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Centre for Feminist Legal Studies

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UBC Law Welcomes Fiona Kelly: Feminist Legal Scholar and Law Reform Activist

By Peggy Lee, Law II

Formerly a sessional instructor of family law and Ph.D candidate at UBC, Fiona Kelly is the newest member of our impressive community of feminist legal scholars. Fiona joined the UBC law faculty as an Assistant Professor in July 2007 and has been actively involved in CFLS activities for years as a UBC doctoral student. In a candid interview for the *LawFemme*, Fiona shares some of her experiences from Australia that inspired her to pursue further academic research in Canadian family law reform.

Encounters with Family Law

Fiona's interest in family law began almost accidentally during her undergraduate law studies at the University of Melbourne. During that time she went on exchange to Duke University in the United States where she took three critical courses – Family Law, Children and the Law and Poverty Law. These courses profoundly impacted the future trajectory of Fiona's legal work and scholarly research interests.

After graduation Fiona continued to develop her interest in family law. Fiona taught in the Faculty of Law at the University of Melbourne, clerked at the Family Court of Australia, and worked as a Research Officer at the Australian Institute of Family Studies, an interdisciplinary research institute that conducts qualitative and quantitative research on issues affecting families.

Law Beyond the Courtroom

In January 2002, Fiona was working as a judicial clerk at the Family Court of Australia when the important case of *Re Patrick (An Application Concerning Contact)*, [2002] F.L.C. 93-096; was heard. The case involved a lesbian couple in a dispute with their gay sperm donor over Patrick, a two-year old baby boy. Prior to the baby's birth the relationship between the lesbian couple (biological mother and co-parent) and the sperm donor grew increasingly embittered. After the child's birth the sperm donor sought orders for increased contact while both the biological mother and co-parent opposed the application. Factual details of the original parenting agreement were strongly contested by both parties. Ultimately, the court awarded contact to the

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UBC Law Welcomes Fiona Kelly (cont'd)

sperm donor akin to those that might be granted a heterosexual father. The order was against the wishes of the lesbian couple.

As the judicial clerk for Justice Guest, Fiona played a significant role in researching the issues of legal parenthood and drafting the judgment. During her work on the case, Fiona witnessed how the law in Australia at the time failed to adequately protect the rights of non-biological lesbian mothers and children from non-traditional families. The traditional heterosexual nuclear family norms were re-inscribed by Justice Guest when he declared the child to have a mother, a father and a co-parent.

I have always felt that having a law degree brings with it a social obligation. You are in this incredibly privileged position in that you know the law and can interact with the law. And you have an obligation to give back to the community using those skills; skills that put you in quite a significant position of power at times.

The case of *Re Patrick* ended in a tragic murder suicide on 1 August 2002 when the biological mother suffocated the child and killed herself. As Fiona was heavily involved in writing the decision, the case and its tragic aftermath produced an immensely difficult personal challenge for her both as a lesbian and a feminist legal scholar.

Reflecting on the impact of the *Re Patrick* case, Fiona spoke candidly about the experience. "My experience with the *Re Patrick* case produced in me a strong belief that the legal aspects of lesbian parenthood demanded scholarly attention. Having witnessed perhaps the worst effects of legal failure, I felt that the need for law reform was immense. Thus, at least part of my role in the research process was as a law reform activist."

Feminist Legal Scholar and Law Reform Activist

Bringing her experiences with Australian family law, Fiona arrived in Canada in 2002 amidst the high-tide of the same-sex marriage debate. Again the same critical questions arose about whether the law adequately protected the rights of same-sex parents and their children. Seeing a potential for progressive family law reform in Canada, Fiona engaged in graduate legal studies at UBC.

Applying her critical skills to Canada's family law, Fiona completed her LLM at UBC in 2003. Her thesis, entitled "Conceptualizing the Child Through an Ethic of Care: Custody and Access Law Reform in Canada", considered whether Canadian custody and access law should abandon the "best interests of the child" test in favour of a legal framework grounded in a child-centred ethic of care. Following her LLM, Fiona stayed on at UBC and embarked on her ground-breaking doctoral project, "Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood", for which she interviewed 49 lesbian mothers from 36 families in British Columbia and Alberta. The mothers were asked about: how they defined "family", how parenthood is understood within the lesbian family, how they perceived the role of sperm donors and their personal views for potential family law reform.

To facilitate the discussion on law reform for lesbian parents, Fiona offered three loosely defined models and sought interviewee responses. The first "presumption model" presumed that a lesbian couple were the legal parents without any need for adoption by the non-biological mother. This model left the sperm donor permanently outside of the legal family and confined the family definition to the lesbian couple or the single mother. The second "opt-in" model was based on intention, where apart from the biological mother other adults, whether in a conjugal relationship or not, could "opt-in" to the legal family. The third "combination" model granted automatic parental status to the conjugal couple (or single mother) while also allowing for additional parents or non-parental figures to "opt-in" to the legal family. From her research, Fiona found that 21 of the 36 families preferred the "combination" model because it reflected the mothers' strong commitment to the option of creating multiple parent families, while still providing legal security to the lesbian couple.

Fiona's socially-significant research work and critical approach to legal scholarship has been recognized with numerous awards throughout her doctoral studies. She was honoured with the prestigious Trudeau Doctoral Scholarship, the Killam Pre-Doctoral Scholarship, the Law Commission of Canada's Audacity of Imagination Award, and the BC Law Foundation Fellowship. Fiona's writing has been published in numerous peer-reviewed academic journals and she hopes to publish her doctoral dissertation as a book.

