



**West Coast LEAF’s Submission to the
Standing Committee on Justice and Human Rights on the
Study on Access to the Justice System**

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West Coast LEAF is pleased to offer this written submission to the House Standing Committee on Justice and Human Rights to aid its members in their study on Access to the Justice System.

West Coast LEAF: Our Expertise

West Coast LEAF was formed in 1985, the year that the equality guarantees of the *Canadian Charter of Rights and Freedoms* came into force. Our mission is to achieve equality by changing historic patterns of discrimination against women through British Columbia-based equality rights litigation, law reform and public legal education. West Coast LEAF is a non-partisan, incorporated non-profit society and federally registered charity. We are governed by an independent, elected Board of Directors, and supported by members, volunteers and staff. We work in partnership with LEAF national, but we are separate organizations.

Over the past 31 years, West Coast LEAF has developed a unique expertise on equality rights with an intersectional approach to the multiple identities and factors of disadvantage that impact women’s achievement of substantive equality within Canadian society. We work along three program streams:

- (1) **Public legal education** is a starting point in ensuring that residents of British Columbia can access and understand their rights, and think critically about the law as it affects them.
- (2) Our **law reform** work seeks to ensure that all laws and policies in British Columbia comply with the equality rights enshrined in the *Charter* and in international conventions to which Canada is a signatory. We conduct comprehensive research projects aimed at providing practical recommendations for implementation by decision-makers at the local, provincial and federal level.
- (3) Finally, we conduct **systemic litigation**, contributing to the development of equality rights jurisprudence through cases originating in British Columbia by advocating for an understanding of substantive equality that recognizes and affirms difference. Our litigation work arises under both the *Charter* and human rights law, with a particular focus on women’s equality.

Access to justice is a long-standing focus of West Coast LEAF's work, particularly in the context of family law proceedings. West Coast LEAF produced (with the Canadian Centre for Policy Alternatives) research reports on the crisis in BC's legal aid system in 2004 (*Legal Aid Denied: Women and the Cuts to Legal Services in BC*) and 2010 (*Rights Based Legal Aid: Rebuilding BC's Broken System*). In 2014, West Coast LEAF conducted a province-wide consultation on how best to meet women's legal needs in the province, a study that culminated in the report *Putting Justice Back on the Map: the Route to Equal and Accessible Family Justice*. The organization has also prepared two resources that "map the gap" in services available to women seeking family law assistance in BC (*Mapping the Gap: A Summary of Legal Resources for Women in British Columbia*), the second of which is focused on those used by and targeted to Indigenous women (*Mapping the Gap: Linking Aboriginal Women with Legal Services and Resources*). West Coast LEAF has supported and intervened in a number of key cases regarding access to justice, most recently at the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* in regard to whether the Province could charge hearing fees in family proceedings.

West Coast LEAF is one of the founding members of the Coalition for Public Legal Services, a group of diverse partners with whom we advocate for an adequately funded legal aid system in British Columbia. As discussed in more detail below, West Coast LEAF has partnered with UBC's Allard School of Law to open the Rise Women's Legal Centre in Vancouver, a legal clinic providing the only services of its kind to women, a model which arose directly out of the province-wide consultation conducted in 2014. In addition, West Coast LEAF staff regularly meet with government decision-makers, the Legal Services Society (BC's legal aid provider) and other stakeholders to seek resolutions to the legal aid funding crisis in BC, and have been invited to speak as experts on access to civil justice at conferences and events across the country. In its work in access to justice, West Coast LEAF brings to the fore the perspectives of individual women and the systemic challenges they face in accessing means of obtaining fair access to the legal system.

A Critical Need for Civil Legal Aid Funding

While the commitment to criminal legal aid funding in this year's federal budget is admirable and necessary, it is civil legal aid that is most woefully underfunded in many provinces. For women, it is *civil* legal aid – particularly in respect of family and poverty law matters – that has the most direct impact on the respect and preservation of their rights. There are a number of reasons for this difference, including that men are far more likely to be charged with a crime than women, and therefore women are less likely to need criminal law assistance. Women also have statistically lower incomes than men, particularly following the breakdown of a relationship, and are therefore less likely to be able to pay for counsel when they have a legal dispute. However, women are more profoundly impacted by the inability to access counsel because women are much more likely to be the victims of violence from male spouses than vice versa. Therefore, women's safety (and the safety of their children) is more likely at stake in family law proceedings. Women remain predominantly the primary care givers of children, and thus have more to lose when they are unrepresented by counsel in family cases. In other words, a failure to fund civil legal aid, particularly for family law disputes, has a disproportionate and detrimental impact on women.

