

*Manitoba Association of
Women and the Law Inc.*



TWENTY YEARS LATER

HAS THE CHARTER MADE A
DIFFERENCE TO
MANITOBA WOMEN?

Executive Summary

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Executive Summary

Introduction

The *Canadian Charter of Rights and Freedom* came into effect on April 17, 1982. The effect of section 15, the equality rights section, was delayed until April 17, 1985 in order to give the federal, provincial and territorial governments an opportunity to examine and reform any statutes deemed incompliant with the *Charter*. When s.15 came into force in 1985, the Charter of Rights Coalition (CORC – Manitoba Chapter), of which Manitoba Association of Women in the Law (MAWL) was a member, undertook to audit Manitoba's statutes to determine how well the provincial government had met the challenges of ensuring substantive equality in Manitoba's laws and government policies. In the following report, MAWL updates the 1985 audit as part of a national effort to celebrate the twentieth anniversary of *Charter* equality rights. The report examines the impact of s. 15 on Manitoba laws, programs, policies and practices; it also identifies what still needs to be done to ensure full equality for Manitoba women.

Since 1985, Canada's federal and provincial governments have travelled a long way on the road towards substantive equality, both in terms of removing gender-specific and discriminatory language in statutes and by creating legislation and practice that further equality. Women's health, economic situations, and safety have all been strengthened since the introduction of the *Charter*. Various branches of government have recognized that women's equality is an important and necessary goal. Despite these efforts, unjustifiable *Charter* violations continue to occur. Many laws and policies remain discriminatory in their impact on women. Such discrimination is a violation of our *Charter* and must end. It is the responsibility of governments to take a proactive approach and remedy these situations.

Women in the Judiciary

The judiciary plays an important role in interpreting equality rights for all Canadians, and as such it is necessary that the judiciary be reflective of the diversity in our society. The current composition of the judiciary does not reflect the reality of Canadian society, or seemingly, the *Charter* guarantees of equality.

Recent Supreme Court appointments have almost brought gender parity to Canada's highest court, with a composition of five men and four women (including the Chief Justice).

The federal government's record on making representative appointments to other federal courts has been less impressive in comparison, with women representing 22.8% of federal court judges. The same lack of attention is evident in appointments to provincial superior courts, with women making up only 28% of judges. Manitoba's superior courts are slightly above the national average, with 35% female

representation. Although Manitoba fares better than other provinces, there is still a long way to go to achieve gender parity.

Women are also poorly represented on Manitoba's provincial bench. Only 12 (30%) of the 40 judges at the Provincial Court are women. It is unclear whether the lack of judicial appointments provincially is due to discrimination at the committee or political level. MAWL is concerned about the lack of a requirement for gender equity between members of judicial appointments committees, both at the federal and provincial levels. Advocacy groups are concerned that women and minorities who have had involvement with equality seeking groups have not been recommended although fully qualified. Having female and minority voices involved in the decision-making process would have a positive impact on developing a gender-sensitive judiciary.

➔ **Women should be appointed at a minimum of a 2:1 basis until gender parity is achieved. The appointment of women to the judiciary should be made a priority.**

Another glaring inequality in judicial appointments is the lack of minority representation, specifically that of Aboriginal peoples. There has never been an Aboriginal judge at the Supreme Court level, despite the place of Aboriginal peoples in Canada's constitution and as a founding people of the country. In fact, Aboriginals are under-represented at all levels of the judiciary. In 2001, there were only 18 Aboriginal judges in Canada. Minorities and rural and northern representation is also much lower than for other groups. The government had an opportunity to rectify this situation through the latest Supreme Court appointment and it is unfortunate they did not do so. This unacceptable situation should be remedied through future appointments.

➔ **Priority should be given to the appointment of minorities, including rural and northern applicants, while still following MAWL's recommendations on gender parity.**

➔ **The Federal government must commit to filling the next Supreme Court of Canada vacancy with a qualified Aboriginal candidate.**

Women and Health

Some of the most significant changes for Canadian women's equality over the past 20 years have occurred in the area of health. While much has been accomplished in this area, much is yet to be done.

Since the original CORC statute audit, abortion has been decriminalized (it should be noted that this was not an initiative undertaken by government, but was the result of a 1988 Supreme Court decision that laws criminalizing abortion are unconstitutional). Court decisions have paved the way for the provision of abortions in community settings within the public health system. The benefits of a clinic setting for the

provision of abortion services have been well documented. Although the struggle by women's groups in the province has been a long one, the government has now committed to funding a new "super women's health clinic", in which abortions will be "just one of a wide range of available services". In the meantime, they will continue funding the Winnipeg-based "Jane's Clinic", a not-for-profit abortion clinic operated by a community-based board and owned by 18 local women.

➡ **The Provincial government must implement their plan to fund procedures at the Jane's Clinic and begin the provision of abortion services through the new WRHA community women's health clinic.**

The Manitoba government should be commended on its proactive approach when it comes to midwifery in the province. The Midwifery Implementation Council was set up in 1994 and the *Midwifery and Consequential Amendments Act* was passed in 2000.

Despite these developments, access to both abortion and midwifery services remains an issue for women in the province. The ability of the public sector to support the demand for abortions has been questioned in court by two women. Jane Doe #1 and #2 maintain their *Charter* rights were violated by lack of access to timely abortions in the public sector and the subsequent refusal by the province to pay for their abortions performed at private clinics. The cases are proceeding to trial for determination.