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Collaborating on Family Law Reform with West Coast LEAF

By Professor Susan Boyd, Chair of Feminist Legal Studies

This summer, the CFLS began an exciting collaboration with West Coast LEAF on a Family Law Reform Project, supported by funding from the Law Foundation of British Columbia. The goal of the project is to examine the B.C. *Family Relations Act (FRA)* and case law, which is particularly important given the current law reform process that the B.C. government has initiated and the ongoing challenges that many women experience in relation to family law. The project has also facilitated a dialogue with community advocates, frontline workers and lawyers, to ensure that its law reform strategies are grounded in the realities and challenges being faced by women on a day-to-day basis. Women's access to justice in family law is the overriding theme.

The role of the CFLS in this project is to conduct research on areas of law that are being reformed (e.g. custody and access law), as well as to locate research that has been conducted in Canada and other countries on the impact of legislative reform. For instance, Australia has moved increasingly towards a norm of shared parenting over the past decade, and empirical studies are available on some problematic consequences for women and children. Four LL.B. students (Magal Huberman, Cristina Cabulea, Peggy Lee and Aditi Master) did research during the summer, under the supervision of Zara Suleman (Director of the Family Law Project at West Coast LEAF) and Professor Susan Boyd (Director of the CFLS).

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Reforming B.C.'s Family Relations Act

By Professor Fiona Kelly

In February 2006, the British Columbia Ministry of Attorney General announced a review of the *Family Relations Act*. The goal of the legislative review is "to modernize the law and support co-operative approaches to resolving disputes, in a statute that is easy to read." The *Family Relations Act* is the provincial Act that deals with custody, access and guardianship, spousal and child support, and the division of property and pensions in the event of separation. For constitutional reasons, the *Family Relations Act* applies primarily to common law couples, though all couples whether married or not must use it to settle the division of their property. The first stage of the Attorney General's review focused on research, culminating in the publication of thirteen Discussion Papers. The second stage involves a three phase public consultation around each of the Discussion Paper topics.

The second phase of the public consultations is currently underway. The topics covered within this phase include "Parenting Apart" (custody and access), "Meeting Access Responsibilities", "Children's Participation", and "Family Violence". The relevant Discussion Papers highlight what the government research committee felt to be the key issues for each of these topics. In several instances, the Discussion Papers address issues through a lens that might be considered "feminist". In fact, it appears that the critical response made by women's groups to Bill C-22 – a 2002 federal Bill intended to amend the *Divorce Act* – has at least somewhat influenced the B.C. review. In particular, the acknowledgement in the "Family Violence" Discussion Paper that the "nature and consequences" of family violence are "typically more severe for women", is a significant victory for women's anti-violence organizations. However, despite some positive signs for feminists, the Discussion Papers include a number of worrying trends.

Mediation

Mediation, as well as other forms of alternative dispute resolution such as collaborative law, is treated by the Discussions Papers as the favoured method by which to resolve family law disputes. Mediation is presented as non-adversarial, cheap, and efficient. It is presumed to save the resources of the parties and, perhaps most significantly, the courts. The "Parenting Apart" Discussion Paper ultimately proposes that mandatory mediation be introduced into the family law process.

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Women, Work, and Law: Reflections on Debates in the Profession

Anna Turinov, Law III

Introduction

A few of us spent this past summer at places that will define our legal careers in the next few years: firms, government, and non-profit organizations. It is a truism that women experience law, law school, and the legal profession differently from men. Women now compose half of the law school graduates and of the new recruits in various areas of the legal profession. Yet, women are still leaving the practice of law, in particular private practice at the firms, at twice the rate of men. Speaking at the 2007 Canadian Bar Association (CBA) Legal Conference, which took place in Calgary this past August, Chief Justice Beverley McLachlin noted that for women, winning the legal right to become lawyers was only half the battle (Kirk Makin, "Office stress ruining women lawyers' lives", *The Globe and Mail*, 14 August 2007). This article explores the second half of this battle, the progress and the challenges ahead.

The Victories

Women's path in the legal profession is not seamless. Women who choose to practice law in one way or another still face more conflicting choices and roles than men. Many women would leave the legal profession at least once in their lives. The first time is to have children. Later in life, some women may leave fast track careers in order to take care of their aging parents, as caregiver roles still rest almost exclusively with women. Until very recently, such choices were an automatic career-limiting move for women. Practice of law and upward mobility in a law firm setting were largely based on an "up-or-out" model.

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Fewer and fewer women are now faced with such stark choices. The progress can be attributed to changes at both the legislative level and in the policies within the legal profession at large. In 2001, provincial employment legislation across the country changed to give employed women the right to one year off work in combined maternity leave and additional parental leave. These provincial changes followed amendments to the federal *Employment Insurance Act* in 2001, which doubled the length of time one can claim parental leave benefits. Although these changes do not benefit most self-employed women, they go some way to improve options for those who are employed.

According to the CBA, as of March 2007, public-sector legal employers and corporate law departments offered year-long parental leaves and 100% salary top-ups. Private law firms tend to offer less, but they also now extend increased financial support to female lawyers on leave. Maternity leaves that exceed 17 weeks are now the norm, and many firms may top up employment insurance benefits. At some firms, the average leave can be up to a full nine-month period (Janice Mucalov, "The Parent Track", *CBA National* (March 2007) 20 at 21, 23).

