The Canadian Bar Association

TOUCHSTONES FOR CHANGE:
Equality, Diversity and Accountability

The Report on Gender Equality in the Legal Profession

Report of the
Canadian Bar Association
Task Force on Gender Equality in the Legal Profession

Touchstones for Change: Equality, Diversity and Accountability

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TOUCHSTONES FOR CHANGE: EQUALITY, DIVERSITY AND ACCOUNTABILITY

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PREFACE

The Task Force on Gender Equality was established by the Canadian Bar Association in 1991 to address the status of women in the legal profession on a national basis. This important step signalled recognition that gender discrimination exists in the profession.

In its Report, the Task Force sets out clear evidence of unequal treatment between the sexes at many levels of the profession across Canada. Two years of research and broad consultation have culminated in a greater understanding of the barriers to equality faced by women lawyers. These barriers take many forms and are found in all sectors of the profession and the judiciary. The barriers include discrimination in employment opportunities and representation, obstacles to career advancement, the lack of accommodation for family responsibilities and sexual harassment. The Report also demonstrates how these barriers are multiplied for women who face additional forms of discrimination on the basis of race, ethnic origin, sexual orientation or disability. The profession must fully recognize the dimensions of gender bias and assert in the strongest possible terms that discrimination is harmful and unacceptable.

Recognition of the problem is the first step in the ongoing process of change, but it is only a first step. The challenge is to ensure that the legal profession guarantees women equality of access and equality of opportunity for advancement. The Report has been drafted with a problem-solving orientation to guide the profession as it struggles with this challenge.

The objectives are two-fold. First, the Report is designed to assist the profession to examine itself and fully understand the nature and impact of discriminatory practices and systemic discrimination that exist in all sectors of the profession. Second, the Report offers a perspective on change and recommendations for achieving gender equality.

The Task Force calls on all members of the profession and the judiciary across Canada to act to eradicate gender discrimination. I echo this call to action. I am certain that when members have read the Report they will agree that the time has come for the profession to accept the challenge of achieving gender equality. Gender discrimination is not a problem "for women" but a problem of the profession. We must approach this challenge in a positive fashion, recognizing that we will all benefit from this process of renewal.

In responding to gender bias, we will create a new, revitalized profession that reflects the values of equality and fairness and the diversity of the Canadian community. Our profession will be better able to operate in the interests of its diverse membership and in the public interest.

While self-scrutiny and improvement from within is essential, we must not forget the broader duty to eradicate gender bias in the justice system as a whole. The Report provides guidance to the profession in this regard as well.

The Canadian Bar Association is proud of the accomplishments of the Task Force and grateful for the efforts of those people who contributed to the Report. In particular, I would like to thank the Chair, the Honourable Bertha Wilson for her vision and untiring commitment to equality issues and the other members of the Task Force for their exceptional contribution to this project.

The Canadian Bar Association will continue to play a leadership role on these issues. Together we must work toward the dual goals of equality for all members of the profession and gender equality in the justice system.

Paule Gauthier, O.C., P.C., Q.C.
President
The Canadian Bar Association

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Despite the fact that we can not acknowledge everyone by name, there are some who deserve special mention. The provincial and territorial working groups were the eyes and ears of the Task Force across Canada. These working groups functioned with very limited resources and under strong time constraints. Yet they furnished the Task Force with invaluable insight into the situation of women lawyers in all jurisdictions. The Chairs were Cecilia Johnstone, Q.C. and Jack Watson (Alberta), Her Honour Wendy Baker (British Columbia), Jennifer Cooper (Manitoba), Judith MacPherson (New Brunswick), Lois Skanes (Newfoundland), Lois Toms (Northwest Territories), Marci Lin Melvin (Nova Scotia), Margaret O'Sullivan, Mary Eberts and Garth Manning, Q.C., (Ontario), Nancy Orr, Q.C., (Prince Edward Island), Jocelyne Olivier (Québec), Merri Ellen Wright (Saskatchewan) and Sylvia MacIntosh (Yukon).

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County of Carleton Law Association
Criminal Lawyers Association
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Albrecht W.C. Bellstedt
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Hon. Justice D.G. Blair
Harvey Bliss
Sheila Block
Sharman Bondy
Hon. Madam Justice Amy Bonkalo
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Stephanie Brown
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Marlys Edward
Cheryl Edwards
Mary Jo Egan
Sue Elliot
Cheryl Elliott
Igor Ellyn
Catherine A. Evans
Christine Evans
Heather Evans
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Norma Farkvam
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Mr. Justice Lee K. Ferrier
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Mary J. Gleason
Alan Gold
L. Golding
Susanne Goodman
William H. Goodridge
Stephen Goudge
K.D. Gowin
Hania E. Grabowski
E. Joy Grahek
Anne Grant
Owen V. Gray
Charalee F. Graydon
Shirley E. Greenberg
Madam Justice Susan E. Greer
Diane M. Grenier
Aline Grenon
Kathleen Grimes
Diane Grygiencza
Joanne Guarasci
Sylvia Guertin
Margaret Haig
Marguerite A. Hale
John P. Hamilton
Jean Franklin Hancher
Kathleen S.M. Hanly
Holly Harris
Christine E. Hart
Shirley Heafey
Wendy Hearder-Moan
Marian Hebb
Thomas G. Heintzman
Madeleine Herbert
Perry Hill
H. Bruce T. Hillyer
Lindsay Histrop
Lisa Hitch
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A. Holthuis
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Judith Huddart
Barbara Humphrey
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George Hunter
William H. Hurlburt
Tallat Hussain
Karl D. Jaffary
Belinda Joan James
Erica L. James
Stanley Jaskot
Elizabeth Johnson
Nancy M. Johnson
William Johnson
Cecilia Johnstone
Marc Jolicoeur
Colin D. Jones
Joan E. Jung
Marlene J. Kane
Jane Kelly
Jane E. Kelly
Terence V. Kelly
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John Laskin
Pierre R. Lavigne
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J. Brett Ledger
Kevin Lee
Judge Brian W. Lennox
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Roslyn Levine
Yolanta Lewis
Adele Liebovitz
Hilary A. Linton
A.T. Little
John Logan
Jennifer Lynch
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Ronald MacIsaac
Donna MacKenzie
Karen Maclaurin
Anne L. Mactavish
R. Dennis Maher
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Alma Malcolm
Maureen J. Malszko
Melanie A. Manchee
Garth Manning
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June Maresca
Wendi L. Maroon
Her Honour Judge Lauren Marshall
Kay Marshall
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Mr. Justice John F. McCart
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Melanie J. McWilliams
Louise Meagher
Eugene Meehan
Mary E. Meisner
Monique Metivier
Alain Michaud
John Millar
E. Lianne Miller
Jim Minnes
Heather Mitchell
Fatima Mohideen
Fatima Mohideen
Anne M. Molloy

Marguerite Mooney
Julie Morelli
J.T. Morin
David K. Moritsugu
Kenneth C. Morlock
Claudia Morrow
Cynthia N. Morton
Mildred Morton
Nancy Mossip
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A. O'Neil
James W. O'Reilly
Margaret O'Sullivan
Deen C. Olsen
Deborah K. Orida
Mary F. Ormerod
George Osini
Raymond Ostiguy
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Gladys I. Pardu
Ward Passi
Catherine Patterson
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Paul Penna
Sarah Pepall
N. Jane Pepino
Marion M. Perrin
Helen M. Pierce
Jean Pigott
E. Jean Polak
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Sandra Rodgers
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E. Anne Rogers
Anne Roland
John M. Roland
Susan D. Rosen
Esther Rosenberg
Steve Rosenhek
Carolle Rossignol
Frederika Rotter
Dennis Roy
Carol-Lynne Saad
Harriet Sachs
Janet Salter
Mary Anne Sanderson
Elena Sarno
Michael S. Schelew
David Scott
Silja Seppi
Katherine L. Shadbolt
William M. Sharpe
Judy M. Shea
David Sherman
Elizabeth J. Shilton
Donald Short
Marilyn Silverman
Bill Simpson
Rosemary Simpson
Sandra Simpson
Douglas Smith
Joni Smith
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Sheryl Smolkin
Judge Ronald E. Sobier
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Tamara Stomp
Diane Stortini
C.L. Sugiyama
Robert M. Sutherland
Henry Swierszcz
Lynda Tanaka
Nicole Tellier
Judge Gordon Teskey
Anne Thomas
Jeannie Thomas
Margaret I. Thomas
David S. Thompson
Peter Thompson
Shelley Timms
Stella Torontow
Rosalyn Train
Liana Turin
Herman Turkstra
John S.M. Turner
Robert J. Turner
P. Vair
John Varley
J.D. Vincent
Milka Vujnovic
Eve R. Wahn
David Wake
Don Wakefield
Margot A. Warren
Rhona Waxman
Madam Justice Karen Weiler
Richard J. Weiler
Joan M. H. Weppler
Leslie A. White
Trudy White
Alan Whitten
Heather Williams
Norman Williams
Doris I. Wilson
Frederica Wilson
Hon. Bertha Wilson
John Wilson
Barbara D. Wise
Arlene D. Wolfe
Philip J. Wolfenden
Diana Woodhead
Susan Wortzman
John Wright
Linda M. Wright
Helene Yaremko-Jarvis
Adrienne Young
Dale L. Yurka
C. Spring Zimmerman
Ellen B. Zweibel

THE TASK FORCE AND ITS APPROACH

I. TERMS OF REFERENCE

The Canadian Bar Association established the Task Force on Gender Equality in August, 1991. The terms of reference provided:

> The Task Force on Gender Equality is established:
>
> a) to inquire into and make recommendations for the improvement of the status of women within the legal profession, with particular reference to the matters set out in Appendix 1;[1]
>
> b) to inquire into and make recommendations with respect to gender bias in the Canadian Bar Association constitution, by-laws, rules and internal operating procedures;
>
> c) to identify and refer to the appropriate Canadian Bar Association Sections and Conferences, for review and report, substantive laws and procedural matters that raise issues of gender equality;
>
> d) to take the lead in acting as a conduit for collection and distribution of information regarding initiatives on gender equality and, in particular, to undertake the consultations set out in Appendix 2.[2]

The focus within this broad mandate is on equality in the legal profession. This was reinforced by the more detailed list of issues set out in Appendix 1 to the Terms of Reference:

i) parental leave policies for women (and men) lawyers:

   A. associates,
   B. partners,
   C. in-house counsel,
   D. civil servants,
   E. law teachers;

ii) ways for women lawyers to have successful legal careers while fulfilling their roles as mothers and the options presented by:

   A. flex-time work,
   B. part-time work,
   C. job sharing, and
   D. other alternative working arrangements;

iii) promoting the upward mobility of women lawyers (breaking the "glass ceiling"):

   A. within law firms,
   B. to the bench,
   C. within universities,
   D. within the civil service,
   E. within corporations, and
   F. within professional organizations;

iv) encouraging women lawyers in their professional development, including:

   A. finding a mentor,
   B. referrals within the firm,
   C. access to professional organizations, and
   D. marketing;

v) the remuneration of women lawyers, including:

A. articling and summer students,
B. associates,
C. partners,
D. managing partners,
E. in-house counsel,
F. civil servants, and
G. law teachers;

vi) promoting equality in the hiring of women lawyers:

A. as articling and summer students,
B. as associates,
C. as law teachers, and
D. as corporate counsel;

vii) day care:

A. availability within law firms, universities, government and corporations,
B. deductibility of child care expenses;

viii) eliminating the harassment (in the broadest sense) of women lawyers:

A. by firm members (particularly the harassment of women articling students by partners),
B. by members of the judiciary,
C. by clients,
D. by other lawyers,
E. of women students by professors;

ix) eliminating the double discrimination suffered by women lawyers from minority and disadvantaged groups; and

x) encouraging women lawyers to remain in the practice of law.

The emphasis to date has been on putting our own house in order, both across the profession and within the Canadian Bar Association. As prescribed by paragraph (c) of the mandate, the Task Force has dealt with gender bias in the substantive and procedural law in only a tangential fashion. It is our expectation that, having completed this Report, the Canadian Bar Association will now pursue these law reform and access to justice issues in the immediate future.

II. MEMBERSHIP

As originally constituted, the Task Force was composed of the Chair, the Honourable Bertha Wilson, and five members selected on the basis of geographic representation, sex, sector of practice, age, experience, and familiarity with gender issues. Half-way through the Task Force's two-year mandate, at the request of participants at a conference sponsored by the Task Force, the Executive of the Canadian Bar Association expanded the Task Force's membership to include two representatives of women lawyers who face multiple discrimination within the profession.

Thus, the current members of the Task Force are:

The Honourable Bertha Wilson (Chair)
Patricia Blocksom (Calgary, Alberta)
Sophie Bourque (Montreal, Quebec)
Daphne Dumont (Charlottetown, Prince Edward Island)
Professor John Hagan (Toronto, Ontario)
Sharon McIvor (Merritt, British Columbia)
Alec Robertson, Q.C. (Vancouver, British Columbia)
Her Honour Corrine Sparks (Halifax, Nova Scotia)

III. METHODOLOGY AND STRUCTURE

A. METHODOLOGY

Although hindered in the beginning by lack of funding, the Task Force organized itself for the massive work at hand by making three initial decisions. First, the Task Force decided to approach the issue of inequality in the legal profession by sector; that is making its inquiries according to the following categories: large law firms; small law firms; corporate counsel; government lawyers; academe and the judiciary. Secondly, the Task Force acknowledged that much work had already been accomplished at the provincial level. In order to avoid duplication and build on existing efforts, the

Task Force carried out an in-depth review of the work already undertaken by provincial law societies and in other common law jurisdictions and began to compile an annotated bibliography. This preliminary work resulted in the release of an analysis of provincial surveys of women in the legal profession and a working bibliography. These documents were distributed in January 1992.

1. Provincial and Territorial Working Groups

The Task Force also wished to ensure that it would have input from across Canada. Working groups were therefore established in each province and territory.[3] The purpose of the working groups was to carry out research and consultations to ascertain the status of women in the legal profession within each jurisdiction as well as to propose solutions to the Task Force. The working groups met these objectives in a variety of ways, including holding public hearings, consulting with organizations, carrying out survey research and so on.

The provincial and territorial working groups filed their reports with the Task Force in February 1993 and met with the Task Force on two occasions in October 1992 and March 1993. Their reports contain a wealth of quantitative and qualitative data, including historical reviews of the participation of women in various sectors of legal practice and in professional organizations. Taken together, the twelve reports provide the fullest picture of the status of female lawyers in Canada available to date. These reports constitute a central contribution to the work of the Task Force. In addition, these reports stand as independent studies and are available as annexes to this report.

2. Research

While it was establishing this broad structure, the Task Force also decided how it was going to gather information at the national level. An ambitious research and consultation project was established.

The research and consultations undertaken are integral to the work of the Task Force and inform its report and recommendations. The reports that were produced from the research are also available as appendices to the report. In addition to the analytic study of provincial law society surveys of women in the legal profession and the annotated bibliography mentioned above, the research commissioned includes: a number of thematic scholarly papers;[4] a discussion paper on sex discrimination in employment;[5] a study of corporate counsel;[6] a discussion paper on the structure of the law firm;[7] and a bibliographic memorandum on multiple discrimination.[8]

A series of national surveys have also been prepared and administered on behalf of the Task Force. Separate survey instruments were prepared for the four groups for which adequate data did not exist: women judges; federal government lawyers; female adjudicators serving on administrative tribunals and law professors. The surveys explore the perception and experience of gender bias by individuals in these sectors. A survey of black and minority women law students, articling students and lawyers has also been implemented.

3. Consultations

With these studies and surveys underway, a consultation process was initiated. Consultation posed a considerable challenge at the national level, where considerations of time and money precluded public hearings. The provincial and territorial working groups were therefore charged with this function. Several avenues were pursued in order to ensure that the Task Force establish a dialogue with interested groups and organizations.

First, in October 1992, the Task Force co-sponsored a continuing legal education conference. The thematic scholarly papers were presented at that time to approximately 150 participants from across Canada. Discussion groups were held on barriers to equality, centres of change and the experience of women within the various sectors of the legal profession.

A consultation meeting with women's organizations was held on January 22 and 23, 1993 in Toronto.[9] Representatives from twelve organizations attended a two-day meeting which included the presentation of formal briefs followed by questions from Task Force members and a general discussion. Several of the groups submitted written briefs.

The consultation meeting provided the Task Force with an excellent opportunity to learn about the nature of discrimination faced by women in the legal profession, particularly the multiple disadvantages facing lesbians, Women of Colour, Aboriginal women, and women with disabilities. The organizations also presented the Task Force with numerous recommendations on how change can and should be achieved within the profession.

The issue of multiple discrimination was canvassed in greater detail in consultations with Women of Colour and Aboriginal women held on a regional basis. Comprehensive reports on the situation of Women of Colour and Aboriginal women, based on the research and consultations, have been prepared.[10] Several Task Force members met with lesbian lawyers attending the National Association of Women and the Law Biennial Conference in February 1993.

The Task Force also held a consultation meeting with representatives of law schools and law societies across Canada on April 2 and 3, 1993. The general theme addressed at the meeting was the role of law schools and law societies in achieving gender equality in the profession. The consultation covered a number of theoretical topics as well as some concrete issues relating to equal access to the legal profession.

The Task Force has also consulted with the National Sections of the Canadian Bar Association, asking them to consider gender issues raised in their respective areas of law and practice. Several of these Sections have reported to the Task Force. This Report contains an initial discussion of these issues and makes recommendations for future action.

B. Plan of the Report

Several comments should be made about the structure of the report. First, the Task Force decided that it was essential, and consistent with its overall approach, that the issue of multiple discrimination be integrated throughout the Report. Secondly, the Report is designed to be a working tool. Thus, the discussion of each issue is followed by the Task Force's recommendation with respect to that issue. The Report elaborates the guiding principles for achieving gender equality, the accompanying Action Plan and Model Policies set out the detailed means for reaching this goal.

An introduction from the Chair identifies the touchstones for change which have guided the Task Force and inform this Report. These touchstones are: equality, diversity and accountability.

Part I of this Report develops the conceptual framework for achieving gender equality in the legal profession. The changing demographics of the legal profession, the law of equality and discrimination, the nature of self-regulation and the duty of non-discrimination are reviewed in this Part.

Part II investigates issues related to entry into the profession, focusing on the role of law schools and law societies. Barriers to entry are examined, beginning with law school admission policies and ending with the requirements of articles and the bar admission course. Potential solutions ranging from outreach programs to part-time articles are reviewed.

The largest section of the Report is Part III, Women in the Legal Profession. This Part opens with a statistical profile of women in the legal profession. Barriers to equality in the profession are examined in detail in an overview based on the research, data, and jurisprudence in four areas: discrimination in employment opportunities; discrimination in career development and advancement; lack of accommodation for family responsibilities; and sexual harassment. These themes are carried through in subsequent chapters on each of the sectors of the profession, where the focus

is on solutions. The practice of family law is the subject of a case study which illustrates the patterns of discrimination within the profession.

Part IV reviews problems of gender inequality within professional organizations and looks at the role these organizations play in promoting equality in the profession. This Part also considers the role of the legal profession through professional organizations in addressing gender issues in the substantive law and procedure. Here the focus is on developing a framework of analysis, identifying issues and recommending follow-up action to be taken by the profession.

Part V comprises a conclusion, a postscript from the Chair and a summary of the recommendations contained in the Report.

An Executive Summary has been prepared and printed as a separate document.

The Action Plan contains all of the recommendations and for each recommendation the following information: the body to which the recommendation is directed, specific targets/objects or action, timelines and indicators of success. The Task Force has also developed a series of model policies to assist the profession in becoming more inclusive.

C. Terminology

The Task Force struggled with a number of sensitive issues related to terminology. In particular, there was great concern over how to describe persons who are not caucasian, disabled persons, homosexuals and other minority groups. The aim was to use a term that was inclusive, accurate and that would not offend the members of such groups. In addition, the Task Force wanted to use terminology that would be meaningful to the wide audience to which this Report is targeted. Terms such as 'equity-seeking' groups, 'visible minority' groups and 'people of diversity' were considered and rejected. In the end, the Task Force has chosen the term 'minority persons' to describe the groups referred to above.

In addition, the term 'Women of Colour' is used to describe non-white women such as African-Canadians and women of Asian, Chinese and East Indian descent. Aboriginal women are treated as a separate group. The terms Women of Colour and Aboriginal women are capitalized to emphasize the common experiences of the members of each group.

D. List of Appendices

The following documents are appended to this Report:

1. Action Plan
2. Model Policies
3. Summary of Working Group Reports
3A. Alberta Working Group Report
3B. British Columbia Working Group Report
3C. Manitoba Working Group Report
3D. New Brunswick Working Group Report
3E. Newfoundland Working Group Report
3F. Northwest Territories Working Group Report
3G. Nova Scotia Working Group Report
3H. Ontario Working Group Report
3I. Prince Edward Island Working Group Report
3J. Quebec Working Group Report
3K. Yukon Working Group Report
4. Synthesis of Provincial Law Society Reports
5. Conference Report
6. Consultation Report
7. Report on Women Corporate Counsel. Volumes I and II
8. Report on Federal Government Lawyers
9. Issues of Gender and Multiple Discrimination in Law School Settings
10. Women of Colour in the Legal Profession
11. Aboriginal Women in the Legal Profession
12. Sex Discrimination in Employment
13. The Structure Dynamics of the Law Firm
14. Annotated Bibliography on Gender Equality in the Legal Profession.

ENDNOTES

1. Appendix 1 to the Terms of Reference is set out below.

2. Appendix 2 to the Terms of Reference set out the preliminary list of organizations to be consulted by the Task Force. Over the course of its mandate, the Task Force expanded this list. See Appendix 6, the Consultation Report, for the complete list.

3. Members of the working groups are listed in Appendix 3.

4. *Gender Equality - Professional and Ethical Issues* by Professor Lynn Smith; *The Dynamics of Exclusion: Women in the Legal Profession*, by Professor Sheilah Martin; *Work and Family in the Legal Profession: Re-Thinking the Questions* by Professor Mary Jane Mossman; *De l'art de passer à travers les mailles du filet - prolégomènes et polémique*, by Professor Marie-France Bich; *Change in the Legal Profession: Is the Glass Ceiling Half Full or Half Empty*, by Professor Carrie Menkel-Meadow.

5. Appendix 12.

6. Appendix 7, volumes 1 and 2.

7. Appendix 13.

8. This discussion paper is included in the Annotated Bibliography on Gender Equality in the Legal Profession — Appendix 14.

9. A detailed report on the consultation is provided in Appendix 6.

10. Detailed reports in Appendix 10 and Appendix 11.

INTRODUCTION FROM THE CHAIR

INTRODUCTION FROM THE CHAIR

TOUCHSTONES FOR CHANGE: EQUALITY, DIVERSITY AND ACCOUNTABILITY

In August of 1991 the Executive of the Canadian Bar Association established its Task Force on Gender Equality in the Legal Profession. Its mandate was extremely broad. It was to investigate gender inequality and sexual discrimination in all sectors of the legal profession in which women lawyers attempt to carve out careers for themselves. It was a mandate which recognized that a profession traditionally resistant to change was in fact changing and changing in very dramatic and, to some, traumatic ways.

Women were entering the profession in large numbers and were competing with men for entrance to law schools; for scholarships and bursaries; for gold medals on graduation; for articling positions and for admission to prestigious law firms. This, inevitably, "shook up" the profession and men as well as women were forced to confront issues to which they had never given really serious thought before. Law as a self-governing profession; law as a monopoly; what did it mean? What were the implications of it? Law as a public service; law as the oil that greases the wheels of social intercourse; what did that involve? Are we really public servants as opposed to public kingpins?

Lawyers realized that this was a time for moral and intellectual stocktaking, for taking a cold dispassionate look at where their profession was going. How was their profession faring in the larger context of society? Was it a profession they were proud to belong to? Or had it become a little tarnished over the years? Had it, as some suggested, become "too commercialized"? Were people now in it for the money? Were we still the moral and intellectual leaders in our communities or were we just high-priced technicians at the beck and call of the corporate elite? In sum, did the profession still warrant the description "noble and learned"? These are the questions lawyers were asking themselves with furrowed brows and no great confidence that they knew or wanted to know the answers.

It was into this period of indecision and doubt that the Task Force was born and it is not surprising that the women who entered the profession in numbers sufficient to create a so-called critical mass were able to bring to it the new energy and vitality that the feminist movement had generated. Here was a real opportunity to give voice to a different perspective on the legal profession, a perspective that took no account of vested interests because the new recruits had none. They had never been part of the power structure to which the profession had felt it must adapt. They had no feeling of being trapped by the pervasive values of the clientele and they started to think about the answers to the questions their male colleagues were asking.

A Self-governing Profession:

What were the implications of being a self-governing profession and holding a monopoly on the provision of legal services? Surely Gavin MacKenzie was right when he cautioned the graduates of the Bar Admission Course:

> We must never forget that we enjoy the right of self-government not for the benefit of lawyers but for the benefit of the public.[1]

Addressing the Call to the Bar Ceremony at the University of Toronto on April 8, 1987 Harry Arthurs, then President of York University, stated:

> In a country which is becoming increasingly intolerant of power and privilege and secrecy in public government, the prospects are not bright for powerful and privileged and secret private governments. In a country where we increasingly expect to hold accountable those who rule us, sell us things or perform vital services for us, a Law

> Society which is accountable neither to its members nor to the public faces a future of recurring and escalating conflict.[2]

Professor Arthurs then went on to point out:

> Very little is known or understood about how the Law Society makes policy, about the arguments and assumptions underlying its policies, occasionally even about their precise content and usually about their effects. The Law Society is not a very open organization, and it never has been. Policy decisions are made in private deliberations, sometimes with limited information or debate, usually unchecked by subsequent accountability to those affected, and typically unchronicled and inaccessible to the judgments of posterity.[3]

We cannot have self-regulation without accountability and we cannot have accountability without openness. This much seems clear. As members of the profession we must know the policies by which our profession is governed because we are accountable for them, every last one of us. This is what it means to be a member of a self-governing profession.

Lawyers as Professionals:

Have lawyers forfeited their status as professionals and become the tools of their clients? Mr. Justice Gonthier in an address to the Federation of Law Societies on "What is Professionalism?" asks:

> What are law schools and law societies doing to promote professionalism? Since I left law school a number of years ago, I have discussed the matter with some of our law clerks, and the response was "not enough". Young graduates express concern and disappointment at the lack of discussion concerning ethical questions. Many feel that they brought to law school greater commitment to public service and idealism than they took out. In the classroom the fast talker and the quick thinker who can humiliate his opponent tends to become the model. There is little discussion of values or of the law as a "calling".[4]

One law student put it to us more bluntly:

> If you had any ideals or any concept that you went into the law in order to serve the public, you sure had them knocked out of you pretty quick at the law school.

Is this decline in legal standards changing? Rosalie Abella thinks so. She expressed the view, in her own inimitable style, at a Law Society of Upper Canada Continuing Education Program that the profession is changing, and in her view, for the better. She said:

> I understand full well that this is a profession which bends only creakingly to change, but change has come. Not all lawyers wear three piece suits, blue and grey are not the only sartorial choices, not everyone wants to do estates or real estate or corporate work, not everyone is part of the old boy network, not everyone comes from an economically comfortable home, not everyone is able-bodied, not everyone is white, and not everyone is male. In short, the profession is becoming more reflective of the community it serves. This change can be the profession's greatest strength if it acknowledges and draws on the concerns, aspirations and talents of its newest recruits.[5]

But it may not be doing so. Recent studies conducted in some of the provinces tell us that while women are entering the profession in substantial numbers, a significant percentage of them are leaving after three or four years. The legal profession, they say, is not "environmentally friendly" to women. They experience discrimination and harassment from their male colleagues and are not afforded the same opportunities for advancement in their chosen field. The Task Force addresses in this Report many of the barriers faced by women in the various sectors of the profession they enter.

Overcoming these barriers represents women lawyers' struggle for equality with men in the pursuit of their careers. But what do we mean by equality? I believe that the Supreme Court of Canada answered this question in *Andrews* v. *Law Society of British Columbia*.[6] It made it clear that when we speak of equality we are really addressing inequality because the *purpose* of human rights legislation is to eliminate inequality. This is why an abstract concept of equality is meaningless. If X earns $12.00 an hour

for doing a certain kind of work and Y earns $10.00 for doing the same work, giving each a raise of $2.00 is not achieving equality. It may be giving them the *same* raise and in that abstract sense treating them equally as far as the amount of the raise is concerned, but it does nothing to eliminate the inequality; indeed, its effect is to preserve it. As Frankfurter J. said in *Dennis* v. *United States*[7]:

> It is a wise man who said that there is no greater inequality than the equal treatment of unequals.

The Supreme Court of Canada accordingly rejected an abstract concept of equality under section 15 of the Charter and focused instead on the remedial aspect, the achievement of equality through the elimination of existing inequality.

The Court, in stressing the remedial aspect, focused on the historic reality of disadvantaged groups in our society. The legislation must be used to root out the myths and stereotypes that degrade and humiliate people and have no foundation in reality. It must be used to prohibit discrimination on the basis of these myths and stereotypes.

Mr. Justice McIntyre defined discrimination in *Andrews* as follows:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others or which withholds or limits access to opportunities, benefits, or advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[8]

One of the barriers faced by women lawyers in virtually all sectors of the profession is the failure to accommodate the child-bearing and child-rearing functions of women. If performance is assessed, for example, as it is in large law firms, on the basis of billable hours, pregnant women or women discharging child care responsibilities will inevitably receive a lower assessment. Most firms do not perceive this as a form of discrimination because they insist on applying an abstract concept of equality, namely that the same number of billable hours should be expected from everyone. It is only when one recognizes that the purpose of the equality guarantee is to redress inequality that one appreciates the need to examine the *context* in order to see whether discrimination and inequality are present. They clearly are in the billable hours example, because the application of the billable hours criterion to measure a lawyer's contribution to the firm has an adverse impact on pregnant women and on women with child-rearing duties to perform. They cannot achieve the same number of billable hours as their male colleagues. They are, in effect, penalized because of their gender. The billable hours criterion is an example of *adverse effects discrimination* under our human rights legislation.

In *Brooks* v. *Canada Safeway Ltd.*[9] the employer's group insurance plan was challenged on the ground that it provided benefits to all employees except pregnant ones. Chief Justice Dickson examined the social context of pregnancy and found it to be something which benefitted the whole of society. To impose its costs exclusively on women was therefore an act of sexual discrimination under section 15 of the *Charter*.[10]

The same must surely be true of the woman's child-rearing responsibility. We have accordingly addressed in our Report ways in which discrimination against women lawyers of child-bearing age and women lawyers discharging child-rearing responsibilities may be redressed or at least to some extent ameliorated.

Multiple Discrimination

The Task Force has been told by minority groups all across the country that our profession has been, since its inception, a white, male, elitist one. In the past three decades women have succeeded in breaking through the gender barrier in significant numbers but many other barriers remain. Your Task Force has asked itself therefore: what should the face of the legal profession look like as it enters the 21st century? Should it continue as a white elitist

yprofession or should it reflect the Canadian diversity? The traditional Canadian concept of Canada as a multi-cultural society (as opposed to a melting pot) reinforces the view that minority groups must have their proper place in our country and profession, not only as a matter of justice and fairness, but as a natural evolution of our historical process. Ideas enshrined in descriptive phrases such as the Canadian mosaic and the community of communities have deeply impregnated our national psyche and the body politic.

The recent constitutional debates have challenged us to contrast the nightmare of two solitudes with the dream of a fellowship of two founding families. The voice of the Aboriginal peoples is now heard clearly in the land. It is accordingly appropriate at this fateful time in Canadian history that this Report should come forward and demand that the legal profession reflect the diverse reality of Canadian society and that women and women's minority groups be fully accepted not with timid tolerance but in the sure knowledge that their enthusiastic acceptance is only just and fair.

The Task Force believes that the goal of the profession should be diversity. It believes that all 'voices' should be heard and all 'perspectives' presented. There is no such thing as a neutral perspective. This is the message that came to us loud and clear:

A white view of the world is not neutral
A masculine view of the world is not neutral
A heterosexual view of the world is not neutral.

Women of Colour, Aboriginal women, disabled women, lesbian women all have had experiences of life that differ profoundly from those of the dominant Canadian culture and each group brings a unique and different perspective to our understanding of life and the law.

Our profession must be inclusive. It must not deny entry or discriminate at any stage of a lawyer's career on grounds of race, sex, disability or sexual preference. We must discard the white, male, heterosexual image of the lawyer and welcome "the other" to our profession. We must celebrate their achievement as we celebrate our own. One Woman of Colour said to us:

> White women lawyers are concerned about how to break through the glass ceiling. We are concerned about how to get through the front door.

This cannot be tolerated in a country as boastful of its human rights record as Canada is. As Alan Page, Professor of Public Law at the University of Dundee, quoted from the *Review of Investor Protection*:

> In this day and age it is just not acceptable ... that people can be excluded from bodies which are not mere social clubs but agencies on which their livelihood depends, without a right to seek to persuade an independent arbiter that they were wrongly excluded.[11]

It would be ironic indeed if the legal profession were using its self-governing status not for the public protection but for its own. It would be unthinkable if it were using its monopoly to violate the law which it is dedicated to uphold.

The Challenge

Madam Justice Abella is surely right when she says that change comes slowly in the legal profession. The traditional legal mindset was well delineated by Lord Buckmaster in 1917 when he moved second reading of a Bill in the House of Lords to lift the barriers against women being admitted to the Roll of Solicitors in England. He said:

> There is no doubt that a legal training does limit and narrow a man's outlook on life; there is no doubt that it leads men to criticize great schemes rather by the consideration of their petty details than by looking at the general principles which they involve. It does induce a view of life which leads one to regard it rather as a series of fine and intricate traceries on an etcher's plate than as a broad and generous design conceived in sweeping lines on a big canvass.

Lord Buckmaster was very well aware of the snail's pace of change in the legal profession as he made his final eloquent plea:

> I would beg of your Lordships not to delay consent until time will have robbed it of all its graciousness, and what today might be a free and dignified act of justice will become tainted with the meanness and the cowardice of expediency.

That was 1917 and this is 1993. Will the reforms the Task Force advocates in this Report be implemented as a free and dignified act of justice? Is the profession ready for equality of opportunity for all women — white women, Women of Colour, Aboriginal women, women with disabilities, lesbian women? Or will their male colleagues make them wait another fifty years until time will have robbed their consent of its graciousness and tainted it with the meanness and cowardice of expediency?

ENDNOTES

1. G. MacKenzie, "Lawyer Discipline and the Independence of the Bar: Can Lawyers Still Govern Themselves?" (1990) 14 L.S.U.C. Gazette 319 at 326.

2. H. W. Arthurs, "Openness" (1987) 21 L.S.U.C. Gazette 232 at 234.

3. *Ibid.* at 233.

4. C. D. Gonthier, "What is Professionalism" (1992) 15 L.S.U.C. Gazette 10 at 15.

5. R. S. Abella, "Woman in the Legal Profession" (1983) 12 L.S.U.C. Gazette 315 at 322.

6. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

7. (1950) 339 U.S. 162 at 184.

8. *Supra*, note 6 at 174.

9. [1989] 1 S.C.R. 1219.

10. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

11. A. C. Page, "Self Regulation - The Constitutional Dimension" (1986) 49 Modern Law Review 141 at 149, yquoting *Review of Investor Protection*, Cmnd. 9125 (1984).

PART I

EQUALITY IN THE LEGAL PROFESSION

CHAPTER ONE

EQUALITY IN THE LEGAL PROFESSION: A FRAMEWORK FOR CHANGE

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CHAPTER ONE
EQUALITY IN THE LEGAL PROFESSION: A FRAMEWORK FOR CHANGE

This Report is about fundamental change. In order to meet the challenge posed by gender inequality, the profession must be convinced of the serious consequences of barriers and discriminatory practices that impact on women lawyers. The Report describes the bleak situation of women in the profession and sets out the Task Force's recommendations for change. In this Chapter, we identify the three major elements of a framework for that change.

The first element of this framework is an exposition of the nature and scale of the problem facing the profession. The second element is understanding what discrimination and equality mean. The third element is a review of the factors which should motivate the profession to change.

The motivating factors can best be understood in terms of the harm caused by gender inequality. Discrimination against women in the legal profession is:

- unlawful and contrary to the fundamental norm of equality which is protected by human rights legislation and enshrined in the *Canadian Charter of Rights and Freedoms*
- unethical and unfair
- contrary to professional standards and calls into question the ability of the legal community to govern itself
- contrary to the public interest and a disservice to clients and the community at large.

The three elements addressed in this chapter provide a framework for the process of change by answering three basic questions: (1) why the profession must change; (2) what legal standards are applicable to shape the outcome of this process; and (3) what are the values or principles that should guide the profession as it works toward achieving gender equality.

I. THE FACE OF THE PROFESSION TODAY AND TOMORROW

A. A QUESTION OF DEMOGRAPHICS

There are more women members of the legal profession in absolute and proportionate terms than ever before. Women now comprise twenty-seven per cent of the legal profession.[1] Their numbers are certain to increase over the next decades as women now comprise approximately fifty per cent of law school students. This change is not unique to the legal profession. In fact, the profession is merely participating in a social change which has had a profound impact on the traditional roles of women in many areas of society.

Another change to the demographics is the integration of diverse minority groups into the profession. The increasing number of persons of colour, Aboriginal people and individuals with disabilities who are now part of the law school population will inevitably change the face of the legal profession.

The majority of women in the workforce also have family responsibilities. Statistics reveal that 70% of working women have children between the ages of six and twelve. During the past decade the number of women with children under three years of age has increased by over 100%. Approximately two-thirds of women working outside the home now

have children in this age group.

While the number of women lawyers with children may be slightly less than the national average,[2] this trend is nevertheless affecting the practice of law. In fact, there are special pressures on the legal profession because of the relatively recent entry of women into the profession:

> Men are distributed over the entire adult life span, while women are disproportionately young and are thinking about their biological clocks as they approach their mid-thirties and forties...If women had always been permitted free entry into the legal profession, then they, like men, would be at different stages of the life cycle and firms would not have as many women who need flexibility in hours and time off.[3]

These changes present a challenge to the profession. The profession has to adapt to these demographics not only in order to serve the needs of the community as a whole, but also to ensure that its own members have a fair and equal opportunity to progress within the profession.

The increase in the number of women in the profession also requires a reshaping of the profession so that it promotes, enhances and values cultural, racial, sexual, and ethnic diversity. All members of the profession must be able to reach intellectual and career goals commensurate with their personal abilities. The search is for inclusion but not at the expense of one's sexual, cultural, racial or ethnic identity.

B. The Challenge Posed by the Entry of Women into the Legal Profession

This Report describes the challenge posed by the entry of women into the legal profession. The dimensions of the problems experienced by women in the legal profession are staggering. In a country where gender equality is entrenched as a primary constitutional value, and in a self-governing profession knowledgeable about law and concerned with justice, women continue to be discriminated against in numerous overt and covert ways.[4]

The central cause of these problems is the narrowness of our image of the lawyer. Despite the massive changes outlined above, there continues to be an internal, visceral perception of the lawyer as male. This narrow image confronts women lawyers on a daily basis. A few of the experiences recounted to the Task Force illustrate this point:

> One female lawyer recalls representing a male client in a family court matter only to have his estranged spouse accuse him of "always hiding under some woman's skirts." Her client promptly responded: "That's no woman! That's my lawyer!"[5]

> When police officers and other witnesses enter my court room looking for the Crown attorney they first approach defense counsel, the court clerk, or any other white male in a suit and tie. Their notion of a lawyer obviously does not encompass a female person.[6]

> I've been mistaken for a secretary by a male litigation partner in my own firm, as well as by an Asian female paralegal (who as a result was reluctant to take on work I'd asked her to do until she discovered I was a lawyer).[7]

In a paper prepared for the Task Force Sheilah Martin examines the dynamics of exclusion. She notes that because of the traditional homogeneity of the legal profession patterns are set, norms established and past practice may be uncritically accepted as "just the way things are done around here."[8] It is essential to recognize that women played no part in the organization, structure and ethos of the profession they have now entered. They do not and can not fit the traditional image.

Up until recently the perceived solution to women's past exclusion from the profession has been to give women the opportunity to meet the existing standards. Women are constantly worrying about measuring up, doing the right thing, being the right way. This approach is based on an unquestioning acceptance of the normalcy of the male lawyer, and assumes that the concept of what it is to be a lawyer is neutral. However, since society sees men as the norm, neutrality is often biased in favour of men.[9]

The pervasiveness of this norm is exhibited in a number of practices within the profession, including the lack of flexibility in career paths.

The problems created by measuring the worth of a lawyer by male standards are accentuated for women who fall further away from the "norm" because of their race, Aboriginal origin, ethnic origin, sexual orientation, or disability. In effect, the refusal to recognise, appreciate and accept the legitimacy of difference reinforces and promotes inequality. The tendency to focus on women lawyers as a group in contrast to male lawyers renders women with other identities invisible, despite the fact that they are subject to even greater forms of discrimination because of their uniqueness.

Discrimination is also more pronounced for female lawyers who bring a feminist perspective to their work. The image of the lawyer as male leads to the view that the traditional perspective on the law, i.e., the "male" perspective, is neutral or objective. This view leads to discrimination on the basis of other perfectly valid perspectives.

There are many misconceptions about the nature of feminism which are used to impugn the credibility of those who give voice to a feminist perspective. It is essential to recognize that everyone operates under a value system which shapes what they see and how they interpret what they see. Feminism is only one of these perspectives. The following definition of "feminism" may help to dispel some of the misconceptions:

> A feminist is a person who believes women and men should be equal participants in society regardless of race, ethnic origin, economic background, gender, sexual orientation, or disability. A feminist believes women have not yet achieved equality in our society and that steps should be taken to correct this situation. Lastly, a feminist believes the world should be a comfortable place for women, men and children, free of stereotypes and myths which restrict the roles each assumes.[10]

In order to take account of all perspectives we need to expand our concept of the norm. Equality demands more than simply "allowing" newcomers into the profession and forcing them to meet existing standards. It must include a reassessment of the standards themselves, and a recognition that they were created exclusively on the basis of male life experiences.[11]

In gaining entry to the legal profession women have demonstrated their creativity and energy in forging a place for themselves in an inhospitable environment. The challenge, however, has not diminished as numbers have grown: "as women have entered the work force, both women and the workforce have changed. What still have to change are the work*place* and men."[12]

C. The Scale of Change

The scale of the challenge facing the profession is daunting. If we accept that the face of the legal profession must change, must lose its maleness, then nothing short of a "re-formation of the partnership of the profession" is required.[13] Initiatives should be directed toward transforming existing practices and policies that result in the institutionalization of inequality. The objective cannot be to simply ensure access and then require women to fit into a profession that has been shaped by and for men. Such a narrow vision would equate equality with mere entry into the profession. Equality is not achieved by including women but forcing them to emulate men. This broader understanding of equality is reflected in the law of anti-discrimination in Canada which is examined in the next section.

II. EQUALITY AND DISCRIMINATION

A. Introduction

The Task Force accepts as a basic premise that men and women should have an equal opportunity to enter and progress in the profession. It views discrimination on the basis of gender as equally repugnant to discrimination on the basis of race or

religion. There is nothing controversial about this assertion. It is the law and must form part of the framework for change in the legal profession.

B. Discrimination and Equality: The Legal Framework

In a paper prepared for the Task Force, Lynn Smith points out that most members of the legal profession have a limited knowledge of equality concepts:

> Canadian courts have created a uniquely Canadian and uniquely effective framework for implementing equality guarantees - recognizing certain kinds of diversity even deep diversity and altering existing social or legal arrangements in order to make this kind of diversity costless. However, knowledge and understanding of Charter equality and human rights principles and jurisprudence is limited in the profession to a few specialists. There is not only a gap in knowledge and familiarity with the concepts, but in the attitude toward them and in the attitude toward what implementation of the egalitarian objectives in the Charter and human rights legislation will produce.[14]

This lack of knowledge about equality concepts hinders the profession's ability to become more inclusive and to eliminate the barriers faced by women.

1. Gender Bias and Gender Equality

The term gender equality is a statement of the positive goal sought to be achieved: gender bias is the statement of the problem.

Gender bias is the predisposition or tendency to think about and behave toward people primarily on the basis of their sex.[15] Gender bias also refers to the greater value society places on men.[16] The following definition incorporates these two ideas. Gender bias is used to identify barriers which:

> have an adverse impact on women, attitudes and behaviours...which are based on stereotypical beliefs about the nature and roles of the sexes, myths and misconceptions about the economic and social problems encountered by women, and the treatment of real differences between men and women in a manner which disadvantages women, by ignoring or devaluing the female difference. Gender bias links the individual biased behaviour to its systemic origins.[17]

"Gender bias" is the term used most often to describe the unequal treatment of women in the legal profession. However, the term poses some difficulties. It is in some ways inadequate and imprecise because it gives an image of a biased person acting out of hatred of women.[18] The problem is not so simple: sexist attitudes can be less of a problem than the established way of doing things and seeing things which creates structural barriers.

The purpose of equality is to redress inequality. Equality must therefore be given a purposive interpretation. It calls for the recognition and redress of existing inequalities and the valuing of diversity so as to provide equal access to the profession and equal opportunity for development within it. It is this purposive approach which must guide the profession as it works toward the achievement of gender equality.

People at work have varied needs that are not necessarily determined by their gender. A system and culture which recognizes diversity and endeavours to establish needs-oriented policies and practices is more likely to meet the aspirations of all individuals and enable them to achieve their full potential.

The legal concept of equality necessitates consideration of several inter-related concepts: (a) the formal/substantive equality dichotomy; (b) the contextual approach; (c) discrimination; and (d) multiple discrimination.

a. The Formal/Substantive Equality Dichotomy

For many years, the central debate in equality theory was whether the purpose of equality

guarantees and anti-discrimination provisions was to achieve formal or substantive equality. This formal/substantive dichotomy is now outdated. Canadian courts have clearly adopted a purposive approach to equality guarantees. The purposive approach focuses on the context of disadvantage experienced by an individual based on membership in a protected group and the imperative of redressing this disadvantage.

Despite these clear developments in the law, the notion of formal equality or equal treatment continues to pervade the profession's approach to gender issues in the legal profession. It is therefore essential to examine the difference between the formal and substantive models of equality.

Formal equality prescribes the equal (or same) treatment of all individuals regardless of their existing circumstances. This approach fails to address the reality of existing inequality and results therefore in the perpetuation of these inequalities. It fails to acknowledge the built-in biases of apparently neutral, universal standards which have in fact been shaped by the needs and experiences of socially privileged groups.[19]

This notion of formal equality, treating all persons the same regardless of their circumstances, must be contrasted with the concept of substantive equality. Substantive equality demands the redress of existing inequality and the institution of real equality in the social, political and economic conditions of different groups in society. Substantive equality requires a focus on systemic and group-based inequalities. It encompasses the right to have one's differences acknowledged and accommodated both by the law and by appropriate social and institutional policies and practices.

b. The Contextual Approach

Existing inequality is redressed through the *contextual approach* to the interpretation of equality. The Supreme Court of Canada in *Andrews* v. *Law Society of British Columbia*,[20] pointed out that in order to redress inequality you must first identify it and you do this by an examination of the social, political and economic conditions in which individuals and groups are currently living. Having identified those individuals and groups who have been historically disadvantaged and underprivileged in our society and continue to be so, these are the logical focus of redress under a purposive approach to equality. The Court rejected a neutral abstract concept of equality and emphasized the *remedial* aspect of the concept, the rooting out of myths and stereotypes which degrade and humiliate people and have no foundation in reality. The contextual approach was the "kiss of death" to the concept of formal equality.

c. Discrimination

Discrimination is detrimental treatment of an individual or group of individuals because of their membership in a defined group. Discrimination has also been defined as an arbitrary barrier which stands between a person's ability and his or her opportunity to demonstrate it.[21]

Canadian law recognizes that discrimination can take two forms: direct and indirect. Using gender discrimination as an example, direct discrimination arises when an individual's act harms another because of the latter's sex. This act can be deliberate and conscious, or unintentional and unconscious. The perpetrator of the act may even believe that he or she is acting in the best interests of the individual. Sexual harassment is one form of direct discrimination.

Again, in the context of gender discrimination, indirect discrimination is the application of rules and procedures which, while they are applied to everyone, have a disproportionate impact on a particular group because of their sex, because fewer members of that group are able to comply with the rule or requirement. Thus, indirect discrimination arises from the use of the LSAT test to screen law school applicants. While the same test is used on all students, it adversely affects students from non-Anglo-Saxon backgrounds.

d. Supreme Court of Canada Jurisprudence

A broad definition of discrimination is emerging

through Supreme Court of Canada *Charter* decisions and human rights jurisprudence. As a result of the adoption by the Supreme Court of the contextual approach to equality in *Andrews*,[22] the Court rejected the so-called "similarly-situated test" applied in the Courts below in favour of an approach focusing on the remedying of disadvantage. The Court defined the purpose of equality guarantees as promoting the equality of historically and socially disadvantaged groups in a proactive and systematic way.

In other recent decisions, the Supreme Court has recognized the potential for direct, adverse effect and systemic discrimination.

e. Direct Discrimination

Direct discrimination occurs when an individual is accorded harmful differential treatment because of his or her group affiliation - i.e. when a woman is denied a job in a traditionally male sector of the labour force because the employer holds negative and false stereotypes about women's abilities. Direct discrimination can be unintentional: "[T]he nature of discrimination is such that attitudes rather than laws or rules may be the source of discrimination."[23]

f. Adverse Effect Discrimination

The Supreme Court of Canada contrasted direct discrimination with adverse effect discrimination in the *Action Travail des Femmes v. Canadian National Railway Co.*[24] Adverse effect discrimination occurs when the application of an apparently neutral law or policy has a disproportionate and harmful impact on individuals from particular social groups. The policy need not have been intended to discriminate against individuals based on their group affiliation. It is the effect of the law or policy not the intent that determines whether or not adverse affect discrimination has occurred.

This concept was elaborated upon by Madam Justice Abella (as she now is) and is quoted by Madame Justice L'Heureux Dubé in *McKinney v. University of Guelph*:

> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.[25]

Not all legal distinctions constitute discrimination, the distinction must involve some type of harm, prejudice, or social disadvantage.[26] As noted above, the Supreme Court of Canada has rejected the "similarly situated test" wherein equality requires merely that all persons similarly situated be accorded the same treatment.[27]

g. Systemic Discrimination

In *Action Travail* the Supreme Court of Canada also acknowledged the existence of systemic discrimination. Systemic discrimination has been defined as institutionalized practices or policies that disadvantage individuals because they are members of certain groups. Systemic discrimination is usually associated with adverse effect discrimination because the latter raises most directly the pervasive problem of discrimination embedded within institutional practices and policies.

However, direct discrimination can also contribute to systemic discrimination if it represents a widespread practice within an institution, such as sexual harassment. To the extent that manifestations of direct discrimination are so much a part of the workplace culture as to be accepted practice they constitute systemic discrimination.

The mixed character of systemic discrimination was described by the Supreme Court in this manner:

> ...systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result

> of 'natural' forces, for example that women 'just can't do the job'...[28]

Understanding the systemic nature of discrimination is key to redressing inequalities, and yet the pervasiveness of the discrimination is itself an obstacle to comprehending its various facets. Individual actions and bias are only one aspect of the discrimination faced by women in the profession. The problem and the solutions are much broader:

> Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.[29]

h. Multiple Discrimination

Multiple discrimination consists of the cumulative and compounding effect of discrimination based on several group characteristics. It is difficult, if not impossible, to untangle discrimination based on gender and on other characteristics such as race:

> For women of colour, experiences of discrimination are complex and do not easily fit into the existing legal structures of racial discrimination. While the effects of discriminatory conduct may be evident, isolating race or gender as the basis of the inequality is often difficult.[30]

It is critical to appreciate that the experience of multiple discrimination is different from the experiences of differential treatment based on one ground of discrimination. It is not always easy to appreciate this distinction because of the mainstream perspective on discrimination. The very use of mainstream-centred categories such as "women of colour" and "racial minorities" has been criticized as obscuring the experience of discrimination against Women of Colour.[31]

Racial and gender discrimination can occur simultaneously and are both rooted in society at large, including the legal and justice systems. Both individual and systemic discrimination can be traced to hardened attitudes which commonly involve rigid stereotypes stressing ethnic differences at the expense of those who cannot conform to the status quo of the dominant white society.

> Because whiteness is the norm, it is easy to forget that it is not the only perspective. Thus, members of dominant groups assume that their perceptions are the pertinent perceptions, that their problems are the problems that need to be addressed, and that in discourse they should be the speaker rather than the listener. Part of being a member of a privileged group is being the centre and the subject of all inquiry in which people of colour or other non-privileged groups are the objects.[32]

Aboriginal women lawyers also face sexual and racial discrimination in the profession. In addition, they have unique concerns emanating from being First Nation individuals. Many aspects of the existing justice system are in conflict with their perspective as a result of the treatment historically of First Nation's people by that justice system. Concerns have also been expressed that legal culture itself is foreign to the cultural values of First Nation's people.

Similarly, lesbians must deal with negative stereotypes and pressure to be like their heterosexual colleagues. These two factors result in a tendency for lesbians to hide their sexuality as law students, articling students, associates, partners, judges, law teachers and so on - even if they are "out" in other aspects of their lives. Here the problem is invisibility not visibility but the price of being compelled to remain "in the closet" is an exceedingly high one. It has been described to us as the option of "the living lie".

Women lawyers with disabilities are faced with a great deal of ignorance concerning their ability to function as lawyers. The advent of modern technology has solved many of their problems and what is really required now is the will on the part of the profession to acknowledge its responsibility to

disabled lawyers to make the necessary facilities available so that they too may enjoy a full and satisfying career in the law.

2. Remedies: Affirmative Action and Duty to Accommodate

The broad definitions of equality that have developed and judicial recognition of the entrenched, systemic nature of discrimination require the development of similarly broad remedies.

Treating people who are unequal in the same way is not, as we have seen, the solution because it perpetuates disadvantage by neglecting to contextualize or take into account their existing inequality. This approach rests on a pretence of equality, while the reality for women is still one of inequality. Gender insensitivity is the prelude to discrimination. If sex is ignored when it is relevant the result will be discrimination.

The recognition of systemic barriers usually requires a systemic response and a positive remedy. These types of responses are often referred to as "affirmative action":

> ...affirmative action is a comprehensive planning process for eliminating systematically induced inequities and redressing historic patterns of employment disadvantage suffered by members of target groups.
>
> The affirmative action approach to the problem of inequity and inefficient utilization of target group workers is based on the concept of systemic discrimination. That is, the approach which identifies discrimination in the workplace in terms of the impact of employment practices on the employment of target group members.[33]

The contextual approach to equality rights provides the rationale for affirmative action. These programs acknowledge that existing social and legal arrangements have actively benefited certain groups and disadvantaged others. They aim to restore the balance.

> Positive action, affirmative action, equity programs should all be understood as integral to and consistent with legal guarantees of equality for historically disadvantaged groups in society, thereby rejecting affirmative action as a discriminatory practice.[34]

Employment equity programs are a good example of affirmative action. These programs are based on an acknowledgement of the historic disadvantage and resultant inequalities in employment practices. They are based on evidence of under-representation of certain groups in a particular sector of the workforce and establish a means to rectify this under-representation. The mechanisms to achieve employment equity can include: audits of employment patterns, the establishment of targets to ensure balanced representation, active recruitment of members of under-represented groups and giving priority to hiring individuals from these groups where they are equally qualified.

Arguments against affirmative action downplay the historic inequalities and focus on the individual situation. They conclude that affirmative action results in "special treatment" and is therefore "reverse discrimination". Yet this approach would result in a continuation of the privilege enjoyed by the dominant groups. Affirmative action programs do not result in special treatment, they result in *appropriate* treatment for minority groups, given the biases in hiring they have historically experienced. The starting point must be that systemic discrimination has resulted in the over-representation of members of privileged groups. Attempts to eliminate historic patterns of discrimination - without doing more - is not an adequate remedy. It perpetuates the status quo by failing to recognize the inequalities that have been created by discriminatory practices. Furthermore, contrary to the perception that is disseminated by those opposed to affirmative action, employment equity programs do not result in unqualified persons being hired over qualified persons. But, where equally qualified candidates apply, priority would be given to the minority person.

Human rights legislation is founded on the principle that there is a duty to accommodate the needs of individuals from historically disadvantaged

groups. The duty to accommodate places a responsibility on the employer to minimize the adverse impact on members of disadvantaged groups that arise from their practices. Efforts to accommodate particular groups transform institutional policies, practices and standards to make excluded groups welcome and to respond to their needs.

Positive measures such as affirmative action, employment equity and accommodation to the unique needs of disadvantaged groups are all directed to the achievement of substantive equality through the recognition of past and present exclusion. Understanding the legal requirements of equality sets the parameters for change within the profession.

III. MOTIVATION FOR CHANGE

A. Introduction

The legal profession must make a commitment to eradicate gender inequality. It will be motivated to do so when it confronts the implications of perpetuating existing discriminatory practices and the structural barriers to equality. The factors that will motivate change include: (a) accepting gender equality as a fundamental legal norm; (b) seeing these issues as matters of ethics and justice; (c) recognizing the enlightened self-interest; and (d) focusing on the public interest.

B. Gender Equality as a Fundamental Legal Norm

The starting point for a discussion on the need for change must be the recognition that gender equality is a fundamental legal norm. The *Charter*, human rights legislation, and Canada's adoption of various international conventions, involve a commitment to eradicating discrimination against women and achieving gender equality.

The law in Canada now demands adherence to the equality principle. The legal profession should show leadership by adopting equality norms as its own. The failure to rise to this challenge raises serious questions about the ability of the legal profession to regulate itself according to law.

C. A Matter of Ethics and Justice

The patent injustice of discriminatory practices and systemic barriers are impossible to ignore. The breadth and depth of gender inequality must be kept foremost in our minds. Otherwise, instances of discrimination will be framed in isolated terms and as issues of personal competence rather than as group-based inequality. This results in very able women attempting to redefine themselves to accommodate the demands of the profession or leaving because they believe that they have reached the limits of their personal competence when in fact they have been the victims of discrimination.[35]

The demands for gender fairness and equality are not the claims of a special interest group. They are legal and ethical issues of fairness and justice for the profession as a whole. They are not "women's issues" but evidence of a serious flaw in the structure and organization of the profession.

D. Enlightened Self-Interest and Accountability of the Profession

It is in the legal profession's own best interests that it become more inclusive. Time and resources are devoted to the practical training of women lawyers and a valuable capital asset is lost when they leave. Accordingly, if for no other reason than enlightened self-interest, it pays to treat women fairly and remove the barriers to equality. Discrimination is divisive and corrodes the spirit of cooperation and collegiality which is essential to the proper functioning of the profession. Moreover, it does nothing for the profession's image and reputation for it to be seen as discriminating against a major segment of its members.

Beyond this narrow self-interest is the imperative

for the profession to remain accountable to its members and to the public. The values espoused by the legal profession should put at the forefront initiatives to identify and eliminate injustice in whatever form it is found. These values are expressed in the CBA Code of Professional Conduct, in the commentaries to Rule 13: "The lawyer should encourage public respect for and try to improve the administration of justice":

> 1. The admission to and continuance in the practice of law implies a basic commitment by the lawyer to the concept of equal justice for all within an open, ordered and impartial system...
>
> 3. The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. The lawyer's responsibilities are greater than those of a private citizen.

Our professional organizations have not only a mandate but a duty to ensure that the legal profession does not create or reinforce barriers to equality of access or equality of opportunity. This duty is one part of the responsibility of self-government.

The privilege of self-regulation is premised upon law societies' ability to act in the public interest. Lawyers, like all professionals, are coming under closer public scrutiny and criticism. The public and their representatives are questioning the value of self-governance in an unprecedented fashion.

In this context, "it is not enough for the legal profession to rest its case for self-governance solely on the benefits to the public of an independent bar."[36] The profession must demonstrate its ability to act in the public interest. Public confidence rests in large measure on the reputation of the profession as well as on the actions of individual lawyers. It is undermined by the exclusionary and discriminatory nature of the profession. The profession's right of self-governance can survive only if its members are, and are seen to be, supportive of fundamental legal and ethical norms such as gender equality.

The decline in homogeneity in the profession poses a challenge to self-regulation. It is an open question whether self-regulation will survive the rapidly changing nature of the legal profession.[37] It certainly will not if the self-governing bodies do not recognize the degree of sexual, racial and other forms of discrimination built into it. We hope that this Report will help them to do so.

E. The Public Interest

Discrimination is contrary to the public interest. Any practices that are contrary to law and to established principles of human rights are clearly contrary to the public interest. The public interest is best served by providing an equal opportunity for women and by having women represented at all levels of the profession and on other bodies requiring the presence of trained lawyers.

The legal profession's role in the administration of justice gives rise to an obligation to ensure that it itself adheres to the principle of equality in dealing with its own members. If it does not, its integrity will be questioned as well as its ability to provide proper service to the community.

The link between discrimination within the legal profession and the public perception of the integrity of the justice system is very close. How an institution treats its female members is a reliable indicator of general institutional attitudes toward equality:

> Women who are lawyers are a privileged group among women. If they are not perceived and treated with equality by the justice system, then it is every woman's credibility that is questioned by the system.[38]

All lawyers should be concerned about the implications of gender discrimination for the justice system as a whole:

> The profession must ask itself: what does it mean that gender discrimination is practised so blatantly in a profession that is linked so closely to the value placed in democratic societies on equal treatment?[39]

IV. SUMMARY

The foregoing has established a conceptual framework composed of three elements: the nature of the challenge; the law of equality and discrimination; and the motivations for change. This framework acts as a guide to understanding the two major types of obstacles faced by women: barriers to entry to the profession and barriers to equality within the profession. These barriers are examined in the next two parts of the report. This framework also highlights the central principles which should guide the search for solutions to overcoming these barriers: equality, diversity and accountability.

ENDNOTES

1. According to the CBA's database in July 1993, there were 59,310 lawyers in Canada: 16, 043 women (27.1%) and 43, 087 men (72.9%).

2. E. Roskies and S. Carrier, "Marriage and Children - Asset or Liability" (1992) APA/NIOSH Conference: Stress in the 90's.

3. C. F. Epstein, "Faulty Framework: Consequences of the Difference Model for Women in the Law" (1990) 35 New York Law Schools L.R. 309 at 332.

4. L. Smith, "Gender Equality - Professional and Ethical Issues" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992).

5. Nova Scotia Working Group Report.

6. Manitoba Working Group Report.

7. Survey of Women of Colour.

8. S. Martin, "The Dynamics of Exclusion: Women in the Legal Profession" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992) at 1.

9. See C. Travis, *The Mismeasure of Woman* (New York: Simon & Shuster, 1992).

10. Law Society of British Columbia. *Gender Equality in the Justice System* (vol. 1) at 1-3.

11. Smith, *supra*, note 4 at 17.

12. L. Marks, "Alternative Work Schedules in Law: Its About Time" (1990) 35 New York Law School L.R. 361 at 362 and quoting A. Hochschild (with A. Machung), *Second Shift: Working Parents and the Revolution at Home* (New York: Viking, 1989).

13. Martin, *supra*, note 8 at 33.

14. Smith, *supra*, note 4 at 5.

15. "The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts" (1986) 9 Women's Rights Law Reporter 129 at 133.

16. *Ibid.*

17. Canada, Department of Justice, *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (1992) at 17.

18. New Brunswick Advisory Council on the Status of Women, *Every Woman's Credibility - The Treatment of Women in the Justice System* (1992) at 6.

19. For discussion of formal versus substantive equality see, for example, J. M. Vickers, "Equality Theories and Their Results: Equality-Seeking in a Cold Climate" in L. Smith *et al.* (eds.), *Righting the Balance - Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986).

20. [1989] 1 S.C.R. 143.

21. Royal Commission on Equality in Employment, *Equality in Employment* (Ottawa: Supply and Services Canada, 1984) (Commissioner: Justice R. S. Abella) at 2, (hereinafter "the Abella Report").

22. *Andrews*, *supra*, note 20 at 164.

23. *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229. Wilson J. at 387 (in dissent, but not on this point).

24. [1987] 1 S.C.R. 1114.

25. *Supra*, note 23 at 423. L'Heureux-Dubé quoting Madam Justice (as she now is) Abella in "Limitations on the Right to Equality Before the Law", in Armand de Mestral, *et al*, eds., *The Limitations of Human Rights in Comparative Constitutional Law* (Cowansville, Qué.: Yvon Blais Inc., 1986).

26. *Andrews*, *supra*, note 20 at 174.

27. *Ibid.* at 168

28. *Action Travail des Femmes*, *supra*, note 24 at 1139.

29. Abella Report, *supra*, note 21 at 387. This passage is quoted with approval by Wilson J. in *McKinney* v. *University of Guelph*, *supra*, note 23.

30. E. Carasco, "A Case of Double Jeopardy: Race and Gender" (1993) 6 Canadian Journal of Women and the Law 142 at 143.

31. See, for example, K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U. Chi. Legal Forum 139.

32. T. Grillo and S. M. Wildman, "Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Otherisms)" [1991] Duke Law Journal 397 at 402.

33. J. G. Kelly, *Human Resources Management and Human Rifts Process*, vol. 1, 2nd ed. (Don Mills: C.C.H. Canadian Ltd, 1991) at 155.

34. C. Sheppard, *Study Paper "Litigating the Relationship Between Equity and Equality"*, (Ontario Law Reform Commission, 1993) at 2. This view is developed at some length in the study paper, see especially pages 19-22.

35. Martin, *supra*, note 8 at 21.

36. G. Mackenzie, "Lawyer Discipline and the Independence of the Bar - Can lawyers still govern themselves?" (1990) 24 Gazette 319 at 321-22.

37. J. Brockman and C. McEwen, "Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?" (1990) 5 C.J.L.S. 1.

38. New Brunswick Advisory Council on the Status of Women, *supra*, note 18 at 3.

39. J. Hagan, "The Gender Stratification of Income Inequality Among Lawyers" (1990) 68 Social Forces 835 at 850.

PART II

ENTRY INTO THE PROFESSION

CHAPTER TWO

BARRIERS TO ENTRY INTO THE PROFESSION

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CHAPTER TWO
BARRIERS TO ENTRY INTO THE PROFESSION

I. INTRODUCTION

The Task Force has taken as its starting point the rhetorical question: should the legal profession continue to be a white male elitist institution or should it reflect the diversity of Canada? It is clear that the profession must become more representative of Canadian society. Women have gained entry to the profession in increasingly large numbers, but their entry has been marked by struggle rather than enthusiasm. This cold reception is accentuated for Women of Colour, Aboriginal women, women with disabilities and lesbians. True access to the profession will require a transformation in the profession itself.

In this Part, we are concerned with issues relating to entry into the profession. The primary focus will therefore be the role of law schools and law societies as the "gatekeepers of the profession".

This starting point has been chosen because it is women's first contact with the profession and not because women face greater barriers in the training process than in practice. Quite the opposite is true. Law schools have made great strides in making legal education more accessible and broadening the composition of their student populations. Indeed, it is in law schools that the transforming effect of this diversity has been most visible.

The Task Force recognizes the commitment that most law schools have made to working toward equality of access. The need for different approaches in the different settings is also acknowledged. The recommendations made in this chapter establish principles which should be applicable across Canada. In some universities policies and practices will already be in place to reach these objectives; in other places more work will have to be undertaken.

In seeking to eliminate the barriers to entry into the profession there are two goals to be achieved. First, there is the objective of a more diverse profession which will result in equality of access for all women. Second, there is the need for a profession more accepting of diversity. If the institutions that control access to the profession and train our future lawyers are themselves discriminatory, gender equality will never be achieved. As has been noted, if students with diverse backgrounds:

> ...cannot share their perspectives in law school and influence change within legal education, the system will continue making most students into lawyers who will perpetuate existing problems.[1]

This chapter begins with a brief discussion of the role of law schools and law societies in eliminating barriers to entering the profession. The remaining sections address specific barriers and mechanisms to deal with them: (a) outreach programs; (b) law school admission policies and qualifications; (c) curriculum and teaching methods; (d) the "poisoned" learning environment; (e) access to articling positions and the articling experience; and (f) the bar admission course.

II. "GATEKEEPERS OF THE PROFESSION"

By necessity the nature, quality and effectiveness of the legal system depends on the type of individual who receives a formal legal education. It is for this reason that representation within the profession is so important, both for the profession as a whole and for the legal system. As the former Chief Justice of Canada has said:

> ...I want to say a few words about the gatekeepers to legal education, namely those involved in the admissions process. Those who fulfil this role are, in a real sense, the gatekeepers of the legal profession. Ultimately, the ethos of the profession is determined by the selection process at the law schools. In order to ensure that our legal system continues to fulfil its important role in Canadian society, it is necessary that the best candidates be chosen for admission to law schools. By 'best' I mean more than just the most academically qualified. I also mean young people who exhibit other qualities such as compassion, unselfish service to their community and idealism.
>
> Furthermore, it is incumbent upon those involved in the admission process to ensure equality of admissions.[2]

To some extent, law societies dictate the attitudes of law schools. There is little point in breaking down barriers to legal education only to find that the profession does not have articling positions for the new recruits when they leave law school. Traditionally, law schools and law societies have operated in separate spheres despite the fact that both are engaged in legal training. Both institutions were protective of their territory. This separation is beginning to melt away as mutual interests are recognized and linkages develop. It is important to identify and celebrate this new development.

A good working relationship between the two "gatekeepers" is critical to ensuring entry and offering support to the diversity of students entering the profession. This relationship should be formalized or regularized to ensure that law schools and law societies achieve real equality of access to the profession.

For example, in Saskatchewan, a study of gender discrimination in the legal profession was jointly conducted by the Law Society, the Canadian Bar Association (Saskatchewan Branch), and the College of Law. The report recommended the establishment of a standing committee on gender equality with representatives from the three bodies sitting on the committee. This recommendation has been implemented. It is difficult to overestimate the importance of institutional cooperation.

> RECOMMENDATION:
>
> 2.1 The Task Force recommends that law schools and law societies develop permanent mechanisms for consulting and coordinating issues relating to entry to the profession.

III. BARRIERS TO ENTRY AND MECHANISMS FOR IMPROVING ACCESS

A. Outreach to Groups Currently Under-represented in the Profession

The legal profession must reach out to groups currently under-represented in the profession. These groups must be told and must come to believe that the profession is open to all Canadians. This clearly involves more than simply addressing target groups of undergraduate or high school students and informing them about the nature of law as a career. Emphasis must be placed on the need to make the profession more inclusive and recognition made that without diversity in its composition the profession cannot hope to achieve true excellence.

In order to be successful the outreach program will have to challenge the prevailing image of lawyers:

> ...and one of the exercises I do is a word association exercise and I call out the word lawyers and invite them to call out words that are evoked in response, and in 100% of the cases, the first word that comes out is money. So my submission is we need to work with departments of education in the [Kindergarten] to 12 system to ensure that the image of the legal profession as it is now and as we would like it to be is something that is communicated in a very honest and a very accurate fashion.[3]

Outreach programs should be run by the legal profession as a whole and should therefore involve

both representatives of law schools and members of the profession. Some existing outreach programs are being successfully run in conjunction with student legal aid. The objective of these programs is to build and strengthen the ties between the profession and the communities in order to promote education equity in law schools. This can be achieved in a variety of ways including: offering grants or bursaries which recognize the special needs of individuals from under-represented groups; increasing minority representation on law faculties; promoting role models; supporting the community by assisting in mentoring programs or academic support to youths from disadvantaged groups; supporting *pro bono* legal and other support services to community organizations.

RECOMMENDATION:

2.2 The Task Force recommends that law schools, law societies and the Canadian Bar Association take leadership roles in implementing outreach programs in order to bring individuals from under-represented groups into the profession.

B. Law School Admission Policies and Qualifications

Efforts to increase the representation of women and visible minorities[4] in Canadian law schools have been productive. Evidence of this is found in the findings from a survey of third year law students by the Department of Justice summarized in Table 1. The best estimates indicate that nearly half (48%) of the third year students are women, 12 percent are visible minorities, just under two percent are Aboriginal Canadians, and nearly 4 percent are persons with long-term disabilities.

Compared to the general population of Canadians these statistics indicate that Aboriginal Canadians are still slightly under-represented in law schools. Two further points should be should be made about these findings. First, since participation in the student survey was not done within regular class settings, there may have been some self-selection that resulted in an increased representation of visible minorities in the sample. It is likely, for example, that individuals with disabilities are over-represented in this sample and under-represented in the law student population. Second, it is clear that through outreach and support programs, some Canadian law schools have contributed more than others to the representation of visible minorities in the overall law school population.

TABLE 1

Representation of Selected Groups Among Third Year Canadian Law Students and General Population*

	Third Year Law Students (%)	General Population (%)
Women	48	50
Visible Minorities	12	6
Aboriginal Canadians	2	2.3
Persons with Disabilities	4	4

* Source: Working document, *Survey of Students at Ten Law Schools in Canada*, Colin Meredith and Chantal Paquette, page vi, Department of Justice Canada: Research and Development Directorate.

Canadian law schools have made significant progress in diversifying their student populations. However, more should be done. The Task Force has heard a number of representations about the barriers posed by some admissions policies and qualifications for legal education.

1. Education Equity Policies

It is clear that equity policies in law schools are working. Such programs should be established where they are not currently in place and enhanced where they already exist. It is recognized that law schools across Canada should coordinate their affirmative

action recruitment programs. This would help to avoid duplication and inefficiencies in resource commitments and would also help to maximize student placements. This does not mean that minority groups should be concentrated at some universities. Diversity is enriching and all law schools must strive for student bodies that reflect their communities. In order to make this financially feasible, the legal profession should increase the amount of funding that is available for entrance scholarships, continuing scholarships and bursaries. This would involve a partnership between law societies, the Canadian Bar Association and law school administrators.

This same partnership should lend vocal support to affirmative action entrance programs in order to combat recurring suggestions that students in these programs are insufficiently qualified. It should be made clear that there is as much competition for the "diversity category places" as the so-called "regular places". There are a great many applications for both. If members of the profession speak out in favour of education equity programs, it will assist these students when they are seeking articles and legal positions.

RECOMMENDATION:

2.3 The Task Force recommends that law schools establish and enhance education equity programs.

RECOMMENDATION:

2.4 The Task Force recommends that law school administrators coordinate affirmative action recruitment programs to avoid duplication and inefficiencies in resource commitments and to maximize student placements.

2. Admission Policies

Some law schools need to develop more flexible admission policies in order to eliminate barriers to entry. Most Canadian law schools rely primarily on undergraduate grade point averages and LSAT scores as their admission criteria. A few faculties use more holistic criteria. For example, since 1978, the Faculty of Law at the University of Windsor employs a "subjective" evaluation of personal characteristics in conjunction with clearly defined objective criteria. The aim of this admissions policy is "not only to select from among the many applicants those students who would excel in the study of law, but also to select those students who, while doing well in the study of law, would have the potential to contribute creatively and meaningfully to the law school and to the community."[5]

A study designed to evaluate the University of Windsor's new policy concluded: "Above all, we have to acknowledge that many individuals (over 1,000 in the period researched) would not have had access to legal education without Windsor's policy; these graduates, as lawyers, have functioned in society competently, creatively and successfully."[6] Under this method, the student body selected is more likely to represent the community at large.

There are two general approaches to admission policies: special criteria for under-represented groups (education equity) and broader criteria applied to all applicants. The advantage of the latter is that, because all students are admitted under one policy, there is no claim that one group is being "advantaged over another", nor any suggestion that different standards or criteria are being applied to different groups.

RECOMMENDATION:

2.5 The Task Force recommends that the legal profession lend vocal support to affirmative action entrance programs in order to combat recurring suggestions that students under these programs are insufficiently qualified.

RECOMMENDATION:

2.6 The Task Force recommends that law schools develop more flexible admissions policies in order to eliminate barriers to entry.

The Task Force has also considered the issues of re-entry and the admissions interviewing process. Law faculties should develop and publish clearly articulated student leave and readmission policies. These should be publicised both to students applying to law schools and to students currently attending law schools.

RECOMMENDATION:

2.7 The Task Force recommends that law school administrations formulate and publicize clearly articulated student leave and readmission policies both to students applying to law schools and to students currently attending law schools.

In order to demonstrate their commitment to equality and openness, law school administrators should prepare clear guidelines indicating the sort of questions which may not be asked of students attending pre-admission interviews.

RECOMMENDATION:

2.8 The Task Force recommends that law school administrations prepare clear guidelines indicating the sort of questions which may not be asked of students attending pre-admission interviews.

3. LSAT

The Task Force received many criticisms of the LSAT. These criticisms were directed both at the content of the test and at the priority that is given to LSAT scores in the admissions process.

The test is perceived as being both sexually and racially biased. Aboriginal students suggested that LSAT questions were not geared for Aboriginal understanding and were not culturally relevant. The substantive content of some questions may also discriminate against members of some groups by failing to take account of different life experiences and circumstances.

> [A] section [of the LSAT] on period furniture, architecture, and abstract art was eliminated from the LSAT because it was so blatantly biased. Test questions designed by members of a certain class, cultural, and/or racial group tend to represent their experience of the world. As a result, people who do not share that point of view may face difficulties handling those questions.[7]

The LSAT has also been criticized because it favours those with a specific aptitude for aptitude tests, which may bear no relationship to academic success in law school or the ability to be a good lawyer.[8]

A Special Advisory Committee to the Canadian Association of Law Teachers has indicated that the reliance on grade point average and the LSAT:

> tends to discriminate against single parents (usually women) and mature students, as well as students from communities who for reasons of systemic economic and social disadvantage have not traditionally been participants in university-oriented career streams.[9]

Given these concerns about the fairness of the test, it is recommended that the Canadian Council of Law Deans commission a study to critically review the priority and weighting to be assigned to LSAT scores in student admissions.

