

**Submission of West Coast Women's Legal Education
and Action Fund (West Coast LEAF)**

**To the Standing Committee on Justice and Human Rights
in Response to Bill C-22, *An Act to Amend the Divorce Act***

August 22, 2003

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This submission is written in response to Bill C-22, *An Act to Amend the Divorce Act*, tabled in the House of Commons by the Minister of Justice in December 2002.

I. About West Coast LEAF Association

West Coast LEAF Association ("WCLEAF") is the British Columbia branch of the national Women's Legal Education and Action Fund ("LEAF"). West Coast LEAF is a charitable, non-profit society that was founded in 1987 to secure equal rights for Canadian women as guaranteed by the Canadian Charter of Rights and Freedoms (the "Charter"). To this end, LEAF and WCLEAF engage in test case litigation, equality research, law reform and public legal education. Through such endeavors, the organization has developed particular expertise with respect to the interaction between equality among persons and laws having a particular impact on women. This submission represents the views of WCLEAF.

II. Discussion

1. Custody and Access Language

Bill C-22 proposes to change the scheme of parenting after divorce by changing the terms of "custody and access" to "parental responsibility", "parenting time" and "parenting orders". We oppose these proposed changes and recommend that the current terminology of "custody and access" be retained. Where the recommended terminology

changes have been implemented in other jurisdictions, such as England and Australia, there has been a resulting increase in litigation, increased opportunity for harassment and interference in the life of the mother and children where violence is involved, and very little actual change in parenting patterns.¹

We do, however, support the listing of factors that must be considered in determining the best interests of the child, and support the submissions of NAWL and the BC Institute against Family Violence in this regard.

2. Access to Justice

As stated above, the proposed changes in Bill C-22 have increased litigation in other countries. The federal government must ensure that mechanisms exist to allow women and children access to justice under the *Divorce Act* and in custody/access decision-making. Such mechanisms include legal aid services to all women who need them, support services, interpretation services, and training for lawyers, judges and family court workers on the dynamics of violence against women, racism, homophobia, and discrimination against persons with disabilities.

We respectfully submit that by virtue of the *Divorce Act*, the federal government has a responsibility to ensure adequate funding for family law matters. The *Divorce Act* is part of the complex legislation and jurisprudence that defines the legal framework of family law in this country; the *Act* and the resulting judicial interpretation has a profound impact on the section 7, 15 and 28 *Charter* rights of the women and children throughout Canada.

Further pursuant to the *Convention on the Elimination of All Forms of Discrimination Against Women*, the government has undertaken “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act

¹ Rhoades, Helen, Graycar, Reg & Harrison, Margaret. *The Family Law Reform Act 1995: the First Three Years*, (Sydney: University of Sydney and the Family Court of Australia, 2000)

of discrimination”,² and shall ensure women have “the same rights and responsibilities during marriage and at its dissolution”.³ However, the lack of legal aid services for family law matters, including the recent dismantling of civil legal aid in British Columbia, severely undermines the ability of women to assert their rights to financial support or to custody of their children upon marriage dissolution.

Equality of opportunity for access to justice is also inherent in section 15 of the *Charter of Rights and Freedoms*. Statistically, women are at serious risk of poverty upon marriage breakdown and are disproportionately in need of legal aid for family law matters. Therefore, lack of access to legal representation fails to uphold women’s rights to equal protection and benefit of the law.

The situation is particularly serious for women who are leaving abusive situations and who are regularly left without legal assistance, or with inadequate legal assistance. Without legal counsel, already overburdened community advocates are inappropriately forced into assisting unrepresented women with very complex legal issues. Further, many women who do not have adequate legal representation give up their rights in the face of seemingly incomprehensible and intimidating legal system and issues and in some cases, are even forced back into abusive situations because of lack of access to legal aid.⁴ The lack of legal aid for family law has and will continue to have a devastating effect on some of the most vulnerable members of our society, including poor women, women of color, women with disabilities, immigrant women, and women who have difficulty with the English language.