Lack of sufficient midwifery services to meet the demand from Manitoba women is also evident. In 2000-2001, funding was provided for only 26 full-time midwifery positions. For every woman who gets midwifery care, one is turned away. Of twelve regional health authorities in Manitoba, six have applied and been approved for funding of midwifery services, but only five actually received funding due to budget limitations. Of the 26 full-time midwifery positions, 16 are currently in Winnipeg and 10 are located in rural and northern communities. In December 2004 it was announced that a new Aboriginal midwifery program would be offered at the University College of the North. This will help to improve prenatal care for Aboriginal women in rural and northern communities.

➡ **The Provincial Government must immediately approve and fund training programs to educate midwives in Manitoba, sufficiently training the more than 100 midwives required.**

The Manitoba government officially recognized gender as a determinant of health in 2000. This means that the health care system must respond appropriately to the special health care needs of women as a group or risk not complying with the *Charter*. Gender based analysis pays attention to identifying and planning for women's health needs. Manitoba Health should be applauded for its initiative in applying gender-based analysis to all existing data analysis and program planning. Planning should show special attention to disabled women, the elderly, and Aboriginal women, as they experience "double jeopardy" in

terms of poor health status. Particular attention should be paid to MAWL's recommendations with respect to Aboriginal women's health, as their poor (and declining) health status is a growing cause for concern.

The mental health of Manitoba's women also continues to be a concern. There is a correlation between social inequality suffered by women and an increased prevalence of mental disorders including depression, anxiety disorders, borderline personality disorders, and eating disorders. Mental health issues must be treated in a holistic manner, focusing on the determinants of health rather than the illness in isolation. Manitoba has recognized such a need within the Manitoba Women's Health Strategy. While the strategy commits to gender-based analysis, further action must be taken in regards to the connection between women's mental health issues and social inequality.

The unique needs of women as health care providers should also be considered, as women make up a disproportionate share of those caring for patients at home. After only 18 months of continuous care, 60% of unpaid caregivers experience a decline in their health. It is estimated that 85-90% of home care is provided by family and friends. Were the province to compensate and recognize these informal caregivers, it would directly benefit women since they remain the primary caregivers in the home. Another issue with homecare is that access varies vastly between rural and northern communities versus urban centres.

➔ **The Province must pay women who are providing home care on a voluntary basis.**

Women and the Economy

In Canada, 60% of poor adults are women. In 2004, 19% of adult women in Canada were poor – the highest rate in 20 years. The situation is worse for Aboriginal women in Manitoba – more than 42% live in poverty. The poverty rate of Manitoba's children is another manifestation of women's equality, with Manitoba's child poverty rate the second highest in Canada at 22.3%. 49.7% of Aboriginal children live in poverty in Manitoba. An examination of government policies affecting Manitoba families, and the economic realities created by implementation reveals government can have a huge impact on women's economic achievement.

Contributing to the lack of gender equality in Manitoba's economy is the lack of gender parity in the workforce. Men outnumber women in the ten highest paying jobs in Canada and women outnumber men in nine of the lowest paying jobs. There is a substantial wage gap between Manitoba men and women: women earn only \$0.72 for every dollar earned by men. While some progress has been made in the workforce (i.e. improvements to the employment standards and worker's compensation provisions), more work is yet to be done.

In 1985, the government instituted the *Pay Equity Act*, requiring pay equity in Manitoba for all employees working for the Crown, the Civil Service, and Crown entities and external agencies. The *Act*,

however, does not apply to the private sector. The Federal government has also instituted an *Employment Equity Act*, the purpose of which is to remove barriers that deny employment opportunities to qualified persons and to correct the disadvantage in employment experienced by women, Aboriginals, members of visible minorities, and persons with disabilities. However, it only applies to federal employees or businesses employing more than 100 people that are in some way connected to a federal organization. Manitoba's employment equity policy targets the same groups and applies to civil servants.

Despite numerous improvements to the *Employment Standards Code*, the areas of part-time and non-standard work are still not fully covered by the act. For example, the requirement that an employee have worked 15 of the 30 days preceding a holiday to receive holiday pay; discrepancies in insurance benefit plans; provisions allowing termination without notice when it is customary to do so, exemptions for call-in wages for employers of theatre, hotel and restaurant workers in rural areas or when the employee is a child. Hotel and other service personnel affected by this exemption are more often women.

Low wages perpetuate the wage gap between men and women. There is a negative correlation between the wages and the percentage of female workers in an occupational category. Occupational segregation, namely the unequal treatment of certain professions that are considered "traditionally female" is also of particular concern. Domestic workers are particularly vulnerable, as they are excluded from protection of the *Employment Standards Code* and are further distinguished from other employees in the *Domestic Workers Regulation*.

Two thirds of low wage earners are women. The number of low wage earners in Manitoba is higher than the Canadian average, and in Manitoba more women than men work for low wages. 65.8% of Manitoba children who live in low-income families have at least one parent who is working, thus in Manitoba a job does not guarantee escape from poverty.

The two most significant factors contributing to low wages are the lower rate of unionization of female employees and the low minimum wage currently in place in this province. Overall, 41.94% of non-union members earn low wages, whereas only 11.85% of union members earn low wages. Women, however, are less likely to participate in unions than are men, negatively affecting their ability to earn higher wages, as well as reap other benefits associated with union membership. Encouragement of unionization in female-dominated occupations would have the effect of allowing more women to earn decent wages.

Another way to increase women's incomes is through raising the minimum wage. This would have a significant impact on fighting poverty. To achieve the accepted standard of living working 40 hours per week in 2003, a single person must have worked full time for the year at \$9.44 per hour. Manitoba's minimum wage currently falls near the middle of rates of other provinces.