RECOMMENDATION:

2.9 The Task Force recommends that the Canadian Council of Law Deans commission a study on gender and race bias in the LSAT.

RECOMMENDATION:

2.10 The Task Force recommends that the Canadian Council of Law Deans commission a study to critically review the priority and weighting to be assigned to LSAT scores in student admissions.

4. Pre-Law Admission Programs

Several law faculties have pre-law admission programs for students entering studies through equity programs. These include the indigenous Black and MicMac program at Dalhousie and the Saskatchewan Pre-Law Program for Indigenous Students. These programs are all an essential step in ensuring that minority students have an equal opportunity to complete their legal education.

Some concerns have been raised about the effectiveness of the programs. For example, the issue of whether the programs give the students a false sense of security was brought to the attention of the Task Force. Pre-law admission programs should be evaluated to ascertain whether they adequately prepare students for law school and whether any improvements should be made.

Recognizing that some students have special educational needs, law schools should offer a pre-law program that includes courses on study skills, note-taking skills, and essay- and exam-writing skills to students who have been out of school for an extended period and to students who do not have university training.

RECOMMENDATION:

2.11 The Task Force recommends that law schools should examine their pre-law admission programs in order to evaluate their effectiveness in preparing students for law school.

RECOMMENDATION:

2.12 The Task Force recommends that law schools offer a pre-law program including courses on study skills, note-taking skills, and essay- and exam-writing skills to students who have been out of school for an extended period of time and to students who do not have university training.

5. Part-Time Studies

Part-time studies are of assistance to law students with family responsibilities, students with disabilities and students whose financial responsibilities oblige

them to work. While part-time legal studies are currently available at some universities, these programs are quite restrictive. They resemble mandatory half-time programs more than truly flexible part-time programs. Limitations on part-time studies are a reflection of law society accreditation policies and so greater flexibility will only be achieved through cooperation between law schools and law societies.

Part-time studies should be made more widely available to students in all years and should be publicized to both prospective and current students.

RECOMMENDATION:

2.13 The Task Force recommends that law school administrators consult with law societies to enhance part-time legal studies.

RECOMMENDATION:

2.14 The Task Force recommends that law school administrators make part-time studies more widely available to students in all years and publicize these policies to both prospective and current students.

6. Child Care

A second policy which reduces barriers to the profession for women is child care. Law schools should investigate and facilitate the availability of child care services on campus and, where possible, make child care facilities available on site in law schools.

RECOMMENDATION:

2.15 The Task Force recommends that law schools should investigate and facilitate the availability of child care services on campus and, where possible, make child care facilities available on site in law schools.

7. Access to Graduate Studies

Education equity cannot stop at the undergraduate level. There should be affirmative action at the graduate level as well. This is especially important given the lack of minority women law professors. Law schools should fashion criteria based on broader experience in addition to grades.

8. Access for Disabled Law Students

The issue of how law school can effectively ensure that disabled students have equality of access to a legal education has been canvassed by David Lepofsky in a presentation to the Canadian Council of Deans in 1990.[10] The paper sets out an action plan to remove barriers to access and ensure accommodation of the needs of students with disabilities. The recommendations include:

- Adoption of a formal policy on equality of access
- Designation of a coordinator responsible for ensuring accommodation
- Establishing a committee to identify barriers
- Establishing a mentoring system
- Examining law school admissions process, criteria and standards to ascertain whether there are any unintended barriers to equity

- adoption of ranges of policies and means to assist disabled students

The Task Force supports the approach taken in this paper and encourages law schools to adopt this action plan.

RECOMMENDATION:

2.16 The Task Force recommends that the legal profession increase the amount of funding that is available for entrance scholarships, continuing scholarships and bursaries.

C. Curriculum and Teaching Methods

Despite increasing diversity in law school curricula, further efforts are required to add and integrate courses that address gender and minority issues. These efforts are essential because gender and minority forms of legal scholarship are often challenged and marginalized in law school settings, particularly by students, but also by faculty members as well.[11]

1. Teaching Methods

The Task Force heard many stories about the exclusionary effect of certain teaching practices. The use of gendered language as well as sexist and racist stereotypes constitute barriers to equality. Often, the exclusion arises from omission. As a Black former law student stated, her "vision of law school was white", racial decisions were not discussed. Law school administrations should promote the use of gender inclusive language and sensitivity to the use of non-stereotypical examples in the classroom.

RECOMMENDATION:

2.17 The Task Force recommends that law school administrations promote the use of gender inclusive language and encourage sensitivity to the use of non-stereotypical examples in the classroom.

All faculty, especially "downtowners",[12] should be given professional training courses that teach them how to facilitate discussion of different perspectives in the classroom. Such courses could include: awareness of silencing; how to encourage tentative talkers; how to encourage student cooperation and participation; how to conduct small non-judgmental discussion groups; and how to vary the form of classroom discussion so that not all dialogue is channelled through the professor.[13]

RECOMMENDATION:

2.18 The Task Force recommends that all faculty should be given professional training courses that teach them how to facilitate discussion of different perspectives in the classroom.

2. Curriculum Development

New perspectives must also be recognized in the law itself. The principle of equality makes it clear that: a male perspective is not neutral; a white perspective is not neutral; a heterosexual perspective is not neutral; and so on. No one's perspective is neutral. Therefore, legal education must include a diversity of approaches to the law that reflect more than just one or two perspectives.

Curriculum reform occurs in a number of ways: by increasing faculty sensitivity to issues of diversity; by encouraging voluntary incorporation of new perspectives on course material; by making curriculum material available; and by recruiting faculty members that reflect a diversity of perspectives.

Law schools should ensure that curricula and methods of instruction enhance equality by eliminating biased material and including material on bias and discrimination. Courses should include components on all forms of discrimination and on the equality rights of women, minorities, Aboriginal peoples, gays and lesbians and people with disabilities.

RECOMMENDATION:

2.19 The Task Force recommends that law schools ensure that curricula and methods of instruction enhance equality by eliminating biased material and including material on bias and discrimination.

They should be assisted in this endeavour by the Canadian Council of Law Deans. Toward this end, the Council of Law Deans should conduct a study of race and gender bias in the law school curriculum. The Council should also act as a clearinghouse for curriculum development so that law faculties can exchange material. It should also facilitate the preparation and dissemination of model course materials that directly focus on gender and minority issues, as well as integrate these issues into traditional areas of teaching.

RECOMMENDATION:

2.20 The Task Force recommends that the Canadian Council of Law Deans conduct a study of race and gender bias in law school curricula.

RECOMMENDATION:

2.21 The Task Force recommends that the Canadian Council of Law Deans also act as a clearinghouse for curriculum development so that law faculties can exchange material.

RECOMMENDATION:

2.22 The Task Force recommends that the Canadian Council of Law Deans facilitate the preparation and dissemination of model course materials that focus directly on gender and minority issues, as well as integrate these issues into traditional areas of teaching.

The Canadian Law Teaching Clinic has advanced quite far in its work on integrating questions of diversity and equality into law school curricula. Many universities have special courses designed to broaden students' approach to the law. For example, at the University of Toronto, the first year Perspectives course includes a mandatory week of lectures and discussion on race and cultural difference and one week on gender issues in the law. The University is contemplating adding one on law and sexuality, largely to respond to the concerns of gay and lesbian students.

Consultations with Aboriginal law students revealed that the curriculum problems exist on a different dimension for native students.[14] Little or

no effort is made in most law schools to incorporate Aboriginal law or Aboriginal perceptions of law into the school curricula. For example, tax law is taught with no concern for Aboriginal tax law in Canada. However, the problem is also more fundamental. Law professors need to recognize that everything learned by Natives presents them with new perspectives. In particular, property law is foreign to the Aboriginal concept of land and land ownership. From the Aboriginal perspective, there is a false premise to property law because it is based on private ownership. Aboriginal students have problems accepting and understanding property law concepts, and some do not want to accept what is being taught, for example, that the Crown owns all Indian lands.

Aboriginal students begin from a different legal perspective. Their relationship to the legal world is one of disempowerment and despair. As one Aboriginal person has stated:

> I'd also like to caution against lumping together, in particular, I'm speaking for Aboriginal peoples, but I am sure that this applies as well to different collectives within visible minorities. Particularly in law, particularly surrounding matters of justice, one of the things that I've noticed in trying to deal with in a good way in the last couple of years is the fact that many visible minorities want into the system. They accept the structure of things the way they are, they accept the law, they accept the courts, all of those kinds of structures. Most of us [Aboriginals] who are involved in the law are trying to construct a way out so our goals in coming to legal studies as visible minority women as juxtaposed with Aboriginal women is quite often one group wants in and our group wants out, and what tends to happen is that the Aboriginal desires get lost when you lump all of those groups together.[15]

Making legal education meaningful for Aboriginal students presents a daunting challenge. Substantial measures should be taken to meet that challenge. The Department of Justice should commission a study into the feasibility of an Aboriginal law school.

RECOMMENDATION:

2.23 The Task Force recommends that the Department of Justice commission a study into the feasibility of an Aboriginal law school.

D. The "Poisoned" Learning Environment - Sexual Harassment and Discrimination

Some approaches to equality equate access with equality. This perspective is illustrated in the following remark: "I don't understand all this talk about gender equality because 50% of my classmates are female. Surely there is now equality." However, the reality is that entry into law schools by traditionally unrepresented or under-represented groups generates new problems that the institution must deal with. One aspect of these is positive remedies, such as the creation of a physical environment which promotes diversity by, for example, having photographs of successful Black women lawyers prominently displayed in the law school or workplace.

There is a strong need for "in-reach" in law schools in order to provide real access and counteract the trends of backlash. As one commentator has pointed out:

> [O]ur admissions policy is akin to the Ellis Island approach to legal education. It provides access to the down trodden but leaves those same people to sink or swim once they are here.[16]

The Task Force has heard of many incidents of what women regard as a "hostile" or "chilly climate" in law schools. This climate restricts opportunities for women and minority students to fully express themselves and achieve their full potential. Female students face blatant forms of sexism and harassment in addition to more pervasive hostility against anyone not fitting into the traditional law school mould. The

pervasiveness of the sexual harassment and discrimination faced by female students leads us to conclude that law schools are a poisoned environment.

1. The Experiences of Female Students

Some students report experiences of professors making sexist or racist remarks. In one episode recounted to the Task Force a part-time property professor, in class, explained boastfully and repeatedly, about how restrictive covenants could be used to prevent Blacks from purchasing homes in certain subdivisions. While he acknowledged that this was illegal, he persisted in teaching in a racist manner. Action was taken by the law school administration to relieve the professor of his duties.

In addition, the Task Force has been told that there is a tendency for students to react with hostility and resentment when law professors do attempt to integrate racial or gender topics in class.

A survey carried out at the University of New Brunswick Faculty of Law revealed a disturbing level of anti-feminism.[17] Over half of the women and a third of the men reported experiencing some pressure from other students not to be or to act seriously concerned about women's issues and rights. About half of the women and a third of the men reported often hearing other students express derogatory or sexist comments about feminists. A substantial percentage of women had heard *professors* make derogatory or sexists comments about feminists, at least occasionally. And a relatively small, but far from insignificant, number of women reported that at least occasionally professors put down, discouraged or trivialized attempts to take women's issues and rights seriously.

Another problem identified by the law students was a generally less positive, enabling and friendly environment for women. Fully half of the women agreed that men are treated better than women, and a majority believe that the general law school climate is better for men than women. These assessments are supported by a tendency for women and men to diverge in their assessments of many aspects of law school life, with women generally experiencing and observing more negative events and attitudes.

These experiences are magnified in the situation of female students who face multiple discrimination. Racially or sexually derogatory comments are made in the hallways and in classrooms. Women of Colour have been hissed at in class, especially if a racial or sexual issue is addressed. Women of Colour report being ignored or not being taken seriously by faculty members or being mistaken for anything but a law student by faculty, staff and other students.

Women of Colour, both former and present law students, have described their experience to the Task Force both in consultations and in responses to a questionnaire sent to members of this group. Generally, law school was described as a lonely and alienating experience by Women of Colour. Apart from being shunned and ostracized from participation in study groups and social events, students reported being questioned, directly and indirectly, about their right to attend law school. Even where admitted under the regular admission policy, minority students frequently felt forced to defend affirmative action policies, given the ever present assumption that such students have inferior abilities and therefore do not deserve to be attending law school.

> The experience was continuously that of racial discrimination. For example one white male student asked me how it felt to carry the burden of knowing I was in law school because of affirmative action. This man had no idea of how or why I was admitted to law school. He assumed as all white students did that I was there on an affirmative action programme.[18]

In addition to anecdotal experiences recounted by Women of Colour, there is statistical evidence of multiple discrimination in the classroom setting. Issues can be addressed with regard to minority women law students by using the results of a survey conducted by the Department of Justice.[19] A first step toward doing so involves locating the separate experiences by the more traditional groupings of race/ethnicity, gender, disability and sexual orientation in Table 2.

TABLE 2

Experience and Observation of Discrimination by Attributed Source and Respondent Status*

	Race/Ethnic Discrimination Experienced/ Observed by Minorities (N=98)	Gender Discrimination Experienced/ Observed by Women (N=448)	Discrimination Against Disabled Experienced/ Observed by Disabled	Discrimination Against Sexual Orientation Experienced/ Observed by Gay/Lesbian Students (N=20)
Experienced				
At school but before law school	51%	38%	15%	35%
When applying to law school	15	3	12	10
During law school from professors	23	28	18	30
During law school from students	38	36	18	45
During interviewing at law offices	41	42	15	30
Average stress/ anger level**	7.2	7.4	8.4	8.4
Observed				
When applying to law school(s)	14	6	1	10
During law school from professors	28	41	12	40
During law school from students	50	43	15	55
Average stress/ anger level**	7.2	7.7	6.9	7.5

* Source: Reconfigured from working document, *Survey of Students at Ten Law Schools in Canada*, Colin Meredith and Chantal Paquette, Pages 19, 21, 23, 24. Department of Justice Canada: Research and Development Directorate.

** Where "1" indicates minimal stress and "10" indicates significant stress/anger.

Table 2 indicates the high proportion of the "at risk" groups who experienced discrimination in school situations prior to entering the study of law: with regard to race (51%), gender (38%), disability (15%) and sexual orientation (35%). Large segments of these same groups experienced discrimination during law school from other students (38%, 36%, 18%, and 45% respectively) and outside of law school during interviews at law offices (41%, 42%, 15%, and 30% respectively). Even higher proportions (50%, 43%, 15%, and 55% respectively) observed such incidents involving other students. Some discrimination was also perceived from professors in law schools, but generally at lower levels than from students.

TABLE 3

Evidence of Multiple Discrimination: Stress and Anger Resulting from Experienced and Observed Discrimination Attributed to Race and Gender by Minority and Gender Status*

	Minority Women	Non-Minority Women	Minority Men	Non-Minority Men
Attributed to Race (Average Stress/Anger Level)				
Stress/Anger Resulting from Experienced Discrimination	7.52	5.93	6.72	5.84
Stress/Anger Resulting from Observed Discrimination	7.58	7.03	6.90	6.26
Attributed to Gender (Average Stress/Anger Level)				
Stress/Anger Resulting from Experienced Discrimination	7.64	7.45	7.46	6.10
Stress/Anger Resulting from Observed Discrimination	7.96	7.70	6.48	6.27
Base N	(26)	(44)	(37)	(38)

* Entries in table represent average stress/anger levels for experienced/observed discrimination, with those in survey experiencing/observing discrimination as base, where "1" indicates minimal stress/anger and "10" indicates significant stress/anger. Source: Reconfigured from Appendix B, *Survey of Students at Ten Law Schools in Canada*, Detailed Tables, Pages 114, 120, 128, 134. Department of Justice Canada: Research and Development Directorate.

A useful way of summarizing the effects of these incidents on those who experienced them is in terms of the scale used in the Department of Justice survey. The survey asked respondents to indicate on a range from "1" to "10" the level of anger and stress they felt as a result of these discriminatory episodes. Results from this summary scale are presented in Table 3.

In order to capture the phenomenon of multiple discrimination, the results have been grouped into four categories with enough students in each to indicate reactions to the experience of discrimination by combined minority and gender group memberships. These combined groupings consist of minority women, non-minority women, minority men, and non-minority men. If the experience of multiple discrimination produces unique problems for those involved, it should be reflected in especially intense feelings of anger and stress among minority women.

This is exactly the pattern that is found in the comparison across groups in Table 3. Minority women consistently have the highest average scores on the anger/stress scale, while non-minority men have the lowest. Indeed, there is a predictable step-like gradient that descends in intensity of feelings from minority women to non-minority women, minority men, and non-minority men. For example, the average scores of stress and anger from observing discrimination are 7.96 for minority women, 7.70 for non-minority women, 6.48 for minority men, and 6.27 for non-minority men. These results support the assertion that multiple discrimination is a greater problem for minority women in law school settings than for other groups.

Aboriginal students also feel constrained by the "poisoned environment" prevalent in law schools. In general, Aboriginal students represent the cream of the crop of Aboriginal peoples; they have had a long, difficult struggle to get to law school and, once there,

find themselves under attack ideologically, emotionally, and psychologically. Law schools and the legal profession in Canada face an enormous task if they are to eliminate the poisoned environment which threatens to kill the initiative of some of Canada's finest Aboriginal minds. Aboriginal students are not being fostered in a friendly atmosphere in the law schools and, in general, they are "hurting" in those schools. They feel lonely, alienated and embattled.

Aboriginal students face stereotyping, including assumptions that they will be experts on Aboriginal law. The Task Force was told of a white male student grabbing a female Aboriginal student and saying, "Don't bring up Aboriginal issues, I'm sick and tired of it." He left bruises on the Aboriginal student. For Aboriginal students the culture of the law school is dramatically different from their native culture - in order to succeed they feel forced to assimilate, to fit into a culture that is hierarchical and patriarchal.

There is a tremendous negative impact on the confidence and self-esteem of all these students. One of the manifestations of the poisoned environment is the silencing of female students. A Saskatchewan survey found that male law students were more likely than female law students to report relatively high levels of participation in classroom discussion, student organizations and formal and informal social events at the law school. An 18% difference in reported levels of participation between male and female students was found in relation to questions about levels of participation in classroom discussion.

2. Monitoring the Learning Environment

Immediate action must be taken to counteract this pattern of discrimination and harassment. Law schools should appoint an Equity Officer and develop on-going support programs to address the needs of students threatened by the poisoned environment. The Equity Officer should be responsible for monitoring the retention, completion and placement of women and minority students.

RECOMMENDATION:

2.24 The Task Force recommends that law schools establish an Equity Officer position and on-going support programs to address the needs of students threatened by the poisoned environment. The Equity Officer should also be responsible for monitoring the retention, completion and placement of women and minority students.

Law schools should facilitate contact among minority students in the various law schools so that these students may co-ordinate their efforts to create more inclusive law schools. Law schools should also hold workshops on "unlearning" sexism and racism. Law schools and law societies should facilitate contact between women in practice and women in law schools to allow for greater communication and sharing of information regarding the role of women in practice.

RECOMMENDATION:

2.25 The Task Force recommends that law schools facilitate contact between minority students in the various law schools to enable these students to co-ordinate their efforts to create more inclusive law schools.

RECOMMENDATION:

2.26 The Task Force recommends that law schools hold workshops on "unlearning" sexism and racism.

RECOMMENDATION:

2.27 The Task Force recommends that law schools and law societies undertake to facilitate contact between women in practice and women in law schools to allow for greater communication and sharing of information regarding the position of women in practice.

Law schools should establish a "forum" in which students, faculty and staff can raise and discuss gender-related issues in a safe way. Law schools should set up a grievance process so that students can raise complaints of gender and race bias in the classroom. Grievance procedures should be community building; they should reduce the focus on intention and on the adversarial process. The process should encourage dialogue among students, among faculty and between students and faculty.

RECOMMENDATION:

2.28 The Task Force recommends that law schools establish a "forum" in which students, faculty and staff can raise and discuss gender-related issues in a safe way.

RECOMMENDATION:

2.29 The Task Force recommends that law schools ensure that a grievance procedure is in place so that students can raise complaints of gender and race bias in the classroom.

Law schools should develop mechanisms to eliminate sexual harassment and overt gender and race discrimination within the law school. This should include developing sexual harassment policies which protect students, staff and members of faculty. Since such policies are in place in most universities, a review should be undertaken to determine whether they are effective and how they can be improved. Law deans should encourage female professors and students to report and document incidents of race and gender discrimination or harassment.

RECOMMENDATION:

2.30 The Task Force recommends that law schools develop mechanisms to eliminate sexual harassment and overt racial and gender discrimination within the law school.

RECOMMENDATION:

2.31 The Task Force recommends that a review of sexual harassment policies be undertaken to determine whether they are effective and how they can be improved.

RECOMMENDATION:

2.32 The Task Force recommends that law deans encourage female professors and students to report and document incidents of race and gender discrimination or harassment.

Some solutions are outside of the scope of individual law schools. The Canadian Council of Law Deans should establish a written Code of Conduct aimed at eradicating race and gender bias and sexual harassment in law schools. The Council should also investigate the possibility of initiating an itinerant safe counsel program for faculty and

students who are harassed or intimidated in law school settings on the basis of gender or minority status.

RECOMMENDATION:

2.33 The Task Force recommends that the Canadian Council of Law Deans establish a written Code of Conduct aimed at eradicating race and gender bias and sexual harassment in the law schools.

RECOMMENDATION:

2.34 The Task Force recommends that the Canadian Council of Law Deans also investigate the possibility of initiating an itinerant safe counsel program for faculty and students who are harassed or intimidated in law school settings on the basis of gender or minority status.

3. Workload and Community Service

It is clear that the profession must act to eradicate the poisoned learning environment which exists in most law schools. On a more positive note, we must also act to instill the values which will assist the profession in achieving gender equality. One of the central themes of this Report is that the profession must reverse the trend toward commercialization of the practice of law and restore the professionalism and virtues of public service. Lawyers should recognize that the benefit of legal training and the privileges associated with being a lawyer confer a duty to give back to the community. The profession must become a more human, hospitable environment.

In order to transform the legal culture we must challenge the workload currently imposed on law students. The objective should not be to impose unreasonable working hours on students in order to prepare them for the life of billable hours ahead:

> I'd also like us to consider the work load that we put on our students under the curriculum. We hear now that the profession is an unhappy place because it is inhospitable to the desire to have both a life and a job, and when I start to think about where do we get the professional ethos of workaholics, and the cultural expectations that you will be working all the time or you'll be justifying why you're not working, and we start to chase it back, some of the workloads that we put on our students may be, I don't have any firm ideas about this, but I'm thinking about when do we start that process, what do we expect? and can we honestly say that our curriculum is friendly to the single-parent mother in terms of what we require them to know. Do we require too much?[20]

Perhaps we can begin to reshape the profession by rewarding public service during legal education. Students should be encouraged to do some *pro bono* work before they are granted their law degrees. This would send a very clear message to students about the importance of such work and would help to connect students to the community.

RECOMMENDATION:

2.35 The Task Force recommends that awards for public service be increased.

RECOMMENDATION:

2.36 The Task Force recommends that students be required to engage in some *pro bono* work before they are granted their law degrees.

E. Access to Articling Positions and the Articling Experience

The problems experienced in law school are also exhibited at the entry levels of the profession. Female lawyers face barriers in articling interviews, in access to articles and in the articling experience itself. In general, more communication and consultation between law schools and law societies will be critical in resolving these matters.

1. Access to Articles

The barriers encountered by women in seeking articles is eloquently articulated in the following statement:

> I have [over 35% of my] students who do not have articles from my third year class. They are overwhelmingly women and they are disproportionately minority students. It has never been that high before, and I think it is a harbinger of things to come across Canada, and I categorically reject that it has anything to do with the quality of my students. I think that they were superbly qualified coming in, they've received a solid legal education while there, and the [35%] are certainly not the bottom quarter of the class. In fact, it's quite the opposite. Some of the so-called gifted, the best and the brightest who are nevertheless women or minorities or minority women, are finding it very difficult to get articling positions. One class mate, a male class mate, turned to a woman and, all allegedly of course, said, "Oh, it doesn't matter if you got better marks than me, I'll get the position." And sure enough, that is exactly what happened.[21]

What steps must the law society take when faced with this evidence of discrimination in the profession? Most law societies have active placement services and a "best efforts policy" in which the society will try to assist a student who cannot find an articling position or has not been placed through the regular processes. However, given the evidence of the skewed impact of difficulties in finding articles, it may be time for new approaches.

Law societies have a duty to educate members of the profession about stereotypes and standards of excellence. Since they require students to article in order to enter the profession, their duty goes beyond that — they have an obligation to ensure that students have equal access to articling positions. This may require rethinking the articling process:

> ... maybe we should be asking law societies across the country why it is under a closed-door system, why the articling system is necessary at all to protect the public, to articulate the exact goals of the articling system, that it meets them proportionally. You can no longer hide behind the marketplace because you control access - if you said articling wasn't required it would not be - that is not the marketplace.[22]

RECOMMENDATION:

2.37 The Task Force recommends that law societies ensure that students have equal access to articling positions.

If the current situation continues and there are insufficient articling positions available, law societies may have to consider greater flexibility in articling requirements in order to meet its duty of fairness to all law students. For example, law societies could allow Aboriginal students to article with Band Councils or with Aboriginal organizations as in-house counsel.

Access to articles is a separate issue from the issue of finding legal positions after being called to the Bar. Without completing articles — regardless of your future abilities or your prior degree — you cannot become a member of a law society and hence can never practice law.

Law societies should introduce part-time articling programs for students with children or other special needs. Where such a program already exists, law societies should publicize it so that firms and students are aware that it exists.

RECOMMENDATION:

2.38 The Task Force recommends that law societies introduce a part-time articling program for students with children or other special needs, and where such a program already exists, law societies should publicize it so that firms and students are aware of its existence.

Law schools and law societies should also collaborate in the development of a program to assist in the placement of students having difficulty finding articling positions.

RECOMMENDATION:

2.39 The Task Force recommends that law schools and law societies collaborate in the development of a program to assist in the placement of students having difficulty finding articling positions.

2. Articling Interviews

Women lawyers have also reported their unhappy experience with the interviewing process. The University of Victoria developed interviewing guidelines for employers interviewing students on campus. Law societies should develop similar guidelines for the interviewing process and promote them within the profession. The guidelines should include a general statement of principles and examples of kinds of questions which can and can not be asked. This will help to ensure that the process is fair and equitable.

RECOMMENDATION:

2.40 The Task Force recommends that law societies develop guidelines for the interviewing process and promote them within the profession.

Law societies should include in their Codes of Conduct rules which provide for penalties against law firms and lawyers who exhibit race and/or gender bias in the articling interview process. However, the problem is with enforcement. Law Societies should promote the guidelines and establish safe mechanisms for student complaints of discrimination in hiring.

RECOMMENDATION:

2.41 The Task Force recommends that law societies include in their Codes of Conduct rules which provide for penalties against law firms and lawyers who exhibit race and/or gender bias in the articling interview process.

3. The Articling Experience

Female bar admission course students have reported numerous incidences of sexual harassment and discrimination while articling. Clearly, articling students are in a difficult, if not impossible position, when it comes to complaining about this treatment. Students therefore require support systems during this period.

One example of a support system has been established in Toronto. Aboriginal articling students and law students in Toronto formed the Aboriginal Articling Students Support Council. Membership is open. The Council was set up in response to suicide among Aboriginal students.

Law societies should require articling students to complete courses on gender issues and racism prior to admittance to the Bar.

RECOMMENDATION:

2.42 The Task Force recommends that law societies require articling students to complete courses on gender issues and racism prior to admittance to the Bar.

The Law Society of Upper Canada has set up an accreditation system for principals. In order to become a principal one has to submit an application form which is reviewed, approved and then "re-reviewed" on an annual basis. This process provides the beginning of a mechanism to monitor the articling experience. It has already resulted in the receipt of a number of complaints from articling students, some of which have been gender-related.

Law societies should regulate the articling process to protect articling students from sexual harassment, discrimination and unfair employment practices. They should introduce clear guidelines regarding minimum terms and conditions of articling jobs. They should also establish a complaints body for summer and articling students.

RECOMMENDATION:

2.43 The Task Force recommends that law societies regulate the articling process to protect articling students from sexual harassment, discrimination and unfair employment practices.

RECOMMENDATION:

2.44 The Task Force recommends that law societies introduce clear guidelines regarding minimum terms and conditions of articling jobs.

RECOMMENDATION:

2.45 The Task Force recommends that law societies establish a complaints body for summer and articling students.

F. THE BAR ADMISSION COURSE

The Bar Admission Course acts as a barrier to women in several ways. First, the course materials and instruction are not free from gender and racial bias. Second, the methods of instruction, including in some jurisdictions, the necessity of travelling to major centres, poses difficulties for women with family responsibilities.

Law societies should eradicate gender and race bias from course materials and include material on gender issues in the Bar Admission program. For example, law societies should establish criteria in their selection process of course instructors to ensure the equal representation of women; the ethics component of the Bar Admission course should be expanded to address issues involving gender; and the Law Office Management Course should be expanded to address issues involving gender, e.g. leave policies, alternative work arrangement policies, workplace equity issues and firm or workplace sexual harassment policies. The Bar Admission courses should also contain a component on human rights which should include discussions of subjects such as sexism, gay and lesbian rights, racism and the rights of people with disabilities.

RECOMMENDATION:

2.46 The Task Force recommends that law societies eradicate gender and race bias from course materials and include material on gender issues and all forms of discrimination in the Bar Admission program.

Law societies should revise mandatory attendance policies to recognize reasonable exceptions to accommodate pregnancy, childbirth, family responsibilities and other situations of this nature.

RECOMMENDATION:

2.47 The Task Force recommends that law societies revise mandatory attendance policies to recognize reasonable exceptions to accommodate pregnancy, childbirth, family responsibilities and other situations of this nature.

Law societies should consider the possibility of "remote learning". The requirement to travel to large centres for the teaching portion of the course can be particularly onerous for people with families in distant centres.

RECOMMENDATION:

2.48 The Task Force recommends that law societies consider the possibility of "remote learning".

ENDNOTES

1. T. Quandt, "Learning Exclusion: A Feminist Critique of Law School Experience" (1991-92) 4 *Education & Law Journal* 219 at 307.

2. B. Dickson, "Legal Education" (1986) 64 Canadian Bar Review at 70.

3. From consultation with representatives of law societies and law schools.

4. C. J. Wydrzyuski *et. al*, *The Impact of Law School Admission Criteria* (paper prepared for delivery at the Canadian Association of Law Teachers meeting, Learned's Conference, 1992).

5. *Ibid.* at 26.

6. S. Neallani, "Women of Colour in the Legal Profession: Facing the Barriers of Race and Sex" (1992) 5 C.J.W.L. 148 at 153.

7. *Ibid.*

8. T. Alvi *et al.*, *Equality in Legal Education ... Sharing a Vision ... Creating the Pathways ...* (Special Advisory Committee to the Canadian Association of Law Teachers) (unpublished: 1991) at 15.

9. This presentation has been published in D. Lepofsky, "Disabled Persons and Canadian Law Schools: the Right to the Equal Benefit of the Law School" (1991) 36 McGill L.J. 636.

10. See Chapter 8 for a more detailed discussion of this phenomenon.

11. This term is used to denote part-time professors who practice law "downtown".

12. N. Gambioli, "Women at Law School: Perspectives from First-Year at Dal or The Washroom Walls are Clean at Weldon" [unpublished paper] at 26.

13. See *Broadening the Law School Perspective* by First Nations Law Students (Curriculum Conference Report: 1992).

14. From consultations with law school and law society representatives.

15. From the introductory remarks made by Dean J. Berryman at a Windsor Faculty of Law retreat on curriculum reform.

16. Ad Hoc Committee on Gender Related Policy of the Faculty of Law, University of New Brunswick, *Survey 1991 Report* (1991).

17. From survey distributed to Women of Colour. See Appendix 10.

18. See section III.B. of this Chapter for a full description of this survey and its limitations.

19. From consultations with law school and law society representatives.

20. From consultations with law school and law society representatives.

21. From consultations with law school and law society representatives.

PART III

WOMEN IN THE LEGAL PROFESSION

CHAPTER THREE

WOMEN IN THE LEGAL PROFESSION - A STATISTICAL PROFILE

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CHAPTER THREE
WOMEN IN THE LEGAL PROFESSION - A LOOK AT THE NUMBERS

I. INTRODUCTION

This chapter sets out the statistical profile of women in the legal profession. The first section provides a historical perspective on the entry of women into the legal profession. The second section provides the current distribution of female lawyers across the sectors of the profession. The statistical profile is not complete because law societies gather statistics on their members in different ways, making comparisons difficult. However, the existing data does illustrate the trends in the career choices of women lawyers.

II. HISTORICAL PATTERNS

The provincial and territorial working groups were asked to provide profiles of their membership by gender and in terms of sector of practice, as well as to provide information about the historical patterns of the entry of women into the profession of that province or territory. There are many similarities between the provinces' reports and patterns can be detected. By and large, apart from a few exceptions, women did not enter law school prior to 1970. Even after 1970 the numbers of women being admitted to the Bar were relatively small with gradual increases every year. During the 1980s change really began to take place, and by the mid-1980s most provinces report that about 30% of those in law schools were women. Now, in 1993, some provinces are reporting not only equal numbers of women in law school, but that women actually outnumber men. For example, 65% of the Ecole du Barreau (bar admissions) students in Montreal are women this year.

This historical pattern can be illustrated through the following statistics from Saskatchewan. The proportional representation of women called to the Bar in that province was:

- 7% from 1970-1975
- 20% from 1976-1980
- 24% from 1981-1985
- 30% from 1986-1990 and
- 38% by 1991.

This same pattern is discernable in the other provinces. Before 1975, women in Alberta were less than 10 percent of those admitted to the bar each year. By 1991 that number had risen to 38% and the proportion of women in the profession was 20.3%. The representation of women was somewhat higher in Manitoba, which reports that women made up 32% of the graduating class of 1980 and 48% by 1992. British Columbia expresses its numbers in terms of the percentage of law society members who were women. In 1971 that figure was only 3.2% but by 1986 it had risen to 16% and by 1990 women made up 21.1% of the bar of that province. Ontario reports that 83% of the practising female lawyers in the province were called to the bar during the last decade, compared to 42% of male lawyers. In Quebec, women were 3% of the Barreau in 1967, 18% in 1982, and 32% by 1991.

The pattern is similar for the Maritime provinces, although the numbers in some cases are so small that they are expressed as a head count of individual women rather than percentages of the population. In Prince Edward Island, the second woman ever to be called to the bar of that province was called in 1975. Newfoundland reports that there was one woman called to the Bar in 1970, six in 1980, six in 1985, fourteen in 1990, and 23 in 1992. A total of 134 women had been admitted to the bar of that province between 1933 and 1992. In Nova Scotia, 7.2% of graduates from law school in 1973 were women and by 1983 that number had risen to 32%.

III. CURRENT TRENDS

Women lawyers comprise approximately 27% of the practising bar today. In this section we have attempted to portray any patterns in the sectors where women lawyers practice. The general trend is for women to be slightly under-represented in private practice and somewhat over-represented in government jobs. As a rule women are under-represented in the judiciary as well as in tenured, full-time jobs as law professors.

A. PRIVATE PRACTICE

Women are under-represented in private practice. Recent figures show that the proportion of women practising in law firms is approximately 10% lower than the proportion of men in this sector. This trend is illustrated in Table 1.

The greatest proportion of women in private practice are in small law firms of two to ten lawyers. Almost half of women lawyers in this sector practice in small firms while the remainder are split between sole practitioners and large law firms.

1. WOMEN NOTARIES

In 1992 there were 3,571 notaries in Quebec, of whom 38% were women (1,353). This represents a significant increase over 3 years, as in 1989 only 29% of notaries were women. Those numbers are likely to increase even further as in 1992 77% of those obtaining the "Diplôme de droit notarial" (D.D.N.) were women.

B. GOVERNMENT LAWYERS

Women lawyers are over-represented in the public sector. The proportion of women lawyers is 3% to 8% higher in this sector than the proportion of male lawyers. This trend is illustrated in Table 2.

Table 2 shows that in British Columbia 14% of women lawyers and 8.8% of men were in government jobs, i.e. an almost equal number of men and women. 16% of women lawyers in Manitoba were government lawyers as of 1993, while 13% of men were employed by government. Manitoba concludes that women are more apt to be government or in-house counsel than are men. Saskatchewan's data reaches the same conclusion with 21.0% of women compared to 15.2% of men in jobs in the public sector. 11.3% of women compared to 6.7% of men held government jobs in Alberta as of 1991. In Ontario, 15.6% of women compared to 10.9% of men held government positions.

TABLE 1

Proportion of Women and Men in Private Practice

Province	% of Women Members	% of Men Members
Alberta	57.3	68.2
British Columbia	62.7	80.1
Manitoba	58	69
Nova Scotia	67	77
Ontario	61	72
Quebec	46	61
Saskatchewan	71	80.5

TABLE 2

Percentages of Women and Men Employed by Government

Province	% of Women Members	% of Men Members
Alberta	11.3	6.7
British Columbia	14	8.8
Manitoba	16	13
Ontario	15.6	10.9
Nova Scotia	14.8	10.9
Saskatchewan	21	15.2

In addition to this comparative data we have the following information about female government lawyers. 31% of Quebec's women lawyers hold positions in the public sector. New Brunswick gives its figure for government lawyers combined with corporate in-house counsel. That province reports that there are 21% of women in those positions. Newfoundland reports that 31 of a total of 76 government lawyers are women, or 41% of those lawyers. Prince Edward Island reports that 35% of the government lawyers in that province are women. In the Northwest Territories, the 1992 data indicates that there were 43 government lawyers and 15 of them were women.

TABLE 3

Percentages of Women and Men in Corporate Legal Departments

Province	% of Women Members	% of Men Members
Alberta	16	9.1
British Columbia	4.2	3.2
Manitoba	10	6
Nova Scotia	3.9	3.3
Ontario	6.3	6.3

C. Corporate Counsel

Women lawyers also tend to be over-represented in corporate legal departments although this trend is not consistent across Canada. The proportion of male and female lawyers practising as corporate counsel is set out in Table 3.

Table 3 demonstrates that there is disparity between provinces in the proportion of male and female corporate counsel. In British Columbia, 4.2% of women lawyers are corporate counsel compared to 3.2% of men. 6.3% of both Ontario's male and female lawyers held corporate counsel positions. Women outnumbered men as corporate counsel in Manitoba, where ten percent of women lawyers had those positions compared to six percent of men. In Alberta, the pattern was similar with 16.0% of women as compared to 9.1% of men acting as corporate counsel.

There are approximately ten lawyers practising as corporate counsel in Newfoundland and five of those are women. In the Northwest Territories, the data also showed an even distribution with 2 men and 2 women practising in corporate positions. Quebec reported that 10% of women held legal positions with business entities. In Saskatchewan in 1992 women represented 11 of a total of 23 corporate counsel positions.

D. Faculties of Law

Women law professors make up 28% of the members of law faculties in Canada. Representation by gender is roughly equivalent in english and french law schools. The proportion of women in these faculties ranges from a high of 50% at the University of Ottawa (Common Law) to a low of 19% at the University of British Columbia.

E. The Judiciary

Women are under-represented on the Bench in comparison with their proportion in the profession as a whole. Approximately 12% of federally-appointed judges are women at the present time. The representation of women on section 96 and section 101 courts is set out in Table 4.[1]

At the provincial court level there is a wide variety in the proportion of women on the Bench ranging from British Columbia where 19% of the judges are women to Prince Edward Island where none of the three provincial court judges are women. The figures for all provincial courts are set out in Table 5.

TABLE 4

Gender Representation on Federally-Appointed Courts

Court	Total Number of Judges in Office	Supernumeraries	Grand Total	Total Number of Women Judges	% Women
CANADA					
Supreme Court	9	0	9	2	22
Federal Court - Appeal Division	11	3	14	1	7
- Trial Division	20	1	21	4	19
Tax Court of Canada	22	4	26	3	12
ALBERTA					
Court of Appeal	11	3	14	4	29
Queen's Bench	60	12	72	11	15
BRITISH COLUMBIA					
Court of Appeal	13	10	23	4	17
Supreme Court	81	19	100	12	12
MANITOBA					
Court of Appeal	7	0	7	1	14
Queen's Bench	33	5	38	6	16
NEW BRUNSWICK					
Court of Appeal	6	0	6	0	0
Queen's Bench	22	6	28	2	7
NEWFOUNDLAND					
Appeal Division	6	3	9	1	11
Trial Division	18	6	24	1	4
NORTHWEST TERRITORIES					
Supreme Court	3	0	3	0	0
NOVA SCOTIA					
Court of Appeal	8	1	9	1	11
Supreme Court	25	3	28	3	11
ONTARIO					
Court of Appeal	16	8	24	4	17
Ontario Court (General Division)	204	52	256	29	11
PRINCE EDWARD ISLAND					
Appeal Division	3	0	3	0	0
Trial Division	5	0	5	1	20
QUEBEC					
Court of Appeal	20	3	23	5	22
Superior Court	140	29	169	16	9
SASKATCHEWAN					
Court of Appeal	9	0	9	2	22
Queen's Bench	30	6	36	5	14
YUKON TERRITORY					
Supreme Court	1	1	2	0	0
TOTAL	**783**	**175**	**958**	**118**	**12**

TABLE 5

Provincial Court Judges by Gender

Province or Territory	Total Number of Judges[2]	Men	Women	% Women
Alberta[3]	106	95	12	11
British Columbia	129	105	24	19
Manitoba	36	33	3	8
New Brunswick	29	26	3	10
Newfoundland	24	22	2	8
Northwest Territories	5	4	1	20
Nova Scotia	45	39	6	13
Ontario	264	221	43	16
Prince Edward Island	3	3	0	0
Québec	289	254	35	12
Saskatchewan	44	40	4	9
Yukon	3	3	0	0
TOTAL	**978**	**845**	**133**	**10**

F. Rates of Departure from the Profession

While women are entering the profession in greater numbers, they are also leaving the profession in higher proportions than men. This trend was noted in the recent provincial law society surveys of the memberships on gender-related issues.

The British Columbia survey revealed that, on average, women leave the profession at a rate 50% greater than men. Similarly, in Alberta women are 20.3% of total active members and yet comprised 42.6% of non-practising members who have transferred to that status between 1987 and 1991. Attrition rates were higher for women in all years of call. The Ontario survey also found that women are over-represented among those leaving law. The Law Society of Upper Canada's records indicate that women represented 37% of those no longer practising law despite the fact that they represent only 30% of the past 15 years of Bar Admissions.

IV. CONCLUSION

Clearly, women have made great strides in terms of numbers entering the profession. However, the statistical profile demonstrates that the representation of women is uneven across the different sectors. More troublesome is the high incidence of women leaving the profession. Both these trends suggest that there are barriers to equality in the legal profession and the reasons behind the trends are examined in the following chapters.

ENDNOTES

1. These are the figures available as of July 1, 1993.
2. This is the total number of judges and does not include supernumerary judges.
3. In Alberta there are 12 supernumerary judges, of whom one is a woman.

CHAPTER FOUR

BARRIERS TO EQUALITY IN THE PROFESSION

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CHAPTER FOUR
BARRIERS TO EQUALITY IN THE LEGAL PROFESSION

I. INTRODUCTION

A growing body of national and international literature has concluded that gender bias exists in the legal profession of most countries. The types of barriers to equality which have been identified include: sexual harassment; salary differentials; difficulties obtaining articles; difficulties in securing good files and problems with work allocation; problems in career advancement in terms of promotion and access to partnership; the lack of women in management and leadership positions; segregation into certain areas of practice; and an unwillingness to accommodate female parents who have family responsibilities.[1]

The list of barriers provides a good snapshot of the situation of women in the legal profession in Canada. However, the list is somewhat numbing. While it illustrates the fact that gender bias exists, it cannot adequately demonstrate the nature and extent of it. In order to engage the profession in the process of achieving equality, we must document the material effects of discrimination on women lawyers.

Sources of information on gender bias in the legal profession include academic studies of women in the workforce, women in the professions and women lawyers. These studies reveal the general patterns of barriers to equality faced by women and reinforce the similarities in the experiences of women in all employment sectors.

A detailed profile of women's experience in the legal profession can be drawn from the statistics gathered in recent surveys of the profession. These quantitative studies, especially when viewed on a national scale, provide a powerful and moving description of the situation of women lawyers in Canada. Five provincial law societies have surveyed their members and reported on gender-related issues. The results of these surveys confirm what other studies have found: that there is a widespread perception among women and men lawyers of discrimination against women in the legal profession. In fact, the results are depressingly similar across Canada.

The numbers provide a sketch which must be filled in with the stories of women's experiences within the profession. The Task Force has carried out extensive consultations with lawyers across Canada and heard and read moving testimony about the dissatisfaction and pain caused by barriers to entry and advancement in the practice of law.

This chapter draws on these three sources, academic studies, statistical surveys and consultations, to provide a detailed analysis of the barriers to equality in the profession. The analysis encompasses both the perceptions of bias and the concrete data which reinforces these perceptions. The findings are presented under the following general forms of discrimination: (1) employment opportunities; (2) career development and advancement; (3) lack of accommodation of family responsibilities; and (4) sexual harassment. Each form of discrimination is addressed in general terms and according to the extent and specific forms that the barrier takes in the legal profession. These findings are then juxtaposed with the law on forms of direct and systemic discrimination. These discussions are prefaced by an overview of the general perceptions of bias in the profession.

The final section reviews the findings and concludes that the view that gender bias exists within the profession is well-founded. This approach, which is centred on the forms of discrimination experienced by women lawyers, is refined in the subsequent chapters focusing on the sectors of the profession. Here, the problem of gender inequality is defined. In

the following chapters the means of overcoming these barriers are examined.

A. Perceptions of Gender Bias in the Legal Profession

The five law society surveys referred to above approached the general issue of gender bias from different perspectives.[2] The Alberta and British Columbia surveys focused on the perception of bias whereas the Quebec survey focused on the experience of discrimination. The Ontario and Saskatchewan surveys asked respondents about both the experience and/or observation of gender bias. The results of these surveys are summarized in Table 1.

The surveys reveal that the vast majority of members of the profession recognize the existence of gender bias in the profession. In British Columbia, 98% of women and 83% of men were of the view that there is some gender discrimination against women in the legal profession. In Alberta, 97% of women and 77% of men were of a similar view.

Despite the overall affirmative response of the vast majority of respondents of both sexes, differences do exist as to the perceptions of the intensity of this bias and the forms that it takes. Women were much more likely to respond that gender bias was widespread but subtle. Conversely, men were more likely to hold the view that gender bias existed but was not widespread.

In Saskatchewan, respondents were asked to indicate the frequency of experienced or observed instances of sexism at three stages in their professional lives: during law school, during articles and in the legal practice after articles. The study concluded that awareness, by both men and women, of discrimination against women increases with time in the profession. In the legal practice categories, 92% of women respondents reported having experienced discrimination on the basis of gender and 82% had observed instances of sexism in the profession. Only 12% of male respondents had experienced sexism and 63% reported having observed it.

TABLE 1

Perceptions and Experience of Gender Bias Against Women Lawyers

Province	Women %	Men %
Ontario	self 70% others 75%	(6%) 29%
British Columbia	98%	83%
Alberta	98%	78%
Saskatchewan experienced - observed -	 92% 82%	 12% 63%
Quebec[3]	71%	n/a

In Ontario, 70% of women surveyed reported having experienced sexual discrimination in their legal careers. In contrast, only 6% of men surveyed reported similar experiences. Three-quarters of the women surveyed reported perceiving sexual discrimination against others while less than a third of men had this observation. Of the respondents in the Quebec survey, 71% had experienced gender discrimination in the profession (only women were surveyed).

The surveys reveal the widespread perception of gender bias in the legal profession. This perception is shared by both men and women, although women perceive bias to be more frequent and more intense. A large proportion of women lawyers report experiences of gender bias. The following sections focus on the specific forms of discrimination experienced by women.

II. EMPLOYMENT OPPORTUNITIES

A. Introduction

Today women enter law schools without much difficulty but the controls imposed by a male-dominated profession impede their progress following graduation. Such controls may take the form of discriminatory practices or may be socially-constructed structural impediments. These are sometimes described as the "push-pull" phenomenon, where women are pulled into areas of law they are perceived as being best at and are pushed out of other areas.[4] The areas they are pulled into are frequently the ones resembling women's role in the family. In addition, the traditional homogeneity of the legal profession leads to a devaluation of certain characteristics and qualities in favour of a narrow image of the competent lawyer represented in the male norm.

In some cases, a bias against hiring women lawyers is more explicit. This is illustrated in the following views from the perspective of a senior male partner:

> My bias against hiring women lawyers is based on practical financial reasons such as loss of office time resulting from the illness of children or maternity leave and susceptibility of spousal transfer.[5]

These problems are clearly more pronounced for women from minority groups who are even less likely to fit the stereotype of the model lawyer envisioned as a white able-bodied male. Perceptions based on group characteristics and stereotypes are at the root of barriers to equal employment opportunities.

B. Access to Legal Positions

The provincial law society surveys reveal a widespread perception of bias in hiring processes, coupled with concrete evidence that women experience discrimination. Examples of barriers to equal opportunity include: difficulty in securing articles, problems related to finding employment and the types of questions asked during the hiring process. In general, there appear to be fewer problems with articling processes than other hiring processes.

The British Columbia and Alberta studies indicate that women and men do not have an equal opportunity to be hired either as articled clerks or as lawyers.

About half of the women and a quarter of the men responding to the Alberta survey perceived gender bias in the hiring process. A third of Albertan women reported having experienced discrimination. However, in Alberta both sexes concluded that the discrimination was not as pronounced at the articling student level as it was in hiring for non-articling positions. Less than 10% of respondents of both sexes perceived bias at this level. There was very little difference in articling experiences of men and women in Alberta, with women only slightly less likely than men to get their first or second choice of articling positions.

The Saskatchewan and British Columbia reports conclude that there is gender discrimination in hiring for articling positions. Women apply to more firms for articles but a lower percentage of the firms to which they apply are willing to interview them. More men than women are hired by their first or second choice firm. A greater proportion of women than men reported spending time looking for a position in the practice of law.

The general conclusion to be drawn from these statistics is that barriers to employment are lowest during the articling process and increase over time.

The problems faced by women seeking legal positions are multiplied for women from minority groups. While statistical information is not available on the special difficulties experienced by these women, the Task Force heard substantial evidence of discrimination against them in the hiring processes.

For example, a First Nations woman seeking articles was asked if she thought she could be "objective" if she had to deal with cases involving land claims or criminal prosecutions of First Nations

people. She was not offered a job. The Task Force also heard several stories of Women of Colour who had high standing in class and yet were unable to obtain articles or had to article without compensation despite excellent qualifications.

1. Interviewing for Articling Positions

In the Saskatchewan, Alberta and British Columbia surveys, many women referred to inappropriate questions they were asked at articling or other employment interviews. The Saskatchewan study addressed this issue in some detail. The highest levels of variance in the kinds of questions asked of male and female candidates related to family status: women were substantially more likely to be asked about number of children or intent to have children in the future. This is borne out by women's experiences in other jurisdictions:

> During my articling interviews, one lawyer asked me outright whether I planned to have children and whether my husband would "allow" me to work the long hours required.[6]

> I went through articling interviews while visibly pregnant and was asked repeatedly whether I really expected to be able to article and be a mother at the same time.[7]

The Quebec report also draws this connection between family status and difficulties in finding employment.

C. The Articling Experience and Access to Future Employment Opportunities

The articling experience is critical to future employment opportunities. The Task Force received many reports of gender-related issues which disadvantage female articling students.

These barriers are based on the existing culture of legal practice which is male-orientated. Women feel disadvantaged by the kinds of gender-related social events that take place within firms. Some firms have highly competitive sports teams from which women are effectively excluded. These teams often provide opportunities for the men to network and obtain assignments from the participants in such events.[8] No comparable opportunities are made available to women in the firm.

The male-oriented culture of legal practice restricts the women lawyers' development opportunities within the firm. Women reported being treated differently from their male counterparts in terms of coaching, training and guidance in the practical aspects of lawyering. Male lawyers tend to take male students "under their wing". Women students are left to fend for themselves. Some women reported that they were given no opportunity to meet clients, while male students enjoyed such opportunities. Others said they were given only files where the clients or opposing counsel were women. Male students accompanied lawyers on work-related trips more often than women because male lawyers felt more comfortable taking them.

Women in articling positions often feel unable to complain about discrimination for fear that doing so will severely impair their chances of being hired back. Those who did raise these issues tended to be viewed by their principals as "hysterical", "nervous", or "whining". Women who were aggressive in obtaining work were viewed negatively and labelled as "pushy" or "bitchy".[9]

D. Access to Areas of Practice

When these forms of behaviour become generalized into patterns the result is ghettoization or the tendency for women to be shunted toward certain areas (usually less lucrative) of the practice.

The Ontario report[10] shows that women lawyers are more likely than their male colleagues to practice family law. It also confirms that women have a tendency to leave the practice of civil litigation over the course of their careers. Roughly equal proportions of female and male lawyers devote themselves to civil litigation at the start of their

careers. However, after several years the number of women still in this area of practice was half the number of their male counterparts.

These trends are also exhibited in the British Columbia data which indicates that men are more likely to be involved:

- in general practice (28% men and 15% women);
- civil litigation (50% men, 40% women);
- criminal law (29% men and 21% women),
- personal injury (36% men and 28% women) and
- real estate (40% men and 32% women).[11]

On the other hand, women are more likely than men to practise family and juvenile law (34% as compared to 26%) and labour law and workers' compensation (13% as compared to 8%).

The same picture holds true in Alberta where men are more numerous than women in:

- corporate law (42% to 29%);
- real estate (38% to 24%); and
- criminal law (19% to 14%).

On the other hand, 32% of female lawyers practice family law and juvenile law as opposed to 15% of male lawyers. These patterns are also reflected in international and comparative studies of male and female legal careers.[12]

To a degree, these patterns are evidence of choice or decisions on the part of individual lawyers. However, the commonality in the trend across decades and jurisdictions indicates that other factors are also at work. The following factors have been identified as playing a role in choice of area of practice: personal interest, availability of job in the field, employer's decisions and client base.[13]

E. Legal Principles in Discriminatory Hiring Practices

A number of cases alleging discriminatory hiring practices have come before Canadian tribunals. While there are no reported cases of discriminatory hiring practices in legal workplaces, the general principles developed under human rights law would appear to apply. When discrimination occurs in the hiring process, tribunals have held that complainants were denied employment, and not just the possibility of employment.[14] Where the tribunal finds that the complainant is fully qualified for the position, a presumption arises that the individual would have been hired but for the discriminatory motive. The burden then shifts to the employer to prove, on a balance of probabilities, that the complainant would not have been hired even without the discriminatory motive.[15]

Where there is an absence of direct evidence, a Tribunal may infer that discrimination in hiring has occurred if the "evidence offered in support ...renders such an inference more probable than the other possible inferences or hypotheses."[16]

Holloway v. *Clairco Foods Ltd.*,[17] is frequently cited in wrongful dismissal cases as well as in discriminatory hiring cases. The case stands for the proposition that it is not necessary to show that the prohibited consideration was a primary or motivating factor in the conduct complained of but only that it was a material or significant element in that conduct.

On occasion, courts and tribunals have been asked to recognize broad, general patterns of discrimination in employment rather than dealing with the problem on a complaint by complaint basis. In *Action Travail*, a group of women successfully claimed that the hiring practices of Canadian National Railway were discriminatory. Their complaint was based on statistical evidence of exclusion of women from employment opportunities within the company. Similar complaints might be lodged against employers of lawyers where there is evidence of patterns of excluding women from the organization or from certain areas of practice within the organization.

F. SUMMARY

While the barriers to equal employment opportunities may be less formal or explicit in the legal profession than in other sectors of the workforce, the effect of informal barriers on women lawyers is the same.

The discriminatory practices highlighted through our research and consultations take the form of both intentional discrimination and broad patterns of systemic discrimination. Both forms of discrimination are based on stereotypic views of women and a narrow concept of the practice of law. Both are contrary to human rights legislation.

III. CAREER DEVELOPMENT AND ADVANCEMENT

A. THE GLASS CEILING AND THE STEEL DOOR

An extensive body of literature points to the pervasiveness of the "glass ceiling" which impinges on the upward mobility of women in all career paths. The legal profession is no exception.[18] Advancement is still controlled by men and perceptions of how women lawyers are different continue to impede their progress. Women are not promoted up the hierarchy in legal organizations.

For example, there are still barriers to women developing business in traditional male client relations; problems with access to clients and clientele preference for male lawyers; and problems with mentoring and networking. The subjectivity of criteria for admission to partnership and for promotions in other sectors of the profession make it easier for gender bias to play a role in the decision-making. Some of these problems relate to the need to accommodate family responsibilities. These are canvassed in the following section.

While the analogy of the glass ceiling is appropriate for some women lawyers, the barriers confronting minority women lawyers is much more pronounced and more aptly referred to as "the brick wall"[19] or "the steel door".[20] Because these barriers block access to the profession, many of these issues have been addressed in the preceding section on employment. It is important to reaffirm that these barriers continue to block the advancement of women from these minority groups when they do gain access to legal positions.

B. THE EXTENT OF BARRIERS TO CAREER ADVANCEMENT

The existence of barriers to career advancement was the most frequently mentioned type of discrimination against women reported in the provincial surveys.

The perception of gender bias in career advancement was not shared by women and men. The vast majority of women responding to the British Columbia and Alberta surveys thought that women did not have equal opportunities to advance within the profession.[21] On the other hand, a majority of men were of the view that men and women had equal opportunities for advancement.[22] In Quebec, career advancement was the second-ranked problem (29%).[23] The Quebec survey revealed that women lawyers perceive a barrier to advancement arising from the fact that men prefer to promote male colleagues.

The survey data can be reviewed in relation to three separate topics related to career development and advancement: (1) work allocation; (2) promotion and partnership; and (3) remuneration.

1. WORK ALLOCATION

In the Alberta and British Columbia surveys close to half of the women respondents and a quarter of the male respondents reported that access to clients and assignment of files are areas of discrimination against women. These perceptions are borne out by the experience of women lawyers. When asked whether they had been denied an opportunity to work on a file because of an objection by a client based on gender,

half of the Alberta women and over a third of the women in British Columbia claimed to have been so denied in the last five years.[24] When asked about the frequency of this form of bias, nearly a third of women reported that this occurred "often" or "sometimes".

A related form of bias occurs where a male lawyer in the firm objects to working with a female lawyer. Over a third of women respondents to the Alberta survey reported having experienced this in the last five years. Again, when asked about frequency, nearly a quarter of the women responded that this happened "often" or "sometimes". Only a small percentage of men reported a comparable experience.[25]

Many women reported experiencing difficulties sending out legal opinions under their own name because of objections over gender. It is difficult to know whether it is the client who is actually objecting or whether it is the supervising lawyer's perception of what the client wants that is the cause of these practices. Regardless of the cause, it is the responsibility of the employer to resist discrimination by clients.

The Task Force's consultations have revealed that the gender bias experienced by minority women is compounded by discrimination on other bases such as race.

> As a female I do not get assigned the "good" files such as the males do. In addition, I have to administer the women staff in my department. Extremely hideous job for a young, female lawyer of colour. I am often sent on errands such as the purchasing of souvenirs by clients, booking lunch reservations and the like.[26]

Several women reported deep concern about apprehensions of bias when there is an opportunity for them to work on a file or a matter pertaining to their particular ethnic or racial community. Why does this question never arise when white males work on matters pertaining to white communities?

> Innuendoes that because I am a woman of colour I will necessarily be biased about cases concerning racism whereas there is no such assumption about white commissioners who have to render decisions in cases wherein all parties are also white or of the same sex.[27]

2. Promotion and Attaining Partnership

The provincial surveys contain evidence of discrimination in promotion, particularly as regards attainment of partnership.

In the Ontario survey, women were more likely to report experiences of being denied opportunities for advancement for which they felt well qualified. Nearly a third of women reported being denied opportunities while a quarter of men reported such experiences.

The reported discrepancy between female and male perceptions of bias in promotion opportunities was greater in British Columbia. Here, over 40% of the women and 15% of the men respondents believed that men have a much better or slightly better chance than women of advancing in the hierarchy of the firm or organization. Less than a third of women respondents believed that women had an equal opportunity for career advancement.

Very little information on partnership rates emerges from the data collected in these surveys. In Ontario, the average period for reaching partnership was similar for men and women. However, this data does not address the issue of which sex is more likely to obtain partnership at all. The sex differential in time for attaining partnership is more strikingly set out in the Saskatchewan report. Of lawyers called to the bar in that province in 1970, 59% of the men and 27% of the women were partners.

Inferences gleaned from this data are limited both by the small sampling of women partners and by the fact that exploratory analyses suggest that some respondents reporting themselves as partners may in fact be sole practitioners working in offices shared with other sole practitioners.[28]

In the British Columbia survey unequal access to partnership is viewed as a basis for discrimination against women by almost two-thirds of women

respondents and a third of men respondents. These perceptions are borne out by the reality. A supplement to the survey indicates that women respondents were less likely than men respondents to be partners among lawyers in private practice within groups of the same years of call.[29]

The experience in Quebec is slightly different. Women lawyers in Quebec achieve the status of partner in fewer numbers that their male colleagues, but they do so a little more quickly.[30] This data may be somewhat skewed by the fact that women tend to become partners in limited partnerships rather than full partnerships.[31]

These statistics echo the results of a recent American study of promotion patterns of women in law partnerships.[32] Taking two groups of women lawyers, in two cities, at two points in time, the study notes the progress of their legal careers and finds that the requirements for promotion to partner are between 50-75% higher for women than for men. As there was no significant difference in other pertinent factors, like law school grades, awards, or productivity, the study concludes that there is definite evidence of discrimination against women in legal careers.

3. Remuneration

The provincial studies show a widespread perception of gender bias in remuneration. About half of the women respondents and 15-20% of male respondents perceived this gender gap in earnings.[33] These perceptions are substantiated by the statistics. Women earn substantially less than men and this disparity *increases* over time.

For example, the Saskatchewan study revealed that for both the 6-10 and 11-15 years of call, women are disproportionately represented in the lowest income categories. Of lawyers with 11-15 years from call, 44% of the women earned less than $40,000 while only 8% of the men fell into this category. Conversely, for this group 58% of men earned in excess of $100,000, compared to 12.5% of women.

In Ontario, women are over-represented among lower income categories and under-represented among higher income categories. Information based on 1989 figures shows that 14% of women earned less than $30,000. In contrast, only 6% of men earned less than this amount. Similarly, 14% of women earned $30,000-39,000 while 7% of men earned this amount. This pattern continues to the $70,000 level at which point a larger percentage of men are likely to earn higher incomes. For example, 18% of men earned $100,000-$149,000 compared to only 6% of women.

Results also show that women 1-5 years from admission to the bar are more likely than men to be among the lower income levels. Similarly, women 5-10 and 10-15 years after bar admission are less likely than men to be located in higher income ranges. The earning differential cannot be explained solely by women's over-representation in professional positions of lower remuneration nor by their recent entry into the profession. The largest earning differentials occur within the private practice of law, while greater equality of earnings exists in employment with government, Legal Aid and law clinics.[34]

A Demographic and Salary Survey conducted by Price Waterhouse for the Law Society of British Columbia completed in January 1990 indicated that women lawyers' incomes were lower than those of men lawyers called to the bar between 1976-1980 and 1981-85. The overall median ranges of pre-tax income from employment for respondents who work full time were $40,000 - $49,999 for women and $60,000 - $69,999 for men.[35]

These findings are consistent with evidence offered by numerous empirical studies of income differentials in the legal profession.[36] Studies suggest that more than a quarter of the difference in earnings of male and female lawyers can conservatively be attributed to gender discrimination.[37] They are also confirmed by a broader study of income in all of the professions which concludes that the professions with the highest incomes have the most pronounced wage gap between the sexes.[38]

These statistics are underscored by reports of discrimination in remuneration experienced by women:

> As a first year lawyer at a large Winnipeg firm, I was told that a male class mate would be paid more because he "had a wife and child to support" although I was billing more.[39]

> When discussing my salary with the senior partner he commented that he wasn't as worried about it as with previous articling students because my husband has a good job.[40]

> I have observed male associates receive a much higher percentage of billing so that their remuneration would be in line with female associate with higher billing for no known reason.[41]

C. The Legal Parameters of Barriers to Career Advancement

1. Patterns of Barriers to Career Advancement

Discrimination in employment may arbitrarily impact on individual women. For example, women may be discriminated against because of an employer's preconceived notions about what pregnancy or maternity will mean for a female employee or for that employer's business. However, discrimination may also take the form of the infamous "glass ceiling" which occurs where women have been permitted access to non-traditional jobs, but find that they can only rise to a certain level in the hierarchy of that workplace. All higher positions appear to be tacitly reserved for men.

Discrimination is also experienced through the division of the profession into more and less prestigious fields, with men concentrated in the more prestigious, higher paid areas, while women are consistently found in the lowest levels of the hierarchy. Carrie Menkel-Meadow did a cross-cultural study of women's participation in the legal profession and found that this phenomenon was remarkably uniform throughout western industrialized countries.[42] Alternatively, women may only gain access to the profession once the profession loses status.

Of course, these various types of discrimination are not discrete. Women can find their access to promotions or senior positions blocked because of a refusal to yield to sexual harassment, or because the conflicting demands of their job and their family responsibilities do not permit the level of demonstrable job commitment required to advance beyond a certain point.

The structure of the workplace may itself be a barrier to women's advancement in non-traditional jobs because of the fact that women continue to bear primary responsibility for children and for housework even when they are full time employees.[43] To require lawyers to work twelve-hour days, or to be available evenings, weekends, or at the last-minute in order to demonstrate commitment to a law firm or to one's own career, is to effectively preclude many women from successfully completing the requirements. Even the nine-to-five work day, when considered on top of the many more hours of work women do once they have returned home, can prove to be a barrier to full employment opportunities for many women.[44]

2. United States: Discrimination in Promotion in the Professions

Three recent U.S. cases suggest that women in the professions are beginning to use the remedies available through the courts to address discriminatory employment practices in their professions. These cases are directly relevant to the legal parameters of barriers to career advancement in Canada.

In *Hishon* v. *King & Spalding*,[45] a lawyer was hired as an associate in a law firm that, in its 94 years of existence, had never had a female partner. She was told when hired that there was a possibility, indeed almost a certainty, of partnership for associates at the end of about five years of satisfactory performance. She accepted employment with the firm, and, after seven years of good work evaluations, she was told that she would not be offered a partnership.

The Supreme Court held that allegations that a law partnership discriminated against an associate on the basis of sex in deciding whether to admit her to partnership are covered by Title VII, the federal human rights legislation. Under Title VII, employers are forbidden from discriminating on the basis of five enumerated grounds including sex. "Partnerships" are explicitly included in the definition of "employer".[46]

While there are as yet no reported cases on this issue in Canada, it seems highly likely that discrimination in admissions to partnership would be prohibited by our human rights legislation. Human rights legislation covers all employment-related decisions. A promise to be considered for partnership is a benefit or privilege of employment that must be made without discrimination and is not protected from scrutiny as other partnership decisions might be.

In *Price Waterhouse* v. *Hopkins*,[47] the United States Supreme Court considered whether a promotion was illegally denied to a senior manager and officer in an accounting firm because of sex discrimination and stereotyping. When she was denied partnership, the partners suggested charm school, a different style of dress and improved manners to add to Hopkins' feminine appeal. At the time 7 of 662 partners were women, and of the 88 persons proposed for partnership that year only Hopkins was a woman.

The main issue at the appeal level was the standard of proof required to defeat an allegation of discrimination. The Court of Appeal held that an employer who allows a discriminatory motive to play a part in an employment decision must show by clear and convincing evidence that it would have made the same decision in the absence of discrimination. That requirement was not met in this case. The Supreme Court reversed this holding, finding it an error to require "clear and convincing" evidence, holding instead that a "preponderance of evidence" standard was appropriate for an employer in order to defeat a plaintiff's claim and avoid liability. This approach is in keeping with the burden of proof developed under Canadian human rights legislation.[48]

The third case, *Ezold* v. *Wolff et al.*,[49] dealt with the validity of a law partnership's decision not to promote a female associate to partner. The District Court held that Ezold had been discriminated against contrary to Title VII, but that there had been no constructive discharge of the plaintiff from the firm. Ezold had been hired as an associate in a partnership track position in 1983. She had been warned when hired that it would not be easy for a woman at that particular firm. While at the firm she had received excellent work evaluations but had not been given the type of assignments that would have permitted her to completely demonstrate her competency or to gain new skills. In 1988, the firm decided not to admit her to partnership and four months later she resigned. This case illustrates the duty on the firm to provide fair career advancement opportunities leading up to the partnership decision.

3. Canadian Tribunals and "Failure to Promote" Cases

In Canada, a number of tribunals have considered "failure to promote" cases under human rights legislation. However, there are no reported cases within the legal profession. Tribunals have found denial of promotion where a department was all male and a female employee was passed over for promotion while less qualified males were promoted.[50] Tribunals have also found a denial of equality of opportunity where an employee received fewer assignments desirable for professional growth and monetary reward.[51]

In Canada, in order to prove discrimination the complainant must establish a *prima facie* case of discrimination. The employer must then provide a reasonable explanation, on a balance of probabilities, for the employment decision. If that is accomplished, the burden shifts back to the complainant to prove that the employer's explanation was false.

D. Summary

A review of the jurisprudence leads to the conclusion that many of the practices adopted by law firms and other employers of lawyers amount to

discrimination. Liability has been found for both the failure to promote and failure to provide equality of opportunity for advancement within the employment context and it is likely that it is only a matter of time before the courts or tribunals will consider those issues in the context of the legal profession.

IV. LACK OF ACCOMMODATION OF FAMILY RESPONSIBILITIES

A. Balancing Family and Career

> I would never recommend law to any young woman who wants to have a family.[52]

> If one makes a choice that family "comes first", then upward mobility is made more difficult. That is, there is a real perception that a woman cannot balance the two: if she wants to play an active role in child rearing, she cannot fully develop her career. This does not seem to be a problem for men, but women are perceived as either bad mothers if they are successful lawyers or bad lawyers if they are devoted to their children.[53]

More and more women within the legal profession have come to realize that there are decidedly negative economic and professional consequences associated with a woman's decision to have a family. These consequences are rarely visited on male lawyers who decide to have children.

One of the main causes of discrimination against women lawyers is the culture that surrounds work in the legal profession. That culture has been shaped by and for male lawyers. It is predicated on historical work patterns that assume that lawyers do not have significant family responsibilities. The "hidden gender" of the current arrangements for legal work manifests itself in many ways, including: the extremely long and irregular hours of work; assumptions about the availability of domestic labour to support a lawyer's activities at work; promotion within law firms which is incompatible with the child bearing and child rearing cycles of most women's lives; and the perceived conflict between allegiances owed to work and family.[54]

If the hypothetical large law firm lawyer is someone without domestic or family responsibilities, he is more likely to enjoy the benefits of the legal culture. For women, by contrast, the consequences of choosing a workplace which enables them to enjoy both meaningful work and a life outside the workplace may be the "glass ceiling".[55]

While the focus tends to be on balancing child care responsibilities with career demands, it is important to ensure that the definition of family responsibilities is a broad one. This definition should be predicated on the fact that everyone needs important and lasting human relationships as well as meaningful work. The differing pressures for women in different circumstances must be recognized because responses to constraints on women lawyers will be different depending among other things upon the lawyer's race, cultural background, sexual orientation and whether or not she is a sole support parent.

The obstacles faced by women attempting to balance family and career persist over the long term. Many women have difficulty meeting standard career expectations on return from maternity leave. The norm of taking on more prestigious work with each year of seniority makes it difficult for individuals to "tread water" or to seek work which appears to rank below their seniority and experience even if only for a brief period of time.

To strike a balance, many women require accommodation in the form of alternate work schedules. However, they have found most employers unwilling to provide such accommodation.

The impact on women of the conflict between family and career is varied and profound. It includes economic disadvantage, both immediate and over the long term; resentment by employer/partners/co-workers of the perceived financial burden and dislocation/pressure on others caused by maternity leave or alternate work arrangements; stigma, questioning of commitment; limited access to high-profile files; increased likelihood of termination of employment; exclusion from business development opportunities; deferral of decisions on promotion/admission to partnership (loss of seniority); limits on advancement and development opportunities; and loss of credibility.[56]

These disadvantages arise from employers' assumption that women who chose to have children are somehow "less committed" to their careers, profession and employers. There is a perception that their responsibilities as parents will detract from their devotion to their practices or that they will eventually leave the profession. These assumptions are based on stereotypical attributes of the group and constitute a denial of the ability, contribution and dedication of each individual lawyer. The impact of variations in a career path to accommodate family responsibilities should be assessed on a fair and objective evaluation of the individual's contribution within the context of alternate work arrangements and not on improper assumptions about commitment.

B. Lack of Accommodation of Family Responsibilities in the Legal Profession

Lack of accommodation for family responsibilities was cited by over two - thirds of women and a third of men as a form of discrimination against women in the legal profession in the survey of British Columbia lawyers. Similarly, the Alberta survey reported that half of women and 16% of men recognized this form of discrimination. In Quebec, 26% of respondents felt that this was a form of gender bias experienced by women lawyers, the third highest form of discrimination reported overall.

1. Child Care Responsibilities

One example of the result of the lack of accommodation of family responsibilities within the legal profession is the differential impact of child care responsibilities on male and female lawyers. Provincial surveys clearly establish that women bear much greater responsibility for child rearing than their male colleagues and that this greater burden substantially limits their opportunities within the practice of law. The statistics on the proportion of

TABLE 2

Child Care Responsibilities

Issue	Province	Women Lawyers	Men Lawyers
Proportion of child care responsibilities borne by lawyers	Ontario	49%	26%
	British Columbia	40%	20%
	Alberta	44%	26%
Reliance on spouse/ spousal equivalent for child care	Ontario	21%	61%
	British Columbia	20%	66%
	Alberta	24%	59%
Reliance on paid child care giver	Ontario	26%	10%
	British Columbia	26%	10%
	Alberta	29%	8%
Number of hours per week spent on child care	Ontario	48	21
	British Columbia	30.5	14
	Alberta	35	15

responsibility for child care borne by female and male lawyers from the Ontario, Alberta and British Columbia surveys is summarized in Table 2.

These statistics allow us to draw the following conclusions about the differences in the nature and degree of child care responsibilities assumed by women and men and the ways in which this disproportionate responsibility disadvantages women lawyers.

1. **The proportion of responsibility borne by women lawyers for their children is almost double that borne by male lawyers.**

   When asked about the proportion of responsibility they bear, women responded 49% (Ontario); 40% (British Columbia) and 44% (Alberta) while men responded 26% (Ontario); 20% (British Columbia); and 26% (Alberta).

   The Saskatchewan survey revealed that women assume primary responsibility for child care in all areas broken down by activity. For example, 59% of women report they care for children when the latter are ill compared to only 4% of men.

2. **Women lawyers are much more likely to rely on paid child care givers than are male lawyers — by a ratio of three to one.**

   In Ontario, female respondents identified the proportion of responsibility borne by paid child care workers as 26%, while men responded 10%. In British Columbia the proportion of child care responsibility borne by paid child care workers was reported as 26% by women lawyers and 10% by men. Again, in Alberta, this proportion was 29% for female lawyers and 8% for male lawyers.

   In the Saskatchewan and Quebec surveys, 70% of women reported having the responsibility for making child care arrangements.

3. **Conversely, male lawyers can count on a spouse or spousal equivalent to be responsible for child care at a rate of approximately three times the spousal assistance available to women.**

   In Ontario, in responding to a question regarding the proportion of responsibility for child care borne by "person you live with", women stated that their mates bore 21% of responsibility while men responded 61%. In British Columbia, 66% of the work associated with child care was performed by the person the male respondent lived with, while only 20% of the child care was performed by the person the female respondent lived with. Similar results were obtained in response to the Alberta survey, 59% by the mate of the male respondent, and 24% by the woman's partner.

   In Quebec, the survey conducted by the Association du Jeune Barreau de Montréal suggested that the male professionals in this sample were able to put in "extra time" and longer hours because they had support at home. Women, on the other hand were likely to provide the "home support" for their spouses and, therefore, less likely to be available to work longer hours.[57]

4. **These different levels of responsibility are reflected in the amount of time spent on child care responsibilities. Women lawyers spend more than double the time spent by male lawyers on child rearing tasks.**

   In Ontario, women spent 48 hours per week, on average, on child rearing tasks while men spent 21 hours. In British Columbia, women spent an average of 30.5 hours per week, while men spent 14 hours. In Alberta, women spent an average of 35 hours per week while men spent an average of 15 hours per week.

5. **Many more women than men report child rearing responsibilities as a reason for leaving the practice.**

In Ontario, 20% of women reported that their primary activity between the first and second professional positions was looking after children; 35% of women cited child care as the primary activity after their second position. In contrast, no men reported looking after children as their primary activity between professional positions. Of the reasons cited for leaving practice among women, "to look after my children" was one of the top-ranked reasons (by 15%); it was not cited in either the top-ranked or second-ranked reasons by men.

In the British Columbia, Former Members Survey, 30% of the women responding cited child care commitments as a factor in their decision to leave the legal profession. Similarly in Alberta, 42.1% of female former members of the law society cited child care commitments as one of the reasons for leaving the practice of law whereas no men identified this as a reason for their departure.

In Quebec, of 15% of the respondents who had left a position because of family responsibilities, 59% were women and 41% were men; of the 15% who had considered leaving their present employer for this reason, 70% were women and 30% were men. Of the respondents who had changed their status from full time to part-time work in order to accommodate their families' needs, 93% were women and 7% were men.

