



West Coast Legal Education and Action Fund

Family Law Project:

Court Watch Report 2005-2006

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APPENDIX A - TERMS

West Coast LEAF Family Law Project: Court Watch Report 2005-2006

BACKGROUND

West Coast LEAF's Court Watch Program is part of our Family Law Project (the "Project"). In 2002, the BC government cut funding to family law legal aid (as well as poverty law and immigration law) and we have been measuring the impact on women¹ and their ability to access justice ever since. In the early stages of our work we have focused on the issue of access to civil legal aid for women, particularly in family law. In that work it is apparent that addressing the need for legal representation is one aspect of the complex way in which family law intersects and impacts women's equality.

The first part of the Project was an Affidavit Campaign (the "Campaign"). During the Campaign volunteers collected sworn testimony from women denied legal aid in Family law matters. The publication, *Legal Aid Denied*, was a direct result of these stories.² Recommendations to government were made and we continue to monitor the Canadian Bar Association's constitutional challenge against both the provincial and federal government's responsibility to provide sufficient civil legal aid.³

The second part of the Project was the Family Court Watch Program which is the subject of this report. Volunteers, who were mainly law students from the University of British Columbia and the University of Victoria,⁴ observed family remand or "first appearance court" in both Victoria and Vancouver Provincial Courts. The Program ran from October 2005 through to April 2006.

The purpose of Court Watch was to get a glimpse of what was happening in family court, but at a very specific time – 'remand day.' Remand days are those days when initial applications under the *Family Relations Act* are made. For example, an

¹ "Women" is used to describe all women who were observed. The use of "racialized women" throughout the report refers to women whom the CourtWatchers first defined as "visible or cultural minorities". This classification is clearly problematic in that it imposes a racial/cultural identity based on how the CourtWatcher defined the women they observed and not through self-identification by the woman. This classification, although an inherent limitation of the observation (CourtWatchers were directed to not speculate on the particular background of the claimants and were instructed not to approach claimants) glosses over the ways in which racialized women may have different experiences based upon their specific racialization, including divergent experiences of bi or multiracial women, in Canadian society.

² Brewin, Alison with Lindsay Stephens, *Legal Aid Denied: Women and the Cuts to Legal Services in BC* (2004), online: Canadian Centre for Policy Alternatives http://www.policyalternatives.ca/documents/BC_Office_Pubs/legal_services.pdf (last accessed: April 2, 2007).

³ In 2005 the Canadian Bar Association (CBA) launched a civil legal aid test case in B.C. as a public interest complaint. In September the BC Supreme Court ruled that the CBA does not have "public interest standing" to challenge the constitutional right to access legal aid in civil matters such as family law. The CBA is appealing this decision. This case is important to women's substantive equality rights because in the case of family law, without access to maintenance, child support, property division and other family law rights upon relationship breakdown, women's vulnerability to poverty and its inherent limitations on women's capacity to be full and active members of society increases.

⁴ In addition to law students, the second CourtWatch term included one practicing lawyer and one PhD student who observed provincial family court.

application for interim custody of a child, amending an existing custody or access order, or setting a date for a Judicial Case Conference or trial. However, if there are issues that are in dispute and that the Judge believes cannot be resolved without a Judicial Case Conference or trial of the matter, the Judge will put the matter over and will not resolve the issue at this appearance.

We chose to watch Provincial Court and not Supreme Court proceedings because Provincial Court has fewer rules and paperwork, as well as no Court filing or trial fees (the filing fee in BC Supreme Court alone is \$208). As a result, more people tend to represent themselves at the Provincial Court level. We also consciously chose to observe Family Court remand days for several reasons. First, we were guaranteed that our volunteers would watch only family law matters and not a mix of different civil law issues. Second, there was a duty counsel present on remand days to help litigants without representation. This provided an opportunity for volunteers to observe duty counsel respond to the needs of unrepresented people. Third, Family Court procedures are supposed to be designed so they are accessible enough for people to represent themselves.

SUMMARY

The two sessions of Court Watch provided observations for 44 family remand court proceedings over a six month period. Data from this observation has provided a thorough basis from which to speak on women's experience in Provincial family remand Court.