➔ **The Manitoba government must raise annual increase to the minimum wage from \$0.25 per year, to \$1.00 per year, until eventually the wage reaches a "living wage".**

➤ **Every person in Manitoba should have the right to a guaranteed annual income, regardless of employment status. The guaranteed annual income must be adjusted according to the Acceptable Living Standard to provide every Manitoban with a liveable income.**

A third reason women have not been able to achieve equality is because they spend twice as much time doing unpaid work, including child care, as they do on paid work. Raising children is one of the main reasons that women (as a group) are poorer than men. Until we have adequate, accessible, and affordable high quality childcare, women will continue to be disadvantaged in the workplace.

The impacts of a low-wage labour market in Canada are disproportionately borne by Aboriginal workers, recent immigrants, and women, particularly women of colour. Disabled women also make up a disproportionate share of those living in poverty. Special attention must be paid to these particular groups when programs are being planned, as increased substantive equality demands such an approach.

Changes are needed in several other areas to address women's poverty in a more holistic fashion. The employment insurance scheme currently run by the federal government is unequal in its application to males and females. Social assistance payments are alarmingly low: a single person on social assistance in Manitoba falls 70% below the low income cut off. A single mother falls 56% below the poverty line, while a family with two parents and two children falls 50% below the poverty line. Common-law couples are still subjected to the sexist "man-in-the-house" rule, meaning they are treated as if the man is contributing financially to the relationship if there is evidence of a conjugal relationship, with no minimum time requirement. Affordable housing continues to be of major concern, as women are disproportionately harmed by the lack thereof. Another obstacle faced by women is lack of access to post-secondary due to high tuition fees and other associated costs.

Women and Pensions

Pensions are a form of income for retired individuals or for those who have reached the age of 65. There are three kinds of pensions: the Old Age Security, the Canadian Pension Plan (CPP) (or Quebec Pension Plan) and private pension plans. Old Age Security is the only pension accessible by retired persons who have not been employed throughout their lives. The length of time spent in the workforce and the amount earned during one's life determines the quantum of CPP and other private pensions. Women are at a disadvantage when it comes to retirement savings because they earn less throughout their lives and spend less time in the paid workforce.

Women name other barriers to saving for retirement such as: never having the chance to learn good money management skills, never having enough money to worry about surplus, not having control of discretionary spending (or of any finances), and fear of losing money through unwise investing. Manitoba's

Pension Commission released a report of recommendations of reforms to the *Pension Benefits Act* in March of 2003. Many of these were enacted in 2004, resulting largely in positive changes for Manitoba's women. There is progress yet to be made in rendering the language in that *Act* more gender-neutral.

One negative change to the *Act* that must be reversed is the change to survivor benefits upon death of the member. On average, women live longer than men and therefore are more likely to rely on survivor benefits. Consequently, women are harmed by their reduction. To reduce the benefit is contrary to s. 15 and s. 28 of the Charter, as women's longer life expectancy places them in a special category requiring protection later in life.

Progress is also needed in the area of private pensions. Women have been steadily gaining equality in terms of the number of women accessing such options. However, because women earn so much less than men they are unable to contribute nearly as much to their plans over the course of their careers. Also, women are more likely to work part-time or have interruptions in work due to child rearing obligations.

Another remaining issue is related to the division of pensions upon relationship breakdown. The current method of valuing pensions for purposes of dividing such benefits is inconsistent across Canada, with Manitoba having a system that most negatively impacts on women.

➡ **The Province of Manitoba must adopt the deferred settlement method, as recommended by the Canadian Institute of Actuaries. It creates the most equal division of pension assets on dissolution of a marriage or common-law relationship.**

Double jeopardy is a problem in pension policy and law: Aboriginal women and other women who are doubly disadvantaged in the workforce, including disabled women, members of visible minority groups and immigrant women also suffer disproportionately in their lack of access to adequate pension benefits.

Women and Childcare

Lack of access to developmentally appropriate, comprehensive, culturally inclusive and affordable childcare spaces for all children who could benefit from these services adversely affects women's equality. Women's equality generally, in the workforce, and in advancing education, is compromised when childcare services are unavailable, of low quality, or unaffordable. The majority of mothers are employed outside the home. The inequality of women is further compounded when the wages of primarily female caregivers are low, underpaid or non-existent.

Childcare remains predominantly "mother's work" and is usually organized as a mother's responsibility. As a result, family work generally falls more heavily on women than men. When childcare is unavailable, it is more likely that mothers rather than the spouse/partner will limit their work-force

participation, take up part-time (rather than full-time) employment or studies, or opt for flexible work which generally carries few benefits and rarely has a pension. Childcare can help ease the strain of work-family obligations, while also enhancing women's economic security. Childcare is essential for gender equity.

Many changes are needed to accomplish the goal of having adequate, accessible childcare facilities for all Manitobans. Today in Manitoba, there are licensed childcare spaces for only 14.3% of children. The vast majority of these spaces are in Winnipeg where there is a childcare space for about 17% of the City's children (a space for 1 in 6 children). There are also places for childcare with regulated family childcare, providing an additional 4,209 spaces in Manitoba, which results in a total of 25,634 spaces available, or regulated spaces for 14.3% of children aged 1-12 in Manitoba.

Unregulated care includes care by a non-immediate family member (in the child's home or in a relative's home), care by a friend or neighbour, and care by a non-relative in the child's own home. Little is known about informal childcare except for the fact that it is by far the most frequently used type of care. Overall, unregulated settings are of a lower quality and standard of care than regulated settings.

Comparatively, Manitoba ranks third in Canada for highest allocation for each regulated childcare space, \$2,848, behind Quebec (\$4,849) and the Yukon Territory (\$3,796). So long as there are not enough childcare spaces for women who need them and childcare costs remain high, there is still much to be done.

Since 1999, Manitoba has made progress with regards to the funding of childcare, resulting in an additional 3,500 funded spaces (an increase of 64% since 1999). In April of 2002, the provincial government announced a new Five Year Plan for childcare. Manitoba's plan proposed to advance three major elements over the five-year period, namely maintaining and improving quality, improving accessibility and improving affordability.