6. **Although both male and female lawyers have experienced stress as a result of competing demands of career and child care responsibilities, women reported negative material effects in the form of loss of income or reduced career opportunities to a degree not reported by men.**

For example, a majority of women reported loss of income attributable to child rearing whereas only a small minority of men did so. In addition, a substantial number of women reported a negative impact on their opportunities for promotion. Men simply do not report this experience.

In British Columbia, men reported the following experiences as a result of having children: suffered stress from competing demands (74%); loss of income (11%); and delay in promotion (1%). Women reported the following: suffered stress from competing demands (90%); loss of income (62%); and delay in promotion (32%).

In Alberta, men reported the following experiences as a consequence of having children: stress from competing demands (55%); loss of income (9%); and delay in promotion (1%). Women reported the following experiences: stress from competing demands (77%); loss of income (51%); and delay in promotion (24%).

In Quebec, 29% of women reported that child care responsibilities affected their career "a great deal" while only 5% of men reported this phenomenon; 22% of women reported that child care responsibilities affected their career "somewhat" compared to 16% of the men. 12% of the women reported that family demands had a negative impact on their career advancement, and this was the second highest reason for difficulties with promotion (after the general category of "difficulty advancing"). In addition, 17% of women reported that having children was an obstacle to finding employment.

7. **Finally, women felt that the fact that they had children resulted in the questioning and testing of their commitment at work to a much higher degree than that experienced by men.**

In British Columbia, 53% of women and 18% of men reported having their commitment to work tested as a result of having children. Similar answers were reported in Alberta (47% of women and 16% of men).

One clear indication of the impact of child rearing responsibilities on male and female lawyers is their income: the highest incomes are earned by men *with* children, the second highest are earned by men without children, followed quite closely by women without children. Women with children finish far behind. Women lawyers with children devote fewer

hours to their practice than those in other categories. In contrast, male lawyers work about the same number of hours *whether they have children or not.*[58]

2. Workplace Accommodation

The most common types of workplace accommodation are maternity and parental leave policies; alternative work arrangements; and assistance in child care. The provincial surveys reveal an appalling lack of policies and practices to accommodate lawyers with child bearing and child rearing responsibilities. This is true even apart from consideration of the need to accommodate other types of family responsibilities which are already gaining ground in the public and private (non-legal) sectors.

a. Maternity and Parental Leave Policies

Unpaid maternity leave was available in up to two-thirds of the workplaces of individuals responding to the surveys. The availability of paid maternity leave varied greatly from province to province with a high of approximately 39% in Saskatchewan and a low of under 20% in British Columbia. Partners have the least access to paid maternity leave, with only 2% of respondents to the Alberta survey reporting this type of benefit. Parental leaves were even less accessible.

b. Alternative Work Arrangements

Lawyers also report that alternative work arrangements are not widely available to the profession:

- in Saskatchewan 17% of respondents had access to alternative work arrangements

- in Ontario, flexible hours on a full time basis was reported as being offered at firms/offices by 39% of respondents; 24% of the respondents reported that part-time work benefits were available at their firm/office; and 7% of respondents reported that job sharing was offered by their firm or employer.

- In British Columbia, 42.3% of women said that they experienced difficulty in obtaining flexible hours or part-time work following having children.

- in Quebec, 42% of lawyers employed in the public service; 59% of lawyers in private practice and 55% of in-house counsel reported that alternative work arrangements were not available.

c. Assistance in Child Care

Although balancing a legal career and family life is seen as a major source of stress for women lawyers, child care facilities at places of work are available for only 2% of those surveyed in Ontario. There is no information from the other jurisdictions on the availability of daycare at places of work. Information relating to other types of assistance in child care such as emergency child care, child care referral services, or assistance with child care fees is also not available.

C. Discrimination on the Basis of Pregnancy and Family Status

Views as to who should bear the costs of reproduction have changed significantly over the last decade or two. It was as recently as 1979, in *Bliss* v. *The Attorney General of Canada*,[59] that the Supreme Court of Canada held that discrimination on the basis of pregnancy was not sex discrimination. The Court stated:

> All inequality between the sexes in this area is due not to legislation but to nature.[60]

Today, it is clear that discriminating on the basis of pregnancy is illegal. It is also clear that motherhood and pregnancy are no longer viewed as

individual choices which should impact negatively on the careers of women who make them. Rather, they are seen as a benefit to society as a whole, the cost of which cannot legally be imposed on one half of the population.

This shift flows from the development of the contextual approach to equality rights. Since *Brooks* v. *Canada Safeway*,[61] and *Andrews* v. *Law Society of British Columbia*,[62] the Supreme Court of Canada has rejected formal equality in favour of substantive equality based on the impact of the activity on the subject group.

In *Brooks*, the Supreme Court of Canada recognized the imperative of accommodating working mothers and linked it to the economic and social disadvantage imposed on women because of their child bearing and child rearing functions. The Court concluded that this is one of the most significant ways in which women have been disadvantaged in society and that removal of these unfair impositions is a key purpose of anti-discrimination legislation.

D. Summary

Developments in the jurisprudence on discrimination on the basis of family status and pregnancy reveal a two-pronged approach: protecting against direct discrimination on the basis of pregnancy and the positive duty to accommodate women who bear and take primary responsibility for child rearing. Despite this clear legal standard, there is continuing resistance in the profession to recognizing and implementing the duty to accommodate the needs of working mothers.

It is difficult to understand this recalcitrance. The evidence does not indicate that these accommodations are not feasible or worthwhile. Fewer women lawyers than male lawyers have children and many women who do choose to have children will not interrupt their careers to any great extent. Many firms have schemes for sabbatical leaves, yet there is a reluctance to devise similar schemes for maternity purposes.

Further, fears of the disruption associated with child bearing and child rearing are greatly exaggerated. Pregnancy provides a generous period of notice and ample time to re-arrange work or employ replacements, indeed a great deal more than is commonly given or expected from departing staff and partners.

The demands of maternity are only one of the many reasons why practitioners, both men and women, leave their jobs. Increasing mobility in the profession causes more changes than family responsibilities. There is no basis for putting parental responsibilities in a different category from other reasons for leaving the practice of law. Similarly, while more flexible working arrangements are widely dismissed as the "amateurism of the part-timer", in fact there are many lawyers who combine practice with business interests, politics, or academic careers. Indeed, from the individual client's point of view, all their lawyers are part-timers!

In those instances where firms do accommodate women's needs by providing more flexible working arrangements, unexpected and unfair consequences that affect women's advancement as professionals frequently arise.

The resolution of this conflict is central to achieving gender equality in the legal profession and has repercussions far beyond those of the individuals struggling to achieve balanced lives. It is in the interests of the profession and the wider public that the profession facilitate the re-entry into the work force of trained professionals. In addition, there is a strong public interest in resolving this dilemma. As matters stand, those who rise to the top in their profession are among those who have minimal experience in raising children. It has been argued that they may be the least suitable people for making decisions of fundamental importance to society.[63]

V. SEXUAL HARASSMENT

A. The Nature of Sexual Harassment

Sexual harassment refers to all conduct which has the effect of eroding the dignity and equality of

opportunity of women lawyers. Such conduct ranges from insensitive or inappropriate remarks, to jokes, to overt sexual advances. This definition gives rise to some question about the appropriateness of the term. Some authors prefer sexual discrimination or gender harassment as more all encompassing terms. However, sexual harassment continues to be the word used to describe these various forms of behaviour.

This broad view has been affirmed by the Supreme Court of Canada in *Janzen* v. *Platy Enterprises*[64] where Chief Justice Dickson (as he then was) said:

> Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.
>
> Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.[65]

The following types of behaviour have been recognized by courts and tribunals as constituting sexual harassment: sexual assault; unwanted touching or patting; leering; sexually suggestive gestures; demands for sexual favours; derogatory or degrading remarks directed towards members of one sex or sexual preference group; repeated offensive sexual flirtations, advances, propositions; verbal threats or abuse; inquiries or comments about an individual's sex life; sexually degrading words used to describe an individual; sexist jokes causing embarrassment; and the displaying of offensive material.

One perspective on this behaviour is captured in the term "gendered interactions", that is, interactions where the sex of the individuals plays an unacceptable role or where sex inappropriately defines the nature of the interaction. These interactions are marked by the power relationship between perpetrator and victim.

Gender-based expectations are carried over into the workplace so that women are seen primarily as sex objects, no matter how business-like their behaviour is, while men are seen as active and competent, no matter how sexually they act.[66] Sexual harassment occurs because men are viewed as the natural inhabitants of workplaces. As relative newcomers to the legal profession women lawyers are not treated as lawyers but as women first because men have a hard time relating to women on other than a social or sexual basis.

As we have come to understand the dynamics of sexual harassment, its definition has broadened to encompass a hostile environment in the workplace and the liability of an employer for transgressions by his employees. It is estimated that 53% of women have been harassed at some point of their work lives.[67] This estimate is a conservative one given the problems with different forms of measurement and definitions of the behaviour included. Women with higher levels of education report experiencing higher rates of sexual harassment.[68]

The employment-based consequences experienced by women who are harassed include: career interruptions, job resignations, wrongful dismissals, lower productivity, less job satisfaction, reduced self-confidence, and loss of motivation and commitment to their jobs.[69] Sexual harassment may lead women to avoid contact with men at work, which may be detrimental to their career advancement. The result is fewer professional opportunities for women and increased sex segregation in the workforce.[70]

Reported incidents in the office, courtroom and chambers suggest that women face credibility issues that men do not.[71] Disrespectful forms of address, inappropriate comments on dress, marital status or parental roles, and sexual teasing or advances undermine women's credibility and effectiveness. Unacceptable behaviour in these environments can range from simple oversights, such as addressing a female lawyer by her first name while addressing men as counsel or by their proper name, to pointed remarks aimed at diminishing the woman's status in the eyes of client, judge and jury.

How do women lawyers respond to sexual harassment? In an ideal world women would be in a position to challenge such behaviour:

> I have found it necessary at the first instance of a sexist remark or a patronizing attitude to politely but very firmly make my attitude known on that particular issue. If one pretends to ignore it or overlook it, that is when the problem continues and I have seen other women lawyers fall into this trap. I believe women, no matter what their job or profession, should be encouraged to immediately object to a sexist remark or overtone so that it is understood by both parties that such behaviour is unacceptable.[72]

However, the reality is that sexual harassment is difficult to address because of power imbalances. These situations create a double bind for professional women, because many assume that people with professional training should be able to deal with these problems and that only an incompetent person would allow herself to be victimized. Women's position in the hierarchy of law offices is rarely one of power and/or independence. They are also acutely aware that a bad reference from an embittered ex-employer can do long-term damage to a career.

The closed nature of the profession means that the fear of retaliation is well-founded. This is particulary true in dealing with inappropriate behaviour by partners and judges because of the enormous power disparity and lack of overarching authority structure.

B. The Extent of Sexual Harassment in the Legal Profession

Only three of the provincial surveys directly addressed the issue of sexual harassment as a form of gender discrimination in the legal profession. Neither the Ontario nor the Saskatchewan surveys inquired into sexual harassment in the professional setting. However, the Saskatchewan report addresses this issue in general terms.

TABLE 3

Experience/Observation of Sexual Harassment of Women Lawyers

Province		Unwanted Sexual Advances		Unwanted Teasing/ Joking	
		Women	Men	Women	Men
British Columbia	by lawyers	33.7%	10.2%	68.2%	34.5%
	by clients	31.9%	9%	53.6%	18.5%
Alberta	by lawyers	37%	17.2%	64.7%	32.1%
	by clients	34.6%	8.2%	51.5%	18.2%
Quebec		15%			

The British Columbia and Alberta surveys asked respondents whether they had experienced or observed sexual harassment in the professional setting in the previous two year period. Sexual harassment was defined in two separate categories "unwanted sexual advances" and "unwanted comments, teasing and jokes of a sexual nature". The surveys also asked about sexual harassment of lawyers by clients and about harassment of support staff. The results of the surveys are summarized in Table 3.

The results were strikingly similar in British Columbia and Alberta. One third of women and 10% of men had observed or experienced women lawyers being subjected to unwanted sexual advances by other lawyers and similar percentages had observed or experienced this behaviour by clients. Over two-thirds of women and one-third of men had experienced or observed unwanted comments, teasing or jokes of a sexual nature against women lawyers. Over half of women and 19% of men had experienced or observed this behaviour by clients.

The results of the Quebec survey reveal that 15% of female members of the Quebec Bar had been or currently were victims of sexual harassment. The principal categories of harassment were harassment by a colleague (20%) and by a superior (17%). The incidences of harassment by a client was much lower (2%).

The surveys reveal a disturbingly high incidence of sexual harassment within the legal profession. Also disturbing are the discrepancies in the perception of the existence of sexual harassment by men and women.[73] Men's failure to notice as many incidents of sexual harassment as women may be the result of differing perceptions of what constitutes harassment or the result of women's experience in courtroom and professional transactions. Women are not "observers" of harassment in the way that men may be. Both may be participants in acts of harassment, but women are more likely than men to be unwilling participants. This is an example of the relative power of men and women in the profession.

C. The Law of Sexual Harassment

Although the pervasiveness of sexual harassment on the job is now widely acknowledged as a reality for women working in paid employment, it has only been in recent years that courts have recognized sexual harassment as sex discrimination and therefore actionable under anti-discrimination legislation. In her article, "Sex at Work", Susan Estrich states that,

> (T)he problem with the court decisions, and the attitudes they reflect, is that offensive sexuality is so routinely considered normal, abuse of power acceptable, and the dehumanizing of women in sexual relations unremarkable, that when we (or the courts, at least) see such things at work, it hardly seems a "federal case".[74]

However, the overdue recognition of sexual harassment as a serious issue has, to some extent, taken hold. Beginning with the realization that the harassment of women at work is a form of sex discrimination, courts have now held that sexual harassment occurs not only when a woman is directly informed that sexual favours are to be exchanged for job security, advancement, or monetary rewards, but also when a work environment is so hostile to women that it interferes with female employees' ability to do their work.[75] Employers have been held legally responsible for damages because of sexual harassment, both when the acts complained of were committed by the employers themselves or by employees in supervisory positions, but also as a consequence of any work-related act of sexual harassment against an employee. This is particularly true if it is found that the employer had either constructive or actual knowledge of the activity and did nothing to remedy the situation.[76]

In the United States, the perspective for judging what type of behaviour is inappropriate in the workplace is shifting from that of the "reasonable person", to a consideration of how a "reasonable woman" in the circumstances would have perceived the behaviour.[77] In Canada, a similar transformation has taken place, perhaps because of the focus on the impact of discriminatory behaviour on the victim of that discrimination.[78]

1. Leading Canadian cases on Sexual Harassment

In Canada, the Supreme Court has dealt with the issue of sexual harassment in two important decisions. In *Robichaud and the Canadian Human Rights Commission* v. *The Queen (Treasury Board)*,[79] the issue was whether an employer is liable for unauthorized acts of sexual harassment by its employees. The Court held that as the employer is best able to provide the result sought in these cases, that is a workplace free of harassment, the employer must be the one responsible for work-related acts of sexual harassment. The Court went on to hold that the legislation in question, the *Canadian Human Rights Act*[80] does not require a finding of fault. Rather, the legislation is remedial so the intent, motivation, or cause for the harassment is irrelevant. The effect of the discriminatory behaviour on the victim and the fashioning of the most appropriate remedy should be the focus.

In *Janzen* v. *Platy Enterprises*,[81] the court found it uncontroversial that sexual harassment is a form of sex discrimination. The Chief Justice considered various definitions of sexual harassment in both Canada and the United States. He found the American distinction between "*quid pro quo*" harassment and "hostile work environment" harassment to be unhelpful. He found that the main point in sexual harassment cases is that,

> unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.... (S)exual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.[82]

The responsibility of employers to ensure that employees in supervisory positions do not abuse their power over other employees has been extended to include the responsibility to prohibit sexual harassment between co-workers. In *Thessaloniki Holdings Ltd.* v. *Saskatchewan (Human Rights Commission)*,[83] the Saskatchewan Human Rights Commission found an employer liable for the sexual harassment of one of its employees by another. In this instance the harassing employee had no supervisory power over the harassed worker. The Court observed that employers should not worry about being unjustly held liable for acts about which they knew nothing. However, they must respond appropriately to reported incidents of harassment and take proper preventative measures.

D. SUMMARY

The jurisprudence on sexual harassment makes it very clear that both the perpetrator and the employer who allows sexual harassment to occur in the employment context will be held liable for sexual harassment. It is difficult to understand the high incidence of sexual harassment in the legal profession given these legal implications. While most of the case law focuses on the employment situation, we must also be concerned about inappropriate conduct in relations among counsel, among partners, between lawyers and clients and between lawyers and court personnel. The huge discrepancy between the reality of sexual harassment and the law underscores the urgency of formulating solutions to this form of gender discrimination.

VI. CONCLUSION

This analysis of law society surveys, research and case law on gender-related issues demonstrates the widespread perception and existence of gender discrimination in the legal profession. The commonalities in the results across the five provincial law society reports is striking. The results could be characterized as providing an overall picture of the situation of women in the legal profession.

According to these studies:

- the vast majority of women surveyed report both the perception and experience of gender bias in the legal profession;
- the vast majority of female lawyers face barriers to career advancement and this is evidenced in the patterns of access to legal positions; access to areas of practice; work allocation; access to partnership and remuneration;
- female lawyers with child care responsibilities are discriminated against because of the lack of accommodation in the profession, this results in loss of income and reduced opportunities for advancement;
- more than one in three female lawyers have experienced sexual harassment in the form of unwanted sexual advances;
- two-thirds of female lawyers have experienced sexual harassment in the form of sexual comments, teasing and joking.

The analysis also outlines the relationships between forms of discrimination, perhaps most strikingly, the relationship between career advancement and child care and family commitments.

The Task Force recognizes that if women lawyers are faced with this degree of discrimination other women employees must also suffer from discrimination. While the situation of non-lawyer employees such as paralegals and secretaries is a matter of equal concern, it is beyond the scope of this

Report. However, the Task Force is hopeful that changes brought about for women lawyers will also ameliorate the situation of non-lawyers.

The nature of the barriers to equality confronting women in the various sectors of the profession are reviewed in more detail in the following chapters. The chapters start with the sectors with the largest number of women and move to those with the smallest, that is: private practice; government legal departments; corporate legal departments; faculties of law; administrative tribunals and the judiciary.

ENDNOTES

1. S. Martin, "The Dynamics of Exclusion: Women in the Legal Profession" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992) at 1.

2. The five law societies are: Ontario, *Transitions in the Ontario Legal Profession* (Law Society of Upper Canada, May 1991); British Columbia, *Women in the Legal Profession* (Law Society of British Columbia Sub-Committee on Women in the Legal Profession, September 1991) and *Gender Equality in the Justice System* (Law Society of British Columbia, September 1992); Alberta, *Identifying the Issues: A Survey of Active Members of the Law Society of Alberta* (Joan Brockman, Alberta Law Foundation, March 1992) and *Leaving the Practice of Law: A Survey of Non-Practising Members of the Law Society of Alberta* (Joan Brockman, Alberta Law Foundation, February, 1993); Saskatchewan, *A Study of Gender and the Legal Profession in Saskatchewan, 1990-91* (S. Robertson, A Report submitted to the Committee on Gender Discrimination, August, 1992) and *A Report on Gender and the Legal Profession in Saskatchewan* (Law Society of Saskatchewan, Canadian Bar Association - Saskatchewan Branch and College of Law, University of Saskatchewan, November, 1992); Quebec, *Les femmes dans la profession* (Barreau du Québec, Aôut, 1992) and *Balancing Professional and Family Responsibilities: A Survey of Lawyers and Law Firms* (J.L. MacBride King and H. Paris, report prepared for the Association du Jeune Barreau de Montréal, 1988). The Nova Scotia Barrister's Society has also surveyed its members on gender issues. This report was not available at the time this report was drafted.

3. In Quebec, only women lawyers were surveyed.

4. C. Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The Feminization of the Legal Profession" (1986) 24 *Osgoode Hall Law Journal* 897 at 908.

5. Manitoba Working Group Report.

6. Manitoba Working Group Report.

7. Manitoba Working Group Report.

8. This section is derived in large measure from a paper prepared by Sylvia L. Tint and Evelyn J. Baxter entitled "Gender Discrimination at the Entry Level" contained in the submission of the National Constitutional and Human Rights Law Section to the Task Force.

9. Ontario Working Group Report.

10. *Supra*, note 2.

11. Law Society of British Columbia, *Women in the Legal Profession, supra*, note 2.

12. C. Menkel-Meadow, "Change in the Legal Profession" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992) at 5-6.

13. J. Brockman, *Identifying the Issues, supra*, note 2 at 23.

14. *Chapdelaine* v. *Air Canada* (1992), 15 C.H.R.R. 4, D/22 at D/32 (Can. Rev. Trib.).

15. *Ibid.* at D/35.

16. B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 142.

17. (1983), 4 CHRR D/1456 (B.C. Bd. Inq).

18. See M-F. Bich, "De l'art de passer à travers les mailles du filet - prolégomènes et polémique" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992).

19. These analogies were put forward by the numerous minority women consulted.

20. *Ibid.*

21. 75% of female respondents in British Columbia and 82% in Alberta.

22. 56% of men in the British Columbia survey and 57% of men in the Alberta survey did not perceive gender bias in career advancement.

23. The most frequently cited problem was interactions with male colleagues (35%).

24. Approximately 14% of Alberta men and 9% of the men in the British Colubia survey reported being denied work on a file due to client bias.

25. 5% of men reported this.

26. From responses to the questionnaire sent to Women of Colour.

27. From responses to the questionnaire sent to Women of Colour.

28. *Transitions in the Ontario Legal Profession, supra,* note 2 at 31.

29. *Ibid.* at 30.

30. E. Mackay, *Les avocats du Québec, sondage général* (Montreal: Barreau du Québec, 1991).

31. Bich, *supra,* note 17.

32. S. J. Spurr, "Sex Discrimination in the Legal Profession: A Study of Promotion" (1990) 43 Industrial and Labor Relations Review 406.

33. The results by province were: in Alberta 51% of women and 14.2% of men and in British Columbia 51% of women and 18.7% of men perceived gender bias in remuneration; in Quebec 20% of women perceived discrimination in remuneration and 47% had salaries lower than their male counterparts.

34. *Transitions in the Ontario Legal Profession, supra,* note 2 at 22-23.

35. *Women in the Legal Profession* (B.C.), *supra,* note 2 at 29.

36. B. D. Adam and D. E. Baer, "The Social Mobility of Women and Men in the Ontario Legal Profession" (1984) 21 Canadian Review of Sociology and Anthropology 21 at 44; D. A. Stager and D. K. Foot, "Changes in Lawyers' Earnings: The Impact of Differentiation and Growth in the Canadian Legal Profession" (1988) 13 Law and Social Inquiry 71 at 85; D. K. Foot and D. A. Stager, "Intertemporal Market Effect on Gender Earnings Differentials: Lawyers in Canada, 1970-1980" (1989) 21 Applied Economics 1 at 18.; J. Hagan, "The Gender Stratification of Income Inequality Among Lawyers" (1990) 68 Social Forces 835.

37. Hagan, *ibid.* at 849.

38. P. H. Armstrong and H. Armstrong, "Sex and the Professions in Canada" (1992) 27 Journal of Canadian Studies 118.

39. Manitoba Working Group Report.Studies 118 at 125.

40. Manitoba Working Group Report.

41. Manitoba Working Group Report.

42. C. Menkel-Meadow, *supra,* note 4 at 901.

43. See J. Drakitch, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989) 3 Canadian Journal of Women and the Law 69 at 85; J. White, "Part-Time Work: Ideal or no Deal?" in E. D. Pask, K. E. Mahoney and C. Brown, eds., *Women, The Law and the Economy* (Toronto: Butterworths, 1985) at 21.

44. C. Geller, "Equality in Employment for Women: The Role of Affirmative Action" (1990-1991) 4 Canadian Journal of Women and the Law 373 at 400.

45. (1984), 104 S.Ct. 2229.

46. 42 U.S.C. 2000e(b), and 2000e(a).

47. (1989), U.S.S.C. 109 S.Ct. 1775.

48. Vizkelety, *supra,* note 16 at 83.

49. 751 F. Supp. 1175 (E.D.Pa.1990); and 758 F. Supp. 303 (E.D.Pa.1991) (currently under appeal).

50. *Guthro* v. *Westinghouse Canada Inc.* (no 2) (1992), 15 C.H.R.R. 32, D/388 (Ont. Bd. Inq.).

51. *C.B.C.* v. *O'Connell* (1990), 12 C.H.R.R. 5, D/69 (Can. Rev. Trib.).

52. Manitoba Working Group Report.

53. Nova Scotia Working Group Report.

54. M. J. Mossman, "Work and Family in the Legal Profession: Rethinking the Questions" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference: 1992) at 9-14.

55. *Ibid.* at 13.

56. This is derived in part from R. T.C. Wong, "Pregnancy, Maternity Leave and Alternate Work Schedules", the submission by the National

57. *Balancing Professional and Family Responsibilities* (Quebec), *supra,* note 2 at 22.Constitutional and Human

Rights Law Section to the Task Force.

58. Bich, *supra*, note 18 at 26-27. See also M. Rochette, *Les femmes dans la profession juridique au Québec: de l'acces à l'intégration, un passage côuteux* (1990) cahier 40, Québec, Groupe de recherche multidisciplinaire féministe, Université Laval, at 136-139.

59. [1979] 1 S.C.R. 183.

60. *Ibid.* at 190.

61. [1989] 1 S.C.R. 1219. The Quebec Working Group Report notes that there is some concern that *Brooks* does not apply in Quebec.

62. [1989] 1 S.C.R. 143.

63. Mossman, *supra*, note 54 at 13.

64. [1989] 1 S.C.R. 1252.

65. *Ibid.* at 1281-1282.

66. B. Gutek, "Understanding Sexual Harassment at Work" (1992) 6 Notre Dame Journal of Law, Ethics & Public Policy 335.

67. *Ibid.* at 344.

68. J. Meier, "Sexual Harassment in Law Firms: Should Attorneys be Disciplined Under the Lawyer Codes" (1990) 4 Georgetown Journal of Legal Ethics 169 at 170.

69. *Women in the Legal Profession* (B.C.), *supra*, note 2.

70. Gutek, *supra*, note 66 at 349.

71. See *Report on Women of Colour*, Appendix 10.

72. Nova Scotia Working Group Report.

73. Menkel-Meadow, "Change in the Legal Profession", *supra*, note 12 at 7.

74. S. Estrich, "Sex at Work" (1991) 43 Stan. L. Rev. 813 at 860.

75. See, for example, *Robinson* v. *Jacksonville Shipyards* (1991) 760 F. Supp. 1486 (M. D. Fla.).

76. For example, *Robichaud and the Canadian Human Rights Commission* v. *The Queen (Treasury Board)* [1987] 2 S.C.R. 84; also, *Janzen, supra*, note 64, and *Thessaloniki Holdings Ltd.* v. *Saskatchewan (Human Rights Commission)* (1991), 38 C.C.E.L. 244 (Sask.Ct.Q.B.)

77. See *Ellison* v. *Brady* (1991), 924 F.2d 872 (9th Cir.).

78. See cases listed at note 76.

79. *Robichaud, supra*, note 76.

80. *Canadian Human Rights Act*, C.S.C., c. H-6.

81. *Supra*, note 64.

82. *Ibid.* at 1283-1284.

83. *Thessaloniki, supra*, note 76.

CHAPTER FIVE

PRIVATE PRACTICE

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CHAPTER FIVE
PRIVATE PRACTICE

I. INTRODUCTION

Private practice is the paradigm for the profession. It is still the central image conjured up when one thinks of the practice of law. Statistics indicate that while female lawyers enter private practice in greater numbers than other sectors, they are under-represented in this sector in comparison with their male counterparts. Under-representation is the result of the two trends described in the preceding chapters: (1) a higher proportion of women enter other sectors of the legal profession at the initial entry level relative to men and (2) there is a higher attrition rate for women than men from private practice.

Change in the private bar is essential to achieving gender equality for the profession as the success rate of women in private practice has broad implications for all women lawyers. Law firms are the model for the profession and the most powerful positions in legal practice are in the largest firms. These firms interconnect with the boards and directorships of major corporations, offer their lawyers the highest incomes, and significantly influence the ruling bodies of the legal profession itself.[1] If women do not remain in private practice, they will not occupy the powerful positions in the profession and will consequently be unable to influence structural change at the higher levels of the profession. In addition, the majority of judicial appointments are drawn from lawyers practising in this sector.

The Task Force conducted its inquiry into gender discrimination in private practice from the perspectives of large and small law firms. It is not easy to distinguish between "large" and "small" law firms. Clearly, the "largeness" of the firm is specific to the community: what is considered a large law firm in downtown Toronto is different from what comprises a large law firm in Kelowna, British Columbia. The Task Force arbitrarily defined large law firms as firms with 10 lawyers and above and small firms as those with fewer than 10 lawyers. However, the difference between large and small firms may be less a question of numbers and more a question of organizational structure. For example, the hiring of an office administrator may signal the transition from a small to a large firm.

The evidence of barriers to women in private practice has already been well-documented in the studies undertaken by law societies. The provincial and territorial Working Groups carried out extensive consultations through roundtable discussions, mini-surveys and individual interviews to supplement these reports. Discussions focused on specific problems faced by women and on recommended solutions.

Many of the barriers faced by women are common to all private law firms, regardless of their size. In fact, many of the solutions that are proposed in the discussion of equality in the large law firm are equally applicable to smaller firms. The major difference between the two is the economic base of the practice. Accommodation of women practising in smaller firms or independently will depend to a greater degree on solutions outside the firm itself — that is on profession-wide or even society-wide mechanisms. The Task Force has consolidated its findings and recommendations about large and small law firms because of the degree of commonalities and overlap. Unless specifically designated, the commentary and proposed solutions are equally applicable to all firms.

This chapter begins with a general discussion of the culture of legal work in the large and small firm contexts. This introductory section is followed by reviews of the types of discrimination described in

the preceding chapter: (a) employment opportunities; (b) career development and advancement; (c) accommodation of family responsibilities; and (d) sexual harassment. A solution-oriented approach is taken throughout.

II. LAW FIRM DYNAMICS

A. THE "PERSONIFICATION" OF THE CULTURE OF LEGAL WORK

Legal work is demanding. To meet the standards of competence expected by the profession requires an intensity of preparation that can rarely be met within normal working hours. Law students become aware of this in law school. Law is also a service-oriented profession. Client demands and expectations play an important role in shaping the structure of the practice of law. These factors are imbued in the culture of the law firm.

While these external demands mold the practice of law, the ultimate shape of the mold is determined by the guiding peer model. The model lawyer is a white, male, competent and respected lawyer, with a devoted clientele. This model lawyer readily achieves and exceeds his quota of billable hours. While he is a family man, his family does not interfere with his dedication to the firm. Rather, his family is a stabilizing force, whose only intrusion into the firm is the standard framed family photograph on the desk.

This model of the successful lawyer was developed by men. It is a career model in which the average lawyer made few, if any, job changes before settling with one firm. The lawyer then produced a continuous stream of work until retirement and neatly separated family life from his professional one. His success was to be measured by his earning power and unswerving commitment.

This model projects a narrow view of how individuals are valued. It is promoted by a narrow perspective of the values of the legal profession in which business interests predominate over service to the community. Significantly, this model makes no allowance for family responsibilities. It is based on assumptions about the availability of domestic labour to support the lawyer's activities at work. These assumptions reflect and reinforce a system of gender privilege in which men can achieve their billing targets and be fully committed to their practice because the home front is not their concern. This system ensures that a disproportionate number of women will be effectively barred from elite jobs.[2]

Women did not influence the development of this model. In fact, it is difficult to discern a female form in this image, and even less a pregnant one. The legacy of total formal exclusion of women has been replaced by partial informal exclusion. This means that the male "insiders" define women as "outsiders", making them both separate and unequal members of the profession.[3] This legacy also means that women continue to be penalized for their dissimilarity to men: "For women in law, professional equality has meant being able to participate as men on men's terms."[4]

It is essential to recognize this invisible and yet tangible model because the structure of the law firm flows from the assumptions that this model embodies. The model produces an inflexibility in the practice of law and a concomitant lack of accommodation for an increasingly diverse profession. These consequences are discussed in greater detail in the following sections on organizational structure and barriers to equality.

The fact that this is the existing model does not mean, however, that this is the only or the best model. If the slate were wiped clean and one were to design a new culture for private practice today, that culture could reflect the large number of women in the profession and the fact that many families have two parents who work outside the home. There are few inherent limits to the way in which law is practised.

However, in order to effect real change we must be prepared to address underlying issues: Is the practice of law organized so as to efficiently and effectively meet client needs now and in the future, or is it organized according to traditional but untested

ideas about clients' needs? Is the legal culture of long hours at the workplace necessary, or does it reflect a tradition that thrives on work (and money) for its own sake?[5]

The practice of law is shaped by the organizational structure of the firm which embodies the culture of legal work described here. Before embarking on a discussion of the specific barriers faced by women in this workplace culture, it is essential to take a closer look at the context of large and small law firms.

B. The Large Law Firm

1. The Large Law Firm Context

Gender issues and large law firm dynamics are closely intertwined. The large scale entry of women into the profession has coincided with the emergence and growth of large firms. This growth represents an historical shift from sole and smaller firm practice to larger scale aggregations of lawyers in hierarchically structured partnerships.[6]

The large law firm is a relatively new phenomenon. None of the 50 largest firms in Canada had more than 100 lawyers in 1970, and only one firm had more than 100 lawyers in 1980. By 1990, 19 firms had more than 100 lawyers.[7]

The reasons postulated for this development include: the dramatic increase in the number of lawyers; economies of scale; size and internal diversity of clients; the relationship between the internal composition of law firms and partnership profits; and the value of name recognition.[8] The size of a law firm is also often market-driven. The larger corporate clients want a relationship with a firm that can provide a variety of competent specialists and has the resources to provide services for any size of transaction within a time schedule that is suitable to the client.

Large law firms produce the highest earnings per lawyer. They seek and attract the brightest students and, taken as a group, large law firms employ the largest number of students. Large law firms are often politically influential and are seen as stepping stones to careers in politics, the judiciary, industry and commerce. In this way they epitomize the professional ideal.

During the 1990s, large law firms have been in transition. The recession has reduced and concentrated the pool of larger clients and the number of transactions available to large law firms. At the same time, competition has become more intense as a number of large law firms have acquired national presence by opening branches in other provinces or becoming associated with existing firms in other provinces.

The movement into practice groups to achieve specialization has accelerated within large law firms. Each member of the practice group, from junior lawyer to the senior partner, is expected to operate under a business plan. Students and associates are no longer recruited only to process work generated by a partner. They are also recruited for their business and marketing skills and must persuade the large law firm of their ability to develop and manage a clientele.

The road to partnership is also becoming longer. Admission to partnership no longer requires only high productivity, but also an established client base. The prevailing view is that these changes will outlast the recession because they are propelled by changes in the nature of the profession itself. It is considered unlikely that large law firms will permit their partnerships to grow at the rate that prevailed in the 1980s.

While large law firms are clearly in a state of evolution, the fundamental aspects of large law firm culture and organizational structure endure. It is this base which must be examined in order to understand the barriers faced by female lawyers and the strategies that can be used to overcome gender discrimination.

2. Organizational Structure

Each large law firm has a unique organizational structure. However, these arrangements reflect

variations on shared organizing principles. The partners generally appoint a managing partner and an executive committee. Day to day management is carried out by the managing partner, usually with the assistance of a non-lawyer administrator. Significant decisions are taken by the executive committee. Lawyers are organized into practice groups, each with its own chairperson who has some responsibilities for budgeting, client development, profitability, and associate training. Other committees of partners handle such matters as the annual review of partners' compensation, associate recruitment, professional development and other functions.

The profitability of a large law firm depends on its lawyers' productivity. This productivity is generally measured in terms of "billable hours". The partners' income is also influenced by the "leverage" they are able to achieve, that is, the ratio of salaried lawyers to partners drawing profits.

While there are varying targets of billable hours for associates amongst large law firms, a common expectation is about 1600 hours per year.[9] Assuming 250 working days per year, meeting the target requires approximately six and one-half billable hours per day. In addition to producing billable hours, associates are expected to spend time on client development, professional development, law firm committees, the administration of their practice and community activities.

It is therefore common knowledge that achieving 1600 billable hours is impossible without working evenings and weekends. It is also well understood that the ability to achieve billable hour targets varies with a lawyer's area of practice. A major litigation file or a major commercial transaction requires intense preparation in long blocks of continuous work. Such files can produce a high number of billable hours in a short period of time. However, a general commercial or family law practice, where there are large numbers of files being serviced, a lot of time spent on the phone and a lot of time lost switching between files, will not yield a daily average of six and one-half billable hours unless the lawyer is in his or her office for 9 or 10 hours per day.

The hierarchical structuring of personnel is pronounced in the large law firm. It differs considerably from the situation of the sole practitioner or the lawyer working in a loose association with other lawyers. A related development is that a higher proportion of new lawyers are starting their careers as employees and remaining in that status for longer periods.[10]

Large law firms have characteristically striven for at least a one to one ratio of associates to partners. The greater the number of associates the better. During the economic expansion of the 1980s, associates were recruited at a much higher rate than they became partners. Partners' leverage rose and large law firms prospered. For example, in the United States, between 1951 and 1980, the number of associates increased fivefold, while the number of partners increased less than threefold.[11] Although perhaps not as pronounced, similar trends are apparent in Canada.[12]

In the past, associates have expected to become partners after five to seven years of practice. However, in the 1990s leverage is shrinking as associates are being been laid off and fewer are being recruited. With the high overhead per lawyer accruing to large law firms, any significant drop in revenue has a direct impact on partners' income. As the pool of associates declines, emphasis naturally shifts to partner productivity. Unproductive partners have often been eased out or suffered a substantial reduction in earnings. Associates are faced with the reality of reduced partnership opportunities.

In the United States, there has been a trend toward changing the pattern of upward mobility within firms. The long dominant "up-or-out system" by which associates were either promoted to partnership or fired, is no longer as prevalent. Firms are no longer characterized by a two-tier structure of partners and associates. New categories of employee lawyers have emerged, including permanent associates, staff lawyers, special counsel, non-equity partners, junior partners and senior lawyers.[13] It is likely that these new patterns of employment will develop in Canada, and there are already signs that this is the case.[14]

C. THE SMALL LAW FIRM CONTEXT

It is impossible to devise a uniform description of the small law firm because of the huge variety in operating styles. However, small law firms do share many of the organizational structures evident in large firms. Billable hours, committees, and the partner-associate relationship also shape the practice of law in the small firm. The smaller law firm context provides greater flexibility than the structure of the large firm and therefore greater potential for accommodation of the diverse needs of lawyers. Flexibility results in more informal management practices, including less formal methods of evaluation, greater control over work schedules and workload, and a less rigid hierarchical structure.

While the smaller scale of the firm enhances flexibility, the smaller economic base means that firms can provide less support to their members in comparison with larger firms. Lawyers work more independently and cannot count on the broad network of colleagues and support staff available in larger firms.

The existing organizational structure in law firms has established the parameters in which women lawyers practice law. The structural dynamics of law firms operate in a manner which disadvantage women and permit discriminatory practices to go unchecked. This discrimination takes a number of forms including limited employment opportunities, barriers to career advancement, lack of accommodation of family responsibilities and sexual harassment.

III. BARRIERS TO EQUALITY IN THE LAW FIRM

A. EMPLOYMENT OPPORTUNITIES

1. WOMEN AND THE LARGE LAW FIRM

Generally-speaking, women are well-represented in articling positions and at the junior associate level. They are entering large law firms at about the same rate as men. The use of objective criteria in the hiring process, such as law school standing, helps to create a level playing field for most women applicants to large firms although subjective factors are still taken into account. However, three to four years from their call to the bar, women begin leaving large law firms at a higher rate than men.[15] A commonly heard refrain is "I'm the only woman of more than ten years of call in my firm". The perception is that senior women in large law firms are an "endangered species".

The pattern of early entry in equal numbers followed by more rapid attrition does not hold true for Women of Colour, Aboriginal women, women with disabilities and lesbians. These groups are not well-represented in large law firms. Here the experience indicates discriminatory practices in a number of areas including hiring.

2. WOMEN AND THE SMALL LAW FIRM

The provincial and territorial Working Group reports contain detailed accounts of problems faced by female lawyers with respect to hiring practices in small firms. There is a general perception that women are less desirable employees than men. The apparent preference for men is linked most closely to the possible disruption to the small firm of a future pregnancy.

Gender also poses a barrier to entry into small firms that have specialty areas still viewed as being "male expertise areas" such as criminal law, corporate, security or tax law. Women are frequently channelled into the practice of family law, regardless of their personal aptitudes and preferences. Bias in hiring based on sex-typing is particularly pronounced when firms have traditionally been exclusively male.

All-woman firms have evolved to counteract the exclusionary trends experienced by women. These firms often develop innovative ways to meet the needs of women practising law. Women find an attitudinal difference between all-female firms and most male dominated firms. For example, women are generally more supportive and sympathetic to issues surrounding maternity leave and child care. All-women firms thus present an option to female

lawyers. However, if these firms develop because other firms will not adapt to the needs of women lawyers, then this is symptomatic of the need for change in other law firms.

3. Hiring Practices

Notwithstanding the increasing rate at which women are entering the profession, the Task Force consultations revealed numerous incidents of discriminatory practices in the hiring process. Some firms seemed to screen women out by inquiring about their marital and family status. In some cases these unfair questions were not asked but remained unstated assumptions that marred the hiring process. Other women were asked to guarantee that they would not become pregnant for a specific period of time.

In hearing these reports, the Task Force was struck by a sense of being in a time warp. It appears as though discriminatory questions which were simply not asked during hiring interviews in the last two decades are once again in vogue. Some employers have developed guidelines for appropriate questions to be asked during the interview process.[16] All law firms should adopt and implement these guidelines.

The negative reception that minority women receive during the hiring process indicates that they are being excluded from law firms on grounds other than merit. Women of Colour and Aboriginal women reported feeling shunned by representatives of large law firms on articling day. Many remarked on negative reactions when interviews were granted on the basis of resumes that did not disclose the woman's racial or ethnic background.

In trying to assess the number of minority women practising in large law firms, the Task Force has been forced to rely on the information obtained from consultations and informal discussions. Access to private practice, and particularly the large law firms, was seen as the single greatest barrier facing these lawyers.[17] There are no statistics to substantiate the lack of representation of minority women. This is due in part to the fact that these women are so poorly represented in large firms and also because law societies do not gather such information. However, the anecdotal evidence is overwhelming. Given the overt barriers faced by minority women, law firms should adopt and implement effective employment equity programs in order to provide equal career opportunities for members of these groups.

RECOMMENDATION:

5.1 The Task Force recommends that law firms adopt guidelines for questions to be asked during interviews for articling and other positions.

RECOMMENDATION:

5.2 The Task Force recommends that law firms adopt and implement effective employment equity programs.

4. Areas of Practice

It has been suggested that women are segregated into certain areas of practice, that they are being channelled into family law and estate practice, and are unable to fully penetrate corporate and general litigation practice. This is particularly a problem in large law firms where lawyers are hired into specific practice groups and is analogous to problems with allocation of files which is discussed below.

It is difficult to assess the exact nature of this phenomenon because there is some indication of a preference by women for careers in public interest, family law, estate law and environmental law.[18] It is difficult to know whether this is a process of self-selection or sex-typing by others.

One reason for women choosing less high profile (and often less lucrative) areas may be that these areas are better suited to part-time practice. But do women choose these areas of practice knowing that

they provide greater flexibility or do employers assume that female lawyers are interested in this trade-off? The broader question of why there has to be a trade-off is addressed in the section on accommodation of family responsibilities.

Despite these complicating factors, there is evidence that women are over-represented in family and juvenile law and under-represented in civil litigation.[19] Many women have complained of being discouraged from entering some areas of law within law firms.

Here again, minority women face multiple barriers in trying to enter areas of practice in large law firms. For example, the stereotypical view of Asian-Canadian women may prevent them from acquiring litigation positions. These women are perceived as being soft-spoken, demure and non-confrontational and therefore not having the temperament that would allow them to succeed as litigators.[20] Aboriginal women face bias which works in two opposites ways. On the one hand, they are expected to work on native law files regardless of individual expertise or interest and, on the other, they are barred from Aboriginal law sections within some large law firms because of perceptions that they can not perform this work in an unbiased manner.[21]

Law firms should monitor the entire hiring process to ensure that all articling students and junior associates have an equal opportunity to develop expertise in a broad range of practice. Such monitoring should include reconsidering the firm's original decision to hire a lawyer into a particular group as well as conducting reviews during the firm's articling period and early years of practice.

RECOMMENDATION:

5.3 The Task Force recommends that law firms monitor the hiring process to ensure that all articling students and junior associates have an equal opportunity to develop expertise in all areas of practice.

B. Career Development and Advancement

The research and consultation carried out by the Task Force demonstrate that career development and advancement by women lawyers is often blocked by prejudicial attitudes and structural barriers. Discrimination is exhibited in many forms, including: allocation of work; client development practices; lack of mentoring; admission to partnership; and exclusion from influential committees.

1. Allocation of Work

a. Pink Files/Blue Files

Discrimination in the allocation of files has been described as the "pink file" and "blue file" phenomenon. Women are allocated more "pink" files which involve less high profile matters, less client contact and correspondence, and reduced opportunities to develop legal skills and a client base.

There are attitudinal and structural barriers that prevent women from developing a client base as easily as their male counterparts. At the individual level, women tend to be passed over when lawyers look for successors for clients who are being transferred. Internal client referrals appear to move exclusively from senior male to junior male lawyers. There is a demonstrable need to track internal referrals.

In addition, women lawyers are systematically excluded from areas of practice which involve significant client contact. They are steered into research or clerical work.

These are self-perpetuating cycles in which women do not have the opportunity to prove themselves through higher profile work with greater client contact, thereby improving their chances to develop independent practices and to advance in the firm. This cycle must be broken by a systematic internal review of allocation of files in order to ensure that all lawyers have access to a range of files.

Women and men lawyers should have the opportunity to work on files of equal importance, equal gravity and equal complexity. Associate reviews should be used to verify that all associates receive significant and wide-ranging experience. If a review reveals that a lawyer is lacking a certain kind of exposure then the law firm should make a commitment to remedying that defect.

RECOMMENDATION:

5.4 The Task Force recommends that law firms ensure that all lawyers have access to a range of files. Law firms should track internal referrals to determine whether systemic discrimination exists.

b. Client Attitude

One issue that arises with work allocation is that women are denied certain files because of an expressed or implied client preference. Firms often do not support women lawyers when clients object to having a woman lawyer assigned to their file. Experience has shown, however, that when firms stand behind the woman's involvement the client's resistance disappears.[22]

It seems almost inevitable that women will encounter client resistance at some time in their careers, if only because the general public has always identified lawyers as men. The likelihood of resistance is increased if a defensive or apologetic attitude is adopted by senior lawyers when introducing their female colleagues. It is obvious that lawyers' fears in this area are greatly exaggerated. In part, these attitudes may stem from lawyers' own reservations, which they assume are shared by clients.

Women lawyers practising in small firms may face more severe client bias because women cannot rely on the reputation of the large firm nor, in many instances, the same degree of support from the partnership. Lawyers tend to gain credibility by the mere fact that they are members of a large law firm. Clients tend to assume that all lawyers at large firms are competent.[23]

Client bias is particularly evident in the type of work assigned to women lawyers at small firms. For example, business clients may request that women lawyers handle their family law files while corporate and real estate files remain with male lawyers.[24]

In any event, clients' resistance does not justify a firm's discriminating against women (or against minority groups). On the contrary, it imposes a positive obligation on the firm to educate clients to accept women as an integral part of the legal profession. Partners should support women lawyers in their firm and speak out against their clients' discriminatory attitudes and actions.

RECOMMENDATION:

5.5 The Task Force recommends that partners should support female lawyers when discrimination by clients is suspected.

Law firms should take proactive steps to ensure a fair and unbiased assessment of women lawyers by clients. For example, firms should issue statements indicating that they adhere to the principles of human rights legislation in their practice. These statements could be published in firm brochures. These steps should be complemented by internal action which fosters the upward mobility of women lawyers. Firms can also pave the way for equal treatment of female members of their firm by ensuring that they are introduced to clients in a manner which engenders confidence and respect.

The need for proactive steps is even more pronounced for women of diversity who potentially face multiple grounds of discrimination. Law firms should be particularly cognizant of the difficulties faced by these individuals.

RECOMMENDATION:

5.6 The Task Force recommends that law firms take proactive steps to ensure that their clients assess women lawyers in the firm solely on the basis of merit.

A related problem faced by some women practising in small firms is greater difficulty in negotiating and collecting fees from clients. Often this is based on the client's view of the value of the legal work: "It is as if clients think: women's work has always been free, so why should I pay for a woman's work?"[25] Small firm clients are often first time users of legal services and do not expect women to be aggressive in collecting fees. Law societies should develop courses to assist women lawyers in dealing with client bias in the negotiation of fees for legal services.

RECOMMENDATION:

5.7 The Task Force recommends that law societies developed courses to assist women lawyers in dealing with client bias in the negotiation of fees for legal services.

2. Client Development

Unequal access to clients is another barrier to equality in the private practice of law. There are three gender issues relating to client development within firms: (1) practices which tend to exclude women lawyers; (2) sexist activities; and (3) client promotion activities that conflict with family responsibilities.

The Working Groups reported that male articling students and junior lawyers were invited more often than their female counterparts to observe and participate in client meetings, corporate closings or negotiating sessions with other lawyers. The effects of these discriminatory practices are devastating on career advancement. The male junior lawyers have the opportunity to develop and demonstrate their ability to interact with clients as well as their negotiating and strategy skills. Women lawyers are deprived of this valuable opportunity. After several years, the male lawyer is regarded as a well-rounded member of the team while the woman lawyer is still in a support role.

The male corporate culture also limits the client development opportunities for women. At the extreme end of this corporate culture are sexist activities. These have the effect of completely excluding women. In the 1990s there are still reports that firm's big business development events include inviting male clients for drinks at striptease bars. Some law firms still hold memberships in clubs that bar or restrict women. Clearly, the time has come to ban sexism in client promotion activities.

RECOMMENDATION:

5.8 The Task Force recommends that law firms ban sexist activities in client promotion.

More subtle but still problematic are client development activities which while not overtly sexist still have a tendency to exclude women. Many lawyers have indicated that their firm's business development activities — such as golf tournaments and tickets to sporting events — focus on activities which tend to interest men. Other, more gender neutral, activities — such as wine tasting -- were not organized by the firm even where these activities are equally appropriate. Women who wish to change the focus of business development or firm events are often accused of being "uptight", "without a sense of

humour", "puritanical" and so on. Firms seem unable to realize the long term disadvantages of excluding a significant proportion of their colleagues from business development activities.

Barriers in this area are particularly important at this time when client development is given higher profile in associates' assessments. Law firms should review their existing client development programs to ensure that they provide equal opportunities to female lawyers. While firms must consider their clients' wishes, there are many activities that would in all probability interest clients and that do not exclude female lawyers. Law firms should promote activities for women lawyers which include business women and other female professionals. This diversification would broaden the opportunities for the firm and its members. Law firms should involve women lawyers in planning these activities and should question on an ongoing basis whether traditional client promotional activities are in fact neutral.

Similar problems are experienced by women lawyers practising in small firms. Some local service clubs and associations which assist in the development of professional relationships continue to be male dominated. The number of women approached to join is limited. Such forums are particularly important in smaller towns and rural areas. Women are still excluded from business lunches, sports activities, social occasions and other activities attended by male lawyers with or without their male clients. Here too, senior practitioners must play a leadership role in ensuring that women are not excluded from client development opportunities.

Law firms must not only re-examine the type of client development activities they promote but must also critically re-assess client activities that take place outside regular working hours. It is time to rethink the traditional expectations of lawyers' availability at night and on weekends. Instead, we must find creative solutions that are more in keeping with balanced lifestyles.

RECOMMENDATION:

5.9 The Task Force recommends that law firms review their client promotion practices to ensure that female lawyers are given equal opportunities to participate in client development and have equal access to clients.

3. Mentoring

Access to and the support of senior lawyers is essential to lawyers' career development. The senior lawyer plays the role of mentor by assisting in the communication of firm values, giving advice on career objectives, providing informal feedback on the junior's performance and informing the junior about firm dynamics. This role should be distinguished from that of a supervisor who is responsible for assisting in the legal training of the junior and overseeing his or her legal work.

Mentoring relationships often appear to develop naturally between senior men and junior male associates. Women, however, experience difficulty in establishing similar relationships. The lack of strong mentoring relationships is a key factor in failing to advance in one's career because it is linked to problems with the allocation of work, performance evaluations and, ultimately, the partnership decision. Lawyers with strong mentors have an edge in attaining partnership. Lawyers without strong mentors tend to become "invisible associates."

Part of the problem in this area arises from traditional "firm bonding practices" which reflect male interests. These activities allow students, associates and partners to get to know each other on a casual basis, to exchange stories and life experiences, to learn about each other's personal attributes and skills and to develop close ties. Many of these relationships focus on team sports and are therefore more accessible to men. Efforts should be made to broaden these practices so that they are

inclusive of all firm members.

The situation is similar for women practising in small firms. Here, one of the greatest problems experienced by female lawyers in small firms is isolation and absence of support. Isolation has an impact on professional development, the lawyer's self-confidence, and client perceptions. Mentoring programs would assist in breaking this isolation. Other solutions such as increased opportunities for networking are discussed in Chapter 13 of this Report which addresses the role of the Canadian Bar Association in achieving gender equality in the profession.

The effect of a lack of strong mentoring relationships on women lawyers should not be underestimated. All of the Working Group reports pointed out that the solution to the problem of gender bias requires partners to take an interest in and support female associates. Such support and encouragement can be achieved through an effective mentoring program.

This is even more vital for women of diversity. In many cases female lawyers from minority groups are "first generation professionals". They may require even greater assistance than white women in establishing their practices. Often these individuals will be at a disadvantage in that they have not lived in an environment in which professional skills develop. Law firms should recognize this reality and take steps to ensure that appropriate mentoring is provided.

Law firms should also establish mentoring relationships between senior lawyers and junior members of the bar who are of a diverse racial or ethnic background, are Aboriginal, disabled or lesbian. Given the relatively small number of these individuals at the senior levels of practice, law firms may need to make a concerted and coordinated effort in this regard.

It is clear that mentoring relationships do not always develop naturally. Law firms should develop criteria for mentors, train partners on what is involved in a mentoring role, make expectations explicit, and monitor progress. Credit should be given for time devoted to this activity. Selection of the mentor will be key to a successful relationship. Wherever possible, efforts should be made to match people: consensual arrangements will come closest to replicating informal mentoring relationships and are likely to be the most effective.

The idea of the firm as a team helping each other to pursue a common goal — a firm which is not only successful financially but also in human terms — should be revived and nurtured.

In addition, law societies should establish mentoring programs for female practitioners in small firms. The purpose of this program would be to assist lawyers in entering the profession, to advise on career development, and to act as a sounding board on experiences within the profession including difficulties with clients.

RECOMMENDATION:

5.10 The Task Force recommends that law firms establish effective mentoring programs for women lawyers to ensure their professional development.

RECOMMENDATION:

5.11 The Task Force recommends that law societies establish mentoring programs for female practitioners in small firms.

4. Admission to Partnership

Women have entered law firms in much higher numbers over the past several years. They are not,

however, entering partnership at the same rate as they are being hired.[26] Many women believe that they are being passed over for admission as a result of the application of subjective criteria that do not accurately gauge merit. Part of the problem is systemic in that law firm criteria for advancement are vague, and work allocation and training are haphazard. The lack of clear criteria tends to work against women lawyers.

For example, in 1990, a front page headline of the *Law Times* read "Study Shows Firms Lack Women Partners".[27] Another widely read periodical reported:

> Walk into almost any established law firm and you will still find, as you would have found a generation ago, that the majority of partners are white males from a middle- or upper-middle-class background.[28]

Long term statistics have not been gathered on a comprehensive basis in Canada. However, the American experience is instructive. Between the early 1960s and the mid-1980s, the percentage of women in the American legal profession increased from 3% to 14%, but women still represented only 5% of partners at the nation's largest law firms and a handful of key judicial and governmental decision-makers.[29]

A unique study that tracked lawyers over time partially explains this phenomenon. An analysis of Harvard law schools' class of 1974 revealed that, although women were more likely than men to begin working at large elite law firms, ten years later only 23% of those women were partners compared to 51% of their male counterparts. Over half of the 49 women who initially entered large firms had left within ten years.[30] Existing Canadian statistics reveal that the number of women partners is considerably lower than would be predicted by entry rates of women into the profession within the last 15 years.[31]

In a research study prepared for the Task Force by Fiona Kay and John Hagan, Ontario survey data from 1990 was reviewed to examine this trend in more detail.[32] The statistical analysis controlled for a number of variables in order to determine the impact of sex on admission to partnership. The survey found that the reduction of partnership opportunities in recent years has had a harsher impact on women than on men.[33] When experience and other variables were held constant, 54% of men compared to 38% of women were found likely to secure partnership. Overall, the study revealed that regardless of experience and background, organizational settings and macro-social factors, men are consistently more likely than women to attain partnership.

These partnership statistics indicate that systemic discrimination exists in partnership decisions. They indicate a persistent pattern of discrimination based on sex. This discrimination is direct discrimination in that it involves the application of subjective criteria and the latent gender bias of the "intangible difference" which guides the selection of partners. This also constitutes adverse effect discrimination, since partnership decisions arise from the application of neutral criteria which adversely affect women due in part to the link between the critical period for attaining partnership and child bearing years.

A more systematic approach to the evaluation of women and men associates in firms must be developed. In particular, the gap between associate evaluation and partnership criteria should be closed. It is recommended that associate evaluations be: based on actual observations of work performance rather than generalized perceptions; recorded annually or semi-annually; and reviewed regularly to ensure that all associates receive the range of practice experience necessary for partnership assessment.

Law firms should also establish an evaluation methodology in order to eliminate gender bias in the partnership decision-making process. This methodology should be publicized within the firm. The evaluation methods should ensure consistency between the criteria for ranking associates and the criteria for partnership. The elements of the evaluation process could include: enumeration of partnership criteria; expected length of time before partnership decision is made; method and frequency of associate evaluation; format of evaluation; method of reporting evaluations to associates; and a grievance or appeal procedure.

RECOMMENDATION:

5.12 The Task Force recommends that law firms develop an evaluation methodology to eliminate bias in the partnership decision-making process.

The Canadian Bar Association should assist law firms by producing an educational booklet which sets out law firms' legal obligations in making partnership decisions and offers practical assistance in developing criteria and methodology for the assessment of associates.

RECOMMENDATION:

5.13 The Task Force recommends that the Canadian Bar Association prepare a booklet on the legal and ethical obligations of law firms in making partnership decisions and offer practical assistance in developing criteria and methodology for the assessment of associates.

In order that women who are candidates for employment or who are junior lawyers can make informed decisions regarding their career prospects, law firms should be obliged to report annually to the law societies on their firm's demographics. This disclosure requirement would include the rates of retention of women lawyers and the rate at which women are promoted to partnership. This information should be freely available for review by students and other interested parties. These disclosure requirements and the role of the law society are discussed in greater detail in Chapter 12. The process of self-assessment will assist the firm in developing fairer employment practices.

RECOMMENDATION:

5.14 The Task Force recommends that law firms be obliged to report to law societies on an annual basis on demographic information within their firms, including retention and promotion rates by sex.

At an individual level, there is a mystique which tends to surround partnerships in law firms and admission to partnership. This shroud of secrecy works to the disadvantage of younger practitioners generally and, therefore, women in particular. The nature of the process also inhibits members of groups who have been traditionally excluded from large law firms. There is a case for a much freer exchange of information both within law firms, between employers and employees, and within the profession generally. The Canadian Bar Association should prepare educational materials for young lawyers on how to work toward the achievement of partnership.

RECOMMENDATION:

5.15 The Task Force recommends that the Canadian Bar Association prepare and distribute educational materials for young lawyers on how to work towards the achievement of partnership.

An additional source of concern is that the alternatives to partnership presently emerging in large American law firms discussed earlier[34] will become a barrier to women's advancement. These developments should be monitored to assess whether the new, evolving forms of associate and partnership arrangements create new barriers to women. The Canadian Bar Association should commission a study in five years to review gender linked patterns of partnership attainment, as well as alternatives to full

partnership and their impact on the career advancement of women lawyers.

RECOMMENDATION:

5.16 The Task Force recommends that the Canadian Bar Association commission a study in five years to review gender linked patterns of partnership attainment, as well as alternatives to full partnership and their impact on the career advancement of female lawyers.

5. Exclusion from Influential Committees

Access to partnership is not the final barrier for women within large law firms. Relatively few women partners in large firms rise to leadership levels in their firms. Even as partners, women report that they hit a glass ceiling.[35]

There is a marked lack of representation of women partners on executive committees, compensation committees, and as heads of practice groups. Usually there is over-representation on recruitment committees, library committees, and other committees with less authority. The result is that women will continue to have less control over their practices in the large law firm setting and will have a weaker voice in decisions involving the structure and policies of the firm. Law firms should review committee structures and internal barriers to promotion to the more powerful committees and take steps to ensure fair representation of women on all committees.

Firms should also promote women to leadership roles on these committees. Ensuring equal access to influential committees, particularly in leadership roles, is a major step in setting an example of gender equality within the firm. It will also help to ensure that women have a voice in the structure of the firm and in the development of its policies so that it can eventually become more inclusive of their needs.

RECOMMENDATION:

5.17 The Task Force recommends that law firms should review committee structures and internal barriers to promotion to the more influential committees and take steps to ensure fair representation of women on all influential committees. Firms should also promote women to leadership roles on these committees.

C. Accommodation of Family Responsibilities

Lack of accommodation for family responsibilities is the greatest single barrier to advancement within law firms and the most significant reason that women leave private practice. The discrimination that women experience because of their family responsibilities is exhibited in a number of ways.

The principal method used to evaluate lawyers is their billable hours, which are applied uniformly to lawyers at various years of call. No accommodation is made for women with child rearing responsibilities. As the burden of raising children still falls principally on women, they are substantially over-extended in attempting to meet the demands of career and family.[36] While a number of large law firms employ lawyers as part-time associates, there is strong resistance to creating part-time partnerships in order to accommodate women with family responsibilities. This resistance has been exacerbated by the intensified focus on partner productivity. The message to women is that women who wish to divide their time between career and family have little future in law firms.

Concern is repeatedly expressed about the lack of policies that accommodate family responsibilities in law firms as compared to most other public and private sector organizations. In addition, the Task Force was told that where policies do exist, they still tend to penalize women for their procreative role. The view of total commitment to practice as an essential characteristic of a lawyer leads to cultural barriers to women attempting to find a better balance between career and family. Women have also noted the disproportionate impact that child care responsibilities can have on female lawyers' advancement in firms. These issues are addressed in greater detail below.

The Task Force recognizes that men are shouldering an increasingly greater proportion of family responsibilities and that male lawyers are also concerned about achieving a better balance between their personal and professional lives. It is also clear that these developments are essential to the eventual achievement of gender equality and an integrated workforce. Nevertheless, the evidence gathered by the Task Force strongly demonstrates that female lawyers continue to bear the lion's share of family responsibilities;[37] that it is women who seek accommodation from their legal employers and that they are disadvantaged within the legal profession because of these factors.

The short term emphasis must therefore be on accommodating women. However, ameliorating the situation of women and reducing structural and attitudinal barriers to a more flexible form of private practice will also benefit men who seek these accommodations.

1. Cause of Barriers to Accommodation

The lack of accommodation of family responsibilities by law firms can best be understood in the context of a collision between women's reproductive capacity and the peer model of the lawyer with an uninterrupted career path. It is a biological fact that only women produce children. Most women spend more time caring for children than men. This is a sociological fact. Every woman who enters a law firm is potentially a mother who may take time off to have children, and may therefore have difficulty keeping up with other lawyers because of her divided responsibilities. Thus, women are perceived to be less valuable to the law firm because they are less likely to conform to the peer model that epitomizes success.

There are female exceptions to this general trend but these appear to be women who have made their own accommodations of their family responsibilities.

Success, therefore, still depends on women adhering to the male model. The fact that certain women can meet these standards does not make doing so either desirable or beneficial. If the only women who succeed in law firms are those who succeed in adapting to the male model, then gender inequality continues unabated.

2. Why Law Firms Must Change

a. Compliance with the law

Law firms should be motivated to be accommodating to women for reasons that include: (a) compliance with the law; (b) the economics of accommodation; and (c) social responsibility. However, the Task Force recognizes that if the existing male model is to be challenged, the model that replaces it must not undermine the law firm's ability to be successful. The firm must be able to continue to attract and hold clients, to attract and hold able lawyers, and to remain profitable.

Human rights codes have been adopted across the country to provide remedies for the harm of discrimination. Canadian human rights law clearly sets out the duty of employers to change their practices where these practices have an adverse impact on members of a protected group.[38] This legal duty to accommodate has clear implications for law firms whose practices discriminate against women lawyers because of their child bearing and child rearing responsibilities.

The relationship between child rearing responsibilities and women's inequality has been eloquently described by former Chief Justice Brian Dickson in *Brooks* v. *Canada Safeway Ltd.*[39]:

> Combining paid work with motherhood and accommodating the child bearing needs of women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.[40]

While it may be "obvious" that women should not be discriminated against because of their role as mothers, it is equally clear that women lawyers are economically and professionally disadvantaged by the fact that they have primary responsibility for child rearing in society. Law firms have a duty to ensure that their practices do not perpetuate this adverse effects discrimination by directly or indirectly imposing limits on their career advancement and compensation and benefits due to their family commitments.

In *Brooks*, the Supreme Court of Canada set out the essential nature of this form of discrimination and its key role in perpetuating gender inequality in society:

> Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons...The argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy against women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation.[41]

The existence of a *legal* duty to accommodate the needs of women with child rearing responsibilities effectively disposes of the argument that women have children by "choice" and therefore should bear the associated costs. In *Brooks*, the Supreme Court affirmed that the need to care for children is social as well as personal. Law firms must ensure that their organizational structures and practices to not have an adverse impact on women because they are mothers and have child care responsibilities.

b. The Economics of Accommodation

High overhead is characteristic of large law firms and drives the need for high billable hours. While appearing to be gender neutral, overhead cost is often used as a barrier to policies that accommodate family responsibilities when, in fact, a balance between flexible policies can be achieved without unduly affecting the profitability of the firm.

Much of the resistance to the part-time practice of law is based on the belief that the overhead applicable to a part-time lawyer is only marginally less than that of a full time lawyer. Law firms also point out that in a service business, where competitive advantage may depend on the timeliness of the service, legal work cannot be channelled into fixed hours on specific days. It is argued that lawyers have little control over the scheduling of their services as it is the client who dictates deadlines. It is only in the support roles within large law firms that some control can be exerted over the scheduling of work and this is where part-time positions are concentrated.

However, there is strong evidence from the business sector that bottom line considerations are best served by accommodating the changing workforce.[42] Accommodating succeeds because it attracts lawyers to firms that offer it. Research also indicates that productivity is linked to employees' effective management of dual responsibilities. In addition, the cost of recruiting and training employees has steadily increased, so losing lawyers because they are not being accommodated can be extremely costly.

Law firms should recognize the economic costs of discrimination. The cost to legal employers of replacing experienced lawyers and employees, taking into account recruiting costs, the time spent on training and the loss of efficiency during training, is significant. It is generally understood that more flexible work practices and career opportunities will pay for themselves, even if all that is accomplished is a reduction in turnover.[43] From a cost-benefit point of view alone there is a compelling reason for legal employers to take seriously the family obligations of their employees.

> Would you let a $100,000 piece of equipment walk out the door? That's what the ABA estimates it costs to replace an associate. There are many cases where attorneys are leaving firms after three or four years, just when they are becoming of value to the firm, and going to firms that have more reasonable personnel policies.

Large law firms spend an enormous amount of money in recruiting and training women lawyers and when these women leave a capital asset must be "written off". If law firms accept that women lawyers are likely to have children and that these women must be accommodated in a manner that permits them to make a positive contribution to all the firm's goals, including profitability, then their attention will be focused on creative ways of tackling overhead issues. The value of accommodation becomes even clearer when one takes a long term perspective: one is generally speaking of a period of reduced productivity of five years or so out of a thirty or forty year career.

Lawyers whose firms accommodate their family responsibilities tend to be very productive professionally. This productivity is, in part, a result of the satisfaction that lawyers experience from having achieved their career objective within the time set aside for it. In addition, lawyers' job satisfaction is enhanced because they know that the firm appreciates their dual role and affords them time to devote to their family responsibilities.

A full and balanced understanding of the economics of accommodation requires a shift in thinking. This change in perspective is similar to the fundamental reorientation which business has made regarding the costs of environmentally sound practices. For many years it was perceived to be too expensive to comply with safe environmental standards and the environment and society suffered the cost of this approach. Today, it is considered good business to operate in an environmentally conscious fashion. Similarly, women have always borne the costs of child bearing and child rearing, but it is increasingly clear that this is not a sound economic approach. Corporations have become conscious of the needs of women workers with respect to their family obligations. They recognize that in the long term the cost of accommodating these obligations is a good investment. Law firms must also adopt this sound economic approach.

c. Social Responsibility

Women will continue to enter the legal profession. They will continue to have both children and careers. Law firms have a social responsibility to ensure that women with children are not precluded from having careers. Like other businesses and organizations they must ensure that their organizations permit people to achieve their full potential, both as socially responsible citizens and as professional lawyers.

The profession as a whole, both men and women, must decide that care giving is a valued and important aspect of our role as lawyers, citizens and workers. The profession must redefine itself in a world that fosters those values. To do so members of the profession must formulate legitimate, productive, and healthy expectations for our legal careers. We must carefully reexamine all our goals and assumptions.[44]

3. The Problem of Billable Hours

Firms of all types now keep track of their lawyers' billable hours. This is, surprisingly, a relatively recent development that did not become common until the mid-1960s.[45] By the 1970s, it was conventional for firms to set targets of over 1500 billable hours per year for associates and partners. While in earlier years seniority and level of expertise were used to establish remuneration, basing remuneration on billable hours switches the focus to productivity and competitiveness. It is an aspect of the increasing commercialization of the profession.

Billable hours are now the predominant measurement of worth in large law firms. This mechanism, while having the appearance of objectivity, poses a barrier to female lawyers in large law firms. Billable hours are social constructs rather than simple forms of measurement, that is they mean different things to different people and serve purposes other than keeping track of billings. Under current law firm practices, the use of billable hours tends to

discriminate against women in terms of partnership attainment and other decisions related to status and income.

A billing target of 1600 hours per year is not neutral. Persons practising in most types of alternate work arrangement and most individuals with disabilities find such targets virtually unachievable. These targets are also more difficult to achieve in some areas of practice than in others, including the fields where women tend to concentrate such as family law.

Hours are key to career advancement, remuneration, and more specifically, attaining partnership. While billable hours are a uniform criterion, the fact that they adversely affect women as a group constitutes discrimination.

> The whole issue of hours plays directly into what I see as adverse discrimination. I suppose the simplest way I've expressed it to people over the years is that the time period during which most women are being considered for partnership, if you accept billable hours as being one of the most significant factors that's considered in partnership, the time period during which women are considered for partnership coincides precisely with the period during which they will be having children...I think that the absurdity of the situation is presented by the fact that on either side of me in private practice, I had a woman colleague who had a child when she was an associate and lives in fear she will never be a partner. And my colleague on the other side of me is a male colleague, precisely the same age, who has four children, and there was no question, and in fact he has been made a partner.[46]

In effect, if billable hours are used as the sole or even primary standard of performance evaluation, they have an adverse impact on women and constitute an unlawful form of sex discrimination. The problem, however, is not with billable hours *per se* but with the unrealistic targets that are set and the fact that they are beyond the reach of women with child rearing responsibilities. They discriminate against these women as a group and some accommodation must be made to take account of this social reality.

In the Task Force's view, law firms must accommodate women lawyers with young children by recognizing that child rearing responsibilities will have an impact on their billable hours and ensuring that their careers are not adversely affected as a result. Women lawyers with young children will inevitably work fewer billable hours and will be less available for business development and other non-billable work. However, these reductions in hours worked should not be seen as turning the woman into a part-time lawyer and should not delay or affect eligibility for partnership nor affect normal compensation. They are simply the accommodation which firms are *required by law* to make for *full time* women lawyers with child rearing responsibilities.

What constitutes a reasonable accommodation will depend to some extent on the size of the firm and other factors personal to the lawyer and the nature of her practice. In a Report prepared by the Boston Task Force on Parenting and the Legal Profession, a reduction of up to 20% in a lawyer's hours of work was seen as a reasonable accommodation for a firm to make for child rearing obligations. This level was derived after consultation with law firms. Similarly, a recent report on women in engineering recommended that a reduction of 20% in hours of work should not affect levels of benefits. The level of accommodation required under Canadian law is that level which falls short of imposing "undue hardship" on the firm. The important point is that this accommodation does not affect the lawyer's status as a full time lawyer or partner. It is simply the means by which the charge of discrimination is met under the law.

Law firms might wish to consider other models of compensation. Alternatives to billable hours, including merit-based criteria, client satisfaction, quality of work, expertise and specialization might be considered. Emphasis on sheer number of hours for which a client is billed might be replaced by an assessment of the value to that client of the hours actually spent. Also, firms should be encouraged to experiment with work sharing, team work on files and other similar innovative concepts. Firms may argue that these other criteria are already in place. However, because billable hours are easy to measure they tend to "occupy the field" despite the nominal

existence of other criteria. Law firms should evaluate lawyers on a basis that gives due weight to the quality of time expended rather than exclusively to the quantity of time expended.

RECOMMENDATION:

5.18 The Task Force recommends that law firms set realistic targets of billable hours for women with child rearing responsibilities pursuant to their legal duty to accommodate.

RECOMMENDATION:

5.19 The Task Force recommends that, as part of the same legal duty to accommodate, the reduced target of billable hours should not delay or affect eligibility for partnership nor affect normal compensation.

RECOMMENDATION:

5.20 The Task Force recommends that law firms evaluate lawyers on a basis that gives due weight to the quality of time expended rather than exclusively to the quantity of time expended.

4. Maternity/Parental Leave/Family Leave

a. The Need to Establish Leave Policies

While more and more of the larger firms are adopting maternity and parental leave policies, the career cost to women of having children remains very high. The fact that child bearing is automatically perceived as a reduced commitment to the practice of law is borne out by the experience of many female lawyers. This perception results in loss of status and income which is often disproportionate to the actual cost of the leave to the firm. Discrimination on the basis of pregnancy is clearly illegal and yet the Task Force received numerous reports of women being disadvantaged when they became mothers.

> In some cases, the penalty for taking maternity leave to have a child is clear. Some associates who took a three-month's maternity leave lost an entire year of seniority for partnership consideration, had their salary frozen during the year of maternity, or were not paid a year end bonus paid to other associates. One lawyer from a major Toronto law firm commented that she could not recall one single successful role model of a female lawyer returning from pregnancy leave. In her firm, pregnancy was equivalent to the proverbial "kiss of death".[47]

This fear was confirmed in provincial law society reports. When questioned about the impact of maternity leave on career several survey respondents cited concrete costs such as "loss of office", "loss of income" and "loss of job".[48]

The experience of women lawyers with respect to maternity leave should be contrasted with the impact of other forms of leave taken by male lawyers. Men who suffer from health problems such as heart attacks and take time off to recuperate, men who take time off to be treated for alcoholism, and men who take 9 to 12 months off in order to pursue graduate studies, even if unrelated to their present employment, are not penalized and typically do not lose seniority either for partnership or salary considerations. It is difficult to understand the prevailing view that taking time off for maternity leave is for "personal reasons" and inherently different from these other reasons for leaves of absence from practice.

The legal profession must recognize that maternity and parental leave policies are part of the cost of having employees. If a firm wishes to retain talented women for the long term, it must find ways to accommodate family responsibilities. The fact that

all careers are "phased", with variations of productivity throughout the life cycle, must be acknowledged. It is unfair to utilize the typically male life cycle as the norm and thereby discriminate against those individuals whose life cycle is different.

Law firms should have established maternity and parental leave policies. Law societies should assist small firms in this regard by developing a bank of policies tailored to the economic realities of their smaller scale.

RECOMMENDATION:

5.21 The Task Force recommends that all law firms establish maternity and parental leave policies.

RECOMMENDATION:

5.22 The Task Force recommends that law societies should assist small law firms in the development of maternity and parental leave policies.

It is unfair to women for firms to deal with these issues on a case by case basis. Established policies will make it easier for lawyers to raise the issue of leave at an early stage and thereby assist the firm in planning. The Task Force recognizes the individual lawyer's responsibility to communicate their needs in this regard to the firm at the earliest opportunity to allow for planning of the leave.

RECOMMENDATION:

5.23 The Task Force emphasizes to lawyers the need for early communication as to the timing and duration of leave.

Law firms must commit themselves to the principle that family responsibilities should not unduly disadvantage their members. The Task Force recommends that law firms provide parental leave benefits and that an employee's entitlement to or eligibility for raises, compensation benefits, seniority, admission to partnership and other advancement not be affected while they are on a paid parental leave.

RECOMMENDATION:

5.24 The Task Force recommends that law firms provide parental leave benefits and that an employee's entitlement to or eligibility for consideration for available raises, compensation benefits, seniority, admission to partnership and other advancement not be affected while they are on a paid parental leave.