The first session laid a solid foundation for evaluating the experiences of litigants in provincial family remand court with a focus on judge and litigant demeanors and related representation, to time taken in court. Several additional observations were made by Court Watchers that then were used to develop the second session.

The second session of Court Watch deepened the analysis of the first. In particular the observers of the second session were able to hone in on the concerns and obstacles that women face through examining what specific issues were raised, specifically: restraining orders, fear for children's or personal safety, economic hardship, compliance with existing court orders and competency as a parent.

The results from West Coast LEAF's Court Watch program are varied and highlight the context of family remand court in Vancouver and Victoria. At a minimum the findings point to a significant lack of resources for litigants who find themselves in the maze of family law legal proceedings. Such a situation further disadvantages already vulnerable groups in society. When these findings are placed within the wider cuts to social services, and the challenges that these vulnerable groups already face in society, it is apparent that the cuts to family law legal aid have a profoundly negative impact on women in British Columbia.

LIMITS AND CHALLENGES OF COURT WATCH PROGRAMS

The challenges with any type of program of this nature are numerous: limits of specific issues raised at a remand appearance; lack of context of history of matter; the intersectional positions of the observer with respect to their race, class, ability, and other realities that affect where the focus of observation may be directed; and/or information that may be missed due to briefness of appearance, as well as the intersectional position of the litigants, to name but a few.⁵

Two specific challenges to both Court Watch sessions were identifying potential language barriers and physical and/or mental disabilities of litigants.

Access to Justice: Language Barrier

Determining the existence of any language barriers was challenging in both Court Watch sessions. In the first session, Court Watchers were directed to note which parties were “not English speakers.” Of the over 500 litigants present in court, only 18 parties were identified in this category. Of these 18 parties, only eight had a translator.

The second session directed Court Watchers to note when they believed a party’s first language was not English. Out of the just under 500 litigants present in court during this session, Court Watchers were able to identify 61 litigants who struggled with English. Of these 61 litigants, 23 had a translator present, meaning 38% were able to participate in the proceedings in their native language.

Although the Court Watchers in this session were able to identify more parties that may have had language barriers in the court system, it is very likely that there were many more litigants who struggled with the language of the court. However, these litigants could not be identified through observation with any accuracy or consistency.

Access to Justice: Physical or Mental Disability

Although it is very likely that many litigants in court suffer from physical and/or mental disabilities, this data is very difficult to gather because of the constraints of Court Watching. The first session attempted to track physical disability with very little success. Only three persons with a visible disability were recorded in that session and no significant findings were gathered regarding their experiences. The second session did not measure these factors because of these difficulties with consistent and accurate tracking encountered in the first.

⁵ For a list of advantages and disadvantages of qualitative observational research please see online: Colorado State University <http://writing.colostate.edu/guides/research/observe/com2d2.cfm> (last accessed: 24 April 2007).

METHODOLOGY

Over 60 volunteers were trained as Court Watchers and approximately 1000 appearances were observed. Volunteers were scheduled to observe one court session on either Wednesday or Thursday morning in Vancouver and Victoria respectively. The observations from the Court Watch Program are varied – some anticipated and some surprising. Likely the greatest benefit gained from the program is a general idea of what issues are being raised in court for women.

Although it was necessary for everyone who volunteered to be a Court Watcher to attend a training session which consisted of background on family remand, review of the questionnaire, review of definitions and legal concepts, and an opportunity for questions and answers, there are limits to what a Court Watcher can be expected to be aware of. As a result, the findings in this paper are a snapshot of what factors may be at play in the courts.

ISSUES BEING “WATCHED”

During the second session, Court Watchers were provided with issues to look for that were being raised, including restraining orders, fear for child(ren)’s safety, fear for personal safety, economic hardship, compliance with court orders, and competency as a parent. The purpose of these observations was to examine what issues were being raised and if there were any differences in issues raised by men and women. The findings are as follows.

Violence Against Women and Children

Restraining Order

A restraining order is an order by the court preventing one person from contacting or attempting to contact the other directly or indirectly.

