

Able Mothers

The intersection of parenting,
disability and the law



by Laura Track

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Written by: Laura Track

Consultations conducted and documented by: Shahnaz Rahman

Edited by: Kasari Govender

Copy edited by: Naomi Moses

Designed by: Nadene Rehnby, Hands On Publications

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555 — 409 Granville Street
Vancouver, BC, V6C 1T2
604.684.8772 | toll free 1.866.737.7716
info@westcoastleaf.org

westcoastleaf.org

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DISCLAIMER

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Executive Summary

Women with disabilities are subject to the discriminatory attitudes of a disabling society on a daily basis. When they become or seek to become mothers, these biases too often influence the views of those best positioned to support them, including government officials, health care professionals, child protection workers, and parenting assessors. As a result, their particular needs as disabled parents go unmet, with negative consequences for both mothers and their children.

This project explores the legal and policy issues affecting mothers and prospective mothers with disabilities. By taking a critical look at the myths, biases and stereotypes that influence decisions impacting mothers with disabilities, we assess where the law falls short in protecting the equality rights of mothers with disabilities. We also explore the law's potential to help mothers with disabilities fight discrimination and faulty assumptions made about them. We then make recommendations for how law and policy can be strengthened and improved to ensure greater respect for the dignity, equality, and rights of mothers with disabilities.

There is little research in Canada on the legal and policy issues faced by mothers with disabilities. However, it is clear that women with disabilities experience many distinct parenting issues not faced by disabled fathers or non-disabled parents of other genders. Women bear a disproportionate responsibility for child care and, as we detail throughout this report, face scrutiny of their behaviour and choices as parents that men do not. Women with disabilities are especially likely to be discouraged from parenting and to lose custody of their children. Moreover, disabled women who are also marginalized by race, poverty, sexual orientation and other grounds face additional challenges and barriers. An analysis attentive to the unique experiences of women with disabilities is necessary in order to prevent these women's voices from being silenced.

To this end, we consulted with a broad range of women with disabilities to inform this project, as well as with a number of the advocates and service providers who work with the disabled. We were also guided by an Advisory Committee made up of community members, advocates, and service providers, several of whom identify as women with disabilities. Our analysis is informed by the stories and experiences of disabled mothers, who are the experts

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of their own experience and often have a clear vision of what systemic changes are needed to improve their lives.

The overarching finding of our research is that disabled mothers face unique challenges stemming from barriers associated with both their gender and disability. For example, mothers with disabilities may lose their children through custody disputes or child protection proceedings because of perceptions about their abilities rather than the best interests of their children. Prospective mothers face obstacles when trying to exercise their reproductive rights or access assisted reproductive technology. There are a number of other areas in which women with disabilities may be challenged by the state and society's perceptions of their ability to parent, including in the contexts of adoption, immigration, and employment. Additionally, poverty and violence have disproportionate impacts on women with disabilities, undermining their safety and equality and compromising their ability to assert and enforce their legal rights.

This report overviews six broad legal and policy issues impacting mothers with disabilities: child protection, family law, sexual and reproductive rights, access to adoption, economic security, and immigration and refugee law. We include data and quotes from our research participants, as well as women's stories reported elsewhere, to illustrate the ways in which women with disabilities have experienced these legal and policy issues in their lives. In each section of the report, we present our legal research investigating the way the issue has been treated by the courts, and we consider relevant legislation. Finally, we make recommendations to law and policy makers that our analysis shows will help mothers and prospective mothers with disabilities improve their lives, advance the best interests of their children, and assert and enforce their legal rights as parents.

The overarching recommendation emerging from this report is that governments must provide the supports necessary to ensure that children can remain with their parents when this is in their best interests. This will require that resources and services, including adapted parenting equipment, accessible and affordable housing, and adequate financial assistance, are provided to mothers with disabilities. It will also require that the people making decisions that impact disabled mothers' lives, including health care professionals and child protection workers, make those decisions based on a careful and individualized assessment of each mother's strengths, limitations, and needs for support, and not on the basis of myths and stereotypes about the capacity of disabled women to parent. The legal rights of both children and their mothers—the rights of children to be raised in a supportive and loving environment, and the rights of mothers not to be discriminated against because of their perceived disabilities and not to be denied their right to parent when they are able to do so—demand nothing less.

Women with disabilities have a right to be treated fairly on the basis of their own unique strengths and skills. They have a right to sexual autonomy, reproductive freedom, and equality as mothers, without discrimination on the basis of their disability. While there will be instances where a disability prevents a woman from parenting her child, most women with disabilities can be perfectly capable mothers when they have access to the right supports. When the social and environmental factors that function to disable them are removed—the physical barriers in their surroundings and the discriminatory attitudes of their communities, for example—their status as able mothers will be evident.

Introduction

In April 2012, Mississauga couple Maricyl Palisoc and Charles Wilton gave birth to a healthy baby boy they named William. They wanted to be parents and were overjoyed when William arrived. However, as soon as William was born, the Peel Children's Aid Society threatened to take the boy away unless he received round-the-clock care from an "able-bodied attendant."¹

Both Maricyl and Charles have cerebral palsy, a disorder that limits their motor skills and slurs their speech, but has no effect on their cognitive abilities. A Children's Aid Society social worker ruled that those physical disabilities made them unfit parents, and obtained a warrant to remove the child from the home.

The couple was devastated. "We know that we need help, but we know that we are the best thing for our boy right now," Maricyl told the CBC. "We both wanted to be parents and now we are, and we don't want to give anyone control of our family."

The Children's Aid Society's demand that William receive 24-hour care from an able-bodied assistant was met with offers of community assistance and support from across the country. The Coalition for Persons with Disabilities provided the funds for the services, but its program coordinator also noted that the child's mother was able to change diapers, breastfeed and "do the necessities" that come with caring for a newborn.² He also pointed out that community support had always been available to the family, and that Children's Aid seemed to have made its decision without knowing all the facts. In light of this community support, Children's Aid rescinded its decision and allowed William to stay with his parents.

Maricyl and Charles were not the first parents to face discriminatory assumptions about their capacity to parent as a result of their disabilities. According to disability advocates, child welfare workers too often jump to conclusions that parents with disabilities can't

Rather than consider what supports parents with disabilities may need in order to parent effectively, social workers, health care providers, and others involved in these families' lives too often assume that the parents' need for supports means that they lack the capacity to parent.

1 "Disabled parents fight to keep newborn at home" CBC News (1 May 2012), www.cbc.ca/news/canada/toronto/disabled-parents-fight-to-keep-newborn-at-home-1.1185318.

2 Ibid.

adequately care for their children.³ Rather than consider what supports parents with disabilities may need in order to parent effectively, social workers, health care providers, and others involved in these families' lives too often assume that the parents' need for supports means that they lack the capacity to parent.

WEST COAST LEAF'S MOTHERING WITH DISABILITIES PROJECT

Maricyl and Charles' story and others like it inspired West Coast LEAF to undertake an investigation into the ways in which people with disabilities, and particularly women, experience discrimination in relation to their roles as parents. What law and policy issues impact the rights of mothers with disabilities? Where does the law fall short in protecting the equality rights of mothers with disabilities, and what is the law's potential to help mothers with disabilities fight the discrimination and faulty assumptions made about them? How can law and policy be strengthened and improved to ensure greater respect for the dignity, equality, and rights of mothers with disabilities?

We were also inspired by a local disability-rights advocate working with Pacific DAWN, a "DisAbled Women's Network with a mission to end the poverty, isolation, discrimination and violence experienced by women with disAbilities."⁴ This advocate showed us a US study that found that the American legal system systemically discriminates against parents with disabilities and their children through unequal and adverse treatment.⁵ She also pointed out that no similar research or analysis exists in Canada, and that Canadian research on the experiences of disabled mothers is sorely lacking. In fact, when it comes to advocacy for mothers with disabilities, the most prominent obstacle to improving their daily lives is the sheer lack of data on their experiences. The impact of discrimination against mothers with disabilities — in custody hearings, by social services, in their ability to exercise their reproductive rights, and so on — is not well studied or documented.

There is no system to track the number of disabled mothers who go through the legal system and no accountability to address their accessibility needs. — Disability Advocate

What is clear, however, is that women with disabilities experience many unique parenting issues not faced by disabled fathers or non-disabled parents of another gender. Women continue to bear a disproportionate responsibility for child care and, as we detail throughout this report, face scrutiny of their behaviour and choices as parents that men do not. Feminist researchers and scholars have pointed out the many ways in which the "ideology of motherhood" divides women on the basis of their social characteristics into "good mothers," who are socially encouraged and supported to become mothers and raise children, and "bad mothers," who are discouraged from bearing and raising children.⁶ Women with

3 Maureen Brosnahan, "Parents want support, not stigma" CBC News (2 May 2012), www.cbc.ca/news/canada/parents-with-disabilities-want-support-not-stigma-1.1168403.

4 Pacific DisAbled Women's Network, <http://pacificdawn.ca/>.

5 National Council on Disability, "Rocking the Cradle: Ensuring the rights of parents with disabilities and their children" (27 September 2012) [Rocking the Cradle].

6 See e.g. Nitya Iyer, "Some mothers are better than others: A re-examination of maternity benefits" in Susan Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto, 1997) 168.

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disabilities, among others, are regarded as “suspect” mothers who are especially likely to be discouraged from parenting and to lose custody of their children.⁷ Disabled women who are also marginalized by race, poverty, sexual orientation and other grounds face additional challenges and barriers. An analysis attentive to the unique experiences of women with disabilities is necessary in order to prevent these women’s voices from being silenced.

To realize this intersectional analysis of women’s experience and inform this project, we consulted a broad range of women with disabilities, as well as a number of the advocates and service providers who work with them. We were also guided by an Advisory Committee made up of community members, advocates, and service providers, several of whom identify as women with disabilities. Our analysis is informed by the stories and experiences of mothers with disabilities, who are the experts of their own experience and often have a vision of the systemic changes needed to improve their lives. West Coast LEAF strongly believes in what we call “participatory law reform” — that is, law and policy reform that is rooted in the experiences of those who will be directly impacted by the changes.