In addition, flexible work arrangements offered by the firms and other employers are becoming more common among young female lawyers who have to deal with competing work and family responsibilities. Such arrangements typically involve fewer hours spent in the office, teleconferencing, or a flexible schedule (Ann Macaulay, "Time on my side", *CBA National* (April / May 2007) 47). This policy comes in large part from recognition that it is better to keep female talent in an organization through flexible accommodation, than to lose such talent at all. Flexible arrangements, although disproportionately affecting women, are also increasingly sought by a younger generation of men.

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McIvor Case Shows Value of Now De-funded Court Challenges Program

By Professor Margot Young

Criticisms of the availability of the equality rights section of the *Canadian Charter of Rights and Freedom* for effecting progressive social and economic change are many. The evolution of section 15 has not been favourable to an expansive doctrine that allows recognition of complex and systemic social and economic harms resulting from inequality. So it is encouraging to read Madam Justice Carol Ross's reasons in the case of *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827. In this case, the two plaintiffs—Sharon McIvor and her son, Jacob Grismer—brought a successful s. 15(1) and s. 28 *Charter* challenge to ss. 6(1) and 6(2) of the *Indian Act*, R.S.C. 1985, c. I-5. These statutory provisions structure entitlement to registration as an "Indian" and do so, Justice Ross found, in such a manner as to unjustifiably prefer male Indians who married non-Indians and descendents from these marriages over female Indians who married non-Indians and descendents from these marriages. The result is that s. 6 of the *Act* is declared unconstitutional to the extent that it authorizes such differential treatment.

This case illustrates the value of the now defunded Court Challenges Programme. Funding from this programme enabled the plaintiffs' challenge to proceed. And the plaintiffs are clear that, with no financial assistance, a response to the government's appeal of this decision is in jeopardy.

The *McIvor* case stands in critical historical relationship to the earlier Supreme Court of Canada decision in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, and to *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981), a decision of the United Nations Human Rights Committee. In *Lavell*, the Supreme Court of Canada, in a decision under the *Canadian Bill of Rights*, S.C. 1969, c. 44, found that the different treatment of men and women in relation to marrying out and Indian status was not inequality before the law. *Lovelace*, dealing with the same legislation, reached an opposite result: finding Canada in violation of Article 27 (the right to access one's culture) of the *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). The BCSC decision in *McIvor* is a long overdue correction to the majority's analysis in *Lavell*, as well as an important domestic acknowledgement of the harm already recognized by the international human rights community.

The origin of the specific discrimination of which McIver and Grismer complained lies with the 1985 amendments to the *Indian Act* achieved by Bill C-31, *An Act to Amend the Indian Act*, S.C. 1985, c. 27. These amendments were themselves passed in response to a history of legal and political concern about the discriminatory treatment of female status Indians marrying non-status Indians. In 1869, federal legislation creating the concept of a "status Indian" was amended to state that when any "Indian" woman married a non-"Indian" man she lost her Indian identity, as did any children of that marriage. "Indian" men, however, could marry non-"Indian" women and not only retain their own Indian status but also transfer it to their wives and children. In 1876 these discriminatory provisions were carried forward into the first *Indian Act*. The discriminatory treatment of "Indian" women continued and remained fundamentally unchanged until the Bill C-31 amendments.

The Bill C-31 amendments partially addressed these problems by establishing a new scheme of registration for those not previously entitled to Indian status. However, this new scheme can result in a "second-generation cut-off" from Indian status for those of mixed ancestry claiming registration though a maternal line of descent. Thus, the preference for male lineage, and marriage to a male Indian, is transferred into the new legislation with the result of denial of status for some grandchildren of women reinstated under Bill C-31. This preference is what Justice Ross found discriminatory.

Of course the concept of "Indian" as a legal status is a creation of the colonizing power. But this status has, over the years, been endowed by government as an entitlement to such things as band membership, the right to membership in

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The Lack of Pay Equity for Women Workers in British Columbia

By Professor Janine Benedet

The current strike by Vancouver library workers seeking pay equity provisions in their collective agreement is a good reminder of just how weak pay equity laws are in B.C., and how important unionization can be for securing equal pay for women.

The first equal pay laws promised simply formal equality – equal pay for equal work without discrimination based on sex. These laws, which existed in all Canadian jusridictions by the 1970s ended the common practice of paying women less for doing the same job as men, on the assumption that men worked to support families while women worked only for "pin money".

Women argued, however, that equal pay laws did not address the problem of job ghettoes: the concentration of women in low paying jobs that were often undervalued relative to male-dominated occupations requiring comparable skills, experience, education and effort. They demanded laws guaranteeing equal pay for work of equal value, with the goal of increasing the value placed on "women's work." All jurisdictions in Canada now recognize the principle of equal pay for work of equal value – also known as pay equity – in their human rights legislation. Some jurisdictions have specific guarantees while others rely on decisions interpreting the general prohibition on sex discrimination in employment. The British Columbia *Human Rights Code* provides, in part, that:

> 12 (1) An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.
>
> (2) For the purposes of subsection (1), the concept of skill, effort and responsibility must, subject to factors in respect of pay rates such as seniority systems, merit systems and systems that measure earnings by quantity or quality of production, be used to determine what is similar or substantially similar work.