Restraining orders were most often raised in the court by women. Women as a whole were almost twice as likely to raise the issue of a restraining order being present in the relationship, as their male counterparts.

Court Watchers were not asked to specify who the restraining order was against, only who raised the issue in court. As such the findings do not necessarily indicate who the restraining order was taken out against, only who brought it to the court’s attention. However, research shows that the majority of restraining orders in the family law context are against male litigants.⁶

⁶ According to a recent Statistics Canada report, 38% percent of women who reported violence to the police also sought a restraining order. This is “more than twice the proportion of men.” See Statistics Canada, *Family Violence in Canada: A Statistical Profile 2006*, Canadian Centre for Justice Statistics, online: Statistics Canada <http://www.statcan.ca/english/freepub/85-224-XIE/85-224-XIE2006000.pdf> (last accessed: April 2, 2007).

Fear for Child(ren)'s Safety

Court Watchers were directed to note when one litigant mentioned that s/he was apprehensive about his/her children's safety in the presence of the other party. Women were over two times as likely to raise this issue during their court appearance as their male counterparts.⁷ As was noted in a report conducted in 2005 by the BC Association of Specialized Victim Assistance and Counselling Programs:

We know that when they (women) take steps to leave an abusive relationship, women and their children become *more* rather than *less* at risk. The abusive partner's control over the woman may be threatened by actions she takes to increase her independence: leaving the relationship, seeking custody of the children, seeking maintenance for children or half the family assets, or reestablishing close contact with her family. His reaction to that loss of control is often to become *more* rather than *less* violent and controlling.⁸

Fear for Personal Safety

Court Watchers were directed to note when a litigant mentioned that s/he was apprehensive of their own safety in light of the other party. Only female litigants raised concerns for their personal safety. Racialized women who were represented or had the assistance of duty counsel were the most likely to raise the issue during their appearance. Men did not raise this issue.

Economic Hardship

Court Watchers were directed to note when a litigant mentioned her/his economic difficulties. The litigant may have indicated that their economic situation was making it hard to find legal representation or that it was making it difficult to pay spousal or child support.

Women who were not represented were the most likely litigants to raise economic hardship in court. This data includes all the male litigants appearing for Family Maintenance Enforcement Program ("FMEP") issues (Please see below for more information on FMEP). This finding appears to support the extensive existing research that women are either disproportionately more vocal about their economic hardship or have disproportionate economic hardship compared with their male counterparts. Research shows that women as a group are more likely

⁷ This finding reflects the concerns of violence that are raised and documented for children and women post-separation.

⁸ Linda Light for BC Association of Specialized Victim Assistance and Counselling Programs, *Family Law Services for Women Who are Victims of Violence: What Can Be Done? Issues and Options for BC* (2005), online: BCASVACP <<http://www.endingviolence.org/publications/253/FamLawServicesForWomen.doc>> at 7-8 (last accessed: April 10, 2007).

to experience economic hardship following a family breakdown than men and that women, in particular racialized and Indigenous women, make less money.⁹

Other Party is Not Complying with Court Order

Court Watchers were directed to record when the other party mentioned or suggested that the other party was not following court orders whether intentionally or not.

On a whole, women were more likely to raise this issue during the appearance.

With respect to this issue, LEAF National recently successfully intervened in the case of *Dickie v. Dickie* at the Supreme Court of Canada. *Dickie* is a family law case that deals with the recourses and remedies available when parties, overwhelmingly men, are in breach of family court orders. LEAF argued that inherent in the issue of support, as in much of family law, are fundamental sex equality issues. In the majority of support cases women are owed support by men and when they do not receive it, women and children are disadvantaged. The Court's decision:

is an important victory for LEAF, on behalf of those women who seek to have orders for child support enforced in the face of non-payment, for women whose former partners use the courts to perpetuate their power advantage, and for family lawyers and advocates who seek effective remedies for their clients, many of whom live with the poverty that so often impacts women and children after the breakdown of their personal relationships.¹⁰

LEAF's factum is available at <http://www.leaf.ca/legal-facta.html>

Not a Competent Parent

Court Watchers were directed to note when a litigant suggested that the other party was not a competent parent.¹¹ They were advised that the allegation could be explicit (eg. "she is an incompetent mother") or implicit (eg. "he always forgets to pick up the kids").

