

Recognizing Economic, Social and Cultural Rights in Canada

One Step Toward Eliminating Violence Against Women in All its Forms

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L'auteure affirme qu'un engagement sérieux vers l'égalité des femmes et un mouvement qui mettrait un frein à toutes formes de violence faite aux femmes requiert des actions positives contre les gouvernements pour assurer un minimum de subsistance. L'absence de remèdes spécifiques légaux pour pallier l'insuffisance des politiques sociales est une violation des engagements du Canada envers les droits humains internationaux.

Gender-based violence is an impediment to full participation in society and prevents women from the full enjoyment of their basic human rights and fundamental freedoms. Yet, women who experience physical, emotional, sexual and economic abuse at the hands of intimate male partners in Canada are caught between a criminal justice system that is ill equipped to deal with the broad implications of domestic violence and a judiciary that is reluctant to recognize that without rights to basic necessities civil and political rights can be rendered meaningless. As early as the 1970s, anti-violence activists in Canada have recognized “the inseparability of criminal law, equality law and social policy” (CASAC 19, 80). They have also recognized that welfare is one of the primary social policy measures through which women can obtain freedom from violent partners. Provincial welfare policies across Canada have been criticized for failing to meet basic needs, the courts have consistently deemed economic and social rights as beyond their institutional capacity and there are no freestanding rights to equality, health care or social assistance.

Canada is a state party to the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* and the *Beijing Platform for Action*. As such, the executive branch of the Canadian government has made international commitments to women's equality through the eradication of women's poverty and the elimination of violence against women in

all its forms. The breach of equality rights and the infringement of liberty and security of the person inherent in women's disproportionate experiences of poverty and increased risk of exposure to “private” violence under inadequate provincial welfare schemes contravene Canada's international commitments. Canada has pointed to ss. 7 and 15 of *The Canadian Charter of Rights and Freedoms* as “providing legal remedies where individuals are deprived of basic necessities” in pleadings before United Nations human rights treaty monitoring bodies (CCPI, para. 14). In 1997 the federal government submitted the *Core Document Forming Part of the Reports of States Parties* to the Secretary General to the United Nations outlining Canada's Constitutional structure, political framework and general framework for the protection of human rights. Paragraph 127 of the Core Document refers to section 36(1) of the *Constitution Act, 1982* as providing a means to economic and social rights.¹ Here I will argue that the existence of public policy measures may provide access to services, but in the absence of specific legal remedies for the repeal or inadequacy of public policy measures designed to meet basic needs, these measures are not rights nor do they meet Canada's international human rights commitments. The burden of poverty and exposure to male violence exacerbated by the repeal and/or inadequacy of welfare policies falls disproportionately on women. Women who face discrimination on various intersecting grounds are more vulnerable to violence and abuse and face greater barriers when seeking services (Status of Women Canada 2).

Canada's International Commitments

Historically, civil and political rights and economic and social rights were divided into distinct statutes with distinct provisions for their domestic enforcement.² Equality rights have always been intended as fully justiciable rights whereas the *ICESCR* contains provisions for progressive

realization in order to accommodate countries whose level of economic development presents obstacles to the realization of Covenant rights (Brodsky and Day 202). Martha Jackman and Gwen Brodsky and Shelagh Day argue that the inclusion of such provisions was never intended as a means through which OECD countries with high levels of economic development, like Canada, could derogate from their legal obligations to provide Covenant rights or methods of legal redress in the event of government failure to adequately provide for them (Jackman cited in Brodsky and Day 202; Brodsky and Day). According to Brodsky and Day, *CEDAW* makes no distinction between women's material inequality and other forms of inequality that women face. The interpretation of *CEDAW* is informed by the *Beijing Platform for Action*, thus through the ratification of these treaties, the Canadian government has made a commitment to implement an adequate social safety net and to pursue and implement policy measures designed to eradicate women's poverty. As such, with regard to these objectives both equality rights and economic and social rights share the same "obligations of immediacy" (203). Unfortunately neither the federal and provincial governments nor the judiciary seem to share this perspective.