Children with disabilities are among the most vulnerable and excluded populations in Canada. We need to prioritize investments in building an inclusive children's public policy agenda in order to meet the social development needs and aspirations of children with disabilities and their families. Of particular importance to children with disabilities is childcare and early learning, as part of a lifelong learning strategy, and disability supports. Since 1999, Manitoba has increased funding for the Children with Disabilities program so that now \$9.6 million is allocated. This initiative should be commended and continued with future funding increases.

The main barriers to childcare are cost and access. Since 2002, approximately half of the parents accessing regulated childcare in Manitoba have received financial assistance in the form of a fee subsidy from the Provincial Government. The demand far outweighs the available supply. The eligibility for a subsidy is set well below the poverty line; increases in inflation have not been met with a corresponding increase in the "turning point" for eligibility for a subsidy.

Childcare is still not affordable for most Manitobans. Ideally, a redesigned childcare system would receive comprehensive funding through the tax system instead of relying entirely on user-fees from parents. The provincial government could immediately improve affordability by eliminating the surcharge of \$2.40 per day.

➔ **The Government of Manitoba must develop a comprehensive provincial childcare policy with long-term financial commitments, targets and timelines.**

A national childcare program with national standards has always been the goal of women working to improve childcare services. Before the last election, the previous federal government signed an agreement with Manitoba committing significant funds to childcare. These federal funds would have been used to ensure that more children have access to high-quality, government-regulated spaces at affordable cost to parents.

However, the Harper government has *not* upheld the former government's agreement to transfer funds for childcare to the provinces. Under the existing childcare agreements – which the Conservatives have said they are cancelling – the federal government agreed to transfer \$1 billion a year to the provinces both to build and operate childcare services. The Harper government instead proposes spending \$250 million a year in tax credits “to employers who cover the full cost of creating spaces.” The centrepiece of the Conservative childcare plan is its Choice in Childcare Allowance. The Choice in Childcare Allowance would pay a maximum benefit of \$1,200 a year per child under six. This is unacceptable.

➔ **The Harper government must implement a National childcare funding program similar to the one proposed by the Martin government and abolish the “Choice in Childcare Allowance” which does nothing to add spaces and increase choice.**

Maternity and parental leave provisions are shared between federal and provincial governments, with provinces setting the length and conditions of leave under employment legislation and the federal government providing benefits under Employment Insurance (EI). In 2001, the federal government increased the parental leave portion of the benefit to 35 weeks (50 weeks combined maternity/parental). All provinces/territories have amended their employment legislation to allow for an extended parental leave that matches or exceeds the federal benefit period. EI benefit pays 55% of wages (up to a ceiling of \$413 in 2005, unchanged from 2001) for eligible workers. However, for a variety of reasons, including self-employment and the number of hours worked, recent research has shown that up to 50% of parents are not eligible for these benefits.

➔ **Maximum allowable amount of benefits available under the EI parental benefit's scheme be increased to a maximum of \$637 per week.**

Many new mothers are ineligible for paid maternity or parental leave which means that they are forced back into the workforce prematurely because they cannot afford the income loss that would result from an unpaid leave. Very few part-time, casual or self-employed parents have access to maternity/parental benefits and are therefore much more likely to return rapidly to the workforce. There is a high demand for quality infant care, but the childcare spaces are not available to accommodate this demand. Canadian women have launched *Charter* challenges to the current EI provisions that are discriminatory according to section 15 of the *Charter*. Unfortunately, none of these cases have been successful.

Women and Education

The link between education and employability has long been recognized. Education allows women (and indeed men as well) to participate more fully in the labour force than they otherwise could, both in terms of likelihood of employment and hours worked while employed. Labour force participation rates for the year 1996 reflect employment rates of up to 90% for women with a university degree or diploma, while only 59% of their counterparts without a high school diploma were employed. Also, educated individuals earn more per hour and rely less on government support programs. For example, women with less than grade 9 educations earn, on average \$21,700/year, as opposed to women with a university degree, who earn \$53,400/year on average (based on 2003 data). Although women's earnings rise sharply the higher their level of educational attainment, whatever their education status, women's earnings are well below those of their male counterparts. With the exception of women who have graduated secondary school or who have some post-secondary training, women's earnings were only about 70% those of their male colleagues at all levels of education.

Boards of school trustees are generally responsible for the administration of school divisions and the setting of policy and programs within divisions. School boards receive funding both through transfer payments from the province and through local taxation. Concern has been and continues to be expressed about the government's refusal to address fundamental issues in education finance and administration, ensuring that glaring inequalities for Manitoba's students and taxpayers will continue to grow. Gaps in access to educational opportunities are largely related to where students live in the province.

➡ **Create a federal education transfer, like in the health care sector, to assure more provincial accountability for these funds.**

Ongoing efforts in the areas of curriculum development have proven successful, as have efforts to improve overall student health and well being through community outreach and nutrition programs. More development in both of these areas would be a further positive step. There is a need for more developed

affirmative action programs, such as those in place in the Winnipeg School Division, as women still make up a minority of school and division administrators.

➡ Adopt affirmative action programs with quotas until women represent an equal amount in administration positions.

Access to post-secondary education continues to be an issue for Manitoba's women. The Department of Advanced Education has clearly recognized the need to modify the current system in order to encourage access for disadvantaged groups. Although university enrolment has generally increased since the year 2000, there is persistently low participation of students from low-income backgrounds. The defining difference between those who have access to post-secondary education and those who do not is financial resources. Gender, therefore, plays a role in terms of access for women, as more women than men fall into low-income earning brackets.