Women argued, however, that equal pay laws did not address the problem of job ghettoes: the concentration of women in low paying jobs that were often undervalued relative to male-dominated occupations requiring comparable skills, experience, education and effort. They demanded laws guaranteeing equal pay for work of equal value, with the goal of increasing the value placed on "women's work."

In practice, such laws have proven wholly ineffective at addressing pay equity in a systemic way. They require an individual worker or group of workers to bring a complaint. Employers can drag out the proceedings for years. In B.C., any recovery is limited to the 12-month period prior to the complaint being made, so years of unequal pay can attract no remedy.

Some Canadian jurisdictions have gone further and passed pay equity laws which place a pro-active requirement on public and/or private sector employers to evaluate their wage classifications to ensure that female-dominated jobs are paid fairly as compared with male-dominated jobs requiring similar skills and effort. These laws have been an important catalyst for improving the pay of women (and men who work in female-dominated occupations). But pay equity laws were dealt a blow in the Supreme Court of Canada decision in *Newfoundland Association of Public Employees* [2004] 3 S.C.R. 381, in which the province of Newfoundland reneged on its promise to make pay equity adjustments for its women workers. The Supreme Court agreed that this violated s. 15 of the *Charter*, but found the violation "saved" under s. 1 because the province was in the throes of a "fiscal crisis." The Court failed to explain why the human rights of working women had to continue to take a back seat to the Province's other spending priorities.

The lack of meaningful pay equity laws in B.C. has prompted unionized workers to make a point of bargaining for pay equity guarantees in their collective agreements. If they are successful in securing such a promise from their employer, they may be able to file a grievance before an arbitrator if the employer fails to ensure pay equity. This can be quicker and less expensive than other legal remedies.

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Library Workers Demand Pay Equity

By Peggy Lee, Law II

Vancouver's library workers have been on strike since the end of July 2007 and are calling for pay equity to end gender bias in wages. According to CUPE 391, which represents 2500 library workers throughout BC, the City of Vancouver has refused to negotiate their four main bargaining demands: pay equity, improvements for part-time workers, job security and general benefit improvements. The City of Vancouver mainly frames the dispute as unresolved demands for improvements in salary and benefits but fails to explicitly address pay equity issues. (City of Vancouver, "Fair. Balanced. Affordable. The City of Vancouver's position on the current CUPE strike." August 19, 2007, online: http://www.vancouver.ca/ctyclerk/ADS/Vancouver_Province_Strike_ad.pdf.)

Since library work is mainly women's work, low pay for library workers becomes a form of gender discrimination that violates the human rights principle of "equal work for equal value". According to CUPE research, traditional male jobs in the municipal sector are typically higher paying than traditional female jobs in library work. Hourly pay for entry-level library workers who are mostly women starts at nearly $6 less than jobs of equal value mostly filled by men (See chart below: CUPE Research, "Overdue: Pay Equity for Library Workers" (July 2007) at 4), online: http://cupe391.ca/action/bargaining_2007_documents/pay_equity_july07.pdf.)

City	Local & Employer	Job Title	Start Rate 2006	Top Rate 2006	Years to Max Rate	Hours/ Week
Vancouver	*CUPE 1004 & City of Vancouver*	Labourer I	$21.08	$21.08	0	40
Vancouver	*CUPE 391 & Vancouver Public Library Board*	Library Assistant I	$15.31	$17.88	3	35

Although they require a master's degree for employment, librarians remain the lowest paid professionals in the municipal sector. They are both undervalued and underpaid. Most library workers do not work full time hours, and if they are the sole income provider for a family of three, their wages would fall below Statistics Canada's Low-Income Cut-Off line (CUPE Research, "Overdue: Pay Equity for Library Workers" (July 2007) at 3).

Vancouver's library workers are calling for a gender-neutral point-weighted job evaluation pay equity program to remedy the gendered wage gap. To achieve equity, male and female wage lines need to be compared according to critical job factors such as skill, effort, responsibility and working conditions. Implementation of a pay equity program for library workers is needed as gender-based wage discrimination is unacceptable.

The Lack of Pay Equity (cont'd)

Of course, no pay equity law has so far been adequate to deal with the problem of women being pushed into low-skill, low-wage jobs and systematically excluded from better careers. Nor can it deal with the female-dominated "no-wage" job of housework and family care. Some writers have argued that the presence of a large number of women in any job causes the job itself to become devalued and that wages are depressed as a result. If true, this is a sobering thought that reminds us that valuing women's work requires first the more basic commitment to value women as human beings.

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Professor Janine Benedet will teach Criminal Law and Labour Law in the 2007-2008 academic year. Janine will be speaking on "Prostitution and the Harms of Harm Reduction" as part of the CFLS Lecture Series on November 7, 2007.

NAWL 2007 Conference: Standing Up For Mothers

By Peggy Lee, Law II

The National Association of Women and the Law [NAWL] hosted a conference entitled "Mothering in Law: Defending Women's Rights in 2007" in Ottawa on May 11th to 12th. The conference was followed by a Mother's Day lobbying session at Parliament Hill on May 14th where conference participants directly petitioned parliamentarians about reforms needed to better protect the rights of women and mothers. I had the pleasure of attending both events.

Andrée Côté, NAWL's Director of Legislation and Law Reform, lobbying on Parliament Hill.