British Columbia provides among the lowest funding per capita for civil legal aid in the country.¹ Canada, as a whole, falls far behind other developed nations in ensuring that those who cannot afford counsel can still access the justice system. This fact has not gone unnoticed on the international stage. In 2008, the United Nations noted in its report on Canada's compliance with the *Convention on the Elimination of Discrimination Against Women* that it was concerned that "financial support for civil legal aid has diminished and that access to it has become increasingly restricted, in particular in British Columbia, consequently denying low-income women access to legal representation and legal services."² According to the World Justice Report, an international ranking of rule of law, Canada is fifty-fourth in the world in providing access to counsel in civil matters: not exactly the rosy picture that many Canadians have of our "world class" justice system.³

While legal aid programs are maintained by the provinces, they are designed to enable access to justice in both provincial and federal courts and the federal government has historically provided for their maintenance. Prior to 1995/1996, the federal government contributed to the cost of civil legal aid with the provinces and territories under the Canada Assistance Plan (CAP). On April 1, 1996, the CAP was replaced by the Canadian Health and Social Transfer (CHST), a lump sum federal transfer provided to each province and territory to support provincial health care, post-secondary education, social assistance and social services. As a consequence of this change, it is not possible to determine the level of federal funding that has been allocated to civil legal aid since the CHST and its current successor, the Canadian Social Transfer (CST), were implemented.⁴

The *Constitution Act, 1867* provides the provinces with jurisdiction over the administration of justice, but it is the federal government who appoints the judges of the superior courts in each province and therefore both levels of government have a constitutional interest in ensuring that everyone in Canada has equal access to justice before those judges. In 2014, the Supreme Court of Canada found that it was unconstitutional for the provinces to administer justice in a way that denied Canadians their right to access justice in the courts.⁵ The federal government has a constitutional investment in ensuring that legal aid programs across the country do not run afoul of the right of access to justice.

Recommendation for Civil Legal Aid Funding

We highly recommend that the federal government commit to **targeted funding for civil legal aid**, including family, immigration and poverty law matters. This action is required to ensure that men and women have substantively equal access to the justice system. Such targeted funding would reflect a transparent commitment to an accessible justice system on the part of the federal

¹ Brewin, Alison and Kasari Govender. *Rights Based Legal Aid: Rebuilding BC's Broken System*. West Coast LEAF and Canadian Centre for Policy Alternatives, 2010. Available online: <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2010-REPORT-Rights-Based-Legal-Aid-Rebuilding-BCs-Broken-System.pdf> at 4.

² Concluding observations of the Committee on the Elimination of Discrimination against Women; Canada, UN Doc CEDAW/C/CAN/CO/7 (7 November 2008) at 5.

³ Buckley, Melina. *Reaching Equal Justice: Balancing the Scales*. Canadian Bar Association, 2014. Available online: http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/CBA_equal_justice.pdf at 46.

⁴ Statistics Canada. *Legal Aid in Canada: Resource and Caseload Statistics, 2011/2012*. Available online: <http://www.statcan.gc.ca/pub/85f0015x/85f0015x2012000-eng.pdf> at 6.

⁵ *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 43.

government and would have a substantial impact on the lives of women and children across the country, as well as on the rule of law more generally.

An Expanded, Robust Court Challenges Program is Crucial for Systemic Change

We are pleased to see that the Committee is discussing the reintroduction of the Court Challenges Program (CCP) as part of its study of Access to the Justice System. A robust means for funding large-scale challenges to government action complements a fully-funded and sustainable criminal and civil legal aid system in securing access to justice.

The previous incarnation of the CCP provided funding to West Coast LEAF in the past, which resulted in important public policy engagement in support of women's equality in BC. For example, in 2010, West Coast LEAF was instrumental in the *Polygamy Reference*,⁶ in which the British Columbia Supreme Court upheld the constitutionality of criminal prohibitions against polygamy. Until this decision, there was considerable uncertainty around whether the polygamy offence provisions were constitutional. As a result, the Crown was having difficulty laying criminal charges against leaders of polygamous communities. West Coast LEAF intervened in the *Polygamy Reference* to argue that the criminal offence provisions are constitutional and do protect women's substantive equality.