⁹ In 2007 Statistics Canada reported that "in 2002, low-income rates among immigrants during their first full year in Canada were 3.5 times higher than those of Canadian-born people. By 2004, they had edged down to 3.2 times higher." See *Chronic Low Income and Low-Income Dynamics Among Recent Immigrants*, online: Statistics Canada <http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2007294.pdf> (last accessed: 29 March 2007).

¹⁰ Fiona Sampson, Women's Legal Education Action Fund, *Leaka Helena Delia Dickie v. Kenneth Earle Dickie* (case analysis February 2007) [unpublished], at 1.

¹¹ We acknowledge that the notion of parental competence is problematic and that the historical gendered, raced and classed context of what makes a competent parent for Indigenous communities is connected to the impact colonization, residential schools, and forced euro-centric models of parenting. Similarly immigrant and refugee communities are often overly observed and assessed to their parenting abilities to see if they match up to dominant North American, white middle-class norms, poor women, women with disabilities, also have an incredibly contested history of "competency" and parenting.

Overall women were more likely to raise the issue than their male counterparts.

FAMILY MAINTENANCE ENFORCEMENT PROGRAM (FMEP)

The FMEP is funded by the Ministry of the Attorney General and operates under the *Family Maintenance Enforcement Act*.¹² It monitors and enforces maintenance orders (and agreements) for child or spousal support enrolled with them. Any payor of spousal or child support and any recipient of such maintenance may register with the FMEP. The FMEP has authority to bring an enrolled case to court when payment is outstanding.

It is important to note that the FMEP represents primarily the interests of the provincial government. Persons on social assistance, for example, are automatically registered with the FMEP irrespective of their interests. The reasoning behind this policy is to ensure that the money provided through private maintenance support is deducted from any money the recipient receives from the provincially funded social assistance program and thereby, supposedly, guarantee fairness in social assistance payment levels. A failure of the payor to keep up with their maintenance support then results in higher social assistance costs for the provincial government. Further research on the impact of the FMEP system on women's interests is necessary.¹³

The first session of Court Watch did not differentiate between those litigants attending court for private family matters and those attending for FMEP matters. The second session measured these two respective issues.

The results of the second session found that of the FMEP applications observed, 98% of litigants appearing were men with outstanding orders. This provides insight into the continual challenges women and children face to have maintenance orders enforced.¹⁴

REPRESENTED VERSUS NON-REPRESENTED LITIGANTS

There were various reasons recorded by Court Watchers as to why unrepresented litigants did not have representation, such as:

- unrepresented parties stated that they did not have money for representation;
- unrepresented parties stated that they were already so much in debt from legal fees that they did not have the money;
- unrepresented litigants stated that they had chosen to appear in court instead of paying their counsel to appear.

¹² *Family Maintenance Enforcement Act*, R.S.B.C. [1996], Chapter 127.

¹³ For an analysis of some of the challenges with the FMEP system see *Mapping Policies on Violence Against Women* published by FREDA in 1999, online: Feminist Research Education Development and Action Centre <<http://www.harbour.sfu.ca/freda/reports/polb09.htm>> (last accessed: March 29, 2007).

¹⁴ A recent Statistics Canada study reported that in British Columbia in 2006 the payor in 96% of maintenance enforcement cases was male and the recipient was female. *Child and Spousal Support: Maintenance Enforcement Survey Statistics, 2005/2006*, online: Statistics Canada <<http://www.statcan.ca/english/freepub/85-228-XIE/85-228-XIE2007000.pdf>> (last accessed: April 10, 2007).

There were over 1000 family court appearances in Vancouver and Victoria during both terms of observation. The second term findings revealed that 77% of the appearances were non-FMEP matters and 23% were FMEP applications brought by the Ministry.

In addition, the second session also measured the presence or lack of legal counsel for these matters. Of the litigants appearing for non-FMEP cases, well over half, or 46%, of the litigants were not represented by legal counsel, 37% were represented by legal counsel and 17% had the assistance of duty counsel for their appearance.