The Lack of Accountability for Federal/Provincial Cost Saving Measures

Since 1995, economic restructuring has deepened women's poverty and created conditions where women are at greater risk of exposure to all forms of violence, most notably sexual violence and domestic violence. Federal and provincial cost saving measures that reduce what have already been criticized as inadequate levels of social assistance have been linked to the exchange of sexual availability for food and other basic necessities and to creating conditions where women are either unable to leave abusive partners or return to abuse when they cannot find refuge in shelters or survive on welfare (CASAC 99; see also Mosher, Evans, Little, Morrow, Boulding and VanderPlaats). Poverty and violence are thus sex equality issues that speak to an inclusive understanding of life, liberty and security of the person that extends beyond the administration of justice. Like many other equality issues, poverty and violence also require state action and the expenditure of government resources for their resolution. Changes in federal and provincial welfare policies that exacerbate women's poverty and place women at greater risk of experiencing violence point to an urgent need for fully justiciable economic and social rights in Canada. These rights would place a positive duty to provide a basic minimum level of social assistance on the governments. They could be realized by looking at the life, liberty, and security of the person interests outlined in the first clause of s. 7 of the *Charter* through the lens of ss. 15 and 28 taken together.³

The aftermath of the 1996 Federal repeal of the *Canada Assistance Plan (CAP)*, eliminating national standards for the provision of social assistance, provides a glaring example of the consequences of the lack of positive rights against governments to ensure a basic minimum level of subsistence in Canada. The provinces are no longer obligated to consider individual budgetary requirements, basic needs or provide a system of appeals, nor are they prohibited from requiring welfare recipients to work for welfare.⁴ As a result Ontario decreased social assistance benefits by 21.6 per cent, Manitoba decreased its benefits to single people by ten per cent and Nova Scotia by 35 per cent (Porter 131). British Columbia's *Employment and Assistance Act* placed a two-year time limit in any five-year period on the collection of social assistance⁵; Ontario initiated the "Workfare" program and reinstated the "spouse in the house" rule that was subsequently contested and declared discriminatory and invalid in the *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community and Social Services)* decision.⁶ Although regulations such as the B.C. two-year time limit or the "spouse in the house" rule can (and have, as in the case of *Falkiner*) been declared invalid on the basis of discrimination, the cuts in themselves cannot. Three potential reasons for this are: 1) the justiciability/judicial deference issue, i.e. a reluctance on the part of the judiciary to interfere with political questions like government spending; 2) discrimination cannot be pleaded when all welfare recipients are equally subject to the same amount of deprivation (in other words when the similarly situated are similarly treated under the legislative scheme or the lack of a legislative scheme); and 3) economic and social rights have not been legislated as such so although Canada has ratified the *ICESCR* and the *CEDAW* judicial interpretation is not bound by their provisions.

Since the repeal of the *CAP*, conditions for provincial receipt of federal monies for social programs has been subsumed under the *Federal-Provincial Fiscal Arrangements Act*. This *Act* defines "social assistance" as "aid in any form to or in respect of a person in need."⁷ This "aid" is provided through transfers of federal money to the provincial and territorial governments.⁸ One of the purposes of the *Act* is to finance "social programs in a manner that provides provincial flexibility."⁹ What this means is that the provincial and territorial governments establish spending priorities and are not accountable to the federal government in the event that a province or territory determines that they do not need the total transfer. If they determine that they do not need the total transfer, the provincial government is entitled to reinvest the money in the same or a related area. As such, there is no guarantee that social assistance recipients will get their needs met. The only national standard kept under the *Act* is that residency need not be established for the receipt of social assistance.¹⁰ In the event that social assistance recipients do not get their basic needs met the lack of fully justiciable

rights to a basic minimum level of subsistence leaves them with no possibility for legal redress.

The 2003 *Budget Implementation Act* bifurcated the CHST into the Canada Health Transfer (CHT) and the Canada Social Transfer (CST). In 2004/2005 the CST received only 37 per cent of the total funding for both Transfers (NAPO 13). While the CHT has a set of standards to which the provinces must comply if they are to receive a full transfer, the CST contains only the requirement that applicants for social assistance need not establish residency in the province within which they are

ernments cannot be made accountable for the deleterious effects of the inadequate distribution of resources it cannot be said that these measures constitute a fulfillment of Canada's obligations under the *ICESCR*, the *CEDAW* or the *Beijing Platform for Action*.

Judicial Deference and the Quality of Social Services

Revisiting the *Falkiner* decision and briefly examining the *Gosselin v. Quebec (Attorney General)*¹³ decision is illustrative. The eradication of women's poverty and the elimina-

Women who experience abuse at the hands of intimate male partners are caught between a criminal justice system that is ill equipped to deal with the broad implications of domestic violence and a judiciary reluctant to recognize that without rights to basic necessities civil and political rights can be rendered meaningless.

applying.¹¹ The elimination of 50-50 federal/provincial cost sharing under the *CAP*, national standards for the provision of social services, and the introduction of block funding creates conditions where all services traditionally funded under the *CAP* compete for provincial funding priority. Those who are disproportionately in need of these services and who lack the possibility for legal redress are single women, elderly women, single women with children and disabled women. According to economist Armine Yalnizyan:

The federal government has virtually no response to the precarious conditions faced by millions of women and their families because of cutbacks triggered by federal actions.... The effect of this budget is negligible on most women's daily lives, and virtually non-existent for millions of women, a remarkable fact given that it unleashes \$49 billion in new tax and spending initiatives over the next five years. (cited in FAFIA 2)

Although Bill C-48, the NDP better balanced budget, has successfully allotted \$4.6 billion toward "investments in affordable housing, public transit, post secondary education, and meeting our commitments to fight global poverty"¹² the results for women may still prove negligible.

The current distribution of resources in the social service sector is inadequate to meet basic needs. The provincial governments do not seem to have any plans to improve the situation and in the event that it gets worse there is no way to render the governments legally accountable. Since the repeal of the *CAP*, the governments have instituted discriminatory cost saving measures in many jurisdictions and systematically reduced already inadequate benefits. Because the federal and provincial gov-

tion of violence against women in all its forms seem to be elusive goals that are pushed aside by the governments in the name of "sound fiscal management" and avoided by the judiciary through extreme deference to the legislatures. Because there are no positive rights against governments to ensure the provision of adequate social assistance, the only way social service recipients can seek redress is if they can successfully frame the measures as discriminatory under the enumerated or analogous grounds of s. 15 of the *Charter*. Although in the broadest sense depriving individuals of the basic requirements to sustain life is clearly discriminatory, the majority in the *Gosselin* decision showed extreme deference in their interpretation of s. 45 of the *Quebec Charter*. The *Gosselin* Court placed the adequacy of social services beyond judicial review, did not find any discrimination based on age under s. 15 of the *Charter*, and established that the facts of Louise Gosselin's case did not warrant a novel application of s. 7 (*Gosselin* 2002: 434). The outcome of this case demonstrates that if the applicants are unable to show that a denial of assistance or the failure of the social assistance scheme to meet basic needs is the result of discrimination under an existing legislative scheme, section 15 is of no use. Also, when there are no explicit positive rights against governments to ensure a basic minimum level of subsistence, judicial deference will more likely than not restrict the ambit of s. 7 from including economic and social rights within the meaning of life, liberty and security of the person.

Both the *Falkiner* and *Gosselin* cases provide examples of women's increased vulnerability to violence due to poverty and a lack of financial autonomy. Both of these cases were challenges to the discriminatory impact of provincial welfare policies. Although sex was not a pleaded ground in *Gosselin* both of these cases illustrate the ways in which women are uniquely affected by provincial cost saving

measures. In *Falkiner* each of the four respondents was a sole support parent, each was receiving social assistance as a single mother, and three of them had been in an intimate or family relationship with an alcoholic and/or abusive man (*Falkiner* 2002, para. 43). Fortunately, with regard to the “spouse in the house” rule, the Ontario Court of Appeal recognized that: “Forcing [social assistance recipients] to become financially dependent on men with whom they have at best try-on relationships strikes to the core of their human dignity” (*Falkiner* 2002, para. 101).

Unfortunately, the issue of whether the benefits avail-

social strata often find themselves in a position where they are one paycheck, relationship breakdown or one physical and/or sexual assault at the hands of an intimate male partner away from a trip to the welfare office. In 2002 in Ontario 50 per cent of women on welfare were on welfare after leaving violent relationships (LEAF para. 17). Violence against women cuts across all social constructions of class and culture but a woman’s subject position at the intersection of gender, race, ability, age, ethnicity, sexual orientation, educational and economic status, and her experiences of colonization and/or dislocation increase

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able to lone parent families are sufficient to successfully live independently of a violent partner was not considered in this case. The “spouse in the house” rule was a blatantly discriminatory one but what about the substantive consideration of the overall effect on women of insufficient benefits under *Ontario Works*?¹⁴

The facts of Louise Gosselin’s case reveal a different kind of vulnerability to violence exacerbated by the experience of extreme poverty under an inadequate welfare scheme. Because her s. 15 claim was pleaded on the ground of age and not sex neither the lower courts nor the majority at the Supreme Court took the gendered aspects of her experience of poverty into account. Nevertheless, the record reveals that she exchanged her sexual availability for shelter and food and she engaged in prostitution in order to obtain money to buy clothing (NAWL para. 8). A man from whom she was obtaining food attempted to rape her and the men with whom she cohabited at a boarding house sexually harassed her (NAWL para. 9). Both of these cases illustrate the ways in which “women’s decision making autonomy” is diminished through the experience of poverty (NAWL para. 41). They also illustrate the ways in which women are rendered more vulnerable to violence, sexual exploitation and coercion under inadequate welfare schemes.