Although female undergraduate enrolment has increased generally, under-representation of women in certain areas continues to persist, as the curriculum and senior administration of those faculties remain highly male-centred. Changes are still needed in Manitoba's education system to eliminate gender bias – there is a definite gap in the number of women pursuing careers in mathematics, engineering, and sciences. According to Statistics Canada, in 2001/02 women made up only 30% of all university students in mathematics and physical sciences, and just 24% of those in engineering and applied sciences. The number of women entering math and science programs is still much lower than the number of men, and this drops off significantly when you look at the number of women entering graduate level programs (as do female attendance rates generally). Changes that begin in the high school classroom are needed to encourage more women to overcome these statistical realities and pursue careers in science, math, and technology.

➡ Develop school-based strategies to encourage more female students to pursue careers in mathematics and sciences.

An associated issue is the recent trend in some professional faculties to increase tuition in order to offset the rising costs of education. Although needs-based bursaries appear to have increased with the increased tuition, they might not be enough incentive to attract low-income students. Middle-income students are also harmed by these increases, as they can slip through the cracks in the needs-based bursary scheme. They are often not poor enough to receive a bursary, but do not have the means to pay for their tuition entirely without help. They are therefore forced to either borrow to finance their degrees or choose not to enter the program.

➡ Increase funding to grant programs to aid in increasing university and college enrolment of students from low-income households.

Students with disabilities in post-secondary education experience double jeopardy, as members of two disadvantaged groups. The same is true for Aboriginal women and visible minority women. Programs should be targeted specifically at these groups in order to raise them out of their present situation.

Women and Family Law

Manitoba is one of the leading provinces in establishing equal rights for all of its citizens. Since the previous CORC audit in 1985 the province has made many improvements to both statutes and practices, which has resulted in greater equality of treatment between women and men within the family law system. The *Charter Compliance Act* became law in Manitoba on January 1, 2003. The *Charter Compliance Act* amended 56 pieces of legislation. On June 30, 2004 the *Common-Law Partners Property and Related Amendments Act* came into force. This act amended another 28 Acts to extend Manitoba's family property regime to common-law partners.

While MAWL applauds this equal recognition of common-law relationship, it is discouraged at the lack of consistency in defining common-law relationships within the amended pieces of legislation. There are four different definitions of a common-law relationship. Thirty-three statutes characterize a common-law relationship as "a relationship of some permanence". Six statutes use the definition "a relationship of at least one year". Two statutes employ the definition "six months of cohabitation" and one uses "three years of cohabitation, or one year if the couple is the parents of a child". These discrepancies create uncertainty that should have been eliminated by the two amendments. The inconsistencies among the definitions results in discontinuous treatment of common-law couples, and prevent them from having certainty regarding the status of their relationship – a certainty which is granted to married couples.

Same-sex couples have recently been granted the right to marry. However, the *Divorce Act* does not contain a provision permitting same-sex couples to obtain a divorce. Currently there is a *Charter* challenge emanating from Ontario that is challenging that deficit in the *Divorce Act*, and that challenge will surely result in the *Divorce Act* being amended. However, it should not be up to a private couple to challenge the *Act*, but is up to the Federal government to amend the *Act* on their own.

On relationship breakdown, the total value of all shareable property is calculated to determine the entitlement of each spouse or common-law partner. Many forms of property may be included in such an accounting, including land, buildings, and household belongings. One item not currently classified as shareable property is education – in the form of formal degrees. It is MAWL's position that any degree earned during the relationship ought to be considered shareable property and included in an accounting as a positive amount on the side of the degree holder. Excluding degrees from an accounting discriminates

against many women, as generally their education and employment takes a backseat to that of their male partners. As such, a woman may support her family and help pay tuition while her partner earns his degree. He can then leave her when he has obtained his degree and she will not receive any reward for her hard work.

Much progress has been made over the past twenty-years in the realm of child and spousal support. Child support guidelines have been created and mandate the award quantum in most situations. Voluntary spousal support guidelines have been developed and are currently being adopted by some courts. These guidelines will provide judges with a guide to calculate what should be a fair support award. These guidelines are not mandatory. The committee that developed these guidelines made many assumptions which reflect the reality of women's lives and should be considered by the judiciary in every case.

➤ **Spousal Support Guidelines must be made mandatory.**

The Child Support Guidelines have addressed many of the problems experienced by spouses trying to get support for their children, however, there are problems remaining in the current system. When the parentage of a child is not known and a mother is attempting to get a declaration of parentage made, she may lose access to many months of child support. Once a declaration of parentage is made there is no provision in the *Family Maintenance Act* for the court to make a retroactive order for past unpaid child support. Such a provision would prevent men from denying paternity in order to escape paying child support until paternity is proven.

s. 30(3) of the *Marriage Act* still allows the court to order a physical examination of parties to a marriage to determine if the marriage has been consummated. Not only is this section a violation of women's *Charter* rights – as men will never be examined to see if a marriage was consummated – but it is a violation of the human dignity of both parties to be physically examined in such a personal way without their consent, a violation which cannot be saved by s.1 of the *Charter*.

The *Homesteads Act* provides that the non-owning spouse has the right to a life estate in the home where the couple resided – meaning he or she can stay in the home for the duration of his or her life – on the death of the other spouse. The right protects spouses who do not own the marital home if the owning spouse bequeaths the marital home to someone other than the surviving spouse or common-law partner. The *Homesteads Act* requires that the non-owning spouse's consent be obtained if any disposition is to be made of a homestead. However, the Homesteads Act does not require the consenting spouse to obtain independent legal advice. This may result in some non-owner spouses being stripped of their rights without their informed consent.

A requirement for independent legal advice is especially important in cases of minors giving up their homestead rights. The *Homesteads Act* deems acts done by married minors, or minors living in common-law relationships, to be done by an adult.