When this data is examined by case type, the number of cases where at least one party was unrepresented in their appearance was 86%. These parties may or may not have had the assistance of duty counsel.

Court Watchers commented that represented parties were more successful in conveying their needs and interests and had shorter more efficient appearances than their unrepresented counterparts.¹⁵ Cases with unrepresented parties tended to take longer to be heard,¹⁶ were stood down more frequently for litigants to consult with duty counsel and had many adjournments due to lack of documents, legal information and the such.¹⁷ Although not addressed specifically in this Court Watch Program, it would be informative to determine how these delays may affect pressing issues such as children's safety or women's safety.

While many represented parties may have appeared confident and proficient at representing their case to the judge, it was found that some unrepresented litigants struggled to adequately represent themselves resulting in time delays and potentially adverse results.¹⁸ This finding is reflected in *Legal Aid Denied* and in the experiences of women who were part of our Affidavit Campaign looking at the effects of provincial legal aid cuts.

“Without adequate legal representation, women are losing custody of their children, giving up valid legal rights to support, and being victimized by litigation harassment.”¹⁹

Affiant #17 describes her own experience with self-representation and how “adverse results” can include negative impact on children, stress and job loss.

After I became self-represented I had to draft my own court documents such as the Notices of Motion and Notices of Hearing. I had to do my own research and present my own evidence in the court...Dealing with this case became like a part time job for me because it was taking up so much of my time...This has meant

¹⁵ *CourtWatcher 16, 17*

¹⁶ *CourtWatcher 17*

¹⁷ *CourtWatcher 4, 6, 22, 19, 18*

¹⁸ *CourtWatcher 8, 24.*

¹⁹ *Supra* note 2 at 7.

keeping very late hours in order to ensure that my children do not have to deal with what is going on...Because of the time I had to spend working on this case I lost a job working at a restaurant because I didn't have the time to do both the job and prepare for court appearances.²⁰

Unrepresented parties appeared more anxious, frustrated and confused.²¹ One Court Watcher provided the example that an unrepresented woman had to have an emotional outburst before the judge understood her situation and modified his order.²² On another occasion, it was noted that one judge asked for opposing counsel's opinion regarding the case of an unrepresented litigant²³. This is one example of the problems with judges being utilized by non-represented litigants with issues that should be dealt with by independent legal counsel.

Generally speaking, Court Watchers recorded that parties without representation tend to:

- be confused about procedural issues;
- need to rely on duty counsel, the opposing counsel or the judge to indicate to them what step they need to take next;
- try to bring legally irrelevant issues to the attention of the judge;
- have an expectation that the appearance will deal with the entire case;
- have failed to follow through with court orders because they didn't understand them or how to follow through on them;
- be frustrated at their lack of knowledge;
- be less well-prepared and able to articulate their concerns.

The overall thrust of the above is that unrepresented litigants are utterly dependent upon well-meaning judges, lawyers and anyone else who works in the court, for information on their rights and obligations. Legal counsel, the very fundamental of our justice system, has become dependent upon the charity and kindness of an already financially limited and time-constrained judiciary. Women and men who find themselves in this situation have little assurance that they will be afforded all the procedures and safeguards that the court process is supposed to provide in order to achieve a just result in court. This uncertainty creates barriers that further prejudice unrepresented litigants, in particular marginalized women. Instead they must hope for an understanding and patient judge, a non-adversarial and helpful opposing counsel and duty counsel that has time to fully understand their case and the issue before the court. This hampered system does not reflect the principles of access to justice for the most marginalized people in our communities.

²⁰ *Ibid* at 19.

²¹ *CourtWatcher* 6

²² *CourtWatcher* 8

²³ *CourtWatcher* 8

GENDER AND REPRESENTATION

Many of the Court Watchers noted differences in the ways that men and women litigants responded to stressful situations in the courtroom. Although many Court Watchers described the family remand process as inefficient and confusing for most litigants, men and women responded differently to these stressors.