Law firms should also recognize the concerns expressed by female lawyers over fear of losing files and clientele while on leave. Law firms should assist in the management of files through a planning process. Firms have a duty to monitor and to ensure a lawyer's reintegration into practice after a parental leave. Best efforts should be made to restore her to the same position she previously held.

More and more businesses are recognizing that the pressure of family responsibilities means more than the upheaval surrounding child bearing or adoption. Law firms should recognize that other forms of family leave may be required for purposes such as elder care.

b. Income Replacement

Within the small law firm the problem created by maternity and parental leave is the simple fact of the absence. The lawyer is not available and yet overhead expenses must be met, income must be generated to support the lawyer, and clients must receive service. Leaves will require planning both in

terms of income replacement and replacement of the lawyer during her or his absence.

Few small firms have the capacity to absorb the costs of an extended maternity or parental leave. Employed lawyers can take advantage of benefits under the Unemployment Insurance scheme but self-employed lawyers must bear these costs alone. This poses an enormous barrier to women in small firms. The Task Force has investigated, through the Canadian Bar Insurance Association, the possibility of insurance policies that will cover maternity leave. Our investigation has led to the conclusion that maternity leaves are uninsurable by traditional private insurers at this time.

There are three potential solutions to dealing with this financial pressure. First, the federal government could extend maternity and parental leave benefits under the Unemployment Insurance scheme to self-employed individuals. This might be best accomplished by removing this benefit from its legislative framework and establishing a family benefits program funded through contributions and made available to everyone. The Canadian Bar Association should form an inter-professional lobby group for this purpose.

RECOMMENDATION:

5.25 The Task Force recommends that the federal government extend maternity and parental leave benefits under the Unemployment Insurance scheme to self-employed individuals. The Canadian Bar Association should form an inter-professional group to lobby on this issue.

A second approach is to establish a family benefit program funded by all members of the profession to enable lawyers to take maternity and parental leave. It is unlikely that this system could be supported by the legal profession alone. The Canadian Bar Association should join with other professional associations to establish a family benefit program for all their members. This could be seen as an alternative to the revised Unemployment Insurance benefit scheme or as an addition to it.

RECOMMENDATION:

5.26 The Task Force recommends that the Canadian Bar Association join with other professional associations to establish a family benefit program.

Third, the government should create a non-taxable "birth and child care fund", similar to RRSPs, education funds, and home-buyer's funds (RHOSP). Contributions made to such funds for the purpose of maternity leave, parental leave and child care expenses would be tax deductible in the year the contributions were made and taxable in the year it is withdrawn. This fund would facilitate long range planning for the costs associated with child bearing and child rearing. The Canadian Bar Association's National Tax Law Section should be charged with investigating this alternative.

RECOMMENDATION:

5.27 The Task Force recommends that the government create a tax deductible and non-taxable "birth and child care fund", similar to RRSPs, education funds, and home-buyer's funds.

c. Temporary Replacements to Provide Legal Services

Women practising in small firms have reported difficulties associated with maintaining their practices during leave, including problems with keeping clients and reintegrating into the firm upon their return to work.

Law societies should assist small firm lawyers with these aspects of planning for maternity and parental leaves by developing temporary replacement services. They should provide a registry service (a locum roster) whereby lawyers who wish to take leaves of absence from practice for parental or other purposes could exchange places with colleagues. Law societies should establish criteria for assessing efficacy and fairness in the locum method and screen lawyers for this purpose. These placement services should be publicized in order to encourage their use.

Law societies should also develop ways to ensure support and professional assistance for women returning from leaves.

RECOMMENDATION:

5.28 The Task Force recommends that law societies provide a registry system of lawyers for temporary replacement purposes.

RECOMMENDATION:

5.29 The Task Force recommends that law societies develop ways to ensure support and professional assistance for women returning from leaves.

5. Alternate Work Arrangements

Alternate work arrangements have developed in many work environments to assist workers to maintain both meaningful work and family lives. The statistics demonstrate that women, more often than men, will work in settings which allow greater flexibility in time commitments.[49] None of these arrangements are widespread in the Canadian legal community and most of them are much less available in private law firms than in other legal workplaces.[50]

There is a demonstrated need to devise innovative ways to practice law. Difficulties in achieving an appropriate balance between work and family commitments is the single greatest reason for women leaving private practice to work in other sectors and leaving the practice of law altogether.[51]

The first step is to recognize that alternate work arrangements are acceptable, and indeed, beneficial ways to practice law. Law firms must recognize that commitments outside of the law do not imply a less than fully committed lawyer. Law firms must accept the responsibility for accommodation and lawyers must accept the need for flexibility. Indeed with proper planning, flexibility and commitment, all parties involved should benefit.

The two main types of alternate work arrangements are restructured full time work and reduced work options.

Even with the adoption of alternative work arrangements, law firms must grapple with the issue of the disparate impact of full time work on women with child rearing responsibilities and their male counterparts. This disparate impact is best exemplified by the fact that women are financially penalized for having children while men with children are rewarded.[52] The workplace must find the means to compensate for this phenomenon in ways other than alternate work arrangements. Law firms should promote a more flexible model of career advancement in large law firms so that both partnership and firm structure can take into account the differing work histories of male and female lawyers.

a. Restructured Full Time Work

Under restructured full time work arrangements, lawyers work what is considered a "normal" number of hours per week but working the hours according to their own schedule rather than nine-to-five, five days a week. The three main types of restructured full time work are: (1) "flexitime", where employees work the total number of hours required, according to their schedule; (2) compressed work weeks, where the employee works the total number of hours in a fewer number of days; and (3) "flexiplace", where a

full time work load is handled partly at the office and partly elsewhere.

These options are difficult to envision in a law firm context where the total number of hours expected makes these arrangements impractical and where accessibility to clients is often key. Also, work done at home can be problematic because women lawyers feel vulnerable to the "visible billable hour syndrome". This syndrome holds that it is the hours lawyers are seen working at the office that matter and not the hours in fact worked in any location. However, depending on the nature of the practice, these arrangements can work without disadvantaging the firm or clients.

These arrangements will become more acceptable to law firms that have already acknowledged, as the Task Force recommends, that lawyers with child care responsibilities will work fewer hours and still be considered full time. Law firms should develop an alternate work arrangement policy which includes restructured full time work options. The specific arrangements will be developed by the lawyer and the law firm within the framework policy.

b. Reduced Work Options: part-time, job sharing and job pooling

Reduced work options involve alternate arrangements in which the lawyer works fewer hours per week (or per year) than is the norm. As discussed above, the definition of the "norm" is quite elusive in private practice. Within reduced work options there are a number of different possibilities including: working fewer than the normal number of days per week, working a total number of hours per year but with less regular hours, billing a defined number of hours per year with flexible time and so on.

The two key aspects of a part-time policy are specification of the hours, days or percentage of expected billable and non-billable hours that the lawyer is expected to work and the acknowledgement that flexibility on the part of the firm is necessary to achieve these goals.[53]

Part-time arrangements can be combined with shared practices such as job sharing or job pooling. Job sharing may be a useful form of part-time work as it responds to arguments about the cost involved in part-time arrangements, through the sharing of costs related to office space and support staff. Job sharing can mean either that two lawyers share files and clients or simply that two lawyers "share an office or secretary, and provide backup to one another on cases".[54] In job pooling arrangements a certain number of files are divided among a larger number of lawyers so that each works less than full time for proportionately less pay.

The same types of problems discussed in relation to maternity leave affect the development of policies and practices that facilitate alternate work arrangements. Again, departure from the standard model of full time, "full" commitment to the practice of law raises questions about the value of a lawyer to the firm. Part-time work may be the preferred choice of some lawyers with family responsibilities. For example, a woman lawyer with young children may decide that she needs a more reduced workload than that provided by the firm's *legal* duty to accommodate her as a *full time* associate or partner, in which case she may wish to move to part-time practice. This would be a matter for negotiation with the firm. In order to overcome resistance to these arrangements, law firms must take a broader approach to the way legal work is undertaken and must find practical solutions to implementing these alternatives.

The profession must recognize that full time work is not essential to the development of lawyering skills. It may be that legal training requires an initial period of supervision that is best accomplished through full time work at the firm. However, firms should be flexible on this point. Part-time work should be viewed as legitimate and consistent with a serious commitment to the practice of law. Clients are not disadvantaged by part-time lawyering: after all, we are all part-time lawyers to our clients. There is no evidence of client resistance or disadvantage as long as the practice is well organized.

Part-time work is a major departure from firm culture and therefore the key to success will be flexibility by both lawyers and the large law firm.

Different kinds of arrangements are needed to meet the needs of different individuals and of different kinds and sizes of large law firms. Law firms should develop a firm framework which sets out the options available to lawyers in the firm and the specific arrangements that can be made within the framework.

The Task Force attaches a high priority to making part-time partnerships available to members of law firms. It is consistent with the acceptance of the principle that part-time practice is an accepted work arrangement that it holds true for all levels within the firm.

RECOMMENDATION:

5.30 The Task Force recommends that law firms recognize the need for alternate work arrangements for all lawyers with parental responsibilities, including part-time partnerships.

c. Implementing Alternate Work Arrangements

An essential aspect of implementing alternate work arrangements is the impact of these arrangements on remuneration and career advancement. Lawyers should not be penalized for taking advantage of these arrangements. To the greatest extent possible lawyers who work part-time should be given work of the same quality as that given to similarly experienced lawyers who work full time.

Compensation should be fairly determined and based on a realistic assessment of overhead costs. The Task Force consultations demonstrate that there is a hazard that the reduction in compensation to take into account overhead is often arbitrarily set and is disproportionate to the actual cost to the firm. Each firm will need to establish the level at which reduction in billings due to part-time work arrangements will cause the firm to make adjustments to its overhead structure and related costs or devise other cost saving measures (such as shared office space and support staff). For larger firms it is relatively easy to have part-time lawyers without it having significant impact on overhead because many of the large components are not closely related to the number of lawyers (for example accounting, mailroom).[55] These costs will depend for example on the nature of the firm and different types of practice. The firm should also factor in the economic benefits of part-time arrangements. These benefits include: saving in recruitment due to better retention of experienced lawyers, and no loss in revenue due to inefficiency in training or due to reallocation of workload.

Evaluation processes should also be fair and not penalize lawyers working part-time schedules. The same evaluation criteria set out above for application to full time lawyers should be used to evaluate part-time lawyers. Reduced billings should not have a *disproportionate* impact on the part-time lawyer's career advancement. (It must not, of course, have any impact on the advancement of full time lawyers accommodated by the firm pursuant to its *legal duty* to accommodate). The route to partnership may not be automatically delayed by the fact that the lawyer works part-time. The admission to partnership should be based on a range of objective criteria of which hours worked is but one factor.[56]

In order to be successful, alternate work arrangements require a certain amount of planning and coordination. Law firms should establish a coordinator to implement alternative work arrangements. This individual would be responsible for finding ways to minimize overhead expenses, reduce friction between the alternative schedule lawyer and others at the firm, and schedule seminars on alternate work arrangements.

RECOMMENDATION:

5.31 The Task Force recommends that law firms assign a coordinator to assist in the implementation of alternate work arrangements.

In addition, the Canadian Bar Association should develop educational materials on strategies for reducing overhead and developing flexible office management techniques in order to facilitate the adoption of alternate work arrangements by law firms.

RECOMMENDATION:

5.32 The Task Force recommends that law firms promote a more flexible model of career advancement in large law firms so that both partnership and firm structure can take into account the differing work histories of male and female lawyers.

RECOMMENDATION:

5.33 The Task Force recommends that law firms establish alternate work arrangement policies that make restructured full time and reduced work options available to members of the firm with parental responsibilities.

RECOMMENDATION:

5.34 The Task Force recommends that the Canadian Bar Association develop educational materials on strategies for reducing overhead and developing flexible office management techniques in order to facilitate the adoption of alternate work arrangements by law firms.

6. Child Care Services

Lawyers have spelled out the need for assistance in finding child care and in learning how to evaluate the quality of that care. The types of assistance which could be provided to lawyers include: child care resource and referral services; referrals to various kinds of day care, including centre-based care; family day care; school age care; and in-home care and counselling on the various types of child care. Law societies should develop these services for their members in order to ensure that child care referral services are available to all lawyers. The regulatory bodies in some American jurisdictions are already providing this service with great success. The Canadian Bar Association could be of assistance in developing these programs.

RECOMMENDATION:

5.35 The Task Force recommends that law societies and the Canadian Bar Association collaborate to establish child care referral services for their members.

a. Emergency Back Up Care

Emergency back-up care refers to care which is available when an employee's regular child care arrangements fail for any one of a number of reasons. Emergency care can take several forms including contracted in-home care, reservation of day care centre slots, and on-site care. The need arises, for example, when a day care provider is ill or on vacation, a day care centre is closed because of a snowstorm or a child is mildly ill.

Law firm employers are urged to evaluate the available forms of emergency care, the nature and amount of the need for such care at their particular firm, alternative types of emergency care, and the best delivery model.

Empirical evidence demonstrates that there is a

strong need for back-up daycare experienced by members of the legal profession. Law firms can provide this service at minimal cost since the need will arise on only an occasional basis. One option is contracted in-home care based on a firm's agreement with an agency to send screened care providers to the firm member's home when regular child care is unavailable. The law firm typically pays the annual registration fee and the hourly agency fee for the number of annual hours purchased. The cost of this benefit can be borne entirely by the firm or shared with the firm member.

RECOMMENDATION:

5.36 The Task Force recommends that law firms provide their employees with emergency back-up child care after an assessment of the most appropriate methods for doing so.

7. Child Care and Child Care Expenses

Law firms should find ways to help lawyers and employees meet their regular child care needs. Proposals could include on-site day care facilities and assistance with child care expenses. While the Task Force cannot make general recommendations on these topics, it does note that offering these benefits to lawyers will encourage them to continue working after they have children. Law firms could consider joining together with other members of the legal community or corporations to establish day care centres close to the firm.

The Canadian Bar Association has already taken steps to have the government change the tax treatment of child care expenses. Pursuant to a resolution of Council adopted in 1990, the Association has lobbied the federal government to make all reasonable child care expenses tax deductible. In addition, the Association intervened in the *Symes* case to support the appellant's argument that child care expenses should be fully tax deductible as business expenses. The Task Force recommends that the Canadian Bar Association continue its efforts to lobby for reform of the tax treatment of child care expenses and investigate other avenues for achieving accessible day care for members of the profession.

RECOMMENDATION:

5.37 The Task Force recommends that law firms investigate the possibility of providing child care services to firm members. Law firms could work alone or in conjunction with other members of the legal or business communities.

RECOMMENDATION:

5.38 The Task Force recommends that the Canadian Bar Association continue to lobby for fair tax treatment of child care expenses and investigate other avenues for achieving accessible child care.

D. Sexual Harassment

1. Sexual Harassment in the Large Firm

The surveys carried out by provincial law societies demonstrate that there is a high incidence of sexual harassment in the legal profession, including the large law firm. Sexual harassment is a common but under-reported experience for female lawyers.[57] Harassment draws attention away from a lawyer's work, and instead draws attention to the lawyer's sex, thereby negatively effecting the lawyer's professional standing and opportunities.

Sexual harassment flourishes in disparate power relationships and therefore is a greater problem for younger women. Articling students are particularly vulnerable. The experiences recounted to the Task Force include the following recent incidences contained in the Ontario Working Group Report:

- An articling student was invited by a lawyer to attend an out-of-town trial. When they arrived at the hotel, she discovered that the lawyer had only booked one room and he expected her to sleep with him. Although he explained that there had obviously been a mistake and booked another room, later in the evening, he made inappropriate sexual advances towards her. Upon returning to the firm, she complained to another senior partner in the firm. She felt that no adequate investigation was made. The partner was not disciplined or reprimanded and she was not hired back at the end of her articles.

- Another articling student was attending a firm function at a lake near Toronto. One of the associates suggested that they take his boat to join up with some of the other lawyers across the lake. Once in the boat, he began to make lewd suggestions about her breasts and made physical advances upon her. She jumped out of the boat and swam back to shore. The associates subsequently called her a "poor sport" and teased her in front of other associates. She was not hired back.

Sexual harassment is not confined to articling students. Women lawyers at all levels are subject to this form of discrimination. Harassment of women lawyers is an affront to the woman's dignity and bodily integrity and can result in loss of employment opportunities, with resulting economic consequences. One example emphasizes this point. A lawyer had been assisting a senior married partner on a file. At one point, the senior married partner began to press her to come to his condominium in Florida, ostensibly to work on the file. It was made clear to her that his wife would not be present. She refused to accompany him to Florida and he subsequently stopped referring any work to her.[58]

Such incidents clearly have grave implications for women's ability to be full participants in the practice of law. Unwanted comments or teasing of a sexual nature also have this negative impact. One example of inappropriate gender-related comments in a professional setting occurred in a judge's chamber. A female lawyer asked the opposing male counsel what his position would be with respect to the issue at hand.[59] The opposing counsel responded, in the presence of the woman's client and other lawyers, "I prefer the missionary position." According to the British Columbia Report, the effect on the lawyer was both professionally devastating and personally humiliating.

> I am a solicitor. Mr. X is a solicitor. My client is sitting beside me. I was asking him a question that is probably asked by almost every lawyer that goes in, "What is your position?" This is what I received. I was rattled. I was embarrassed. I was angry...There was no question in my mind that this was sexual harassment. He looked blankly at me and he turned away. He did not say another thing to me...He used these words as a weapon against me. That was the way he was defending his clients, by attacking me being a woman and I am the counsel of record.[60]

In addition to the horrendous impact of individual instances of harassment on the women involved, there is the broader effect of sexual harassment on the law office environment in which women and men curtail their interactions for fear of similar incidents. Sexual harassment also tends to occur in repetitive patterns of behaviour which become acceptable to at least some of the participants. One woman who was faced with repeated examples of harassment voiced her exasperation with the situation:

> I have also tolerated a firm charity fund-raising dart game, where one lawyer brought his own darts that displayed naked women on the dart wing tips. My complaint went unnoticed. No one understood the surface problem (never mind the underlying suggestion of violence toward women). When I do express concerns, I am advised to be a "sport". I should "grin and bear it". "You catch more flies with honey than vinegar". I've even made (male) associate lawyers try to intimidate me and silence me, coming into my office to tell me I'm ruining their fun....[61]

2. Sexual Harassment in the Small Firm

Sexual harassment is a particular problem for women practising in small firms because there is no organizational structure to neutralize the behaviour of individual members of the firm, colleagues or clients. Female lawyers in these situations are limited in their sources of income and are more dependent upon referrals from members of the firm or clients than in other legal workplaces. These limitations make it extremely difficult for women to report harassment.

Difficulties in reporting are exacerbated in smaller communities. This is a real problem for women outside urban centres. In smaller communities women who respond to a sexist comment are often mocked or ostracized. This leads to further isolation within the legal community.

3. Law Firm Response

Law firms have been slow to adopt sexual harassment policies, and do not deal effectively with sexual harassment when it occurs. The large law firms tend to take no action unless the offending lawyer is prepared to admit committing the offending behaviour. Such avoidance is said to occur even where the partner's reputation with women is well-known to his colleagues. The result is that women prefer to avoid the lawyer altogether and not make any complaint.[62]

The law societies of Ontario, British Columbia and Alberta have developed policies on sexual harassment, including procedures for firms' investigation of alleged incidents. Clearly, firms should adopt policies and practices to deal with sexual harassment. The Task Force has developed a model policy to assist law firms in this regard. These policies should apply to the entire firm, including support staff members.

RECOMMENDATION:

5.39 The Task Force recommends that all law firms adopt policies and procedures to deal with sexual harassment in the firm.

However, many women testified as to the problems with internal investigations. In some cases, the perpetrator of the offence sits on the investigating committee. Confidentiality is difficult to maintain within a law firm. It is far too easy for a firm to "avoid" the problem by dismissing the complainant rather than challenging a partner accused of sexual harassment. One of the most significant concerns that women expressed is fear of reprisals. In the view of the Task Force, retaliation by a harasser should be treated at least as seriously as the sexual harassment itself. Law societies should be empowered to monitor the behaviour of individuals who have been found to harass.

RECOMMENDATION:

5.40 The Task Force recommends that law societies be empowered to monitor the behaviour of individuals who have been found to harass, in order to minimize the potential for retaliation.

Internal guidelines regarding sexual harassment will be inadequate until law firms show a commitment to confronting and disciplining the alleged harasser and to giving the complainant professional respect and emotional support. Education about the nature of sexual harassment is key. Internal mechanisms are likely to be even less effective in small firms, although educational initiatives will be of equal importance in this work environment.

Mechanisms which are external to the law firm must therefore be developed. The seriousness of the problem of sexual harassment in the large law firm and the very clear limitations on the internal ability of the law firm to address this issue make this essential.

The existing provisions in Human Rights Codes are not a solution. Human rights commissions are ineffective because of the cost of lodging a complaint. Women lawyers clearly feel vulnerable in dealing with workplace sexual harassment. There is widespread support for creating a formal independent body for lodging and investigating complaints under the auspices of the law societies. This would be contingent on making workplace sexual harassment a disciplinary offence. The Task Force supports both of these recommendations. Chapter Twelve of this Report contains a more detailed discussion of the appropriate mechanisms to allow the law society to play this vital role. In developing these mechanisms, law societies will have to address the issue of how to deal with sexual harassment in smaller communities by ensuring equal access to complaint and support mechanisms through funding for safe counsel to travel and toll-free lines.

RECOMMENDATION:

5.41 The Task Force recommends that in-house education programs about the nature of sexual harassment be established for the personnel of large law firms.

RECOMMENDATION:

5.42 The Task Force recommends that professional rules of conduct be amended to specifically provide that sexual harassment is a disciplinary offence.

E. Workplace Equity in Law Firms

The Task Force has concluded, based on the experiences of individual women and the overall patterns of the careers of women lawyers within private practice, that law firms are not "environmentally friendly" to women. This section has addressed a number of specific issues and set out proposed solutions to deal with discriminatory practices and systemic barriers.

Law firms must respond to the challenge posed by the influx of women into the profession or be doomed to lose some of the brightest and most productive lawyers in Canada. As a first step, law firms should articulate a workplace equity policy directed to overcoming the principal barriers to career advancement by women in the firm.

The policy could take the form of a series of statements of principle analogous to a "Bill of Rights" for lawyers. The key elements of the policy are those outlined earlier in this chapter: non-discriminatory recruitment and hiring processes; equal access to all practice groups; fairness in the allocation of files; equal opportunities for client development; equal access to partnership; and, representation and leadership on influential committees. Employment equity, including active recruitment of individuals from groups which are currently under-represented in the firm, should also be enshrined in the policy and be taken into consideration in firm decisions.

RECOMMENDATION:

5.43 The Task Force recommends that law firms articulate a workplace equity policy to promote entry into the firm by members of under-represented groups and career advancement by women within the firm.

In addition, large law firms must create structures to review gender-related issues within the firm. Law firms should establish in-house equality committees to design and implement solutions which are best suited to the firm. Many law firms have already established such committees. Where this is the case, law firms should assess the effectiveness and progress made by the existing committee. Ongoing structures are essential because gender discrimination is so pervasive in the legal profession, as in society as a whole, that its forms "defy doctrinal categorization".[63] As the manifestations of inequality change, so too must law firms adapt to redress the unfair results.

Law firms should look at the relationship of the equality committee to the management committee. A member of the management committee should be assigned to the equality committee. While most large law firm committees work autonomously and report only to management committee, the equality committee should work in conjunction with all firm committees. The committee should review this Report, take responsibility for implementing the relevant recommendations and monitor developments.

RECOMMENDATION:

5.44 The Task Force recommends that all law firms establish in-house equity committees on a permanent basis and that the mandate and operations of these committees be reviewed on a regular basis.

Law firms should be assisted in these tasks by professional organizations such as the Canadian Bar Association and law societies. The role of these bodies is addressed in greater detail at the end of this Chapter and in Chapters twelve and thirteen of this Report. Ideas for assistance to law firms include the development of videos and other resource materials on equality issues such as access to large law firms, and the interviewing process itself, sexual harassment, career development, and, family responsibilities. These national educational initiatives should be undertaken by partnerships of the Canadian Bar Association, law societies, the Federation of Law Societies and law foundations. Educational materials should be reviewed by members of under-represented groups to ensure that they accurately reflect the experience and perspective of these individuals.

RECOMMENDATION:

5.45 The Task Force recommends that national educational initiatives be undertaken to inform the private bar about discrimination against women in the profession. The Canadian Bar Association should develop partnerships with law societies, the Federation of Law Societies, law foundations and others to implement and finance this initiative.

ENDNOTES

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6. F. Kay and J. Hagan, "The Structural Dynamics of

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7. R. J. Daniels, "The Law Firm as an Efficient Community" (1992) 37 McGill L.J. 802 at 829.

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9. The targets range from about 1500 to 1800 billable hours.

10. Kay and Hagan, *supra*, note 6 at 4.

11. Abel, *supra*, note 8 at 230.

12. J. Hagan *et al.*, "Cultural Capital, Gender, and the Structural Transformation of the Legal Practice" (1991) 25 Law and Society 239.

13. R. J. Gilson and R. M. Mnookin, "Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns" (1989) 41 Stanford Law Review 567; J. S. Kaye, "Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality" (1988) 57 Fordham Law Review 111 at 114.

14. Hagan *et al.*, *supra*, note 12.

15. R. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1988); Hagan *et al.*, *supra*, note 12 at 246.

16. See, for example, the guidelines developed by the University of Victoria, reproduced in the Law Society of British Columbia Report.

17. See Women of Colour in the Legal Profession (Appendix 10) and Aboriginal Women in the Legal Profession (Appendix 11).

18. C. Meredith and C. Paquette, *Survey of Students at Ten Law Schools in Canada* (Ottawa: Department of Justice Canada, 1992) at 15.

19. See Chapter 4.

20. See Women of Colour in the Legal Profession, Appendix 10.

21. See Aboriginal Women in the Legal Profession, Appendix 11.

22. Summary of Large Law Firm Focus Group Discussions.

23. Quebec Working Group Report.

24. *Ibid.*

25. *Ibid.*

26. Kay and Hagan, *supra*, note 6 at 15-19.

27. Reporting on the Law Society of Upper Canada's 1989 report of its membership, Paula Kulig wrote, "Within the last seven years of being called to the Bar, only 5.5% of female lawyers have secured a partnership, compared to 14.8% of men".

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29. D.L. Rhode, "Perspectives on Professional Women" (1988) 40 Stanford Law Review 1163 at 1179.

30. D. L. Chambers, "Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family" (1989) 14 Law and Social Inquiry 251.

31. Kay and Hagan, *supra*, note 6 at 18.

32. Kay and Hagan, *supra*, note 6 at 26.

33. *Ibid.* at 41.

34. See *infra* at 84 and footnote 14.

35. From the Summary of Large Law Firm Roundtable Discussions.

36. See discussion in Chapter 3.

37. See the discussion in Chapter 4 on child care responsibilities.

38. *Re Ontario Human Rights Commission and Simpson-Sears Ltd.*, [1985] 23 S.C.R. 536 (sub nom O'Malley and Simpson-Sears Ltd); *Bhinder* v. *Canadian Nataional Railway*, [1985] 2 S.C.R. 561.

39. [1989] 1 S.C.R. 1219.

40. *Ibid.* at 1234.

41. *Ibid.* at 1244.

42. See the American Bar Association Commission on Women in the Profession, *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (Chicago: American

Bar Association Commission on Women in the Legal Profession, 1990).

43. Report of the Boston Bar Association Task Force on Parenting and the Legal Profession at 1.

44. Alberta Working Group Report.

45. Kay and Hagan, *supra*, note 6 at 7.

46. From consultation with law schools and law societies representatives.

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50. Mossman, *supra*, note 5 at 32.

51. This is discussed at length in Chapter 3.

52. See the discussion on remuneration in Chapter 4.

53. American Bar Association Policies Manual at II-4.

54. L. Marks, "Alternative Work Schedules in Law: It's About Time" (1990) 35 New York Law School L.R. 361 at 365.

55. San Francisco Bar Association Report on the Economics of Part Time Arrangements.

56. See section III.B.4, "Admission to Partnership", *infra*.

57. See discussion of sexual harassment in Chapter 3.

58. Ontario Working Group Report.

59. This example is set out in Law Society of British Columbia Gender Bias Committee, *Gender Equality in the Justice System*, vol. 1 (1992) at 3-5.

60. *Ibid.*

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63. B. Wilson, "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 *Queen's Law Journal* 5 at 12.

CHAPTER SIX

GOVERNMENT LEGAL DEPARTMENTS

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CHAPTER SIX
GOVERNMENT LEGAL DEPARTMENTS

I. INTRODUCTION

Government legal departments present a unique employment environment for female lawyers because they merge certain characteristics of large law firms with those of government departments. In this chapter, the Task Force will explore some of the equally unique issues that that environment presents. However, as will become clear, the dearth of information available makes it difficult to present a comprehensive analysis.

A higher proportion of female lawyers than male lawyers is employed in the public service.[1] However, as in other sectors of the legal profession, there is evidence that women lawyers leave their jobs in government at a higher rate than men. At the federal level, studies have shown that women professionals leave the public service at a rate two and a half times that of men.[2]

The Task Force considered why a higher proportion of women than men work in government. The initial hypothesis was that the working environment was more conducive to women than private practice because of the flexibility offered by the broader organizational structure of government departments. However, the Task Force's study, which is discussed in greater detail below, revealed that women lawyers primarily select public service because of the challenging and diverse nature of the work and the desire to advance the public good.[3] Women lawyers stated that they made this career choice in order to influence law reform, to gain experience and to have interesting and broad work.

Women also mentioned, but as a secondary motivation, that government legal departments offered a better work environment with less stress, higher quality of life, and a greater ability to balance family and career.[4]

Little research has been conducted on gender-related issues and the experience of women lawyers in government legal departments. The Report of the Task Force on Barriers to Women in the Public Service, *Beneath the Veneer*, addressed the situation of women within the public service as a whole.[5] The Report identified three main barriers to women's careers in government: attitudes, corporate culture, and balancing work and family responsibilities. It concluded that these barriers result in reduced output, loss of talent, impaired credibility and low morale. The Report set out four general recommendations:

(1) take gender balance seriously, and make a commitment to achieve it;

(2) treat the lack of gender balance as a management problem, not as a women's issue peripheral to management;

(3) act on system improvements that have been recommended in the past; and

(4) recognise that system improvements will not solve the problem alone - attitudes and the corporate culture must also be addressed.

While the provincial law society surveys included government lawyers, they were not studied as a distinct group. Thus, faced with this paucity of information, the Task Force decided to survey lawyers employed by the federal government. A questionnaire was specifically designed to examine the work environment of the government lawyer.

This questionnaire was sent to all the female lawyers employed by the Department of Justice and an equal number of randomly selected male lawyers from the Department.[6] Some federal lawyers not employed by the Department of Justice were also surveyed although the survey questions were not as applicable to lawyers employed by crown

corporations. The responses of the Crown lawyers have been incorporated to the greatest extent possible. Lawyers serving in non-legal positions in the federal public service were not contacted.

The questionnaire addressed four main issues:

- quality of work and work allocation
- career opportunities
- balancing family and career, and
- workplace environment and workplace culture.

The questions were designed to elicit quantitative data about the perceptions and experiences of government lawyers on these issues, their comments about the nature of the problems the issues raise and proposed solutions.

The survey is used as a starting point for this chapter, and material from other sources is incorporated, with emphasis on the Working Group reports. After canvassing the issues and making recommendations on the four issues referred to above, the Task Force addresses the more general topics of implementing changes and the role of government legal departments in promoting gender equality in the profession as a whole. Because of the many differences in size and structure of the various departments, our recommendations are made at a general level. The best methods for achieving these goals will have to be devised by the individual departments themselves.

The Task Force relied on two other primary sources in this chapter. First, the provincial and territorial Working Groups gathered information about and held consultations with women in provincial government legal departments. Second, roundtable discussions were held at the national conference in October 1992 and a meeting was held with representatives of the Federal Department of Justice's Advisory Committee on Equal Opportunities for Women.

II. ISSUES AND RECOMMENDATIONS

A. Quality of Work and Work Allocation

1. Results of Survey

The survey of federal government lawyers began with questions about the impact of gender on quality of work and work allocation. The responses to these questions are analyzed and set out in Table 1.

The questionnaire asked whether the distribution of desirable work is affected by gender. Over two thirds of women lawyers and a third of male lawyers perceived bias in the allocation of work.[7] Subsequent questions addressed possible reasons for this "misallocation" of work, including the client's preference, the fact that certain files involved extended travel, long hours, difficult negotiations, or socializing with clients, and the preference of the lawyer assigning work. About a third of both men and women perceived that, in some instances, a lawyer had not worked on a file because of a client's preference.[8] About 10% of both women and men felt that they had been personally discriminated against in this manner. Women reported that they had been discriminated against because of the preference of the lawyer assigning the work, while men reported this phenomenon to a lesser degree.[9]

Interestingly, despite the reports of gender bias in work allocation, the level of satisfaction with the quality of files was almost identical for both sexes. Over two thirds of respondents stated that they were "generally satisfied".

The Task Force also inquired about attitudes concerning gender-related issues in the allocation of work. The vast majority of lawyers in the Department of Justice believed that it is never acceptable for gender-related factors to be taken into account when work is assigned.[10] Two thirds of the women surveyed believed that the Department should address gender-related issues in the assignment of work, while only 40% of men shared this opinion.

TABLE 1

The Impact of Gender on Quality of Work and Work Allocation[11]

Issue	Response	Women %	Men %
Distribution of Work Affected by Gender	Frequently	9	1
	Sometimes	31	11
	Rarely	29	22
	Never	25	58
Access to Files Denied Because of Client Preference	Self	11	13
	Others	30	27
Access to Files Denied Due to Preference of Lawyer Assigning Work	Self	28	18
	Others	31	25
Satisfaction with the Quality of Files	Always Satisfied	20	22
	Generally Satisfied	68	67
	Sometimes Satisfied	8	6
	Generally Dissatisfied	2	2

2. Discussion

The comments made by the survey respondents describe in greater detail the types of problems encountered with respect to work allocation. The following complaints were frequently reported:

- women lawyers must wait longer before being assigned important files
- women are more often than men asked to do "core work" on such matters as library resources, newsletters or computerization projects
- women are more directly supervised by male managers than their male colleagues
- women more often act as assistants on files, and
- certain files are classified as "girl files".

The survey showed that the greatest problems in work allocation arise in the areas of corporate law, commercial law, criminal law and litigation. Certain types of files were seen as particularly "pink" (sexual assault, family law, administrative law) or particularly "blue" (prosecutions, tax, and dangerous offenders). Respondents also noted the tendency for high profile cases to go to men. In particular, assignment of counsel on appeals to the Supreme Court of Canada was seen as an area where gender bias prevails.

Respondents noted that one reason gender bias exists is because most senior counsel and upper level managers are male. This results in male networking which tends to exclude women and perpetuates attitudes that have a negative impact on women. These attitudes can be manifested in assumptions about a woman lawyer's availability for work involving long hours and travel, or paternalistic assumptions about a woman's abilities. As one respondent noted, this type of barrier:

> often takes the form of a male manager being more directly involved in "supervising" female lawyer — male lawyers allowed greater flexibility and control over his files and files handled by female lawyers more likely to result in senior

male manager accompanying lawyer to important meetings on her files or going with her.

3. Working Group Reports

The Working Groups of several provinces reported that women were "ghettoized" in certain areas of law within the public sector. The Working Group in Prince Edward Island reported that women in government were concentrated in criminal and administrative law, while the Newfoundland report indicated that women were primarily concentrated in family law, in the Social Law Section which deals with Social Services, Education, Health and similar areas, and in the prosecution of sexual assaults. The Nova Scotia Working Group reported that most women in the Attorney General's office litigate civil matters in the Legal Services Division. In New Brunswick, the Working Group said that female lawyers in government were more strongly represented in law reform and administrative work than in other areas.

Despite the fact that most of the Working Groups agreed that promotional prospects and ghettoization were problems with public sector employment in their provinces, women in government legal departments said that the quality of work was an important reason for deciding to work in the public sector. Female government lawyers in the Northwest Territories said that more interesting and challenging work was available for them in government jobs than would be available in private practice. Ontario women indicated that interest in their work was the overriding reason for their choice of government employment. The female government lawyers in Prince Edward Island, Alberta, and Newfoundland expressed similar opinions.

In British Columbia, women reported that the type of work allocated to women throughout their careers had a negative impact on their prospects for promotion. Crown attorneys in Ontario said gender bias was often manifested in case assignments and the types of prosecutions given to women. One woman reported that,

> (w)omen are assigned sexual assault and child sexual assault cases more than men, who get the big frauds and homicides. Promotions are often based on level of convictions which are less common in these (sexual assault) cases. This causes status, ghettoization and promotional problems: I am never given any of the tasks that would make me promotable... [12]

Although the Ontario government has a workplace discrimination and harassment prevention policy, most participants felt that the policy did not address systemic discrimination.

4. Summary

Both the survey results and the outcome of the Working Group consultations demonstrate the experience and perception of bias in work allocation. Government legal departments should identify and implement measures to ensure fair allocation of work to female and male lawyers. These measures should include some form of review and evaluation of patterns of work allocation which suggest discrimination. It may also be helpful to provide specific examples of such discrimination. Another effective measure would be to publicize case assignments.

RECOMMENDATION:

6.1 The Task Force recommends that government legal departments identify and implement measures to ensure fair allocation of work to both female and male lawyers.

B. Career Opportunities

1. Results of Survey

The survey asked government lawyers about the impact of gender and gender-related issues on career advancement and about policies intended to counter gender bias. An analysis of the impact of gender on

career opportunities and career advancement is set out in Table 2.

About a third of all respondents felt that hiring practices in the Department of Justice were not gender neutral. 42% of women and 26% of men felt that assessment of work performance was also affected by gender.

Over half the women respondents believed that career opportunities in the assignment of interesting files and in primary responsibility for files was affected by gender, whereas less than a third of men believed this. Between 50 and 60% of men and women believed that both promotion opportunities and appointments are affected by gender. A third of women, but only 10% of men, felt that salaries were affected by gender.

There was a marked discrepancy in the responses to the question: Do you think that a female lawyer is as likely as a male lawyer to advance in her area of practice? Women were evenly split, with close to 40% stating that women lawyers are as likely to advance as their male colleagues, and an equal proportion stating that they are not. In contrast, 80% of the male respondents felt that women were as likely to advance as their male counterparts.

The questionnaire also asked female federal government lawyers about the level of responsibility they had in comparison to males with similar experience. Most men and women stated that they had similar levels of responsibility. However, 12% of women felt that they had less responsibility, while only 2.5% of men believed this to be the case.

The majority of lawyers were not aware of policies geared toward improving women's opportunities for promotion. When asked whether the Department should act to address this problem, 56% of women and 38% of men said that the Department should.

The Task Force was also interested in whether government employment limits other professional opportunities. The general view was that employment in this sector does not affect appointments to professional bodies or educational positions, but can limit opportunities in such areas as law reform, social reform and politics.[14] Approximately one quarter of both men and women were not, however, concerned about these limitations.

TABLE 2

Impact of Gender on Career Opportunities and Career Advancement[13]

Issue	Response	Women %	Men %
Hiring Practices	Yes	55	61
	No	32	32
Assessment of Performance	Yes	42	26
	No	50	69
Career Opportunities	Yes	52	29
	No	44	65
Promotion Opportunities	Yes	59	55
	No	35	41
Appointments Within Department	Yes	56	51
	No	34	43
Salary	Yes	29	11
	No	62	85

One of the Task Force's concerns was whether government employment restricted the professional activities of women lawyers. This is especially important because of the higher proportion of women working in this sector. Generally, women lawyers felt that government employment limited their opportunities in politics, but that the limitation was justifiable. However, many felt that they were limited in their opportunities to engage in law reform and that such limitations were unacceptable.

2. DISCUSSION

Comments made regarding career opportunities highlighted the fact that serious problems exist. Most of the blame fell on managers who were perceived to be either improperly trained or discriminatory in their attitudes. In particular, respondents were concerned about management having too much discretion.

The respondents to the survey suggested three main vehicles for minimizing managerial discretion, all based on increasing management's responsibility for its decisions. First, structural changes were recommended, such as implementing a process of review and appeal and ensuring appropriate representation of women lawyers on important committees. The second suggestion was to establish principles and policies to guide managerial discretion. Examples included issuing gender equality statements, assigning work according to unbiased criteria, and reviewing the assignment of certain easily identifiable kinds of work, such as appearing before superior courts. The third recommendation was to promote education and communication on issues such as the impact of family responsibility on career advancement, and the implementation of gender-related policies.

3. Working Group Reports

There was a consensus among the provincial Working Groups that one of the most common problems in government employment was the lack of upward mobility. The types of barriers reported included status problems, promotion rates, ghettoization, lack of support for professional volunteer work, and remuneration. A lack of respect from colleagues in the private bar was also identified as a problem. Contract lawyers were frustrated with the insecurity of their jobs. Female Crown attorneys in Ontario said that gender bias was the biggest problem in the job. Women in British Columbia reported that barriers to promotion arise from the type of work assigned to women throughout their careers, as well as the fact that women are always evaluated by male managers and section heads.

In addition, some of the Working Group reports touched on the issue of multiple discrimination. A very low representation of minority groups was noted in the public service in Ontario, and few respondents expressed an awareness of whether problems would be worse for those groups. There was, however, a general sense that any problems existing in government would be worse in private practice.

4. Summary

One way to minimize bias is to ensure that management is more responsible in setting examples for juniors and colleagues. It would also be helpful if discretionary elements in employment decisions were monitored.

Government departments should devise methods to empower women. For example, a department could provide information sessions to encourage dialogue on career advancement issues. Furthermore, female lawyers should be provided with opportunities to participate on government committees, including policy-setting committees, working committees and task forces.

RECOMMENDATION:

6.2 The Task Force recommends that government legal departments should ensure gender balance on all committees, including policy-setting committees, working committees and task forces.

The Task Force also recommends that government legal departments ensure representation of minority women's groups in the public service.

As many women identified management structure as a problem, changes to that structure would seem to be required. Government employers should, for example:

- set goals and take measures to ensure equal representation in management positions
- fill management positions through competition
- review the composition of selection committees to ensure greater diversity and gender balance

- undertake more active recruitment of women for senior management positions
- provide resources for and encouragement to women to obtain training in management through courses, secondments, and development positions
- enlarge the number of developmental and acting positions
- ensure management staff is sufficiently educated to identify and eliminate discrimination, including gender bias, in the promotion process
- monitor promotions to ensure gender equality
- eliminate population control to permit promotion on merit
- encourage cooperative management structures with co-directors or establish term directorships (permitting rotation back to a counsel position)

RECOMMENDATION:

6.3 The Task Force recommends that government legal departments take steps to ensure gender equality in the management structure and promotion process for lawyers.

One difficulty for government lawyers is the absence of professional organizations dedicated to their concerns. While the Canadian Bar Association once had a Conference of government lawyers, that Conference no longer exists. Furthermore, the Canadian Bar Association's fees may be beyond what some government lawyers can reasonably afford.

RECOMMENDATION:

6.4 The Task Force recommends that government legal departments endorse and encourage membership in professional associations and participation in related activities.

RECOMMENDATION:

6.5 The Task Force recommends that the Canadian Bar Association examine the feasibility of reinstating a government lawyers Conference and take other steps to increase the participation of government lawyers and particularly female government lawyers within the Association, such as reducing the cost of membership for government employees.

The Task Force encourages government employers to find new and better ways to evaluate work, to redefine merit and to include a demonstrated commitment to equality as a requirement for promotion. It is recommended that government employers ensure that equality and affirmative action goals and programs are clearly communicated to management and staff by identifying what they are and when and how they are applicable to the hiring and promotion processes.

Government legal departments need to inform themselves about gender bias and its effect on decision making. At a minimum, the following analyses must be undertaken:

- an analysis of the salary levels of men and women;
- an analysis of the criteria used in the evaluation process to ensure that women are protected against gender bias, and

- an evaluation of the progress of the careers of women lawyers in the public service to ensure equality of access to promotion.

RECOMMENDATION:

6.6 The Task Force recommends that government legal departments review their evaluation procedures to ensure that they do not have an adverse impact on women.

Many of the provincial Working Group reports documented very low representation of minority groups in the public service. The consultations with female Aboriginal lawyers also indicated that when Aboriginal women are being interviewed their ability to be unbiased in dealing with Aboriginal issues is often questioned. The under-representation of minority groups demands immediate attention.

RECOMMENDATION:

6.7 The Task Force recommends that government legal departments review their recruitment and hiring procedures to facilitate greater representation of all female lawyers including Women of Colour, Aboriginal women, lesbians and women with disabilities.

C. Balancing Family and Career

1. Results of Survey

The questions and consultations on career advancement illustrated the relationship between family responsibilities and the glass ceiling. The survey inquired about the existence of policies that accommodate family responsibilities and the impact of family responsibilities on advancement. Table 3 summarizes the survey's findings.

TABLE 3

Impact of Family Responsibilities on Career

Issue	Response[15]	Women %	Men %
Equal Opportunity For Men Who Assume Child Care Responsibilities	Yes - Equal Opportunity	32	34
	No	24	32
	Don't Know	34	31
Equal Opportunity For Women Who Assume Child Care Responsibilities	Yes - Equal Opportunity	20	38
	No	55	31
	Don't Know	20	25
Does Taking Advantage of Policies That Encourage a Balance Between Family and Career Have Short Term Impact on Work	Yes	44	22
	No	29	52
	Don't Know	10	14
Does Taking Advantage of Policies That Encourage a Balance Between Family and Career Have Long Term Impact on Career	Yes	49	25
	No	20	42
	Don't Know	19	20

The vast majority of federal government lawyers were aware of family-sensitive policies such as leaves, flextime and part-time employment. Men and women were almost equal in their use of flextime policies. 10-15% of respondents had made flexible time arrangements of one sort or another. 27% of the women who responded had taken maternity leave and similar proportions of men and women had taken parental leave. However, there was a significantly higher proportion of women who had worked, or were presently working, part-time.

The questionnaire asked respondents about the effect of using family sensitive policies, both in the short term (i.e. snide comments, loss of interesting files, and loss of perks) and for long term career opportunities within the Department of Justice. 43% of women felt that it affected short-term work prospects, and close to half felt that it had a long term effect on the careers of those availing themselves of the policies. Approximately one quarter of men felt that it affected short term work relationships and long term opportunities.

When asked whether the Department of Justice should accommodate lawyers with responsibilities for child care, approximately three quarters of both men and women agreed that it should.

Respondents were divided over whether men who assume child care responsibilities have an equal opportunity to advance within the Department, with close to a third of respondents of both sexes answering each of "yes", "no", and "don't know". Male respondents were also divided over the effect of child care responsibilities on female lawyers, but over half of the women respondents believed that women's careers were affected by child care responsibilities.

2. Discussion

The answers to the open-ended questions revealed a distrust of management discretion in allowing certain accommodations. Some respondents believed that management attitudes made it more difficult to achieve a balance between family and career. Some policies were available in theory but not in practice because management attitudes discouraged their use. There was a strong view that women were penalized for taking maternity leaves or negotiating alternative work arrangements.

Some of the specific recommendations made by survey respondents include:

- provide on-site daycare facilities
- make available alternate work arrangements through job sharing, part-time opportunities and flexible working arrangements
- reimburse child care expenses incurred during the exercise of the position outside regular working hours
- use teams, buddy systems or back-up co-counsel
- avoid or eliminate late and early meetings
- schedule meetings during the regular work day, and
- provide emergency child care.

Other types of policies to accommodate family responsibilities were suggested, including: telework, work-at-home, compressed work week, family-related leave, and self-funded leave.

3. Working Group Reports

The general consensus among the Working Groups was that while the benefits of government employment were reasonably adequate, they were not completely satisfactory.

There were mixed responses on the impact of taking advantage of policies to accommodate family responsibilities. Many women believed that making use of such policies would have a negative long-term effect on promotional prospects. Other women lawyers were of the view that there were no negative aspects to taking advantage of available leave provisions. However, many lawyers felt that reduced work scheduling was seen as evidence of a reduced commitment to the job.

A British Columbia survey of Crown counsel found that women returning from parental leaves

suffered negative repercussions from having taken the leave, such as loss of salary accretion, less desirable assignments, and reduced advancement opportunities. Federal government lawyers reported that when returning to work from leaves they experienced considerable pressure to show that their new families would not interfere with their performance, and received frequent negative comments. Respondents also said that benefits were not publicized and were often granted unevenly.

4. Summary

While many benefits are available to women lawyers in the public service, problems still exist with respect to real access to these policies because of management discretion and lack of resources for replacement lawyers.

Government legal departments must develop mechanisms to make policies intended to accommodate family responsibilities more accessible to women by ensuring that those participating in such arrangements are not prejudiced with respect to assignments or promotion. Departments should issue directives to ensure that such alternatives are made available whenever possible and to communicate the acceptability and value of such arrangements. There should be provisions for a review of management discretion to ensure consistency and integrity in its exercise.

RECOMMENDATION:

6.8 The Task Force recommends that governments make provision for the review of discretionary decisions by managers with respect to the availability of policies to accommodate family responsibilities.

RECOMMENDATION:

6.9 The Task Force recommends that government legal departments identify and implement employment arrangements to accommodate women's family responsibilities without reducing their opportunities for career advancement.

Finally, it must be made clear that taking advantage of employment arrangements intended to accommodate family responsibilities, such as maternity leave, will not prejudice the evaluation of a lawyer's work.

RECOMMENDATION:

6.10 The Task Force recommends that government legal departments take measures to ensure that the use of policies intended to accommodate family responsibilities, such as maternity leave, does not affect a lawyer's evaluation or compensation.

D. Workplace Environment and Workplace Culture

1. Results of Survey

The Task Force survey asked a number of questions relating to the environment and culture of government legal departments. The responses to these questions are set out in Table 4.

TABLE 4

Workplace Culture and Sexual Harassment

Issue	Response	Women %	Men %
Ever Felt Excluded Because of Gender	Yes	32	11
	No	68	89
Has Exclusion Affected Your Career	Yes	60	36
	No	36	64
Treated in a Dismissive or Disrespectful Manner for Gender-related Reasons	Yes	39	7
	No	59	92
Experienced or Observed Sexual Remarks or Behaviour	Yes	50	38
	No	48	60
Existence of Male Culture	Yes	57	24
	No	35	58

Female and male lawyers were asked whether they had ever been marginalized from social activities because of their gender. One third of women and only 11% men reported having experienced such exclusion. 60% of women felt that this form of exclusion had had a negative effect on their careers. A third of the male respondents felt likewise.

Sexual harassment — defined as having been treated in a dismissive or disrespectful manner due to gender — was reported by nearly 40% of women and 7% of men. Half of the women had experienced or observed sexist remarks or behaviour. 38% of men also reported having observed sexist conduct.

A substantial proportion of men and more than half the women believed that legal departments should do more to address gender-related issues in the work environment. While a high proportion of both men and women were aware of the Department's policy on harassment, they were undecided as to whether the procedure is effective: one third of men but only 11% of women thought the procedure was effective. Junior women were much less likely to find that it was effective.[16]

2. Discussion

Respondents indicated that there is a problem with abuse of authority in many workplaces. Mechanisms should be implemented to make decision-makers accountable for the manner in which they exercise their discretion in order to ensure equality of opportunity in the workplace and to prevent and prohibit sexual harassment. Such measures could include the establishment of appropriate complaint procedures and follow-up processes, as well as mechanisms to ensure that managers act on any complaints. Alternatives to decision-making by individual managers, such as having applications for flexible-work arrangements assessed by a management committee, should be considered. Similar steps might be taken in the area of promotion, where often too much discretion and subjectivity is present in evaluating the progress of an individual's career.

Most managers are men and many junior women lawyers are held to an implicit male norm. Such management bias against women in decision-making may be unconscious, or conscious but subtle. Women's opinions or approaches to work may be taken less seriously or shown less respect than

corresponding views expressed by male colleagues. Women may not receive the types of files necessary to get ahead, and many report feeling "ghettoized" in their jobs.

Education for both managers and employees is needed. Managers now receive mandatory training programs, and those programs should include issues of employment equity and be ongoing throughout managers' careers. Too few managers have the necessary awareness of the balancing required to maintain both families and careers or the particular impact that requirement has on women. Employees should be educated to identify behaviours that need not be tolerated and to become informed about the appropriate complaint mechanisms. Networking should be facilitated by professional organizations and employers, so that government employees receive more information about benefits and the protection available, and feel less excluded or isolated in their jobs.

Although more women are being promoted than ever before, the number of women in management positions in government still does not correspond to their numbers in the profession. Further, there are reports of a "backlash" against women who rise in the ranks, as well as problems of a lack of collegiality toward women and the prevalence of sexual harassment. A "critical mass" of female lawyers in management positions who may be able to change the face of the work environment has not yet been achieved.

Some immediate steps that may be taken include:

- mandatory education on employment equity for senior management
- setting up promotion criteria that would disqualify for promotion persons guilty of gender bias
- establishing a mentoring/networking system for women lawyers in government
- establishing complaint mechanisms that are confidential, easy to use, that penalize those who exercise discriminatory tactics or sexually harass, and that protect complainants from retaliation
- publishing complaints made and any action taken in order to increase awareness of the employer's commitment to addressing the problem, and
- designating a person to be responsible for workplace equity program implementation.

It is recognized that many problems can not be dealt with as formal complaints but require informal mechanisms, peer group pressure, and general changes in attitude. Management must show leadership in effecting these changes and older, senior management especially should be held to a high standard of professional conduct.

3. Working Group Reports

Although most provincial governments had workplace discrimination and harassment prevention policies in place, many women lawyers were unsure of their effectiveness. They were of the view that the policies failed to address systemic discrimination.

In 1991, the British Columbia Attorney General's office published a sexual harassment policy, expressed an intention to train supervisors on the issue, and to establish guidelines for dealing with complaints. In 1992, a Gender and Employment Equity Committee was established by the Criminal Justice Branch in that province. Still, the 1992 Crown Counsel Association report indicated that female Crown counsel were being harassed by colleagues, by defence counsel and by the bench.

The Alberta government has had a policy on sexual harassment since 1986. Despite that policy, 31% of respondents from Alberta believed that government lawyers were still subject to some sexual harassment, although primarily outside the office environment. 72% of respondents felt that female government lawyers were subject to some form of discrimination. 69% of respondents in the Alberta Attorney General's office said there was a "male culture"[17] in that workplace.

A very high percentage of the women consulted reported that there was a male culture in their government employment.[18] Nova Scotia's Working

Group stated that "(t)he overwhelming response to whether a "male" culture existed within the provincial government was yes." Some women reported that such an atmosphere was more apparent in certain areas of government than in others. However, many felt that the male culture was less prevalent in government than in private practice. Most believed that the male culture was most prevalent in the upper levels of the hierarchy within the departments.

4. SUMMARY

The general view is that women in government had fewer problems with sexual harassment than those in private practice.

One recommendation was to establish contact groups of two or three women lawyers who could meet monthly with senior management to discuss their concerns directly with those in a position to effect change rather than doing so through the intermediate level of department heads. Another suggestion was that lawyers be regularly rotated between practice areas, so as to avoid concentrations of women in certain areas.

It is fundamental that governments ensure communication of their anti-discrimination and harassment policies to all staff. Governments should ensure that employees have an adequate understanding of what constitutes discrimination and harassment and a clearer understanding of the policy and procedures. In-house education sessions, lunch-time seminars, and videos could be used.

RECOMMENDATION:

6.11 The Task Force recommends that government legal departments make anti-discrimination training and gender equality education available to all staff, particulary with respect to sexual harassment.

III. IMPLEMENTATION

Although benefits in the public sector may exceed those offered in private practice, women frequently report that access to those benefits limits their career advancement and opportunities. Taking advantage of some benefits may also be hampered by limited resources. For example, leave periods may be unavailable due to insufficient funds to hire replacement lawyers.

Government departments can alter their workplace environment in a variety of ways. Promotions could be made available to those who have demonstrated a commitment to the equality principle. A monitoring system could be developed to track work assignments and advancement patterns for gender bias. Seemingly neutral practices could be scrutinized for possible adverse effects on women. For example, employee appraisals that require the employee's presence in the office for the appraisal at a particular point in the year may exclude women who are on leave. Finally, government departments can take a leadership role in implementing policies to ease the balance of work and family, such as providing in-house daycare or alternative scheduling options.

A. EMPLOYMENT EQUITY COMMITTEES

The Federal Department of Justice has established a number of employment equity committees pursuant to its employment equity program. The committees' mandate is to recommend the development of policies to the Deputy Minister and to monitor their implementation. The four advisory committees are: women, disabled persons, Aboriginal people and visible minorities. The terms of reference of the Advisory Committee on Equal Opportunities for Women provide that the Advisory Committee:

- reviews comparative data concerning the employment and career progression of women
- identifies and recommends means to remove employment or promotional barriers that may limit equal access for women of all

occupational groups at all levels in the Department

- proposes measures for reducing and eliminating attitudinal barriers against the representation of women of all occupational groups at all levels in the Department
- monitors the participation of women serving as selection board members in the staffing process
- recommends policies that will enhance employment opportunities and the career advancement of women
- identifies the requirement for information sessions for departmental employees, personnel officers and management on employment matters concerning women.

RECOMMENDATION:

6.12 The Task Force recommends that government legal departments establish advisory committees on gender issues and equal opportunities for women and mandate them to review this Report and devise strategies for implementing the recommendations concerning government lawyers.

B. Employment Equity and Legal Services

The objective of the federal contract compliance program is to ensure that contractors who do business with the government achieve and maintain a fair and representative work force. The program applies to large companies with over 100 employees and to contracts over $200,000. Pursuant to regulations under the *Employment Equity Act* law firms are exempt from these requirements. The Canadian Bar Association should lobby for an amendment to these regulations to ensure that law firms are included.

Annual reviews show how lucrative legal contracts with government can be. In 1990 for example, three law firms billed the Federal government $700,000, three more were in the $600,000 range and more than 100 firms billed over $50,000. In total, the top 20 law firms alone account for about one-third of the total federal expenditures for legal services — well over $10 million.[19]

Although the numbers of firms involved in providing legal services to government makes monitoring for employment equity measures difficult, random, in-depth compliance reviews could be undertaken. The failure to comply with prescribed employment equity measures should result in a loss of opportunity to compete for future government business. Firms who receive work from the government should be scrutinized to see if a workplace equity program is in place, to see what representation of women and minority women's groups has been achieved by the firm, and to see what measures, if any, have been taken by the firm to eliminate systemic discrimination. Such measures could include reasonable accommodations for minority groups as well as the adoption of policies that monitor discriminatory practices within the firm.

RECOMMENDATION:

6.13 The Task Force recommends that government legal departments refer their legal work to law firms that demonstrate effective employment equity programs that ensure representation of all women regardless of their race, ethnicity, sexual orientation or physical abilities.

ENDNOTES

1. See Table 2 in Chapter 3, *infra*.

2. Task Force on Barriers to Women in the Public Service, *Beneath the Veneer* (Ministry of Supply and Services Canada: 1990)

3. Task Force survey results and Working Groups survey.

4. *Ibid.*

5. *Supra*, note 2.

6. The response rate was approximately 50%.

7. 9% thought that this happened frequently, 30% felt that it occurred sometimes and 29% felt that it happened rarely.

8. For government lawyers the client is generally a department of government.

9. 27.3% of women and 18% of men responded that they had been kept off a file because of the preference of the lawyer assigning the work.

10. For example, 85% of men and 90% of women felt that it was never acceptable to allow the preference of the lawyer assigning to be taken into account in the allocation of files.

11. Percentages have been rounded off. Responses may not add up to 100% due to failures to respond/don't know.

12. Ontario Working Group Report.

13. Percentages have been rounded off. Responses may not add up to 100% due to failures to respond and responses of "don't know".

14. While respondents were not asked to indicate why such opportunities were limited it may be that such activities are discouraged because of concerns about possible conflict of interest.

15. Percentages have been rounded off. Responses may not add up to 100% due to failures to respond and responses of do not understand or do not know.

16. Close to 20% of female managers and senior practitioners believed the sexual harassment policy to be effective but only 10% of other respondents agreed.

17. The Working Groups were asked to survey their members on the question: "Is there still a "male" culture in your provincial/territorial government?" The term "male culture" was not defined.

18. For example 80% of women in the New Brunswick survey indicated the existence of a male culture.

19. "Cash Cow" Canadian Lawyer (October 1990) 14.

CHAPTER SEVEN

CORPORATE LEGAL DEPARTMENTS

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CHAPTER SEVEN
CORPORATE LEGAL DEPARTMENTS

INTRODUCTION

At the time the Task Force embarked on its broad mandate, there was an emerging body of data that outlined the dimensions of the problems faced by women in the legal profession. The data available, however, focuses on the problems faced by women in private practice and does not adequately profile any differences that may face women who practice within a corporate legal department.

A lack of resources and time precluded the Task Force from undertaking a separate study of Canadian corporate counsel. It was felt, however, that further statistical analysis was required to determine whether the problems facing women practising as corporate counsel are the same as those facing women in private practice. Rather than commissioning a separate study, the Task Force elected to arrange and analyze the results of surveys previously conducted, according to the responses provided by corporate counsel. The two surveys in question took place in British Columbia and Alberta. The two surveys were almost identical in content and format and were both conducted by Professor Joan Brockman of Simon Fraser University.

The Task Force commissioned Professor Brockman to sort and analyze this data and to prepare a report summarizing the results. The report is entitled *Perceptions and Experiences of Bias by Corporate Counsel in Alberta and British Columbia.*[1] The results of both surveys are set out in Appendix 7 to this Report.

Professor Brockman was also asked to identify, based on the survey results, approaches and topics which might be useful in helping focus groups of corporate counsel gather additional information for the Task Force. Three specific areas were identified: opportunities for advancement ("the glass ceiling"); sexual harassment; and lack of accommodation for family commitments.

A series of questions based on these three areas of concern was prepared and formed the basis for discussions by focus groups made up of female corporate counsel representing a variety of industries and a range of experience. These focus groups were held in Vancouver, Calgary, Toronto and Montreal. In Calgary, three different groups, with a total of 20 women, participated in roundtable discussions.[2] Forty-six female corporate counsel, in six different groups, participated in the roundtables in Toronto.[3] In Vancouver, the single focus group was made up of six lawyers. In addition, one lawyer from outside the Lower Mainland completed the questionnaire on her own.[4] Three focus groups, involving eighteen women, were conducted by the Quebec provincial Working Group prior to the completion of Professor Brockman's report.

The results of the focus groups were compiled in a second report prepared by Professor Brockman entitled *Women in the Corporate Legal World: A Report on Roundtable Discussions Regarding Gender Bias in Calgary, Toronto, Vancouver and Montreal.*[5]

Included in the *Roundtable Report* are a series of recommendations that flowed from the focus groups. These recommendations are general in nature and focus on four areas: sexual harassment; the glass ceiling; lack of accommodation for family commitments; and employment/hiring/recruitment. Each of these areas is addressed in the following chapters.

GENERAL FINDINGS - PERCEPTIONS OF BIAS

In the final chapter of *Perceptions of Bias* Professor Brockman sets out the conclusions she reached on the basis of her analysis of the corporate counsel's responses to the Alberta and British Columbia surveys. A summary of her observations follows.

The overall results of the two surveys clearly indicate that lawyers have a widespread perception that bias against women exists within the profession. The perception of gender bias was as widespread, and to some extent more widespread, among corporate counsel as it was in the overall responses to the surveys in Alberta and British Columbia. An overwhelming majority of the corporate counsel in Alberta (98.6% of the women and 83.7% of the men, as compared to 97.2% of the women and 77.6% of the men in the overall Alberta survey) were of the view that there was some bias or discrimination against women in the legal profession. Similarly, in British Columbia, 100% of the female corporate counsel (as compared to 97.5% of the women in the British Columbia survey as a whole) thought there was some form of bias against women. Among British Columbia male corporate counsel, 80.6% thought there was some bias against women in the legal profession, compared to 83.4% of the men in the overall survey.

Questions about the types of bias against women revealed that women were far more likely than men to identify specific forms of bias against women. This strongly suggests that it is those exposed to gender bias who more readily perceive its occurrence. It is interesting to note in this regard that more female lawyers in the overall Alberta survey than female corporate counsel perceived judicial attitudes as an area in which women are discriminated against.[6] This is likely a result of the fact that corporate counsel appear in court less often than lawyers in private practice and therefore are less exposed to bias in that forum. Similarly, female in-house lawyers in the Alberta survey were less likely than women as a whole to see judicial appointments as an area in which women are discriminated against.[7] Here again, female corporate counsel indicated little interest in being appointed to the bench and were consequently less likely to see the judicial appointment process as being discriminatory.

While the results of this study show that women corporate counsel are faced with many of the same problems encountered by their counterparts in the profession as a whole, there are some areas which are of concern to a greater proportion of corporate counsel. For example, access to managerial positions was identified as a type of bias or discrimination against women by 81.2% of Alberta's women corporate counsel. Only 52.8% of the women in the overall Alberta survey identified this as an area in which women were discriminated against. The female Alberta corporate counsel were also more likely than women lawyers as a whole to think that men had a better chance of advancement in their organization — 56.5% and 46.0% respectively. Slightly more women corporate counsel (87.0%) than women in the Alberta survey as a whole (81.8%) identified "career advancement" as an area in which women were discriminated against.

I. EMPLOYMENT, HIRING AND RECRUITMENT

A. INTRODUCTION

Women are over-represented in the corporate sector of legal work relative to their numbers in the profession.[8] Statistics from the Law Societies of Alberta and British Columbia indicate that the "over-representation" was greater in Alberta than in British Columbia. In 1991, in Alberta, 16% of the women members of the Law Society of Alberta worked for corporations, while only 9.1% of the men did so. In that year, 31% of all corporate counsel were women although women comprised only 20.3% of the membership as a whole. In 1990, in British Columbia, 4.9% of the women and 4.1% of the men who were members of the Law Society of British Columbia were employed in industry. In that year, 24% of corporate counsel, but only 21.1% of the membership as a whole, were women.[9]

In *Lawyers in Canada*,[10] David A.A. Stager and Harry W. Arthurs listed the reasons that in-house

counsel have given for their choice of careers. These include:

1. there is more involvement with the company's problems, by comparison with the more detached relationship an outside lawyer would have;

2. in-house counsel can be involved in broader business decisions, as well as the strictly legal questions related to these;

3. opportunities exist to move into other branches of the company, such as finance and labour relations, and toward top management positions;

4. there may be more job security than when working as a salaried lawyer in a law firm - and likely at least a steady, predictable annual income; and

5. some lawyers may be able to specialize in certain areas of the law sooner than they would have if they were in a general practice firm.

All of these factors add up to what may be described as simply a different professional life-style.[11] Many of these are reasons that would appeal to female lawyers considering their employment options in the legal profession.

Many of the women in the Quebec focus groups had practised in law firms before becoming corporate counsel. Their reasons for preferring the in-house practice included 1) working for only one client; 2) not being subject to a billable hours system and 3) a better quality of life. Working for a single client not only means there is no pressure to develop a clientele - particularly outside of normal business hours - but also that a special, ongoing relationship develops between the lawyer and the corporate client. The Quebec groups noted that there is considerable satisfaction in seeing a file through from beginning to end, in being able to intervene early enough to prevent legal errors from occurring, and being able to exert real influence on the way the corporation conducts its business.

Professor Brockman also suggests that corporations may be considered attractive employers by female lawyers because they have been quicker than law firms to adjust to and accommodate the "new labour force", where employees have extensive responsibilities outside the workplace. Companies have begun to realize that there are financial consequences to having employees subject to stress in their personal lives and recognize that it serves the companies' own best interest to offer a supportive environment to their employees.[12] It also appears that corporations are making greater strides in the area of child care than private law firms.[13]

B. Results of Surveys

It is difficult to draw any statistically significant conclusions from the survey results about why a disproportionate number of female lawyers work in corporations rather than private law firms. Their demographic make-up is not significantly different from other women lawyers. Set out below are the statistics related to some of the areas in which one might have expected to find differences.

Measured by median income, both male and female corporate counsel in Alberta, working full time, earned more than their counterparts in the overall survey with similar years of call.[14] There was insufficient data to do a comparable analysis in British Columbia.

There was little difference between the male and female corporate counsel in Alberta with respect to the number of hours worked (men: 47.7 hours per week; women: 47.9 hours per week). Both worked slightly fewer hours than men and women in the overall survey (men: 50.6 hours per week; women: 50.9 hours per week). This trend was also seen in British Columbia where the male and female corporate counsel worked about the same number of hours (men: 47.2 hours per week; women: 46.7 hours per week) and worked less than the overall group of respondents (men: 51.3 hours per week; women: 51.1 hours per week).

The Alberta survey revealed that the same percentage of visible minority women worked in the corporate sector as in the legal profession as a whole

(2.9% of the female corporate counsel identified themselves as members of visible minorities, as compared to 3% of the women in the Alberta survey as a whole). Visible minority men were under-represented in the corporate group in Alberta: 1.6% of the men identified themselves as members of a visible minority group as compared to 4.2% of all the male corporate counsel.

In British Columbia, however, only one female corporate counsel identified herself as a member of a visible minority group. This represented 3.4% of the women corporate counsel while visible minority women represented 4.9% of the whole sample of women. Similarly, only one male in-house lawyer identified himself as a visible minority person (2.8% of the male corporate counsel as compared to 6.3% of all the men surveyed).

Because the numbers are so small it is difficult to determine the extent and nature of discrimination faced by minority women (or men) in corporate legal departments. Even less information is available about Aboriginal women, lesbians and disabled women. Based on the statistics gathered about the profession as a whole, it is, however, likely that these women face discrimination at an entry level as well as at the more senior stages of their careers.

RECOMMENDATION:

7.1 The Task Force recommends that corporate legal departments take a leadership role by implementing employment equity programs to encourage the recruitment and hiring of women from minority groups, whether or not the corporation as a whole has an employment equity program.

C. Roundtable Discussions

While employment, hiring and recruitment were not areas specifically addressed by the focus groups in Alberta and British Columbia, a number of comments were made during the roundtable discussions that touched upon these issues. Most of these comments arose during the discussion of career-advancement and are therefore referred to in the section on the glass ceiling. Issues such as the need for mentors, role models and networking are addressed in that section of this chapter.

In Quebec, however, there was more direct discussion of employment issues. The focus groups, in addition to noting the advantages of corporate practice referred to above, also commented on the disadvantages of working in the corporate milieu. They pointed out that many corporate environments continue to be dominated by a very masculine culture that makes it difficult for women to feel comfortable. Many businesses, for example, still operate under the assumption that their employees have spouses at home to manage family responsibilities. The Quebec participants also noted that many corporations do not have policies that address women's concerns and therefore tend to deal with women's issues on a case by case basis.

The Quebec focus groups also discussed remuneration of female corporate counsel. Many of the women believed that they were not paid as much as their male colleagues nor as much as lawyers in private practice.[15] Others, however, believed that corporations were more likely than private law firms to have fixed policies that determine pay based on merit. Some participants also noted that when being hired women are less likely than men to negotiate all working conditions including, in addition to salary, the various perks that are often available. Many women felt that more information should be available about the salaries and perks paid by corporations.

With respect to the numbers of hours worked, a number of the Quebec participants noted that this was one of the reasons they had left private practice to join corporations. Some participants noted that, nevertheless, the number of hours expected in corporate legal departments is increasing. However, they acknowledged that these hours are generally spent working on files rather than in engaging in social activities designed to develop a client base.

Women in the Quebec focus groups felt that in terms of their relationships with their colleagues, the senior ranks of the corporation, and corporate clients, being a woman was a disadvantage. They felt that they were taken less seriously and needed to prove themselves before being accepted. Furthermore, some of the participants noted that corporate clients continue to be ill at ease with female lawyers, although this seems to be improving. Some women believed that they had an advantage over men in that they were more accustomed to using "psychology" to develop business relationships. They also noted, however, that women must tread a fine line when trying to develop good working relationships for fear that friendly overtures will be misinterpreted.

None of the lawyers in the Quebec focus groups had any concerns about the recruiting process. In fact, they noted that recently the best candidates for positions are often women. However, there is also a recent trend, with the increase in demands for maternity leave, of corporations beginning to show somewhat greater reluctance to hire women.

D. Conclusions

Given the prominent position that corporations occupy in the economic sphere, and the fact that they are often more progressive on women's issues than the legal profession, there is a powerful and important role for the corporate sector to play in encouraging others, particularly law firms, to follow their lead. Corporate law departments refer a significant amount of legal work to lawyers in private law firms. This work is highly coveted by the law firms and, in many cases, the extent of such work can have a dramatic influence on a law firm's success. This provides an opportunity for corporations to take a leadership role in acknowledging the problems that women face within private practice and to take steps to ensure that some of the overt systemic barriers faced by women lawyers are reduced and eventually eliminated.

The Task Force believes that one of the most effective methods of promoting change is to establish a positive economic link between law firms' implementation of equity policies and the amount and availability of legal work they obtain from corporations. Some corporations in the United States have made efforts to do this. For example, one American company, before retaining a Canadian law firm, inquired about the percentage of partners who were women. Specific questions that could be asked include inquiries about the percentage of female articling students, associates and partners as well as about the existence of employment equity policies, sexual harassment policies and reduced work load policies.[16]

RECOMMENDATION:

7.2 The Task Force recommends that corporate law departments refer their legal work to law firms that demonstrate that they have effective employment equity programs in place which ensure representation of all women regardless of their race, ethnicity, sexual orientation or physical abilities.

II. "GLASS CEILING" (Access to Managerial Positions)

A. Introduction

The concept of the glass ceiling means something different to corporate counsel than to lawyers in private practice. In corporations, opportunities for promotion for lawyers exist not only within the legal department but may also include transfers into non-legal management positions. Thus, addressing upward mobility problems for female corporate counsel may require different approaches to attacking bias.

Moving into managerial positions in a corporate setting may involve a head-on collision with unfamiliar aspects of the "corporate culture". For example, one corporate counsel suggested that the bias experienced by women lawyers, especially in

natural resources companies which are often managed by engineers and geologists, may be directed more against lawyers generally than women specifically. In examining barriers to women's access to managerial positions in corporations, it is therefore necessary to move beyond legal services to examine some of the other "ladders" in the corporate structure.

B. Survey Results

Female corporate counsel, like their counterparts in the profession as a whole, do not participate to the same extent as men in activities which may lead to career advancement. In the Alberta survey, for example, only 27.3% of female corporate counsel were involved in promotion and client development, compared to 33.6% of the male corporate counsel. Oddly enough, promotion and client development was one area in which female British Columbia corporate counsel were more involved than their male counterparts (42.1% compared to 23.3%).

The female corporate counsel in both the Alberta and British Columbia surveys believe that women are discriminated against with respect to career advancement. In fact, this was identified as the most prevalent form of discrimination against women: in Alberta, 87% of the female in-house lawyers believed that they were discriminated against with respect to career advancement (81.0% of the women in the overall survey also believed this to be the case). Only 48.0% of the male corporate counsel in Alberta agreed (compared to 42.4% of all the men in the survey). In British Columbia, 79.3% of the female corporate counsel felt that they were discriminated against in terms of career advancement opportunities (compared to 75.5% of all the women surveyed), in contrast to 58.3% of their male counterparts (43.7% of all the men surveyed).

The figures are even more dramatic with respect to the perception that there is discrimination against women with respect to access to managerial positions. In Alberta, 81.2% of the female corporate counsel and 37.2% of the male corporate counsel believed that such discrimination existed — compared to 52.8% and 17.5%, respectively, in the overall survey. Among British Columbia corporate counsel, 48.3% of the women and 22.2% of the men identified this as an area in which women faced discrimination (compared to 45.5% and 15.4%, respectively, in the overall survey).

The views of the female Alberta corporate counsel on these issues are borne out by their responses to questions asking if they believed that discrimination existed against women with respect to the nature of office/firm functions and with respect to the nature of promotional functions. The corporate women were more likely than women generally to identify the nature of corporate functions as discriminating against women (58.0% as compared to 40.5%). There was no difference between the male in-house lawyers and all the Alberta men in terms of their perceptions of bias in this regard. The female corporate counsel in Alberta were also more likely than women generally in the Alberta survey to believe that women were discriminated against by the nature of promotional functions (53.6% as compared to 41.8%). Again, there was virtually no difference between the male corporate counsel and all the male Albertan respondents in terms of their perceptions (9.3% as compared to 9.8%). These questions were not asked in the British Columbia survey.

C. Roundtable Discussions

As a result of the foregoing analysis of the Alberta and British Columbia surveys, one of the main subjects discussed by the focus groups was "the glass ceiling". The topics addressed included: 1) why women do not participate in career-advancing activities; 2) activities that women should become involved in; 3) changing the nature of office and promotional functions; 4) why so few men identify the glass ceiling; and 5) how male corporate counsel can assist in making changes. The responses are summarized below.

It is important to recall in the following discussion that certain career-advancing activities can have a somewhat different meaning in the corporate context. For example, there are two kinds of clients. To the in-house lawyer, her real client is the corporation itself. Promotions both within the legal

department and laterally within the corporation depend on the lawyer establishing good relations with the corporate client, often outside of office hours. In the following discussion, such activities will be referred to primarily as office functions.

However, the corporation also has business "clients" and the ability to "develop" the corporations's clients, again often outside of usual working hours, is also perceived as an important criterion for promotion. Law firms generally focus on this kind of client development. In the following discussion, this type of activity is referred to as client development or as promotional activities or functions.

1. WHY WOMEN DO NOT PARTICIPATE IN CAREER-ADVANCING ACTIVITIES

There was considerable discussion within the focus groups about why women do not participate in so-called "career-advancing" activities. The analysis of the data and the discussion within the focus groups identified several reasons for this lack of participation including the nature of the activities involved, women's lack of availability for after-hours work due to family responsibilities, concerns about men misinterpreting social overtures and the lack of role models.