The *Homesteads Act* allows for a court to dispense with the consent requirement in certain circumstances – for example, if the spouse (whether married or common-law) is mentally incapable of consenting or if the couple has been living separate and apart for six months. The *Act* also allows for the homestead rights of a common-law, non-owning spouse to be terminated if the couple has been living separate and apart for a minimum of three years. The only way for the owning married spouse to terminate the other spouse's homestead rights is by applying for – and being granted – a divorce (as homestead rights end on divorce). As same-sex couples are now allowed to marry in Manitoba – and throughout Canada – yet they are not yet permitted to seek a divorce under the *Divorce Act*, there is no way for an individual married to someone of the same-sex to terminate his or her spouse's homestead rights. This is just one more reason to grant same-sex married couples access to the same divorce legislation as opposite-sex married couples.

Although the provincial government has jurisdiction over most family matters, the federal government has jurisdiction over family law matters with respect to Aboriginal peoples living on reserve. The *Indian Act* has been found lacking by many Aboriginal communities when it comes to division of matrimonial property. Significant amendments were made to the *Indian Act* in 1985 to address many of the inequalities suffered by Aboriginal women, including removing the section that stripped women of their band status on marriage to a non-band member. However, the amendments alone were not enough to eradicate the sexist and discriminatory treatment of women on reserves. On reinstatement of band membership under the 1985 amendments to the *Indian Act*, many women have reported difficulty in acquiring housing on-reserve and establishing residency on reserves in their own right.

➔ **The Federal government must give up jurisdiction over matrimonial property division on reserves to Aboriginal self-governments, conditional on *Charter* compliance.**

Women and Legal Aid

Access to justice in Canada is a concern for everyone, from governments and policy-makers, to legal professionals and the public in general. One important aspect of accessing justice is access to legal services. Not all Canadians have the resources to pay for a lawyer. Legal aid plans have been established in all provinces and territories, with the common goal of assisting lower income Canadians who require professional legal counsel.

In Canada, the right to legal aid has been eroded by competing social claims for limited funding. This has resulted in chronic under-funding, long waiting times for service, inaccessibility of counsel, and inadequacy in services. Despite recognition of concern by the provincial government through the establishment of an in depth examination of the current legal aid system, resulting in a report containing recommendations for its improvement, little proactive change has resulted.

➡ **The Federal Government must immediately increase its funding for criminal legal aid to ensure its prior commitment of 50/50 cost sharing with the provinces.**

➡ **There must also be an immediate increase in provincial funds for Legal Aid.**

The Manitoba government should be commended on its commitment to Aboriginal and northern communities through the development of several initiatives. Manitoba Legal Aid has a separate Aboriginal Law Office that handles cases where there are legal issues of particular interest to the Aboriginal community or that might affect a large number of Aboriginal people. Legal Aid also has a program for Aboriginal paralegals that speak both English and Cree. These paralegals work out of legal aid offices in Thompson and The Pas and travel to surrounding communities. Manitoba's legal aid poverty law program is located at the Family Law Office. It caters to those who have legal problems unique to poor people, such as welfare issues, pension benefit concerns, and so forth.

The Public Interest Law Centre is a special branch of Manitoba Legal Aid providing assistance to groups and individuals on matters of law of public import. The Centre carries a mixed portfolio of cases, with an emphasis on equality rights, the environment, aboriginal issues, social welfare and consumer matters. Its activities include test case litigation, law reform, and advocacy training. It has a mandate to take cases representing a broad public interest, but with an emphasis on concerns affecting low income Manitobans.

Manitoba, like other provincial jurisdictions, currently has a statutory requirement to prioritize criminal law (where incarceration is a potential outcome) over civil and family law matters. Bonding is usually required in the sales/service industry, in which 34.7% of Manitoba's working women are employed (versus 20.9% of working males). Being convicted of a lesser criminal offence often results in a loss of livelihood women. When budgets are cut, women are hurt the most.

Lesser criminal matters and important civil matters such as child protection, custody, support and protection for women suffering abuse are often not covered in provincial legal aid plans. The result of limited funds and prioritization shut Manitoba women out of legal aid programs they urgently need. Cuts to legal aid will hurt Manitoba women more than men, as women apply for civil legal aid more than twice as often as Manitoba men. This denies women equal protection and benefit of the law.

Questions also remain about the scheme in place for determining financial eligibility for legal aid. In 2003, the Government of Canada increased the Low Income Cut-Off levels; the current LICO level for a single person is \$19,795; for a family of 2 (one adult, one child), \$24,745; for a family of 4, \$37,353. Despite the increasing LICO level, eligibility for legal aid in Manitoba remains at the low 1994 level, making accessing justice even more difficult than it should be for those living in poverty (women in particular).

The denial of legal aid funding for many kinds of legal proceedings—both civil and criminal—could be held to be discriminatory under Section 7 and 15 of the *Charter*. This is further complicated by the disparity in legal aid programs among the 13 provinces and territories. With regard to financial eligibility, matters covered, funds available to the program, and modes of service delivery suggest that significantly more legal aid funding goes to male applicants than female applicants in all programs. There is currently a challenge underway by the Canadian Bar Association, advocating for a constitutional right to civil legal aid.

With the limited funding currently available for legal aid services in Manitoba, and the increasing need for legal advice, alternatives to Legal Aid Manitoba are being developed. One example of such a program is “A Woman’s Place” legal clinic. The focus of the Clinic is assisting female survivors of domestic violence. The Clinic provides legal support by means of a competent staff and volunteers.

Women and Criminal Justice

In any one year women make up approximately 3% of federal and 8% of provincial admissions to prison. Women have remained invisible when it comes to providing support and services within the criminal justice system and nowhere has this been more apparent than in Manitoba.