Court Watchers described women as responding more passively to the obstacles they faced in court, accepting the judicial process and its inevitable frustrations and becoming anxious and fearful when pressed by judges or the other party. Again the limits of Court Watch make it difficult to provide a greater explanation or analysis of the subjective observations of women's passivity. Some women may have resigned themselves to the court process, others may be selective about where their energies go and yet some may see the court process as an extension of the controlling and traumatic abuse they have and may still be surviving. Other women, in particular indigenous women have the colonial legacy and current colonial practice of the courts that divides indigenous families and communities. Passivity also does not take into account individual, family or group characteristics that inform each woman differently. Lastly the court observations may capture women being passive on a particular day but those same women may have been silenced in court at another appearance. The situational analysis makes it difficult to frame how individual women may predominately act in their lives.

Men on the other hand were recorded as becoming frustrated with the obstacles that they faced in court, responding assertively or aggressively when frustrated and pushing their interests while being resisted by judges.

ATTITUDE OF THE JUDGE

The first term of Court Watch measured the attitude of the judge in the proceedings. The clearest findings came from three sets of data.

First Court Watchers observed when a judge "denied a party their request to speak." In general, women were more often than men denied their request to tell the judge what they wanted her/him to know. The specific category of women that was most disadvantaged in this way was unrepresented racialized women. They were, on average, over three times as likely to be denied the ability to communicate what they wished to the judge.

Second, and related to the first set of data, was when Court Watchers observed a judge being "impatient" with a party. Again, racialized women without representation were most likely to be treated with impatience. White women and racialized men without representation followed.

Third was when a judge had to "explain a court procedure to a party." It was clear from the observations that having representation resulted in fewer procedures needing to be explained by a judge to the party. Generally judges explained most

procedures to unrepresented racialized women and men. This category was followed by white women and men who were not represented. This finding likely explains part of the reason why lack of representation per case is related to a lengthier appearance.

Court Watchers noted that the demeanor of the judge was fundamental in determining party experience in court. This finding supports the data from the first Court Watch session which measured the demeanor of judges towards litigants. Where some Court Watchers observed patient, accessible judges, others commented on the aggressive, impatient and intimidating nature of other judges. Litigants were also recorded as responding positively or negatively to the demeanors of judges.

Some Court Watchers specifically commented on the influence the judge had on the surrounding context of the court and experience of litigants. There were generally two camps of observation. The first noted the accessibility of the judge²⁴ and how he or she explained the court process or orders in a clear manner,²⁵ was patient and impartial,²⁶ calm in the face of aggressive litigants,²⁷ aware of the vulnerabilities of certain litigants²⁸ and responsive to clarification if litigants did not understand what was being said the first time.²⁹ There was a sense that these judges were trying to facilitate unrepresented litigants concerns and additional needs for information and compensate for the power differentials created where there was a lack of legal representation.

The second noted that the judge appeared frustrated,³⁰ exasperated, aggressive and impatient.³¹ One Court Watcher commented that a judge yelled at one litigant³² and another found that an observed confidence in female litigants coming before this judge quickly gave way to anxiety in the face of the aggressiveness of the court environment, particularly the aggressiveness of the judge.³³

Litigants appearing before these two camps of judges may have significantly divergent experiences. They may even have divergent results to their appearances particularly where the litigant lacks legal representation and struggles to adequately canvass the relevant issues to the judge.

²⁴ *CourtWatcher 14*

²⁵ *CourtWatcher 15, 6*

²⁶ *CourtWatcher 11, 4*

²⁷ *CourtWatcher 22*

²⁸ *CourtWatcher 16*

²⁹ *CourtWatcher 1*

³⁰ *CourtWatcher 8*

³¹ *CourtWatcher 3*

³² *CourtWatcher 3*

³³ *CourtWatcher 3*

DUTY COUNSEL

Several Court Watchers commented on the role of duty counsel particularly in light of the consequences of having a large number of unrepresented litigants. The term duty counsel refers to the presence of a lawyer in court, paid by the Legal Services Society of British Columbia to *assist* litigants with their family law matters. Duty counsel lawyers do not represent the litigant in the same manner as legal counsel and legal aid. Duty counsel lawyers do *not* take on the litigant's case or represent the litigant throughout the court process.