The conference program was organized around four themes: Mothers at Work, Mothers in the Family, Mothers and Citizenship, and State Obligations to Mothers. Susan Boyd and Fiona Kelly of UBC presented on "Law Reform for Lesbian Mothers (in a System that Likes to Find Fathers)". They discussed the present legal climate that prioritizes paternal biogenetic ties and finding fathers for children; and proposed family law reform models that would better protect the rights of lesbian mothers. Evelyn Calgay of PINAY, a Filipino Women's Organization of Quebec, presented on the problems of the Live-in Caregiver Program that leaves migrant workers vulnerable to exploitation and abuse because they are required to work 24 out of 36 months in order to obtain permanent resident status and have work permits tied to a single employer. PINAY calls for the granting of permanent residence upon arrival for live-in caregivers or at least work permits that are not employer specific. Jody Dollaire of Child Care Advocacy Association of Canada presented on the need for a pan-Canadian, publicly-funded, universal, non-profit child care system.

Throughout the conference and lobbying session the devastating effects of the Stephen Harper government's cuts were highlighted including the 5 million dollar cut to the already small budget of Status of Women Canada, the elimination of the Court Challenges Program and the removal of "promotion of women's equality" from the mandate of the Women's program. Due to the funding cuts, the bulk of NAWL's important advocacy work for women's rights is no longer eligible for funding. In response, NAWL has launched the *Staying Alive in 2007* fundraising campaign to enable NAWL to continue its work and strengthen solidarity with feminists across Canada amidst a difficult climate of anti-feminist backlash.

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NAWL is a feminist non-profit organization that has worked to promote the equality rights of all women in Canada since 1974. For further info on NAWL see: http://www.nawl.ca/ and for a summary of conference presentations see: http://www.nawl.ca/ns/en/documents/2007NAWLconference-publi.pdf

UBC Law Welcomes Fiona Kelly (cont'd)

Fiona's conviction and commitment to advance law reform that protects the rights of the marginalized is expressed in her own words: "I have always felt that having a law degree brings with it a social obligation. You are in this incredibly privileged position in that you know the law and can interact with the law. And you have an obligation to give back to the community using those skills; skills that put you in quite a significant position of power at times." Another opportunity for Fiona to give back to the community has arisen, as currently the BC Attorney General is seeking public consultation in its review of the Family Relations Act. From her innovative doctoral research work, Fiona is well-positioned to provide academic feedback on the need for law reform that broadens the legal definitions of parenthood and family to better protect the rights of lesbian parents and their children.

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Professor Fiona Kelly will teach Torts Law and Family Law in the 2007-2008 academic year and hopes to offer a seminar course on Law and Sexuality in the following year. Fiona will present on "Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood" on January 23, 2008 as part of the CFLS Lecture Series. She encourages students to get involved with the Centre for Feminist Legal Studies and develop a broad critical approach to their legal studies.

Reforming B.C.'s Family Relations Act (cont'd)

While mediation may be an effective dispute resolution tool in certain circumstances, it can be extremely harmful to women in situations where they experience a power imbalance vis-à-vis their former partner. Power imbalances may be the product of spousal abuse or financial inequality between the parties. Forcing women to mediate in situations of abuse enables the perpetrator to perpetuate that abuse through "official" channels. It also requires that women negotiate with their abusers, something they should never be required to do. Mandatory mediation in situations of financial inequality may lead women to agree to property and support arrangements that are far less advantageous than they would have achieved in court. Thus, while mediation may be effective in some situations, the suggestion that mediation be *mandatory* is severely misguided and is likely to harm women. Women who experience abuse or financial inequality within their relationships, and who justifiably resist mediation, risk being labeled "non-conciliatory". For example, a woman who refuses to engage with mediation because she is fearful of her former spouse or is trying to protect her child, could easily be seen as an antagonist. Women need to have a choice over how their disputes are resolved, particularly in situations of abuse, and should never be forced to risk their own safety or economic integrity in order to comply with the family law process.

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Access denial/failure to exercise access

While it is acknowledged in the Discussion Paper on "Meeting Access Responsibilities" that there are "two sides" to access responsibility – that of exercising access and that of facilitating access – the Paper largely dismisses the former and focuses almost exclusively on punitive measures that might be used to enforce the latter. This approach is taken despite an acknowledgement by the Canadian Bar Association that failure (by fathers) to exercise access, rather than frustration of access (by mothers), may be the more prevalent problem. The measures suggested in the Discussion Paper include contempt orders, quasi-criminal convictions and imprisonment, fines, court-ordered apprehension of the child, mediation, termination, modification or suspension of spousal support, and the variation of existing custody and access orders. Supervised access it also suggested as a solution to ongoing conflict over access. The Discussion Paper does briefly discuss the possibility of "excusable breaches" of access orders, but does not otherwise consider *why* women might deny access.

While some of these gender neutral proposals may ultimately assist women, unless the review acknowledges the gendered nature of family violence, it is unlikely that reforms will adequately respond to women's systemic inequality within the family.

The almost exclusive focus on women's purported access denial, despite an acknowledgement that failure to exercise access is likely the bigger problem, is troubling. Such an approach inflates the problem of access denial beyond the reality of the situation, and gives the impression that mothers are selfishly keeping their children away from their fathers. It also fails to hold men accountable for their failure to exercise access or for the effects that this failure has on women and children, both emotionally and financially. Perhaps most significantly, however, it fails to grapple with *why* women might legitimately deny access. While we cannot be certain of all the reasons for access denial, a significant number of women do so because they fear for their own and/or their child's physical and emotional safety. Access visits are often used by abusive men to continue the abuse that characterized the relationship prior to separation. In fact, Statistics Canada research has shown that violence often escalates at the point of separation. Women may therefore have perfectly valid reasons for denying access, yet the Discussion Paper's focus on punitive measures designed to punish women for access denial suggests otherwise. The omission of any consideration of women's genuine fear of violence is ironic considering that the topic of a second Discussion Paper is "Family Violence". The failure of

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Reforming B.C.'s Family Relations Act (cont'd)

the Research Committee to make a link between access denial and violence suggests a troubling lack of understanding of the role violence plays in many women's experience of post-separation parenting.