I feel that the policy makers should pay attention to people with disabilities in general, and help them understand the system. — A mother with disabilities

The overarching finding of our research is that disabled mothers face unique challenges stemming from barriers associated with both their gender and disability. For example, mothers with disabilities may lose their children through custody disputes or child protection proceedings because of perceptions about their abilities rather than the best interests of their children, which detrimentally impacts the rights and well-being of both mothers and children. Further, prospective mothers face obstacles when trying to exercise their reproductive rights or access reproductive technology. There are a number of other areas in which women with disabilities may be challenged by the state and society’s perceptions of their ability to parent, including in the contexts of adoption, immigration, and employment. In addition, poverty and violence have disproportionate impacts on women with disabilities, undermining their safety and equality and compromising their ability to assert and enforce their legal rights.

We have divided this report into chapters detailing six broad legal and policy issues impacting mothers with disabilities. The legal areas we explore in this report include: child protection, family law, sexual and reproductive rights, access to adoption, economic security, and immigration and refugee law. We include data and quotes from our participants, as well as women’s stories reported elsewhere, to illustrate the ways in which women with disabilities have experienced these legal and policy issues in their lives. In each section of the report, we present our legal research investigating the way the issue has been treated by the courts, and we consider relevant legislation. Finally, we make recommendations to law and policy makers that our analysis shows will help mothers and prospective mothers with disabilities improve their lives, advance the best interests of their children, and assert and enforce their legal rights as parents.

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⁷ Ibid at 177.

METHODOLOGY

The work of the project was guided by an Advisory Committee of professionals and service providers with diverse expertise in supporting people with disabilities. A number of our project advisory members also self-identified as living with a disability, and offered their own experiential expertise to the project. The Advisory Committee advised us on outreach methods and strategies for engaging mothers with disabilities, raised accommodation and accessibility considerations, and provided feedback on the final report, including tips to ensure it is accessible to people with visual impairments.

West Coast LEAF prepared and distributed fliers to organizations serving women and people with disabilities describing the project and seeking mothers and prospective mothers interested in sharing their story about a legal or policy issue they had encountered. We conducted 15 one-on-one interviews with disabled women who were either mothers, expectant mothers, or who wanted to become mothers. We also conducted two focus groups, one in Vancouver and one in Victoria. In these focus groups we spoke with a total of 10 women. Women were given a small honorarium for their time.

Interview questions were semi-structured in nature and allowed participants to freely share their personal experiences of mothering with disabilities. This approach allowed us to capture a wide range of issues, experiences, and interactions women had with different laws, policies, and systems in BC. All interviews were conducted in English with the exception of one interview which was conducted in Hindi and Punjabi. We conducted interviews with two deaf mothers and used sign language interpretation to facilitate this communication.

Most mothers had had a legal issue in their lives that was impacted by their disability. Many had been involved in court processes. We asked mothers about their experiences with the legal system in the context of their parenting and how their disability affected the outcome of their case. We also invited them to suggest what would have been helpful to them or might be helpful to other women going through a similar situation.

In addition to the 25 women with disabilities we spoke with, we also consulted with representatives from 14 organizations who shared their expertise and insights on the issues and barriers encountered by the women with disabilities they serve. These organizations and experts included the Aboriginal Mother's Centre; Western Institute for the Deaf and Hard of Hearing; Jane Doe Legal Network; Pacific DAWN; YWCA Munroe House; Vancouver YWCA Single Mothers' Support Group; Pivot Legal Society; Together Against Poverty Society; BC Families in Transition; Catalyst Enterprises BC; Cerebral Palsy Association of BC; A Nu-Vision; Sunshine Coast Community Services Society; and Sunrise Family Services Society. We also spoke to lawyers working in child protection, family and immigration law; a law professor specializing in disability law; and a doctor working in assisted reproductive technologies.

A research assistant transcribed the interviews and created a coding framework. Interviews and consultations were then analyzed and coded for key themes. A qualitative research software tool called NVivo was used to analyze the data and present the findings. An evaluation of the project, with a particular focus on the participatory law reform strategies described above, was underway at the time of this report's publication.

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PARTICIPANTS

Of the 25 mothers with disabilities we spoke to, 19 lived in the Lower Mainland (Vancouver, Surrey, Burnaby and Richmond). Four women lived in Victoria, one in Mission, and one in Sechelt. Eleven of the women were white/Caucasian; nine were Indigenous; three were of South Asian origin; and two were of Central/South American origin.

Participants were asked to self-identify their experience of disability, and they reported a wide range of disabilities. Most women reported having more than one disability. Every participant reported some kind of mental health issue, with depression the most common. The majority also discussed the impact of trauma on their mental and physical health. The table below lists the number of participants reporting each disability:

Participants reporting each disability	
Mental health (depression, anxiety, panic attacks)	25
Addiction	11
Deaf/hard of hearing	2
Chronic pain	3
Learning disabilities	3
Cerebral palsy	2
Autism spectrum disorder	1
Paralysis	2
Multiple sclerosis	1
Cancer	1
Anorexia	1

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LAW AND POLICY ISSUES ARISING FROM THE CONSULTATIONS

Participants raised a wide range of legal and policy issues they have encountered. Their experiences will be described in more detail in the chapters that follow. Some participants raised clear legal issues, such as experiences in family court and with child protection officials, and difficulties accessing legal aid. Others described experiences that did not necessarily involve the formal legal system, but which point to critical deficiencies in law and policy and raise significant safety and security issues for women with disabilities, including poverty, violence, and exclusion. Notably, all but four of our participants disclosed that they had been subject to abuse and violence in their lives, most by an intimate partner and one by a parent. Below is a table summarizing the legal and policy issues participants raised.

Legal and policy issues reported by participants	
Violence	21
Child Protection	14
Poverty	12
Child Custody in Family Law	5
Discriminatory societal attitudes and responses	10
Criminal Justice (e.g., restraining orders)	9
Legal Aid and Access to Justice	9
Discriminatory treatment by medical service providers	6
Employment	8
Housing	8
Reproductive Rights	2
Immigration	2

We will address these issues in turn in the chapters that follow.

Our Approach to the Concept of Disability

Before considering the specific legal and policy issues that impact mothers with disabilities, it is necessary to set out the framework within which we will consider the concept of disability.

THE SOCIAL MODEL OF DISABILITY

The drafters of the United Nations *Convention on the Rights of Persons with Disabilities* (the “Convention”) describe how they understand the term “disability”:

Disability is an evolving concept and...disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.⁸

This is often referred to as the “social model” or the “human rights model” of disability, which describes it as the outcome of interactions between people and their environment.⁹ This “social model” recognizes that it is society’s failure to accommodate the needs of people with disabilities, and not the mental or physical condition, which is the primary cause of the disabling disadvantage that people with disabilities encounter in their daily lives.¹⁰

The social model of disability has been accepted and articulated by the Supreme Court of Canada in a number of cases. In a case called *Mercier*, Justice L’Heureux-Dubé, writing for the Court, made it clear that disability manifests not only as a physical limitation, but also as a social construct that must be interpreted broadly:

In a case called *Mercier*, Justice L’Heureux-Dubé, writing for the Court, made it clear that disability manifests not only as a physical limitation, but also as a social construct that must be interpreted broadly.

8 Preamble at (e).

9 See Daniel Mont, “Measuring Disability Prevalence,” (World Bank, 2007), <http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf> at 2-3. See also Human Resources and Social Development Canada, “Advancing the Inclusion of People with Disabilities” (Ottawa: Social Development Canada, 2006) at 6.

10 Lana Kerzner, “Providing legal services to people with disabilities” (ARCH Disability Law Centre, December 2010). [ARCH Report]

By placing the emphasis on human dignity, respect and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a “handicap” [the term used in the Quebec statute at issue]. In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes... Thus, a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors.¹¹

The Supreme Court expanded upon this model in *Granovsky*, stating that there are three aspects to disability: physical or mental impairments; functional limitations (whether real or perceived), and the “problematic response of society to [the individual’s] condition.”¹² A proper analysis of disability requires unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed.

The older “medical model” defined disability in terms of a physical or mental defect or sickness necessitating medical intervention. However, health problems alone do not prevent people from participating in society. Rather, it is the obstacles in the socio-economic and built environment that do.¹³ ARCH Disability Law Centre provides the following illustration of the “social model” of disability:

Consider that people who use wheelchairs are able to enter buildings, but when buildings are erected with steps in front of them, they become ‘disabled’ from entering. It is the existence of steps in this example that results in a limitation, or disablement. When buildings incorporate ramps, elevators, automatic door openers, accessible washrooms, and other accessibility features, people who use wheelchairs are no longer disabled.¹⁴

It is through this lens that we endeavour in this report to address the legal and policy issues impacting mothers with disabilities.

Some proponents of the social model of disability posit that the best way to reflect the “disabling” impact of the socio-economic and built environments is to refer to “disabled people,” while others advocate the “person first” approach and prefer to refer to “people with disabilities.”¹⁵ We see the value of both terms and use them interchangeably throughout this report.

We are still human first before we are ‘disabled’... Not the disabled woman, the woman with a disability. There’s a big difference. Pay attention to the woman. Just listen to her. Don’t dismiss her. — Mother with a disability

The older “medical model” defined disability in terms of a physical or mental defect or sickness necessitating medical intervention. However, health problems alone do not prevent people from participating in society. Rather, it is the obstacles in the socio-economic and built environment that do.

11 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27.

12 *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28 at paras 29-30.

13 *Ibid.*

14 ARCH Report, *supra* note 10 at 4.

15 See e.g. Lisa Egan, “I’m not a “person with a disability”: I’m a disabled person” (9 November 2012), www.xojane.com/issues/i-am-not-a-person-with-a-disability-i-am-a-disabled-person.

