result is that Aboriginal women living on-reserve are significantly disadvantaged, denied protections widely

recognized as essential to women and children upon marriage dissolution. Land and housing are in short supply on many reserves. On-reserve Aboriginal women in abusive domestic situations who do not hold the certificate of possession to the matrimonial home often face either remaining in the abusive situation or seeking housing off-reserve, away from support networks of community, friends, and family.

*Indian Act*, R.S.C. 1970, c. I-6, Section 20

*Paul v. Paul* [1986] 1. S.C.R. 307

*Report of the Royal Commission on Aboriginal Peoples, Volume 4, Perspectives and Realities* (Ottawa: Government of Canada) at pp. 51-53

383. The federal government, to date, has failed to provide legislative protection for married Aboriginal women facing these situations. More recently, in ongoing negotiations to turn over land management to select Aboriginal Bands, the federal government has refused Aboriginal women's requests to ensure that the resulting agreements provide for the protection of the equality rights of on-reserve married women with respect to matrimonial property. The land management framework agreement resulting from these negotiations simply states that Bands must "within a year" enact provisions with respect to the division of matrimonial property on marriage breakdown. There is no requirement that this must be done in a way that respects on-reserve women's domestic and international equality rights. The Federal Government has thus refused to meet its constitutional and international responsibilities for the equality of Aboriginal women.

*Indian Act*, R.S.C. 1970, c. I-6, Section 20

Framework Agreement on First Nation Land Management Between the Following First Nations: Westband, Musqueam, Lheit-lit'en, N'quatqua, Squamish, Siksika, Muskoday, Cowessess, Opaskwayak Cree, Nipissing, Mississaugas of Scugog Island, Chippewas of Mnjikaning, Chippewas of Georgina Island and the Government of Canada, 1997

384. Aboriginal women have launched a Charter challenge to the federal government's discriminatory treatment of them with respect to matrimonial property.

## **X. Conclusion**

385. FAFIA submits that, in the many ways described in this Report, Canada is violating the rights of women set out in the *Convention on the Elimination of All Forms of Discrimination*.