Litigants seeking the assistance of duty counsel must meet the duty counsel financial eligibility requirements in order to qualify for legal advice from duty counsel. This legal advice is capped at three (3) hours. If the litigant does not meet the financial eligibility requirements the litigant may still be provided with forty-five (45) minutes of legal advice and may still have the assistance of duty counsel during pre-trial court appearances provided that duty counsel is available.

It appeared in observations of the Court Watchers that some duty counsel were overtaxed, and disorganized.³⁴ Having said this, one Court Watcher commented on the utility and significance of duty counsel in helping litigants navigate the system and move the process forward.³⁵

FURTHER OBSERVATIONS FROM COURT WATCHING

Each Court Watcher was asked to answer a set of questions after their observation. The questions were open-ended and provided a place for Court Watchers to interpret their findings or to provide additional observations that may not have been captured in the observation questionnaires. The following is an overview of these reflections.

Courtroom context

Many Court Watchers commented on the tone or environment of the courtroom. These descriptors varied and seemed to be tied particularly to the presiding judge and also to the make-up of litigants that day.

The Court Watchers most often described the courtroom as **fast-paced** and at times **chaotic**³⁶ where many parties appeared **confused, frustrated and anxious**³⁷ with an extremely **inefficient** court process.³⁸ Having observed that, many Court Watchers described the efforts by judges, clerks, duty counsel, lawyers and the

³⁴ *CourtWatcher 6*

³⁵ *CourtWatcher 1*

³⁶ *CourtWatcher 3, 16*

³⁷ *CourtWatcher 6, 13, 16*

³⁸ *CourtWatcher 3* Note: One focus of the first term of CourtWatch was to examine whether or not legal representation or lack thereof would impact the efficiency of the courtroom process. CourtWatchers were equipped with stopwatches and timed appearances. These times were then correlated with representation or lack thereof. The findings from the first term of CourtWatch were very clear: the less representation a case had, meaning the less representation per two parties in a case had, the more time the appearance took.

FMEP representatives to help litigants navigate this process and access all potential resources available to them.³⁹ Although helpful for some, the problem with this type of fragmented assistance is that it is given at a time and place where the litigant may feel they are under pressure. They may make decision without having an opportunity to think it through.

Given the substantial provincial and federal cuts to women's programs and legal aid funding the help women receive at Court may be too little too late for their case.⁴⁰

Differences in the way Men and Women Respond to Issues

Some clear differences between how men and women cope with their courtroom experience emerged in the after observation questionnaires. Although both men and women appeared to struggle to understand procedural requirements, they tended to respond in different manners.

Men were more likely than women to act aggressively in court. They were more likely to interrupt the judge,⁴¹ argue with the judge if they felt the result was inadequate,⁴² be defensive and argumentative,⁴³ address their ex-partners directly,⁴⁴ be louder,⁴⁵ grow angry or scornful⁴⁶ demonstrate frustration,⁴⁷ volunteer additional information or unrelated information to the judge⁴⁸ and be more defiant of the process.⁴⁹

If placed in a context of violence against women the court process and the behaviour of the men contribute in making going to court a harrowing experience for women survivors of violence.

Women were more likely than men to be accepting of the process. They were more likely to try to appeal to the court's sympathy,⁵⁰ address the judge directly,⁵¹

³⁹ *CourtWatcher 19, 20*

⁴⁰ For further reference on this issue please see, online: BC Institute Against Family Violence <http://www.bcifv.org/pubs/Child%20Custody%20and%20Access%202001.pdf> (last accessed April 2, 2007) and Patricia Monture, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992), 56 Sask. L. Rev. 237.