Unfortunately, the discussion of "career-advancing" activities focused almost exclusively on activities that take place outside the office. This was likely due to the reference elsewhere in the focus groups' recording forms to office and promotional functions. As a result, participants did not talk about why female corporate counsel were less likely than their male counterparts to be involved in other career-advancing activities such as making hiring decisions, assigning files, supervising other lawyers, and participating in policy, management and remuneration decisions. It is unfortunate that the focus groups' views on these important "career-advancing" activities are not known.

Quite often, the activities involved in client development have little intrinsic interest to women. They may involve sporting events or time spent in surroundings perceived to be unsavoury or uncomfortable for women. As a participant in the Calgary focus group commented,

> [There is an] emphasis on drinking or smoky bars or strip joints, such activities are not comfortable to women. Sporting events purposely exclude women. The activities are generally geared to male tastes - e.g. hockey tickets, golf tournaments etc. or they may be held at bars where the tone set is risky to women, e.g. drunkenness and inappropriate behaviour.

Women's time outside the office is often dedicated to their family responsibilities. The focus groups revealed that many women corporate counsel prefer to spend their time with their families and are reluctant or unwilling to sacrifice that time. Others are simply unable to make the time for after-hour activities because their family commitments require them to be at home. Thus, women corporate counsel were unable to participate in the kinds of activities that assist advancement within corporations.

Women corporate counsel also find professional socializing with men can be very difficult. They are concerned that men invited to dinner or a hockey game may misunderstand their intentions. Even when the person invited clearly understands the woman's intentions, there is a perception that others will gossip about such meetings. Women in the focus groups also believed that similar concerns prevent men from inviting women corporate counsel to activities outside the office. As one woman commented:

> Women may be afraid to "go out" with a man more than a couple of times after work... they get the wrong idea... and vice versa... the man may be afraid that he will be considered to be harassing if he says lets go for a drink.

Most of the focus groups expressed the view that the corporate culture of the organizations they worked for was a barrier to their participation in career-advancing activities. Women noted that corporations practice systemic discrimination against women, that there is an "anti-woman" element to corporate cultures. Some women noted that promotions within their corporations were only available to those with scientific backgrounds.

Others believed that lawyers' roles within corporations do not make them desirable candidates for promotion out of the legal departments, particularly as there may be few opportunities for promotion in any event. Some noted that lawyers simply may not have the skills needed to function effectively outside the legal departments.

Many of the women who participated in the focus groups commented on the lack of opportunity for women to network and discuss their common problems. Many also mentioned that the focus group provided them with the first opportunity in their careers to discuss the gender discrimination they have faced. The opportunity to do so made them realize that their feelings of isolation and frustration were not unique.

Because women have so few counterparts in other powerful women they feel isolated and unable to compare problems at work with other women. This dearth of women often precludes informal or formal mentoring of junior women by senior women corporate counsel.

2. Activities Women Should Become Involved In

Some participants noted that women need to become involved in establishing objective standards that will be used in their corporation to determine who will be promoted. A number of groups thought it was necessary for women to become more involved in company projects outside their legal work in order to give themselves greater exposure. For example, one group's point-form notes said:

> Involvement in multi-disciplinary project teams within company - visibility, credibility beyond legal function, increased knowledge of business. Create a higher profile - senior management recognition [needed] to be "pulled up" the corporate ladder.

Some groups suggested becoming more involved in professional and industry associations.

There were mixed responses with regard to volunteer work. Some groups thought it was important to be involved in charitable organizations. Others, however, felt that women should not become involved as "social organizers" because this is seen as "woman's work".

One group noted that it was important for women to make it clear to their superiors that they were interested in being promoted as some men have the mistaken belief that women are not ambitious. Another group suggested that women must become more strategic in their approach to their careers by identifying what they want to achieve and devising a plan on how to get there. In a similar vein, another group expressed the need for women to "play their [men's] game" and to be aggressive.

Another group suggested that women need to be more tolerant of other women at work, and to help to promote other women. Two groups spoke of women's needs for mentors, possibly other women.

3. Changing the Nature of Office and Promotional Functions

One group noted that women need to be given the opportunity to provide input into the nature of office functions. Others noted that corporations should stop holding events in men-only locales. Two groups indicated that changes in attitudes to such functions must be initiated at the senior level in order to be effective, while another group said that such changes required changes to the corporate culture itself.

Another group opined that the corporate culture will change as more women enter the workforce, while yet another indicated that there is a need for women's support groups within organizations. Some participants felt that senior women in the company need to lobby senior management to change the nature of office and promotional activities. A number of women suggested that sporting events be replaced by more "cultural" activities.

4. WHY DO SO FEW MEN SEE THE GLASS CEILING?

Many groups believed that either men were not aware of discrimination or that they simply did not give it much thought. Most thought that they are not aware of it because they do not experience it. Others noted that men do not see the ceiling because it is indeed made of "glass"; since there is little overt discrimination they do not believe that discrimination exists. Similarly, other groups remarked that for men to acknowledge the existence of a glass ceiling would require them to admit they behaved in a discriminatory way. Men would prefer to believe that they are progressive and do not discriminate. In addition, many men now believe that reverse discrimination exists in the workplace and that women are favoured for promotions rather than discriminated against. Other groups noted that men do not care about these issues as they do not perceive that they affect them. Or, if they are aware of the glass ceiling, some women noted, they are pleased that it exists because it benefits them.

Another group noted that they were reluctant to talk to their colleagues about their views of the glass ceiling because they felt that it sounded as though they were "whining". The same group remarked that men do not recognize the power and the impact of their networking. Similarly, other participants noted that firm events are planned by men for men and that they regard them as fun events rather than as "ladder-climbing" activities.

5. HOW CAN MALE CORPORATE COUNSEL ASSIST IN MAKING CHANGES?

Many groups suggested that men make the effort to include women when engaging in informal office discussions. Other recommendations included having male corporate counsel ensure that women are treated fairly and that men ensure that women are equally represented on committees. One group also suggested that men make themselves more aware by asking women lawyers for their views and that men who notice their male colleagues engaging in inappropriate behaviour point out that such actions are unacceptable.

A number of groups suggested that men could act as mentors for women. Six groups mentioned support in one form or another. Their suggestions included promoting awareness of diversity, giving women responsibility, ensuring that women are given the opportunity to make presentations to senior management and the need to show support for women to prospective clients. Some groups suggested that men support employment equity programs, create an awareness that there are qualified women to advance, and comply with employment equity policies.

6. CONCLUSIONS

The discussion about the glass ceiling begs the question of why certain types of activities are viewed as career advancing. Is it simply that men have more time available to them outside work hours and that engaging in so-called client development is really socializing rather than deal-making or client-retaining time? If this is the case, then should engaging in such activities be a prerequisite to promotion?

It seems clear that socializing *within* the corporation should not be a criterion for promotion (and technically is not) but the fact is that the lawyer who plays squash with the president may be more likely to be promoted than one who does not. Changing senior management's perceptions of why promotions are granted and sensitizing them to their own biases (in favour of those they play squash with, or in favour of those who remind them most of themselves) would assist women in climbing the corporate ladder.

The fact that little attention has been paid to the gender related problems faced by women practising within corporations needs to be addressed initially at an institutional level. The lack of information available about the specific problems faced by women corporate counsel indicates that some of the professional organizations that deal with issues relating to corporate counsel need to be more inclusive of women's concerns.

One organization dedicated to the concerns of in-house counsel is the Canadian Corporate Counsel Association (the "CCCA"). This Association is a Conference of the Canadian Bar Association. The CCCA meets several times each year and its annual meeting is held at the same time as the National Canadian Bar Association Annual Meeting. The executive of the CCCA consists of representatives from each province and territory. This organization needs to play a greater role in assisting and supporting female corporate counsel.

RECOMMENDATION:

7.3 The Task Force recommends that the Canadian Corporate Counsel Association establish a Subcommittee on Gender Issues to provide an opportunity for discussion of women's issues and to develop long term strategies for change.

The Subcommittee proposed in this recommendation could liaise with the proposed CBA Standing Committee on Gender Issues, to co-ordinate efforts and exchange information. The Canadian Bar Association could permit the use of its office, facilities and staff to assist in the organization of this Subcommittee.

RECOMMENDATION:

7.4 The Task Force recommends that the proposed Subcommittee on Gender Issues of the CCCA be charged with the overall responsibility for implementing the recommendations in this Report pertaining to corporate counsel and monitoring the progress of such implementation.

RECOMMENDATION:

7.5 The Task Force recommends that the proposed Subcommittee on Gender Issues of the CCCA consider further recommendations that should be made to the CBA and other professional organizations with respect to female corporate counsel.

RECOMMENDATION:

7.6 The Task Force recommends that the provincial CBA branches require provincial Corporate Counsel sections to set up Subcommittees on Gender Issues at the provincial level so that there can be a coordinated effort between the national CCCA Gender Equality Subcommittee and the provincial sections.

Generally, corporations should make efforts to promote mentoring and networking for their female in-house lawyers. For example, at the time a female lawyer joins the corporation, she could be "matched" with a senior woman in the corporation, either within or outside the legal department. This mentor would be able to speak to the junior lawyer about her own experiences with the organization, and offer a friendly and supportive ear. She could also act as a resource for the junior woman, introducing her to others and informing her of policies that she may wish to make use of. Where an appropriate senior woman is not available, a junior woman could be matched with a senior man who is sensitive to the kinds of problems women face.

RECOMMENDATION:

7.7 The Task Force recommends that Canadian Bar Association provincial corporate law sections be encouraged to set up an informal mentoring program for female corporate counsel.

Some of the activities which were identified as "career advancing" involve committee work within the corporation and company projects. In addition, participants mentioned that it was important, generally, to maintain as high a profile professionally as possible. One opportunity for corporate counsel is to become involved with trade associations related to their corporation's areas of business. These associations often seek corporate counsel to sit on their boards. It can also be helpful to become involved in professional organizations such as the Canadian Bar Association, county law associations and law societies.

RECOMMENDATION:

7.8 The Task Force recommends that the CCCA Gender Equality Subcommittee and the provincial CBA Business Law sections develop lists of positions available on the board of directors of trade organizations and at the senior levels of professional organizations.

RECOMMENDATION:

7.9 The Task Force further recommends that the CCCA Gender Equality Subcommittee create a data bank of female corporate counsel who are prepared to assume positions on the board of directors of trade organizations and at the senior level of professional organizations.

In order to make these recommendations effective, the proposed CCCA Gender Equality Subcommittee and the CBA Business Law Subcommittees could actively recruit women to be included in these data banks. Corporate legal departments should also prepare lists of positions within the corporation that are available. Corporations should encourage their female in-house lawyers to participate on these committees or projects. Making the selection process for such positions more open would also be an important part of making them more available and attractive to women.

RECOMMENDATION:

7.10 The Task Force recommends that corporate legal departments prepare lists of the positions available on internal committees and projects and encourage female in-house counsel to assume such positions.

Some of the focus groups also noted that there are industry tribunals and boards that influence corporate policy, such as the Conference Board of Canada. Organizations such as the Conference Board can influence corporations generally while more specific industry and trade organizations, such as the Canadian Bankers Association, can influence a segment of corporations. A number of the issues

raised in this section may have been considered within some of these forums. If these issues have not been considered, it would be helpful to female corporate counsel if they were addressed.

RECOMMENDATION:

7.11 The Task Force recommends that the Gender Equality Subcommittee of the CCCA look at ways in which gender related issues can be raised in other industry and trade associations.

III. LACK OF ACCOMMODATION FOR FAMILY COMMITMENTS

A. INTRODUCTION

Speaking about the interaction between professional and personal responsibilities, Professor Brockman notes:

> Historically, companies and employers integrated women and children into the workplace whenever there was an economic need to call on women's services in the workplace. Today, there are arguments which address the economic benefits of accommodating women with children in the workplace. While both of these approaches have their temporary benefits for some women lawyers who have child care responsibilities, in the 1990's such integration or accommodation has to go beyond economic arguments to those of human rights and how we want to treat our children.[17]

Many corporations have developed and integrated policies dealing with parental leave, flexible hours and part-time work. In this regard, corporations generally do more to accommodate family commitments than most law firms. These policies affect not only female corporate counsel, but all the employees within the corporation who have family commitments. Some corporations have been more successful than others in creating policies and strategies that have reduced the barriers facing women professionals and, in particular, women corporate counsel. However, many corporations' policies still do not accommodate women's needs as much as they should.

B. SURVEY RESULTS

In Alberta, 75.4% of the female in-house counsel (64.6% in the overall Alberta survey) and 23.2% of their male counterparts (22.3% in the overall Alberta survey) viewed "lack of accommodation for family commitments" as a type of discrimination against women.[18] In British Columbia, 65.5% of the women corporate counsel (68.4% in the British Columbia survey as a whole) and 22.2% of the men (33.8% in the British Columbia survey as a whole) were of this view.[19]

The statistics in *Perceptions of Bias* indicate that 50% of female corporate counsel have children who require care. Female corporate counsel who worked full time and had children requiring care spent over twice as much time caring for their children as the male respondents. Although female in-house lawyers reported slightly less difficulty in making child care arrangements than the general response rate of women lawyers to the Alberta survey, the responsibilities for making these arrangements had a disproportionate effect on the choice of job available to them.

C. ROUNDTABLE DISCUSSIONS

Within the focus groups there was much discussion about how the profession and the corporate workplace can better accommodate women and men who have family commitments. It was clear from the variety of responses that some corporations have much better developed policies in this area than other corporations and private law firms.

D. CONCLUSIONS

There is a real benefit to having corporations share their knowledge of and experience with policies aimed at accommodating their employees' family

commitments. Making such policies publicly available would have an educational effect and allow corporations who do not have policies or who have inadequate policies to benefit from the experience of other corporations. Corporations can also review the model policies developed by the Task Force and modify them to suit the corporate environment.

RECOMMENDATION:

7.12 The Task Force recommends that the CCCA Gender Equality Subcommittee act as a repository for corporate policies dealing with parental leave, flexible hours and part-time work.

Several of the focus groups suggested that corporations could play a significant role in accommodating female corporate lawyers' child care responsibilities by allowing female employees to select a child care credit instead of other standard benefits such as extended medical coverage or life insurance coverage. The Canadian Bar Association should study the feasibility of developing a system of personalized employment benefits, offering employees a spectrum of optional employment benefits covering diverse needs and priorities.

RECOMMENDATION:

7.13 The Task Force recommends that the Canadian Bar Association commission a research paper which examines the feasibility of developing a system of personalized employment benefits, offering employees a spectrum of optional employment benefits covering diverse needs and priorities.

This paper should be available to corporations through the CCCA Sub-Committee and to any interested CBA members.

There is a recent trend in corporate law departments to retain lawyers on a contract basis to perform work for the corporation. Concerns have been expressed that this trend is having a disproportionately negative impact on women as contract positions generally do not enjoy the benefits available to full time employees. This would include maternity benefits, which only women receive.

RECOMMENDATION:

7.14 The Task Force recommends that corporations carefully review the contracting out of legal work in order to determine whether doing so has a disproportionately negative impact on women.

IV. SEXUAL HARASSMENT

A. INTRODUCTION

Sexual harassment exists in the workplace and both law firms and corporations are no exceptions to this phenomenon. In the Alberta and British Columbia surveys, a distinction was drawn between two types of harassment: unwanted sexual advances and unwanted teasing, jokes or comments of a sexual nature. The surveys also distinguished between sexual harassment by lawyers and by clients, and asked for lawyers' views about the sexual harassment of their support staff.

B. Survey Results

1. Sexual harassment of lawyers as a form of discrimination

Among the Alberta corporate respondents, 47.8% of the women (compared to 57.7% of the women in the overall survey) identified "unwanted teasing, jokes or comments of a sexual nature" as a form of bias against women in the legal profession. "Unwanted sexual advances" were seen as a form of discrimination against women in the legal profession by 34.8% of Alberta female in-house lawyers (37.0% of the women in the Alberta survey) and by 17.8% of their male counterparts (17.2% of the men in the overall Alberta survey). This question was not asked in the British Columbia survey.

2. Lawyers' Experiences with Sexual Harassment

a. Unwanted Sexual Advances

In both the Alberta and British Columbia surveys, female corporate counsel were less likely than female lawyers as a whole to have observed or experienced women lawyers being subjected to unwanted sexual advances by other lawyers.[20] This is not to suggest, however, that female corporate counsel are not sexually harassed. In both provinces, approximately one quarter of female in-house lawyers reported having observed or experienced unwanted sexual advances from other members of the profession. Far fewer male corporate counsel reported having observed such behaviour than their female counterparts.[21] Male in-house lawyers also perceived fewer unwanted sexual advances than male lawyers generally.[22]

Unwanted sexual advances by clients were observed or experienced by male and female lawyers in both surveys. Almost a quarter of the female in-house lawyers had observed or experienced such behaviour (compared to 34.6% of all the female lawyers surveyed). Only 3.1% of the male Alberta in-house lawyers had observed such behaviour (compared to 8.2% of all the men). Lower rates of such behaviour were reported by the female corporate counsel in British Columbia - only 10.3% (compared to 31.9% of all the women surveyed). None of the male corporate counsel in British Columbia had observed clients engaging in such behaviour (compared to 9% in the survey as a whole).

b. Unwanted teasing, jokes or comments of a sexual nature

Over 50% of the female corporate counsel in the Alberta survey had personally observed or experienced women lawyers being subjected to unwanted teasing, jokes or comments of a sexual nature by other lawyers.[23] This was lower than the 64.7% of women in the overall survey who reported such experiences, but still significantly higher than the rates observed by both male corporate counsel and men as a whole.[24] In British Columbia, 37.9% of the female corporate counsel had personally observed or experienced lawyers subjecting women lawyers to unwanted teasing, jokes or comments of a sexual nature. Again, this was less than the rates reported by women as a whole[25] and significantly higher than the rates reported by British Columbia men.[26]

Clients had also been observed subjecting women to unwanted teasing, jokes or comments of a sexual nature. In the Alberta survey, 56.5% of the female corporate counsel had observed or experienced such behaviour. This figure is higher than the rates reported by women lawyers as a whole[27] and much higher than the incidences observed by men.[28] In British Columbia, fewer female in-house lawyers than female lawyers as a whole (37.9% compared to 53.6%) had observed or experienced unwanted sexual comments and teasing. Male lawyers observed even less of such behaviour (8.3% of the male corporate counsel and 18.5% of the male lawyers as a whole).

3. Sexual Harassment of Support Staff

a. Unwanted sexual advances

Female corporate counsel in Alberta were less likely than female lawyers as a whole to report support staff being subjected to unwanted sexual advances by lawyers (14.5% compared to 22.7%).

Surprisingly, male corporate counsel reported higher rates than their female counterparts (15.5% compared to 14.5%) and higher rates than Albertan male lawyers as a whole (13.4%). Clients were reported to have subjected support staff to unwanted sexual advances by 15.9% of the female corporate counsel (20.8% of all women in the Alberta survey) and 10.1% of their male counterparts (14.5% of all men).

In British Columbia, far fewer female corporate counsel than women lawyers as a whole had observed support staff being subjected to unwanted sexual advances (6.9% compared to 27.8%). Here again, male corporate counsel reported more incidences of such behaviour than their female counterparts (8.3%), but lower rates than British Columbia male lawyers as a whole (16.7%). In British Columbia, lower rates of such behaviour by clients was reported by all categories of respondents (3.4% of female corporate counsel, 19.1% of all women lawyers, 2.8% of male corporate counsel and 15.3% of all men lawyers).

b. Unwanted teasing, jokes or comments of a sexual nature

In the Alberta survey, lawyers, both male and female and corporate and non-corporate, had observed more unwanted teasing of support staff by lawyers than their respective counterparts in British Columbia.[29] Unwanted teasing of support staff by clients was observed by 33.3% of the female corporate counsel in Alberta (higher than the 30.9% reported by the women in the overall survey) and 13.2% of their male counterparts (20.8% in the overall survey). In British Columbia, 17.2% of female in-house lawyers observed such behaviour by clients toward support staff (30.5% of all women surveyed), while only 11.1% of the male corporate counsel did so (21.8% in the overall survey).

These statistics might lead one to the assume that sexual harassment of women lawyers is more common than sexual harassment of support staff. This assumption is unwarranted; the differences in the perceptions of the prevalence of harassment more likely indicates respondents' focus on their own group. A survey of support staff would more clearly establish the extent of sexual harassment in their workplace.

C. Roundtable Consultations

In Vancouver, Calgary and Toronto the roundtable discussions on sexual harassment focused on corporate policies that address sexual harassment. Participants were asked about the barriers which exist for women (both support staff and lawyers) in using sexual harassment policies, and how these policies can be made more "user-friendly" and more successful in preventing sexual harassment. In Montreal, the discussion was more general in nature.

The topics discussed in Vancouver, Calgary and Toronto include the nature and effect of policies, the complaint process, the nature of the person hearing the complaint, the confidentiality of the complaint, the need for education and information, the response to the complaint, the need for corporate support for the policy, concerns about retaliation and post-complaint effects, proactive measures, and the special position of corporate counsel. In addition, a number of groups expressed concern over the fact that their corporations did not have sexual harassment policies.[30]

1. Nature and Effect of Policy

A number of groups had suggestions about the content of sexual harassment policies. Two groups noted that policies should provide a clear definition of what constitutes sexual harassment while another recommended that the policies should distinguish between harassment and discrimination. Others noted the need to make policies as user-friendly as possible, preferably by using simple, straight-forward language.

Another two groups noted that the corporation as a whole should have the opportunity to help design the policy. They expressed the concern that policies written by senior men are often not sensitive to the reality of sexual harassment in the workplace.

2. Nature of person hearing complaint

Many of the focus groups expressed concerns about the person designated by the sexual harassment policy to receive complaints. Some noted that the persons designated under the sexual harassment policies at their corporations were not very approachable. Others remarked that the human resources departments of large corporations often appeared to be protecting the corporation's interests rather than those of the employee. Yet another group felt that difficulties occur when the person receiving complaints is senior in the corporate hierarchy, or is the harasser himself. They recommended that someone in the human resources group should handle such issues.

However, other groups felt that the person receiving the complaint must be highly enough placed in the corporation so as to command respect and attention when these issues arise. Generally, there were concerns that the person hearing the complaint must be attuned to women's problems with sexual harassment and be prepared to listen sympathetically to complaints.

A number of groups recommended that someone outside the corporation be charged with hearing complaints of sexual harassment. Other suggestions included appointing more approachable people within the corporation to be the contact person and focusing specifically on women as contact persons.

3. Confidentiality of Complaint

Most of the groups felt that confidentiality of the complaint was important, although one group was concerned about the "need to know the results of the investigation". Generally, however, there was a consensus that complaints should be anonymous.

4. Education and Information

Many of the focus groups discussed the need for education about sexual harassment. This was interpreted as including education about what constitutes sexual harassment and about the existence and content of sexual harassment policies. Some of the participants felt that if men are more aware of what sexual harassment is they will modify their behaviour accordingly or be more conscious of whether their colleagues are engaging in such behaviour.

Some recommended that an effective means of education is through the use of videos, which can illustrate instances of sexual harassment. Others simply recommended publishing and widely disseminating the corporation's sexual harassment policy. Employees must also be informed and persuaded that there will be no reprisals for making a complaint.

Other recommendations included encouraging women who have been sexually harassed to let the harasser know that his behaviour is considered offensive, and ensuring that all women are aware that immediate access to friendly and effective support is available. Other participants pointed out that legal departments have an important role to play in educating the corporation as they can and should point out that the corporation may be liable for damages arising from their employees' sexually harassing behaviour.

5. Response to complaint

A number of groups were concerned with the way in which the corporation responds to complaints. In order to encourage women to come forward, they must feel that they will receive a sympathetic and supportive reaction. Many participants felt that the response to complaints is often to be critical of the complainant for being too sensitive. There was a general perception that concerns about sexual harassment are not taken seriously and that this dissuades women from making complaints.

6. Support for policy/ corporate culture

There was a general consensus among the focus groups that the corporation's support for sexual harassment policies is critical to its success and is, unfortunately, often lacking. That support, one person noted, must include a commitment to dealing decisively with offenders. A number of people noted that male-dominated senior managements were not supportive of companies' sexual harassment policies, particularly if the perpetrator is a member of upper management.

A number of groups noted that there were more difficulties with sexual harassment policies in smaller corporations than in larger ones. Another repeated observation was that fear of liability is a good motivation for promoting an effective sexual harassment policy.

7. Retaliation and Post-Complaint Effects

Most of the focus groups were of the view that fear of recrimination was a problem with the use of sexual harassment policies. These fears included concerns about: the impact of a complaint on the complainant's career mobility, possible loss of job or trust, demotion, being punished in terms of salary benefits, being blacklisted or labelled, interactions with the perpetrator after the complaint is made, and being seen as a weak female. There was also a concern expressed by two of the Calgary groups about the potential impact of complaints on the perpetrator, such as being dealt with too harshly.

8. Nature of Corporate Counsel's Position

One of the Toronto groups noted that corporate counsel were less likely to face direct sexual advances than other company employees because of their senior status. They were more likely to be subjected to sexual jokes as part of the "testing ritual" of the male workplace. Another Toronto group was concerned that lawyers' special status makes it difficult for them to handle problems through regular channels.

9. Proactive Measures

One of the Toronto groups suggested that more proactive measures were needed to deal with sexual harassment problems.

The female corporate counsel practising in Quebec remarked that lewd and sexist comments are often made during the course of business, whether or not women are present. Some men make fairly aggressively sexist comments in front of women. Even supposedly flattering or complimentary remarks changes the professional flavour that ought to prevail in the business context.

A number of the Quebec respondents indicated that they have resigned themselves to sexist behaviour by more senior men but find similar behaviour by younger men unacceptable. Unfortunately, the female Quebec corporate counsel have noted a surprising amount of such behaviour by younger men and attribute it to the fact that they feel encouraged to behave that way by the older men.

D. Conclusions

The statistical results of the surveys suggest that there may be less sexual harassment in corporate legal departments than in law firms. Whether this is because more corporations have sexual harassment policies or because corporations are more aware of sexual harassment as a problem is unclear. However, the numbers also clearly indicate that sexual harassment continues to be a problem for women.

Four areas were identified by focus groups as primary areas of concern. More than half of the focus groups identified the following as areas that needed to be improved in order to make sexual harassment policies more effective: education and information; retaliation and post-complaint effects; corporate support for the policy; and the nature of the position of person(s) hearing the complaint.

While the circulation of sexual harassment and harassment policies within the legal profession by the Law Societies of Upper Canada and British Columbia should be applauded, it may be necessary to consult with those who might be most affected (or ignored) by these policies. Support staff may have different concerns which they may be reluctant to express to lawyers at their place of work.

It is clear from the discussion within the focus groups that, although sexual harassment policies may be more common within corporations than in law firms, harassment is still a barrier to women. Both support staff and lawyers need effective access within these policies. Given the differences between the corporate environment and the corporate legal environment it is difficult to suggest one method of effectively implementing such policies.

Many corporations have not only implemented sexual harassment policies but have also embarked on significant education programs to raise awareness of sexual harassment. It would be beneficial for corporations to make their policies available to other corporations. This would assist smaller corporations, which may not have well developed policies or procedures, and allow other large corporations to compare and contrast their policies.

RECOMMENDATION:

7.15 The Task Force recommends that the CCCA Gender Issues Subcommittee become a repository for corporations' model policies and education programs on sexual harassment.

RECOMMENDATION:

7.16 The Task Force recommends that the educational materials on sexual harassment developed in accordance with the recommendations set out elsewhere in this Report should be relevant and sensitive to women's circumstances in corporate legal departments.

V. CONCLUSION

Changes must be made to existing policies and procedures within corporate legal departments in order to improve the working environment. While women corporate counsel enjoy more influence and privilege than other women within the corporation, all women suffer from the failure to provide a supportive environment. The process of designing and implementing gender-sensitive corporate policies should, therefore, be aimed at redressing the problems encountered by all women within the corporation. All women are affected by discriminatory practices and women who occupy non-legal positions within corporations generally have less status and privilege than lawyers and therefore less power to effect change themselves. It would be short-sighted to devise corporate policies designed only to improve the lot of companies' female lawyers.

It is also important that corporations acknowledge not only that systemic discrimination exists within the legal profession but that they also recognize that discriminatory practices are built into corporate structures. In fact, the situation in both the legal profession and the corporate world merely reflects attitudes that permeate Canadian society as a whole. There is, however, an immense corporate infrastructure that forms a significant part of the commerce of this country and employs a significant part of the total Canadian female workforce. The position of power that corporations and lawyers

occupy in our society places an onus on them and gives them the ability to spearhead changes to attitudes that negatively affect women. Corporations must be encouraged to take a leadership role: lessons learned in the workplace will carry over into the day-to-day lives of the people they affect and begin to change the attitudes that foster discriminatory behaviour.

ENDNOTES

1. J. Brockman, *Perceptions and Experience of Bias by Corporate Counsel in Alberta and British Columbia* (A Report Prepared for the Canadian Bar Association's Task Force on Gender Equality, (1992). Hereinafter referred to as *Perceptions of Bias*.

2. The mean and median year of call for the twelve women who completed the demographic questionnaire was 1980, with the earliest year of call being 1972 and the latest 1991. The age range was 30 to 43 years, and they had practised for an average of 8.3 years as corporate counsel.

3. The mean year of call for the Toronto groups was 1983, and the median was 1985. The earliest year of call was 1962 and the latest 1989. They varied in age between 30 and 58. The Toronto women had practised as corporate counsel for an average of 5.6 years.

4. All but one of the Vancouver lawyers was in her early 30s and had been called between 1983 and 1989. All of these lawyers but one had practised at least two years as corporate counsel..

5. J. Brockman, *Women in the Corporate Legal World: A Report on Roundtable Discussions Regarding Gender Bias in Calgary, Toronto, and Vancouver* (A Report Prepared for The Canadian Bar Association Task Force on Gender Equality, 1993). Hereinafter referred to as the *Roundtable Report*.

6. 39.1% of the female corporate counsel compared to 54.5% in the overall survey.

7. 8.7% of female in-house lawyers as compared to 16.5% in the overall survey.

8. D. A. A. Stager and H. W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 271.

9. *Perceptions of Bias*, *supra*, note 1 at 2.

10. *Supra*. note 8.

11. *Ibid.* at 273.

12. *Perceptions of Bias*, *supra*, note 1 at 2-3.

13. *Ibid.* at 3 and footnote 11.

14. Professor Brockman does not indicate how wide the gap is.

15. Note that this does not accord with the results of the British Columbia and Alberta studies.

16. One difficulty with this recommendation is that the legal department does not always have complete control over the choice of outside counsel. Where this is the case, legal departments should still make every effort to influence the corporation to retain law firms with progressive policies toward women.

17. *Roundtable Report*, *supra*, note 5 at 37.

18. These figures include both those who believe that this is a form of discrimination against women and those who believe that it is a form of discrimination against both women and men.

19. These figures include both those who believe that this is a form of discrimination against women and those who believe that it is a form of discrimination against both women and men.

20. In Alberta, 24.6% of the female corporate counsel compared to 31.5% of the women in the overall survey. In British Columbia, 24.1% of the female corporate counsel, compared to 33.7% of the women in the overall survey.

21. In Alberta, 5.4%, and in British Columbia. 2.8% of male corporate counsel.

22. In Alberta, 6.9%, and in British Columbia, 10.2%, of the men in the overall survey.

23. The exact figure is 52.2%.

24. 27.9% of the male corporate counsel had observed such behaviour, compared to 32.1% of the men in the overall survey.

25. 68.2%.

26. British Columbia male corporate counsel: 11.1%, compared to 34.5% of the men in the survey as a whole.

27. 51.5%.

28. 14.7% of male corporate counsel compared to 18.2% of all men in the survey.

29. Professor Brockman reports: "'Support staff subjected to unwanted teasing, jokes or comments of a sexual nature by lawyers' was reported by 34.8% of the Corporate women (43% in the Alberta Survey) and by 25.6% of the Corporate men (25.6% in the Alberta survey). ... 'Support staff subjected to unwanted teasing, jokes or comments of a sexual nature by lawyers' was reported by 24.1% of the Corporate women (43.0% in the B.C. Survey) and by 8.3% of the Corporate men (29.2% in the B.C. Survey).

30. There was also a concern expressed by one of the Toronto groups that the Law Society of Upper Canada's policy on sexual harassment did not apply to corporations.

CHAPTER EIGHT

FACULTIES OF LAW

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CHAPTER EIGHT
FACULTIES OF LAW

I. INTRODUCTION

A succession of incidents has increased awareness of issues of gender and multiple discrimination in Canadian law school settings. These incidents include, for example, the publicity surrounding a memo on gender issues at Queen's University Law School,[1] the controversy surrounding the selection of a new dean at Osgoode Hall Law School and a related complaint to the Ontario Human Rights Commission,[2] the dismissal in 1989 of an associate dean at the University of Western Ontario Law School in a dispute over the hiring and appointment policy with regard to women faculty,[3] and the dismissal and reinstatement of a young feminist member of the Faculty of Law at the University of Saskatchewan.[4]

These incidents are illustrative of what many women regard as a "hostile" or "chilly climate" in law schools that restricts the opportunities for female and minority students and faculty to fully express themselves and to achieve their full potential. Although blatant forms of sexism and harassment are an aspect of this concern, women in law emphasize that this is only one part of a more pervasive hostility they sense toward women and others who differ from the norm of the "lawyer and law teacher as white upper class male." Women and minorities worry that individuals with unexpected or divergent values, experiences and customs (such as women, Blacks, First Nations peoples, gays and lesbians, handicapped people, etc.) are likely to be viewed as "different" if not "heretics" in law school settings. They worry, for example, that they may suffer career sanctions as the price of preserving their identities. One senior woman professor in a national survey of law teachers observed that,

> Faced with such hostility, many members of these groups may try to develop a lawyer "suit" or "persona" that will allow them to survive in the profession without career repercussions, especially in periods when members of their group are first entering the profession and are too few in numbers to have much influence in reshaping values. For example, one of my [minority] colleagues once talked about going home at the end of the day, taking off her "lawyer suit," and putting on her ["ethnic"] suit. "Faking it" effectively in this manner takes practice, and the person is still likely to be punished for nonconformity in the period before she/he gets the performance right. Even when the performance is perfected, maintaining this shell around the non-traditional lawyer's real personality and values consumes energy that could be better used for other purposes, including contributions that she could otherwise make as an unrestricted non-traditional law teacher. [bracketed terms are modified to assure anonymity].

This respondent goes on to urge that,

> equity will only be achieved in the legal profession when lawyers from all backgrounds genuinely accept that there is more than one way of being a good practitioner or professor and allow one another to "live long and prosper", even though we may have different values, cultures and life-styles.

These kinds of gender and minority concerns are not confined to faculties of law.[5] There are other areas of university life where women and minorities are less well represented, and law schools have been rather successful in recruiting women students. Canadian law schools are not distinct from their American counterparts with regard to continuing concerns about gender and minority issues. For example, a U.S. report from the late 1980s indicates that,

> ... about a fifth of the reporting schools are not moving at an appropriate pace to add women to their regular teaching staffs, slightly under two-fifths of the "high prestige" institutions are significantly behind the national pace in adding women to their faculties, and some schools are denying tenure to women at disproportionate rates.[6]

Minority law professors are poorly represented in both Canadian and American law schools.

However, we still have relatively limited knowledge about issues of gender and multiple discrimination in Canadian law school settings. In fact, not a great deal is known about the evolution of Canadian legal education generally. The landmark "Arthurs' Report" is the most systematic assessment to date of the development of Canadian legal education, research and scholarship.[7] This Report is now about a decade old and is not focused on issues of gender and multiple discrimination. So while we know that these issues are manifest in Canadian law teaching,[8] there is still relatively little systematic inquiry into their scope and dimensions.

A. Methodology

Due to the lack of information on issues of gender and multiple discrimination in Canadian law faculties, in the early months of 1993 the Task Force commissioned a survey of full time Canadian law faculty. Since there is no comprehensive and central source of information on Canadian law faculty, it was necessary to first enumerate this population by contacting the deans and associate deans of all Canadian law schools. This revealed that there are approximately 730 full time law teachers in faculties across Canada, with just over 500 in English Canada and 230 in Quebec. There are about 200 women and about 530 men on law faculties in Canada. A mail-back survey was sent to all 200 women and a randomly selected sample of 200 men. With follow-up mailings and reminder letters, 257 law teachers responded to the survey, resulting in a response rate of nearly 65 percent. About 54 percent of the respondents were women and about 46 percent were men. The relatively high rate of response and the approximate balance by gender suggest that the results of this survey should be representative of full time law teachers in Canadian law schools.

The survey of faculty included open-ended questions and this source of qualitative data is also cited in this analysis. Further information is drawn from briefs provided to the Task Force on Gender Equality[9] and from the provincial and territorial Working Group reports.

B. Perceptions of Gender Bias in the Law School Setting

We began this part of the survey by asking respondents to indicate the factors they thought were the most prevalent sources of gender bias in law faculties. The results are reported in Table 1.

The results demonstrate that the perceived problems are with various forms of gender harassment. More than half the female law teachers felt that students and colleagues did not give appropriate weight to their opinions and experienced unwanted teasing, jokes and comments. Half of the female respondents perceived discrimination in career advancement. Problems were cited in many areas: promotion, hiring, academic honours or awards, remuneration, access to administrative positions, research opportunities and course assignments. Close to half of the female respondents perceived gender bias in the lack of accommodation for family commitments.

II. ISSUES OF REPRESENTATION

Table 2 (on page 158) draws on the enumeration of law school faculty as well as Statistics Canada data to indicate by field the proportion of Canadian university faculty who are women. There were so few minority law teachers in these faculties that it made little sense to construct population estimates or inquire further about minority teaching experiences in the general faculty survey. However, this in itself is an important finding. It is a finding that parallels the experience in the United States where a recent report confirms that "...minority professors in general ... tend to be tokens if they are present at all."[10] The under-representation of minority women on Canadian law faculties is a serious problem.

TABLE 1

Percentages of Women and Men Law Professors Who Perceive Selected Sources of Gender Bias Against Women Faculty in Legal Academic Settings

	Gender			
	Women		Men	
Students Not Giving Appropriate Weight to Opinions	69.1	(96)	44.0	(51)
Other Professors Not Giving Appropriate Weight to Opinions	66.9	(93)	34.5	(40)
Unwanted Teasing, Jokes or Comments	50.4	(70)	36.2	(42)
Career Advancement	50.4	(70)	23.3	(27)
Lack of Accommodation for Family Commitments	46.8	(65)	31.9	(37)
Promotion	39.6	(55)	15.5	(18)
Unwanted Sexual Advances	33.1	(46)	31.0	(36)
Hiring	32.4	(45)	8.6	(10)
Academic Honours or Rewards	31.7	(44)	6.0	(7)
Remuneration	31.7	(44)	14.7	(17)
Access to Administrative Positions	30.2	(42)	12.9	(15)
Research Opportunities	25.9	(36)	9.5	(11)
Course Assignments	17.3	(24)	5.2	(6)

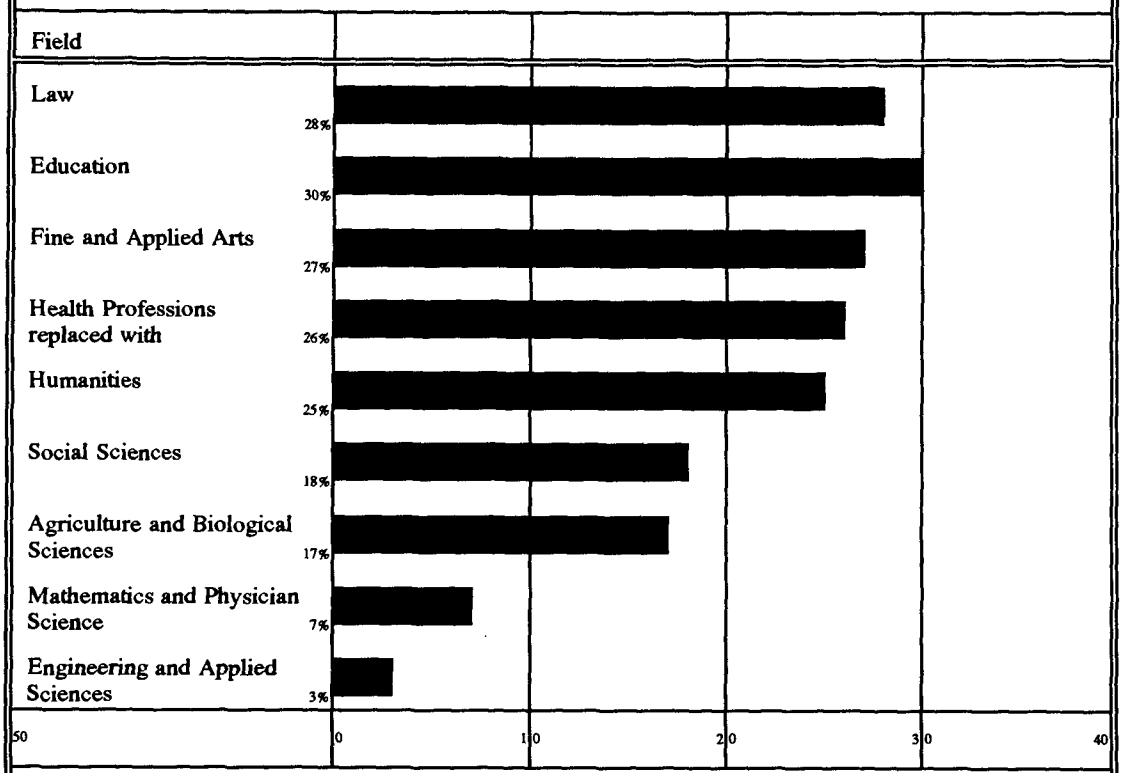
Meanwhile, about one in four (28%) full time teachers in Canadian faculties of law are women, with almost identical representation of women in francophone (26.7%) and anglophone (28.4%) faculties. Although this figure is much larger than in math, engineering and the physical and applied sciences, and larger as well than in the social and life sciences, the representation of women in Canadian law teaching remains tentative and circumscribed, especially with regard to minority status, as noted above. Constance Backhouse notes that the numbers of women teaching in university settings have risen and fallen several times in this century, so that, for example, while nearly 20% of Canadian university teachers were women in 1944, the number dropped again to 11% in 1958. We address issues of representation in terms of rank and salary below, but first we further consider the issue of multiple discrimination in law school settings.

A. Issues of Multiple Discrimination

It is increasingly apparent that minority women experience unique challenges in all parts of our society, including in relation to law. Nitya Duclos makes this point in her research on human rights complaints where racial or sex discrimination was alleged.[11] She finds that when cases involving a complainant who is, for example, a minority woman, are isolated, the presentation of facts and judgments tends to distort the woman's experience by responding to only one aspect of the case. For example, a sexual harassment case involving a minority woman is seen as sexual harassment alone, without considering that race may also be involved. The interplay of race and sex is ignored, and the complainant is not seen as a whole person. Duclos concludes that attention to the interaction of group memberships is required.

TABLE 2

Proportion of Canadian University Faculty Who Are Women by Field*



* Sources: Figures for all fields but law taken from J. Lee, "Women in Academia - A Growing Minority" (1993) 5 *Perspectives on Labour and Income*, at 24-30 (Statistics Canada). Law Faculty figures collected from individual faculties.

Similarly, Shelina Neallani cites the experience of one of the few minority women who currently teaches in a Canadian law faculty as combining the effects of gender and race.[12] Incidents of prejudice and discrimination experienced by this faculty member have an interactive effect that can be difficult if not impossible to disentangle, as the following first person account illustrates:

> Whenever something like this happens in discussion of gender and race, I cannot separate them. I do not know, when something like this happens to me, when it is happening to me because I am a woman, when it happens to me because I am an Indian, or when it is happening to me because I am an Indian woman.[13]

This point is made again in the following way:

> For Women of Colour, experiences of discrimination are complex and do not fit easily into the existing legal structures of racial discrimination. While the effects of discriminatory conduct may be evident, isolating race or gender as the basis for the inequity is often difficult.[14]

The implication of these experiences is that attention should be given in research to capturing the multiple sources of discrimination that can impinge on women's lives in ways that go beyond gender and often involve race as well as other group memberships.[15]

B. Discussion

The issue of multiple discrimination is a cause for concern in Canadian law schools. This was reflected in the feelings of stress and anger expressed by minority women students in these settings.[16] It is reflected even more clearly by the absence of minority women from more than token representation in teaching positions.

Minority groups are poorly represented in law school faculties. Although the representation of women on law faculties is increasing, it is crucial that issues involving the integration and advancement of women and minorities in law school settings be addressed. Law schools should give priority to the recruitment of minority groups into faculty positions.

RECOMMENDATION:

8.1 The Task Force recommends that law schools should give priority to the recruitment of members of minority groups into faculty positions.

The Task Force also recommends that law schools undertake regular reviews of recruitment practices to ensure that sufficient progress is being made toward gender parity and full representation of minority groups in teaching appointments. Law schools should ensure that these are tenure track positions and not disproportionately contract positions.

RECOMMENDATION:

8.2 The Task Force recommends that law schools undertake regular reviews of recruitment practices to ensure that sufficient progress is being made toward gender parity and full representation of minority groups in teaching appointments.

Female law professors also report problems with reaction to affirmative action hiring. What would otherwise be seen as normal "beginner's mistakes" are considered by some to be indications of lack of ability. Law deans should take steps to promote a greater understanding of the needs of new faculty members and should make full efforts to ensure that all individuals hired under affirmative action recruitment are recognized as fully qualified appointments.

RECOMMENDATION:

8.3 The Task Force recommends that law deans make full efforts to ensure that affirmative action recruits are recognized as fully qualified appointments.

III. CAREER ADVANCEMENT

A. Rank, Salary and Administrative Responsibilities Among Law Teachers

We turn next to the faculty survey to consider the rank, salary and administrative positions of women compared to men in Canadian law schools. The first panel of Table 3 (on page 161) indicates that nearly half the women (48.9%) with positions in these schools are in contractually limited or assistant professor positions. In contrast, more than half the men are full professors (55.2%). If the sample is weighted with respect to the population from which it is drawn, it is also possible to consider the representation of men and women within ranks. In the second panel of weighted results in Table 3, we see that more than half the contractually limited and assistant professor appointments are women (58.1%), while the great majority of full professors are men (83.8%). These imbalances are partially the result of women's more recent entry into faculties of law. Nonetheless, the differences in rank reflect a gender stratification of law teaching that is worthy of note

and further study.[17] The use of contractually limited appointments is a matter of particular concern because these positions have no security. They offer less opportunity to do research, which reduces the prospects of subsequently finding a tenure track position.

Respondents also reported their last year of salary from law teaching. These salaries were reported within $5,000 categories and category mid-points are used in estimating average salaries.[18] In the private practice of law, gender differences in earnings increase with movement up the stratification hierarchy of law firms.[19] Similarly, in law schools we find that the average salaries of contractually limited appointees and assistant professors are nearly exactly the same ($55,100 and $56,400 respectively for men and women) but that there is a seven thousand dollar difference for associate professors ($63,200 and $70,000) and, at the full professor rank, men average almost $30,000 more than women ($84,800 and $114,500 respectively). The latter differences may again reflect residual differences in seniority within rank that require further study.[20] The size of the disparity nonetheless is cause for concern and is consistent with recent detailed studies which find residual unexplained differences between women's and men's academic salaries that justify remedial action.[21,22] Some respondents to the survey expressed the concern that such salary differentials reflect a further reluctance of senior faculty to share power with newcomers.

Respondents were also asked to report their service in administrative positions. The results appear in Table 4. While almost 20% of the men in the sample had served as deans (18.1%) and another 20% had served as associate deans (20.9%), the respective figures for women were 5.8% and 14.7%. Of course, rank and experience account for some of this difference because deans are most often chosen from among full professors. To take this fact into account, the lower part of Table 4 considers only the women and men who are full professors. Some difference remains, as 18.8% of the women who are full professors have been deans, compared to nearly 27% of the men.

A number of concerns emerged from respondents' comments about search and appointment processes for deans. One respondent suggested:

> The same strategies that were historically used to resist initial appointments of women to teaching positions, such as double standards, are likely to resurface in dean searches. For example, in the first internal deanship search in which I participated it was suggested that one female lost because she was too masculine, while the other lost because she was too feminine.

Other concerns may also play a role:

> Women and candidates from other historically excluded groups may be disadvantaged by the "rain-making" factor, i.e., the assumption that a dean's primary function is to do fund-raising for the law school, and that you need to have pre-existing "connections" and conform to the expectations of the most traditional segments of the bar to do this effectively. This is the decanal equivalent to a law firm denying women partnerships because it is assumed that they cannot be "rain-makers."

However, the most central issue raised by respondents' comments was the balance of power and influence that operates along gender lines in the administration of law faculties.

> Deans have real power and prestige both within the law school and in the larger university and legal community, and they receive stipends and other more intangible benefits while they hold the positions. Thus, senior and mid-level male faculty have a real continuing interest in being deans, or having their friends be deans so that they will confer favours upon them. There may also be fear that female deans or deans from other non-traditional backgrounds will change the status quo in ways that will affect the comfortable habits of the male faculty. Thus, law schools that quite consciously practice affirmative action with respect to teaching positions may resist its application to the deanship, and this resistance may be as strong among junior and mid-level male faculty as among senior professors.

The more general worry is that collectively these considerations in the decanal selection process emphasize "connections", conformity to traditional norms, and access to privileged sectors of the legal community. This marginalizes not only women but

TABLE 3

Rank and Salary Data by Gender for Stratified and Weighted Samples of Canadian University Law Teachers

Rank	Stratified Sample		Weighted Sample		Stratified Sample	
	Percentage of Women in Rank	Percentage of Men in Rank	Percentage of Rank Who are Women	Percentage of Rank Who are Men	Average Annual Salary for Women	Average Annual Salary for Men
Contractually Limited Assistant Professor	48.9 (68)	16.4 (19)	58.1 (68)	41.9 (49)	$55,100	$ 56,400
Associate Professor	25.2 (35)	25.9 (30)	31.2 (35)	68.8 (77)	$63,200	$ 70,000
Full Professor	23.0 (32)	55.2 (64)	16.2 (32)	83.8 (165)	$84.800	$114,500

TABLE 4

Percentages of Women and Men University Teachers Who Have Held Positions of Administrative Responsibility

Position	Women		Men	
A. Across All Ranks				
Deanship	5.8	(8)	18.1	(21)
Associate Deanship	14.7	(17)	20.9	(29)
Other Position	11.2	(13)	12.9	(18)
B. Among Full Professors				
Deanship	18.8	(6)	26.6	(17)

members of all minority groups, as well as white males who do not have economically affluent backgrounds.

B. Discussion

Progress is apparent in the recruitment of women into teaching positions in Canadian law faculties and in relation to other areas of academic teaching. However, women are still concentrated in the lower ranks of law teaching, they are not represented as often as men in administrative positions in law schools, and their salaries may not increase at the same rate as men's salaries as they progress through the ranks. Issues of promotion and advancement therefore merit further attention.

The "glass ceiling" that confronts women in law firms also exists in law schools. There is a concern

that careers of women can only progress to a certain point before being "dead ended". This is underscored by the departure of senior women faculty over the last few years which can be attributed to the lack of opportunities within the law school for women faculty members. One type of barrier identified by female law professors was appointments to influential committees and to leadership roles on these committees.

RECOMMENDATION:

8.4 The Task Force recommends that law deans ensure the participation of female faculty on law school committees and that women are well represented in terms of leadership roles on committees.

There are more mundane but nevertheless significant reports of problems with issues such as the allocation of offices and other scarce resources. This allocation is not a neutral activity. Women, particularly junior faculty, are marginalized through poorly located offices — which affect the ease of integration, accessibility of other members of faculty for informal advice and consultation, and students' perceptions of the professors' value on the faculty. It shows lack of institutional support. All institutional decisions of this nature should be carefully considered in terms of the consequences for junior female faculty members.

The Task Force's survey and consultations have also revealed concerns about the negative impact of feminist research and scholarship on assessments for tenure, appointments, and other professional opportunities. This issue is discussed in greater detail below.

Law schools should demonstrate leadership in adopting and implementing model workplace equity policies that ensure equal treatment to women and minority groups. Law deans should ensure the participation of female faculty on law school committees and that women are well represented in terms of leadership roles on committees.

RECOMMENDATION:

8.5 The Task Force recommends that law schools demonstrate leadership in adopting and implementing model workplace equity policies that ensure equal treatment to women and other minority groups.

Given the problems highlighted above with respect to gender bias in appointments to administrative positions, the Task Force recommends that law schools give due consideration, which might include affirmative action, to women, minority faculty and feminist scholars for decanal appointments.

RECOMMENDATION:

8.6 The Task Force recommends that law schools give due consideration, which might include affirmative action, to women, minority faculty and feminist scholars for decanal appointments.

Linked to the problem of the glass ceiling is the issue of remuneration. This is a university-wide problem. Most universities have carried out studies on the systemic differences in salaries between male and female academic staff.[23] The problem of disparities in salaries was recognized in the early to mid-1970s. Many universities have set aside funds to remedy gender-linked salary inequities. However, studies have considered criteria of average salary, age and years of service by rank and have concluded that there are substantial differentials between salaries of full time female and male academics overall and within ranks.[24] National reviews of pay equity in

1973 and 1986 show a very slow decline in wage disparities with time.[25] The concern is always that part of the difference may be attributable to factors other than discrimination, such as qualifications and length of service.

Resolution of systemic discrimination in salary levels must be undertaken by the universities as a whole. Many universities have taken steps in this direction. Universities should develop and implement plans to eliminate the systemic differences in salaries between male and female faculty members. The Task Force also recommends that law faculties monitor starting salaries and qualification and promotion rates of new female and male faculty members in order to ensure that further inequities for either sex are not institutionalized.

RECOMMENDATION:

8.7 The Task Force recommends that universities develop and implement plans to eliminate systemic differences in salaries between male and female members.

RECOMMENDATION:

8.8 The Task Force recommends that law faculties monitor starting salaries, qualifications and promotion rates of new female and male faculty members in order to ensure that inequities are not institutionalized.

IV. BALANCING CAREER AND FAMILY RESPONSIBILITIES

A. Choice and Satisfaction with Law Teaching

Respondents to the law faculty survey were asked to indicate the features of law teaching they found most attractive, how satisfied they were with this choice of occupation, and how this choice might have affected decisions about their personal lives. Table 5 indicates which features of law teaching men and women found attractive. About a third of both the women and men found law teaching attractive because of the opportunity it provides to do research. However, men were slightly more likely than women to find the opportunity to teach very attractive (44% compared to 36%), while women were more likely than men to find the flexible work schedule one of the most attractive features of law teaching (25.9% compared to 12.1%).

TABLE 5

Percentages of Women and Men Who Rate Selected Features of Law Teaching as Most Attractive

	Women		Men	
Teaching	36.0	(50)	44.0	(51)
Opportunity for Research	34.5	(48)	36.2	(42)
Flexible Work Schedule	25.9	(36)	12.1	(14)
Work Environment	7.2	(10)	8.6	(10)
Opportunity for Consulting	1.4	(2)	.9	(1)
Other	2.2	(3)	1.7	(2)

Many women commented more generally about the freedom law teaching offers to pursue personal along with professional interests. For example, one respondent referred to "the freedom, the academic challenge, the opportunity to travel and meet others in my field in different provinces and countries, the opportunity to affect social change." Another respondent referred to "the opportunity to teach and pursue academic issues and interests through research and writing," along with "the flexibility in work schedule which make it easier to accommodate family

demands."

The Task Force also wished to determine how satisfied women and men were with their careers generally. Research tends to show that across a range of occupations, individuals are quite satisfied with their jobs, and that women are surprisingly similar to men in this regard. A comprehensive survey of life satisfaction reports that "there is practically no difference between women and men in average job satisfaction."[26] In fact, there are a number of studies that indicate women's attitudes toward their jobs are more favourable than those of men.[27]

Several explanations are offered for these findings. First, as noted above, women may differ from men in the characteristics of work that they value.[28] Second, some women may gain satisfaction from family involvements that positively influence their evaluations of work.[29] Third, women may, for reasons of socialization and/or acquiesence resist expressing their true feelings about their work.[30] Fourth, women may use different comparison groups and standards of evaluation from men, contrasting themselves only to other women who work in and outside the home.[31]

The last of these explanations was clearly reflected in a number of comments on the survey that favourably compared law teaching to the pressures and perils of private practice. For example, one respondent commented that,

> My guess is that you will find high job satisfaction (it sure beats practice) but complaints in terms of workload, etc. This may seem paradoxical but it is due to the fact that the "legal profession" itself is a hostile environment for many women and universities are slightly less hostile, but nonetheless demanding.

Another respondent observed that,

> For me, life as an academic is infinitely more satisfying than as a practising lawyer; I do not find the oppressive hierarchy that I did as a lawyer — though I work just as hard. I don't feel I have to "be seen around the office" at ungodly hours, and in this sense it is easier to combine with a family.

A third respondent reflected that,

> The university setting is a joy after being in practice where there are constant, serious and pervasive examples of both bias and harassment.

A final respondent summarized the comparison with private practice this way:

> Academia is not a low pressure setting, but the pressure is different from that in private practice, and easier for me to handle. There is less pressure to conform to a given model, and more room to experiment with new ideas and approaches.

Nonetheless, liking one's occupation or career choice is not necessarily the same as liking one's immediate job. Studies have focused on occupational or career satisfaction more than on satisfaction with the specific job held. It may be the specifics of the current job experience that are most disconcerting to many professional women, including female law professors.

As this last possibility seemed most compelling in the law school context, respondents were asked not only how much they liked their jobs as a career, but also how they liked their jobs in their current faculties. Since past research consistently showed that job satisfaction increases with age and hierarchical position, the responses to these questions were broken down by rank of the respondents.

The results summarized in Table 6 confirm that, regardless of gender, associate and full professors have higher levels of job satisfaction than contractually limited appointees and assistant professors. Again regardless of gender, respondents of both ranks like their careers more than their current faculties. More specifically, about 65 percent of associate and full professors are very satisfied with their careers, and about 50 percent are very satisfied with their current faculty. However, lower levels of satisfaction and differences by gender emerge among contractually limited appointees and assistant professors. Half these men, compared to about forty percent of the women, indicate they are very satisfied with their careers, while only about 28 percent of these women, compared to about 44 percent of men are very satisfied with their current faculty. The 28

percent figure for younger women in law faculties is a source of particular concern.

One source of job dissatisfaction among female professionals may involve sacrifices in their private lives. To explore this possibility respondents were asked whether they felt aspects of their jobs unduly influenced decisions made in their personal lives. Women were more likely than men to indicate that this was the case. The responses summarized in Table 7 indicate that more than half of the women (55.4%), compared to a third of the men (33.6%) felt that their private lives were unduly influenced in this way.

Greater sacrifices seem to be required of women than men in law teaching. Often these sacrifices involve the conflicting roles of parent and professional that are uniquely imposed on women. One respondent wrote that "as a mother of three young children and an ambitious legal academic, I carry on my life with almost no free time and minimal leisure." Another respondent commented that, "I don't work weekends because of child care responsibilities and I find it hard to do my job within the time constraints I have. I work very fast, never take lunches, and I'm still behind in everything."

B. Discussion

Women are drawn to university positions in law by the opportunity to conduct research and teach, and are especially drawn to the flexible work schedules that university teaching provides. However, women in law teaching are still more likely than men to find that decisions about their personal lives are influenced by the sacrifices they must make to pursue an academic career. Still, the majority of women, like men, are very satisfied with their chosen careers in law teaching. The notable exception to this conclusion involves younger women who are contractually limited appointees and assistant professors. Only slightly more than a quarter of these women are very satisfied with their current jobs. The Task Force's survey of younger female faculty members suggests some pressing reasons for this markedly diminished sense of satisfaction.

TABLE 6

Percentage of Women and Men Law Professors Very Satisfied with Job as a Career and with Job in Current Faculty

	Contractually Limited or Assistant Professor		Associate Professor		Full Professor	
A. Job as a Career						
Women	40.6	(26)	61.5	(24)	65.56	(21)
Men	50.0	(9)	64.5	(20)	64.1	(41)
B. Job in Current Faculty						
Women	28.1	(18)	51.3	(20)	50.0	(16)
Men	44.4	(8)	48.4	(15)	54.7	(35)

TABLE 7

Percentage of Women and Men University Law Teachers Who Feel Their Job Has Unduly Influenced Decisions Made About Personal Life

	Women		Men	
Definitely	18.7	(26)	8.6	(10)
Yes, On Occasion	36.7	(51)	25.0	(29)
Perhaps	8.6	(12)	11.2	(13)
No	30.9	(43)	40.5	(47)
Definitely Not	3.6	(5)	12.9	(15)
Don't Know	1.4	(2)	1.7	(2)

Law schools can take several steps to reduce the burden on women faculty members and assist them in balancing career and family responsibilities. In view of the growing research and publication demands placed on those beginning their careers as law teachers, programs should be put in place to grant reduced teaching loads in the first year of appointment, combined with half-year pre-tenure sabbaticals at the approximate midpoint between recruitment and the tenure decision.

RECOMMENDATION:

8.9 The Task Force recommends that law faculties put in place programs to grant reduced teaching loads in the first year of appointment for men and women faculty, combined with half-year pre-tenure sabbaticals at the approximate midpoint between recruitment and the tenure decision.

The Task Force's consultations also revealed that many female faculty members are overextended as a result of committee work and time spent counselling students. While it is essential that women are well-represented on committees, this imperative should not be permitted to place a disproportionate burden on female law professors. Law deans should regularly review the burden of committee work in faculties to ensure that junior and senior women are not required to over-extend themselves. Law deans should also recognize and reward women's "invisible work" as role models and the time spent counselling students.

RECOMMENDATION:

8.10 The Task Force recommends that law deans recognize and reward the "invisible work" as role models and in counselling done by women.

RECOMMENDATION:

8.11 The Task Force recommends that law deans regularly review the burden of committee work in faculties to ensure that junior and senior women are not required to over-extend themselves.

V. SEXUAL HARASSMENT

A. Gendered Interactions

The final part of the Task Force's analysis focused on perceived sources of gender bias in law school settings, with particular attention to what the Task Force described as "gendered interactions" between women and men in these settings. Perceived sources of gender bias were set out above in Table 1. The information in this Table demonstrated that the majority of women and a minority of men thought the following were likely sources of gender bias: students not giving appropriate weight to opinions (69%/44%), other professors not giving appropriate weight to opinions (67%/34%), unwanted teasing, jokes or comments of a sexual nature (50%/36%). It is of interest that about a third of both women (33%) and men (31%) agreed that unwanted sexual advances were a notable source of gender bias.

Many respondents to the survey emphasized the importance of distinguishing between blatant forms of sexual harassment and more subtle forms of gender harassment. The following comments convey the nature of this concern:

> The problem in most law schools is not **sexual** harassment in the sense that this term is usually defined, but rather **gender** hostility or harassment directed at women professors or women students simply because they are **female** professors or **female** students... I could report an enormous range of incidents of this sort of animosity during the past two years directed at my female colleagues, my female students and myself. Moreover, the problem is not going away, despite the fact that women constitute half our student population, and that women are now roughly one third of our faculty complement. The new women faculty are encountering the same sort of problems that I experienced fourteen years ago, although they now have more senior women to support them, and our Black and First Nations faculty have been victimized in similar fashion.

The following Tables set out in greater detail the distribution of responses with respect to the less explicit forms of gendered interactions. The respondents to the survey are categorized by academic rank and whether their area of academic

concentration is in feminist or other areas of scholarship. The categorization of rank is as in earlier tables.

The forms of gendered interactions considered involve student and faculty not giving appropriate weight to opinions, and unwanted teasing, joking or comments from students and faculty. These perceived sources of gender bias were included in the survey to provide a range of experiences that could include harassment as well as challenges, in and out of the classroom, whether explicit or implicit in their sexual or gender content. We do not assume that these responses are at all exhaustive of the range of possibilities, but they may be representative. They are probably at least indicative of some of the problems.

In Table 8, we consider reactions to female academics in the form of the perceived appropriateness of the weight given to their opinions by students and faculty. There is a pattern to the responses summarized in this table that recurs throughout the remaining analysis. The pattern indicates that younger women are most vulnerable to problems of gendered interaction, while women who are full professors experience these problems to a lesser degree.

For example, all but one of the female contractually limited appointees and assistant professors with a feminist concentration (96.8%) reported that students did not give appropriate weight to their opinions. One woman assistant professor observed that, "the real discrimination I feel is as a feminist. If and when I disguise my conviction that more work should be done in this area, things ease up." The feeling that students did not give appropriate weight to their opinions was only slightly less common among female associate professors with a feminist academic concentration (84.2%). However, less than a third of the female full professors with a feminist concentration (30.8%) reported this problem; although one cross-appointed full professor noted that, "there is a group of arrogant male students in the law school not found in my other graduate faculty."

TABLE 8

Percentages of Women and Men, Feminist and Other Law Professors Who Perceive Students and Faculty Giving Inappropriate Weight to Opinion as a Source of Gender Bias Against Women Faculty in Legal Academic Settings

Appointment	Gender				Academic Concentration			
	Women		Men		Feminist		Other	
A. Student Opinion								
Contractually Limited or Assistant Professor	79.7	(51)	55.6	(10)	96.8	(30)	75.9	(60)
Associate Professor	74.4	(29)	58.1	(18)	84.2	(16)	66.7	(46)
Full Professor	40.6	(13)	35.9	(23)	30.8	(4)	37.9	(36)
B. Faculty Opinion								
Contractually Limited or Assistant Professor	75.0	(48)	38.9	(7)	80.7	(25)	67.5	(54)
Associate Professor	64.1	(25)	51.6	(16)	73.7	(14)	58.0	(40)
Full Professor	26.6	(17)	53.1	(17)	38.5	(5)	34.7	(33)

Although the pattern we have observed is strongest in relation to students and among women with feminist interests, the same general pattern is repeated by gender and in relation to faculty opinion. For example, about three quarters of women who are contractually appointed and assistant professors perceive that professors do not give appropriate weight to their opinions (75%), compared to about two-thirds of the female associate professors (64.1%) and about one quarter of the female full professors (26.6%).

Many comments on the respondents' surveys reinforced the validity of the patterns observed thus far. For example, one respondent noted that,

> Women, and in particular young feminist women professors, are on the front lines of institutional and educational reform in the law school. As such, they shoulder huge amounts of hostility, anger, disrespect and resistance from students. This usually occurs without much institutional support.

The specific way in which this tension and hostility focused on younger female professors is reflected in the following comments:

> There is an enormous difference between life as an untenured assistant female professor, and life as a tenured associate female professor.... As an untenured assistant professor, my job was extremely stressful, and very insecure. The power of students, particularly male students, to harass young professors and otherwise make them miserable cannot be underestimated.

This point is well recognized by more senior women in the profession, another of whom commented that:

> Much of my observation of discrimination relates to younger colleagues. At my age and rank, you've got a lot more protection than a young, untenured woman.

A third respondent observed that:

> The direct challenges are likely to die down somewhat as any given woman becomes more senior, because (a) if she survives to the point where her job cannot be threatened, she will develop confidence and techniques for managing the class that are compatible with her personality and sex and that are also tolerable to the majority of students and (b) the trouble-making students are smart enough to see that there isn't much point in challenging a tenured professor.

Several other aspects of student behaviour toward younger women law teachers drew comments from respondents. One respondent mentioned problems that may ensue when a younger female professor tries to be creative by experimenting with new teaching styles that reflect women's values, or to interject new material into the curriculum that reflects the experience of women or other minority groups. One respondent commented:

> many students are likely to suffer from culture shock when they are exposed to new teaching styles which are not used by the senior white male professors who epitomize the students' image of a law professor. Students may also reject the new "diversity" material as irrelevant to the profitable careers they hope to build for themselves in the legal profession.

These reactions can lead to difficulties in teaching evaluations that are important in salary, promotion and tenure decisions. The problems can include:

> ... both "low numbers" and scathing anonymous written comments that are most painful for women who have devoted large amounts of effort to doing good jobs with their classes. Indeed, these negative individual comments may be present in significant numbers even if the majority of the students in the class like the professor, since the anonymity of the questionnaires allow the unhappy minority to take a safe revenge. At worst, student hostility may go beyond negative evaluations and take the form of active lobbying for non-renewal of a term or initial appointment, or denial of tenure to a female professor.

Tables 9 and 10 present further results relating to unwanted teasing, joking or comments from students and faculty respectively. However, in these tables the results are broken down in terms of personal experience, observation and other awareness of these problems. The pattern observed previously, of

TABLE 9

Percentage of Women and Men, Feminist and Other Law Professors Who Report Personally Experiencing, Observing and Being Made Aware of Unwanted Teasing, Joking or Comments Directed at Themselves or Female Colleagues by Students During Past Two Years

Appointment	Gender		Academic Concentration	
	Women	Men	Feminist	Other
A. Experienced Oneself				
Contractually Limited or Assistant Professor	50.9 (30)	22.2 (4)	70.0 (21)	43.2 (32)
Associate Professor	30.7 (12)	24.1 (7)	38.9 (18)	26.9 (18)
Full Professor	35.7 (10)	6.3 (6)	23.1 (10)	15.6 (14)
B. Observed in Relation to Female Colleague(s)				
Contractually Limited or Assistant Professor	35.9 (23)	16.7 (3)	41.9 (13)	31.3 (25)
Associate Professor	32.3 (10)	35.8 (14)	42.1 (8)	33.3 (23)
Full Professor	34.4 (11)	12.5 (8)	23.1 (3)	20.0 (19)
C. Aware of in Relation to Female Colleague(s)				
Contractually Limited or Assistant Professor	46.9 (30)	16.7 (3)	58.1 (18)	27.5 (22)
Associate Professor	53.9 (21)	35.5 (11)	63.2 (12)	44.9 (31)
Full Professor	25.0 (8)	25.0 (16)	30.8 (4)	24.2 (23)

greater vulnerability for younger women law teachers, especially those who have feminist interests, reappears in the reports of personal experiences, especially in relation to students. Again, about 70 percent of the feminist contractually limited appointees and assistant professors, compared to about 39 percent of the feminist associate professors and 23 percent of the feminist full professors, experienced unwanted teasing, joking or comments.

Similar, but reduced and less clear cut patterns, occur with regard to observations and awareness of these experiences in relation to others.

B. Discussion

There is a striking pattern of vulnerability to inappropriate student and faculty opinion, conduct, and comments directed at younger and especially, but not exclusively, feminist law teachers. These younger women members of law faculties encounter unique challenges in teaching students and in dealing with their faculty colleagues. The problems are most evident in a lack of appropriate weight given to their opinions, and in negative comments, especially by students, but also by colleagues. A thoughtful comment by a respondent to the survey summarizes the challenge that many women law teachers confront, especially with regard to students:

TABLE 10

Percentage of Women and Men, Feminist and Other Law Professors Who Report Experiencing, Observing and Being Made Aware of Unwanted Teasing, Joking or Comments Directed at Themselves or Female Colleagues by Male Colleagues During Past Two Years

Appointment	Gender		Academic Concentration	
	Women	Men	Feminist	Other
A. Experienced Oneself				
Contractually Limited or Assistant Professor	45.3 (29)	5.6 (1)	58.1 (18)	37.5 (30)
Associate Professor	43.6 (17)	19.4 (6)	47.9 (9)	26.9 (23)
Full Professor	34.4 (11)	14.1 (9)	23.1 (3)	15.6 (20)
B. Observed in Relation to Female Colleague(s)				
Contractually Limited or Assistant Professor	40.6 (26)	27.8 (5)	54.8 (17)	31.3 (31)
Associate Professor	41.0 (16)	25.8 (8)	36.8 (7)	33.3 (24)
Full Professor	34.4 (11)	20.3 (13)	46.2 (6)	20.0 (23)
C. Aware of in Relation to Female Colleague(s)				
Contractually Limited or Assistant Professor	40.6 (26)	27.8 (5)	64.5 (20)	37.5 (30)
Associate Professor	46.2 (18)	35.5 (11)	52.6 (10)	52.6 (10)
Full Professor	31.3 (10)	20.3 (13)	30.8 (4)	23.2 (22)

Women law professors face serious problems of student hostility that are likely to persist in some form throughout much of their careers. Even if the woman professor behaves exactly like a man with equivalent seniority there is likely to be student resentment. Teaching takes practice, and most young professors experience difficulty in their first few years of law teaching.... These problems are aggravated by the presence of a small minority of students who take out their unhappiness about the less pleasant parts of the law school experience by ... challenging professors whom they perceive to be vulnerable. Such students often think young untenured women will not have the support of their colleagues, and will focus even more specifically on women who are "multiply disadvantaged" because they are Black, Aboriginal, handicapped, or lesbian. In many cases, disruptive students will be right about the lack of support from senior faculty, especially if there are no senior women faculty or others with minority backgrounds. Junior professors may be afraid to tell more senior faculty what is going on for fear the senior faculty will assume they are incompetent because they are being challenged by students, or the senior faculty may be indifferent or not understand the dynamics in question even if they are told.

Because our analyses reveal that these reports are anchored so clearly in personal experience and among women in untenured positions, it is difficult to discount the reports as merely problems of perception. If these problems were simply due to heightened sensitivity, they should not decline in intensity among more senior scholars, as we found they did. Similarly, if these problems were imagined more than experienced, the patterns in the analyses should have been more apparent when they were observed by respondents in relation to others, rather than by the respondents themselves, or when they were reported as a matter of general awareness, rather than personal experience. It is difficult to escape the conclusion that younger female law teachers, especially those who express feminist views, are unique targets of derisive forms of gendered interactions in law school settings.

Lack of institutional support has been a problem where women faculty experience difficulties in the classroom that are directly related to the fact that they are women. Where this occurs it is important that the law school respond appropriately and not further undermine the woman faculty member. An institutional understanding of the nature of these problems, and institutional support is essential to create a good working environment. Law schools need to develop effective mechanisms to eliminate gender harassment and discrimination. Recommendations to achieve this end were made in Part II of this Report.

A closely-related issue is the general environment of the law school. The faculty is seen by many as a proving ground for the adversarial nature of the profession. This exacerbates the difficulties faced by many women law professors.

Despite developments increasing diversity in the curriculum, further efforts are required to secure and integrate course offerings that address gender and minority issues. These efforts are essential because gendered and minority forms of legal scholarship, especially by younger faculty, are often challenged and marginalized in law school settings, especially by students, but by some faculty members as well. Resources should be developed, such as the Canadian Council of Law Deans video tape materials and seminars, to illustrate the challenges experienced by faculty members who teach material involving gender and minority issues. The purpose of such resources is to expose and explore student and faculty responses to teaching materials that explore gender and minority issues as well as ways of improving these responses. These materials could be used as part of the orientation process for new students.

RECOMMENDATION:

8.12 The Task Force recommends that the Canadian Council of Law Deans develop video tape materials and seminars to illustrate the challenges experienced by faculty members who teach material involving gender and minority issues, with the purpose of exposing and exploring student and faculty responses, as well as remedial strategies.

ENDNOTES

1. See S. McIntyre, "Gender Bias Within the Law School: The Memo and its Impact" (1987-88) 2 Canadian Journal of Women and the Law 362.

2. See A. Picard, "124 Women File Discrimination Complaint against Law School" *The Globe and Mail* (29 September, 1987) A16.

3. See B. Feldthusen, "The Gender Wars: 'Where the Boys Are'" (1990) 4 Canadian Journal of Women and Law 66.

4. See University of Saskatchewan Faculty Association Bulletin, Press Release "Dismissal Proceedings at the University of Saskatchewan" (November 1992).

5. See N. Aisenberg and M. Harrington, *Women of Academe: Outsiders in the Sacred Grove* (Amherst: University of Massachusetts Press, 1988); H. Breslauer, "Women in the Professorate: The Case of Multiple Disadvantage" in *The Professorate -- Occupation in Crisis* (Toronto: Ontario Institute for Studies in Education, 1985); C. Backhouse, "Women

Faculty at the University of Western Ontario: Reflections on the Employment Equity Award" (1990) 4 Canadian Journal of Women and the Law 36; M. Guillett, *We Walked Warily: A History of Women at McGill* (Montreal: Eden Press Women's Publications, 1981); A. R. Ford, *A Path Not Strewn With Roses: One Hundred Years of Women at the University of Toronto 1884-1984* (Toronto: University of Toronto Press, 1985).

6. R. Chused, "The Hiring and Retention of Minorities and Women on American Law School Faculties" (1988) 137 University of Pennsylvania Law Review 537.

7. See Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: Minister of Supply and Services, 1983) (chaired by Harry Arthurs).

8. See, for example, J. Bankier, "Women and the Law School: Problems and Potential" (1974) 22 Chitty's Law Journal 171; M. J. Mossman, "'Otherness' and the Law School: A Comment on Teaching Gender Equality" (1985) 1 Canadian Journal of Women and the Law 213; E. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 Canadian Journal of Women and the Law 36; E. Sheehy and S. Boyd, *Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings* (Toronto: Resources for Feminist Research, 1989).

9. These include the Osgoode Hall Law Students' *Brief to the Task Force on Gender Equality*, coordinated by Fay Faraday and Elizabeth Grace, members of the Osgoode Hall Law School's Women's Caucus, and N. Gambioli, *Women at Law School: Perspectives from the First-Year at Dal, or The Washroom Walls are Clean at Weldon*, Dalhousie University Law School (1993).

10. Chused, *supra*, note 6 at 539.

11. N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and the Law 25.

12. S. Neallani, "Women of Colour in the Legal Profession" (1992) 5 Canadian Journal of Women and the Law 148.

13. *Ibid.* at 152.