The overwhelming majority of spousal and sexual assault victims are female. Their experiences are overall “more severe, more frequent and cause more serious physical injury and psychological harm (Status of Women Canada 2).” Female victims of violence are three times more likely than male victims to become physically injured; they are five times more likely to receive medical attention; they are also five times more likely to become hospitalized and twice as likely to report chronic, ongoing assaults (Status of Women Canada 23). Women of all

vulnerability to violence and can inform the type and severity of the violence experienced (Status of Women Canada 2).

In 1995 it was estimated that violence against women cost the government \$2,368, 924, 297¹⁵ in expenditures to the social service sector alone. Since this estimate was made there has been an increase in demand for shelters on the part of women fleeing violence (Status of Women Canada 13). Even with an increase in emergency shelters in last 35 years, homelessness and the lack of affordable housing have both been declared a national crisis (FAFIA 33). On April 17, 2002, 2,826 women and 2,525 children fleeing abuse were admitted to shelters; on that same day 254 women and 222 children were turned away (Status of Women Canada 35). Seventy-one percent of those turned away were turned away because the shelters were full (Status of Women Canada 35). In 2003 the Canadian Association of Sexual Assault Centres reported that women are qualifying for welfare less and less often. Janet Mosher *et al* point to a situation in Ontario where women fleeing abuse are denied benefits on account of phone calls made by the abusive partner to the welfare fraud “snitch-lines (Mosher 64).” With these facts and figures in mind, it is important to ask how a country that will be unleashing forty-nine billion dollars in new tax and spending initiatives over the next five years can continue to justify the maintenance of inadequate provincial social assistance schemes and plead poverty in the face of fully justiciable economic and social rights.

Conclusions

Both paragraph 127 of the *Core Document* and s. 36(1)(c) of the *Constitution Act, 1982* make reference to the “quality” of public services. The federal government has

articulated that s. 36(1)(c) of the *Constitution Act* and ss. 7 and 15 of the *Charter* are expressions of Canada's intention to give life to its international human rights obligations. The Supreme Court of Canada has articulated that ss 7 and 15 of the *Charter* provide for the enforceability of social and economic rights by the courts.¹⁶ The Charter Committee on Poverty Issues argued that the "direct justiciability of s. 36" was not at issue in the *Gosselin* case (CCPI paras. 13 and 14). But, whether a justiciable right to adequate social assistance is provided by s. 36 needs to be answered. Whether the denial of adequate assistance is a breach of the equality guarantees under s. 15 and/or a breach of the life, liberty and security of the person interests under s. 7 of the *Charter* also needs to be answered. The existence of public policy measures may provide access to services, but in the absence of legal remedies for the repeal or inadequacy of those measures (especially those designed to meet basic needs) these measures are not rights nor do they meet Canada's international human rights commitments. A commitment to women's equality requires fully justiciable economic, social and cultural rights (Brodsky and Day 219; Lakeman 27; CASAC 95; FAFIA 21; NAWL para. 36). This need is underscored by: 1) the effects of the repeal of the *CAP* in the form of cuts to the social transfer and a national move to welfare reform; 2) the knowledge that women are over-represented among the recipients of social assistance; and 3) poverty increases women's vulnerability to all forms of violence. A substantive commitment to women's equality and a solid step on the road to eradicating all forms of violence against women in Canada requires fully justiciable positive rights against governments to ensure a basic minimum level of subsistence.

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¹HRI/CORE/1/Add.91. Paragraph 127 states: Section 36 of Part III of the Constitution Act, 1982, entitled Equalization and Regional Disparities, commits federal and provincial governments to promoting equal opportunities for the well-being of Canadians, furthering economic development to reduce disparity in opportunities and providing essential public services of reasonable quality to all Canadians. Furthermore, it commits the federal Government to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. These provisions are particularly relevant in regard to Canada's international obligations for the protection of

economic, social and cultural rights.

²See also Arbour; La Forest.