ADDICTION AS A DISABILITY

Importantly, drug and alcohol addictions are well-recognized as disabilities under Canadian human rights law.¹⁶ To constitute a disability under human rights law, there must be a dependence on the drug; casual or recreational use of substances is not defined as a disability unless people are treated adversely because they are perceived to have addictions or be “substance abusers.”¹⁷

The inclusion of addiction within the definition of disability is not without controversy, with some researchers arguing that, unlike other mental health conditions, addiction is voluntary and drug use is an individual choice.¹⁸ However, in rejecting the Government of Canada’s assertion that it is personal choice, not law, that causes death and disease for people addicted to illicit drugs, the Supreme Court of Canada found that “addiction is an illness, characterized by a loss of control over the need to consume the substance to which the addiction relates.”¹⁹ The American Society of Addiction Medicine echoes this view and has updated its definition of addiction to highlight that addiction is a chronic brain disorder, and not simply a behavioural problem involving too much alcohol or drugs.²⁰ The result of a four-year process involving more than 80 addiction experts, the new definition describes addiction as a primary disease, meaning that it is not necessarily the result of other causes such as emotional or psychiatric problems. Addiction is also recognized as a chronic disease, like cardiovascular disease or diabetes, so it must be treated, managed and monitored over a lifetime. According to the past president of the Canadian Society of Addiction Medicine and chair of the committee that created the new definition: “Simply put, addiction is not a choice. Addictive behaviours are a manifestation of the disease, not a cause.”²¹

Addiction fits well within the social model of disability described above. People with addictions may face unique experiences of marginalization and disadvantage, whether due to extreme stigma, lack of societal understanding, stereotyping, poverty, or criminalization of their addictions. The Ontario Appeal Court has endorsed the view that “addiction is a disability that carries with it great social stigma and...this stigmatization is compounded where an addicted person is also part of another stigmatized group, such as those on social assistance.”²²

There is often significant overlap between addictions and mental health issues. As described in more detail below, many of our participants reported both mental health and addiction

According to the past president of the Canadian Society of Addiction Medicine and chair of the committee that created the new definition: “Simply put, addiction is not a choice. Addictive behaviours are a manifestation of the disease, not a cause.”

16 In *Entrop v Imperial Oil* (2000) 50 OR (3d) 18 at para 89, the Ontario Court of Appeal accepted the finding of a Board of Inquiry that drug dependence and alcohol dependence are each “handicaps” entitled to protection under the Human Rights Code. See also *Mainland Sawmills v Industrial Wood and Allied Workers of Canada, Local 2171*, [2002] BCCA 69 at para 69 (QL), in which it was found that “alcohol and drug addiction are illnesses and are physical and mental disabilities for the purposes of the Human Rights Code. There are no reasons to consider them any less an illness or disability than any other serious affliction.”

17 *Entrop, ibid* at para 92; *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Co*, 2007 ABCA 426; *Chornyj v Weyerhaeuser Company Limited*, 2007 CanLII 65618 (ON SCDC).

18 See e.g. Gene Heyman, *Addiction: A Disorder of Choice* (Harvard University Press, 2009).

19 *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134, 2011 SCC 44.

20 Disabled World, “Drug addiction and substance abuse information”, www.disabled-world.com/medical/pharmaceutical/addiction/

21 *Ibid.*

22 *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 126.

issues. A third intersecting issue is violence against women; again, many of our participants reported that violence had led to both their addiction and their mental health challenges. Not only are women with disabilities more likely to experience violence than the rest of the female population, they are also more likely to experience mental health and substance use issues.²³ In addition to helping them cope with violence, some women with addictions become addicted to the pain medication they use to manage their disability on a day-to-day basis; others find substance use to be a means of coping with the loss of control they feel, not only from the violence, but from the disability itself.²⁴

23 M. Chappell, "No relief in sight: Problematic substance use for women with disabilities in Canada" in N. Poole & L. Greaves, *Highs and Lows: Canadian Perspectives on Women and Substance Use* (Toronto: Centre for Addictions and Mental Health) at 72.

24 Rebecca Haskell, "Reducing barriers to support: Discussion paper on violence against women, mental wellness and substance use" (BC Society of Transition Houses, 2010).

The Legal Framework

The equality rights of people with disabilities in Canada are protected by the *Canadian Charter of Rights and Freedoms* and, in British Columbia, by the *BC Human Rights Code*.

THE BC HUMAN RIGHTS CODE

The *Human Rights Code* (the “Code”) prohibits discrimination on the basis of physical or mental disability, sex, family status, and a number of other grounds. The Code applies to relations in the private sphere, such as employer-employee, landlord-tenant, and business owner-customer. The Code prohibits discrimination in employment (hiring, firing, and terms or conditions of employment); employment advertising; the provision of services (such as restaurants, stores, and services provided by strata councils, schools and government programs), tenancy, and the purchase of property.

Disability is not defined in the legislation, but interpretation has evolved to include protection for people who have, or are perceived to have, mental or physical disabilities, whether visible or non-visible, permanent (e.g., a visual or mobility impairment), or temporary (e.g., a treatable illness or temporary impairment resulting from an accident).²⁵ All major diseases are included, such as cancer, Alzheimer’s, Crohn’s disease, cerebral palsy, epilepsy/seizures, heart attack, heart conditions, HIV/AIDS, arthritis, etc. All mental illnesses are also included, as are conditions associated with developmental delay and learning disabilities. As described above, addiction is well-established as a disability in Canada, and in BC, obesity is also considered a disability.²⁶

Discrimination on the basis of disability can be blatant and direct, or it can be the result of seemingly neutral policies, qualifications, requirements, standards or rules that have the

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25 BC Human Rights Coalition, “Grounds of protection in BC”, www.bchrcoalition.org/files/GroundsProtection.html#Disability.

26 Ibid.

effect of excluding or disadvantaging people with disabilities. The latter kind of discrimination, known as “adverse effects discrimination,” is especially prevalent in the case of disability. The government will rarely single out disabled people for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled.²⁷

Employers, landlords, and service providers have a duty to accommodate the needs of people with disabilities up to the point of undue hardship. This is a central concept in human rights jurisprudence. The courts have described “accommodation” as “what is required in the circumstances to avoid discrimination.”²⁸ The Supreme Court of Canada has elaborated on the duty to accommodate people with disabilities as follows:

The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a bona fide justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider.²⁹

The principles underlying the duty to accommodate include respect for dignity, individualized accommodation, and the integration and full participation of people with disabilities in society.³⁰

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THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian *Charter of Rights and Freedoms* (the “Charter”), which applies to government action and legislation, guarantees the equality rights of people with disabilities in section 15. Section 15(1) states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has endorsed a substantive understanding of the Charter’s equality protections. Substantive equality integrates two important features: 1) a recognition of the fact that there are groups within our society that have historically been treated unequally, and 2) that the purpose of equality law is to end their inequality and help members of these groups overcome the results of their mistreatment. It recognizes that not all differences in treatment lead to inequality, and that sometimes identical treatment may produce serious inequality.³¹

27 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 64.

28 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 22. [Grismer]

29 *Council of Canadians with Disabilities v VIA Rail Canada Inc* [2007] 1 SCR 50 at para 121.

30 Ontario Human Rights Commission, “Policy and Guidelines on Disability and the Duty to Accommodate” (2000, amended 2009).

31 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 14.

This can be contrasted with the more limited and outdated concept of formal equality, which requires only that people who are “similarly situated” receive the same treatment — in other words, treating likes alike. Formal equality allows lawmakers and courts to ignore, rather than take into account, the important differences in how people experience life in our society.

For people with disabilities, a substantive conception of equality is critical if their rights to access and participate in society and public life are to be maintained and protected. People with disabilities may require accommodation and proactive measures to ensure their equality rights. A written test that is not offered in Braille fails to accommodate people who are vision impaired; a building with stairs and no ramp cannot claim to be open to everyone on an equal basis. Section 15 and the principles of substantive equality require that the particular needs of people with disabilities be accommodated and taken into account in order to foster their meaningful equality and participation in society.³²

In a foundational section 15 case called *Eldridge*, deaf parents challenged the BC government’s failure to provide them with sign language interpreters in the course of the provision of health care.³³ The Supreme Court of Canada agreed that the government’s policy had a discriminatory impact on people with hearing impairments, finding that effective communication is an integral part of the provision of medical services, and sign language is the means by which deaf people can receive the same quality of medical care as the hearing population.³⁴ The Court ruled that governments may be required to take special measures to ensure that disadvantaged groups, such as people with disabilities, are able to benefit equally from government services.

For people with disabilities, a substantive conception of equality is critical if their rights to access and participate in society and public life are to be maintained and protected.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The United Nations *Convention on the Rights of Persons with Disabilities* (the “CRPD” or the “Convention”) is the first comprehensive international treaty to specifically protect the rights of the world’s population of people with disabilities.³⁵ Its purpose is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”³⁶ It prohibits all forms of discrimination on the basis of disability and requires that all appropriate steps be taken to ensure reasonable accommodation. It also provides a number of substantive rights for people with disabilities, including rights relating to employment, education, health services, transportation, access to justice, accessibility to the physical environment

32 See *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 67.

33 *Eldridge*, supra note 27.

34 *Ibid* at para 69 and 71.

35 Arlene S. Kanter, “The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities” (2006) 34 *Syracuse J Int’l L & Com* 287 at 288.

36 Secretary General, Final Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, art. 1, delivered to the General Assembly, UN Doc A/61/611 (6 December 2006).

and protection from abuse. The Convention calls on participating governments to change their country's laws, as necessary, to comply with its terms.

Canada signed the Convention on March 30, 2007 and ratified it on March 11, 2010. By ratifying the Convention, Canada has assumed the responsibility of ensuring that the nation's laws and policies comply with its provisions.³⁷ Unfortunately, however, Canada has not adopted a national strategy for implementing or monitoring the Convention. To date, no new legislation has been enacted to specifically implement the Convention into Canadian domestic law. However, several of the rights articulated in the Convention are already addressed in Canadian domestic laws, including the *Canadian Charter of Rights and Freedoms* and human rights legislation, as described above.

The Council of Canadians with Disabilities (CCD) and the Canadian Association for Community Living (CACL) have advocated for an overarching implementation plan for the Convention that would provide coherence in addressing the substantive issues, as well as a framework for monitoring and reporting.³⁸ It would act as the road map for success and provide the necessary benchmarks to monitor Canada's progress on making the promises of the Convention a reality. Essential elements of the implementation plan would include:

By ratifying the Convention, Canada has assumed the responsibility of ensuring that the nation's laws and policies comply with its provisions.