14. E. Carasco, "A Case of Double Jeopardy: Race and Gender" (1993) 6 Canadian Journal of Women and the Law 143.

15. See also A. Smith and A. Stewart, "Approaches to Studying Racism and Sexism in Black Women's Lives" (1983) 39 Journal of Social Issues 1 and M. B. Lykes, "Discrimination and Coping in the Lives of Black Women: Analyses of Oral History Data" (1983) 39 Journal of Social Issues 79.

16. See discussion, *supra*, in Chapter 2.

17. See also M. Angel, "Women in Legal Education: What its Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women" (1988) 61 Temple Law Quarterly 799.

18. J. Hagan, "The Gender Stratification of Income Inequality Among Lawyers"(1990) 68 Social Forces 835.

19. See M. Tienda, S. Smith, and V. Ortiz, "Industrial Restructuring, Gender Stratification and Sex Differences in Earnings" (1987) 52 American Sociological Review 195.

20. For a discussion of what such analysis might look like, see R.D. Raymond, M.L. Sesnowitz and D.R. Williams, "The Contribution of Regression Analysis to the Elimination of Gender Based Wage Discrimination in Academia: A Simulation" (1990) 9 Economics of Education Review 197.

21. See, for example, *Joint University of Manitoba/University of Manitoba Faculty Association Committee on Systemic Differences in Salaries Between Female and Male Academic Staff* (1992) (hereafter the *Joint Committee*).

22. N. Guppy, "Pay Equity in Canadian Universities, 1972-73 and 1985-86" (1989) 26 Canadian Review of Sociology and Anthropology 5.

23. *Joint Committee*, *supra*, note 21.

24. *Ibid.*

25. Guppy, *supra*, note 22.

26. A. Campbell, P. Converse and W. Rodgers, *The Quality of American Life: Perceptions, Evaluations and Satisfactions* (New York: Russel Sage Foundation, 1976).

27. See N. Glenn, P. Taylor and C. Weaver, "Age and Job Satisfaction Among Males and Females: A Multivariate, Multisurvey Study" (1977) 62 Journal of Applied Psychology 189; L. Penley and B. Hawkins, "Organizational Communication, Performance and Job Satisfaction as a Function of Ethnicity and Sex" (1980) 16 Journal of Vocational Behavior 368; R. Quinn, G. Staines and B. C. McCullough, *Job Satisfaction: Is*

There a Trend? (Washington, D.C.: United States Government Printing Office, 1974).

28. R. Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1977).

29. J. Veroff, E. Douvan and R. Kulka, *The Inner American* (New York: Basic Books, 1981).

30. E. N. Glenn and R. L. Feldberg, "Degarded and Deskilled: The Proletarianization of Clerical Work" (1977) 25 Social Problems 52.

31. Glenn *et al.*, *supra*, note 27.

CHAPTER NINE

ADMINISTRATIVE TRIBUNALS

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CHAPTER NINE
ADMINISTRATIVE TRIBUNALS

I. INTRODUCTION

A. WOMEN LAWYERS IN ADMINISTRATIVE JUSTICE

The influx of female lawyers into positions with government has been matched by a corresponding influx of women as members of administrative tribunals. For female lawyers this type of work represents an important alternative to the private practice of law. There is a great array of tribunals as well as a wide range of responsibilities assumed by those serving on them.[1] The spectrum of activity defies generalization and our knowledge about employment in this sector is limited. Despite these limitations, there are several reasons for reviewing the status of female lawyers serving on administrative tribunals. First, the number of women serving in this capacity has increased dramatically in the last decade. Secondly, the Canadian justice system is increasingly relying on tribunals for the resolution of conflicts. Third, administrative tribunals, like other public service positions, are an important alternative for female lawyers seeking a greater balance of career and family responsibilities.

The Task Force relies predominantly on two sources in this chapter: a national survey of female lawyers serving on adjudicative tribunals and a brief prepared by an Ontario group of female lawyers serving on adjudicative tribunals.[2] The Ontario brief is itself based on an informal survey, research and consultations within that community of lawyers. The national survey was sent to a group of 97 full time female lawyers serving on tribunals across Canada. These women were identified through a review of available lists of tribunal members.[3] Some of the individuals identified were not lawyers. 34 of the questionnaires were completed and returned. This small sample does not provide a complete picture of female lawyer tribunal members. However, the survey results do provide an interesting profile of the women lawyers serving in this capacity, their reasons for choosing this career, and their experiences working as tribunal members.

II. ISSUES OF REPRESENTATION

As the Task Force discovered in attempting to consult with female lawyers sitting on administrative tribunals, there are no national statistics on women who choose this career path. However, a review of the situation in Ontario provides an illustration of trends in this area.

There are 311 agencies, boards and commissions listed in the Ontario Government's 1992-93 guide.[4] Counting each individual regional agency operating within each board, there are 709 separate agencies, boards and commissions in the province. Of these, approximately 90 are regulatory or administrative tribunals.

Statistics which reflect the numbers or proportion of female lawyers who have entered this sub-sector of government are not readily available. Of the 90 bodies referred to above, only 34 require full time chairs. For many of these bodies, the chair is not a lawyer. Also, many of the vice-chairs are not lawyers.

However, it is known that of the boards, agencies and commissions within Ontario which are chaired by lawyers, one-half are female. Similarly, 48% of all full time vice-chairs in the province are female. These figures signify a major demographic shift since 1985.[5] However, the figures may not be representative of the situation across Canada.[6]

Appointments to tribunals are not made according to any established practice or policy. Most are made

by the prerogative of the responsible Minister. In Ontario, the main methods for seeking candidates are: using a data base of potential candidates held by the Public Appointments Secretariat; contacting the responsible ministry for recommendations; seeking public input through outreach programs[7] and, (more rarely) recruiting applicants through paid advertising.[8]

It is clear that the provincial government's commitment to appointing women to positions of chair and vice-chair of administrative agencies has resulted in increased gender equality in these organizations. This approach should be taken by all levels of government and should be extended to other groups that are under-represented in administrative tribunals. Proactive recruiting measures should be used to identify and attract larger numbers of qualified women and members of other under-represented groups to these positions.

RECOMMENDATION:

9.1 The Task Force recommends that governments use proactive recruiting measures to identify and attract women and members of other under-represented groups to positions on administrative tribunals.

III. CAREER ADVANCEMENT

The vast majority of respondents to the survey indicated that they had selected a career as a tribunal member because of an interest in public service and the challenging nature of the work. The main concerns raised in terms of career advancement were: (1) problems with limited term appointments; (2) lack of future professional opportunities; and (3) remuneration.

A. Problem With Limited Term Appointments

Most enabling statutes establish that appointments to administrative tribunals are for a limited term. In Ontario, the Management Board of Cabinet has directed that a term of appointment not exceed three years with a re-appointment allowable for a further three years. This aspect of their employment has a serious impact on women who have accepted appointments. Fully 50% of the respondents to the national survey indicated that the fact that their appointments were time limited created problems.

The changing career patterns in the field of administrative justice illustrate how limited term appointments have an adverse impact on female lawyers. Traditionally, such appointments were reserved for lawyers entering the latter stages of their career. Security of tenure was, generally speaking, not an issue of significant concern. In many cases the term appointment amounted to an appointment for life. Current data suggest that more women are serving on tribunals at a younger age and much earlier in their careers than the men who formerly dominated this field.

In contrast, a woman who makes a decision to accept a three year appointment at age 35 has significant concerns with respect to tenure. Chances are good that she has a young family which she supports in partnership with another adult, or supports alone. Her term of appointment will expire during those years of family life when the demand for security of income is highest and financial obligations are the most onerous. This woman is not planning to retire after her term expires.

Furthermore, there is no re-appointment protocol and this leads to great financial and professional insecurity. Governments should articulate and adopt a re-appointment protocol which provides a fair period of notice prior to the expiry of a term of appointment. This protocol should also articulate the principle that re-appointment decisions should be based upon the performance history of the individual and not on extraneous considerations.

In addition, governments should consider instituting longer terms for these appointments, for example for 5 or 7 years or removing limits on the number of re-appointments.

RECOMMENDATION:

9.2 The Task Force recommends that governments adopt a re-appointment protocol for individuals serving on administrative tribunals.

RECOMMENDATION:

9.3 The Task Force recommends that governments assure meritorious individuals serving on administrative tribunals of re-appointment with no mandatory upper limit on the number of terms which can be served.

B. Lack of Future Professional Opportunities

One of the greatest concerns raised by female lawyers serving on administrative tribunals is that the appointment leads to a dead-end in the careers. Governments have no commitment to relocating adjudicators in other sectors of government or on other tribunals. Indeed some questions have been raised as to the degree to which even excellent service on an administrative tribunal is held in high regard by governments or by the profession for career development purposes.[9]

Respondents to the survey were asked what their preferred position following their current appointment would be. Their responses clearly indicate that this field was a career choice: 32% preferred to have their appointment continued; 25% preferred to be appointed as chair of some other tribunal; and 44% preferred a judicial appointment.

Governments should re-evaluate the esteem in which they hold the experience gained through these appointments. This experience should be recognized as a valuable asset to governments. Rotation programs, secondments to other agencies and cross and multiple appointments are all options which should be explored in order to broaden the professional opportunities available to female adjudicators. Lawyers who are tribunal members should be considered as "internal" applicants for available government lawyer and senior civil service positions. Governments should also consider experience in administrative justice as relevant experience for judicial appointment.[10]

RECOMMENDATION:

9.4 The Task Force recommends that governments consider applications from lawyers who have served on administrative tribunals as internal applications for available government, legal and senior civil service positions.

RECOMMENDATION:

9.5 The Task Force recommends that governments view lawyers who have served on administrative tribunals as appropriate candidates for judicial appointment.

C. Remuneration

As women move from jobs in government or private practice to positions on administrative tribunals, they often make a financial sacrifice. They trade money for the opportunity to serve as adjudicators.

It appears that as women have entered this expanding field the perceived value of the work has declined. Governments should review the salary levels of adjudicators and assess the value of their work in comparison with work performed by government lawyers, senior civil servants and private practice.

In addition, reports of bias in the way that salaries are set have been made to the Task Force. While women have been encouraged to seek appointment as chairs of administrative tribunals, they have found that once they accept an appointment a salary is imposed. For a man, the announcement of an appointment to a tribunal often triggers the beginning of negotiations that lead to a mutually satisfactory remuneration package. Efforts by women to negotiate were often rebuffed. A number of women reported feeling humiliated by this difference in approach. It appears to speak volumes about the extent to which female lawyers in such positions are valued by the government which appoints them.

The Task Force believes that a study is required into whether discriminatory practices or systemic discrimination exists in the salaries offered to male and female adjudicators. Governments should take the necessary steps to document the remuneration levels of all those who serve on administrative tribunals. If this study reveals the existence of gender bias, governments should set a reasonable timetable for the correction of salary levels.

RECOMMENDATION:

9.6 The Task Force recommends that governments review the salary levels of adjudicators on administrative tribunals and assess the value of their work in comparison with work performed by government lawyers, senior civil servants and lawyers in private practice.

RECOMMENDATION:

9.7 The Task Force recommends that governments study whether or not the salary levels of adjudicators are affected by discriminatory practices or systemic discrimination.

IV. BALANCING CAREER AND FAMILY RESPONSIBILITIES

One of the main reasons administrative justice has emerged as an important career alternative for women is that this field offers flexibility to lawyers who value family life. In this sense it has the potential to evolve into a positive model for other environments. This is particularly true for vice chairs and other full time members who usually do not have primary responsibility for the daily duties linked to administering a large organization.

The nature of the adjudicator's duties involves the conduct of hearings according to a schedule,which in some organizations may be established well in advance. Depending on the individual workplace environment, hearing schedules may be established in a manner which takes into account the adjudicator's availability.

Where the enabling statute requires written reasons, or where the tribunal's policy requires them, a certain number of hearing days is often matched by days for research and writing. It is not usually necessary that the latter responsibility be fulfilled during "office hours". The workplace culture in some organizations enables decision writing to be performed outside the office.

With the possible exception of the Chair, performance of the duties of these adjudicators rarely requires an arduous social or "marketing" component. Work required outside office hours usually involves the research and writing components referred to above.

Although the potential for flexibility exists, it is equally clear that not all administrative or regulatory tribunals operate in a manner which accommodates the demands of family life. For example, many such positions require extensive travel.

The results of the national survey confirm that female lawyers with children are over-represented on tribunals. 67% of respondents to the survey had children, while only approximately 55% of the total group of female lawyers were mothers. Respondents were asked what proportion of child care responsibility they carried: 43% said 75%, while 30% said they bore 50% of overall responsibility for childcare.

The national survey also questioned female lawyers about the types of benefits they receive in their current position. The responses indicate unevenness in the types of options available to accommodate family responsibilities:

- 47% said that they had access to parental leave;
- 38% had access to flexible full time hours;
- 11% had access to permanent part time work; and,
- 2% had access to child care.

Administrative tribunals should take steps to ensure that the flexibility which is possible in this work environment is maximized. Each organization should evaluate workplace practices, scheduling procedures, and travel protocols, in order to achieve enhanced flexibility for individuals who requires it. Policies and practices should be adopted which accommodate the needs of lawyers with family responsibilities. For example, policies pertaining to travel expenses should be amended to cover actual child care costs incurred by a member who travels from his or her home city on behalf of the tribunal during hours not included in the normal working day. Governments should also take steps to facilitate the balancing of family responsibilities. For example, they should suspend the term of appointment during periods of maternity and parental leave so that the individual who requires leave during one term of appointment may serve the full remainder of that term following the leave.

RECOMMENDATION:

9.8 The Task Force recommends that administrative tribunals adopt policies and practices which achieve enhanced flexibility for individuals with family responsibilities.

RECOMMENDATION:

9.9 The Task Force recommends that governments suspend the term of appointment of an administrative tribunal during periods of maternity and parental leave.

V. SEXUAL HARASSMENT

The national survey asked respondents to state whether they had experienced or observed sexist remarks or behaviour while in their current position on an administrative tribunal. 35% of respondents answered in the affirmative.

Female lawyers were also asked whether they perceived gender discrimination in any aspect of their activities related to their position. This question was broken down into categories of relationships: in dealing with government, superiors, colleagues, lawyers and other representatives appearing before them, in dealing with parties, and "other". 41% of respondents reported having problems with lawyers and other representatives appearing before them.

Reports of discrimination in all other categories was fairly low. In remarks which accompanied this

question, many women commented that they felt their views were discounted on the basis of their sex.

> My discussion with other female Vice Chairs confirms my impression that male lawyers will try to get away with more with a female Vice Chair than with a male one. Controlling a hearing therefore becomes more difficult. Parties sometime intimate that although I'm a "sweet dear", I really have no authority.[11]

Women do not feel that they have the level of respect that would automatically be accorded to men: "some of the lawyers who are senior to me at the labour bar make inappropriate submissions - telling me what I can and cannot do with their matters."

The Task Force cannot propose specific methods for dealing with sexual harassment in the field of administrative justice. However, the recommendations contained in this Report should assist in eradicating this unwelcome conduct. For example, educational measures taken by the profession should result in improving lawyers' understanding of the problematic nature of this conduct. Also, sexual harassment will be considered professional misconduct if the Task Force's recommendations are adopted by law societies. Both these measures should eventually reduce the level of harassment experienced by female adjudicators.

VI. CONCLUSION

The situation of female lawyers in administrative justice is, in most respects, similar to the experience of women in the other sectors covered in this Report. One notable characteristic is the coincidence of the expansion of the use of administrative tribunals and the entry of women lawyers into this field. It appears as if this work becomes undervalued as more women begin to do it. Remuneration has begun to reflect this. Career opportunities which flow from the experience are limited. The profession must be concerned about whether administrative justice is becoming a "pink ghetto". Steps must be taken now to elevate the status of this field in order to ensure that female lawyers are not segregated into a "second class" stream of justice.

ENDNOTES

1. This chapter addresses only the issues related to tribunal members. There are, of course, many lawyers who work for tribunals whose concerns were addressed in the chapter on government lawyers.
2. *Submission on Behalf of Female Lawyers in Administrative Justice in Ontario* (1993) (hereafter the *Ontario Submission*).
3. This task was undertaken by Elaine Newman.
4. A Guide to Agencies, Boards and Commissions. (Government of Ontario, 1992/93) Public Appointments Secretariat).
5. *Ontario Submission*, *supra*, note 2 at 7.
6. There are no national statistics available.
7. Outreach programs have, for example, targeted community, labour and management groups.
8. *Ontario Submission*, *supra*, note 2 at 5.
9. *Ontario Submission*, *supra*, note 2.
10. See Chapter 11, *infra*.
11. Response to questionnaire sent to female adjudicators.

CHAPTER TEN

THE JUDICIARY

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CHAPTER TEN
THE JUDICIARY

I. INTRODUCTION

It should be noted at the outset that the Task Force's mandate is not a mandate to review generally the issue of discrimination in the administration of justice in the courts. The focus of the Task Force's study is women in the legal profession which includes, of course, women on the bench and women practising law as counsel in the courts.

The Task Force consulted broadly on the issue of gender equality in the judiciary. This was a lively topic for discussion both at the National Conference and in our consultations with women's organizations. The provincial and territorial Working Group reports addressed this topic. However, the Task Force also decided that it was essential to contact women on the bench directly. This decision was implemented through a survey letter that was sent on a confidential basis to every woman judge at both the federal and provincial levels across Canada.

This Chapter addresses four main issues: (1) judicial appointments; (2) judicial education; (3) discrimination in the judiciary; and (4) judicial discipline. The sections which refer to the survey material were prepared by the Chair who alone had access to the confidential material.

II. THE JUDICIAL APPOINTMENT PROCESS

There is no doubt that the judiciary today is being subjected to greater scrutiny than ever before and that the public's expectations of judges at all levels of the court system are very high. It is essential therefore that the very best candidates be selected for judicial appointment. In addition, over the last few years there has been growing public recognition of the need for a bench which is representative of the Canadian community in all its diversity. The rationale for attempting to ensure adequate gender representation in the judiciary is fourfold:

(a) women who are bound by the justice system should be participants in it at all levels;

(b) public confidence in the system would be enhanced by the participation of both sexes;

(c) female judges are important role models; and

(d) female judges can make a unique and important contribution to the adjudication process.[1]

We must ask ourselves whether the existing judicial appointment processes are meeting the twin principles of merit and representativity.

A. FEDERAL JUDICIAL APPOINTMENT PROCESS

Federal judges are appointed by the Governor in Council on the recommendation of the Federal Cabinet. Since 1988, the Commissioner for Federal Judicial Affairs has been responsible for soliciting and maintaining records of persons interested in a federal judicial appointment.

All candidates must now apply for a federal judicial appointment. Copies of the application forms are available from the Commissioner for Judicial Affairs at the Department of Justice in Ottawa. Candidates must submit the names of four referees. Chief Justices encourage potential candidates to apply. These individuals usually get "fast-tracked" through the process. As applications come forward the Commissioner performs a perfunctory check for the basic requirements: good standing in a Canadian law society, no criminal record and ten years of call.

At this point the assessment committees in each jurisdiction take over the process. These committees are composed of a nominee from each of the following: the relevant provincial branch of the Canadian Bar Association, the law society, a federal judge nominated by the Chief Justice of that jurisdiction, a nominee of the provincial attorney general and a nominee of the Minister of Justice. This Committee is responsible for screening out candidates not worthy of a canvass by the profession. Those applicants who pass pre-screening are checked out by the Committee members with members of the profession. There are no formal criteria used during this process. Usually the referees are called and asked questions about the candidate's suitability and at least ten informal reports are obtained. The Committee does not interview the candidate, except in Nova Scotia.

The Committee advises the Minister of Justice on whether the candidate is "not recommended", "recommended" or "highly recommended". The list of "recommended" and "highly recommended" candidates are added to the list of potential appointees. Candidates are not informed of their rating. The final choice is in the discretion of the Minister. Once persons are recommended their names stay on the list for two years. Candidates not appointed in that period must reapply if they wish to continue to be considered.

When vacancies arise, the Minister of Justice selects from the list of potential appointees. The Minister also consults the Chief Justice and the Attorney General in that province. A practice has arisen in which candidates on the list solicit letters and testimonials from influential persons in an attempt to persuade the Minister of Justice to appoint them.

B. Provincial Judicial Appointment Process

Provincial judicial appointment processes are similar to the federal procedures. Appointments are made by the Lieutenant Governor in Council on the recommendation of the provincial cabinet. Most provinces have advisory committees which interview or review candidates and make recommendations for appointment. The provincial judicial councils also play a role in the appointment process by considering proposed appointments and making reports to the Attorney General.

C. Results of the Process

Women are under-represented on almost every court in Canada, both in terms of the proportion of women in the population and the proportion of women in the legal profession.[2] Although there has been progress in the last several years, the pace of change in federal appointments has been modest. Approximately 12% of the federally-appointed judges and 13% of the provincially appointed judges are women.[3] One study has suggested that it will take nearly half a century for women to achieve equity in representation at the existing rate![4]

One of the reasons given for this under-representation in the judiciary has been the lack of qualified women to appoint. To test this hypothesis, the Ontario Working Group examined the pool of Ontario women lawyers qualified for appointment. Their findings are reproduced in Table 1.

Their conclusion is that while it was true in the early years that there were fewer qualified women to appoint, the pool of women qualified to be appointed as judges increased dramatically from those called in 1970 to those called in 1982. For example there were 140 women called to the Ontario Bar in 1978 of whom 11 have been appointed as judges to courts at the various levels. It would appear that there are factors other than lack of qualified women affecting the selection process.

The Ontario experience is illustrative of what can be done to ensure a more equitable appointment process. The Ontario Government and its Judicial Appointments Advisory Committee have taken a proactive approach to gathering nominations for judicial appointments. These steps have included: placing notices in newspapers and contacting organizations to solicit applications of lawyers from groups that are under-represented on the Bench.

TABLE 1

Pool of Ontario Women Lawyers Qualified for Judicial Appointment

Year of Call	Eligible Women Members	Number of These Women Who Are Judges	Division(s)
1929 - 1959	35	8 judges plus Madam Justice Wilson	all General Division
1960 - 1969	54	9 judges	7 General Division 2 Provincial Court
1970	13	1 judge	General Division
1971	19	4 judges	1 Federal Court 1 C.A. 2 Provincial Court
1972	18	1 judge	C. A.
1973	39	7 judges	3 General Division 1 U.F.C. 3 Provincial Court
1974	39	2 judges	Provincial Court
1975	67	6 judges	4 General Division 2 Provincial Court
1976	88	6 judges	2 General Division 4 Provincial Court
1977	119	11 judges	1 Federal Court 1 C.A. 3 General Division 6 Provincial Court
1978	140	7 judges	1 General Division 3 Provincial Court
1979	210	4 judges	1 General Division 3 Provincial Court
1980	217	4 judges	1 General Division 3 Provincial Court
1981	236	2 judges	1 General Division 1 Provincial Court
1982	240	1 judge	General Division

In early 1991, the Ontario Attorney General created and funded 27 new Provincial Division appointments following the *Askov* decision. A special campaign was launched. The Advisory Committee advertised across the province and wrote directly to the presidents of women's, francophone, visible minority, Aboriginal and disabled person's groups asking them to encourage their members who were qualified to apply for judgeships. In addition, the Attorney General wrote to every women lawyer who was qualified for appointment (that is, members of the bar for ten years or more) encouraging them to

apply. He also wrote to organizations representing visible and racial minorities.

This proactive approach has produced the following results:

1989 - 4 out of 9 judges appointed were women

1990 - 8 out of 24 judges appointed were women

1991 - 14 out of 30 judges appointed were women

1992 - 9 out of 17 judges appointed were women.

That is 35 out of the 80 new judges were women (43.8%). In addition, 10 of the 80 appointees were persons of colour or Aboriginal individuals. The rate of appointment is coming closer to women's representation in the population and exceeds their representation in the legal profession. This result was facilitated by the increase in the number of judges appointed during this period.

D. Criteria for Appointment

The Ontario experience demonstrates how effective an outreach program can be. Another factor which influences the outcome of the appointment process is the development, distribution and application of criteria for the selection of judges.

Both the selection process and the criteria for assessing potential judges are issues with which the Canadian Bar Association has been actively involved. In the 1985 report on *The Appointment of Judges in Canada*, the CBA Special Committee reviewed the qualifications and character requirements for judicial appointment and recommended the following list of essential qualities for men and women considered for judicial appointment:

- high moral character
- human qualities: sympathy, generosity, charity, patience
- experience in law
- intellectual and judgmental ability
- good health and good work habits
- bilingualism, if required by the nature of the post.

Given the developments over the past few years, the Canadian Bar Association should consider revising this list to include reference to gender sensitivity and to broaden some of the misperceptions of what work experiences make a good judge. Other lists of criteria may be helpful in this regard.

RECOMMENDATION:

10.1 The Task Force recommends that the Canadian Bar Association develop objective criteria for judicial appointment and publicize such criteria. Federal and provincial judicial councils should also consider establishing committees to establish such criteria.

In introducing the new federal judicial appointment process in 1988, the Minister of Justice noted that the primary qualifications for appointment to the bench must be merit, defined to include proficiency in the law, a well-rounded legal experience, maturity and objectivity in judgement, evidence of human qualities indicating that the judge would be receptive to and appreciative of social issues arising in litigation, and the capacity to exercise the larger policy role conferred upon the judiciary by the *Charter*. In addition, the ideal of public service should be a prime motivation for candidates for judicial office.[5] The Minister has also said that the judiciary should represent a broad cross-section of Canadian society. To achieve this, the appointment of women and individuals from cultural and ethnic minorities should be encouraged.[6]

RECOMMENDATION:

10.2 The Task Force recommends that the Minister of Justice adopt an affirmative action policy for the appointment of women and minority women similar to that adopted in Ontario and some of the other provinces.

The Ontario Judicial Appointments Advisory Council has developed a much more detailed set of criteria for the selection of provincial judges. The criteria include:

Professional Excellence

- a high level of professional achievement in the area(s) of legal work in which the candidate is engaged. Experience in the field of law relevant to the division of the Provincial Court on which the applicant wishes to serve is desirable but not essential
- involvement in professional activities that keep one up to date with changes in the law and in the administration of justice
- an interest in or some aptitude for the administrative aspects of a judge's role
- good writing and communication skills

Community Awareness

- a commitment to public service
- awareness of and an interest in knowing more about the social problems that give rise to cases coming before the courts
- sensitivity to changes in the social values relating to criminal and family matters
- interest in methods of dispute resolution alternatives to formal adjudication and in community resources available for participating in the disposition of cases

Personal Characteristics

- an absence of pomposity and authoritarian tendencies
- respect for the essential dignity of all persons regardless of their circumstances
- politeness and consideration for others
- moral courage
- an ability to make decisions
- patience and an ability to listen
- punctuality - good regular work habits
- a reputation for integrity and fairness
- not involved in serious, unresolved professional complaints, civil actions of outstanding financial claims such as unpaid taxes

Demographic

- the provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation of women and several ethnic and racial minorities

Career Plans

- the provincial judiciary should be open to those who may wish to serve for a limited number of years and resign before reaching retirement age as well as those who wish to finish their professional career on the bench.

Many governments have recognized the need for diversity in the judiciary. For example, the Nova Scotia legislature has adopted the following statement of principle:

> The provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation of women and minorities. It is also essential for the provincial judiciary to reflect the bilingual nature of the Province. The Committee will recommend the appointment of a well

qualified person from an under-represented group if no one else is clearly qualified.[7]

In rethinking the criteria for judicial appointment we should be sensitive to the diverse experiences of members of the legal profession and the breadth of insight that this would infuse in the judiciary. High profile in the profession should be secondary to the intrinsic qualities of the candidate. Appropriate value should be allotted to the special qualities of women resulting from their societal role as child bearers and child raisers and as organizational, administrative, cultural and emotional supports of their family units. Appropriate value should also be allotted to the special qualities of members of minority groups whose experience of exclusion, sexism, racism, heterosexism and discrimination on the basis of disability in our society has bred into them a sensitivity to, understanding of, and compassion towards the frailties of human nature denied to representatives of the majority group. In addition to review by the Canadian Bar Association, the federal and provincial court judiciaries should each set up a Committee on Judicial Qualifications and establish mechanisms for their implementation.

RECOMMENDATION:

10.3 The Task Force recommends that the federal and provincial governments take all possible steps to eradicate from the judicial appointments process discrimination against women and minority women and have as their respective long-term goals a federal and provincial judiciary which reflects the Canadian diversity.

RECOMMENDATION:

10.4 The Task Force recommends that the Canadian Judicial Council or the National Judicial Institute gather statistics on the representation at all levels in the judiciary of women and minority women and keep the same up to date.

RECOMMENDATION:

10.5 The Task Force recommends that the federal and provincial governments consider women lawyers serving (or who have served) on administrative tribunals as potential candidates for judicial appointment.

III. JUDICIAL EDUCATION

There is a widespread feeling that a legal education *per se* does not fully equip lawyers for the role of judge, that the role of judge requires further training beyond mere knowledge of the law. This had led some to give serious consideration to the desirability of special judicial training for lawyers who aspire to judicial appointment. Some countries have taken this approach. Others suggest that new appointees should be required to do more than just attend a two or three day seminar for new judges. Extended courses in the judicial process including fact management, evidentiary rules, legal analysis, decision-making and judgment writing have all been advocated together with courses in human rights, democracy and the Canadian polity.

Special emphasis has been put, in the context of our Task Force's mandate, on the need to train judges on the issues of sexism and racism, their causes, symptoms and cure.

In the United States in the 1980s, a number of states established judicially appointed Task Forces to investigate the extent to which gender bias existed in the state's judicial branch and to develop educational programs to eliminate it. They found that stereotyped myths, beliefs and biases affected decision-making in a number of areas including tort law, criminal law and family law. As a consequence special courses were prepared, some of them illustrated by videos, to raise the judiciary's awareness of how the judge's bias had influenced his or her decision. For example, one scenario dealt with judges' devaluation of the homemaker's contribution when dividing matrimonial property on divorce and when awarding damages to homemakers in personal injury cases. The judges in the video gave no indication that a homemaker's unpaid work had economic value for either of these purposes. The materials accompanying the video encouraged discussion of the nature and impact of the bias in this scenario.

It is regrettable that when Canada followed the United States' lead in attempting to probe the degree of gender bias in its judiciary, the Canadian judiciary remained generally aloof from the process and did not provide the kind of leadership and support that many of the Chief Justices in the United States provided. Indeed, as far as I am aware, Mr. Justice Rothman of the Quebec Court of Appeal was the first member of the Canadian judiciary to publicly acknowledge the presence of gender bias in the courts of this country and to recommend that courses similar to those instituted in the United States should be part of the education, not just of newly appointed judges in Canada, but of judges at all stages of their careers.

There is no doubt that the inclusion of gender bias courses in Canadian judges' seminars has helped greatly to raise judicial sensitivity to this issue. Indeed, the program prepared by the Western Judicial Centre has been rated by Professor Norma Wickler, a sociologist at the University of California and a pioneer in this field, as the best of its kind available anywhere. The irony is, however, that those who need the course most do not take it. It is not surprising, therefore, that momentum has been building in the last few years, both in the legal profession and in society generally, to have instruction in gender bias made compulsory for all Canadian judges. This has been to some extent the result of media coverage of some of the more glaring demonstrations of lack of judicial sensitivity to the fact that Canada is a multicultural and multiracial society and that respect for "the other" is a fundamental aspect of civilized behaviour.

Judges protest that to make such courses on gender and racial bias compulsory would be to interfere with their judicial independence. It seems passing strange that this doctrine should be invoked to preserve gender or racially biased behaviour that not only works an unfairness and hardship on the targeted group but militates against the delivery of quality justice to the litigants. Surely the courts of Canada as well as of the United States have a special obligation to reject, not to reflect, society's irrational prejudices. Any judge who thinks himself or herself immune to those prejudices has a very serious problem.

The Task Force therefore endorses the concept of compulsory training for judges in both gender and racial issues. In its view, such training is just as much a prerequisite for the proper dispensation of justice as any other aspect of a judge's training. If there is any legitimacy to the concern over judicial independence, the training can be provided exclusively by judges themselves. I must say, however, that I have never heard judges resist instruction in judgment-writing on the ground that it was delivered by those non-judges especially schooled in the art of the English language. Nor have I heard a judge resist instruction in French on the basis that it interfered with his or her judicial independence if counsel in their particular jurisdiction were permitted to present their case in that language.

RECOMMENDATION:

10.6 The Task Force recommends that sensitivity courses for judges on gender and racial bias be made compulsory not only for newly appointed judges but for all judges.

IV. DISCRIMINATION IN THE JUDICIARY

A. Discrimination Against Women Judges

It was recognized at a very early stage of the Task Force's process that an inquiry into the degree of discrimination against women judges by their male colleagues was a very sensitive subject. It was also recognized that discrimination against women judges could operate at two levels, the first involving the kind of discrimination which might be experienced by women generally and the second, the kind of discrimination which directly affects the woman judge's ability to discharge the full responsibilities of her office. The second is clearly the more serious of the two.

Two preliminary decisions were reached before pursuing the inquiry into discrimination against women judges. The first was that, if a questionnaire approach were taken, the judges' responses would have to be held in the utmost confidence; and the second that, if a questionnaire was used, it could not be of the usual type where the judge simply ticked off "yes" or "no" answers to bald questions. In order to make possible some assessment of the extent and the seriousness of any discrimination alleged it would be necessary to receive responses in anecdotal form. Accordingly, a letter was sent by the Task Force Chair to the approximately 200 women judges in Canada, this number being almost equally divided between federal and provincial appointees, asking them whether or not they had personally experienced discrimination by male Chief Justices, Chief Judges or male colleagues. Of the 200 recipients of this letter 132 responded and, of those 132, 58 reported having personally experienced discrimination in one form or another while on the bench.

Many of the women judges who experienced discrimination did so upon their initial arrival on the court. They report that they were not made to feel welcome, that in many cases they were told that they had been appointed simply because they were women and that there were male candidates "out there" who would have been better appointees. Some of the younger women appointed were asked if they were feminists and told that feminists were unsuited for the judicial role because of their radical and biased views. Some were even told that feminism automatically disqualified them from sitting on cases involving sexual assault because of their anti-male prejudice! The comments were made before the male members of the court had had any opportunity to get to know their new colleague; they were simply applying their own preconceived ideas and exhibiting a mindset which clearly was not based on rational evidence but on myths and stereotypes accepted and applied without critical or constructive thought.

Several women judges described the disheartening effect of being made to feel unwelcome by their judicial colleagues had upon them. As they put it, they had left the collegial environment they had enjoyed in the law firm, government department or business corporation prior to their appointment. They now had to start from scratch proving themselves all over again to a fresh group of sceptics. They envied their male colleagues the assumption that "they must have what it takes or they would never have been appointed." No such assumption was applied to them, but rather the reverse, that they were not appointed on the ground of merit but because of their sex.

Nor did this attitude necessarily disappear with time as one might have anticipated. Men appear to be by nature very competitive and the woman judge who succeeded in proving herself and eclipsing all the expectations of her male colleagues ceased to be the victim of patronization and became the victim of

sarcasm and ill-disguised hostility. Several women had been told by their defensive male colleagues — "No woman can do my job!" — a very revealing observation because of the sense of personal affront or insult experienced by their male colleagues by their (the women's) very status as judges.

Other women judges described the attitude of their male colleagues as one of "amused tolerance." One illustrated this by the comment made to her — "And how is your little jury trial going, my dear?" Others reacted to this kind of attitude by saying — "My male colleagues are really quite nice people. They just view everything from a privileged male perspective without having any awareness that they are doing so." Other women judges say they made it by "acting out like one of the guys".

It seemed to be generally agreed that the younger male lawyers and judges who had been exposed to women at law school and as contemporaries in the practice were much more ready to accept women colleagues as equals. The major problem, they say, is the "old guard" who have no idea how to relate to women as professionals; they feel uncomfortable and threatened and must belittle their female colleagues in order to bolster their own sense of security. Some women judges therefore expressed the view that they will become accepted on their courts only through a process of attrition. Others said there was another way — when the senior judges have daughters or daughters-in-law who are trying to break through the barriers!

One interesting point was made in several letters, namely that male lawyers and judges are predisposed to accept the authority of hierarchy much more readily than their female counterparts. Women tend to question edicts or policies filtering down from the top if they cannot identify a sensible, supporting rationale for them. Women tend, therefore, to be viewed as not sufficiently "biddable" or "conformist" in the eyes of their superiors. They may be perceived as "troublemakers" in a large law firm or on a court. The women who raised this issue did so to point out that their younger male colleagues, who may well endorse the concept of equality in principle, cannot be looked to for assistance in achieving it because they are part of a hierarchical structure which must be respected and reinforced at all costs. Only time will tell what impact, if any, this alleged male predisposition in favour of hierarchical or patriarchical authority will have on women's attempts to break down barriers in existing legal and judicial structures.

No incidents of sexual harassment were reported by federally appointed women judges but there is a problem at the provincial court level. It is not widespread but it is serious. Fortunately, the worst offenders are well known for their proclivity in this direction and newly appointed younger women judges are warned by their male colleagues. Judicial conduct at conferences and seminars where alcohol is served poses a special problem and some very scandalous incidents were reported by a number of women judges as having occurred on these occasions. There is clearly a need for supervision at these events.

Quite a number of women judges said they had experienced or were currently experiencing discrimination of the type which interfered with the full discharge of their judicial responsibilities. They were, in other words, discriminated against in the assignment or allocation of work. Several whose background was in criminal law complained that they were not given the opportunity to sit on complex, high-profile murder cases, that these were automatically assigned to their male colleagues, and that their repeated requests to sit on such cases had been consistently refused on the ground that they did not have sufficient experience in handling complex trials. Their response that they would never gain such experience if never permitted to sit was generally not appreciated. Chief Justices and Chief Judges with whom I had the opportunity to discuss this matter explained that they had a responsibility to assign to a case, criminal or civil, the judge they considered best fitted by training and experience to handle it. To do otherwise, it was felt, would be a dereliction of duty which could not be justified by considerations of gender equality. It would appear that this is one of those situations where the decision of the superior will be accepted if he has succeeded in establishing a relationship of trust and confidence with those subject to his authority. If he has not succeeded in doing so, his motivation will be suspect,

particularly if the male judge assigned is not generally perceived by the members of the court as the one "best fitted by training and experience" to handle the case.

Some women judges complained that they were not permitted to sit on sexual assault cases on the ground that they were not capable of exercising the required degree of objectivity. Those women judges were usually younger, recently appointed, and perceived by their male colleagues to be "radical feminists." As has been pointed out by many writers on gender issues, a "radical feminist" in the eyes of some men may simply be a woman who believes in equality, publicly asserts that belief and attempts to achieve it. Because the existing norm has always been and still is the norm of inequality, equality must inevitably seem radical to some in that it is a total rejection of inequality. It does, indeed, go to the very "root" of it!

There would appear to be no justification at all for denying women judges the opportunity to sit on sexual assault cases or any other case in which women have been victimized by men. There is absolutely no evidence that gender is relevant to the ability to objectify and overcome the natural predispositions to which both sexes are heir.

Several women judges reported that, when they were first appointed, considerable pressure was put upon them to take over the family law part of the court's docket so as to relieve their male colleagues of the demeaning duty of "women's work." It was assumed that women would want to do this kind of thing and that the male judges were therefore doing them a kindness. When some objected that they were not especially interested in family law and would like to take some commercial, tort and criminal cases they met again with the charge that they must be feminists and not quite normal. Some women judges said they agreed to take on the family law work simply in order to be accepted as a useful addition to the court.

There is no doubt that discrimination is in part like beauty i.e. it is to some extent in the eye of the beholder and that what to some will be a kindly well-meaning offer of assistance to a fledgling judge will be to another a patronizing, condescending put-down. It is for that reason that, in assessing the responses from the women judges for statistical purposes, I selected very carefully from the examples of discrimination and reported only those which seemed to fall clearly into the latter category. It is not difficult for a person with some elementary degree of sensitivity to offer assistance and encouragement to a colleague in a respectful way, nor is it difficult for it to be received in a similar vein. We may, however, all have to work a little harder at our relationships.

I became aware at a relatively early date after writing to the women judges that some were very reluctant to respond to my letter in writing despite the promise of confidentiality. They were particularly hesitant to criticize their Chief Justices or Chief Judges on paper. One or two refused to participate in the study at all on the ground that they were being asked to do something underhanded and improper. Some, however, responded by telephone; some I met with personally during my cross-country travels for the Royal Commission on Aboriginal Peoples; and some I met with in large or small groups depending upon the location.

There is no doubt that many women judges feel a tremendous sense of alienation where they are the only one or one of a very small number on their court. They have no real sense of belonging and are unable to discuss their situation with their previous colleagues at the Bar. The inner workings of the court have the sanctity of the confessional and no judge feels free to discuss what goes on behind the walls. It is, accordingly, a particularly lonely life for women judges on smaller courts. Women members on larger courts in Quebec, Ontario and British Columbia where there is a substantial female component have been able to offset the overwhelmingly male atmosphere by having their own social and cultural events. The Canadian Judicial Council or the National Judicial Institute might wish to give some thought to possible means of bringing women judges together to discuss matters of special interest to them.

There are very few women from minority groups on the bench. This is to some extent due to the fact that Women of Colour and Aboriginal women have only in recent years been encouraged and financially

assisted in pursuing a career in law. Fortunately, this situation is changing. Although we find minority women in growing numbers in the law schools, there is still only a very small group of minority women occupying judicial office and mostly at the provincial court level. Their responses to my letter were not encouraging. They experience sexism and racism on the bench as they did in the practice and display remarkable courage and determination in extremely trying circumstances. The Task Force was delighted when Her Honour Judge Connie Sparks was appointed to the Task Force in November 1992. The study conducted by her on "Women of Colour in the Legal Profession: A Panoply of Multiple Discrimination" was an invaluable contribution to our work and is an Appendix to this Report.

We were likewise delighted when Sharon McIvor of the Native Women's Association of Canada was appointed to the Task Force and greatly appreciate the extensive study done by her on "Aboriginal Women in the Legal Profession" which is also an Appendix to our Report. We look forward to the day when minority women will be sitting at all levels of the Canadian judiciary bringing their unique insights and understanding of law and life to the judicial process.

Steps should be taken to promote the appointment of minority women lawyers to the bench. The National Judicial Institute should provide training for these lawyers and support to those appointed in their early years in judicial office.

RECOMMENDATION:

10.7 The Task Force recommends that Chief Justices and Chief Judges treat women judges on their court fairly in the assignment or allocation of work.

RECOMMENDATION:

10.8 The Task Force recommends that the Canadian Judicial Council or the National Judicial Institute consider possible means of bringing women judges together to discuss matters of special interest to them and ensure that funding is made available for this purpose.

RECOMMENDATION:

10.9 The Task Force recommends that the National Judicial Institute provide training for minority women lawyers qualified for and interested in judicial appointment and provide support to those appointed in their early years on the bench.

B. Discrimination Against Women Counsel

It is a serious matter for a male judge to discriminate against his female colleagues; it is an even more serious matter for him to discriminate against female counsel. The abuse of judicial power in this way must offend us all. Yet many female counsel complain of their treatment in court and in chambers by male members of the judiciary. They do not appreciate epithets like "girlie", "my dear", "young lady" (in a reproving tone) or being completely ignored while the judge discusses an upcoming golf game with their opponent or arranges an adjournment without any reference to their (the women's) timetables. They particularly resent being made fun of by the judge in front of their clients and the public. Women counsel also complain that judges do not intervene when derogatory remarks are made about them by opposing counsel, but, on the

contrary, seem to enjoy it. Women counsel expect judges to exercise some control over what goes on in their courtroom and, of course, judges should set an example themselves by a proper form of address and treating female counsel with civility, courtesy and respect.

Women counsel may suffer discrimination at the hands of male or female judges as well as by opposing male counsel, administrative staff and other court personnel. The Task Force has to be concerned about any and all forms of discrimination against female counsel regardless of the identity of the perpetrator. Judges should play a more active role in preventing incidents of harassment in their courtrooms. One mechanism which has been proposed is the development of a comprehensive list of behaviours which are considered unacceptable in the courtroom. There is a natural reluctance on a judge's part to intervene to discipline or reprimand counsel for fear of prejudicing the case. The comprehensive list may be of assistance in a number of ways: (a) its very existence and the possibility of intervention may prevent occurrences; (b) it may spark courts to critically examine the ways in which the dignity of the court is maintained; and (c) it would make it clear that resolving these issues is a matter of judicial conduct and intervention must occur as a matter of judicial conduct.

I will not elaborate further on this subject because it is more fully documented elsewhere. Suffice it to say that this Task Force decided at a relatively early stage of its mandate that it would not focus on "horror stories" which are not representative of most judges' behaviour but would concentrate rather on judges' conduct which is quite prevalent but nevertheless wholly unacceptable.

C. Inequality in Judicial Appointment

In my letter to the women judges I asked for their opinion as to whether or not there was gender inequality in the judicial appointment process at either the federal or provincial court levels. The prevailing view was that considerable progress had been made at the provincial court level. While traditionally women were seriously under represented on the provincial court bench, this situation had ameliorated over the past five years through a form of affirmative action. A great deal of credit was given to the Province of Ontario for its policy of seeking out qualified women candidates and inviting them to apply. Several provinces are now following Ontario's lead. A number of respondents to my letter described themselves as beneficiaries of this policy. They indicated, however, that many of their male colleagues viewed this as a form of "reverse discrimination" against their male lawyer friends and took every opportunity to criticize the respondents' judicial performance as confirming that they were not appointed on merit.

The federal appointment process was still perceived by many as unfair despite former Justice Minister Campbell's revised advisory committee structure for the selection of candidates. The federal judiciary is still perceived as an institution of predominantly white males from superior socio-economic backgrounds, many with political connections. Judicial appointment is seen by some of these appointees as a reward for past services and this may contribute to their attitude that a seat on the bench is akin to retirement. They are therefore perceived as completely content with the status quo and as having no interest in any kind of change such as, for example, establishing a collegial relationship with new female colleagues.

Women judges and others consulted by the Task Force expressed a very strong view that the criteria for judicial appointment, other than simply years at the bar, should be identified and publicized. The legal profession, the applicants and their sponsors, and the general public would then have some objective standard by which to measure potential candidates and to assess the merits of appointments made. This was advanced as a way of eliminating the "mystery" and "secrecy" that surrounds federal judicial appointments and reassuring the profession and the public that the process is fair and free of political influence. The Canadian Bar Association should take active measures to encourage women and representatives of minority groups to submit their names as candidates.

Many women judges identified ways in which women were disadvantaged in seeking judicial appointment, particularly women with family responsibilities. Male lawyers, who have the "home front" covered by their wives or companions, have the time and energy to participate in professional organizations such as the Law Society and the Canadian Bar Association. In this way they achieve a higher profile in the profession than women. They appear more frequently on candidate lists and garner a higher proportion of the vote. Many also attain a public persona through extra-legal charitable activities for which many women lawyers also do not have time. The qualities of women candidates who are combining a career with family responsibilities are accordingly less well-known. On the rare occasions on which their names do appear on candidate lists the reaction is usually: "who is she? I never heard of her".

The tenure requirement also militates against women candidates who have entered the practice of law at a later stage of their lives than most men. Many have done other things in their earlier years and it was felt that alternative life experiences should be considered. Many Women of Colour and Aboriginal women, for example, have built up high profiles in their communities (and in some cases in the country) for their dedicated public service to their people prior to their adoption of a legal career. The heightened sensitivity they have achieved through this life experience as well as the honing of their interpersonal skills must be an asset in any judge.

Other forms of pre-employment experience than private practice should be considered including, in the case of federal appointments, experience on a provincial court or as an adjudicator on an administrative tribunal and, in the case of all appointments, experience such as corporate counsel, on law reform commissions, on human rights commissions, in legal education institutions and so on. The aim should be to draw on as wide and as varied a range of experience as possible.

For example, women who have served on administrative tribunals have had a unique opportunity to develop adjudicative skills and it has been pointed out to the Task Force that they constitute a ready-made pool of potential judicial candidates. Many women lawyers with family responsibilities are occupying these positions or have retired from them after their permitted terms of office expired. They then face the prospect of a return to practice after years of absence. The Task Force endorses the view that the expertise of these women should be further utilized through judicial appointment.

D. Judicial Discipline

Calls for action in the area of judicial discipline have been loud and widespread across the country and many submissions were made to the Task Force on the need for an effective mechanism to deal with members of the judiciary whose conduct was, to say the least, offensive and repugnant even on the most elementary standards.

Judicial conduct must be regulated if public confidence in the justice system is to be maintained. How is this to be done? It was recommended by a number of consulting groups (some of which included female judges) that a Commission on Judicial Conduct should be established to administer discipline of federally appointed judges and that an equal number of judges, lawyers and members of the public should be appointed to it. Complaints of judicial misconduct would be within the exclusive jurisdiction of the Commission and it would have its own counsel and staff to assist it. Its primary responsibility would be to administer a Code of Judicial Conduct which would include rules of judicial conduct, complaint mechanisms and graduated levels of sanctions, short of removal from office, for breach of provisions of the rules. The Code itself and complaints filed under it would be made public as would the hearings of such complaints and their final disposition.

Similar bodies with comparable jurisdiction and powers were advocated at the provincial level.

It was emphasized to the Task Force that public confidence in the judicial discipline process is enhanced when the Commission includes members of the public. Their presence serves two important

functions. It injects into the discipline process a much needed "people perspective" and it avoids the appearance of a closed secretive system which is one of the major concerns about the process as it is today. Law Societies across Canada now include lay members on their discipline committees and disciplinary hearings are open to the public. These two developments have enhanced public trust in the disciplinary process for lawyers.

It will no doubt be argued that representation of the profession and the public on the proposed Commission on Judicial Conduct would undermine the independence of the judiciary. Several people who spoke to us at a workshop on the judiciary expressed the view that it was beyond time that this principle of judicial independence was re-examined to ascertain its true meaning and effect. They were suspicious that the principle may be being used as a cloak for conduct that it was never intended to address, that its essential purpose was to protect the judicial branch of government against interference from the other two branches, and was never intended to make the judiciary unaccountable to anyone for substandard judicial behaviour. Obviously the Commission would have no jurisdiction to review or comment upon the correctness of judges' decisions. That is the function of the appellate process. Its function would be that of a separate forum for ventilating and examining complaints about substandard judicial behaviour.

The prevailing view expressed by those attending the workshop on the judiciary (which included one male and six or seven female judges) was that the existing system of having complaints against judges dealt with by the Canadian Judicial Council and its provincial counterparts is wholly ineffective in addressing the problem of racist and sexist behaviour on the part of some judges. There is a strong feeling that our justice system is being brought into public disrepute by their behaviour and by the seeming inability of the Canadian Judicial Council to deal with it.

The Canadian Judicial Council was established in December of 1971, is made up of Chief Justices and Associate Chief Justices from all the superior courts of Canada, and has as its mandate "to promote efficiency and uniformity, and to improve the quality of judicial service, in superior and county courts." The disciplinary powers of the Council over Canadian superior and county court judges are administered through its Committee on Judicial Conduct. Although the judges are appointed during good behaviour and can only be removed from office by the Governor General on address of the Senate and the House of Commons, the Council has extensive powers of inquiry and investigation. Inquiries may be held in public or in private and the judge in respect of whom an inquiry is to be made must be advised of the inquiry and that he or she has the right to be heard, to cross-examine witnesses and to adduce evidence on his or her own behalf. However, inquiries are in fact rarely held.

While some members of the legal profession are aware that the Canadian Judicial Council has an internal process for disciplining its judges and that a record of complaints made and the disposition of these complaints is published in the Council's Annual Report, the vast majority of lawyers are totally unaware of the process and have never seen a copy of the Council's Annual Report. The general public is, of course, even less knowledgable about the Council's process and derives its information on judicial misconduct exclusively through colourful reports in the media. This situation seems quite unsatisfactory. In the view of the Task Force the time is ripe to initiate a more effective disciplinary process for judges which will involve judges, lawyers and members of the public. In this way a more balanced assessment of judicial conduct will be achieved, the integrity of the judiciary preserved, and public confidence in the justice system restored.

RECOMMENDATION:

10.10 The Task Force recommends that discrimination by judges against other judges or counsel be the subject of judicial discipline.

RECOMMENDATION:

10.11 The Task Force recommends that the Canadian Judicial Council develop a Code of Judicial Conduct which includes complaint mechanisms and graduated levels of sanctions for breach of its provisions and that the Code be freely available to the profession and the public.

RECOMMENDATION:

10.12 The Task Force recommends that the Canadian Judicial Council recommend to the Minister of Justice the establishment of a Commission on Judicial Conduct with its own Commission counsel and staff to administer the Code of Judicial Conduct and that its hearings and final dispositions be made public.

RECOMMENDATION:

10.13 The Task Force recommends that the Commission on Judicial Conduct be composed of an equal number of judges, lawyers and members of the public.

RECOMMENDATION:

10.14 The Task Force recommends that the Attorneys General of the provinces and territories consider the establishment of similar Commissions of Judicial Conduct with comparable composition, jurisdiction and powers to administer a Provincial Code or Codes.

RECOMMENDATION:

10.15 The Task Force recommends that the Canadian Judicial Council develop a comprehensive list of behaviours which will not be tolerated in the courtroom.

ENDNOTES

1. I. Grant and L. Smith, "Gender Representation in the Canadian Judiciary", in *Appointing Judges: Philosophy, Politics and Practice* (Report of the Ontario Law Reform Commission, 1991).

2. However, some provincial courts are close to being representative of the proportion of women in the profession. For example, 19% of the British Columbia provincial courts are women and 24.4% of the members of the Law Society of British Columbia are women.

3. For detailed breakdown see Tables 4 and 5 in Chapter 3.

4. Ontario Working Group Report at 9.

5. Department of Justice Canada, *A New Appointments Process* (Ottawa: 1988) at 5.

6. *Ibid.*

7. From *Provincial Judicial Appointments: Cabinet Guidelines to Ensure Appointments Based on Merit*

(tabled in the House of Assembly, Nova Scotia, May 29, 1991).

CHAPTER ELEVEN

THE PRACTICE OF FAMILY LAW - A CASE STUDY

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CHAPTER ELEVEN
THE PRACTICE OF FAMILY LAW - A CASE STUDY

I. INTRODUCTION

The Task Force is addressing the area of family law under a separate heading of this Report for a number of reasons. First, many judges sitting in family and juvenile courts asked the Task Force to look into what they perceived as the "low status" of family law. Second, our general consultations showed that concerns about this area of practice existed among lawyers in private practice, among teachers at law schools, and among government lawyers who were working in the family law area through provincial legal aid schemes. Third, many of the submissions which we received referred to problems in the area of family law. The Task Force circulated a survey on the practice of family law at the 1992 National Family Law Program, a major conference of family lawyers and family court judges sponsored jointly by the Canadian Bar Association and the Federation of Law Societies and received a wide range of thoughtful responses from across the country.

Finally, the Task Force was interested in the degree to which the legal profession and the judicial system reflected the priorities and values of Canadian society. Canadian governments state that they value children and their welfare very highly; Canadian lawmakers legislate widely to protect children, to provide for the support of single parents, and to regulate the division of family assets upon marriage breakdown; family legal aid schemes have been established to enable those who have been financially disadvantaged by their commitment to family and children to have access to the rights guaranteed in our legislation. Are these endeavours backed up by practical commitments? Are the lofty phrases of our legislators reflected in the concrete experiences of our family lawyers and litigants? In reviewing the evidence about the practice of family law in Canada, the Task Force found that the reality fell far short of our aspirations and our ideals. Lawyers struggling to provide justice to litigants in this area received little support despite verbal assurances from many levels of government. In the cynical words of one female lawyer, governments provide "all possible aid short of actual help".

The confluence of these issues, coming from all quarters of the profession, signalled to the Task Force that a closer examination was required. The status of family law and the situation of female lawyers in this area of the practice is a good case study of the impact of gender inequality on the justice system.

II. THE STATUS OF FAMILY LAW

A. WHY DISCUSS STATUS?

The Task Force has discovered that in the pecking order that describes the degree of prestige attached to the practice of particular areas of law, family law almost invariably falls near the bottom. As an area of practice it has little "status" and, consequently, family law lawyers have little status in the profession. Those who mentioned the low status of family law to the Task Force used the term in its most basic sense. Having status as a lawyer usually means having adequate income and sufficient resources to do one's job well and to provide quality service to clients. It means that the lawyer has self-esteem, the support of colleagues, and the respect of the legal community.

Status in this sense is important for both lawyers and judges. On a personal level it affects advancement and promotion and at the community level it affects the allocation of court resources, the allocation of legal aid funding, and ultimately the

ease with which family lawyers achieve just results for their clients.

As lawyer after lawyer and judge after judge raised the issue of status, it became progressively clearer that these expressions of concern were more than just reflections of personal discomfort. While it was true (as the quotes which follow illustrate) that many lawyers were hurt by, and troubled about, crass and insulting comments which were made about the area of law in which they worked, more serious problems were also exposed.

It is important for a good judge or lawyer to be able to use the legal system to achieve fair results. The ability to do this is essential if one hopes to have a successful and rewarding legal practice or a satisfying career as a judge. To develop that reputation for skill which enables one to have a growing practice one must be able to deliver "justice" to clients or litigants at reasonable cost and in a timely fashion.

Family law at present combines limited resources and unduly complex procedures with lack of respect and inadequate financial reward — and as a result the amount of "justice" which family lawyers can produce for their clients is severely limited. In family law this is a special problem as there are very few aspects of family law practice which permit the lawyer working alone to provide a complete service. In family law a high proportion of cases require dispute resolution or the achievement of what philosophers call distributive justice — a fair result which divides scarce assets fairly. In consequence, most clients of family law practitioners care profoundly about (and are deeply affected by) the scarcity of resources available to their lawyers. Scarcity of resources, in turn, occurs when those who allocate resources view certain needs as unimportant. In family law practice, as well as in family courts, the shortage of vital judicial and financial resources has reached a critical point in Canada. Those who submitted their views to the Task Force felt that this was a direct result of the low status attributed to family law in Canada.

Family law's lack of status and the lack of resources dedicated to this area of practice has a disproportionately negative impact on women. Statistics in Ontario indicate that approximately 70% of legal aid clients for family law matters are women.

General comments on status were quite telling. Virtually everyone who mentioned it said that they felt that family law had *extremely* low status. Some noted that it had about the same status as criminal law while others said that poverty law, landlord and tenant law, and the proverbial "foreclosing of mortgages on widows and orphans" would rank slightly lower. This confirms the results of an American survey in which a detailed list of over two hundred areas of practice were submitted to lawyers for the purpose of ranking them according to status and desirability. Family law came fourth from the bottom, followed only by landlord and tenant law, immigration law, and poverty law. Lawyers noted that derogatory comments about family law came both from the bench and from other lawyers.

One respondent noted that family law is seen as "women's work". Another said:

> I am never allowed to forget that I am not a "real lawyer." The senior lawyers in my firm do not respect my practice. My firm just expects the women to take the family cases — do they think we have some sort of "maternal instinct" for this area of practice?

Many commentators pointed out that status equates to money. One asked:

> How can family law rank lower than the hideous and ghastly work of withholding funds from, or limiting insurance benefits for, the disabled, the injured, the orphaned, or the abused in insurance cases? Surely the only variant is pay?

Another noted:

> Family law has lower status because it is less lucrative, very time consuming, and emotionally draining ... some men do it in Ontario since no-fault insurance laws have dried up lucrative personal injury law, but "the guys" know that these fellows find it distasteful and that it is only being done out of necessity. The rest of their work is "real" law — deals, money matters, injury settlements, although often these cases

would not involve one-tenth of the money of a medium size family law case.

Many comments about family law showed a general frustration with the status of family law in firms:

> The family law section in our firm is "poor cousin" of litigation and treated as a joke. The senior partners discourage junior associates and articled clerks from developing natural talents which they may show in this area. I feel this area of law is really difficult and demanding and the class of the field, lawyers who have real talent and inborn ability, are needed here. Real estate, wills, corporate reorganization, and such, can be done by lawyers with good technical skills, but they do not have to have the sort of talents that prosecution, trial litigation, labour negotiation, etc. demand. These talents **are** required of family lawyers.

> The low status assigned by others, mostly men, to my work is reflective of the discomfort our male-dominated profession has with anything not wholly cerebral, analytical, concrete, capable of definition, and removed from our intrinsic humanity. With all family lawyers I will continue to work within a biased legal system full of stereotypes and inequalities, and by increments we will make a difference. Now that's **real** law! Thanks for asking.

> Those who work with the disadvantaged and depend on the disadvantaged to fund their careers are in real financial trouble and usually have low status. It does not seem to be so bad if the rich, the powerful, or the government funds the work. If a church pays you to work with the poor, or criminal legal aid pays for your clients, or the government hires you as a social worker to help the disadvantaged, then you still have status.

> Anything that depends on legal aid has low status - why this is I do not know, as money coming from governments in **large** blocks is okay (getting major files to prosecute or being hired by the government to do civil litigation). In other words, size does count!

There is a real contradiction in the "status question" for women lawyers. Compared with other women in the community, family lawyers have very high status and appear to have very high-paying jobs, so much so that women clients often expect women lawyers to work for nothing. Some clients assume (without questioning their assumption) that these lawyers' "other" clients pay them so lavishly that they can afford to receive nothing from the woman who is asking for the free service. Often women lawyers are told, "if you are a feminist you should do this for free". In comparison with male lawyers, however, female lawyers are relatively poorly paid and have much lower status. The same dichotomy is often present when income is in question: it is very difficult to be in a position where partners feel you are billing **far** too little, and clients feel you are billing **far** too much. It is clear from the tone of many of the responses that family law work, which most concede is difficult and demanding, is made less rather than more pleasant by the negative comments and outright contempt often met by lawyers practising in this area. A few examples follow:

> The work is considered to be "dirty and stressful". In one of life's major ironies I was once told by a thoracic surgeon that **he** thought **my** work was "messy"! It took me some time to realize how truly strange this opinion was.

> I have heard a judge complain in the courtroom that because a criminal trial was delayed, he was "stuck in this swamp".

> Family law gets no respect. I once heard a judge ask at the beginning of a family law trial, "How did I get stuck with this dog?"

> Even in law school my colleagues said that family law was not "real" law - I felt it deeply then and I still do.

Two important observations must be made at this point: a disproportionately high number of family lawyers are women and being a family lawyer limits success and advancement within the legal profession.

B. THE REPRESENTATION OF WOMEN WITHIN THE PRACTICE OF FAMILY LAW

Women have started to practice family law in disproportionately high numbers. Two reasons were

given by female lawyers for this phenomenon — being self-selected into family law through interest in the area, and being pushed or "socialized" into it by other lawyers. The arguments given for "pushing" women into family law break down into three categories.

First, women lawyers are thought to be better able to handle cases involving children, the home, and emotional domestic situations (our "traditional" areas of expertise). Some commentators felt that the ghettoization of this area of law occurred because of a natural tendency on the part of senior lawyers to expect women to be comfortable doing the hardest and most impoverishing work in law. They told us:

> You are dealing with emotions in family law - it is far below the dignity of senior male lawyers to cope with that, at least that is what they tell you. Personally I do not understand this - are they trying to tell me that there are no emotions involved in corporate mergers? In personal injury actions? In criminal law? I think what they mean is that the "standard" negative male emotions, such as anger, frustration, aggression, resentment, greed, fear, and need to exert power, **do** appear in other areas of law like labour law, trade law, etc. but that this is somehow "all right". It's emotions to do with your **family** that aren't acceptable.

> When I think about family law I think of a stereotype — women as caretakers, sympathetic in the face of pain, cheerfully scrubbing the "kitchen floor" of the law. This bothers me.

Second, women lawyers are not thought to be able to handle other areas of law such as corporate law, criminal defence work, or civil litigation:

> The old boys think women cannot handle the "more difficult" areas of law.

> In my firm it is very hard for women to get into corporate or commercial work so I do family law by default.

Third, male lawyers won't or can't do family law so women simply **must** do it:

> Men avoid this area and push women into it.

> I practice family law because there is a huge and continuing demand for it, and I think women clients prefer women lawyers.

Family law has become a "pink ghetto" in the wider community of the law. It is a very large ghetto, increasing in size as the rights of parents, children and separated spouses are broadened and more precisely defined. In fact, it could be argued that the explosion in the number of family law cases, and the current intolerable pressure on the scarce resources of the family law system and the practitioners within that system, could be a result of the increased numbers of women practising family law. When only men practised law, family law was a very minor area of specialization and few rights had been developed for women litigants.

Is it true that women lawyers are "better at" family law than men? Many who commented on this were uncertain. Some commentators seemed to feel that a "real" family lawyer, whether male or female, conformed to a certain model. They felt that problems developed when lawyers and judges who had no instinct for family law tried to practice it regardless. One lawyer felt that men were tougher and that their egos became involved in cases to the detriment of the client's interests. A judge noted that, "the better counsel, on average, tend to be experienced female counsel". The general feeling was that different personalities (i.e., nurturing, aggressive, passive) practised law differently and that most of the family law type personalities tended to belong to women. However, many made comments along these lines:

> The men who practice in family law are usually great individuals with whom I very much enjoy working.

> Men with the aptitude for family law are **extremely** good at it, but I think more women have the basic aptitude and the tolerance for the problems arising in such practices.

C. CAREER ADVANCEMENT FOR THE FAMILY LAWYER

Many family lawyers indicated that their commitment to this type of practice limited their future options.

1. LIMITS ON ADVANCEMENT TO PARTNERSHIP:

Most commentators felt that it was harder for family law practitioners to obtain senior positions and partnerships, although it was easier to get junior positions if one specialized in family law. In order to move on to the upper levels of the law, family law practices had to be shed, in a sort of "rite of passage".

> I find family lawyers mostly in medium or small firms, as they have been tossed out by the large firms.

> At the lower level family law is good — you often hear "we have a position open as an associate but you must do family law".

2. LIMITATION ON INCOME:

Virtually everyone agreed that because family lawyers' rates were usually lower, receivables were higher, involuntary write-offs were greater, and payments were delayed longer than in other areas of law, incomes were seriously affected. Others cited the general inability to bill "quality bonuses", the unavailability of contingency fees, and the general inability to "premium bill" as serious problems. Commentators also noted the care with which family law clients reviewed bills and cited clients' tendency to tax lawyers' bills if they were even slightly dissatisfied. They noted that family law clients were generally middle or low income earners who had no way of funding their cases except from their own pockets. Two of the most telling comments we received were:

> I can guarantee that if family law clients had the same resources as corporations or insurance companies, family law would have a much higher status.

> If spouses had "separation insurance", as homeowners have liability insurance, all the elite firms would be rushing to specialize in family practice!

3. REDUCED INVOLVEMENT IN PROFESSIONAL ASSOCIATIONS:

We asked whether being a family lawyer limited involvement in professional organizations. Almost universally people perceived that this was not a problem, being particularly complimentary to the Canadian Bar Association for its involvement of family lawyers and its respect for this area of practice. Finding the time and money to participate was the difficulty. These were typical comments:

> It is harder to do Canadian Bar Association and law society work for family lawyers, as less time can be allowed away from your practice.

> We work incredible hours to obtain barely acceptable billings — who has time for volunteer work with the Canadian Bar Association?

4. REDUCED CHANCES OF JUDICIAL APPOINTMENTS:

Virtually everyone who responded to the survey perceived that it was harder for family law specialists to be appointed to the highest level of the bench. However, in jurisdictions where there are separate family courts, promotion of family law specialists onto these separate courts naturally presented little difficulty. Most respondents said that since all their superior court judges were paid at the same rate there was no discrimination against family law judges on superior courts. However, in areas where there were separate family courts, or where a great of deal of family law was before provincial court judges, most of the family court judges were at the lower (provincial) level and were thus paid less than superior court judges, sharing this distinction chiefly with criminal court judges. One response from Ontario noted:

> In Southwest Ontario, most judges are from insurance or motor vehicle litigation practices, but most motions are in the family law area. This is not good.

Another respondent commented that:

> For judicial appointments I've heard that family law specialists are considered to have "too narrow" an area of expertise to get onto the bench. No one with a family law speciality has been appointed to the Saskatchewan bench in ten years, as far as I can remember.

A lawyer from another area believed that:

> None of our recent general division appointments have ever done **any** family law, let alone have a real knowledge of this area.

These are just perceptions, but they show a strong sense among family law practitioners that the coveted goal of a judicial appointment is limited by their area of practice.

III. LACK OF RESOURCES

The Task Force has identified two areas in which lack of resources cause real and insoluble problems for family lawyers and their clients. To the extent that these lawyers and clients are disproportionately female, these problems amount to systemic injustice for those affected.

A. Lack of Funding for Legal Aid.

The Task Force's research into the relationship between legal aid funding and the welfare of family lawyers gave rise to an outpouring of frustration. Virtually all respondents indicated that the funding of family legal aid in general, and the gross discrepancy between the greater resources allocated to criminal legal aid and the much smaller amount available for family legal aid, presented a serious problem. The one exception is the province of Quebec where the reverse is true. The most serious concerns were that the criminal legal aid tariff is often anywhere from twice to four times as generous as the family legal aid tariff, and that legal aid schemes take no account of the need in family law for special disbursements for expert witnesses and for other extra expenses associated with civil litigation.

Also, commentators disliked the focus of legal aid tariffs on litigation and court appearances. One woman noted that, "Legal aid files limit your time for thought, research, and writing, as you need far more files to get decent returns". Another said, "The family legal aid tariff pays more for court appearances and drafting documents than for mediation, research, and negotiation, even if the latter is successful. This seems wrong".

Many lawyers stated that they simply could not afford to take legal aid certificates. Others reported that their firms would no longer allow them to do so. The seriousness of the situation is underscored by the oft-repeated remark that it is cheaper for family lawyers to work *pro bono*, thus avoiding the paperwork generated by the legal aid system. For example, in Ontario legal aid pays $67.00 an hour (less 5%) for family law certificates while overhead can easily amount to $80.00 per hour depending on the size of the firm.

Respondents to the survey contrasted their situation with that of legal aid for criminal matters:

> Family law has a far higher overhead for things like typing, copying, secretarial work, disbursements, research, letters, long-distance telephone calls, etc. than does criminal law, but it pays far less. Also, you cannot achieve **any** efficiencies of scale, as you can in criminal law by doing several bail hearings at once or entering several pleas on the same morning.

> Why does criminal legal aid pay so **very** well financially while doing family legal aid is a positive drain on your bank account? In British Columbia one day in criminal court pays $1600.00 whereas one day in family court pays $400.00. This seems to be a form of systemic discrimination calculated to lure good family lawyers into lucrative criminal practice. Where are our "family values"? There seems to be an ironic contrast between the verbal focus on family

values and the tangible support given to criminal matters.

B. Lack of Judicial Resources

Many commentators felt that the resources of the judicial system (judges' time, courtrooms, court staff, office space, etc.) were not fairly and sensitively allocated to family law cases. Perceptions about this issue depended on the province or district from which the lawyer came. About half of those who responded felt that resource allocation was not fair. Areas where unified family courts were in operation seemed to receive the best reviews, but where the resource allocation **was** seen as unfair, the effects on lawyers and clients were very serious:

> In British Columbia I am pleased to say that custody trials get *de facto* priority over all other matters, although other family law cases rank at the bottom of the B.C. totem pole in priorities of trial judges.
>
> In Ontario the pressure of interim motions in family is so great that the few judges available are so busy that they can't always review the material fully.
>
> I am frustrated by the lack of mediation personnel, and the lack of supervisors for supervised access orders. I fear that those who are already negatively prejudiced are being betrayed by ineffective mediation and limited resources.
>
> The Saskatchewan provincial court judges do family cases last after criminal work is finished, as an "add-on" in a crowded docket.
>
> I am totally frustrated that criminal cases, with their fixed court days always get priority over family cases when courtroom time is being allocated. The mythical "urgency" of criminal law is grossly over-emphasised in the court system and the real urgency of family law cases is ignored or denied, because some powerful third party (a judge or a director of child welfare) is not setting a date by which the family law matter must be dealt with. Surely the criminal cases should come **after** the family cases?

Commentators also felt that these problems bring additional stress to bear on those family court judges who are dedicated to their work and are trying to shoulder impossible burdens in some jurisdictions. The greater number of emergencies in family law causes pressure on both facilities and judges.

IV. FRUSTRATION AND MOTIVATION

The Task Force felt that it was important to determine why family law practitioners keep going under such adverse conditions. The frustrations they experience are myriad, but the satisfactions were seen as unique, justifying, for some, the daily struggles involved in family law practice. Negative aspects of family law practice were easy to list: it was exhausting and intense, it caused burnout, it demanded long hours and it was very stressful. One woman said:

> When you know your clients cannot afford you and that paying your bill is putting client and children in genuine need, unable to buy necessities, it adds a lot of stress to the job.

Other commentators said:

> I find gender-biased and culturally ignorant counsel and judges make life miserable.
>
> Women clients often think they have hired "a best friend", and they resent paying for what they see as just a chat. Women are far less used to "using" a professional properly, and want to build up a relationship with you. They need to feel that they have done so (if they stay with you as a lawyer).
>
> I never seem to be able to balance the unreasonable expectations of my clients against the minimal judicial resources in our area.
>
> I hate the hours I have to work - my son recently said "Oh! this is how you look in daylight!"
>
> It bothers me that family law expertise, which is unquestionably vital to firms when trusts, estate planning, commercial work, lending and property

> transactions, wills, etc. are in question, is not valued. The law in these areas changes rapidly and expertise is hard to obtain, yet my colleagues never seem to ask my advice until its too late.

Some lawyers had been subjected to harassment and even death threats.

The positive comments about family law were diverse and ranged from, "it's fun", to a profound, "I **must** do my best to reduce suffering and isolation", from a male family lawyer. A further selection of comments is given below:

> I like to "protect" children and keep clients focused on the children's best interest. Sometimes clients lose sight of the specific benefits to children while believing in general that "beating" the spouse on some issue would be best for the kids. It is not that simple and my perspective helps to remind the client of this.

> Corporate law was boring - boring - boring - not even **tax** law could save the day! I missed people and I love family law.

> This is real justice — corporate mergers have nothing to do with justice, they are just a combination of masterful technique and quasi-guerrilla strategy, which we call law because these areas are peripherally governed by the law. The desire to help people who are in trouble, and to guarantee the rights of the oppressed, is at the heart of being a lawyer, and to some extent all others are just technicians. Family lawyers **epitomize** the lawyer, if justice is really fairness. Family lawyers have the spark, the passion, and the motivation to do the real thing.

> It's a real challenge — we are the physicians of the law, operating without anaesthetic on living tissue. You have to be very skilled to do this!

> The other family lawyers in my area are a joy to work with, both men and women, and we all share a collegial appreciation of the ups and downs of family law.

> I prefer to work with parents and children rather than with titles and privileges.

> I like bringing reason to an irrational situation and hope to a "hopeless" one.

One judge wrote that family law was challenging and stimulating because:

> The tensions in our society are reflected immediately in the family. In no other area of law must one work out these issues on a daily basis.

Some lawyers — both men and women — declared a feminist approach to family law:

> I like giving women the truth about their rights, telling them they deserve respect, and that the law will be a positive benefit to them through their claim for support, possession of the home, etc.

> I see substantive family law as a major area of change for women, and I like to set good precedents. I find the law challengingly complex.

> I like helping people with the **core** of their lives.

It was clear that these practitioners saw family law as a vibrant and all-encompassing area of the law which presented a satisfying daily challenge. But is it wise, fair, or just, to continue to expect a disproportionately large number of female lawyers to carry the demanding burdens of family law practice while unable to expect any of the standard rewards of a legal career? Neither status, nor the esteem of colleagues, neither financial reward, nor equitable promotion and advancement, nor even the basic resources to do the job, can be consistently depended on by family law practitioners.

V. PROBLEMS WITH THE SUBSTANTIVE LAW

The law and procedure that govern the practice of family law attracted some criticism. Problems were identified in several areas.

A. Unsatisfactory treatment of First Nations Litigants in Family Law

First Nations lawyers and litigants expressed many problems with the effect of family law. Many First Nations women felt that male lawyers were biased against them from the outset in custody cases, particularly if the father of the children in question was not an Aboriginal person. They spoke of very bad experiences in child apprehension cases, referring to bias against First Nations foster-parents and to lack of understanding of their traditions of community responsibility for child care. First Nations women stressed the need to encourage family lawyers to continually question their assumptions when giving advice to Aboriginal clients.

The law which regulates the division of family assets in cases where Aboriginal persons are separating was also criticized. Both the current state of the law and family lawyers' knowledge of it need improvement, according to many commentators.

B. The Limited Rights of Lesbian Parents and Couples

General dissatisfaction with the law's assumption that lesbian parents are *prima facie* inferior to heterosexual parents was expressed. Others criticized the law's reluctance to treat lesbians as spouses (for insurance and other purposes) and called for study and review.

C. Unduly Complex Procedures

It was felt that complex procedures limited access to justice for poor women. One commentator said:

> I believe the judiciary in general has lost touch with reality — demanding binding, highlighting, and other arbitrary requirements for our presentations in family law cases. These all cost the client a great deal and limit access to justice in the interest of the convenience of the judge.

D. Unclear Family Property and Support Guidelines

The unclear state of the law was viewed as leaving too much discretion to judges. Even where this discretion was scrupulously exercised by conscientious judges the mere existence of the discretion substantially increased the costs of litigation. The Task Force was urged to work toward more consistent rules for the division of assets.

Commentators felt that the Canadian Bar Association could improve the quality of justice for family law litigants and the quality of practice for their lawyers by encouraging governments to improve and simplify substantive law and procedures.