Our involvement in the *Polygamy Reference* was as a direct result of the former CCP. In 2004, we received funding from the CCP to convene a national consultation on women and religious freedom, the outcome of which was the argument we made in the *Polygamy Reference*. We could not have done this consultation without the CCP and the importance of the consultation and accompanying research cannot be overstated. As a result, we were able to develop a principled argument in support of substantive equality rights for women adversely impacted by polygamy. This was a case in which other groups with whom we sometimes partner had views diametrically opposed to ours. This is the nature of many constitutional cases, and equality rights cases in particular. The issues are complex and divisive. They require thoughtful evidence-based analysis and research, which cannot be done without adequate funding.

Movement on two fronts – access to direct legal services and challenging the constitutionality of laws – is necessary to achieve substantive equality before and under the law. This May, West Coast LEAF will be launching the Rise Women's Legal Centre. The Centre will provide wrap-around, full legal representation services to women living in metro Vancouver and its suburbs, with a particular focus on family law, the area of greatest need in BC. The Centre is not a panacea – it is only one part of the multifaceted response needed to address the legal aid crisis in British Columbia. We will look at the cases that come through the Centre, identify systemic issues ripe for challenge, and analyze whether litigation would be a useful means by which to seek change. A renewed Court Challenges Program is indispensable to making that work a reality.

A renewed and expanded Court Challenges Program is an exciting opportunity. We have several recommendations for the program, listed below. Our key recommendation, which would mark a significant change for the program, is to **expand its coverage to provincial and territorial government action**. By allowing applications from groups and individuals seeking to challenge

⁶ *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (*Polygamy Reference*).

either federal and/or provincial government action, the program would be aimed at supporting the next generation of equality rights jurisprudence. In its prior iterations, the CCP was instrumental in the maturation of section 15's equality jurisprudence at the federal level. Provincial and territorial laws directly affect the largest numbers of Canadians and areas of law regarded as provincial in jurisdiction disproportionately affect women, such as family law and access to social services. Therefore, expanding the CCP is an essential part of fulfilling the promise of substantive equality enshrined in the *Charter*.

Much as the federal and provincial governments have shared responsibility to ensure access to the courts and the federal government provides transfer payments to the provinces for the administration of justice, their jurisdiction is interwoven in many areas of substantive law as well. For instance, several provinces, including BC, have recently modernized or are moving to modernize family law legislation. These provincial enactments will place pressure on the federal government to revisit the *Divorce Act*, as marriage and its dissolution falls under federal jurisdiction. Expanding the reach of the CCP will recognize the interlocking and concurrent jurisdiction already in place which arises under cooperative federalism. Where federal laws are being challenged, provincial Attorneys General frequently take an interest and participate as interveners – and vice versa – because the impact of a decision on one level of government may have broad repercussions for the other, just as the impact of a decision in one province, affects the interpretation of similar laws in other provinces.

Litigants seeking to mount successful test case litigation face a daunting, uphill battle. Test cases are financially draining, easily costing hundreds of thousands of dollars at trial. Litigants bear the risk of an adverse costs award if unsuccessful in the outcome. Test cases are labour-intensive, involving several years of litigation, across at least one, though likely three levels of court, requiring support from dozens of lawyers, staff, expert witnesses and supporters. Test cases may involve countless litigants, including the parties at the core of the dispute, Attorneys Generals and other interested individuals and organizations seeking intervenor status. They take an emotional toll on individual litigants, who, as the “face” of the litigation, are subject to considerable media and public scrutiny. Along the way to their day in court, plaintiffs typically face a barrage of interlocutory applications, defeating each of which is necessary to see a resolution on the merits of the case.

Mounting *Charter* litigation is difficult in any case; it is especially so in the context of challenging laws against substantive equality. Equality seeking litigants must amass an extraordinary evidential record setting out the discriminatory impact of the law, a herculean effort when the discriminatory effects of the law are compounded by intersecting disadvantages and vulnerabilities. As test cases are by their nature at the cutting edge of legal thinking and predicting success is incredibly difficult, litigants must anticipate any and all evidentiary and jurisprudential gaps and seek a means to fill them all to ensure they have framed the case and the issues in the litigation in a way the court will accept. They bear a significant risk that their arguments may not succeed. Before any of this takes place, however, successful test case litigation requires years (if not decades) of groundwork, of collaborating with individuals and community groups to understand the deep, complex roots of substantive inequality, and to devise legal strategies to address those harms in meaningful ways. For all these reasons, the decision to engage in test case litigation is not made lightly. Litigation remains but one tool among those seeking social change, a tool that is clearly out of reach for the vast majority of individuals and organizations.