West Coast LEAF’s Affidavit Campaign illustrates many of these problems and inequities. Women have identified a lack of or inadequate legal representation as a serious problem in affecting their safety, health and self-esteem, in being able to navigate

² Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981, Article 2(c)

³ Ibid. Article 16.1(c)

⁴ West Coast LEAF, BC Institute Against Family Violence and Vancouver Custody and Access Support Advocacy Association. *Civil Legal Rights of Abused Women: A Transformative Public Legal Education Project, Final Project Report*, (August 2000 to June 2002); Bain, Penny, Shelly Chrest & Marina Morrow of the Women’s Access to Legal Aid Coalition, *Access to Justice Denied: Women and Legal Aid in BC*, (July 2000)

the legal system and access their rights to financial support and custody of their children. For example, some women involved in the Affidavit Campaign have stated the following:

I have been overwhelmed at the enormity of the court case and it has caused me moments of anxiety and depression. I have a million questions about my court case and have no qualified person to answer them. I have no way of knowing whether the steps I have taken so far are correct or whether I have made dire errors that will adversely affect me and my children.

The lack of legal representation has meant I have had to declare bankruptcy, my mental and physical health has diminished, I have strained relationships with my family and friends from borrowing money, and as a result, I am unable to adequately care and provide for my children.

In addition, failure to provide legal aid services in family law matters has been found to violate section 7 of the *Charter*. In *G.(J.)*⁵, the Supreme Court of Canada held that the failure of the New Brunswick government to provide legal aid to a woman whose children had been apprehended by the government had violated the woman's right to security of the person under s.7 of the *Charter*. In coming to this conclusion, the Court stated:

For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child ... I find that the appellant needed to be represented by counsel for there to have been a fair determination of the children's best interests. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person.⁶

The lack of legal representation undermines an abused woman's ability to put expert child development assessment and treatment evidence relating to the impact of the violence before the judge. The lack of expert evidence compromises the judge's ability to weigh the nature and seriousness of the impact of the violence on the children or to determine the risk that the violence will continue to impact the children's well being. If

⁵ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46

⁶ *Ibid.* at paragraphs 73, 81.

relevant evidence is not available, the judge will be unable to make an appropriate order respecting the future safety and well being of the children, or the safety and security of the abused mother during access visits. All of this fails to ensure a fair and egalitarian outcome for women and children upon marriage breakdown.

Accordingly, West Coast LEAF recommends that the federal government provide adequate funds and ensure that the provinces and territories use these funds to provide family law services and legal aid for family law matters.

3. Decision-making under the *Act*

Bill C-22 fails to explicitly recognize women's equality interests. We submit that it is extremely important that the *Divorce Act* contain reference to a substantive equality rights framework for interpreting provisions of the *Act* and to guide custody/access decision-making.

A substantive equality approach seeks to ensure that the application of a law will lead to positive gains for those persons who are most disadvantaged in Canada, such as women, Aboriginal peoples, racial and ethnic minorities and persons with disabilities. This approach also focuses on the positive and progressive interpretation that must be given to the *Divorce Act* to ensure that such groups are accorded equal respect and an equal benefit of the law.

A substantive equality approach mandates that the *Divorce Act* acknowledge that marriage reinforces the historic and ongoing social and economic inequality of women, allows women's victimization through family violence, and that women continue to perform the majority of housework and care giving, both during marriage and after divorce. Decision-making under the *Act* must not reinforce these pre-existing disadvantages. As stated by L'Heureux-Dubé, J. in *Willick v. Willick*⁷:

⁷ [1994] 3 S.C.R. 670 at 705, 706.

it is important that statutory provisions be interpreted in such a way as not to contribute to that inequality in a way that is contrary to the values of substantive equality embodied in our *Charter*.

An assessment of whether a particular interpretation of a statute is consistent with these *Charter* values necessitates a contextual approach which contemplates the social framework in which the Act operates. Interpretation consistent with the values of substantive equality espoused by the *Charter* requires that both words and results be contemplated.

The *Act* must also be framed in a manner that recognizes the diversity of families. This includes recognizing the existence of same sex families and consideration of the impact of homophobia and systemic discrimination.

The *Divorce Act* must contain a clear prohibition against discrimination and include a non-exhaustive list of grounds for discrimination. It must also acknowledge women's and children's human rights under s.7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*.