VI. CONCLUSION AND RECOMMENDATIONS

The low status of family law pervades all facets of our justice system and is reflected in a lack of public resources devoted to resolving conflicts in this critical area. This low status is rooted in the gender-related approach of our legal system. Our legal system is based on the standard of male life experience and exclusively male values and priorities, on the gendered division of labour inherent in our society which privileges male activities and denigrates women's work, and on the traditional separation of private and public spheres of action. Flowing from the gender bias in our justice system is the devaluation of family matters as being essentially private and therefore outside the realm of the "real law". For example, the violence suffered by wives at the hands of their husbands is not taken as seriously as other acts of violence, but rather is often considered a problem in the family dynamic that should be dealt with privately.

Family law as a whole is devalued, and this has had a demeaning impact on the status of family law practitioners. Family law lawyers enter practice with a classic consciousness of injustice and a strong desire to improve their clients' lives. Yet they do not

receive equal pay for work of equal value. They are predominantly women who receive little recognition for the impressive skills they bring to their work. Fortunately, courts are being urged to recognize the importance of family law. Madam Justice l'Heureux Dubé stated, in the recent Supreme Court of Canada decision in *Moge* v. *Moge*:[1]

> [S]o often the evidence [in family matters] is incomplete owing to the ignorance or incompetence of counsel or the inexperience or unreasonable expectations of the client! Or the evidence is cut short so as not to prolong the discussion (or make the judge impatient) when there is already an overloaded list of such cases to be heard! Or the evidence is truncated owing to a lack of interest or a failure to understand its full meaning!
>
> It is significant that this type of carelessness occurs much less often in the fields of contract, insurance or tort, which are classified as "civil law" as distinct from "family law", yet the law should not be prepared to accept half-measures in either case. The outcome of a family law proceeding is certainly more dramatic. Lack of income is felt daily, and may affect the children's entire lives, aside from often working to the detriment of the person who though with adequate resources, deprives his family of what they need.
>
> This, in my view, had to be said since such deficiencies are so often encountered in the entering of evidence in family law cases.

These discriminatory and hurtful realities limit both lawyers' career aspirations and clients' access to justice. Family lawyers have a great deal of self-esteem, but this does not make up for, or translate into, profession-wide status or influence. Given that family lawyers are in so many cases working for the removal of great injustices, their inability to achieve these goals efficiently has a serious effect on society as a whole. Lack of access for family specialists to top partnerships or managing partnerships in large firms should be corrected. Large firms should share with small firms the struggle, stress, and financial difficulty of providing high quality services in the family law area. Until the disproportionate disadvantage felt by family law practitioners is remedied, it may never be possible to bring real equality to all women in the legal profession. Add to this the fact that women are disproportionately represented among family law lawyers and one begins to see the mutually reinforcing nature of gender bias in the justice system.

The study of this area undertaken by the Task Force should be seen as only a beginning. A major study of these converging patterns is long overdue. However, steps should be taken in the meantime to address the consequences of the low status of family law identified through this preliminary study.

First, as regards the status of family law generally, law schools and law societies could do a great deal to elevate the profile of family law by emphasizing the challenging nature of practice in this area and its fundamental importance in the structure of our society. Family law could be made a mandatory course at law school and its relationship to other areas of the law could be emphasized, for example, to property law, to tax law and to the law of estates and trusts.

RECOMMENDATION:

11.1 The Task Force recommends that law schools and law societies ensure that family law has a high profile in law school and law society courses.

Second, the Canadian Bar Association should focus attention on the issue of the low status of family law within the profession. The National Family Law Section should be mandated to develop means to end the disparagement of family law lawyers by judges and practitioners and to provide support to family law practitioners who suffer stress and low self-esteem related to these issues. The Section should continue to study the special problems faced by lawyers in this area of practice. The Section could also publicize and reward top family law work in order to enhance the profile of this area of practice across the profession. Continuing legal education on family law issues affecting minority

groups, such as First Nations people and persons of colour is greatly needed. Some of the accepted principles of family law may be inappropriate or require modification or adaptation in the case of clients belonging to these groups. We are already seeing interesting developments in the law of child custody in relation to lesbian parents. This whole aspect of family law requires innovative study.

RECOMMENDATION:

11.2 The Task Force recommends that the National Family Law Section of the Canadian Bar Association develop means to improve the status of family law within the profession and provide support to family law practitioners.

Third, the federal and provincial governments must ensure that appropriate resources are devoted to family law cases. Adequate legal aid funding for family law must be guaranteed in all areas of Canada. The Federal/Provincial/Territorial Working Group Report on Gender Bias in the Justice System recognized the importance of increased funding for family law matters. In particular, the Task Force recommends that the federal government establish a national civil legal aid tariff. There is perhaps no other single step which could ensure equal access to justice in family law matters. Governments must also ensure that adequate judicial resources are dedicated to family law cases. This includes sufficient funding to employ mediators, counsellors and access supervisors to support these cases.

RECOMMENDATION:

11.3 The Task Force recommends that federal and provincial governments ensure that adequate legal aid funding for family law cases is guaranteed in all areas of Canada, and in particular that the federal government establish a national civil legal aid tariff.

RECOMMENDATION:

11.4 The Task Force recommends that federal and provincial governments ensure that adequate judicial resources are dedicated to family law cases.

ENDNOTES

1. (1992), 99 D.L.R. (4th) 456 at 498 (quoting an earlier decision of the Quebec C.A.).

PART IV

PROFESSIONAL ORGANIZATIONS

CHAPTER TWELVE

LAW SOCIETIES

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CHAPTER TWELVE
LAW SOCIETIES

I. INTRODUCTION

This chapter deals with the role of law societies in achieving gender equality in the legal profession. The law society is seen as an agent of change in two respects: (1) as the implementing body for a new model of regulation for the profession, and (2) as a professional organization which exhibits leadership on gender issues in its internal operations.

II. A NEW MODEL OF SELF-REGULATION FOR THE LEGAL PROFESSION

A. SELF-GOVERNMENT AND THE ROLE OF LAW SOCIETIES

The extent of gender discrimination in the legal profession and particularly the experience of women lawyers in private practice is startling. The reluctance or inability of lawyers and law firms to respond to this discrimination in an effective manner is equally shocking. Recent accounts of law firm operations remind one of 19th century sweatshops.

> ....[law firms are] an almost classic example of 19th century capitalism. Here we are, unmitigated by any of the social measures that have been introduced by the State like maternity leave, like equal pay, any of that. Like human rights law. It's almost as if these firms exist in a time warp where we are as lawyer the means of production. Our time and our lives are cut up into little bits and sold to the highest bidder and they are sold in volume lots and if you command high pay then you are productive and all of that goes on, notwithstanding the fact that we have an array of social legislation that should be governing these firms and notwithstanding that a lot of corporations that are the clients of these firms have come to terms with social legislation and learned how to become productive within it. The law firms that serve them have not yet done that and they are not making use of the knowledge that exists in the community to come out of the early 19th century.[1]

In this respect law firms can be contrasted with other sectors of the legal profession in which gender discrimination exists but where the potential for monitoring and redressing discrimination can be located within the organizational structure. In private practice the structure of the firm has tended to impede rather than advance progress.

Gender discrimination is perpetuated because we are not as a profession applying our minds to the things we value in life. We are not putting work into a life perspective. We are not considering its value in relation to other things like home and family and the community. It is absorbing all our energy and attention and blinding us to some of the grim realities of the society of which our profession is a part.

In order to set us on the right path, law societies should adopt and publish a mission statement that the legal profession is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status, or sexual orientation. This is the first step in reinstating some of the values we have lost.

Women are faced with "the difficult task of trying to get into a system that was not originated by us, that was not configured by us, the dimensions of which and the preoccupations of which have very little to do with our own reality".[2] It is a challenge that cannot be resolved at the level of the individual alone. The legal profession must respond on a collective level. This has important implications for the self-regulation of the profession.

Law societies have a central role to play in changing the shape of the legal profession. The ethical imperative of acknowledging that discrimination exists in our profession and working toward its eradication is both an individual and a collective responsibility. It is a matter of laying down the standards of professional conduct and acting in conformity with them. Law societies must define these standards and develop ways and means to ensure that they are met.

While changes in individual attitudes and behaviour are key to achieving equality for everyone, this only addresses one aspect of discrimination. Many of the barriers faced by women lawyers are systemic rather than direct. The barriers are created by policies and practices some of which appear to be neutral but have the effect of restricting the opportunities available to women in comparison with men. Because these practices appear to be neutral it is difficult for many members of the profession to see the need for change and even more difficult to know how to tackle change. Consequently these forms of discrimination require a proactive approach on the part of law societies. They must become engaged in new forms of regulation such as the monitoring of law firm policies in addition to simply regulating the conduct of individual lawyers as they have done in the past.

This approach will have an impact on the traditional perception of the role of law societies: that is, law societies will have to take on more extensive educational and regulatory functions. Several law societies have already moved in this direction. There is certain to be resistance to these initiatives. This resistance is likely to be based, at least in part, on the view that the law society has no jurisdiction over law firms as opposed to individual lawyers. It is worth noting, however, that law societies have always regulated some aspects of law firm practice, for example matters relating to trust accounts. Also, more recently law societies have not hesitated to look into various types of internal firm practices in the context of assessing the merits of the concept of the "national" law firm and in protecting the public against harmful conflicts of interest arising from amalgamations and mergers.

If, however, there is any merit to the jurisdiction argument, the Task Force believes that law societies should make every effort to acquire this jurisdiction in order to discharge the clear responsibility they have in the area of human rights based on the profession's privilege of self-governance.

The Task Force believes that the concern law societies have that they should not get ahead of the profession is misplaced. Rather they should be concerned about keeping pace with the public. Law societies have to look to the future. A major part of their mandate will be to guide, regulate, and educate law firms. This necessitates regulating the collective practice of law, not simply the conduct of individual lawyers.

This section points to a new concept of self-regulation and addresses issues such as: (1) the duty of non-discrimination, including the need for amendments to codes of conduct and the development of formal and informal implementation processes; (2) prescribing requirements of firm disclosure and monitoring adherence to them; (3) considering alternatives to the discipline process; and, (4) strengthening the relationship between law society regulation and human rights legislation.

RECOMMENDATION:

12.1 The Task Force recommends that law societies propound a statement that the legal profession is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status, or sexual orientation.

B. THE DUTY OF NON-DISCRIMINATION

The starting point for a remodelled approach to regulating the legal profession is the explicit recognition of the duty of non-discrimination within professional codes of conduct.[3] Ethical codes are central to self-regulation: the existence of a "code of ethics" is often thought to be the very essence of professionalism. The terms "ethical" and "professional" are sometimes used interchangeably.[4] While traditionally the ethical codes were seen as the hallmark of professions in contradistinction to occupations, today codes of ethics are seen as a means of effecting progressive social change.

The purpose of an explicit statement of the duty of non-discrimination in professional conduct handbooks is the belief that normative statements are an important and basic first step and have significant educational and deterrent effects:

> What would follow from gender equality becoming a matter of professional responsibility and ethics? It would be seen as a norm of conduct such that a lawyer who violated it would be viewed in the same way as a lawyer who cannot be trusted on an undertaking. Bar Admissions courses would educate articling students about it, and it would become an internalized "goes-without-saying" standard of conduct. Breaches would be subject to investigation and discipline on the same basis as other breaches of Law Society rules.[5]

The arguments against explicit recognition of the duty of non-discrimination are varied.[6] First, it is argued that discrimination does not cause the same kind of harm and need not be treated the same way as, for example, misappropriation of trust accounts, acting while in conflict of interest, misleading the court and other clear categories in which the legal profession takes steps to discipline its members.

Secondly, human rights norms are said to be beyond the competence of regulatory bodies. Lawyers will suggest that law societies have no business telling their members how to manage their business affairs. Issues of whom they hire, whom they take into partnership, how they treat their employees, are, it will be said, all private business decisions. Law societies do not have the mandate to prescribe standards of internal business practice. If a firm wants to be "a mean firm" the market will deal with that but it is not the concern of the law society.

Further, it is argued that these duties are already set out in human rights legislation and need not be repeated in professional rules of conduct.

These arguments have obviously not prevailed in some jurisdictions which have enshrined principles of equality in their codes of conduct.

The Nova Scotia Handbook[7] under Chapter 18, "Duties to the Profession Generally", states:

> A lawyer has a duty to uphold the integrity of the profession and to promote the reputation of the profession for fairness, justice and honesty.

The guiding principles are:

> Public confidence in the profession requires that lawyers respect and zealously guard those values and principles and modes of conduct and behaviour that promote the ideal set forth in this Handbook. Conduct by a lawyer that does not promote the ideals of fairness, justice and honesty will adversely affect the image and morale of the profession and the public perception of the legal system.

And the Commentary adds:

> Human Dignity
>
> 18.9 A lawyer has a duty to uphold human dignity in the conduct of the lawyer's professional practice. This duty embodies the duty to respect and foster human rights and freedoms including among other things, those set forth in the *Canadian Charter of Rights and Freedoms*.

This duty is addressed even more directly by the Law Society of Upper Canada's rule 13 "Responsibility to the Profession Generally" which

has had the following commentary attached to it since 1974:

> Commentary 5
>
> There shall be no discrimination by a lawyer on the grounds of race, creed, colour, national origin, sex, marital status or age in the employment of other lawyers or articled students, or in dealings between himself and other members of the profession.

Recently the Law Society of British Columbia amended its rules of conduct to explicitly include the duty of non-discrimination, including fairly broad definitions of discrimination which include sexual harassment:

> Ruling 13 Discrimination
>
> 1. A lawyer shall not discriminate on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, marital or family status, disability or age:
> 2. For the purposes of this Ruling, age means less than 65 years of age;
> 3. Sexual harassment is a form of discrimination on the basis of sex;[8]
> 4. This Ruling does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.

The law societies of Alberta and Ontario are in the process of consulting their memberships with respect to incorporating a duty of non-discrimination into their rules. Rule 28 of the Rules of Professional Conduct of the Law Society of Upper Canada states:

> Discrimination by the lawyer on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences,[9] marital status, family status, or disability with respect to professional employment of other lawyers, articled students or any other person, or in professional dealings with other members of the profession or any other person is professional misconduct.[10]

Law societies have long since recognized that their duty to regulate the profession will sometimes overlap with the duties imposed on lawyers under the law. This does not prohibit the law society from acting. In many cases, law societies are better able to ensure that legal requirements are met by their membership. The Law Society is better placed to address issues relating to discriminatory practices in employment and working conditions of the profession than human rights commissions and has a well-defined interest in ensuring that its members are treated fairly.

1. Codes of Professional Conduct

The Task Force on Gender Equality recommends that law societies amend their codes of professional conduct to recognize that discrimination is a category of professional misconduct and sanctionable as such. These amendments and attached commentary should be as explicit as possible, beginning with general statements of principle but referring to the wide ambit of discriminatory practices to be avoided. The rule and commentary should specify that the duty of non-discrimination applies to lawyers both in their professional dealings with clients and other members of the profession and in their employment practices and workplace conditions.

Commentaries on the rule should attempt to illustrate the different types of discrimination which may occur. Clarity in this area is extremely important if the conduct is to be liable to sanction.

The Task Force has developed a detailed model rule of non-discrimination to be included in the Canadian Bar Association Code of Professional Conduct.[11] The commentary on the model rule covers the following issues: the duty of non-discrimination, the extent of this duty, special programs, responsibility, discrimination in employment, the duty of accommodation, sexual harassment, harassment generally and sexist activities. The commentary cites examples of the various forms of discrimination prohibited under the rule. This model may be of assistance to law societies as they develop their own rules.

RECOMMENDATION:

12.2 The Task Force recommends that all law societies enact non-discrimination rules in their jurisdiction and that discrimination in the profession be designated as professional misconduct.

2. Methods for Addressing Discrimination

a. Mechanisms Within the Firm

The Task Force recognizes that there can be both formal and informal mechanisms for implementing a rule on non-discrimination. Law societies should encourage law firms to establish internal procedures to handle complaints about gender and sexual discrimination. The complaint procedure should involve formalized reporting and a written response from the firm on final disposition of the complaint, including full reasons. These reports should be reviewable at the option of the complainant by a committee of the Law Society with the right of the complainant to a "trial *de novo*" and with disciplinary sanctions available as a remedy.

The Task Force considered whether these types of internal mechanisms should be mandated by the law society. Our view is that voluntary compliance should be tried first. However, compliance should be monitored by the law society through the reporting process and more coercive measures should be considered if necessary.

RECOMMENDATION:

12.3 The Task Force recommends that law societies encourage law firms to establish internal procedures to handle complaints about gender discrimination.

3. Safe Counsel

One of the main recommendations to emerge from our consultations was that women lawyers should have access to "safe counsel". A safe counsel is defined as a person who is able to counsel a complainant and advocate on her behalf without any potential conflict of interest or interference by the person against whom the complaint is made. Safe counsel should have independent power to initiate investigations and to determine appropriate standards and targets for law firms in order to ensure that the goal of equality is achieved by the legal profession. The purpose of creating the office of safe counsel is to ensure that the complainant remains anonymous and free of retaliation, that she receives appropriate support and retains control over decisions as to when and how to proceed. The Law Society of Alberta has recently established a safe counsel position. The Law Society selects volunteers from the profession to act in that capacity.

The Task Force cannot emphasize enough the pivotal role to be played by safe counsel. These individuals will acts as intermediaries. They will be exempt from the duty to disclose a breach of the rule of non-discrimination. They will be able to co-ordinate complaints and advocate on behalf of individuals or a group of women lawyers. As safe counsel would act as an ombudsperson contacting the law firm and letting the concerns which have been expressed be brought to the attention of relevant parties without threatening the individual who has been subjected to harassment or other forms of discrimination and is in a vulnerable position.

Safe counsel would assist in developing understanding about patterns of discrimination. For example, students and associates could be encouraged to give "exit interviews" to safe counsel to disclose their experience at a law firm and their views of the events leading to their departure.

Law societies should appoint an appropriate number of "safe counsel" to receive and investigate complaints of discrimination and harassment. This is as an essential step in enforcing the duty of non-discrimination.

RECOMMENDATION:

12.4 The Task Force recommends that law societies appoint an appropriate number of "safe counsel" to receive and investigate complaints of discrimination and harassment.

4. The Discipline Process

The formal mechanism for ensuring compliance with a non-discrimination rule is the disciplinary process through which complaints of professional misconduct are processed. This process would be in addition to or as an alternative to internal firm procedures and safe counsel. Different levels of intervention are beneficial as they create an interlocking "watch dog" environment. Where the aggrieved lawyer has complained to safe counsel, procedures should be implemented under which women withdraw their anonymity before an investigation leading to a disciplinary hearing is undertaken.

The aim of these measures is to create an environment in which it becomes less and less acceptable to discriminate. Where there has been a complaint about discriminatory behaviour by a lawyer and the complaint is withdrawn, the law society should be enabled to pursue the disciplinary proceeding without the complainant. There is no reason to distinguish between infringement of the non-discrimination rule and other forms of misconduct. Discrimination is an issue of professional conduct and there is a collective interest in eradicating this kind of substandard behaviour.

RECOMMENDATION:

12.5 The Task Force recommends that law societies ensure that the existing disciplinary process through which complaints of professional misconduct are processed be extended to ensure compliance with non-discrimination rules.

RECOMMENDATION:

12.6 The Task Force recommends that where there has been a complaint made about discriminatory behaviour by a lawyer and the complaint is withdrawn, the law society can still pursue the disciplinary proceeding.

C. Monitoring and Requirements of Firm Disclosure

The various formal and informal mechanisms set out above are best suited to addressing overt discrimination and harassment. They are unlikely to be effective in dealing with the more widespread patterns and policies which have an adverse effect on women and constitute systemic discrimination. These are best addressed through the law society monitoring the status of women in law firms. The monitoring function will be based on disclosure requirements placed on law firms and on increased information-gathering by the law society.

A regulatory initiative should require law firms to report. Complaint-driven mechanisms are inherently limited. They place pressures on lawyers who might make complaints, because complaints are viewed negatively and in many cases seen as a career-ending

process. On the other hand, law firms are being asked to consider these issues and implement equity policies. It is logical that they be required to report on what they are doing and the extent to which they are meeting goals and targets in this area. This process will require them to think through their own policies and this is perhaps the best way of effecting positive change within the firm.

Monitoring these matters will help to identify systemic barriers to women lawyers. The results of the surveys will make women lawyers more aware of the firms that are truly supportive of women lawyers. Such close scrutiny may also encourage law firms to become more sensitive to gender issues. The reports will serve an important educational and planning function.

As pointed out in Chapter Five, on private practice, law firms should be required to make an annual report to law societies on demographic information within their firms, including retention and promotion rates of women.[12] This report should be expanded so as to become an "equality audit" which reports on all aspects of the status of both sexes within the firm, including firm policies on gender-related issues and on the representation of minority groups. The report should be lodged with the law society and made available to the public.

Law societies have a special responsibility in the area of monitoring and should consult with professional survey researchers in developing strategies to trace the access, entry and advancement of women and men in the profession. It is extremely important that information on hiring, retention and promotion be collected on individuals as they move through the profession, so that special attention can be given to the problem of attrition of women and minority lawyers from practice. It may often be possible to develop important information on these issues through the use of existing or somewhat expanded data collected on annual law society membership forms. More extensive information should also be developed on sample groups of lawyers entering and advancing through the profession. Since some lawyers, especially minority lawyers, experience problems finding entry positions, and therefore may not become members of law societies, it will be necessary to develop further samples of law school and bar admission graduates and track their career experiences.

Law societies bear a special responsibility to monitor as comprehensively as possible the career experiences of the full range of lawyers prepared for the practice of law in Canada. In addition, the Canadian Bar Association bears a responsibility to press law societies to adopt common methods of gathering data in order to assist in developing a national data bank of statistics on these issues.

RECOMMENDATION:

12.7 The Task Force recommends that law societies monitor the progress of women and other minority groups within firms by requiring disclosure of the status of these individuals within the firm.

RECOMMENDATION:

12.8 The Task Force recommends that law societies use their own membership data and additional surveys to monitor the access entry and advancement of bar admission graduates as well as members through their professional careers.

RECOMMENDATION:

12.9 The Task Force recommends that the Canadian Bar Association encourage law societies to develop common methods to gather data in order to assist in establishing national statistics.

D. Alternatives to the Discipline Process

The traditional way for law societies to regulate their members is through the disciplinary process. This is an acceptable mechanism for dealing with individual complaints of discrimination but may not be as effective in compelling firms to abandon their discriminatory practices.

First, disciplinary proceedings are very much linked to the professional conduct of lawyers vis-à-vis third parties. Here we are addressing a related but separate issue, namely the relationship between lawyers *inter se*, particularly those in an employer/employee relationship. The goal is to encourage employment practices and policies that will promote good professional relationships among lawyers themselves. The Task Force recognizes that barriers to achieving this are not so easily overcome through the normal adversarial discipline process.

Secondly, there is considerable stigma attached to the disciplinary process. It is essential not to over-dramatize problems related to patterns of professional relationships and working conditions. The primary goal in dealing with these is not to punish but to remedy.

The limits of the disciplinary process suggest the need to create an entirely new body within law societies which is independent of traditional disciplinary committees — a body similar to that of a labour relations board. This "equity advisory committee" could deal with questions regarding the organization of the law firm, including maternity and parental leave policies, employment equity policies, discrimination in articling conditions and discriminatory denial of partnership. The Committee could help to establish and encourage the adoption of standards, and help the profession to adjust to the new business aspects of the practice triggered by the greater numbers of women in the profession. The Committee could also establish non-adversarial grievance procedures to address concerns of firm members.

RECOMMENDATION:

12.10 The Task Force recommends that law societies establish "equity advisory committees" to assist law firms in establishing and implementing sound working conditions.

E. Relationship to Human Rights Legislation

The Task Force recognizes the value and importance of self-regulation as the primary means of ensuring gender equality in the practice of law. Nevertheless, a direct relationship between the structures of self-regulation and human rights legislation should be clearly set out. There is no doubt that human rights legislation applies to employment decisions. For greater clarity and to ensure there are no loopholes, law society enabling legislation should be amended to require law firms and lawyers to comply with human rights legislation.

In addition, a successful complaint against a lawyer or law firm under a human rights code should automatically trigger an investigation by the law society.

RECOMMENDATION:

12.11 The Task Force recommends that the Law Society Acts of each province and territory be amended to require law firms and lawyers to comply with provincial human rights legislation.

RECOMMENDATION:

12.12 The Task Force recommends that a successful complaint against a lawyer or law firm under a human rights code should automatically trigger an investigation by the law society.

III. INTERNAL POLICIES AND PRACTICES

The law society's responsibility to promote gender equality in the profession is as relevant to its own operations as a professional organization as it is to its capacity as the governing body of the profession. This dual responsibility has already been acknowledged in several of the provincial law society reports on women in the legal profession.[13]

Law societies must ensure that they are equally accessible to all their members. Access issues arise with respect to representation on the governing body and its internal committees, membership fees and the development of member resources. Law societies should also review internal employment practices to ensure that they are consistent with the message delivered to the profession.

In addition, law societies should re-examine their programming and procedures to ensure that they enhance equality and reflect the diversity of the profession.

A. ACCESS

1. REPRESENTATION

Gender equality requires that women achieve positions of influence across the profession. Participation in the governance of the law society by becoming a bencher accords a lawyer the ability to influence the structure of the profession. Thus, it is essential that benchers become fully representative. Law societies should take measures to encourage women, including minority women, to run for election as benchers.

RECOMMENDATION:

12.13 The Task Force recommends that law societies take measures to encourage women, including minority women, to run for election as benchers.

The first step toward this end is encouraging the active participation of women lawyers in their professional organizations. Law societies should:

- inform women lawyers about their structures and operation
- work toward consistent and fair representation of women from different sectors on their committees
- develop ways to achieve these goals, including the compiling of lists of women lawyers
- produce data on an annual basis setting out the participation of women in law society committees and activities.

Changes to existing practices should be made to facilitate these developments. For example, the expectations of a bencher's time commitment is prohibitive for women lawyers with family responsibilities. Law Societies should review the time demands on benchers and develop means to reduce their impact on individuals with family responsibilities.

Law societies should also encourage women lawyers to participate in various professional activities as steps in the process toward becoming a bencher. Participation will assist them in gaining a

higher profile in the profession. For example, women should be appointed to law foundations, judicial appointment committees and so on. Law societies should ensure that their nomination and appointment procedures are open and work toward equitable representation of women and minority groups on all entities on which the law society is represented.

RECOMMENDATION:

12.14 The Task Force recommends that law societies take steps to facilitate the active participation of women lawyers in their professional organizations.

RECOMMENDATION:

12.15 The Task Force recommends that law societies review the time demands on benchers and develop means to reduce their impact on individuals with family responsibilities.

RECOMMENDATION:

12.16 The Task Force recommends that law societies ensure that their nomination and appointment procedures are open and work toward equitable representation of women and minority groups on all entities on which the law society is represented.

2. Fees

Law societies should review their fee structures to ensure that they accommodate the reality of women's lives. These organizations should establish lower fees for lawyers who are involved in alternative work arrangements. In addition, law societies should investigate implementing lower insurance premiums for lawyers in order to promote alternative types of practice including part-time, flexible time and job-sharing. Consideration should also be given to introducing graduated fees for women re-entering practice after temporary absences to fulfil family commitments.

RECOMMENDATION:

12.17 The Task Force recommends that law societies review their fee structure to ensure that they accommodate the needs of lawyers with family responsibilities.

3. Programs and Resources

Law societies should ensure that their programs and resources are fully accessible to all members of the profession.

One aspect of this recommendation is to make materials prepared by the law society fully accessible. For example, gender inclusive language should be used in all their documents. The use of gender biased language is offensive and excludes women. Similarly, law societies should ensure that all their materials are available in alternative formats, which should include Braille, material on tape, material on computer disks, and large print.

A second aspect to this recommendation is for law societies to ensure that women lawyers are adequately represented on program committees and in continuing legal education programs.

RECOMMENDATION:

12.18 The Task Force recommends that law societies ensure that their programs and resources are fully accessible to all members of the profession.

RECOMMENDATION:

12.20 The Task Force recommends that law societies demonstrate leadership in the area of employment equity by encouraging and ultimately ensuring diversity in their staff.

B. Internal Employment Practices

The new regulatory function recommended to law societies in this report emphasizes the need for law firms to examine their employment practices and working conditions to ensure that they do not discriminate against women. Professional organizations must carry out this same type of review and should adopt gender-related policies for their staff where this is appropriate.

Law societies should also demonstrate leadership in the area of employment equity by encouraging and ultimately ensuring diversity in their staff. To meet this goal, law societies should establish affirmative action programs to ensure that under-represented groups are included among their staff.

RECOMMENDATION:

12.19 The Task Force recommends that law societies review their internal employment practices and adopt gender-related policies for their staff where this is appropriate.

C. Educational Function

Education will be key to achieving gender equality. Lawyers must be better informed about the nature of equality rights, the duty of non-discrimination and the various steps which should be taken to eliminate discriminatory practices and accommodate the diverse needs of lawyers. Lawyers, law firms and other employers of lawyers will need assistance in developing mechanisms to address these issues.

Law societies should prepare and implement on-going educational programs and establish regular means of communication within the legal profession on gender issues. Programs should also sensitize members to issues affecting Women of Colour, Aboriginal women, lesbians and women with disabilities. These programs will help to foster an atmosphere of respect for members of these minority groups. Measures should include Bar Admission and Continuing Legal Education Courses, liaison with the judiciary, and law firm policies.

While the Task Force has focused on making these educational materials available to members of the profession on a voluntary basis, this might not be enough. During our consultation process several groups recommended mandatory education on discrimination for lawyers who serve in supervisory roles, and particularly for principals. However, at the present time the Task Force believes that making these resources available to the legal community on a voluntary basis will be sufficient.

Law societies should also develop programs, including audio-visual materials, to assist lawyers who are subject to discrimination. These materials should offer support and empower lawyers to deal with discrimination in a positive way. They should be sensitive to the unique needs of Women of Colour, Aboriginal women, lesbians and women with disabilities.

In keeping with this leadership role and accountability to the public, law societies could also develop model programs on issues of sexism and racism. These model programs could be released to the public, including government bodies and other agencies.

RECOMMENDATION:

12.21 The Task Force recommends that law societies undertake educational initiatives to inform members of the profession about gender equality and to assist the profession in eliminating discrimination.

RECOMMENDATION:

12.22 The Task Force recommends that law societies' programs be designed to sensitize members to issues affecting Women of Colour, Aboriginal women, lesbians and women with disabilities.

RECOMMENDATION:

12.23 The Task Force recommends that law societies develop programs, including audio-visual materials, to assist lawyers who are subject to discrimination.

RECOMMENDATION:

12.24 The Task Force recommends that law societies develop model programs on issues of sexism and racism for dissemination to the public.

D. Multiple Discrimination: Need for Further Study

In approaching the study of Women of Colour and Aboriginal women in the profession the Task Force was struck by the lack of information relating to the experience of these lawyers. We need reliable statistics concerning the number of minorities and minority women applying to law schools, attending law school, articling, practising and in the judiciary. Any statistics compiled on the legal profession must consider the race or ethnicity of persons within the profession.

The Task Force has begun to review the situation of Women of Colour and Aboriginal women in the profession. Our findings make it clear that further studies of racism in the profession are required. This task should be undertaken jointly by the law societies and the Canadian Bar Association.

During the consultation process, the Task Force was informed about the problems surrounding the process of legal accreditation in Canada and its impact on minority women lawyers. This issue was not deemed to be within the Task Force's mandate, however we do acknowledge the need for reform. Law societies and other authorities should undertake an in-depth review of the legal accreditation process in order to design a more just and equitable process. This would help to ensure the increased availability of quality legal services for members of minority groups from lawyers who speak their language and understand the community's efforts.

RECOMMENDATION:

12.25 The Task Force recommends that law societies gather reliable statistics concerning the number of minorities and, in particular, minority women in the Bar Admission Courses, in articling positions and as members of the profession.

RECOMMENDATION:

12.26 The Task Force recommends that law societies undertake a full study of racism in the profession. This task should be undertaken jointly between the law societies and the Canadian Bar Association.

RECOMMENDATION:

12.27 The Task Force recommends that law societies and other authorities undertake an in-depth review of the legal accreditation process in order to design a more just and equitable process.

E. Implementation of the Task Force Report

Law societies should establish committees to review and devise means of implementing the relevant sections of the Task Force Report. Where possible, joint committees with representatives from other legal organizations including the Canadian Bar Association should be established in order to maximize effectiveness. Gender Issues or Gender Equality Committees have already been established in several jurisdictions. The Report could be referred to these committees for review and advice to Convocation and the membership as a whole.

RECOMMENDATION:

12.28 The Task Force recommends that law societies establish committees to review and devise means to implement the relevant sections of the Task Force Report. Where possible joint committees with representatives from other legal organizations, including the Canadian Bar Association, should be established.

ENDNOTES

1. Mary Eberts, Address (Canadian Bar Association Conference: Gender Equality - A Challenge for the Legal Profession, 29 - 31 October, 1992) [unpublished].

2. *Ibid.*

3. C. Tennant, "Discrimination in the Legal Profession: Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15 Dalhousie L.J. 464.

4. H. W. Arthurs, "Code of Professional Ethics" in H.W. Arthurs, D.L. Mills and G. Starr, eds., *Materials on the Canadian Legal Profession* (Osgoode Hall Law School, 1985) [unpublished].

5. L. Smith, "Gender Equality - Professional and Ethical Issues" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference, 1992).

6. Lynn Smith discusses these in her article, *ibid.*

7. *Legal Ethics and Professional Conduct* (Nova Scotia Barristers' Society, 1990).

8. This reflects the Supreme Court of Canada decision in *Janzen* v. *Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252. The Chief Justice said:

> Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.
>
> ...
>
> Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands.... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or when employees must endure sexual groping, propositions and inappropriate comments but where no tangible economic regards are attached to involvement in the behaviour. [At 1281-1282]

He concluded:

> ...sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. [At 1284]

While the *Janzen* case dealt with sexual harassment in an employment situation, this Ruling covers more than lawyers' conduct as employers or employees. It also deals with relations among counsel, among partners, between lawyers and clients, and between lawyers and court personnel.

9. In respect of employment decisions, see Commentary 11 for the definition of record of offences and a discussion of reasonable and *bona fide* exceptions.

10. See the *Human Rights Code*, R.S.O. 1990, c. H. 19, part I and s. 10.

11. See Chapter 13.

12. See Recommendation 5.14.

13. See, for example, *Transitions in the Ontario Legal Profession* (Law Society of Upper Canada, 1991).

CHAPTER THIRTEEEN

THE CANADIAN BAR ASSOCIATION

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CHAPTER THIRTEEN
THE CANADIAN BAR ASSOCIATION

I. INTRODUCTION

The Canadian Bar Association ("CBA") is the national representative of the legal profession. As such, it has a primordial role in ensuring that its internal composition and operations are consistent with and reflect the principles of equality, diversity and accountability.

This chapter addresses the related issues of the role of the Canadian Bar Association as a professional organization in achieving gender equality in the profession and in its internal structures. The discussion and recommendations contained in this section are based on a report prepared by the Sub-Committee on Gender Equality within the CBA, established by the CBA Executive Committee in September 1992.[1] That Report was prepared after a review of existing practices, discussions among members of the Sub-Committee, other CBA members and staff and consideration of the relevant sections of the reports from the provincial and territorial Working Groups established by the Task Force on Gender Equality. It was reviewed and adopted by the Executive Committee in April 1993.

The following issues are addressed in this chapter:

1. the nature of the CBA's role in promoting equality within the legal profession;
2. participation by women lawyers in all CBA activities, including an examination of barriers to participation;
3. use of gender inclusive language in CBA documents;
4. consideration of gender issues in substantive policy-making for the Association;
5. internal employment practices of the CBA;
6. amendment to the CBA Code of Professional Conduct; and
7. implementation of the Task Force on Gender Equality's report and recommendations.

II. ISSUES AND RECOMMENDATIONS

A. THE NATURE OF THE CANADIAN BAR ASSOCIATION'S ROLE IN PROMOTING EQUALITY WITHIN THE LEGAL PROFESSION

In establishing the Task Force on Gender Equality, the Canadian Bar Association has taken the important first step of formal recognition of the barriers to women in the legal profession. The CBA should develop this initiative by taking on a leadership role in achieving change in the profession. In this context, the role of the CBA, as a professional organization, is to ensure that women are supported and accepted as equals within the profession.

In reviewing the role of the CBA in promoting the achievement of gender equality, we must be mindful that there is no one type of woman lawyer. Women, like men, have experiences and interests which distinguish them from their counterparts. One facet of this is multiple discrimination. Multiple discrimination occurs when the discrimination suffered by women lawyers based on their sex is compounded by discrimination on additional grounds such as disability, race, ethnic origin, aboriginal status, sexual orientation, age and marital status. For these women, the exclusionary nature of the legal profession is even more pronounced. The Canadian Bar Association has a special duty to take measures that will adequately respond to their unique needs.

In general terms, the interest of the Association in gender equality can be expressed in the following manner:

> The Canadian Bar Association, representing some thirty-seven thousand lawyers across Canada, recognizes that women comprise a large number of its members and acknowledges that, notwithstanding the overall numbers of practising women lawyers, both within and outside the Association, women lawyers do not receive the same benefits of the profession (status, privilege, financial rewards) accorded to male lawyers. This inequality is not limited to women; other groups continue to be excluded from full benefits of membership in the legal profession as the norm of the white, heterosexual male continues to be privileged.
>
> This inequality is evident at every level, from law school through practice to appointment to the bench. The CBA is committed to fully promote public respect for and improvement in the administration of justice. To do this, the CBA must take determined steps on behalf of its lawyers to ensure that discrimination against any lawyer on the basis of gender, race, ethnic origin, Aboriginal origin, sexual orientation, age, marital or family status and so on is eliminated. A healthy and vibrant profession embraces all who are committed and worthy to be called members.

The CBA's commitment to the eradication of all discrimination will be judged by its actions in the years to come. The Task Force has developed a recommended plan of action and it will be the responsibility of the CBA to ensure its implementation. A long-term approach should be undertaken with action, decisions, programs and statements that will demonstrate that the CBA cares, understands and will behave according to this commitment to equality and diversity. Measures taken by the CBA to fight discrimination of all kinds towards women lawyers and other lawyers who are excluded from full and equal participation in the profession will serve justice, make the Association more inclusive and help to build a greater sense of belonging to the Association.

The first step for the CBA should be the adoption of a clear statement that one of the Association's principal goals is the achievement of equality. This statement would recognize that zero tolerance of discrimination is not only a matter of ethics or the regulation of individual lawyer behaviour but also a collective responsibility.

This statement of principle should be included in both the Constitution and the Mission of the Canadian Bar Association. At the present time, the Mission contains several references to anti-discrimination goals: to "assist in eliminating discrimination in the administration of justice" and to "help and assist members to overcome discrimination in the legal profession". Unfortunately these goals are somewhat obscured by the fact that they are listed as sub-goals of the main mission objectives "to improve the administration of justice" and "to promote the interests of members of the Canadian Bar Association". It is recommended that the Mission be amended to include the general objective of promoting equality in the legal profession and the justice system.

RECOMMENDATION:

13.1 The Task Force recommends that the Constitution of the Canadian Bar Association be amended to include, in section 2, a clear statement that the Canadian Bar Association will work for the total eradication from the legal profession of any form of discrimination, including discrimination on the basis of sex, age, race, creed, colour, national origin, Aboriginal origin, sexual orientation, disability, marital or family status.

RECOMMENDATION:

13.2 The Task Force recommends that the Mission of the Canadian Bar Association be amended to include the clear statement that the mission of the Canadian Bar Association is, *inter alia*, to promote equality in the legal profession and the justice system.

RECOMMENDATION:

13.3 The Task Force recommends that the Canadian Bar Association conduct a full inquiry into racism in the legal profession. The Association should consider undertaking this inquiry in conjunction with the law societies.

B. CBA's Role in Encouraging Diversity in the Legal Profession

As part of this commitment to achieving equality, the CBA has an important role in encouraging diversity in the legal profession. Pursuant to the declaration set out above, the CBA must take proactive steps to eradicate all forms of discrimination. The recommendations contained within this Report are aimed at this objective, hence the CBA will fulfil this mandate by beginning to work for their implementation. The Task Force has some specific recommendations to make in this regard.

The CBA should conduct a full inquiry into racism in the legal profession. The Association should consider undertaking this inquiry in conjunction with the law societies. While the Task Force has attempted to deal with issues of multiple discrimination and in particular has carried out preliminary inquiries into the status of Women of Colour and Aboriginal women in the profession, a great deal more effort is required to ascertain the scope of the problem.

In the meantime, the CBA should take steps to improve our understanding of these issues and to eliminate racial discrimination in the profession. Steps which should be taken include:

- promoting academic excellence in the area of scholastic studies respecting Women of Colour and Aboriginal women in the profession by, for example, establishing a scholarship fund to assist in research in this area and devoting space in publications for coverage of these issues;
- establishing a library resource base for those pursuing academic research on diversity issues and making this information available to members at large;
- establishing a race relations committee;
- developing a scheme through which law firms that demonstrate leadership with respect to employment of members of diverse racial and ethnic groups be provided with positive reinforcement; and,
- develop and disseminate model racial harassment programs.

RECOMMENDATION:

13.4 The Task Force recommends that the Canadian Bar Association take steps to improve our understanding of racism and to eliminate racial discrimination in the profession.

The CBA should also take a leadership role by delivering the message to the profession and to government that people with disabilities should become part of the profession and should be accommodated. No barriers that can be removed should prevent these individuals from gaining access to the profession. The CBA should ensure that its meetings and materials are accessible to all lawyers, including those with disabilities. In addition, the Association should promote the goal that all legal materials should be accessible to lawyers with disabilities. In order to achieve this goal the CBA should encourage government, legislatures and law societies to produce legal materials, law reports, legislation and regulations in alternative formats such as Braille, audio tape, computer disks and large print. In order to accomplish these goals the CBA should establish an advisory council which can assist the profession in understanding the needs of people with disabilities and give advice on the removal of barriers. This would mainly be an information role.

RECOMMENDATION:

13.5 The Task Force recommends that the Canadian Bar Association ensure that its meetings and materials are accessible to all lawyers, including those with disabilities.

RECOMMENDATION:

13.6 The Task Force recommends that the Canadian Bar Association promote the goal that all legal materials should be accessible to lawyers with disabilities by encouraging government, legislatures and law societies to produce legal materials, law reports, legislation and regulations in alternative formats.

RECOMMENDATION:

13.7 The Task Force recommends that the Canadian Bar Association establish an advisory council which can assist the profession in understanding the needs of people with disabilities and give advice on the removal of barriers.

The CBA should play the same advocacy role with respect to gays and lesbians within the profession. The CBA can demonstrate leadership in this area by including openly acknowledged gays and lesbians in leadership positions and by ensuring that all social activities and members' services, and in particular insurance programs, do not discriminate against members on the basis of their sexual orientation.[2]

RECOMMENDATION:

13.8 The Task Force recommends that the Canadian Bar Association include openly acknowledged gays and lesbians in leadership positions and ensure that all social activities and members' services do not discriminate against members on the basis of their sexual orientation.

The following sections of this chapter address other means by which the CBA can become more inclusive in its structure, operations and programs.

C. Participation by Women Lawyers in all Canadian Bar Association Activities, Including an Examination of Barriers to Participation

Obstacles to the participation of women lawyers in all CBA activities should be reviewed at three distinct levels:

- women as members and in the organized activities of the CBA;
- women as volunteers in CBA bodies; and
- women in leadership positions at different levels of the organization.

1. Women Lawyers as Members

The *Canadian Bar Association Survey of the Legal Profession - Final Report*[3] (hereafter the *Membership Survey*) indicates that at the present time 72% of legal professionals are men and only 28% are women.[4] The CBA represents 37,000 lawyers: 8,000, or approximately 21% of the membership are women. Women are under-represented in the CBA in comparison with the proportion of women in the legal profession. Women lawyers within the CBA, as within the profession as a whole, are over-represented in the junior levels: 44% are in the 18 to 34 years membership category; 22% are in the 35 to 54 years category; and only 2% of the membership are in 55 years and over category. The *Membership Survey* also indicates that women are more likely than men to earn less than $60,000.00 per year.

Statistics concerning participation in activities of the CBA or as volunteers in the CBA are not gathered on the basis of sex. It is therefore difficult to draw conclusions about why women do or do not join the CBA or participate in its activities. It is recommended that as part of the follow up to the Task Force report, the CBA gather statistics or find other means to track the level of involvement of women in the CBA. Member surveys could be used to develop strategies and determine appropriate support for women members. Any future general surveys of the membership should be formulated so as to elicit this information. The CBA should also investigate means to gather information on the participation of members on other grounds such as race and disability.

RECOMMENDATION:

13.9 The Task Force recommends that the Canadian Bar Association gather statistics or find other means to track the level of involvement of women in the Association.

RECOMMENDATION:

13.10 The Task Force recommends that the Canadian Bar Association gather statistics or find other means of tracking the level of involvement of minority groups in the Association.

The *Membership Survey* concluded that the CBA should undertake efforts to attract more women and more lawyers of different racial and ethnic backgrounds to its membership. The *Survey* report recommended the following structural improvements:

1. An increased presence of women within all major decisional posts of the Association should be prioritized in order to avoid losing sight of the needs and expectations which will be demanded by this new generation of female legal professionals.

2. The increase [by] users of various ethnic origins is also a foreseeable reality and the Association should favourize the particular needs of this increasing clientele group.

The Sub-Committee has reviewed the issue of participation by women and makes recommendations for improvement in five areas: (a) membership fee structure; (b) gender issues section or conference; (c) becoming a "family-friendly" organization; (d) CBA as an advocate for women lawyers; and (e) resource and professional development programs.

a. Membership Fee Structure

The results of the *Membership Survey* demonstrate that women lawyers are the youngest and least economically healthy segment of the legal profession. Other studies of the status of women lawyers reinforce these conclusions and emphasize the impact of child bearing and child rearing on the legal careers of women. These facts may necessitate a re-thinking of the membership fee structure to reflect the new reality that this profession is no longer composed solely of men following a predictable career advancement pattern based on continuous full time employment.

The reality of different career patterns and the need for flexibility in the membership fee structure has already been recognized in two resolutions brought before CBA Council. These resolutions seek to establish a dues waiver program (for CBA members temporarily unable to pay fees) and a baby bonus program (a financial bonus for CBA members who take maternity or parental leave). Both resolutions have been tabled until the financial implications can be more fully understood.

The dues waiver program, although not originally elaborated with these considerations in mind, may provide assistance to women on maternity leave, for example, or to women working part time. Adapting the fee structure to the reality of part-time lawyers is also a demand expressed by many of the provincial Working Groups of the Task Force on Gender Equality.

This proposal needs to be further refined to meet the needs of women lawyers. The requirement to review the fee structure should not be interpreted as a demand for reduction of fees for women *per se*. Rather, a more flexible fee structure is one way in which the CBA can reflect the new reality of the profession and thereby benefit the entire profession.

The "baby bonus" resolution (a rebate of a portion of fees to members who have babies and/or take parental leave) is another way to make the CBA more inclusive and to recognize that having children is not only a woman's responsibility but a collective one as well. The major financial consequences of child bearing is still borne by women. Statistics clearly demonstrate that child bearing and child rearing affect the careers of women lawyers to a much greater degree than men lawyers. The "Baby bonus" is a means by which the CBA can demonstrate that it recognizes the impact of child bearing on lawyers and supports its members in a tangible way.

These two resolutions are being promoted within the CBA. However, these proposals must be examined from a financial perspective to ensure that they are feasible and the best alternatives to meet the objectives. It is recommended that the general issue of a flexible fee structure and other financial measures adapted to the reality of women's lives be referred to the most appropriate body for study. A Working Group of representatives of the Membership Committee, the Young Lawyers Conference, and the Finance and Planning Directorate should be established to ensure that these issues are dealt with and a comprehensive report tabled by the 1994 Mid-Winter Meeting.

RECOMMENDATION:

13.11 The Task Force recommends that the general issue of a flexible fee structure and other financial measures adapted to the reality of women's lives and parental responsibilities be referred to a working group of representatives of the Membership Committee, the Young Lawyers Conference, and the Finance and Planning Directorate of the Canadian Bar Association to ensure that these issues are dealt with and a comprehensive report tabled by the 1994 Mid-Winter Meeting.

b. Gender Issues Section or Conference

Many women choose not to join the CBA because they do not have the feeling of belonging to the Association. The *Membership Survey* revealed that 28.1% of non-members have given this reason for not joining the CBA. Steps should be taken to make the CBA inclusive by making the Association more inviting and accessible to women.

The major recommendation which has been proposed to deal with this problem is the establishment of a Gender Issues Section or Conference, which would operate mainly at the branch level. All of the provincial and territorial Working Group reports emphasized the need for the CBA to promote networking and mentoring of women within the profession through the creation of this type of forum. These bodies would encourage the participation of women by facilitating networks, sharing information and sponsoring special events of particular interest to women (although membership in the Section or Conference would not be limited to women). The Section or Conference could also be a mechanism for women to approach the Association with their concerns and to have these concerns addressed. While the emphasis of the Gender Issues Section or Conference would be to encourage broad, grass-roots participation in the Association, the local divisions would also work with the National Equality Committee which, it is suggested, would be responsible for implementation of the Task Force report. (See *infra*, section G).

The CBA should also establish sub-sections in which Women of Colour, Aboriginal women, lesbians and women lawyers with disabilities are able to come together to discuss common issues and offer support to each other.

RECOMMENDATION:

13.12 The Task Force recommends that a Canadian Bar Association Gender Issues Section or Conference which would operate largely at the branch level be created. This body would be an avenue for encouraging the participation by women and providing an opportunity for women to network with each other.

RECOMMENDATION:

13.13 The Task Force recommends that Canadian Bar Association sub-sections for Women of Colour, Aboriginal women, lesbians and women with disabilities be established where this is appropriate.

c. Becoming a "Family Friendly" Organization

Encouraging the participation of women in CBA activities necessitates recognizing the various demands women face in balancing career with family responsibilities. The CBA must become a "family friendly" organization.

We should not forget that women are still the ones who carry by far the greater responsibility of caring for children by comparison with their male counterparts. The results of provincial Law Society surveys of the profession reveal that female lawyers spend more than twice as much time as male lawyers in taking care of their children.[5] The energy and time devoted to family responsibilities and legal work leave little, if any, in reserve for other activities. The result is that women often have less time for bar association activities because of family responsibilities. This is a type of systemic discrimination which can be addressed, as was said earlier, by finding ways to accommodate lawyers with family responsibilities.

While some aspects of CBA operations should be commended (for example the children's program at the Annual Meeting), this trend should be woven through the fabric of the organization so that family responsibilities do not create a barrier to participation. For example, care should be given to the time of day when meetings are held and consideration given to on-site child care. As an example, women lawyers in Québec City once expressed to the Barreau that the "Happy hour" meetings are the most difficult to attend, considering that their children are coming home from school and it is supper time. Once the situation was recognized, special attention was given to scheduling meetings at 8:00 AM, at lunch time or even in the evening when it is easier to find a babysitter.

The CBA should be family sensitive in all the activities it organizes and creative ways should be developed to assist lawyers with family obligations. It is recommended that every branch, section and conference take steps to make sure that all their activities are planned and organized in a way that will encourage the participation of lawyers with family responsibilities. These steps should be publicized so that lawyers can take advantage of them.

RECOMMENDATION:

13.14 The Task Force recommends that the Canadian Bar Association National Office and every branch, section, committee and conference take steps to ensure that all their activities are planned and organized in a way that will favour the participation of lawyers who bear family responsibilities. These steps should be publicized so lawyers may take advantage of them.

d. CBA as Advocate for Women Lawyers

Another way in which the CBA can attract more women lawyers into the Association is to take the lead as an advocate on issues of particular interest to women lawyers. The establishment of the Task Force and the recent CBA intervention in the *Symes* case on the deductibility of child care expenses are two examples of this approach. These initiatives demonstrate to female CBA members that their professional association is aware of their concerns and is prepared to act on their behalf. It is recommended that the CBA continue to expand its advocacy role on issues of interest to women lawyers.

The CBA should become an advocate for achieving equality within the profession. For example, the Association could sponsor Gender Awareness Programs through Continuing Legal Education on issues such as employment equity, pay equity, changing demographics of the workplace, managing diversity, and the definition and prevention of workplace harassment. These programs should be developed for managers of law firms and other legal employers whether they are men or women.

Similarly, the CBA could advocate for maternity benefits and parental leave benefits to assist lawyers who practice in small firms or as sole practitioners who generally do not have access to these benefits.

RECOMMENDATION:

13.15 The Task Force recommends that the Canadian Bar Association continue and expand its advocacy role on gender issues including issues of particular interest to women lawyers.

e. Resource and Professional Development Program

In addition to advocating for its women members the CBA should develop resources and professional development programming targeted to the needs and interests of women lawyers. Ideas for these projects include:

- developing a system for encouraging women to apply for judicial appointment
- gathering and disseminating information regarding salaries and earnings
- developing resources and training regarding career advancement (breaking the glass ceiling)
- assisting with re-entry to the profession
- developing a directory of women lawyers to assist in networking.

These programs should also be tailored to deal specifically with the needs of Women of Colour, Aboriginal women, women with disabilities and lesbians. For example, resources should be designed to address unique issues facing women in all their diversity.

RECOMMENDATION:

13.16 The Task Force recommends that the Canadian Bar Association develop resources and professional development programming targeted to the needs and interests of women lawyers.

2. Women as Volunteers

As mentioned above, there are no statistics available as to the participation of women as volunteers in the CBA. As a matter of fact, besides members holding office in a branch, section or conference, who are named in the CBA directory, we have no idea who and how many people volunteer for the CBA. It is difficult to say if there are obstacles for women that prevent their participation in the CBA organization.

Participation in the organization of CBA events is certainly the first step to access to leadership positions in the CBA. It is also the best way to have a strong, lively and healthy organization. For these reasons, it is important to be sure that there are no barriers to women's involvement in the CBA and that, in fact, women are encouraged to participate as volunteers. It is recommended that a general statement of principle to encourage the participation of women be adopted and promoted throughout the organization. The statement could provide:

> Every effort should be made to encourage women to participate in CBA activities as volunteers at all levels. An extra effort should be made to involve women affected by multiple discrimination.

In addition to this general statement, the Task Force recommends that the CBA improve its nominating procedures and develop other measures to encourage women to participate actively in the Association.

a. Formal and Informal Nominating Procedures

The Sub-Committee on Gender Equality within the Executive reviewed the CBA directories for the last ten years to provide a record of participation by women at the national level. Lists have been drawn up of the executives of the various standing committees, sections, conferences, special committees and task forces from 1983 to 1993. These lists are available to interested members.

The record demonstrates that while women are achieving higher levels of representation on national bodies, the progress is very uneven. For example, the first female member of National Executive Committee was in 1983. The number of women on the Executive over the last decade has ranged from a low of zero in 1986 and 1987 to a high of 11 (50%) in 1993. Given the current nominating procedures, there is no guarantee that the composition of this year's Executive is a trend.

Some committees have had a very low level of participation by women. For example, CBIA has its first sitting female member this year (although two women appointed to this Board in the past were unable to serve). In the 1980s, many of the high profile committees and Task Forces, such as Supreme Court Liaison, Federal Court Rules, Judges Salaries and Benefits, Legislation and Law Reform and Judicial Appointments had few, if any, women representatives. Of these, only the Legislation and Law Reform Committee has made progress in this regard in recent years. Conversely, some committees such as Law Day and Public Legal Education have consistently had a high number of women members.

The most striking feature of this record is the lack of consistency and predictability in the outcome of the procedures for establishing the membership of committees. Individuals are nominated to positions on the various CBA bodies through formal and informal procedures. In addition, many of the leadership positions are filled through elections. The following is a brief review of the various procedures:

- The CBA By-law governs the formal nomination procedures for Standing Committees. The Nominations Committee is composed of all Branch Presidents and chaired by the Immediate Past President of the Association. The Past President writes to each Branch asking for nominations to the various positions. These nominations are then reviewed to ensure that an appropriate balance of geographic representation is achieved. These nominations are confirmed by Council.

- Membership of the executive of National Sections are generally drawn from past chairs of branch sections and elected by the current executive. A Model By-Law has been developed for National Sections which sets out this process.

- Membership of the executive of each Conference takes place in accordance with their By-law.

- The Finance and Planning Directorate is composed of designated representatives.

- The National Executive is composed of the elected Senior Officers and representatives of the Branches and Young Lawyers Conference.

- Membership on Task Forces and Special Committees is by appointment of the President.

In addition to formal procedures, informal nominations for participation in special projects takes place on a regular basis. While there is increased sensitivity to the need to have representatives of both sexes on CBA bodies, the days of the all male "Blue Ribbon" special committee are not long gone. The disproportionate results of the nominating process also tend to occur in the ad hoc nominating processes. For example, in the last year when volunteers were recruited for the constitutional hotline project and the court delays project, all but one name put forward were men while for domestic violence projects all suggested individuals were women.

Given the nature of a volunteer organization, it would be difficult to mandate gender parity on all committees: too much depends on the expertise, level of interest and time commitment of the individual. It is equally clear that some measures must be taken to improve nominating procedures especially when one recognizes the high level of discretion on the part of individuals responsible for recruiting and nominating members for the various bodies and special projects.

It is recommended that a dual approach be taken. First, the CBA should adopt a statement of principle which recognizes the long term goal of gender parity and the short term goal that the membership of all internal bodies and special projects should strive to have at least representation based on the proportion of CBA members of each sex. At the present time, this would mean that approximately one-quarter of all representatives should be women. The statement of principle should be disseminated to all those involved in the recruiting and nominating processes. The individual or individuals responsible for establishing the membership of a given body should be mandated to ensure that this statement is implemented in every case.

The second and complementary approach is to enlarge the pool of volunteers to permit gender equal representation. Where proportionate gender representation has not been achieved, it is recommended that nominating bodies be encouraged to nominate an equal number of men and women to permit more flexibility in the final selection to achieve balanced committees.

In addition, it is recommended that more pro-active measures could also be undertaken to broaden the pool of representatives. For example, the availability of positions should be more broadly publicized so that a broader base of capable and willing CBA members could express their willingness to participate. In addition, lists of women who are interested in becoming more actively involved should be created in order to ensure that women wanting to participate will be called upon when there is an opportunity. These lists should be prepared on an annual basis following an announcement to the membership that lists are being prepared and these lists should be made available to the President, as well as any chair or organizer of activities.

RECOMMENDATION:

13.17 The Task Force recommends that the Canadian Bar Association adopt a statement of principle recognizing the long term goal of gender parity on all Association bodies and the short term goal that the membership of all internal bodies and special projects should strive to have at least representation based on the current proportion of Canadian Bar Association membership of each sex.

RECOMMENDATION:

13.18 The Task Force recommends that the Canadian Bar Association take more pro-active measures to broaden the pool of representatives. Examples include publicizing available positions and the creation of lists of women interested in becoming more actively involved in the Canadian Bar Association.

b. Participation in Professional Development Activities

Following from the same general theme of increasing the participation of women, it is also important to emphasize that in the planning of CLE and other conferences or events, the organizers should always make sure they select women speakers and speakers from minority groups. They should be sensitive to the fact that there are a substantial

number of excellent lawyers who are never asked to act as speakers because they are not in the traditional basket of speakers coming from the large firms or from the "CBA network", i.e. lawyers already known to people of the CBA because they are or were involved with the CBA. Those not called include women lawyers, lawyers from minority groups, lawyers working in small firms and so on.

The CBA should adopt the goal of equal representation of both sexes on the roster of speakers at all events. In addition, the CBA should promote opportunities for women lawyers to speak in public, in particular, to raise their profile and acceptance by the profession and the public.

The Task Force recognizes that it is not easy to select and find good speakers and that it requires extra effort to make panels representative. However, it is essential that we take steps to enlarge the bank of possible speakers. It is recommended that an outreach program be instituted. The Department of Professional Development at the National Office should create a bank of speakers, including the curriculum vitae and references for the potential speaker and all relevant information about his or her professional activities. Reference to this bank can be very useful to organizers of Continuing Legal Education throughout the country. In order to ensure that this bank is as representative of the entire legal community as possible, all members of the CBA (via a letter or some other means) should be made aware of the creation of that bank and an invitation should be issued to all to participate. The organization of the bank, its contents, etc. can be left to the Professional Development department but the terms of reference should be submitted to the National Executive before being implemented.

RECOMMENDATION:

13.19 The Task Force recommends that the Canadian Bar Association adopt the goal of equal representation of both sexes on the roster of speakers at all events. In addition, the Canadian Bar Association should create and promote opportunities for women lawyers to speak in public.

RECOMMENDATION:

13.20 The Task Force recommends that the Department of Professional Development at the Canadian Bar Association's National Office create a bank of speakers, including the curriculum vitae of the potential speaker and all relevant information about his or her professional activities.

c. Reimbursement of Child Care Expenses Related to Attendance at Meetings

Another measure which could help to recruit women to become more actively involved in the CBA is the reimbursement of child care expenses for attendance at meetings. A policy to this effect was recently adopted by the British Columbia Branch in March 1993.

The British Columbia policy will reimburse child care expenses incurred when attending provincial Council, Executive Committee and provincial Council Committee meetings. The policy is intended to be used to provide reimbursement for those expenses which would not otherwise have been incurred but for the Member's involvement in voluntary Branch activities. The policy includes a set of guidelines for

how and when expenses can be claimed. The policy will be implemented on a one-year trial basis commencing in September 1993 and reviewed quarterly.

Early discussions of this issue at the national level by the Finance and Planning Directorate have been inconclusive. The Task Force has concluded that child care costs incurred in order to attend meetings is one barrier to the participation of women in the CBA because women have greater child care responsibilities than men. There is no compelling reason to distinguish between the other types of out of pocket expenses related to attendance at meetings which are currently reimbursed (meals, taxis, etc...) and child care expenses. It is recommended that a policy for reimbursement of child care expenses related to attendance at meetings be adopted at the national level. Clearly, the claim for reimbursement would be available to qualifying male and female members. Guidelines to implement this policy should be formulated by the Finance and Planning Directorate.

RECOMMENDATION:

13.21 The Task Force recommends that the Finance and Planning Directorate of the Canadian Bar Association adopt a policy for reimbursement of child care expenses for attendance at meetings at the national level.

3. Women in Leadership Positions

The data from the last ten years illustrates that women have been making progress in gaining leadership positions within the CBA, although this progress has been erratic. The CBA has its first woman president this year and will have its second immediately following. We can say that it is not too early. It is important for the CBA as a whole to have women in leadership positions throughout the Association. It will certainly help women lawyers to have a greater feeling of belonging to the Association. It will also benefit the CBA to have the input and the vision of women in these positions.

Many of the recommendations made above to reach out to women to become members, to participate as volunteers, to be speakers at CLE, will also serve the objective to have more women in leadership positions. As the CBA becomes more "women-friendly", women will feel more confident that they can attain leadership positions.

RECOMMENDATION:

13.22 The Task Force recommends that the Canadian Bar Association analyze, on an annual basis, the status of women and minorities in the Association's leadership positions, identify barriers if they exist, report to Council with its findings and take the necessary steps for the removing of those barriers.

a. Monitoring and Reporting on the Progress of Women in the CBA

The CBA should monitor the progress of women within the Association to ensure that this development continues and to identify on an ongoing basis barriers to women. The Task Force recommends that the CBA adopt a reporting system to monitor the status of women within the organization. This system is inspired by the American Bar Association ("ABA") *Goal IX Report Card*.

As a result of the work of the Commission on Women in the Profession, the ABA adopted several goals. Goal IX directs the Association to "promote full and equal participation in the profession by minorities and women" and to "develop and encourage initiatives that will ensure full and equal

participation for minorities and women in bar association activities". In 1989, after a survey by the Commission of Women in the Profession about the history of women's participation in the ABA, a *Goal IX Report Card* was created. Its purpose is to give an annual picture of the progress of women within the ABA. Once a year, the *Goal IX Report Card* is sent to every chair of every section or division of the ABA. The results of this survey are compiled into a final report which also gets broad circulation and publicity within the ABA. The purpose of the *Report Card* is:

- to report on the current status of women in Association governance and section and division leadership;
- to identify persistent barriers which prevent women from full and equal participation at all levels of Association activity, and
- to suggest ways for removing those barriers.

The *Report Card* is intended "to identify and encourage activities which open the paths to leadership and clear the way for women to participate fully and equally throughout the Association."

In addition to reporting on the status of women in the CBA, this system could be used to monitor the progress of women generally in the profession following from the adoption of the goal statement on eradicating all forms of discrimination in the legal profession.

In furtherance of the CBA's commitment to eradicating all forms of discrimination from the legal profession, it is recommended that the CBA annually analyze the status of women and minorities in CBA leadership positions, identify barriers if they exist, and take the necessary steps for the removal of such barriers.

b. Barriers to the Presidency

One of the barriers to the CBA Presidency is an economic one. At the present time, only those lawyers with a broad enough financial base, usually through partnership in a large firm, can afford to become President.

A few years ago, the Association recognized that the financial burden on the President and his or her firm could not be supported by them alone. As a result, an allowance of $50,000 (indexed to the cost of living, currently approximately $74,000) for the President has been established. There is no compensation for the Vice-President.

The inadequate financial support for President and Vice-President acts as a barrier to women because women are proportionally over-represented in small firms or as sole practitioners. It is highly unlikely that an individual would attain the CBA Presidency with only 5 or 10 years of practice when revenue may be around $70,000. Realistically, by the time this position is achievable, financial obligations, to office and family, will generally be well over $70,000. This is true even for lawyers who are sole practitioners or working in small firms. Every CBA member should have the same equal access to the presidential position, no matter what his or her economic situation or the kind of practice he or she has. The Presidency should no longer be solely within the purview of senior partners of major law firms in Canada or those with independent sources of income. It is recommended that the Executive Committee create a Sub-committee with a mandate to examine the positions of President and Vice-President and to make recommendations on how to make these positions accessible for all members of the profession.

RECOMMENDATION:

13.23 The Task Force recommends that the Executive Committee of the Canadian Bar Association create a Sub-committee with a mandate to examine the positions of President and Vice-President and to make recommendations on how to make these positions accessible for all members of the profession.

c. Promoting Role Models

The Canadian Bar Association should take the lead in recognizing the contribution of women to the legal profession. The promotion of female role models can encourage women to choose the law as a profession and to remain within the practice. The outstanding work of women lawyers throughout the country should be highlighted in all CBA publications.

The CBA should also develop mechanisms to honour women who excel in the profession and who have played a role in promoting equality in the profession and in the justice system. It is recommended that the CBA create a new award to recognize and celebrate the accomplishments of women lawyers. While all CBA awards are available to both sexes it was in 1992 that the President's Award was awarded, for the first time, to a woman, the Honourable Bertha Wilson. The Task Force believes that a special award should be instituted to highlight the importance which the Association attaches to affirming women lawyers.

RECOMMENDATION:

13.24 The Task Force recommends that the Canadian Bar Association establish an award to recognize and celebrate the accomplishments of women lawyers.

D. Use of Gender-Inclusive Language in CBA Documents

The use of gender-inclusive language is one means to ensure that women become full and equal participants in the legal profession. Whereas gender-biased language has an alienating effect on women, gender inclusive language reflects women's reality and encourages them to feel included as an equal part of the profession. Gender inclusive language means using gender-neutral language where a reference applies equally to women and men and gender-specific language where a reference is more appropriate to one sex. For example, one would use "he or she" when referring to lawyers in general but "she" in reference to the beneficiary of a maternity policy.

In 1991, Council adopted a resolution requiring the CBA to undertake a general revision of the Association's by-laws and regulations. One part of this review is the use of gender-inclusive language. This review is well under way and it is anticipated that it will be completed in the near future.

It is already standard practice for staff to review the use of gender-inclusive language in public statements of CBA policy in submissions, press releases and so on. For example, the submissions review policy specifically states that gender-inclusive language should be used and all drafts are reviewed to ensure that they comply with this policy. It is sometimes more difficult to achieve this goal in French than in English (due to the different language structures).

It is important that gender-inclusive language be used in all CBA documents including correspondence, CBA publications and so on. In order to achieve this goal, it is recommended that the CBA establish gender-inclusive language policies in both official languages. These policies should include guidelines for use and give examples. These policies should be promoted throughout the profession.

RECOMMENDATION:

13.25 The Task Force recommends that gender-inclusive language should be utilized in all Canadian Bar Association documents.

RECOMMENDATION:

13.26 The Task Force recommends that existing Canadian Bar Association documents and drafting practices be reviewed to ascertain whether or not gender-inclusive language is being utilized.

RECOMMENDATION:

13.27 The Task Force recommends that the Canadian Bar Association produce gender-inclusive language policies in both official languages and promote their use throughout the Association and the profession.

E. INTERNAL EMPLOYMENT PRACTICES OF THE CBA

If the CBA is to take a leadership role in promoting gender-sensitive employment practices by law firms and other employers of lawyers, it is essential that the internal employment practices of the CBA meet these standards. The CBA National Office should also be in a position to provide guidance and support to branch offices on these issues.

The CBA has had a maternity benefits policy since August, 1988. The policy fulfils the requirements under the UIC Act and "tops" up the salaries of employees during maternity leave. This policy is subject to a mandatory review after five-years or by August 1993. At this time the policy must be reviewed to ensure that it continues to comply with changing legal requirements. It will have to be amended to deal with adoption. There is no CBA policy on parental leave.

In October 1992, the Finance and Planning Directorate established a policy for reimbursement of child care costs for employees who are required to attend meetings outside regular office hours (evenings and weekends). This decision in principle will require the development of guidelines for implementation.

In recent years, management of the CBA has provided flexible work hours for employees who request these arrangements. These alternative work arrangements have been made with support staff, professional staff and managers. There is no policy on alternative work arrangements, rather these have developed on an ad hoc basis. There has not been a formal review of these arrangements.

The CBA National Office does not have a workplace harassment or a sexual harassment policy nor a formal procedure for complaints. This omission should be remedied immediately. Once a policy is in place, the CBA should ensure that employees be advised of their rights and responsibilities under the policy.

The CBA is now subject to provincial pay equity legislation. The CBA should ensure that it complies fully with its obligations under this legislation. Under Ontario legislation, an internal committee comprised of at least three people must review the salary structure to ensure that the goals of pay equity are met. In addition, the CBA should review other workplace equity policies (i.e. for fair hiring and promotion) to ascertain their applicability or adaptability to the office environment.

The status of existing employment policies suggests that the CBA should establish a process of review and creation of practical policies and procedures for issues such as: maternity and parental leave; reimbursement of child care expenses; alternative work arrangements; sexual harassment and harassment; pay and employment equity. Staff members should be consulted to ascertain their views and to determine whether there are other unresolved gender-related issues. For example, there is an unofficial policy concerning reimbursement for transportation after regular office hours to ensure safe transportation home but not all staff members are

aware of the dimensions of the policy. Once finalized, these policies and procedures should be set out in the office manual and employees should be advised of their rights and responsibilities. Any training which is necessary for implementation of the policies should take place.

The CBA should make a commitment to demonstrating leadership in the area of employment equity by ensuring racial, cultural and ethnic diversity in-house.

It is recommended that an internal committee comprised of at least five members including the Administrative Officer and representatives of support staff, professional staff and management be established for the purpose of making recommendations to the Executive on these issues. It is highly recommended that the internal office committee include members of both sexes. These recommendations should be reviewed by the Finance and Planning Directorate and approved by the National Executive. While it may be necessary to deal with these issues one at a time over a period of several months, policies should be in place by the 1994 Mid-Winter Meeting. Once set, these policies should be made available to branch offices which should be encouraged to adopt and implement them.

RECOMMENDATION:

13.28 The Task Force recommends that the Canadian Bar Association take a leadership role in setting and promoting employment equity policies and gender-sensitive internal employment practices. The Association's National Office should also be in a position to provide guidance and support to branch offices on these issues.

F. Amendment to the CBA Code of Professional Conduct

The CBA should play a leadership role in eliminating gender discrimination within the profession. An important aspect of this role is education of its membership on the nature, extent and consequences of discrimination. Education can lead to changes in attitude and behaviour. While the CBA does not regulate the profession, its policies can bind its members in the exercise of their duties within the professional association. In addition, the CBA has the potential for moral suasion of its membership.

One example of this capacity to affect the conduct of its membership is the CBA's Code of Professional Conduct. The Code is not mandatory and yet in many jurisdictions law societies have adopted all or substantial parts of its provisions.

The current Code of Professional Conduct does not directly address the subject of discrimination, although it can be argued that the current provisions regarding professional misconduct and "conduct unbecoming" would capture discriminatory behaviour.

It is recommended that the Code of Professional Conduct be amended to make it clear that workplace harassment and discrimination cannot be tolerated.

In order to fulfil its educative function, the revision to the CBA's Code of Conduct may need to be more specific about the types of behaviour which are unacceptable. There is still widespread lack of knowledge about the meaning of discrimination within the legal community. The Sub-Committee recommends that the commentary to the revised provisions spell out that gender and other grounds of discrimination are not to be a factor in articling, hiring, client distribution, apportionment of profits or payment of salaries, membership in key partnership committees, entry into partnership, firm-sponsored membership in clubs and so on.

The Task Force recommends that the CBA amend its Code of Professional Conduct in the following manner:

DISCRIMINATION

RULE[6]

The lawyer shall not discriminate on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status or disability.

COMMENTARY

Duty of Non-Discrimination

1. The lawyer has a duty to respect the dignity and worth of all persons and to treat persons equally, without discrimination. This duty is quite broad and includes:

   (a) the requirement that the lawyer does not deny services or provide inferior services on the basis of the grounds noted in the rule;

   (b) the requirement that the lawyer not discriminate against a fellow lawyer in any professional dealings;

   (c) the requirement that the lawyer not engage in discriminatory employment practices; and

   (d) the requirement that the lawyer prohibit partners, co-workers and employees and agents subject to the lawyer's direction and control from engaging in discriminatory practices.

Extent of Duty of Non-Discrimination

2. As a member of the legal profession, the lawyer must ensure that he or she is at all times acting in compliance with the law. The law applicable in this context is human rights legislation. According to the law, discrimination can be constituted by the effect of action or omission. Intent to discriminate is not a prerequisite to a finding of discrimination. Discrimination can also arise through the adverse impact of neutral practices on the basis of the grounds noted in the Rule. Failure by the lawyer to take reasonable steps to prevent or stop discrimination by the lawyer's partner, co-worker or by any employee or agent also violates the duty of non-discrimination.

Special Programs

3. Discrimination does not include special programs designed to relieve disadvantage for individuals or groups on the grounds noted in the Rule.

Responsibility

4. Discriminatory attitudes on the part of partners, employees, agents or clients do not diminish the responsibility of the lawyer to refrain from discrimination in the provision of service or employment.[7]

Discrimination in Employment

5. The Rule applies to discrimination by the lawyers in any aspect of employment and working conditions, including recruitment, promotion, training, allocation of work, compensation, receipt of benefits, dismissal, lay-offs, discipline, performance appraisal and hours of work. It applies to all discrimination with repercussions for employment and workplace conditions including physical work sites, washrooms, conferences, business travel and social events. Examples of discrimination in employment include:

   (a) setting unnecessary or unfair hiring criteria than tend to exclude applicants on prohibited grounds;[8]

   (b) asking questions during an employment or promotion interview that are not logically related to the essential requirements of the job;[9]

(c) assigning work on the basis of factors or assumptions other than individual ability or denying work to lawyers on the basis of prohibited grounds;

(d) failing to promote appropriate maternity and parental leave thereby discriminating on the basis of sex of family status;[10]

(e) failing to accommodate religious holidays or religious practices thereby discriminating on the basis of religion;[11]

(f) requiring billable hour targets or workload expectations which effectively exclude those who have child care responsibilities and adversely affect such persons on the basis of family status or sex.

Duty of Accommodation

6. One aspect of the duty of non-discrimination is the duty to accommodate the diverse needs of lawyers on the basis of grounds noted in the Rule. Such accommodation is required unless it would cause undue hardship to the lawyer.[12] Examples of the type of accommodation include:

(a) the provision of flexible hours to accommodate family responsibilities, or to accommodate transportation difficulties for persons with disability;

(b) the modification of the physical workplace to include wheelchair access, modified furniture and assistive devices;

(c) a benefits policy that includes same sex couples;[13]

(d) adjusting the billable hour or workload expectations to accommodate family responsibilities;

(e) accommodation of religious holidays or religious practices.[14]

Sexual Harassment and Harassment

7. Sexual harassment and harassment are forms of discrimination.[15] The lawyer should refrain from engaging in vexatious comment or conduct that is known or reasonably ought to be known to be unwelcome and that affects an individual or group on the basis of sex or other grounds noted in the Rule.

Sexist Activities

8. The lawyer must refrain from participating in sexist activities in his or her professional life. This includes membership in any organization which discriminates on the basis of the grounds noted in the Rule.

The amendment to the Code of Professional Conduct could usefully serve as an opportunity for the CBA to raise awareness within its membership of the dimensions of discrimination and make members aware of their rights and responsibilities. The CBA should plan programs and develop resources (such as videos, pamphlets) to educate its membership about the nature of discrimination, equality issues and the law and methods to deal with barriers to equality in the legal profession.

The CBA should ensure that these resources are designed to be used in all sectors of the profession. In addition, these resources should be sensitive to the needs and perspectives of minority women. In order to ensure that this occurs, representatives of these groups should be involved in the planning and production of these educational materials.

This educational function is a vital aspect of the CBA's leadership role on equality issues.

RECOMMENDATION:

13.29 The Task Force recommends that the Canadian Bar Association Code of Professional Conduct be amended to make it clear that workplace harassment and discrimination cannot be tolerated. Commentary on the nature of discrimination and the specific types of behaviour which are prohibited should be included in the revised Code.