- A high-level federal coordination body, consisting of assistant deputy ministers or higher;
- Establishment of a Minister Responsible for the Status of Persons with Disabilities to promote the status of persons with disabilities and advance the Convention;
- Consultations between federal, provincial, territorial and First Nations governments, and strong consultation and participation from people with disabilities and their advocates;
- A standing parliamentary committee to advance disability-related issues; and
- Designation of an independent monitoring mechanism to "promote, protect and monitor" implementation of the Convention, as required by Article 33. The Canadian Human Rights Commission, with the appropriate mandate and resources, should be designated as the monitoring mechanism.

West Coast LEAF endorses the CCD and CACL's recommendations. An essential component of the implementation plan must be to ensure that the diverse perspectives of people with disabilities, including those of women, mothers, immigrant, and Indigenous people, are heard and incorporated. Our research shows that a gender lens is essential to meeting the diverse needs of people with disabilities.

37 United Nations, "Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality, Realizing the rights of persons with disabilities" Ch. 4: Becoming a Party to the Convention and the Optional Protocol, www.un.org/disabilities/documents/toolaction/ipuhb.pdf; Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573 at para 48.

38 Council of Canadians with Disabilities and Canadian Association for Community Living, "UN Convention on the Rights of Persons with Disabilities: Making domestic implementation real and meaningful" (February 2011), www.ccdonline.ca/en/international/un/canada/making-domestic-implementation-real-and-meaningful-feb2011.

The Convention also contains an Optional Protocol (the “OP”), which Canada has not signed or ratified. The OP provides for a complaints mechanism whereby groups and individuals, after exhausting all possible domestic remedies, can have the Committee on the Rights of Persons with Disabilities consider a claim that a State Party has violated provisions of the Convention. Optional Protocols are important accountability tools in international human rights law, and provide a means by which people who allege infringement of their rights by the State may have their claims addressed. Canada should immediately begin the process of ratifying the Convention’s Optional Protocol.

Convention Provisions Relevant to Mothers with Disabilities

A number of the Convention’s provisions are particularly relevant to protecting the rights of mothers with disabilities.

Respect for home and the family

Article 23, Respect for Home and the Family, requires States Parties to:

- Take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others;
- In accordance with the best interests of the child, ensure the rights and responsibilities of persons with disabilities with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation;
- *Render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities; and*
- Ensure that a child shall not be separated from their parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. *In no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents.*

Article 23 also addresses the reproductive rights of people with disabilities, which include access to assistive reproductive technologies. Specifically, Article 23 requires States Parties to ensure that:

- Persons with disabilities, including children, retain their fertility on an equal basis with others; and
- The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the *means necessary* to enable them to exercise these rights are provided.

Health

Article 25 ensures the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. Specifically, States Parties shall provide people with disabilities with the same range, quality, and standard of free or affordable health care and programs as provided to other persons, including in the area of sexual and reproductive health. Article 25 also requires health care professionals to provide care of equal quality to people with disabilities, and to raise awareness of the human rights, dignity, autonomy, and needs of people with disabilities through training and the promotion of ethical public and private health care standards. Article 25 also prohibits discrimination against people with disabilities in the provision of health insurance, and prevents discriminatory denial of health care or health services on the basis of disability.

Article 25 is crucial, as people with disabilities receive a lower standard of care and frequently encounter a lack of awareness among practitioners, despite seeking medical attention more regularly than people without disabilities.³⁹ Moreover, Article 25 ensures that practitioners do not employ methods of discriminatory access to reproductive health care, especially with regard to assisted reproductive technologies.

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Equality and Non-Discrimination

The CRPD contains additional protections for parents with disabilities and their children. Parents with disabilities continue to face accessibility barriers that impede their ability to carry out their parenting responsibilities. Article 5 addresses this by requiring States Parties to prohibit discrimination on the basis of disability, guarantee legal protections for people with disabilities who are discriminated against, and take all appropriate steps to ensure that reasonable accommodations are provided.

The Convention also recognizes that women and girls with disabilities are subject to multiple forms of discrimination, and Article 6 requires States Parties to ensure their full and equal enjoyment of all human rights, and to take all appropriate measures to ensure their full development, advancement, and empowerment.

Article 8 attempts to combat ignorance, stereotypes, and misconceptions by requiring States Parties to adopt immediate, effective, and appropriate measures to raise awareness throughout society about people with disabilities; to combat stereotypes, prejudice, and harmful practices relating to people with disabilities, including those based on sex and age; and to promote awareness of the capabilities and contributions of people with disabilities. To do so, States Parties must initiate and maintain effective public awareness campaigns designed to nurture receptiveness to the rights of people with disabilities and promote positive perceptions and greater social awareness of people with disabilities.

³⁹ Rocking the Cradle, *supra* note 5.

Access to Justice

Article 13 addresses access to justice by requiring States Parties to ensure effective access to justice for people with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations to facilitate their effective role as direct and indirect participants (as witnesses, for example) in all legal proceedings, including at investigative and other preliminary stages. Moreover, to help to ensure effective access to justice for people with disabilities, States Parties shall promote appropriate training for those working in the administration of justice. As this report demonstrates, parents with disabilities face significant barriers to meaningful participation in court proceedings. Article 13 seeks to ensure their rights in these areas.

An adequate standard of living

Parents with disabilities and their children often live in poverty. Article 28 addresses this critical issue by requiring States Parties to recognize the right of people with disabilities to an adequate standard of living for themselves and their families—including adequate food, clothing, and housing, and to the continuous improvement of their living conditions. States Parties shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. Further, States Parties must ensure that by people with disabilities and their families who live in poverty can access assistance from the state with disability-related expenses, including adequate training, counseling, financial assistance, and respite care, as well as public housing programs.

While critical, the best interests of the child is not the only relevant consideration; the rights of parents must also be considered.

THE RIGHTS AT STAKE

Domestic and international human rights law protects the rights of both children and parents. The UN *Convention on the Rights of the Child* (the “CRC”) states that the best interests of the child are a primary consideration in all actions concerning them; moreover, the CRC also states that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine...that such separation is necessary for the best interests of the child.”⁴⁰ This principle is echoed in Canadian family law and child protection legislation and Supreme Court of Canada jurisprudence.

While critical, the best interests of the child is not the only relevant consideration; the rights of parents must also be considered. As the Supreme Court of Canada has held, child protection proceedings engage a parent’s right to security of the person, protected by section 7 of the *Charter*, as the removal of a child from parental custody constitutes a “serious interference with the psychological integrity of the parent” and a “gross intrusion into a private and

40 Article 9.

intimate sphere.”⁴¹ The parental interest in raising and caring for a child is, as LaForest J. held in *B.(R.)*, “an individual interest of fundamental importance in our society,”⁴² and denial of that interest can result in extreme distress, stigma, and psychological harm.

Children’s rights to security of the person are also engaged by state action removing a child from the custody of their parent. This was recognized by the Court in *G.(J.)*:

Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent’s right to security of the person at stake, the child’s is as well. Since the best interests of the child are presumed to lie with the parent, the child’s psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.⁴³ [Emphasis added.]

In *K.L.W.*, Justice Arbour noted that “not only should the Court recognize the child’s interest in being protected from harm, but we must also recognize the interest of a child in being nurtured and brought up by his or her parent.”⁴⁴ While acknowledging the importance of protecting children from harm, she found that it is equally important to recognize the child’s interest in remaining with his or her parents, and that harm may also come to the child from misguided state interference.

Since the best interests of the child are presumed to lie with the parent, the child’s psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

There will be situations where a mother is simply unable to parent her child because of barriers associated with her disability. Whether due to addiction, a serious mental health issue, cognitive impairment or other significant disability, some women will be unable to ensure the safety and security of their children, even with appropriate supports in place. Protecting children from harm is a critical role that the state must play, and keeping children safe is a sound rationale for state intervention in families. However, our research shows that too often, decisions about disabled women’s capacity to parent are made on the basis of myths, stereotypes and misconceptions about their abilities, rather than on the basis of an individualized assessment of their particular strengths and challenges.

Moreover, these decisions are too often made in the absence of the supports and resources that would assist disabled women to parent effectively. This is the underlying recommendation emerging from this report: the state must provide the support reasonably necessary to ensure that children are able to remain with their parents when it is in their best interests to do so, in particular through the provision of support services to mothers with disabilities. This is because of the legal rights of both children and their mothers: the rights of children to be raised in a supportive and loving environment, and the rights of mothers not to be discriminated against because of their perceived disabilities and not to be denied their right to parent when they are able to do so.

Nowhere is this more obvious than in the child protection context, to which we now turn.

41 *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 61, 78.

42 *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 83.

43 *Ibid* at para 76.

44 *Winnipeg Child and Family Services v KLW*, [2000] 2 SCR 519 at para 12.

Child Protection

The story with which we introduced this report, that of the Mississauga couple with cerebral palsy who gave birth to a healthy baby boy only to have the Children’s Aid Society threaten to remove him shortly after his birth, is unusual in only one respect: it garnered significant media attention and generated dozens of offers of support to the family, and ultimately resulted in the child remaining with his parents. More typically, children are removed from parents with disabilities without attention or fanfare. Parents with disabilities and their families are frequently, and often unnecessarily, forced into the child protection system and, once there, they lose their children at disproportionately high rates.⁴⁵

Child protection services play a vital role in protecting children’s safety, wellbeing and rights. When these services are functioning as they should, they are adequately funded, culturally appropriate, family focused, evidence based, founded on principles of substantive equality, and driven by the best interests of children. At its best, the system supports parents with disabilities to keep families together whenever possible, and finds loving “forever families” for children whose parents are unable to meet their children’s needs even with support. At its worst, presumptions and biases about the parenting capacity of people with disabilities infuse the decisions of social workers, medical staff, and courts; additional factors including poverty, social isolation and violence also contribute to the high rates of state involvement in the lives of disabled parents and their families. Serious underfunding of the Ministry of Children and Families means that social workers are overstretched, inadequately trained and seriously impeded in their ability to meet the best interests of children or families; this is particularly true with respect to social workers and family support workers serving First Nations communities.⁴⁶

When these services are functioning as they should, they are adequately funded, culturally appropriate, family focused, evidence based, founded on principles of substantive equality, and driven by the best interests of children.