Notwithstanding the increasing numbers of women being incarcerated in Canada (the majority of whom are incarcerated for poverty-related offences), women still make up only a small fraction of the overall prison population. Yet the criminal justice system, and the prison systems to which women are sent, has long treated women as “too few to count,” and not adequately addressed the needs of women who are criminalized. There is one group of women who suffer disproportionately in the criminal justice system – Aboriginal women. Aboriginal women suffer double discrimination: as women and as Aboriginal people; as victims and as offenders.

The justice system is presented with many opportunities to prevent and redress the criminalization of women – before they have been introduced to the system; while they are entrenched in the system; and when their involvement with the system is nearing an end.

Prevention of involvement with the justice system is the first step towards achieving more equality among men and women in criminal justice matters. Women are often victimized by poverty and violence perpetrated against them, making them more likely to have involvement with the justice system.

One example of such unequal application of the law is in the mandatory charging policies of the RCMP and the Winnipeg Police Service. Such policies have resulted in many women being charged and convicted of violent crimes even though they are, in fact, the victims. The number of charges laid against women in the City of Winnipeg doubled from 1991 to 1995 (for violent offences), yet 80% of those charges were eventually stayed by the Crown.

Women are also being convicted of crimes for defending themselves. Three problems result in the over-incarceration and conviction of women for violent crimes: mandatory minimum sentence, the current defence of self-defence, and the current defence of provocation. The mandatory minimum sentence for murder distorts the availability of defence and contributes to inequality within the system. Mandatory minimum sentences do not allow a sentencing judge to take into account the inequalities that lead women to resorting to violence, such as poverty and past physical and sexual abuse.

➡ **The Federal government must abolish mandatory minimum sentences.**

The current defence of self-defence is much too limited for women to use it successfully in homicide cases. Despite recent trends by the Supreme Court in the relaxing the immediacy requirements of the defence, there is no consistent resolution. In virtually identical circumstances, some women have been acquitted on the basis of self-defence while others are convicted.

There is unequal application of the defence of provocation to men and women. Almost exclusively men who have killed their wives in the "heat of passion" after discovering infidelity have historically used the defence of provocation successfully. In other words, provocation has often endorsed femicide. This defence should be abolished, as the only positive purpose it serves only to reduce a murder sentence to manslaughter. If mandatory minimum sentences were abolished, such circumstances would be taken into account in sentencing.

➡ **The Federal government must abolish the defence of provocation in the Criminal Code, contingent on the abolition of the mandatory minimum sentences for murder.**

After an individual is convicted of a crime, a sentencing judge has many options available. In many circumstances an individual could fulfil his or her sentence in the community rather than in confinement facilities. Traditionally, women involved in the criminal justice system have suffered from a lack of opportunity to take advantage of these options. More often than not they are sent to prisons with inadequate programming and a lack of reasonable facilities to accommodate them. The Portage Correctional Centre, Manitoba's women's jail is in deplorable condition and there has been a recommendation for its closure. A new jail is being constructed at Headingley, to open in 2009. The injection of funds into building a new jail is short-sighted; the provincial government should instead invest in helping more women serve their sentences in the community.

The loss of liberty caused by incarceration has permanent, detrimental effects on women and their children. The overcrowded and under resourced facilities they find themselves in upon conviction compounds the problem. Segregation is frequently used at federal prisons, and women are often subjected to searches by male guards. Women are often over-classified as requiring high security, as there is not a minimum-security women's prison in Manitoba.

➔ **Women's homes are a viable alternative for sentencing and the option of a woman serving her sentence in her home should be considered in every case where a conviction is entered.**

Another disadvantage faced by incarcerated women is poor health. HIV and Hepatitis C infection rates are much higher among women prisoners than among male prisoners and the general population. Women have higher rates of disability than men, as well as higher rates hospitalization for suicide attempts.

Young women also suffer discrimination in the justice system generally, while Aboriginal youth bear an even heavier burden. Aboriginal youth are criminalized and jailed at early ages and for longer periods of time than non-Aboriginals. The desire to keep young women safe from the many outside forces that might jeopardize their purity is apparent. This is problematic and reinforces sexist stereotypes. Also, imprisonment is frequently used to protect women from outsiders. This is a regressive refusal to address the root causes of women's safety concerns. The 2002 passing of the *Youth Criminal Justice Act* has resulted in a decrease in the overall numbers of youth in prison. However, a corresponding increase in funding for supportive community programming has not been forthcoming. This has resulted in many young women being sentenced to custody due to lack of community alternatives.

Youth in custody face largely the same problems as adult women. Lack of programming is a constant concern, as is the constant contact required with male guards. Human rights and equality abuses occurring in prisons must be stopped immediately.

➔ **Close all juvenile correctional institutions, while at the same time providing community services and programs to help youth involved with the criminal justice system.**

Women and Violence

While violence affects all segments of the population, women are disproportionately the victims of violent acts. This victimization is a violation of the right of all women to equal treatment by the law, under the law and to equal benefit of the law, as guaranteed in s.15 and s.28 of the *Charter*. Women represent 85% of all spousal violence victims, and men represent 9/10 alleged perpetrators. Perhaps that is the reason why women in violent unions are more than five times more likely to fear for their lives than men (38% vs. 7%). No person should be the victim of violence, and especially not the severe forms of violence that Canadian women are enduring. Aboriginal women are affected disproportionately by violence.