Family Violence

The inclusion of a Discussion Paper focused entirely on family violence is commendable. It suggests that the message women's groups have been disseminating about the effects of family violence on women involved in family law disputes, is beginning to be heard. As the discussion above suggests, however, there is still much to be done. The "Family Violence" Discussion Paper begins by noting that the "nature and consequences" of family violence are "typically more severe for women". Unfortunately, this is where the gendered analysis ends. At no point does the Discussion Paper acknowledge that women are more likely than men to be victims of family violence (Statistics Canada, "Measuring Violence Against Women: Statistical Trends 2006", October 2006 at 16). Nor does it recognize, beyond the single statement about the nature and consequences of family violence, that the experience of family violence is different for women than for men. For example, the severity of violence perpetrated against women by men is much greater than that perpetrated by women against men (Statistics Canada, "Measuring Violence" at 16). In fact, rather than acknowledging that family violence is gendered, both with regard to prevalence and severity, the Discussion Paper adopts a position of gender neutrality. While some of these gender neutral proposals may ultimately assist women, unless the review acknowledges the gendered nature of family violence, it is unlikely that reforms will adequately respond to women's systemic inequality within the family.

A second concern in the "Family Violence" Discussion Paper is the section on "false allegations" of family violence, particularly child abuse. Despite citing evidence that false allegations are rare, the Discussion Paper discusses introducing additional criminal and civil penalties in an effort to respond to the problem false allegations are made. "Men's groups", as well as "some British Columbians", are cited as supporting such measures. The focus on false allegations is likely to create a climate in which women's claims are treated with suspicion, making it more difficult for women to raise their genuine concerns about abuse or violence.

Conclusion

As noted from the outset, the Discussion Papers offer some hope for feminists. They raise issues that previous government reform processes, most notably those around the federal *Divorce Act*, largely neglected. However, as this article suggests, significant concerns remain for feminists. It will therefore be important that as the reform process unfolds, feminist voices continue to be heard.

Collaborating on Family Law Reform (cont'd)

UBC's new family law professor, Fiona Kelly, is also involved with the project. Our focus over the summer has been on laws related to parenting after separation, because submissions to the government are due on September 7, 2007 (or within a week of that date). Based on the research that has been conducted, as well as consultations with community groups, various submissions will be prepared. The next stage of the law reform project is focused on the status of children, including legal parentage, spousal and parental support, and co-operative approaches to resolving disputes. This stage will include an examination of law reforms that are necessary to recognize same sex parenting. Submissions are due in November 2007.

The website for the BC government Family Law Relations Act reform project is at: http://www.ag.gov.bc.ca/legislation/#fra. Consultation papers are available on several topics such as "Parenting Apart" and "Family Violence". Instructions for submissions are also available. There are two ways in which you can make submissions -- via a written submission or by filling out the online response form/survey. It will be important to have as many responses as possible from individuals and groups who are familiar with the implications of these laws and the proposed changes for women. The website for the West Coast LEAF Family Law Reform Project is: http://www.westcoastleaf.org/index.php?pageID=43&parentid=29

Women, Work and Law (cont'd)

Challenges Ahead

A number of unresolved issues remain. One such issue is returning to work after an extended leave. Notwithstanding most generous maternity leave packages, those who return find it challenging to continue working at the same rhythm. Longer maternity leave, even if fully legitimate and funded, can still be potentially detrimental to those who embark on the parental track. As a result of taking leave, lawyers risk having less exposure to files, interaction with the clients and professional development opportunities. This can delay, for example, promotion or admission into partnership as employers may apply the same criteria to those who are away from the firm whether due to maternity leave, medical leave or a secondment. Similar challenges can be foreseen in the case of flexible work arrangements.

Further, paternity leave remains far less common than maternity leave. While the legal profession has made significant progress when it comes to maternity leaves, it has yet to adjust to the fact that more fathers now want to spend time with their children and family.

The final challenge may be of particular interest to those who embark on careers in private practice, namely business development and networking. In April 2007, an article in *Lexpert*, Canada's business magazine for lawyers, noted that many women do not share the same interests as their male clients or colleagues such as sports. Young women still have fewer role models to emulate as there are fewer women in leadership roles. The male model of mentorship and coaching, on the other hand, is not necessarily workable. Moreover, women lawyers may be concerned about the perceptions created when asking male contacts to socialize. Men may still take an invitation for a lunch or drinks in the wrong way. Further, male partners or senior managers may try to protect women in ways that can impede their networking progress, for example, not asking young mothers to undertake extended work-related trips. Finally, female lawyers may face resistance from certain clients who would prefer to work with a male lawyer (Sally Schmidt, "Marketing and Women: There are Differences", *Lexpert* (April 2007) 102). In this respect, there may also be unique, gender-specific challenges faced by women who choose to practise criminal law. This area remains to be explored further.