RECOMMENDATION:

13.30 The Task Force recommends that the Canadian Bar Association develop programs and resources to educate the profession about the nature of discrimination, equality issues and the law and methods to deal with barriers to equality in the legal profession.

III. IMPLEMENTATION OF THE TASK FORCE REPORT AND RECOMMENDATIONS

The CBA should establish a standing committee with a broad mandate to address issues of concern to women members. The Committee's first task would be to implement the Task Force recommendations. All of the provincial and territorial Working Groups have suggested that the CBA should create an implementation committee of some kind. They suggested that the committee operate at both a national and branch level.

In recent years, many CBA branches and law societies throughout the country have established standing committees on women in the profession. These committees have undertaken extensive studies about the status of women in the profession and many initiatives are underway across the country. There is an important role for the CBA to monitor these initiatives and co-ordinate activities on a national basis.

The Committee could serve a broad array of purposes including: education of the profession, serving as a forum for women and men in the CBA to discuss the particular problems faced by women in the profession and for the formulation and implementation of solutions for achieving gender equality.

This format has been used by the ABA. In 1987, the ABA created the ABA Commission on Women in the Profession. Its four primary objectives are:

- assess the status of women in the legal profession
- identify barriers that prevent women lawyers from full participation in the work, responsibilities and rewards of the profession
- develop educational programs and materials to address discrimination against women lawyers
- make recommendations to the Association for action to address problems identified by the Commission

It is recommended that the Canadian Bar Association establish a Standing Committee on Equality whose mandate should, at a minimum, include:

- to educate the members of the profession about discrimination against women in the profession and ways to eradicate it
- to develop resources to assist the profession in achieving equality
- to monitor on a national basis the status of

women in the legal profession, and

- to oversee the implementation of the recommendations of the report of the Task Force on Gender Equality.

The membership of this committee should reflect the diversity of the profession. The Task Force also recommends that each Branch establish an implementation committee on gender equality.

RECOMMENDATION:

13.31 The Task Force recommends that the Canadian Bar Association establish a National Standing Committee on Equality, as well as Branch Committees dedicated to achieving gender equality.

ENDNOTES

1. The Sub-Committee on Gender Equality in the CBA was composed of Sophie Bourque, Melina Buckley, Sylvia Guertin and Ken Ready.

2. The Canadian Bar Insurance Association (CBIA) has recently amended its policies to ensure that they do not discriminate on this ground.

3. The survey was conducted in January, 1992.

4. The figure of 28% differs from the statistic cited in Chapter 3 (27%). The figure of 27% relected only members of law societies. The 28% is derived from the CBA's survey which, in addition to surveying members of law societies, also included judges and law students. This difference in the base groups must account for the slight difference in the statistics.

5. See discussion in Chapter 4 at IV.B.1.

6. This draft rule was prepared with the benefit of the Law Society of Upper Canada's Proposed Rule on Non-Discrimination, Draft of June 25, 1993.

7. *Renaud* v. *Board of Education of Central Okanogan No. 23 and C.U.P.E., Local 523* (1992), 141 N.R. 185 (S.C.C.); *Imberto* v. *Vic and Tony Coiffure* (1981), 2 C.H.R.R. D/392 (Ont. Human Rights Comm. Bd. of Inquiry); *Loland* v. *Forbirich Enterprises Ltd.* (1991), 13 C.H.R.R. D/144 (B.C. Human Rights Council); *Bouchard* v. *Canada (Canadian Armed Forces)* (1990), 13 C.H.R.R. D/111 (Cdn. Human Rights Trib.); *De Jong* v. *Horlacher Holdings Ltd.* (1989), 10 C.H.R.R. D/6283 (B.C. Human Rights Council); *Stefanyshyn* v. *4 Seasons Management Ltd. (4 Seasons Raquet Club)* (1986), 8 C.H.R.R. D/3934 (B.C. Human Rights Council).

8. *Onischak* v. *British Columbia* (1990), 13 C.H.R.R. D/87 (B.C. Human Rights Council); *Attorney General of Canada* v. *Rosin*, [1991] 1 F.C. 391 (C.A.); *Phalen* v. *Solicitor General of Canada* (1980), 2 C.H.R.R. D/433 (Canadian Human Rights Tribunal); *Foreman* v. *VIA Rail Canada Inc.* (1980), 1 C.H.R.R. D/III (Canadian Human Rights Tribunal).

9. S. 23 of the Human Rights Code. See also *Taylor* v. *Via Security Systems Inc.* (1987), 8 C.H.R.R. D/3925 (Ont. Human Rights Comm. Bd. of Inquiry); *Lindahl* v. *Auld Philips Ltd.* (1986), 7 C.H.R.R. D/3396 (B.C. Council of Human Rights); *Suchit* v. *Sisters of St. Joseph's for the Diocese of Toronto* (1983), 4 C.H.R.R. D/1329 (Ont. Human Rights Comm. Bd. of Inquiry); *Downey* v. *Metropolitan Transit Commission* (1991), 14 C.H.R.R. D/487 (Nova Scotia Bd. of Inquiry).

10. *Canada (Minister of National Defence)* v. *Mongrain* (1992), 1 F.C. 472 (C.A.); *Wormsbecker* v. *Super Value and Westfair Foods Ltd.* (1980), 2 C.H.R.R. D/348 (Sask. Bd. of Inquiry); *Century Oils (Canada) Inc.* v. *Davies* (1988), 9 C.H.R.R. D/4659 (B.C.S.C.) aff'g, (1986), 8 C.H.R.R. D/3770 (Sub nom. *Davies* v. *Century Oils (Canada) Inc.* (B.C. Human Rights Council); *Paton* v. *Brouwer and Co.* (1984), 5 C.H.R.R. D/1946 (B.C. Council of Human Rights).

11. *Re Ontario Human Rights Commission and Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 530; see also *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4th) (S.C.C.); *Board of Education of Central Okanogan and Professional Employees International Union, Local 267* v. *Domtar Inc.* (1992), 8 O.R. (3d) 65 (Gen. Div.); *Re Chrysler Canada Ltd. and United Automobile Workers, Local 444* (1986), 23 L.A.C. (3d) 366 (Arbitrator); *Van Gaalen* v. *Fabricland Distributors Ltd.* (1988), 10 C.H.R.R. D/5666 (B.C. Human Rights Council); *Singh* v. *Security and Investigation Services Ltd.* unreported, (Ont. Human

Rights Comm. Bd. of Inquiry May 31, 1977).

See also *Khalsa* v. *Co-op Cabs* (1980), 1 C.H.R.R. (Ont. Human Rights Comm. Bd. of Inquiry); *Pannu* v. *Prestige Cab Ltd.* (1986), 8 C.H.R.R. D/3709 (Alta. Bd. of Inquiry); *Sehdev* v. *Bayview Glen Junior Schools Ltd.* (1985), 9 C.H.R.R. D/4881 (Ont. Human Rights Comm. Bd. of Inquiry); *Pandori* v. *Peel Bd. of Education* (1990), 12 C.H.R.R. D/364 (Ont. Human Rights Comm. Bd. of Inquiry).

12. *Re Ontario Human Rights Commission and Simpson-Sears, ibid.*

13. *Leshner* v. *Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Human Rights Comm. Bd. of Inquiry).

14. *Supra*, notes 11 and 12.

15. *Janzen* v. *Platy Enterprises*, [1989] 1 S.C.R. 1252.

CHAPTER FOURTEEN

GENDER EQUALITY IN THE SUBSTANTIVE LAW AND PROCEDURE

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CHAPTER FOURTEEN
GENDER EQUALITY IN THE SUBSTANTIVE LAW AND PROCEDURE

I. INTRODUCTION

The advent of significant numbers of women into the legal profession is a relatively recent development. The law as it has evolved over the centuries was made by men and for men.

Women are therefore now asking themselves: Might the law have developed differently if it had benefitted from the input of both sexes? Women believe that it is only logical to assume that it would and, indeed, there is evidence that some areas of the law have developed without taking account of women's real life experience.

This recognition has sparked a great deal of interest among feminist lawyers and there is now a sizeable body of scholarship in both Canada and the United States on the extent to which an exclusively male perspective has conditioned the law and, in effect, suffused it with gender bias.

Men have traditionally, and many still currently, view a male perspective as gender neutral. Yet one only has to think for a moment to appreciate that gender neutrality is a myth. We all bring a great deal of baggage to the pursuit of our professions: lawyers, law-makers and judges are no exception and our own unique mix of attitudes, beliefs, assumptions and predispositions colour all that we do and all that we say. It is folly to think that we can separate ourselves from them. They are what makes us what we are. They are what makes each of us distinctive and unique.

This being so, it is challenging and stimulating and, of course, very timely for the legal profession to review established legal principles from a female perspective, not because a female perspective is any more neutral than a male one, but because it is just possible that the combined perspectives might lead to a better, more relevant and more humane legal system.

This is certainly a goal worth striving for and the profession would be remiss indeed if it failed to take advantage of the now readily available input from scholarly members of both sexes.

The Canadian Bar Association is fully aware that this interest is not confined to its female members. Many of its male members practising in different areas of the law recognize "unevenness" in the law's application when they see it. They know that some laws favour men even though they appear on their face to be neutral and objective. This is because they are not being applied to an "even" context. Women's real life experience has not been factored into the search for a just result.

It is sometimes said that women do not see themselves in the justice system. They do not think it was developed with them in mind. It is a serious matter that they have such thoughts; it is even more serious if it is true. The legal profession has an obligation to find out.

II. METHODOLOGY

While the Terms of Reference of the Task Force dealt primarily with gender bias in the profession, it also required us to:

> identify and refer to the appropriate Canadian Bar Association Sections and Conferences, for review and report, substantive laws and procedural matters that raise issues of gender equality.

The Task Force interpreted this aspect of its mandate as requiring it to point the way to areas of

the law already identified as in need of gender-related reform so that the Canadian Bar Association could concentrate upon them in the near future. It focused therefore on two aspects: identifying a preliminary list of issues and the establishment of structures and procedures within the Canadian Bar Association for their further analysis and study. The objective is to enhance the Association's ability to play a leading role in reform.

The Task Force wrote to all national and provincial sections explaining this aspect of their mandate and requesting guidance and advice in light of the special expertise they have in their particular area of law. The Task Force expected the following objectives to be served by contacting the sections:

- raise awareness of gender issues in the substantive law and procedure;
- stimulate initiatives on gender issues throughout the CBA;
- enhance the ability of sections to act as a conduit to CBA members for information on gender issues within the organization; and
- generate recommendations on how to improve the CBA's ability to deal with gender issues on a consistent basis (i.e. in its legislation and law reform initiatives).

The Task Force requested each national section to prepare a report to include the following:

1. a summary of gender issues within the section's area of substantive law and practice;
2. recommendations on what the CBA could do in order to address these issues (perhaps to include a listing of priorities);
3. an overview of how the section might be involved in the gender issues in their area of law and practice;
4. copies of work on gender issues already carried out by the Section or planned to be carried out by the Section; and
5. recommendations for changing the structure of the CBA if necessary or desirable in order to increase the Association's ability to deal with gender issues (i.e. establishment of a Women's Conference, Feminist Legal Research Section, Equality Rights Section, or gender issues sub-committees in relevant sections).

In addition, the Task Force solicited input from CBA volunteers on gender issues within the CBA. Sections were invited to comment on the participation of women in section activities, on section executives, and within the organization as a whole. These commentaries might include both the current situation and recommendations for improving current practices. This last inquiry brought immediate results. Several National Sections realized that they had no women lawyers on their current executives and took immediate steps to remedy this oversight.

III. SECTION INPUT

The Task Force received input from only six of the 28 National Sections[1] and the Ontario Section on Pensions and Benefits (which has no national counterpart). Most National Sections consulted their provincial counterparts in preparing their submission. The Task Force can only speculate as to why more sections did not respond to repeated requests for information. It is possible that some sections thought that there were no gender-related issues in their area of practice.[2]

Some sections addressed themselves to general issues of women in the legal profession and these submissions have been considered in the preparation of the other parts of this Report. For example, the National Constitutional Law Section prepared a detailed submission on the gender bias faced by women lawyers. The Competition Law Section focused on the specific use of the term "Chairman" in reference to the head of the Competition Law Tribunal.

The following is a brief overview of the issues raised in the four section submissions which addressed gender equality in the substantive law and procedure.

A. Intellectual Property Law Section

The National Intellectual Property Section reported that on its face legislation relating to intellectual law and practice, including the requirements to become a patent or trade-mark agent, are gender neutral. The Section identified one principle arising from the case law that might be seen to require some modification in the use of language. The Section pointed out that the words "the man skilled in the art" are used in patent law to refer to the person to whom an alleged invention would be obvious. Such a term was considered reflective of a by-gone era when it may have been that the person with the requisite knowledge was indeed invariably a man. As this is no longer the case, the Section recommended that "the person skilled in the art" would be a more accurate and appropriate term.

The Section also recommended that its Publicity Committee be asked to provide information about intellectual property law practice opportunities to undergraduate students in science and engineering. It foresaw the need to collaborate with provincial engineering societies to encourage and support women in engineering as a step toward increasing the number of women in this area of practice.

B. Family Law Section

The National Family Law Section identified the following gender equality issues as priorities:

(a) unrealistic expectations of self-sufficiency for women out of the work force during marriage;

(b) the economic burden on the custodial parent of raising children and the effect of parenting responsibilities on professional advancement;

(c) the overlap between property issues and spousal support issues (i.e. does property division replace appropriate spousal support);

(d) determining an appropriate level of child support with adequate recognition of the cost of raising children and the financial effect of limited involvement by the non-custodial parent;

(e) domestic violence in the civil context;

(f) the cost of litigation and lack of appropriate remedies for "suit costs";

(g) privacy of financial information and problems of disclosure; and

(h) enforcement issues.

The Section's submission contained detailed recommendations pertaining to the role of the Canadian Bar Association in addressing these issues. These recommendations are incorporated into the conclusion and recommendations at the end of this chapter.

C. Criminal Justice Section

The National Criminal Justice Section prepared a detailed report on gender bias issues in the criminal law. The Section referred to many of the existing reports on these issues.[3] Their report addresses three main areas for reform: spousal assault, sexual assault, and women offenders. The submission also acknowledged the difficulties many women criminal law lawyers face practising in a male-dominated field.

The report acknowledged that there is much work to be done in the area of gender bias in the criminal law. It identified many issues, presented tentative solutions and suggested legislative changes.

- **spousal assault**
  - charging policies
  - post-charge diversion programs
  - pre-charge diversion programs
  - resources for women victims
  - need to enhance judicial awareness of the dynamics of domestic violence
  - facilitating the testimony of victims
  - database to track repeated offenders
  - monitoring of Winnipeg family court project designed to deal with all cases of family violence

- **sexual assault**
  - extended probation
  - legislation on disclosure requirements of the Crown
  - treatment of victims in court

- **women offenders**
  - alternatives to criminalizing prostitution
  - examination of defences to ensure they meet the unique needs of the female offender
  - detention facilities and programs for female offenders
  - the unique needs of Aboriginal women offenders
  - relationship between abuse and crime

D. Pensions and Benefits Section

The Pension and Benefits Section of the Ontario Branch undertook a broad review of gender issues in the law dealing with employment-related benefits. The Section submitted a comprehensive submission on seven pieces of legislation: (1) the *Human Rights Code*; (2) the *Pensions Benefit Act*; (3) the *Canada Pension Plan*; (4) the *Employment Standards Act*; (5) the *Unemployment Insurance Act*; (6) relevant portions of the *Income Tax Act* relating to benefits; and (7) the *Workers' Compensation Act*.

The submission focuses on issues affecting women and their exclusion from the employees' benefits regime. This analysis is placed in the context of the historic exclusion of women from benefit plan participation and the marginalization of women arising from the more limited employment opportunities available to them, their depressed wage levels and the expectations placed on them regarding child care and elder care.

The submission cites numerous examples of how employment benefit schemes discriminate against women either through exclusion or through the adverse impact of neutral rules. For example, Regulation 321 under the *Employment Standards Act* sets out various forms of discrimination permitted on the basis of age, sex or marital status in the provision of pension and insured benefits. One form of discrimination permitted by Regulation 321 which would significantly affect female employees is the permitted exclusion of female employees from coverage under disability plans while on pregnancy or parental leave.

Adverse effects discrimination can arise under the *Pension Benefits Act* because of the eligibility and vesting requirements which require relatively long periods of continuous full time employment. Women tend to have fewer uninterrupted periods of employment than men and these time requirements will prevent some women from accumulating significant pension benefits or any pension benefits at all.

Bias arises not only from legislation itself but also from policies designed to implement the law. For example, sexual harassment and violence against women in the workplace are not compensated under *Worker's Compensation* legislation. Acts of violence or sexual harassment fall within the definition of "accident" set out in subsection 1(1) of the *Worker's Compensation Act* and therefore a claim made in respect of such an act may be compensable under the *Act*. However, the Section expressed certain concerns relating to the establishment of a claim based on such acts in the workplace. The concerns related to the lack of a specific policy of the Worker's Compensation Board ("the Board") with respect to these claims and possible difficulties in establishing a connection between the claim and the employment relationship.

IV. STUDIES AND REPORTS ON GENDER BIAS IN THE JUSTICE SYSTEM

This brief review of a very limited number of section submissions provides some indication of the breadth of gender issues in the substantive law and procedure. There is a rapidly expanding body of legal research on gender bias in the justice system.[4] The "coming of age" of this field of research is exemplified by the growing number of University Chairs on women and the law and by events such as the research consultation on how to study gender bias in the law, the courts and the legal profession held in Vancouver in November 1991.

Several comprehensive reports on gender bias in the justice system have been released in the last few years. These include: *La situation des femmes dans l'administration de la justice*,[5] the proceedings and recommendations from the *National Symposium on Women, Law and the Administration of Justice*,[6] the Law Society of British Columbia's Report on *Gender Equality in the Justice System*,[7] and the report of the Federal/ Provincial/Territorial Working Group of Attorney General Officials on *Gender Equality in the Canadian Justice System*[8].

These reports cover a broad spectrum of issues including:

(1) **gender bias in the substantive law:**

- **human rights law** - review of existing legislation to ensure fully complies with equality rights of women, pay equity and employment equity legislation;
- **taxation law** - inconsistencies and disadvantages in the treatment of women depending on their marital status; limited recognition of child care and other work related expenses; tax treatment of support payments; differential impact of de-indexation on women; differential impact of taxes and tax credits on women;
- **personal injuries** - differential assessment in the assessment of damages; new areas of personal injury action for women
- **family law** - matrimonial property law, pension division reform, custody and access, spousal support, child support, the rights of common law spouses
- **pensions and benefits** - differential treatment of women

(2) **access to justice for women:**

covering topics such as court structure, language of the law, public legal education, victim witness services, native court worker programs, criminal injuries compensation, legal aid, programs to facilitate interventions in equality rights cases, enforcement of family orders and agreements and alternative dispute resolution;

(3) **the justice system's response to violence against women:**

non-specific violence, pornography, prostitution, wife assault, sexual assault, crown discretion;

(4) **gender bias in the courts:**

myths, stereotypes and biases in judgements and sentencing; treatment of witnesses; and

(5) **women in conflict with the law:**

facilities and programs available to women offenders; provisions for Aboriginal women; provisions for mentally disordered offenders; provisions for young offenders; specific nature of "female crimes" related to the experience of abuse by women; prostitution, property crimes, sentencing, crime prevention programs for women.

These reports emphasize the diversity of women's experience in the justice system and the ways in which Women of Colour, Aboriginal women, lesbians and women with disabilities face multiple

discrimination in the law. A more detailed look at the unique issues facing Aboriginal Women are presented in the *Report on Aboriginal Women in the Legal Profession.*[9]

V. CONCLUSIONS AND RECOMMENDATION

It is essential that the profession progress from the narrow interests of its membership to universal concerns affecting all participants and observers in the justice system. Three initiatives should be undertaken by the Canadian Bar Association toward this end: (1) continuing legal education; (2) comprehensive review of gender bias in the substantive law and procedure; and (3) ongoing consideration of gender issues in the substantive policy-making for the Association.

A. CONTINUING LEGAL EDUCATION

The Canadian Bar Association should take steps to ensure that members of the legal profession develop a more profound understanding of gender equality issues in the justice system. Continuing legal education in all relevant areas of the law should include components on gender bias. These seminars and resources should focus on gender bias in a practical manner. Education of this kind will assist members of the profession to better serve their clients, and particularly, their female clients.

RECOMMENDATION:

14.1 The Task Force recommends that the Canadian Bar Association offer continuing legal education programs on issues of gender bias in the substantive law and procedure.

B. COMPREHENSIVE REVIEW OF GENDER BIAS IN THE SUBSTANTIVE LAW AND PROCEDURE

The Canadian Bar Association should develop a national strategy to eliminate gender bias from the justice system. The Association should build on the excellent work that has already been carried out to identify the causes and manifestations of gender bias. There is a need to consolidate the recommendations contained in these reports and build an action plan for achieving reform. The relevant National Sections should review these reports. Following this review, section recommendations should be submitted to Council as a comprehensive report. If adopted by Council, these recommendations would then become Canadian Bar Association policy and the President would be responsible for working toward implementation.

In some cases the recommendations in these reports are already Association policy. For example, the Canadian Bar Association supports the recommendations to provide funding for intervenor status in equality rights cases and to provide better treatment for women offenders. The Association has lobbied the government extensively on these issues in the past several years.

The Canadian Bar Association should vigorously pursue the implementation of measures that promote access to justice for women. The Task Force identifies two access to justice issues as being of particular importance. One is the recommendation for the establishment of a national civil legal aid tariff (Recommendation 11.3). The second is the reinstatement of the Court Challenges Program or a similar program to fund equality rights challenges to discriminatory laws and policies.

RECOMMENDATION:

14.2 The Task Force recommends that the Canadian Bar Association develop a national strategy to eliminate gender bias from the justice system.

RECOMMENDATION:

14.3 The Task Force recommends that the Canadian Bar Association vigorously pursue the implementation of measures that promote access to justice for women, in particular the establishment of a national civil legal aid tariff and the reinstatement of the Court Challenges Program.

C. Ongoing Consideration of Gender Issues in Substantive Policy-Making for the Association

One aspect of the Association's goal of promoting equality in the justice system is ensuring that gender issues are fully considered in the substantive policy-making process of the Association on an ongoing basis. Canadian Bar Association policy is created through resolutions of Council, through public statements including legislative submissions and other law reform projects, and through section activities. It is fair to say that gender issues are not always adequately addressed during the formulation of policies and review processes. The present structures for policy formulation and review are inadequate in the sense that there are no bodies charged with ensuring that gender issues are considered and hence there is no consistency in the approach taken in the various initiatives.

The Task Force recommends that the inadequate representation of gender equality perspectives within the process be ameliorated through a number of reforms. Changes should result in gender issues being identified and considered early in the policy formulation process and receiving in-depth study by national sections with review by the Standing Committee on Equality and the Legislation and Law Reform Committee.

It is essential that all relevant viewpoints including the gender-sensitive one are included as early as possible in the process of policy formulation so that gender issues are properly identified and canvassed. The Legal and Governmental Affairs Directorate at National Office should work closely with national sections to ensure early identification of gender issues.

It is recommended that, where relevant, national sections establish a sub-committee on gender issues. These sub-committees would report to the National Section Executive on steps taken in this area. Work on gender issues should be given consideration in the funding process. Guidelines should be issued by the Standing Committee on Equality to assist National Sections to fulfil this mandate. Each National Section should be directed to report on gender issues as part of its general reporting requirement. These reports will form part of the CBA's Annual Report Card (Recommendation 13.22). Once the Standing Committee on Equality is established it should also be consulted on all substantive initiatives and have a general responsibility to promote consideration of gender issues by the appropriate entities within the Canadian Bar Association.

In addition, a member of the Legislation and Law Reform Committee should be charged with the responsibility of reviewing submissions to ensure that gender-related issues have been addressed.

RECOMMENDATION:

14.4 The Task Force recommends that the Canadian Bar Association ensure that gender-sensitive viewpoints are included as early as possible in the process of policy formulation to ensure that gender issues are properly identified and canvassed.

RECOMMENDATION:

14.5 The Task Force recommends that relevant National Sections establish sub-committees on gender issues.

RECOMMENDATION:

14.6 The Task Force recommends that the Canadian Bar Association consult its National Equality Committee on all law reform and policy initiatives.

RECOMMENDATION:

14.7 The Task Force recommends that the Canadian Bar Association's Legislation and Law Reform Committee be charged with the responsibility to review submissions to ensure that gender-related issues have been properly addressed.

ENDNOTES

1. The following National Sections submitted a report to the Task Force: Civil Litigation; Competition Law; Criminal Justice; Family Law; Intellectual Property; Real Property.

2. The National Construction Law Section wrote a letter to this effect. The National Real Property Section did submit a report but concluded that there was little bias and what bias was reported had more to do with bank practices than legal practice.

3. *Report of the New York Task Force on Women in the Courts* (1986); *Report of the Florida Supreme Court on Gender Bias* (1990); *Justice for Women - Nevada Supreme Court Gender Bias Task Force* (1988); *Gender Bias Study of the Court System* (1989); *Gender and Justice in the Courts* (Washington State Task Force); *Gender Bias in the Courts* (Report of the Maryland Special Joint Committee, 1989); *Gender Equality in the Courts* (Study by the Manitoba Women in the Law Association, 1991); *The Justice House* (Report to the Special Advisor on Gender Equality to the Minister of Justice, Northwest Territories, 1992); *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); *Survey of B.C. Female Crown Counsel for the Law Society Gender Bias Committee* (1992); *Gender Equality in the Justice System* (A Report of the Law Society of British Columbia Gender Bias Committee, 1992).

4. See for example the books and articles listed in *Selected Annotated Bibliography on Gender Bias in the Law* (Feminist Institute for Studies on Law and Society, 1991).

5. Gouvernement du Québec, Conseil du statut de la femme (1991).

6. (Ottawa: Department of Justice Canada, 1992).

7. (Vancouver: Law Society of British Columbia, 1992).

8. (Ottawa: Department of Justice Canada, 1992) (released July 1993).

9. Appendix 11 to this Report.

PART V

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

CHAPTER FIFTEEN

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CHAPTER FIFTEEN
CONCLUSION

I. A CHALLENGE FOR THE PROFESSION

This Report sets a momentous challenge for the legal profession. Study after study has shown that women lawyers are discriminated against within the profession. The results of our research and consultations serve as further proof that gender bias exists in all sectors of the profession and on a national basis. Evidence of gender inequality abounds in the restricted nature of employment opportunities available to women, in the limits placed on their career advancement, in the lack of accommodation of family responsibilities and in sexual harassment.

The purpose of this Report is neither to point fingers nor to apportion blame for unfair treatment. Discrimination is deeply rooted in the legal profession as in society at large. It is not solely a question of individual prejudicial acts but also the systemic functioning of institutions. This Report highlights the need to examine the legal profession's culture and attitudes toward women, in particular recruitment and selection processes, working patterns and the allocation of work. Men and women, law firms and other employers of lawyers such as professional associations, corporations and government all have an important role to play in meeting this challenge.

We must change our practices at both an individual and institutional level in order to eradicate gender bias in all its forms. It is simply not enough for the individual to say that he or she does not discriminate. There is a shared responsibility for the gender bias that occurs in every institution across the profession and the country. The magnitude of the challenge is no excuse for failing to act.

Change will not occur all at once but incremental change is possible and necessary. Each step will build on the next. For example, studies show that the most important factor in reducing sexual harassment is an organizational culture that promotes equal opportunities for women.[1] The benefits to women and men will quickly become obvious. It is equally clear that the less women encounter harassment and gender bias, the greater their job satisfaction and commitment to their firms.[2]

II. THE DIMENSIONS OF GENDER INEQUALITY

The Task Force recognizes that progress has occurred. Women have clearly made an enormous impact on a profession which has traditionally excluded them. However, progress in terms of increased numbers of women in the profession has occurred only through individual female lawyers accommodating to the prevailing male norms of legal practice. Consequently, these advances have been achieved at a high personal cost. This is not equality. The fact is that there continues to be wide discrepancies between male and female perceptions of equality issues within the profession.

The findings and conclusions of this Report are based on the experiences of women. The Task Force has learned that we, its members, have a limited perception of what "women" means. At the outset, the Association and the Task Force had a tendency to see women as a monolithic group of individuals. The picture was one of white, middle class, able-bodied, heterosexual women. Over the course of the project both the Task Force and the Association came to realize that it is essential to look at women in the legal profession as a diversity. To do otherwise would be a sterile and formalistic exercise which would exclude Women of Colour, Aboriginal women, lesbians, and women with disabilities. You cannot

separate people from their fundamental characteristics. They must be seen and appreciated as whole persons. This is not a broadening of the Task Force's mandate but a realistic interpretation of it.

Our Report presents cogent arguments for the profession affirming and implementing a duty of non-discrimination and a concomitant duty to accommodate women lawyers. This latter duty is for some the most difficult to understand and accept. One helpful technique is to contrast it with the existing strategy in which women accommodate to the profession.

Many women who have succeeded in reaching the top of their profession have done so only by accepting and adapting themselves to the standards and norms established by male lawyers. This means working as many hours as their male counterparts but often making much greater sacrifices to do so. Men who succeed in law often do so because they are able to give their undivided attention to their careers. Many in doing so sacrifice the opportunity to develop meaningful relationships with their wives and children and to pursue other interests.

Women lawyers, like women in all areas of employment, usually bear primary responsibility for child rearing in addition to their jobs. Our analysis bears this out. Women who have achieved partnership in large firms have often been forced to compromise their role as mothers or forego motherhood entirely in order to achieve success. Such compromises often produce feelings of guilt and tension as women try to balance the competing demands in their lives. In addition, many women who have "made it" in the legal profession have done so by conforming to the male model, by not reacting to sexist comments and attitudes, by not reporting sexually harassing behaviour, and by forcing themselves to develop interests that match those of their male colleagues.

The impact these compromises have on a woman's self-image can be substantial. Many end up not liking themselves and wondering if the compromises were worthwhile. It is much harder for women who experience multiple discrimination.

How do we proceed?

> What is a reasonable response to the fact that large numbers of people entering law find basic incompatibility with the [lawyer's] role? One attorney suggests, "if you can't stand the heat, get out of the kitchen". A more thoughtful reply would be to ask what is wrong with the kitchen that so many bright, competent people find it difficult to work there? What happens if people work all day in a kitchen that is too hot?.. What [can] we learn about the legal system and about the possible changes which need to be made?[3]

This passage aptly captures two contrasting views about lawyers' work and the potential responses of the profession faced with this dilemma. Referring to this passage, Professor Mary Jane Mossman suggests the following two characterizations of the problem facing the profession. Is the nature of the work fixed and immutable, so that lawyers must adapt to it or exit from the profession? Or, on the other hand, are we willing to examine current arrangements for legal work with a view to adapting the work, where possible, to accommodate the needs and interests of lawyers, many of whom wish to participate in both meaningful work and family life?[4]

The significant costs of women's accommodation to a profession that was not structured to reflect their needs are obvious. The imperative for the tables to be turned and for the profession to accommodate women is fundamental to the achievement of gender equality. A "reformation of the partnership of the profession" is required. Given the daunting nature of this challenge, the Task Force anticipates a certain level of resistance. We acknowledge this as simply one part of the process of change.

III. THE PROCESS OF CHANGE

A. Points of Resistance

There is a big leap from the recognition of the problems created by discrimination against women to immediate remedies. An anecdote from a recent speech on women in the legal profession clearly

demonstrates that women may have a "foot in the door" but they still have "a long way to go":

> What can you say when partners at King & Spalding were reported to have wanted a wet t-shirt contest for their female summer associates only last summer with full knowledge that the *Hishon* case [on sex discrimination in the partnership decision] was pending against them before the US Supreme Court?[5]

This section points out some of the obstacles or points of resistance that will be faced in trying to achieve change, and describes some of the strategies that can overcome those obstacles.

1. THE "PROGRESS IS BEING MADE" MYTH

There is a strong sense within the legal profession that, left to themselves, women would succeed in the current system on the basis of their abilities. This perspective drastically underestimates the problem of gender discrimination.

It is true that women have made substantial progress over the past twenty years. However, that progress has generally been within the narrow parameters set by men. The "its better now" philosophy is hollow and unjustified. Women continue to be excluded from the full, fair and equal practice of law. As Sheilah Martin notes:

> The allegation of widespread change is usually twinned with a claim that things for women in the profession are somehow better now. Such a claim is probably true in some limited sense, but an analytical inquiry cannot end here if the possible deceptions of half truths are to be avoided. We must go further and question what this statement really means, who makes this statement and why, what values does it encode, and what does it counsel for the future. As we learnt in grade school, better is a relative concept, so the important questions are better relative to what and better relative to whom? Is the scale GOOD, BETTER, BEST or is it something more like TERRIBLE, BAD, LESS BAD, ALMOST GOOD? How many people who claim that things are better for women now, could honestly say that they have ever been good? They certainly could not claim that things are as good as they should be or as good as they have been for men. And when we analyze better relative to whom, is the referent women of the past or men of the present? Regardless of what baselines for comparison are chosen and defended, a preoccupation with "better" detracts attention away from the best and the best way to achieve equality.[6]

The view that time and the example set by the growing number of able women lawyers will dispel discrimination is a seductive one. It absolves individuals and the profession from taking action. There is little evidence, however, within the profession or elsewhere, that the *laissez faire* approach is effective. The persistence of the glass ceiling is but one example of the continuous shift in the barriers faced by women as they advance in the profession. This myth is also belied by the higher proportion of women leaving the profession.

2. ECONOMICS

The harsh economic climate is a potential obstacle to achieving gender equality. Economic insecurity may deter individuals from raising concerns about their treatment because the prospect of a negative reaction and possible unemployment or financial penalties is too big a risk to take.

In addition, the attitude that "it's tough for everyone, not just women" may develop. In other segments of society such views have tended to perpetuate indirect discrimination and the continuation of unfair practices. The reality is that when it is tough for everyone it is usually worse for women.

The profession may also use the economic downturn as an excuse for inaction. If there is a perception that change will cost money, and that resources are already overextended, this could become a barrier to progress.

We will have to develop strategies to overcome these obstacles. For example, safeguards for women must be created so that they can come forward with complaints without fear of retaliation. The cost-

effectiveness of non-discriminatory practices should also be promoted.

3. Reverse Discrimination

"It's the men who need equality, not the women. Women are getting all the breaks." This plaintive note is being sounded across Canada. It is based on an opposition to affirmative action and often a misunderstanding or lack of knowledge about equality. This misinformation or misunderstanding must be countered by concrete data about the privileged position occupied by male lawyers. For example, there is the myth that men are being "denied" judicial appointments because of the policy of appointing equally qualified women to these positions. And yet, our statistics clearly show that women continue to be under-represented on the bench.

4. Denial of Bias

One of the most common forms of resistance is denial of bias. While many individuals acknowledge that gender discrimination is a problem for the profession, they often do not believe that it is a problem in their environment. This leads to complacency. Others recognize that a problem exists but do not believe that action should be taken to remedy the problem.

Often such resistance is based on a difficulty in comprehending the nature of inequality. While most lawyers can readily perceive overt discriminatory practices, fewer lawyers understand the nature of systemic barriers. For example, the lack of professional management practices and monitoring systems do not appear to them to constitute gender discrimination. However, these omissions perpetuate an environment where discrimination is likely to go undetected or unchallenged.

Some argue that there is "a consensus of denial" by male lawyers. One of the significant observations found in the Task Force reports and research is the existence of two, almost separate, perceptual or cultural worlds. Women in the legal system continue to report discrimination and the perception of being treated differently from men while men report either a lack of awareness of discriminatory practices or a belief that the system operates fairly or neutrally.[7]

Although the lack of information about gender discrimination is one reason for denying its existence, that denial is also caused by an unwillingness to share power. Exclusion and discrimination are as much about privilege as they are about disadvantage. This dynamic is outlined by Sheilah Martin:[8]

> Exclusion is when a process simultaneously creates burdens and distributes benefits, the resulting inequalities do more than unfairly disadvantage the excluded: they actually privilege those with the power to exclude. To focus on the disadvantage is only the bottom part of the picture. For example, if men understand that they have controlled the legal profession, limited competition through exclusion and set the standards mostly in their own image, it becomes more difficult for them to justify their elevated positions on the basis of their individual or collective merit.

While men are often willing to acknowledge that women are disadvantaged, they are less likely to admit that men are over privileged.[9]

Again, part of the solution is concrete information about the manifestations of gender inequality and its tangible effects on women lawyers.

5. Perceptions of "Women's Nature"

One of the instrumental causes of gender discrimination against women is, of course, the male attitude toward women. It is often expressed in the form of cherished convictions as to the proper role of women. In spite of the fact that men also have children and are sexual beings, there is a tendency to regard all women in relation to their biological and/or sexual function. Such stereotyping is a major barrier to access and advancement in the profession.

The arguments most often put forward to explain or excuse discrimination have been summarized as follows:

1. that women's careers are likely to take second place to bearing and raising children. The profession is a secondary role for them.

2. that women are less intelligent and less capable than men or because of their manner and psychology are less suited to a career in an adversary system.

3. that women are less acceptable to clients than men.

4. that women have equal opportunities but fail to take full advantage of them.[10]

Each of these assumptions reflects a failure to treat women as individuals who, like men, have a number of options open to them at various stages of their career from which they will make choices according to their personal wishes and priorities. Education about the nature of sexual harassment and stereotyping should alleviate some of the attitudes which underlie this conduct. Men must learn to think of women lawyers as lawyers first, and as women second.

6. BACKLASH

Backlash grows as women begin to achieve success in a particular field of endeavour. It takes the form of negative messages, with anecdotes, myths, and homilies which reinforce gender stereotypes. Misinformation abounds and can even be unwittingly spread by women as they repeat these myths. Backlash also results in silencing women through accusations of "whining" or being "provocative" when legitimate complaints are raised.

For example, the week following the Law Society of British Columbia's enactment of its new rule on the duty of non-discrimination (which includes a definition of sexual harassment) was reported to the Task Force as the "worst week for women lawyers ever". Women were subjected to relentless teasing about what does or does not constitute sexual harassment.

We must develop strategies to counter this backlash:

> To the extent that this backlash fuels the vicious cycle of discrimination, bias and sexual harassment, we owe it to ourselves and to the profession to recognize, stop and counter these messages.[11]

IV. ACHIEVING GENDER EQUALITY IN THE LEGAL PROFESSION

Given the broad dimension of gender bias in the profession and the anticipated points of resistance, a multifaceted strategy for achieving change should be devised. In order to transform the legal profession, we must envision change at a number of levels: behaviours, attitudes, institutional policies and practices and in the structure of the profession itself.

As a profession we must find both short and long term solutions to the challenge posed by women's entry into the profession. We need to respond to the immediate and pressing problems of those who are currently lawyers while ensuring that the solutions are consistent with egalitarian goals for the legal profession in the long term. In drafting its report, the Task Force was inspired by a vision of the profession twenty years from now.

The process of achieving change begins by asking questions about the way we practice law and by challenging the assumptions which underlie the status quo. Asking these questions assists in the development of commitment throughout the profession. This commitment should be affirmed through the articulation of goals and the adoption of statements of principle.

Having asked the questions, we must become informed. Education about the nature of gender inequality in the legal profession is crucial. We see this Report as a valuable educational tool.

> Gender bias is largely a question of attitude and power. A change in attitude will normally require time, but with education, it can occur.[12]

What is needed for the legal profession is "remedial human rights jurisprudence" accessible to

non-specialists. The basics of equality rights jurisprudence are woven throughout this Report. These messages should be repeated until they form the basis of a common understanding of our legal duties to our colleagues in the profession and beyond.

As we move forward we must make sure that discrimination is seen as everybody's problem, not just women's problem. We have no wish to alienate men. On the contrary, a solution advocated by women only will not work because men are a major source of the problem. We must also avoid creating a backlash against women. We do not want to scare women into leaving the profession in greater numbers than is already occurring.

> The largest problem facing women of the profession is that an aggressive stance against gender bias will create more problems than it will solve. The diehards won't change and criticizing them will just cut them off completely. Other men will have to approach and try to reform them.[13]

We must develop a culture of "problem-solving" for our own profession. Lawyers are trained to criticize and demolish arguments. In order to achieve gender equality, we must learn how to find creative solutions for our own internal problems.

In order to "institutionalize" change we must revise and create codes, laws, regulations, procedures, standards, and other administrative measures to secure an environment free of gender bias.[14] Creating new rules is not by itself a guarantee of change but new guidelines do provide a critical framework for achieving change.

We must not only develop tools, such as model policies, for achieving change but also tools for measuring change, gathering information, monitoring progress, and reporting progress. The Report has many recommendations in this regard.

Finally, we must lobby for change which is beyond the control of the profession. The problems faced by women lawyers reflect those experienced by women in Canadian society generally. Some of the solutions, such as maternity benefits and fair tax treatment of child care expenses, affect women across the workforce and the economy. One important step will be to develop cooperation among all women's groups sharing the common goal of equality.

V. POSTSCRIPT (THE CHAIR)

Nellie McLung, a leading early figure in the feminist movement in Manitoba, described in 1914 the "wonderful plans she and women like her" had for Canada's future. She said:

> We would rewrite our history. We would copy no other country. We would be ourselves, and proud of it. How we scorned the dull brown Primer from which we had learned Canadian history! Written as it was from the top down with no intimate glimpses of the people at all.[15]

Your Task Force has had a unique opportunity to conduct an overview of the legal profession in Canada. It has had many "intimate glimpses" of the people who are joining our profession, who are leaving our profession, who are concerned about our profession. All are aware that reform is required. But reform does not come easily. Richard Hoggart writes:

> When people feel they cannot do much about the main element of their situation, feel it not necessarily with despair or disappointment or resentment but simply as a fact of life, they adopt attitudes towards that situation which allow them to have a liveable life under its shadow, a life without a constant and pressing sense of the larger situation.[16]

This is precisely the attitude we encountered among many of the lawyers we spoke to, male and female. They had lost any sense of agency or power in their profession. They didn't even feel any anger about it, only resignation and reconciliation to "a liveable life under the shadow" of the existing legal culture. Over and over again the comment was made to us by younger members of the profession:

> Let's be realistic. The profession isn't going to change. The clients like us the way we are.

We hope that lawyers will see in this Report an alternative vision of the profession. Lord Denning said in *Jones* v. *National Coal Board*:[17]

> It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies truth: and the less dust there is about the better.

We hope that the Task Force has helped to remove some of the dust.

ENDNOTES

1. ABA Newsletter.
2. This statement is based on a study of women lawyers reported in *Perspectives* vol. 2 (Spring 1992) at 7.
3. D. Jack and R. Jack, "Women Lawyers: Archetypes and Alternatives" in Gilligan, Ward and Taylor, eds, *Mapping the Moral Domain* (Harvard University Press, 1988) as reproduced in Brettel Dawson, ed., *Women, Law and Social Change* (Cactus Press, 1991) 129 at 141, quoted in M.J. Mossman, "Work and Family in the Legal Profession: Re-Thinking the Questions" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference, 1992) at 9.
4. Mossman, *ibid.* at 7.
5. Speech delivered at the American Bar Association 1984 Mid-Year Meeting in Las Vegas, Nevada.
6. S. Martin, "The Dynamics of Exclusion: Women in the Legal Profession" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association Conference, 1992) at 21.
7. C. Menkel-Meadow, "Change in the Legal Profession - Is the Glass Ceiling Half Full or Half Empty?" in *Gender Equality - A Challenge for the Legal Profession* (Canadian Bar Association, 1992) at 28.
8. S. Martin, *supra*, note 6 at 9.
9. P. McIntosh, "White Privilege: Unpacking the Invisible Knapsack" *Peace & Freedom* (July/August 1989).
10. Report of the Working Party on Women's Careers, *Equal in the Law* (England: 1989).
11. C. Amron, *Perspectives* vol. 2 (Spring 1992).
12. Manitoba Working Group Report.
13. *Ibid.*
14. L. Hecht Schafran, "Institutionalizing Change" *Court Review* (Fall, 1989) 28 at 28.
15. *Women in the Canadian Mosaic*, G. Matheson, ed., (1976) at 17.
16. *The Uses of Literacy*, (1960) at 322.
17. (1957), 2 Q.B. 55 at 64 (C.A.).

CHAPTER SIXTEEN

SUMMARY OF RECOMMENDATIONS

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CHAPTER SIXTEEN
SUMMARY OF RECOMMENDATIONS

CHAPTER TWO
BARRIERS TO ENTRY INTO THE PROFESSION

The Task Force recommends:

2.1 That law schools and law societies develop permanent mechanisms for consulting and coordinating issues relating to entry to the profession.

2.2 That law schools, law societies and the Canadian Bar Association take leadership roles in implementing outreach programs in order to bring individuals from under-represented groups into the profession.

2.3 That law schools establish and enhance education equity programs.

2.4 That law school administrators coordinate affirmative action recruitment programs to avoid duplication and inefficiencies in resource commitments and to maximize student placements.

2.5 That the legal profession lend vocal support to affirmative action entrance programs in order to combat recurring suggestions that students under these programs are insufficiently qualified.

2.6 That law schools develop more flexible admissions policies in order to eliminate barriers to entry.

2.7 That law school administrations formulate and publicize clearly articulated student leave and readmission policies both to students applying to law schools and to students currently attending law schools.

2.8 That law school administrations prepare clear guidelines indicating the sort of questions which may not be asked of students attending pre-admission interviews.

2.9 That the Canadian Council of Law Deans commission a study on gender and race bias in the LSAT.

2.10 That the Canadian Council of Law Deans commission a study to critically review the priority and weighting to be assigned to LSAT scores in student admissions.

2.11 That law schools should examine their pre-law admission programs in order to evaluate their effectiveness in preparing students for law school.

2.12 That law schools offer a pre-law program including courses on study skills, note-taking skills, essay- and exam-writing skills to students who have been out of school for an extended period of time and to students who do not have university training.

2.13 That law school administrators consult with law societies to enhance part-time legal studies.

2.14 That law school administrators make part-time studies more widely available to students in all years and publicize these policies to both prospective and current students.

2.15 That law schools should investigate and facilitate the availability of child care services on campus and, where possible, make child care facilities available on site in law schools.

2.16 That the legal profession increase the amount of funding that is available for entrance scholarships, continuing scholarships and bursaries.

2.17 That law school administrations promote the use of gender inclusive language and encourage sensitivity to the use of non-stereotypical examples in the classroom.

2.18 That all faculty should be given professional training courses that teach them how to facilitate discussion of different perspectives in the classroom.

2.19 That law schools ensure that curricula and methods of instruction enhance equality by eliminating biased material and including material on bias and discrimination.

2.20 That the Canadian Council of Law Deans conduct a study of race and gender bias in law school curricula.

2.21 That the Canadian Council of Law Deans act as a clearinghouse for curriculum development so that law faculties can exchange material.

2.22 That the Canadian Council of Law Deans facilitate the preparation and dissemination of model course materials that focus directly on gender and minority issues, as well as integrate these issues into traditional areas of teaching.

2.23 That the Department of Justice commission a study into the feasibility for an Aboriginal law school.

2.24 That law schools establish an Equity Officer position and on-going support programs to address the needs of students threatened by the poisoned environment. The Equity Officer should also be responsible for monitoring the retention, completion and placement of women and minority students.

2.25 That law schools facilitate contact between minority students in the various law schools to enable these students to co-ordinate their efforts to create more inclusive law schools.

2.26 That law schools hold workshops on "unlearning" sexism and racism.

2.27 That law schools and law societies undertake to facilitate contact between women in practice and women in law schools to allow for greater communication and sharing of information regarding the position of women in practice.

2.28 That law schools establish a "forum" in which students, faculty and staff can raise and discuss gender-related issues in a safe way.

2.29 That law schools ensure that a grievance procedure is in place so that students can raise complaints of gender and race bias in the classroom.

2.30 That law schools develop mechanisms to eliminate sexual harassment and overt racial and gender discrimination within the law school.

2.31 That a review of sexual harassment policies be undertaken to determine whether they are effective and how they can be improved.

2.32 That law deans encourage female professors and students to report and document incidents of race and gender discrimination or harassment.

2.33 That the Canadian Council of Law Deans establish a written Code of Conduct aimed at eradicating race and gender bias and sexual harassment in the law schools.

2.34 That the Canadian Council of Law Deans investigate the possibility of initiating an itinerant safe counsel program for faculty and students who are harassed or intimidated in

law school settings on the basis of gender or minority status.

2.35 That awards for public service be increased.

2.36 That students be required to engage in some *pro bono* work before they are granted their law degrees.

2.37 That law societies ensure that students have equal access to articling positions.

2.38 That law societies introduce a part-time articling program for students with children or other special needs, and where such a program already exists, law societies should publicize it so that firms and students are aware of its existence.

2.39 That law schools and law societies collaborate in the development of a program to assist in the placement of students having difficulty finding articling positions.

2.40 That law societies develop guidelines for the interviewing process and promote them within the profession.

2.41 That law societies include in their Codes of Conduct rules which provide for penalties against law firms and lawyers who exhibit race and/or gender bias in the articling interview process.

2.42 That law societies require articling students to complete courses on gender issues and racism prior to admittance to the Bar.

2.43 That law societies regulate the articling process to protect articling students from sexual harassment, discrimination and unfair employment practices.

2.44 That law societies introduce clear guidelines regarding minimum terms and conditions of articling jobs.

2.45 That law societies establish a complaints body for summer and articling students.

2.46 That law societies eradicate gender and race bias from course materials and include material on gender issues and all forms of discrimination in the Bar Admission program.

2.47 That law societies revise mandatory attendance policies to recognize reasonable exceptions to accommodate pregnancy, childbirth, family responsibilities and other situations of this nature.

2.48 That law societies consider the possibility of "remote learning".

CHAPTER FIVE
PRIVATE PRACTICE

The Task Force recommends:

5.1 That law firms adopt guidelines for questions to be asked during interviews for articling and other positions.

5.2 That law firms adopt and implement effective employment equity programs.

5.3 That law firms monitor the hiring process to ensure that all articling students and junior associates have an equal opportunity to develop expertise in all areas of practice.

5.4 That law firms ensure that all lawyers have access to a range of files. Law firms should track internal referrals to determine whether systemic discrimination exists.

5.5 That partners should support female lawyers when discrimination by clients is suspected.

5.6 That law firms take proactive steps to ensure that their clients assess women lawyers in the firm solely on the basis of merit.

5.7 That law societies developed courses to assist women lawyers in dealing with client bias in the negotiation of fees for legal services.

5.8 That law firms ban sexist activities in client promotion.

5.9 That law firms review their client promotion practices to ensure that female lawyers are given equal opportunities to participate in client development and have equal access to clients.

5.10 That law firms establish effective mentoring programs for women lawyers to ensure their professional development.

5.11 That law societies establish mentoring programs for female practitioners in small firms.

5.12 That law firms develop an evaluation methodology to eliminate bias in the partnership decision-making process.

5.13 That the Canadian Bar Association prepare a booklet on the legal and ethical obligations of law firms in making partnership decisions and offer practical assistance in developing criteria and methodology for the assessment of associates.

5.14 That law firms be obliged to report to law societies on an annual basis on demographic information within their firms, including retention and promotion rates by sex.

5.15 That the Canadian Bar Association prepare and distribute educational materials for young lawyers on how to work towards the achievement of partnership.

5.16 That the Canadian Bar Association commission a study in five years to review gender linked patterns of partnership attainment, as well as alternatives to full partnership and their impact on the career advancement of female lawyers.

5.17 That law firms should review committee structures and internal barriers to promotion to the more influential committees and take steps to ensure fair representation of women on all influential committees. Firms should also promote women to leadership roles on these committees.

5.18 That law firms set realistic targets of billable hours for women with child rearing responsibilities pursuant to their legal duty to accommodate.

5.19 That, as part of the same legal duty to accommodate, the reduced target of billable hours should not delay or affect eligibility for partnership nor affect normal compensation.

5.20 That law firms evaluate lawyers on a basis that gives due weight to the quality of time expended rather than exclusively to the quantity of time expended.

5.21 That all law firms establish maternity and parental leave policies.

5.22 That law societies should assist small law firms in the development of maternity and parental leave policies.

5.23 The Task Force emphasizes to lawyers the need for early communication as to the timing and duration of leave.

5.24 That law firms provide parental leave benefits and that an employee's entitlement to or eligibility for consideration for available raises, compensation benefits, seniority, admission to partnership and other advancement not be affected while they are on a paid parental leave.

5.25 That the federal government extend maternity and parental leave benefits under the Unemployment Insurance scheme to self-employed individuals. The Canadian Bar Association should form an inter-professional group to lobby on this issue.

5.26 That the Canadian Bar Association join with other professional associations to establish a family benefit program.

5.27 That the government create a tax deductible and non-taxable "birth and child care fund", similar to RRSPs, education funds, and home-buyer's funds.

5.28 That law societies provide a registry system of lawyers for temporary replacement purposes.

5.29 That law societies develop ways to ensure support and professional assistance for women returning from leaves.

5.30 That law firms recognize the need for alternate work arrangements for all lawyers with parental responsibilities, including part-time partnerships.

5.31 That law firms assign a coordinator to assist in the implementation of alternate work arrangements.

5.32 That law firms promote a more flexible model of career advancement in large law firms so that both partnership and firm structure can take into account the differing work histories of male and female lawyers.

5.33 That law firms establish alternate work arrangement policies that make restructured full time and reduced work options available to members of the firm with parental responsibilities.

5.34 That the Canadian Bar Association develop educational materials on strategies for reducing overhead and developing flexible office management techniques in order to facilitate the adoption of alternate work arrangements by law firms.

5.35 That law societies and the Canadian Bar Association collaborate to establish child care referral services for their members.

5.36 That law firms provide their employees with emergency back-up child care after an assessment of the most appropriate methods for doing so.

5.37 That law firms investigate the possibility of providing child care services to firm members. Law firms could work alone or in conjunction with other members of the legal or business communities.

5.38 That the Canadian Bar Association continue to lobby for fair tax treatment of child care expenses and investigate other avenues for achieving accessible child care.

5.39 That all law firms adopt policies and procedures to deal with sexual harassment in the firm.

5.40 That law societies be empowered to monitor the behaviour of individuals who have been found to harass, in order to minimize the potential for retaliation.

5.41 That in-house education programs about the nature of sexual harassment be established for the personnel of large law firms.

5.42 That professional rules of conduct be amended to specifically provide that sexual harassment is a disciplinary offence.

5.43 That law firms articulate a workplace equity policy to promote entry into the firm by members of under-represented groups and career advancement by women within the firm.

5.44 That all law firms establish in-house equity committees on a permanent basis and that the mandate and operations of these committees be reviewed on a regular basis.

5.45 That national educational initiatives be undertaken to inform the private bar about discrimination against women in the profession. The Canadian Bar Association should develop partnerships with law

societies, the Federation of Law Societies, law foundations and others to implement and finance this initiative.

CHAPTER SIX
GOVERNMENT LEGAL DEPARTMENTS

The Task Force recommends:

6.1 That government legal departments identify and implement measures to ensure fair allocation of work to both female and male lawyers.

6.2 That government legal departments should ensure gender balance on all committees, including policy-setting committees, working committees and task forces.

The Task Force also recommends that government legal departments ensure representation of minority women's groups in the public service.

6.3 That government legal departments take steps to ensure gender equality in the management structure and promotion process for lawyers.

6.4 That government legal departments endorse and encourage membership in professional associations and participation in related activities.

6.5 That the Canadian Bar Association examine the feasibility of reinstating a government lawyers Conference and take other steps to increase the participation of government lawyers and particularly female government lawyers within the Association, such as reducing the cost of membership for government employees.

6.6 That government legal departments review their evaluation procedures to ensure that they do not have an adverse impact on women.

6.7 That government legal departments review their recruitment and hiring procedures to facilitate greater representation of all female lawyers including Women of Colour, Aboriginal women, lesbians and women with disabilities.

6.8 That governments make provision for the review of discretionary decisions by managers with respect to the availability of policies to accommodate family responsibilities.

6.9 That government legal departments identify and implement employment arrangements to accommodate women's family responsibilities without reducing their opportunities for career advancement.

6.10 That government legal departments take measures to ensure that the use of policies intended to accommodate family responsibilities, such as maternity leave, does not affect a lawyer's evaluation or compensation.

6.11 That government legal departments make anti-discrimination training and gender equality education available to all staff, particulary with respect to sexual harassment.

6.12 That government legal departments establish advisory committees on gender issues and equal opportunities for women and mandate them to review this Report and devise strategies for implementing the recommendations concerning government lawyers.

6.13 That government legal departments refer their legal work to law firms that demonstrate effective employment equity programs that ensure representation of all women regardless of their race, ethnicity, sexual orientation or physical abilities.

CHAPTER SEVEN
CORPORATE COUNSEL

The Task Force recommends:

7.1 That corporate legal departments take a leadership role by implementing employment equity programs to encourage the recruitment and hiring of women from minority groups, whether or not the corporation as a whole has an employment equity program.

7.2 That corporate law departments refer their legal work to law firms that demonstrate that they have effective employment equity programs in place which ensure representation of all women regardless of their race, ethnicity, sexual orientation or physical abilities.

7.3 That the Canadian Corporate Counsel Association establish a Subcommittee on Gender Issues to provide an opportunity for discussion of women's issues and to develop long term strategies for change.

7.4 That the proposed Subcommittee on Gender Issues of the CCCA be charged with the overall responsibility for implementing the recommendations in this Report pertaining to corporate counsel and monitoring the progress of such implementation.

7.5 That the proposed Subcommittee on Gender Issues of the CCCA consider further recommendations that should be made to the CBA and other professional organizations with respect to female corporate counsel.

7.6 That the provincial CBA branches require provincial Corporate Counsel sections to set up Subcommittees on Gender Issues at the provincial level so that there can be a coordinated effort between the national CCCA Gender Equality Subcommittee and the provincial sections.

7.7 That Canadian Bar Association provincial corporate law sections be encouraged to set up an informal mentoring program for female corporate counsel.

7.8 That the CCCA Gender Equality Subcommittee and the provincial CBA Business Law sections develop lists of positions available on the board of directors of trade organizations and at the senior levels of professional organizations.

7.9 That the CCCA Gender Equality Subcommittee create a data bank of female corporate counsel who are prepared to assume positions on the board of directors of trade organizations and at the senior level of professional organizations.

7.10 That corporate legal departments prepare lists of the positions available on internal committees and projects and encourage female in-house counsel to assume such positions.

7.11 That the Gender Equality Subcommittee of the CCCA look at ways in which gender related issues can be raised in other industry and trade associations.

7.12 That the CCCA Gender Equality Subcommittee act as a repository for corporate policies dealing with parental leave, flexible hours and part-time work.

7.13 That the Canadian Bar Association commission a research paper which examines the feasibility of developing a system of personalized employment benefits, offering employees a spectrum of optional employment benefits covering diverse needs and priorities.

7.14 That corporations carefully review the contracting out of legal work in order to determine whether doing so has a disproportionately negative impact on women.

7.15 That the CCCA Gender Issues Subcommittee become a repository for corporations' model

policies and education programs on sexual harassment.

7.16 That the educational materials on sexual harassment developed in accordance with the recommendations set out elsewhere in this Report should be relevant and sensitive to women's circumstances in corporate legal departments.

CHAPTER EIGHT
FACULTIES OF LAW

The Task Force recommends:

8.1 That law schools should give priority to the recruitment of members of minority groups into faculty positions.

8.2 That law schools undertake regular reviews of recruitment practices to ensure that sufficient progress is being made toward gender parity and full representation of minority groups in teaching appointments.

8.3 That law deans make full efforts to ensure that affirmative action recruits are recognized as fully qualified appointments.

8.4 That law deans ensure the participation of female faculty on law school committees and that women are well represented in terms of leadership roles on committees.

8.5 That law schools demonstrate leadership in adopting and implementing model workplace equity policies that ensure equal treatment to women and other minority groups.

8.6 That law schools give due consideration, which might include affirmative action, to women, minority faculty and feminist scholars for decanal appointments.

8.7 That universities develop and implement plans to eliminate systemic differences in salaries between male and female members.

8.8 That law faculties monitor starting salaries, qualifications and promotion rates of new female and male faculty members in order to ensure that inequities are not institutionalized.

8.9 That law faculties put in place programs to grant reduced teaching loads in the first year of appointment for men and women faculty, combined with half-year pre-tenure sabbaticals at the approximate midpoint between recruitment and the tenure decision.

8.10 That law deans recognize and reward the "invisible work" as role models and in counselling done by women.

8.11 That law deans regularly review the burden of committee work in faculties to ensure that junior and senior women are not required to over-extend themselves.

8.12 That the Canadian Council of Law Deans develop video tape materials and seminars to illustrate the challenges experienced by faculty members who teach material involving gender and minority issues, with the purpose of exposing and exploring student and faculty responses, as well as remedial strategies.

CHAPTER NINE
ADMINISTRATIVE TRIBUNALS

The Task Force recommends:

9.1 That governments use proactive recruiting measures to identify and attract women and members of other under-represented groups to positions on administrative tribunals.

9.2 That governments adopt a re-appointment protocol for individuals serving on administrative tribunals.

9.3 That governments assure meritorious individuals serving on administrative tribunals of re-appointment with no

mandatory upper limit on the number of terms which can be served.

9.4 That governments consider applications from lawyers who have served on administrative tribunals as internal applications for available government, legal and senior civil service positions.

9.5 That governments view lawyers who have served on administrative tribunals as appropriate candidates for judicial appointment.

9.6 That governments review the salary levels of adjudicators on administrative tribunals and assess the value of their work in comparison with work performed by government lawyers, senior civil servants and lawyers in private practice.

9.7 That governments study whether or not the salary levels of adjudicators are affected by discriminatory practices or systemic discrimination.

9.8 That administrative tribunals adopt policies and practices which achieve enhanced flexibility for individuals with family responsibilities.

9.9 That governments suspend the term of appointment of an administrative tribunal during periods of maternity and parental leave.

CHAPTER TEN
THE JUDICIARY

The Task Force recommends:

10.1 That the Canadian Bar Association develop objective criteria for judicial appointment and publicize such criteria. Federal and provincial judicial councils should also consider establishing committees to establish such criteria.

10.2 That the Minister of Justice adopt an affirmative action policy for the appointment of women and minority women similar to that adopted in Ontario and some of the other provinces.

10.3 That the federal and provincial governments take all possible steps to eradicate from the judicial appointments process discrimination against women and minority women and have as their respective long-term goals a federal and provincial judiciary which reflects the Canadian diversity.

10.4 That the Canadian Judicial Council or the National Judicial Institute gather statistics on the representation at all levels in the judiciary of women and minority women and keep the same up to date.

10.5 That the federal and provincial governments consider women lawyers serving (or who have served) on administrative tribunals as potential candidates for judicial appointment.

10.6 That sensitivity courses for judges on gender and racial bias be made compulsory not only for newly appointed judges but for all judges.

10.7 That Chief Justices and Chief Judges treat women judges on their court fairly in the assignment or allocation of work.

10.8 That the Canadian Judicial Council or the National Judicial Institute consider possible means of bringing women judges together to discuss matters of special interest to them and ensure that funding is made available for this purpose.

10.9 That the National Judicial Institute provide training for minority women lawyers qualified for and interested in judicial appointment and provide support to those appointed in their early years on the bench.

10.10 That discrimination by judges against other judges or counsel be the subject of judicial discipline.

10.11 That the Canadian Judicial Council develop a Code of Judicial Conduct which includes complaint mechanisms and graduated levels of sanctions for breach of its provisions and that the Code be freely available to the profession and the public.

10.12 That the Canadian Judicial Council recommend to the Minister of Justice the establishment of a Commission on Judicial Conduct with its own Commission counsel and staff to administer the Code of Judicial Conduct and that its hearings and final dispositions be made public.

10.13 That the Commission on Judicial Conduct be composed of an equal number of judges, lawyers and members of the public.

10.14 That the Attorneys General of the provinces and territories consider the establishment of similar Commissions on Judicial Conduct with comparable composition, jurisdiction and powers to administer a Provincial Code or Codes.

10.15 That the Canadian Judicial Council develop a comprehensive list of behaviours which will not be tolerated in the courtroom.

CHAPTER ELEVEN
FAMILY LAW

The Task Force recommends:

11.1 That law schools and law societies ensure that family law has a high profile in law school and law society courses.

11.2 That the National Family Law Section of the Canadian Bar Association develop means to improve the status of family law within the profession and provide support to family law practitioners.

11.3 That federal and provincial governments ensure that adequate legal aid funding for family law cases is guaranteed in all areas of Canada, and in particular that the federal government establish a national civil legal aid tariff.

11.4 That federal and provincial governments ensure that adequate judicial resources are dedicated to family law cases.

CHAPTER TWELVE
LAW SOCIETIES

The Task Force recommends:

12.1 That law societies propound a statement that the legal profession is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status, or sexual orientation.

12.2 That all law societies enact non-discrimination rules in their jurisdiction and that discrimination in the profession be designated as professional misconduct.

12.3 That law societies encourage law firms to establish internal procedures to handle complaints about gender discrimination.

12.4 That law societies appoint an appropriate number of "safe counsel" to receive and investigate complaints of discrimination and harassment.

12.5 That law societies ensure that the existing disciplinary process through which complaints of professional misconduct are processed be extended to ensure compliance with non-discrimination rules.

12.6 That where there has been a complaint made about discriminatory behaviour by a lawyer and the complaint is withdrawn, the law society can still pursue the disciplinary proceeding.

12.7 That law societies monitor the progress of women and other minority groups within firms by requiring disclosure of the status of these individuals within the firm.

12.8 That law societies use their own membership data and additional surveys to monitor the access entry and advancement of bar admission graduates as well as members through their professional careers.

12.9 That the Canadian Bar Association encourage law societies to develop common methods to gather data in order to assist in establishing national statistics.

12.10 That law societies establish "equity advisory committees" to assist law firms in establishing and implementing sound working conditions.

12.11 That the Law Society Acts of each province and territory be amended to require law firms and lawyers to comply with provincial human rights legislation.

12.12 That a successful complaint against a lawyer or law firm under a human rights code should automatically trigger an investigation by the law society.

12.13 That law societies take measures to encourage women, including minority women, to run for election as benchers.

12.14 That law societies take steps to facilitate the active participation of women lawyers in their professional organizations.

12.15 That law societies review the time demands on benchers and develop means to reduce their impact on individuals with family responsibilities.

12.16 That law societies ensure that their nomination and appointment procedures are open and work toward equitable representation of women and minority groups on all entities on which the law society is represented.

12.17 That law societies review their fee structure to ensure that they accommodate the needs of lawyers with family responsibilities.

12.18 That law societies ensure that their programs and resources are fully accessible to all members of the profession.

12.19 That law societies review their internal employment practices and adopt gender-related policies for their staff where this is appropriate.

12.20 That law societies demonstrate leadership in the area of employment equity by encouraging and ultimately ensuring diversity in their staff.

12.21 That law societies undertake educational initiatives to inform members of the profession about gender equality and to assist the profession in eliminating discrimination.

12.22 That law societies' programs be designed to sensitize members to issues affecting Women of Colour, Aboriginal women, lesbians and women with disabilities.

12.23 That law societies develop programs, including audio-visual materials, to assist lawyers who are subject to discrimination.

12.24 That law societies develop model programs on issues of sexism and racism for dissemination to the public.

12.25 That law societies gather reliable statistics concerning the number of minorities and, in particular, minority women in the Bar

Admission Courses, in articling positions and as members of the profession.

12.26 That law societies undertake a full study of racism in the profession. This task should be undertaken jointly between the law societies and the Canadian Bar Association.

12.27 That law societies and other authorities undertake an in-depth review of the legal accreditation process in order to design a more just and equitable process.

12.28 That law societies establish committees to review and devise means to implement the relevant sections of the Task Force Report. Where possible joint committees with representatives from other legal organizations, including the Canadian Bar Association, should be established.

CHAPTER THIRTEEN
THE CANADIAN BAR ASSOCIATION

The Task Force recommends:

13.1 That the Constitution of the Canadian Bar Association be amended to include, in section 2, a clear statement that the Canadian Bar Association will work for the total eradication from the legal profession of any form of discrimination, including discrimination on the basis of sex, age, race, creed, colour, national origin, Aboriginal origin, sexual orientation, disability, marital or family status.

13.2 That the Mission of the Canadian Bar Association be amended to include the clear statement that the mission of the Canadian Bar Association is, *inter alia*, to promote equality in the legal profession and the justice system.

13.3 That the Canadian Bar Association conduct a full inquiry into racism in the legal profession. The Association should consider undertaking this inquiry in conjunction with the law societies.

13.4 That the Canadian Bar Association take steps to improve our understanding of racism and to eliminate racial discrimination in the profession.

13.5 That the Canadian Bar Association ensure that its meetings and materials are accessible to all lawyers, including those with disabilities.

13.6 That the Canadian Bar Association promote the goal that all legal materials should be accessible to lawyers with disabilities by encouraging government, legislatures and law societies to produce legal materials, law reports, legislation and regulations in alternative formats.

13.7 That the Canadian Bar Association establish an advisory council which can assist the profession in understanding the needs of people with disabilities and give advice on the removal of barriers.

13.8 That the Canadian Bar Association include openly acknowledged gays and lesbians in leadership positions and ensure that all social activities and members services do not discriminate against members on the basis of their sexual orientation.

13.9 That the Canadian Bar Association gather statistics or find other means to track the level of involvement of women in the Association.

13.10 That the Canadian Bar Association gather statistics or find other means of tracking the level of involvement of minority groups in the Association.

13.11 That the general issue of a flexible fee structure and other financial measures adapted to the reality of women's lives and parental responsibilities be referred to a working group of representatives of the

Membership Committee, the Young Lawyers Conference, and the Finance and Planning Directorate of the Canadian Bar Association to ensure that these issues are dealt with and a comprehensive report tabled by the 1994 Mid-Winter Meeting.

13.12 That a Canadian Bar Association Gender Issues Section or Conference which would operate largely at the branch level be created. This body would be an avenue for encouraging the participation by women and providing an opportunity for women to network with each other.

13.13 That Canadian Bar Association sub-sections for Women of Colour, Aboriginal women, lesbians and women with disabilities be established where this is appropriate.

13.14 That the Canadian Bar Association National Office and every branch, section, committee and conference take steps to ensure that all their activities are planned and organized in a way that will favour the participation of lawyers who bear family responsibilities. These steps should be publicized so lawyers may take advantage of them.

13.15 That the Canadian Bar Association continue and expand its advocacy role on gender issues including issues of particular interest to women lawyers.

13.16 That the Canadian Bar Association develop resources and professional development programming targeted to the needs and interests of women lawyers.

13.17 That the Canadian Bar Association adopt a statement of principle recognizing the long term goal of gender parity on all Association bodies and the short term goal that the membership of all internal bodies and special projects should strive to have at least representation based on the current proportion of Canadian Bar Association membership of each sex.

13.18 That the Canadian Bar Association take more pro-active measures to broaden the pool of representatives. Examples include publicizing available positions and the creation of lists of women interested in becoming more actively involved in the Canadian Bar Association.

13.19 That the Canadian Bar Association adopt the goal of equal representation of both sexes on the roster of speakers at all events. In addition, the Canadian Bar Association should create and promote opportunities for women lawyers to speak in public.

13.20 That the Department of Professional Development at the Canadian Bar Association's National Office create a bank of speakers, including the curriculum vitae of the potential speaker and all relevant information about his or her professional activities.

13.21 That the Finance and Planning Directorate of the Canadian Bar Association adopt a policy for reimbursement of child care expenses for attendance at meetings at the national level.

13.22 That the Canadian Bar Association analyze, on an annual basis, the status of women and minorities in the Association's leadership positions, identify barriers if they exist, report to Council with its findings and take the necessary steps for the removing of those barriers.

13.23 That the Executive Committee of the Canadian Bar Association create a Sub-committee with a mandate to examine the positions of President and Vice-President and to make recommendations on how to make these positions accessible for all members of the profession.

13.24 That the Canadian Bar Association establish an award to recognize and

celebrate the accomplishments of women lawyers.

13.25 That gender-inclusive language should be utilized in all Canadian Bar Association documents.

13.26 That existing Canadian Bar Association documents and drafting practices be reviewed to ascertain whether or not gender-inclusive language is being utilized.

13.27 That the Canadian Bar Association produce gender-inclusive language policies in both official languages and promote their use throughout the Association and the profession.

13.28 That the Canadian Bar Association take a leadership role in setting and promoting employment equity policies and gender-sensitive internal employment practices. The Association's National Office should also be in a position to provide guidance and support to branch offices on these issues.

13.29 That the Canadian Bar Association Code of Professional Conduct be amended to make it clear that workplace harassment and discrimination cannot be tolerated. Commentary on the nature of discrimination and the specific types of behaviour which are prohibited should be included in the revised Code.

13.30 That the Canadian Bar Association develop programs and resources to educate the profession about the nature of discrimination, equality issues and the law and methods to deal with barriers to equality in the legal profession.

13.31 That the Canadian Bar Association establish a National Standing Committee on Equality, as well as Branch Committees dedicated to achieving gender equality.

CHAPTER FOURTEEN
GENDER EQUALITY IN THE SUBSTANTIVE LAW AND PROCEDURE

The Task Force recommends:

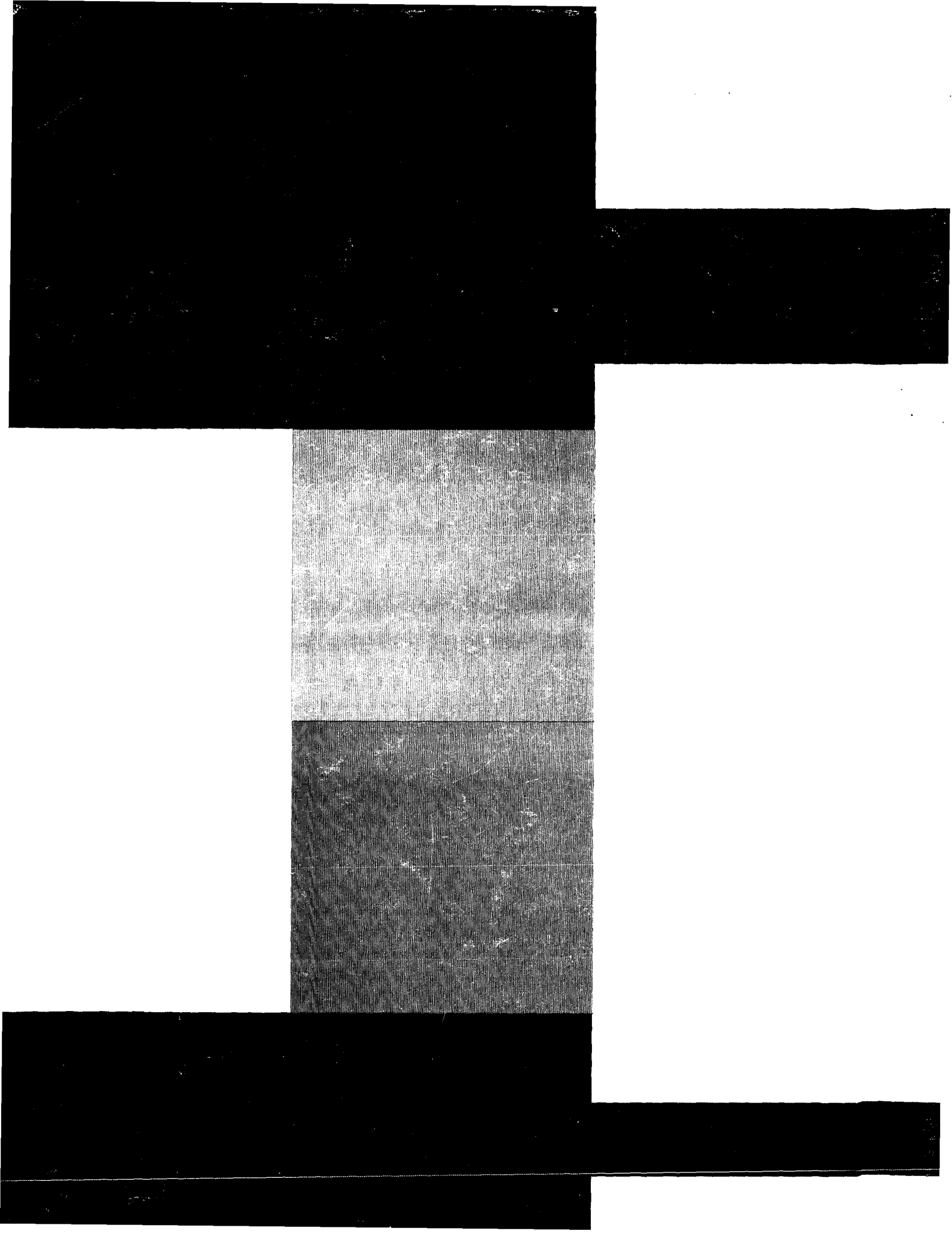
14.1 That the Canadian Bar Association offer continuing legal education programs on issues of gender bias in the substantive law and procedure.

14.2 That the Canadian Bar Association develop a national strategy to eliminate gender bias from the justice system.

14.3 That the Canadian Bar Association vigorously pursue the implementation of measures that promote access to justice for women, in particular the establishment of a national civil legal aid tariff and the reinstatement of the Court Challenges Program.

14.4 That the Canadian Bar Association ensure that gender-sensitive viewpoints are included as early as possible in the process of policy formulation to ensure that gender issues are properly identified and canvassed.

14.5 That relevant National Sections establish sub-committees on gender issues.

14.6 That the Canadian Bar Association consult its National Equality Committee on all law reform and policy initiatives.

14.7 That the Canadian Bar Association's Legislation and Law Reform Committee be charged with the responsibility to review submissions to ensure that gender-related issues have been properly addressed.