⁴¹ *CourtWatcher 2*

⁴² *CourtWatcher 23*

⁴³ *CourtWatcher 4*

⁴⁴ *CourtWatcher 4*

⁴⁵ *CourtWatcher 14*

⁴⁶ *CourtWatcher 9*

⁴⁷ *CourtWatcher 10, 21, 23*

⁴⁸ *CourtWatcher 17, 23, 7*

⁴⁹ *CourtWatcher 15, 21*

⁵⁰ *CourtWatcher 4*

⁵¹ *CourtWatcher 4*

present their statements in a more neutral way,⁵² accept the legal obstacles facing them,⁵³ display emotion,⁵⁴ be silent or act passive,⁵⁵ appear timid or anxious.⁵⁶

CONCLUSIONS

Women in family court settings experience continued control and power asserted over them similar to that experienced in abusive and violent relationships with men. Law is gendered and not neutral and women's oppressive experiences within the system reflect this reality.⁵⁷ The lack of adequate representation is undermining the justice system itself and further perpetuating a gender based experience of what is supposed to be neutral. This is especially so for marginalized women. Governments have a constitutional obligation to right historical disadvantage and impact and benefit of the law.

WHERE DO WE GO FROM HERE?

Court Watch further illustrates and identifies continued gaps in access to justice. What is necessary is a continued challenge to systemic barriers, more funding and resources for unrepresented clients, more accessible legal information, training and education for judges, duty counsel, court workers and all those involved with providing legal services. This is necessary in order for these groups to understand the many issues women entering the family law system are faced with and for the system to reflect these issues.

West Coast LEAF will continue our work and our need to communicate this message.

THANK YOU

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West Coast LEAF staff

West Coast LEAF Law and Government Liaison committee members

⁵² *CourtWatcher 4*

⁵³ *CourtWatcher 9*

⁵⁴ *CourtWatcher 10*

⁵⁵ *CourtWatcher 17*

⁵⁶ *CourtWatcher 14, 23*

⁵⁷ See Patricia Monture, "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992), 56 Sask. L. Rev. 237; Susan Boyd, "Impact of the Canadian Charter of Rights and Freedoms on Family Law" (2000) 17 Can. J. Fam. L. 293 – 331; and also by Boyd "W(h)ither feminism? The Department of Justice Public Discussion Paper on Custody and Access, (1995) 12 Can. J. Fam. L. 331-365; and *Child Custody, Law, and Women's Work*, (Oxford: Oxford University Press, 2003).

APPENDIX A - TERMS

Legal Counsel: The term legal counsel is used in this report to denote the presence of a private or provincially funded (through the Law Society Services of British Columbia) lawyer who has been retained by the litigant to represent them in their family law matter. Examples of the work that legal counsel may provide to the litigant are: advising the client of his/her rights and obligations in the family law context, filing appropriate court documents, engaging in discussions with the opposing party or legal counsel for that party, preparing and attending court with or on behalf of the client as well as preparing and attending family case conferences or other forms of family mediation with the client and finally representing the client at trial.

Because of the constraints of Court Watch observation, no data differentiates between privately obtained legal counsel and legal counsel funded provincially called “*legal aid*.”

Legal aid lawyers are available only for “serious family problems,” the definition of which is essentially that the litigant or his/her children is at risk for physical violence⁵⁸. In addition, the legal aid-seeking litigant must meet the financial eligibility requirements in order to qualify for legal aid. Prior to 2002, this legal aid program for family law was much more expansive. In 2002 the provincial government made massive cuts to family law legal aid.⁵⁹ Duty counsel has arisen in part to fill in the gap created by these cuts.

Duty Counsel: The term duty counsel refers to the presence of a lawyer in court, paid by the Law Services Society of British Columbia to *assist* litigants with their family law matters. Duty counsel lawyers do not represent the litigant in the same manner as legal counsel and legal aid. Duty counsel lawyers do *not* take on the litigant’s case or represent the litigant through the court process.

Litigants seeking the assistance of duty counsel must meet the duty counsel financial eligibility requirements in order to qualify for legal advice from duty counsel. This legal advice is capped at three (3) hours. If the litigant does not meet the financial eligibility requirements the litigant may still be provided with forty-five (45) minutes of legal advice and may still have the assistance of duty counsel during pre-trial court appearances provided that duty counsel is available.

⁵⁸ There are some exceptions to this general rule. They can be found online at: http://www.lss.bc.ca/legal_aid/legal_representation.asp#legalprobs1.

⁵⁹ See *Legal Aid Denied: Women and the Cuts to Legal Services in BC* by Alison Brewin at http://www.policyalternatives.ca/documents/BC_Office_Pubs/legal_services.pdf.