Expanding the CCP to provincial and territorial laws will not open the floodgates of litigation, occasion spurious lawsuits or lead to a federal-provincial showdown. Expanding the CCP to provincial laws will enhance the federal government's ability to ensure it is meeting constitutional and international obligations, and will hold governments at all levels accountable as custodians of the *Charter*.

Recommendations for the Court Challenges Program

- Retain the mandate of the Court Challenges Program to **support enforcement of the Constitution and historically disadvantaged individuals and groups seeking equality** in Canada.
- Expand the scope of the program to **include provincial and territorial government action** to ensure that it addresses those areas of law that most frequently and most directly impact a majority of individuals, such as family law and access to social services.
- Allow access to the program for litigants who bring **challenges under sections 15⁷ and 28⁸ of the Charter**, and under **section 35(4)⁹ of the Constitution Act, 1982**, either in isolation or in combination with other provisions of the *Charter*.
- Provide **adequate, sustainable funding** appropriate to large-scale *Charter* litigation, which requires amassing a considerable body of lay and expert evidence in respect of each of the contested issues, many days of hearings at the trial level, many years before final resolution is achieved at an appellate level, costly disbursements associated with securing lay and expert witnesses, etc.
- Operate the program with a **clear mandate** and with **independent oversight**. The process for making application for funding must be transparent and accountable.
- Funding for the Court Challenges Program should be **separate and apart from funding for Indigenous rights cases** that arises as a result of the the Crown's fiduciary duty to Indigenous Peoples and under the Honour of the Crown.

Guardians of the Rule of Law: Section 4.1 of the *Department of Justice Act*

We commend the Committee for including the Minister of Justice's role in the examination of bills and regulations for compliance with the *Charter* as part of this study on access to justice. We believe that access to justice does not simply have a curative aspect; it is not only about finding ways to bring people before the courts. If we are to remedy systemic inequality and truly

⁷ Section 15(1) of the Charter provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15(2) shields laws, programs or activities that have as their object the amelioration of conditions of disadvantaged individuals or groups from challenge under section 15(1).

⁸ Section 28 provides that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

⁹ Section 35(4) provides that, notwithstanding any other provision of the *Constitution Act, 1982*, aboriginal and treaty rights are guaranteed equally to male and female persons.

enhance access to justice, we must look closely at the laws we enact and their impact on our rights and freedoms.

As the Prime Minister acknowledges in his Mandate Letter to Minister Wilson-Raybould, she must wear two hats. She, like every other who preceded her, is both the Minister of Justice and the Attorney General of Canada. Regardless of which hat she wears, the overarching goal is to “ensure our legislation meets the highest standards of equity, fairness and respect for the rule of law” demonstrating “the greatest possible commitment to respecting the *Charter of Rights and Freedoms*.”

This laudable obligation has both a legal and political dimension. Legally, the Minister of Justice and the Attorney General are guardians of the rule of law. Legislation introduced by the government must comply with the *Charter* as the government is no more above the law than any individual among us. The obligation also has socio-political dimensions. We are a rights-respecting parliamentary democracy. The *Charter* sets out the rights and freedoms upon which our political and legal systems are founded.

After the fact litigation is merely a safety valve; it must not take the place of thoughtful, evidence-based policy development and constitutionally sound law-making. We encourage the Committee to give section 4.1 of the *Department of Justice Act* close scrutiny to ensure that any standard developed to give practical effect to the examination provisions reflects the obligation of the Minister and Attorney General to stand as guardians of the rule of law. Canadians deserve and expect no less.

Recommendation for Charter Compliance Examination

We recommend a **good faith standard** to assess bills and regulations for compliance with the Charter. The inquiry would be: Does the government in good faith believe the regulation or bill at issue complies with the text and the spirit of the *Charter*?

Suggested Resources

Alison Brewin and Kasari Govender. *Rights Based Legal Aid: Rebuilding BC's Broken System*. West Coast LEAF and Canadian Centre for Policy Alternatives, 2010. Available online: <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2010-REPORT-Rights-Based-Legal-Aid-Rebuilding-BCs-Broken-System.pdf>.

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The Right to Legal Aid: How British Columbia's Legal Aid System Fails to Meet International Human Rights Obligations, Lawyers' Rights Watch Canada, 2014. Available online: http://www.lrwc.org/ws/wp-content/uploads/2014/09/Right-to-Legal-Aid.BC-Fails-Sept.19.BN_.pdf.