Conclusion

Law and the legal profession have come a long way as far as gender equality is concerned. In the last few years, law has seen an unprecedented arrival of women as well as of mature law students who have families and a different sense of priorities in life. Another change has been an increasing recourse by the clients to non-adversarial methods of dispute resolution such as mediation, rather than to litigation. Many believe that this model of dispute resolution will attract a higher proportion of women. This view, however, is premised on the pre-existing essential differences in the way women and men approach conflict and to date has not been statistically supported.

While the gender gap has considerably narrowed, it has not closed. Many agree that generous leave policies or reduced work hours can be detrimental to the business model that dominates the private practice of law. At the same time, a number of other fast-paced professions, for example large accounting firms, have had some success in moving in a more flexible direction. If demands are not made, changes may be slow to come.

Outlaws Standard Margins Conference: Advancing Queer Rights

By Peggy Lee, Law II

As a queer law student who had just frantically submitted my last first year paper assignment at 4 pm that day, I ran into the April 27th evening reception of Outlaws Standards Margins Conference in a state of relief and exhaustion. I was truly amazed that the student organizers, Jeff Yuen (Law III) and Jennifer Lau (Law III), had managed to organize a national conference on law and sexuality with such an impressive program of speakers. There were many highlights to the weekend as speakers included many prominent legal advocates, feminist legal scholars, queer (friendly) researchers and community activists. It was most inspiring to learn from the many dedicated queer legal advocates, scholars and activists who have been at the forefront of the struggle to advance queer rights in Canada.

(*left to right*) Geoff Rawle, Sas Ansari, Marguerite Russell, Kathleen Lahey, Susan Boyd, Claire Young, Emma Cunliffe, Fiona Kelly, Elaine Craig

Susan Boyd and Claire Young of UBC presented "Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada". Their talk raised much critical debate on new hierarchies formed through dominant discourses on legal recognition of same-sex relationships that reinforce conservative and heteronormative family ideology. Ruthann Robson of CUNY gave the keynote speech on "Sexual Freedoms in Global Perspective" that queried the limits of whether legal institutions could be a vehicle to advance sexual freedoms. Elaine Craig of Dalhousie University presented on "Transphobia and the Relational Production of Gender" that examined the relationship between binary gender identity constructs, gender transgression and trans-phobia. Sean Rehaag of University of Montreal presented on "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" that examined the challenges that bisexual refugee claimants posed to immigration adjudicators who lacked understanding about the complexity of sexual orientation and sexual minority experiences of persecution. Kathleen Lahey of Queen's University presented on "Queers in Canada 2007: Are We Really Equal Now?" She mapped the historical context of the struggle for LGBT rights in Canada and posed difficult questions about whether equality is achieved and where we must continue the struggle. Fiona Kelly of UBC presented on "Living Your Difference: Lesbian Mothers and the Challenge of Family Recognition". She discussed the experiences of lesbian mothers who resisted the traditional hegemonic concepts of "family" and their struggles to assert a self-determined concept of "family" contrary to traditional norms.

Coming into the conference exhausted from a gruelling year of first year law, I left energized by the many ideas and stories we had shared all weekend. The conference reaffirmed for me that it was indeed possible to effectively use law in the service of the community – whether it was sexual minorities, refugees or women in poverty. It was a poignant reminder for me as an activist that the long arduous struggle to advance the rights of the marginalized must continue with strength and fortitude. ……..

Outlaws is the queer law students association at UBC. Come out and build a vibrant lesbionic, gay and all-around queer law school community! Check out Outlaws website for event updates: http://www.ubclss.org/outlaws_info or email Geoff at: <remember@gmail.com>.

Student Researchers' Perspective on the Collaborative Project

By Aditi Master, Law III

For students, irrespective of their subject of study or final destination in their careers, any practical experience in their chosen academic field is invaluable. The West Coast LEAF-CFLS collaboration on family law is no exception. For us – the students working on the BC *FRA* reform project – the opportunity to collaborate with, read about and learn from experts in the family law field, particularly in the context of women's daily reality with the current family law system in other common law jurisdictions in addition to Canada, better readies us as future legal professionals to handle our cases and clients with a broader perspective and the much-needed sensitivity in the legal and social realms.

The research experience has not only provided us with a better understanding of the reality on the ground for women and put our ongoing legal education into practical context, but the time together has also fostered a more supportive working group and manner of thinking. The opportunity to have face-to-face discourse with frontline social workers working under immense time and monetary constraints is an education in itself –priceless knowledge that cannot be found in lengthy judgments or textbooks. They are the true heroes and teachers of our time, who bring out the voices of those disadvantaged or unfairly treated by our current legal system. A more pronounced collaborative effort between the social agencies and the legal professionals is a sure way forward.

McIvor Case (cont'd)

communities, the right to live on reserve lands, eligibility for federally funded programmes and assistance, and the right to treaty payment. Status is also reinforcement of aboriginal identity, heritage, and belonging. The Court thus rejected the government's argument that denial of Indian status engages only minor and unimportant interests.

Justice Ross's decision in *McIvor* provides a rich discussion of the history of this issue and cuts convincingly and smoothly through a number of formalistic and, on one occasion, as Justice Ross argues, "ironic" arguments advanced by government. For instance, in relation to the first observation, Justice Ross relies considerably upon both the 1970 final report of the Royal Commission on the Status of Women and testimony before this Commission and other Parliamentary committees of aboriginal women. In this history, Justice Ross discusses the tension between the challenge to correct the discrimination and reinstate those aboriginal women disentitled by it and the struggle for aboriginal self-government and self-determination as to band membership in particular. It is important to the decision that the 1985 amendments separated the issue of status registration from band membership.