45 “Rocking the Cradle” supra note 5 at 84.

46 See Representative for Children and Youth, *Lost in the shadows: How a lack of help meant a loss of hope for one First Nations girl* (February 2014).

THE LAW

Child protection in British Columbia is governed by the *Child, Family and Community Services Act*⁴⁷ (the “CFCSA” or the “Act”). Among the Act’s guiding principles are the necessity of supporting families to care for children in the home, improving services for Aboriginal families, using apprehension only as a last resort, and reunifying children and parents as quickly as possible when a temporary removal is necessary. The Act states that “a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents.”⁴⁸ It also highlights the necessity of supporting families to remain together: “if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided.”⁴⁹ A guiding service delivery principle under the Act is that families and children should be informed of the services available to them and encouraged to participate in decisions that affect them; another is that the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.⁵⁰

The Act highlights the necessity of supporting families to remain together: “if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided.”

EXPERIENCES OF MOTHERS WITH DISABILITIES

Canadian research has found that mothers with a mental health diagnosis were three times more likely to have been involved with the child protection system than mothers without a diagnosis.⁵¹ Similar patterns exist in other jurisdictions: in a sample of 407 Australian child protection cases, parents with a diagnosed psychiatric disorder or serious mental illness featured in 18.4 percent of the cases; a US study revealed that half of parents involved in child welfare cases had been diagnosed as having an emotional disorder and/or low IQ.⁵² The study also found that four fifths of cases in which a parent had a psychotic disorder and one fifth of cases in which a parent had an emotional disorder resulted in permanent out-of-home placement of the child.

Parents with cognitive impairments also face increased scrutiny of their capacity to parent and disproportionate state interference in their families. A Canadian study found that parental cognitive impairment was present in 10 percent of cases opened for child maltreatment investigations in Canada in 2003.⁵³ Given that people with cognitive impairments represent only 1-3 percent of the population, this shows a gross over-representation of parents with cognitive impairment in these types of investigations. Most cases (72.1 percent) involved a

47 [1996] RSBC c 46.

48 S 2(b).

49 S 2(c).

50 S 3.

51 Callie Westad and David McConnell, “Child welfare involvement of mothers with mental health issues” in David McConnell et al. (eds) *Child welfare process and outcomes: Caregiver cognitive impairment* (University of Alberta, 2009) at 55.

52 Cited in Westad and McConnell, *ibid.*

53 David McConnell, Maurice Feldman, Marjorie Aunos & Narasimha Presad, “Parental cognitive impairment and child maltreatment in Canada” (2011) 35 *Child abuse and neglect* 621.

biological mother with a cognitive impairment. In cases that resulted in a court application, 27 percent involved a parent with a cognitive impairment.

These statistics are troubling. Considerable evidence shows that, with appropriate training and supports, people with cognitive impairments can learn and maintain parenting skills.⁵⁴ Research also shows that in most cases, there is little to no evidence of child maltreatment in cases that are investigated; instead, pervasive myths, misconceptions, and pejorative stereotypes about parents with cognitive impairment instead lead to assumptions that the parent is inherently incompetent, justifying removal of the child even in the absence of any evidence of mistreatment.⁵⁵ This is compounded by disproportionately high rates of poverty for people with cognitive impairments and other disabilities, which is also often seen as evidence of parental deficiency.

In a UBC law professor's review of 40 child protection trial judgments in which the mother had a mental health diagnosis, every case involved poverty and economic disadvantage. All but one resulted in the permanent removal of the child.⁵⁶

Indigenous women lose their children to child welfare agencies at disproportionately high rates. Nearly half of children under 14 in foster care in Canada are Indigenous children,⁵⁷ and in BC more than 52 percent — or about 4,450 out of the total of 8,106 children in care — are Indigenous. Indigenous women do not always meet dominant cultural and middle class expectations of motherhood, and have often been stereotyped as “bad mothers” based on Western social constructions and norms.⁵⁸ Indigenous women have been denied the right to mother their children for generations, losing them first to residential schools, and then to the child welfare system. As the Report of the Aboriginal Justice Inquiry of Manitoba states, after the closure of residential schools in the 1960s:

...the child welfare system took its place. It could continue to remove Indian children from their parents, devalue Native customs and traditions in the process, but still act “in the best interests of the child.” Those who hold this view argue that the Sixties Scoop [the placement of aboriginal children with white families] was not coincidental; it was a consequence of fewer Indian children being sent to residential schools and of the child welfare system emerging as the new method of colonization.⁵⁹

Many Indigenous children and families face deep and chronic poverty and live in crowded and inadequate housing. A 2013 study found that while the average poverty rate in BC for non-Indigenous children is 17 percent, the poverty rate for Indigenous children is 28

Nearly half of children under 14 in foster care in Canada are Indigenous children, and in BC more than 52 percent — or about 4,450 out of the total of 8,106 children in care — are Indigenous.

54 Ibid.

55 Ibid.

56 Judith Mosoff, “Child protection and mental disability: When will “bad parenting” be in the DSM?” YouTube (2 April 2014), <https://www.youtube.com/watch?v=WMU-PrvXGxk>.

57 Michael Woods and Sharon Kirkey, “Tragic’ number of aboriginal children in foster care stuns even the experts” Canada.com (8 May 2013), www.canada.com/health/Tragic+number+aboriginal+children+foster+care+stuns+even+experts/8354098/story.html.

58 See M. Kline, “Complicating the ideology of motherhood: Child welfare law and First Nation women” in M. Fineman and I. Karpin, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press, 1995).

59 Aboriginal Justice Implementation Commission, “Report of the Aboriginal Justice Inquiry of Manitoba, Chapter 14: Child Welfare” (November 1999), www.ajic.mb.ca/volume.html.

percent and for Status Indian children it is 48 percent — nearly three times the average for non-Indigenous children.⁶⁰ These statistics illustrate how poverty, disability, racism, and colonial legacies intersect to undermine the equality rights of Indigenous women in the child protection system.

Fourteen of the 25 women in our sample had interacted with BC's child protection system. Five mothers received supportive interventions and retained custody of their children; the other nine lost custody of their children, at least temporarily. All but two described themselves as poor, low-income, or receiving social assistance. Eight of the nine Indigenous women we interviewed had at some point had their children taken into care.

You know because still, I think about my kids every single day. Every day, not a day goes by that I don't think about them. — A mother in recovery

Supports

Social and Economic Supports

Participants told us that the guiding principles set out in BC's child protection legislation do not reflect the reality of their experiences. Numerous investigations of BC's child protection system have also concluded that current child protection practices are not adhering to these principles and are failing to meet the objectives set out in child protection law.⁶¹ In particular, the BC government's lack of commitment to providing publicly funded support services including safe and affordable housing, adequate income assistance, drug and alcohol treatment and harm reduction, mental health services, and supports for victims of domestic abuse, undermines the Ministry of Children and Family's ability to support families and take a preventive approach to child protection issues. Because apprehensions are most often due to parents' struggles with poverty, addictions, mental health issues, the legacy of colonialism, and/or family violence,⁶² investing in these supports is crucial to the objectives of keeping families together and using apprehension only as a last resort.

Many participants expressed frustration that they were not offered the resources and supports they required to parent and provide for their children:

Support before apprehension would be more effective to deal with parenting issues. It's ironic that there are only supports available when the child is apprehended. — A young Aboriginal mother

It's more like if your kid gets taken away they'll provide services. Once you get your kid back, the services get less and then they cease to exist. It sucks because they could offer

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60 David MacDonald and Daniel Wilson, "Poverty or Prosperity: Indigenous Children in Canada" (Canadian Centre for Policy Alternatives and Save the Children, June 2013).

61 Pivot Legal Society, *Broken Promises: Parents speak about BC's child welfare system* (February 2008) [Broken Promises]; Ted Hughes, *BC Children and Youth Review: An Independent Review of BC's Child Protection System* (April 2006); Representative for Children and Youth, *Honouring Kaitlynn, Max and Cordon: Make their Voices Heard Now*, (March 2012).

62 Broken Promises, *ibid* at 2.

the services before and it would do so many people so much better and save the money in the long run I think. — A young Aboriginal mother

One mother described how discrimination and economic barriers impeded her ability even to visit with her children:

A family court order allows me to visit my children but the child protection system is not allowing me to see my daughter. I am told I have to pay for the supervision. I don't have any money to pay for the supervision; as a result I have not seen my child since January 2013. ...The child protection system uses my depression and anxiety to discriminate against me and I feel I have lost my children due to this discrimination. — An immigrant mom dealing with depression and anxiety

Some women expressed anxiety and lack of confidence in their own parenting capacities in the absence of needed support:

So I'm going to groups and stuff to deal with all this but it makes me scared because I'm close to having him back. It makes me scared that I will not get support from the Ministry ...there needs to be extra help when people get their children back from child protection services. Not just 'here you go.' — A young mother with addiction and depression issues

A lawyer with experience working with mothers in the child protection system explained the link between a lack of access to economic resources and child apprehensions:

Poor disabled mothers consistently lose custody of their children. Well-off mothers with disabilities are less at risk of losing custody of their children, because they have resources and may not even come across the system. Even if they do, they can demonstrate to the courts how their resources will help them be the best parent.