Interpretation and application of the *Act* must also uphold Canada's international obligations under the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Beijing Platform for Action*, which require the government to ensure its laws and policies promote gender equality and to perform gender-based analysis of the *Act's* impact on women and children. It is essential and integral to the protection of children's best interests that the *Divorce Act* promotes women's substantive equality rights.

Lastly, decision-making under the *Act* must acknowledge the reality of violence against women and children within the family, and the gendered nature of power, control and violence as stated in the *Declaration on the Elimination of Violence against Women*:

violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the

crucial social mechanisms by which women are forced into a subordinate position compared with men

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:...

(f) Develop, in a comprehensive way, preventative approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;⁸

Specifically, we would refer you to *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 1997, c. 30 (Bill C-46) as an example of legislative language that recognizes violence against women and children:

WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

In particular, although the *Act* contains reference to best interests of the child in s.16.2, s.16.2 contains a number of competing factors that might contradict each other in certain fact situations, particularly those involving abuse. Therefore, to address this problem, the *Act* must clearly state that the safety of children and their caregivers be given greater weight when factors conflict to prevent the perpetuation of family violence during separation and after divorce. In addition, the *Divorce Act* must specifically direct judges to consider whether a child will be safe while a violent party has custody of or access to the child.

We propose legislative recognition of all of the above principles to stress their

⁸ Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), Preamble, Article 4(f)

importance and to help ensure uniform consideration of these values and principles by judges and other decision-makers under the *Act*. The addition of an application section at the beginning of the *Divorce Act* to acknowledge these principles will better ensure their consideration from the outset. We recommend the addition of an application section to the *Divorce Act*, either instead of or in addition to a preamble, so that the principles enunciated therein will have greater legal force to guide decision-making. We would refer you to section 3(3) of the *Immigration and Refugee Protection Act*, 2001, c.27 (Bill C-11), which contains a similar legislative structure to help guide decision-making.

Due to the foregoing, we recommend the addition of an application section to the *Divorce Act*, which includes the following:

Application

This Act is to be construed and applied in a manner that:

- (a) gives paramount consideration to the safety of children and their caregivers in all decisions made under this Act;*
- (b) recognizes the prevalence of violence against women and children and that violence has a particularly disadvantageous impact on the equal participation of women and children in society;*
- (c) acknowledges women's historical and ongoing disadvantaged position in the family and in society;*
- (d) ensures that decisions taken under this Act are consistent with sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination on the basis of age, sex, class or socio-economic condition, aboriginal heritage, race and ethnic origin, disability and sexual orientation; and*
- (e) complies with international human rights instruments to which Canada is signatory, including the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence against Women, the Convention of the Elimination of All Forms of Racial Discrimination, the Beijing Platform for Action, and the Convention on the Rights of the Child.*

III. Summary of Recommendations

West Coast LEAF makes the following recommendations:

1. That the current language of custody and access under the *Divorce Act* be retained;
2. That the federal government provide adequate funds and ensure that the provinces and territories use these funds to provide family law services and legal aid for family law matters;
3. That the *Divorce Act* contain an application section to guide decision-making. These sections should incorporate reference to the Canadian *Charter of Rights and Freedoms* and Canada's international obligations to ensure that equality and human rights principles are part of the decision-making process under the *Act*.
4. That the Application section include the following:

This Act is to be construed and applied in a manner that:

- (a) *gives paramount consideration to the safety of children and their caregivers in all decisions made under this Act;*
- (b) *recognizes the prevalence of violence against women and children and that violence has a particularly disadvantageous impact on the equal participation of women and children in society;*
- (c) *acknowledges women's historical and ongoing disadvantaged position in the family and in society;*
- (d) *ensures that decisions taken under this Act are consistent with sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination on the basis of age, sex, class or socio-economic condition, aboriginal heritage, race and ethnic origin, disability and sexual orientation; and*
- (e) *complies with international human rights instruments to which Canada is signatory, including the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence against Women, the Convention of the Elimination of All Forms of Racial Discrimination, the Beijing Platform for Action, and the Convention on the Rights of the Child.*