³Brodsky and Day outline that in *New Brunswick (Min. of Health) v. G. (J)*, the Court was unanimous in finding that failing to provide a parent with legal aid in child apprehension proceedings violated the s. 7 security of the person interest. The minority in this decision established that the case raised both the s. 7 interest and the sex equality provisions of s. 15. They argued that because single mothers are disproportionately affected by child-protection proceedings, and thereby disproportionately affected by an inability to access legal aid the s. 7 analysis should consider "the principles and purposes of the equality guarantee in promoting the equal benefit of the law...(215)." Brodsky and Day argue that *G. (J)* illustrates by analogy that s. 7 interpreted through the lens of ss. 15 and 28 can include rights to subsistence (215). They extend the possibilities further by arguing that although basic needs should fall within the scope of s. 7, the gendered dimensions of poverty and the increase in women's economic vulnerability caused by government cuts to social assistance constitute a specific "violation of women's right to equality (215)."

⁴FAFIA. 2003 at 19, paragraphs 65 and 66. Keeping in mind that even with these guidelines, before the repeal of the *CAP*, social assistance levels had already been criticized for falling far below Statistics Canada's low-income cutoff (Porter 131).

⁵See *British Columbia. Employment and Assistance Act* (2002), s. 36(1).

⁶Each of the respondents was a sole support parent, each was receiving social assistance as a single mother and each had been in an intimate or family relationship with an alcoholic and/or abusive man (para. 43). The Ontario Court of Appeal dismissed the government's appeal, concurred with the Ontario Divisional Court that the definition of "spouse" in section 1(1)(d) of the regulation 366 under the *Family Benefits Act* violated s. 15 of the *Charter*, was not justifiable under s. 1 and refused to suspend the declaration of invalidity.

⁷Canada. *Federal-Provincial Fiscal Arrangements Act*, R.S., 1985, c. F-8, s. 1; 1995, c. 17, s. 45. (Online) Ottawa: Department of Justice Canada.

⁸The Canada Health Transfer-CHT and Canada Social Transfer-CST.

⁹*Ibid* at 13(1)(a).

¹⁰*Ibid* at 19 (1) (a) and (b).

¹¹2005. *Canadian NGO's Submission to the Untied Nations Committee on Economic, Social and Cultural Rights Pre-Sessional Working Group* at paragraphs 21- 27.

¹²See "Minority budget better than Martin's majority budgets, but not great": Layton, (online) available: <http://www.ndp.ca/page/1133> [October 11, 2005]

¹³Under s. 29(a) of the regulation welfare recipients under 30 were only entitled to receive funds ranging from \$158 per month as of April 1st, 1985, to \$185 per month as of

January 1st, 1989 compared to the monthly amount available to those over 30 that ranged from \$434 per month as of April 1st, 1985, to \$507 per month, as of January 1st, 1989 (Gosselin 456 and NAWL para. 2). The 18-30 year olds would be able to top up their benefit only if they participated in one of the three education or work experience programs afforded them under the social assistance scheme. Even though there were 85,000 people under the age of 30 receiving social assistance at the time, the government initially made only 30,000 program places available (Gosselin 439). In 1987 Statistics Canada determined the poverty level for a single person living in a large metropolitan area to be \$914 per month; the cost of adequate nourishment was \$152/month and the cost of rent for a bachelor apartment in Montreal ranged from between \$237/month to \$412/month (Gosselin 631-633). Given that, at least initially, there were only 30,000 places available in the training programs, in the event that all of places were filled approximately 55,000 people under 30 years of age would have been forced to subsist off less than \$200/month at some point during that period. Given the average monthly living costs at the time less than \$200/month was inadequate to meet basic needs. The majority concluded that although the circumstances for younger people during this period were “particularly dire” due to the recession, the government’s short-term purpose was to get young people into training programs in order to provide them with the skills they would need to meet the longer-term purpose of securing employment and becoming self-sufficient. The Court established that “the regime constituted an affirmation of young people’s potential rather than a denial of their dignity.”

¹⁴As of February 2005, the maximum monthly shelter and basic needs allowances are as follows for people living in the Metropolitan Toronto area under *Ontario Works*: Single independent: shelter allowance, \$335, basic needs allowance, \$201; lone parent, one dependent: shelter \$527, basic needs with dependent under 13 years, \$460, basic needs with dependent over 13 years: \$501. For an overview of maximum benefits under *Ontario Works* see: Ontario. 2005. *Toronto: Ontario Works Overview February 2005*. (Online)

¹⁵See the 2001 *Final Report of the Ad-Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*.

¹⁶See *Slaight Communications v. Davidson* [1989] 1 S.C.R. 1038, *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 and especially *R. v. Ewanchuk* [1999] 1 S.C.R. 330 per L’Heureux-Dubé, J at paragraph 73 regarding violence against women and the *CEDAW*: “Our *Charter* is the primary vehicle through which international human rights achieve a domestic effect. In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, liberty and security of the person) embody the notion of respect of human dignity and integrity.”

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