Fear of Asking for Help

Participants also shared that the fear of having their children removed actually prevents mothers from reaching out to social workers and asking for the support they need. Compounded by the discrimination they face as mothers with disabilities, they fear that asking for economic or social support will further cast them in a negative light and raise questions about their fitness to parent:

I just think that they made it seem like they were more there to help and as I opened up to them they just took that information and used it against me. — A mother dealing with anorexia and violence in her relationship

I would like them to pay attention to the person, the woman. To really thoroughly investigate what's going on ... trying to help the mother with her situation whatever it may be. Help her, not just take the child away. — A mother living in poverty

But there's always going to be that fear and that's my biggest paranoia and thing I struggle with. That any time somebody knocks on the door I think it's somebody coming to take

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my kids even though I haven't done anything wrong. It's just a constant fear I guess. I even had nightmares about it last night. For no reason. I just had this horrible nightmare and woke up and woke my boyfriend up and I was like 'they're coming to take the kids.' It's always with me. — A mother recently reunited with her two children

Participants and service providers also told us that the intimate nature of the questions asked on the application form for disability assistance intimidate mothers with disabilities and give rise to fears that their children will be taken away:

I think that there are a lot of parents with disabilities that don't want to ask because they think that their children may be taken away. — A mother dealing with anxiety and depression

Many women are fearful of disclosing the full impact of their disability. They worry that their children will be apprehended and thus minimize their disability, resulting in their application being denied. — Anti-Poverty Advocate

Lack of access to sign language interpretation was flagged as a huge barrier for deaf women. Deaf women are often referred to the same support services as the hearing community without any consideration of their particular needs.

Women have legitimate reason to fear that disclosure of their disabilities will draw attention and raise questions from their support workers. In *K(D) v The Director of Child Family And Community Service*,⁶³ a mother with a history of mental health issues disclosed her pregnancy to her financial aid worker (likely in order to access supplemental pregnancy benefits). The worker responded by calling the police and having her admitted to hospital by way of an involuntary committal under the *Mental Health Act* for a period of 30 days. She was diagnosed as suffering from schizophrenia and was prescribed medication. Social workers and doctors held a case conference to discuss her medical situation, and a decision was made to induce the birth. By this time, the 30 days had passed and the certificate for her committal had expired; however, her consent was not obtained to induce the birth. An “alert” was given to the Ministry of Social Services that the child was to be apprehended at birth due to disability of the parent. A social worker attended the hospital when the birth was induced, and the child was removed from the mother’s care shortly after the child was born.

Sign Language Interpretation

Lack of access to sign language interpretation was flagged as a huge barrier for deaf women. Deaf women are often referred to the same support services as the hearing community without any consideration of their particular needs.

For example if there's someone who is able to hear, counseling is available to them easily. It's all accessible, even in the area that I live in. Some of the hearing friends I have that have been mandated to get counseling in order to get their children back, they have gotten their kids back within 6 months to one year. — A deaf mother whose children have been in care for over a year

⁶³ (1998), 55 BCLR (3d) 343.

I want to encourage social workers especially at MCFD or people who want to become social workers that are in child protection to be able to learn about disabilities. ...To learn about deaf culture. —A deaf mother whose children have been apprehended

Violence

Mothers who have experienced violence are at particular risk of losing their children to the child protection system. Despite their vulnerabilities, these mothers may also be held responsible by social workers for the impact of their spouse's violence on the children.

After the violent incident, social workers became involved in my case again. They blamed me for not protecting my daughter from his abuse. He was not held accountable for anything. They coerced me into signing a voluntary care agreement by saying the baby is not safe with me at this point. They then placed her in a foster home for two and a half months. — An Aboriginal mother

However, mothers who do take action to keep their children safe from an abusive spouse may face disbelief, allegations of mental illness, and even retribution from their social workers for disclosing the abuse.

In one high-profile case, BC child welfare authorities forced a mother to fight for years against charges that she was mentally unstable after they seized her four children.⁶⁴ Without properly investigating the allegations, the Ministry accused her of fabricating claims that her ex-husband had physically assaulted her and was sexually abusing their children. The mother was treated like a suspect, was deemed to be suffering from an undiagnosed mental illness, and was accused of coaching the children to say they had been molested. She received only minimal and intermittent supervised access while the father received unsupervised access and, she alleges, continued his sexual abuse. After more than two years, the Ministry finally realized its mistake and backed away from its position, telling the Court that it no longer had any protection concerns about the mother and the children should be returned to her care, and advising the Court that it would not be calling any evidence in the proceedings.

After a 92-day trial over the children's seizure, the judge concluded in a 137-page ruling that the mother had suffered "from extreme distress caused by the sexual abuse disclosures and the apprehension of and subsequent separation from her children, and from finding herself in an ongoing situation where no one in a position of authority was prepared to believe her."⁶⁵ He returned the children to the mother's full custody after a reintegration plan was developed to help them recover from the sexual and physical abuse and from the apprehension. The mother sued the Ministry for public malfeasance, bad faith, and abuse in care, but the Court has not yet issued its decision on that action.

Since 2004, the Ministry of Children and Family Development ("MCFD" or the "Ministry") has provided their staff with practice guidelines for cases involving domestic violence, called the "Best Practice Approaches: Child Protection and Violence Against Women" (the

Mothers who do take action to keep their children safe from an abusive spouse may face disbelief, allegations of mental illness, and even retribution from their social workers for disclosing the abuse.

⁶⁴ *JP v BG*, 2012 BCSC 938.

⁶⁵ At para 491.

“Best Practices”). In December 2010, the government released the latest version of the Violence Against Women in Relationships (“VAWIR”) policy and an updated version of the Best Practices and created a training curriculum based on the VAWIR policy. The newly created Provincial Office of Domestic Violence reports that staff training began in September 2013, and it has delivered the training to over 1,429 staff to date.⁶⁶ However, years after the BC government first created these policies, many women around the province continue to report that they experience inconsistent, unhelpful and unsupportive involvement with MCFD child protection workers when dealing with situations of gendered violence and spousal abuse.⁶⁷ It is critical that social workers across the province have enough training and resources to deliver service that is in line with MCFD’s Best Practices. MCFD should also audit for compliance with those practices.

Child Protection Workers

It is critical that social workers across the province have enough training and resources to deliver service that is in line with MCFD’s Best Practices. MCFD should also audit for compliance with those practices.

Feelings of coercion and intimidation by Ministry staff were prevalent in our participants’ narratives. Women whose children were apprehended reported a sense of betrayal and mistrust of their social workers:

I had to sign a voluntary care agreement so that I didn’t require court. But it was basically, sign this or we’re going to apprehend. Either way there was no choice; my child was being removed from me. — A mother in recovery

The only person I knew at the hearing was my social worker and she was against me. — A young mother struggling with depression and anxiety

One Aboriginal mother shared her experience of growing up in foster homes. She told us how this history was used against her by social workers when she was forced to sign adoption papers without knowing her legal rights.

They [social workers] forced me. They said if I don’t sign the adoption or agree with it, that they are going to pull up more stuff on me, and they are going to pull my kids in. I didn’t want my kids to hear bad things about me. Since I agreed with it, I am not allowed to reverse it. — An Aboriginal mother in recovery

Legal aid is available for very low income women with a child protection issue, even if MCFD has only threatened to remove a child from the home, but has not yet done so.⁶⁸ They may be eligible for legal advice and services that will help them understand their legal rights and avoid losing custody of their children. In addition, a new service will be piloted by the Legal Services Society this fall that will focus on early, collaborative resolution of child protection matters. Staff at the Parents’ Legal Centre will help parents as they work with the Ministry by providing legal advice and information and support before and at hearings.⁶⁹

66 Provincial Office of Domestic Violence, “Final Report: Taking action on domestic violence” (August 2014).

67 Jane Doe Legal Network, “31 Things BC can do to end violence against women” (March 2013), www.janedoelegal.org/31_things.

68 See Legal Services Society, “Child protection matters”, www.lss.bc.ca/legal_aid/childProtection.php.

69 Legal Services Society, “Five new projects from LSS” (9 September 2014), <http://elan.lss.bc.ca/2014/09/09/five-new-projects-from-lss/>

However, many women are unaware that legal aid is available prior to removal, and most women do not access legal aid until after their child has been taken into care.⁷⁰ Child protection workers must ensure parents know their legal rights in these cases, and should be required to proactively inform parents about the legal services available to them.

Addiction Issues

With MCFD it was like 'you're a bad parent. You have addiction issues, you don't get your kid.' — An Aboriginal mother

Substance abuse by a parent is a prevalent reality in the child protection context. In a 2002 survey of BC child protection workers, staff estimated that 70 percent of their child protection cases included substance misuse by the mother.⁷¹

Addiction was the most common reason for child welfare officials to become involved in the lives of the mothers in our sample. Nine participants shared that their addiction issues had resulted in the removal of their children. Two participants voluntarily placed their children in care because they knew that neither they nor their partners could parent the child because of their addictions. Other participants also knew that their addictions were undermining their ability to parent, but didn't know where to turn.

Some participants identified that they turned to alcohol and drugs as a way of coping with trauma and mental health challenges:

I starting drinking when I went to the clubs, and I found out that drinking made my anxiety better so I could start talking and be outgoing and stuff like that. And I started to take it home. I never drank before this. And I started going to the liquor store [to] buy my own alcohol. You know and at first one little glass of wine was fine, then it grew bigger and bigger until it was a box of wine you know and I would be unconscious basically. But I was doing it so I could take care of my kids but at the same time it became a problem in my life. — A mother of two with depression and addiction issues as a result of domestic abuse

My experiences would have been different if courts listened to me, if they realized the impact of his violence on me, if they better understood my trauma and depression and connected me with support folks rather than punishing me for it. — An immigrant mother

MCFD has a policy on how to manage parental addiction issues; however, an investigation by BC's Representative for Children and Youth found that only one in 10 of the workers assigned to a particular case involving parental substance misuse had any formal training on how to work with families challenged by addiction, and only one of the workers had heard of the policy.⁷² There is no dedicated budget within MCFD for worker training on this issue.

Substance abuse by a parent is a prevalent reality in the child protection context. In a 2002 survey of BC child protection workers, staff estimated that 70 percent of their child protection cases included substance misuse by the mother.