This case illustrates the value of the now defunded Court Challenges Programme. Funding from this programme enabled the plaintiffs' challenge to proceed. And the plaintiffs are clear that, with no financial assistance, a response to the government's appeal of this decision is in jeopardy. General concerns about the cancellation of the Court Challenges Programme resulting in financial barriers to important constitutional equality issues receiving full judicial consideration are certainly illustrated by this case.

. . . . . .

Margot Young is a Professor at the University of British Columbia Faculty of Law where she teaches and writes in the areas of constitutional law and social welfare law. Most recently she is co-editor of the book Poverty: Rights, Social Citizenship and Legal Activism *(UBC Press, 2007)*.

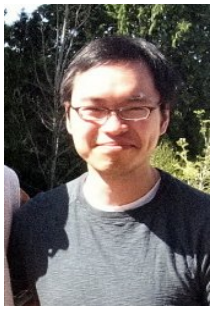
Congratulations!

Auriol Gurner Young Memorial Award to Brenda Belak

Brenda Belak (LLB 3) was awarded the Auriol Gurner Young Memorial Award in recognition for her contributions to women and the law. Brenda has worked on human rights in Burma and presented a shadow report to the UN CEDAW Committee together with Burmese women. She is co-chair of this year's Women's Caucus, an active member of Law Students for Choice, a LSLAP clinician and a regular at the Centre for Feminist Legal Studies. Outside of the law school one can always find Brenda at women's marches, community meetings, and other grass-roots initiatives touching on women's rights. She is a passionate and intelligent feminist who inspires those who know her.

Marlee Kline Essay Prize to Jeff Yuen

Jeff Yuen (LLB 3) was awarded the Marlee Kline essay prize for his essay "Do Sex and Sexuality Matter? Lesbian Parenting in a Gendered Legal Arena". Jeff co-organized the Outlaws Standards Margins conference in April 2007 and will be clerking at the Supreme Court of Canada in 2008.



Position Available—CFLS Student Coordinator

The Centre for Feminist Legal Studies invites applications from law students for the position of Centre Student Co-ordinator during Winter 2008. The Coordinator works under the supervision of the Director and the Steering Committee of the Centre but must be capable of independent work. Duties include assisting the Director in the running of the Centre, monitoring use of the Centre, renewing the resource library, helping to organize the speaker series and other events, publicizing the Centre's activities in the student body and in the community, organizing student volunteers, liaising with the Women's Caucus, helping to answer queries about the Centre's activities, updating the website, and conducting occasional research for the Centre or the Director. Preference will be given to applicants with a strong background in feminist knowledge and/or activism, excellent organizational and interpersonal skills, prior involvement in the Centre, a willingness to facilitate a relationship between feminist legal studies in the university and feminist law workers in the community, and a commitment to enhancing feminist legal studies and research. Preference will also be given to students who are able to continue the Coordinator work during the summer of 2008 and can do some hours during fall 2007.

Please submit your applications to:

Professor Susan B. Boyd, Director
Chair in Feminist Legal Studies
Room 233, Curtis Law Building
604-822-6459, boyd@law.ubc.ca

Deadline: September 28, 2007

Centre for Feminist Legal Studies

CFLS 2007 Fall Lecture Series

Lectures are held each Wednesday from 12:30-1:30 in Curtis Room 157

Susan B. Boyd Chair of Feminist Legal Studies, UBC Faculty of Law	CFLS Open House 2007 with UBC Feminist Faculty at CFLS in Annex One	September 12
Nitya Iyer Partner at Heenan Blaikie, West Coast Legal Education and Action Fund (LEAF)	*Co-sponsored with Law Students for Choice* The *Watson Spratt* Case and Access to Abortion	September 19
Judy Fudge Landsdowne Chair in Law, University of Victoria	Substantive Equality, The Supreme Court of Canada, and the Limits of Redistribution	September 26
Amber Prince Legal Advocate, Atira Women's Resource Society	*Co-sponsored with Social Justice Action Network* Atira Women's Resource Society: Providing Feminist Advocacy for Women in the Downtown Eastside	October 3
Cherlyn McKay WAVAW Victim Services, Medical Support Worker Manijeh Ghaffari WAVAW Stop the Violence Counsellor, Outreach Coordinator	Navigating the Criminal Justice System: Potential Barriers for Women Survivors of Violence	October 10
Claire Young Professor and Senior Associate Dean, UBC Faculty of Law	The Gendered Impact of Funding Pensions Through Tax Expenditures	October 17
Ning Alcuitas-Imperial Lawyer, Philippine Women's Centre	Philippine Women's Resistance Against Political Killings and State-Sponsored Terrorism	October 24
Gillian Whitehouse Associate Professor, School of Political Science, University of Queensland	Industrial relations systems and gender pay equity: challenges under changing legislative frameworks in Australia	October 31
Janine Benedet Associate Professor, UBC Faculty of Law	Prostitution and the Harms of Harm Reduction	November 7

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We want to acknowledge the Musqueam people, whose traditional territory we are on, and thank them for allowing us to be here.

CFLS Advisory Board

Become a "Friend of the Centre"

You may become an annual Friend of the Centre for $25, which entitles you to notices of Centre events and programs, a one year subscription to our Newsletter *LawFemme* and access to the resource centre and library.

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