Acts of violence against women are more serious than against men as women are three times more likely than men to be physically injured, five times more likely to receive medical attention, five times more likely to be hospitalized, three times more likely to need to take time off work, and twice as likely to report chronic assaults or more than ten assaults. Also, it is estimated that violence is the leading cause of death for women aged 15-44, and is also the leading cause of injury for women in that same age bracket. Not only are the majority of the victims of violence women, the majority of women have been the victim of a violent act at some point in their lives. 51% of women have reported experiencing violence against them since age 16, and almost 60% of those victims have experienced more than one incident of violence. The estimated cost of violence against women is \$4.2 billion per year for such programs as social services and education, criminal justice, labour and health care. Thus, any investment into the reduction of violence against women will not only be a move towards gender equality as espoused in ss.15 and 28 of the *Charter of Rights and Freedoms*, but will also be financially beneficial to the Province of Manitoba, and to Canada.

There are two main areas of violence done against women: violence perpetrated by male partners, and sexual violence perpetrated by anyone. There is a great overlap between these two areas as sexual assaults against women are twice as likely to involve known men as strangers. However, there are also many differences between the two areas. All violence done to women by their partners is referred to as domestic violence, whether their partners are male or female, and studies suggest that lesbian partner abuse may even be as prevalent as abuse in heterosexual relationships. With sexual abuse it is predominantly women and girls who are the targets, and the overwhelming majority of perpetrators of child sexual abuse are male. Sexual violence against women includes the purchasing of sexual services provided by prostituted women. Within those two areas of violence, there are many factors that may increase a woman's vulnerability to abuse. These include dislocation, colonization, racism, homophobia, disability, poverty and isolation.

Manitoba has done well to create a supportive and specialized justice response to violence, however the preventative side, although growing, is inadequate. Private violence is still conceptualized in terms of relationship issues and is less connected with the social position of the sexes.

Approximately one in three girls is sexually abused before age 18, approximately one in four before age 14; and approximately one in six boys is sexually abused before age 16. These numbers are appallingly high, and do not even account for women who are sexually assaulted after turning 18! Overall, 82.6% of victims in reported cases of sexual assault were women, and 98% of the accused were men. Since the majority of sexual assault victims are female, any discrimination suffered by the victims of sexual violence is a violation of women's rights to equality under s.15 and s.28 of the *Charter*. Not only is the incidence of sexual abuse extremely high, but the perpetrators of that abuse are not being punished, or recognized as

the criminals they are. According to statistics Canada, only 6% of all sexual assaults are reported to police, and only 1% of all “date/acquaintances rapes” are reported to police.

One of the reasons women are reluctant to report the abuse is their fear of disbelief by their family and friends, and indeed the authorities. A second is that at a trial women are often re-victimized. This happens in two ways. First, the requirement of a preliminary hearing forces victims to relive the incident in court – twice. In Britain – which has a similar commonwealth justice system – the preliminary hearing has been abolished and this has not resulted in an increase in wrongful convictions. That is a common sense approach, as it is highly unlikely that a crown prosecutor would proceed to trial if they did not have enough evidence to make it past a preliminary hearing. Secondly, the victim’s credibility is often at issue through cross-examinations on her medical records. Bill C-46, a measure introduced to protect complainant medical records, offers more protection than the common law approach followed by courts. The government could do more to assure the confidentiality of records, as the test involves a fair amount of judicial discretion. Also, Bill C-46 only applies to sexual assaults and not to domestic violence more generally.

➡ **The Federal government must abolish the requirement of a preliminary hearing before a case goes to trial, particularly in cases involving violence against women.**

Women are overwhelmingly the victims of prostitution. The current laws that criminalize women for solicitation for the purpose of prostitution, when properly enforced, punish both Johns and prostitutes. However, the law is not enforced equally against both parties. This unequal application of the law to the detriment of women is contrary to s. 15 and s. 28 of the *Charter*. The federal government is currently considering decriminalizing prostitution. Legalizing prostitution is not the answer. Purchasers of such services should be targeted. Condoning prostitution does not protect women. Keeping Johns away from them does.

➡ **The criminal code should be amended to eliminate the crime of solicitation, and to add the crime of “purchasing sexual services”. Only the purchaser of the services will be criminalized and not the women who are being victimized. Prostitution should not be legalized.**

Youth prostitution has traditionally been treated in a more severe fashion than when adults engage in the activity. It is apparent these individuals are entering prostitution rings at young ages, and often have difficulty escaping due to financial dependence on the income it produces. Addiction rates for girls involved in prostitution are alarmingly high. Services for girls are extremely important, both to protect them from entering the sex trade and to help them escape when they desire to do so.

While the Manitoba government has made efforts to provide aid to the victims of domestic violence, much still needs to be done. Domestic abuse is very different from other forms of violence, because the likelihood of repeat violence is predictable and common, and because most often the victim is known in

advance. The government should adopt preventative measures to address the root causes of violence in the home in order to reduce the incidences of domestic violence.

One of these causes is that victims often remain in the home after abusive incidents, even where these incidents have been reported to the police. Economic instability is one of the most influential factors in keeping women in these situations. Women's poverty and lack of earning power must be addressed if these women are to escape violence.

Women are often not only victimized by their abusive partners, but also by the criminal justice system. Women who commit spousal violence are less likely to have initiated than men in similar settings. Far too often the criminal justice system fails to see that these women are the victims in this setting. Also, often they are either physically or sexually abused by the person they are convicted of assaulting or killing. This is often not taken into account when they are being sentenced. Also, men who assault their partners are not being punished fully for the crimes they commit due to the use of the defence of provocation.

Not only is violence against women devastating for those who are the intended targets, but it has a serious impact on the children of those victims. Children might also be victimized themselves.

Disabled women, Aboriginal women, immigrant women, and visible minority women are at a double disadvantage when it comes to violence, both sexual and domestic. They experience higher rates of abuse than others, and therefore require special protections if substantive equality is to be achieved.