70 Broken Promises, supra note 61.

71 Representative for Children and Youth, *Children at risk: The case for a better response to parental addiction* (Victoria BC: June 2014). [Children at Risk]

72 Ibid.

The lack of training for workers can result in poor outcomes for families, as parents with addiction issues may be less likely to cooperate and work with a social worker who lacks empathy and an understanding of addiction.⁷³

The need for services and supports to help mothers address substance use issues without losing custody of their children was raised by several participants. Mothers with addiction issues face a lose-lose scenario: either they seek help for their addictions and risk losing custody of their children, or they keep quiet so as not to draw attention to themselves and their families and struggle with their addictions on their own, without the benefit of treatment and support. One mother in our study described how overwhelming it is to be a parent trying to overcome an addiction without the necessary support:

Why isn't there funding set out for people with addictions that are, that have freshly got their kids back? Like why isn't that? Or why can't they offer more support? If they really want their kid back we'll do it and you've got to let us know when you need a break because it's overwhelming, people get anxiety, panic attacks, if they're doing it right or wrong and they don't want to tell people. Like it's really hard for my friend upstairs and she's struggling, she's literally struggling. — A mother of three coping with depression, anxiety and addiction issues

Despite the great demand for treatment, the vast majority of pregnant women and mothers seeking assistance to overcome drug dependency cannot obtain the help they need.

This participant's quote highlights the importance of after-care for mothers with addictions who complete treatment programs and have their children returned to their care. There is also a critical lack of detox and treatment services for people with addictions in BC, particularly in rural and remote communities. Wait lists and a requirement to telephone daily in order to keep a place on a wait list constitute significant barriers to treatment for women with addictions.

In their 1993 report, the Royal Commission on New Reproductive Technologies called on all provinces and territories to ensure that they have in place "counselling, rehabilitation, outreach and support services designed specifically to meet the needs of pregnant women with drug/alcohol addictions."⁷⁴ Community service providers have also identified the need for supports for mothers with drug or alcohol addictions.⁷⁵ However, despite the great demand for treatment, the vast majority of pregnant women and mothers seeking assistance to overcome drug dependency cannot obtain the help they need; drug treatment programs routinely deny admission to pregnant women because they lack the resources and facilities to accommodate them, and the few that will treat pregnant women have long wait lists, often longer than the duration of the pregnancy itself.⁷⁶

The Fir Square Combined Care Unit at BC Women's Hospital is a rare exception; it provides care for substance-using women and substance-exposed newborns.⁷⁷ Women at Fir Square

73 Ibid.

74 Nancy Miller Chenier, "Reproductive Technologies: Royal Commission Final Report" (April 1994).

75 See e.g. Justine Patterson, "Family-centered treatment for mothers with addictions" (Elizabeth Fry Society, June 2014), <http://elizabethfryblog.wordpress.com/2014/06/17/why-enabling-mothers-to-bring-children-to-addictions-treatment-is-important/>.

76 Lindsay Kines, "Province urged to treat addicted parents without separating them from the children" *Times Colonist* (30 November 2012), <https://www.elizabethfry.com/news/docs/timescolonist-12-2012.pdf>.

77 BC Women's Hospital and Health Care Centre, "Substance use and pregnancy", www.bcwomens.ca/Services/PregnancyBirthNewborns/HospitalCare/SubstanceUsePregnancy.htm.

have access to counselling and instruction to enhance critical life skills, parenting techniques and coping mechanisms, and babies receive specialized care to meet their needs. The philosophy of care is one of harm reduction. The aim is to help reduce substance use and risky behaviours that can cause harm to mothers and their babies. Mothers and their babies are supported to safely stay together after they leave the hospital, and assistance is offered to mothers to help them gain confidence in parenting.

Sheway, a community-based health and social service program in Vancouver's Downtown Eastside, also serves pregnant women and mothers with infants under 18 months who are dealing with drug and alcohol issues. The focus of Sheway's Pregnancy Outreach Program is to help women have healthier pregnancies and positive early parenting experiences. Sheway's model of care is rooted in the recognition that the health of women and their children is linked to the conditions of their lives and their ability to influence those conditions. Sheway brings together drug and alcohol counsellors, community health nurses, physicians, social workers, nutritionists, infant development consultants and other professionals to provide pregnant women and mothers with a range of supports including nutrition counselling, parenting support, drug and alcohol counselling, assistance securing housing and social benefits, and practical necessities such as baby food, formula, diapers and toys.

In British Columbia, the Peardonville House Treatment Centre, funded by the Fraser Health Authority, is one of the only drug and alcohol treatment facilities that accepts mothers with children.⁷⁸ Women come from all over the province for the program, which has eight spaces for children and usually has a two- to three-month waiting list.⁷⁹ The Elizabeth Fry Society's Firth Residence in Abbotsford provides transitional housing and support services to women in recovery and accepts women with children, but does not receive any additional provincial funding to provide for the children's needs.⁸⁰

These services are rare; most drug and alcohol treatment centres do not allow children to stay with their mothers while they get help for a substance use problem. As a result, mothers face the choice of placing their children with other family members or in government care in order to get the help they need, or delaying treatment out of fear of losing their kids. Neither is a good option for children, who can experience trauma both from being removed from their parent and from remaining in a situation where they are exposed to substance abuse.

Fear of losing their children is one of the major barriers that discourage women from accessing treatment for their addictions. Studies have shown that many pregnant women with addictions actively hide their substance use habits from their health care providers, undermining the health of both women and their fetuses.⁸¹ Fear of reporting erodes trust between patients and doctors and deters women from seeking treatment, potentially caus-

These services are rare; most drug and alcohol treatment centres do not allow children to stay with their mothers while they get help for a substance use problem.

78 Atira Women's Resource Society, Talith Koums Society and Raven's Moon Society offer addiction support and second stage housing that accommodates children for women who have already completed primary treatment. See "British Columbia residential drug and alcohol treatment programs", www.canadadrugrehab.ca/BC/British-Columbia-Residential-Alcohol-Drug-Rehab-Programs.html.

79 Ibid.

80 Rochelle Baker, "Gaps in addiction recovery put Abbotsford moms and kids at risk" *Abbotsford Times*, (19 July 2012).

81 Nancy Poole and Barbara Isaac, "Apprehensions: Barriers to treatment for substance-using mothers" (2001), www.hcip-bc.org/readings/documents/apprehensions.pdf.

ing more harm to the fetus than the drug use itself due to lack of proper nutritional advice and other prenatal care.⁸² Research indicates that allowing mothers to keep custody of their children while seeking treatment for their addictions results in more women seeking out such treatment.⁸³ In addition, women who abuse drugs may be better able to take care of their children than the foster care system, especially when they are provided with the material supports they need.⁸⁴

Also key is ensuring that women can live lives free of violence and abuse. Increasingly, it is being recognized that mothers struggling with substance use are also likely dealing with trauma.⁸⁵ In some shelters for women fleeing domestic violence, as many as 50 percent of the clients have suffered from depression and post-traumatic stress disorder. The prevalence of substance use disorders among women in these shelters has been estimated to range from 33 percent to 86 percent. In substance use treatment centres, 40 percent of women have been found to also have a major mental health disorder, 67 percent have a history of being abused, and 50 percent are or have been in an abusive relationship.⁸⁶

Research points to a disturbing connection between female substance abuse and a history of being subjected to violence.⁸⁷ A report by the American Medical Association indicated that 70 percent of the women in one substance abuse treatment program had been sexually abused as children, and 70 percent claimed to have been beaten. Other studies have found that up to 80 to 90 percent of drug or alcohol-addicted women have been victims of rape or incest. Research on alcohol use has yielded similar results, indicating that while less than 20 percent of non-abused women drink regularly while pregnant, the percentage of abused women who exhibit similar behaviour is 70 percent.

Male spousal violence against pregnant women has been identified as one of the most un-addressed sources of fetal abuse. Medical researchers have explicitly acknowledged a causal link between abuse while pregnant and subsequent substance abuse during pregnancy.⁸⁸ A study in Ontario indicated that 6.6 percent of pregnant women who received prenatal care experienced physical abuse during their pregnancy. Research in the US has found that pregnant women are more likely other women to be battered, and that the battering is usually more intense. A Canadian study similarly concluded that domestic violence often begins or is intensified during pregnancy. Data further indicates that pregnant women tend to increase their drug and alcohol use following episodes of abuse, and that women who are abused often self-medicate with alcohol, illicit drugs and prescription medicine in order to cope with the violence. Thus, substance abuse emerges as a maladaptive coping method,

Research indicates that allowing mothers to keep custody of their children while seeking treatment for their addictions results in more women seeking out such treatment.

82 Seema Mohapatra, "Unshackling addiction: A public health approach to drug use during pregnancy" (2011) 26 *Wis JL Gender & Soc'y* 241 at 256.

83 Barry M. Lester et al., "Substance use during pregnancy: Time for policy to catch up with research" (2005) 1 *Harm Reduction J* 40 at 26.

84 *Ibid.*

85 LM Najavits, RD Weiss, & SR Shaw, "The link between substance abuse and posttraumatic stress disorder in women" (1997) *The American Journal on Addiction* 273.

86 K Appleyard, LJ Berlin, KD Rosenbalm & KA Dodge, "Preventing early child maltreatment: Implications from a longitudinal study of maternal abuse history, substance use problems, and offspring victimization" (2011) 12 *Society for Prevention Research* 139.

87 This research is described in Emilia Ordolis, "Maternal substance abuse and the limits of the law: A relational challenge" (2008-2009) 46 *Alta L Rev* 119.

88 This research is also described in Ordolis, *ibid.*

and as a response to the anxiety, depression, desperation, and feelings of powerlessness associated with abuse.

The Building Bridges initiative, part of the Woman Abuse Response Program at the BC Women's Hospital and Health Centre, has identified that women who experience a combination of domestic violence, addictions and mental health problems will have difficulty finding appropriate support and services.⁸⁹ Much more investment in these programs is desperately needed. Addressing substance misuse should include a trauma-informed approach and the means to address root causes and contributors, including violence in relationships, trauma and mental health problems. State intervention in the lives of pregnant women and mothers with addiction issues cannot be only about removing children; it must also involve seeking out and helping those who need assistance with prenatal care, addiction treatment, nutrition, care of other children, and protection from a violent spouse.

RECOMMENDATIONS

- The BC government must invest in safe and affordable housing, adequate income assistance, drug and alcohol treatment and harm reduction, mental health services, and supports for victims of domestic abuse, and ensure families are aware of and can access these supports. No child should ever be removed from their family due to poverty — government support should be provided.
- The government should work with disability organizations to develop and offer free parenting courses, workshops and support groups focused on the unique needs of parents with disabilities, and should ensure that these resources are available across the province.
- When counselling is mandated in order for parents to keep or have their children returned from care, MCFD should ensure that counselling is meaningfully available to parents with disabilities. This must include providing sign language interpreters for people who are deaf or hard of hearing.
- MCFD requires significantly more funding and staff to enable it to meet its mandate to keep children safe. Child protection workers have a highly stressful job, and perform critical tasks associated with the safety of children; they require the Ministry's support to perform their role effectively.
- MCFD should provide in-person training on its "Best Practice Approaches: Child Protection and Violence Against Women" guidelines to every social worker in the province, and should audit for compliance with those practices.
- MCFD should provide its social workers with in-person training to manage parental addiction issues, and should ensure that every social worker in the province is familiar with its policies on this issue.

⁸⁹ J Cory, L Godard, A Abi-Jaoude, & L Wallace, *Building Bridges: Linking Woman Abuse, Substance Use and Mental Ill Health, Woman Abuse Response Program* (BC Women's Hospital and Health Centre, Vancouver, BC: 2010).

Social workers should advise parents that they may be eligible for legal aid as soon as there is a protection concern about their child, and they should advise parents on how to apply.

- Social workers should advise parents that they may be eligible for legal aid as soon as there is a protection concern about their child, and they should advise parents on how to apply.
- Government must invest in more detox and treatment facilities for mothers with disabilities, and should focus on investing in facilities that allow mothers and their children to remain together during the mother's treatment, provided this is in the best interests of the child. The Peardonville House Treatment Centre is an excellent model for this type of service. Programs like Sheway and Fir Square should also be expanded across the province.
- Women experiencing domestic violence should be supported by community-based victim services, transition houses, counselling, and supports that are accessible to women with disabilities, including mothers and their children.
- The Ministry of Justice should work with disability, women-serving and anti-violence organizations to develop and deliver training for professionals working in the child protection system, including lawyers, social workers, mediators, and parenting assessors, on the impact (or lack thereof) of disability on parenting capacity. Professionals working in the child protection context must be guided by the principle underlying BC's child protection legislation that families should receive the support services they need to provide a safe and nurturing environment for their children.

Family Law

Under BC's *Family Law Act*, the only relevant consideration for a judge deciding a custody dispute is the best interest of the child or children involved. While there are a number of factors the law says must be considered, assessing the best interests of the child will always be a subjective determination, and in applying this standard, decision-makers may, due to their own experiences or biases, invoke a normative and idealized image of parenting in a white, middle-class, non-disabled, heterosexual, two-parent family. A woman who deviates from this normative model of motherhood, whether due to her race, sexuality, gender identity, class, single-parent status, or disability, risks being viewed negatively regardless of her actual history of caregiving for the child.⁹⁰ Similar to the child protection context, disabled mothers may also have to fight stereotypes, myths and biases about their capacity to parent, and may face hostility and discrimination regarding their choice to parent and shaming due to their need for additional support.

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THE LAW

To determine the best interests of the child, as required under BC's family law legislation, all of the child's needs and circumstances must be considered, including their health and emotional well-being, the nature and strength of their relationships with significant people in their life, and their own views, unless it would be inappropriate to consider them. Other relevant factors include the history of the child's care, the child's need for stability, and the ability of each of the parents to exercise their parental responsibilities. The impacts of family violence must also be considered. A Court may only consider the past conduct of a parent if it is relevant to one or more of these factors, and only to the extent that it affects that factor.

⁹⁰ Susan Boyd, *Child Custody, Law and Women's Work* (Don Mills, Ontario: Oxford University Press Canada, 2002) at 13.

A mother with a mental health challenge who is involved in a custody dispute is placed in a double-bind: she is expected by her doctors and the mental health system to take every measure possible to improve her mental health, while at the same time, she may be prejudiced in her legal dispute precisely for prioritizing her own mental health needs.

As described above, the best interests of the child standard is an inherently subjective one, and thus open to influence by biases and misconceptions about the capacity of people with disabilities to parent. The American cases described above exemplify pervasive bias against disabled parents in the family courts. However, relatively little Canadian case law exists addressing custody issues for mothers with disabilities. Such cases rarely reach the courts and are often settled long before the litigation stage because of disabled women's lack of access to legal services and courts, lack of financial resources, and pervasive misconceptions—reinforced by partners, parents, social workers and lawyers—that women with disabilities are inferior parents.⁹¹

Despite the small number of reported decisions, some key issues have nonetheless emerged, particularly with respect to misconceptions about mental disability and its effect on the outcomes of Canadian custody cases. Mothers who have suffered from depression, anxiety, or other mental health problems are often considered less able to parent because of these difficulties.⁹² A mother with a mental health challenge who is involved in a custody dispute is placed in a double-bind: she is expected by her doctors and the mental health system to take every measure possible to improve her mental health, while at the same time, she may be prejudiced in her legal dispute precisely for prioritizing her own mental health needs.⁹³ Moreover, mothers with disabilities who assert their rights tend to be viewed as demanding and uncooperative, whereas men exhibiting similar behaviour may be seen as merely being concerned and involved with their children.⁹⁴

There is also a double-standard in how mothers and fathers with disabilities are treated in custody cases.⁹⁵ Societal expectations demand that mothers take care of children themselves, and if a mother arranges for various physical caregiving duties to be performed by others, she may not be seen as giving the same care as an able-bodied mother or father could, even when she is physically present and involved while the physical care is being provided. On the other hand, fathers are generally expected to rely on other sources of caregiving, such as paid child care or grandparents, because of the assumption that they will be working full-time in the paid labour force. If a father with disabilities stays home with the children, it may be seen as very positive and out-of-the-ordinary, even if he has to pay for child care to assist him.

Mothers with addictions or serious mental illnesses may not be able to parent their children while they are seeking treatment for their mental health needs. Where children are at risk as a result of a mother's disability, the state has a legitimate role to play in keeping them safe. However, any assessment of a mother's competence to parent must take account of her unique circumstances, and must not be made on the basis of discriminatory assumptions and generalizations about people with mental illness. Moreover, every effort must be made to ensure that she is provided with the supports she needs to fulfill her mothering role.

91 Ibid.

92 Ibid at 16.

93 Judith Mosoff, "A jury dressed in medical white and judicial black": Mothers with mental health histories in child welfare and custody" in Susan Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto: 1997).

94 Boyd, supra note 90 at 16.

95 Ibid.

EXPERIENCES OF MOTHERS WITH DISABILITIES

A number of high profile American cases illustrate some of the biases applied to parents with disabilities. In the 1979 case *In re Marriage of Carney*,⁹⁶ one of the most widely recognized decisions to address the custody rights of parents with disabilities, a mother of two children petitioned the courts to have a previous custody order changed because the father had sustained a spinal cord injury and was quadriplegic. The lower court held that because of the father's disability, his relationship with his children would no longer be "normal," and it granted the mother's motion to change the custody arrangement. The father appealed, and the California Supreme Court reversed the trial court's decision, stating that the father's disability did not suggest a reduced ability to be a good parent to his children. The Court felt strongly that the parent-child bond was not merely the ability to engage in physical interaction, and thus the father should not have his parental rights severed or limited simply because of his disability.

Although the higher court in *Carney* held that a parent's disability should not be a factor in determining custody, according to US researchers, this view has not been consistently enforced.⁹⁷ Many parents continue to experience discrimination in child custody and visitation cases, and published court opinions reflect an ambivalent approach to deciding custody and visitation disputes in which a parent has a disability.⁹⁸

In another American example of how the family law system treats parents with disabilities, a judge maintained that a mother with a physical disability could not parent despite psychological and occupational therapy evaluations documenting her capability.⁹⁹ He assumed that the children would function as her attendants, despite the fact that the mother was independent, there was personal assistance to meet her needs, the home was modified with adaptations, and her children did only the usual household chores. The judge raised concerns about how quickly she could get upstairs in an emergency. When her ability to get upstairs was demonstrated, the judge's next demand was to test her speed with a stopwatch.

In another American case, a war veteran and quadriplegic mother's former boyfriend filed for custody of their 10-week-old son, alleging that she was "not a fit and proper person" to care for their son and that her disability "greatly limits her ability to care for the minor, or even wake up if the minor is distressed."¹⁰⁰ In fact, the new mom had prepared extensively for motherhood by working with an occupational therapy program for expectant mothers and parents, adapting her house for parenting, securing adapted baby care equipment, and using personal assistants to help her as needed.¹⁰¹ Illustrating the bias that pervades the family law system, a lawyer who was not affiliated with the case remarked, "Certainly, I

The Court felt strongly that the parent-child bond was not merely the ability to engage in physical interaction, and thus the father should not have his parental rights severed or limited simply because of his disability.

96 598 P.2d 36 (Cal. 1979).

97 Rocking the Cradle, supra note 5.

98 Ibid.

99 The case is described in Megan Kirshbaum, Daniel Taube, and Rosalind Lasian Baer, "Parents with Disabilities: Problems in Family Court Practice," (2003) 4 *Journal of the Center for Families, Children and the Courts* 38.

100 Sara Olkon, "Disabled Mom Fighting to Keep Her Son," *Chicago Tribune* (20 December 2009), http://articles.chicagotribune.com/2009-12-20/news/0912190290_1_disabled-parents-custody-mom.

101 Through the Looking Glass, Legal Program, "Battle for the Rattle: A Soldier Mom Story of Custody Court, Disability, and Mothering," accessed December 2, 2011, <http://pwd-legalprogram.org/Battle-for-the-Rattle.html>.

sympathize with the mom, but assuming both parties are equal (in other respects), isn't the child obviously better off with the father?"¹⁰²

Poverty and Unemployment

Five participants in our study had been involved in custody disputes with their ex-partners. The most common experience these mothers reported was being unable to work because of their disability and feeling that their unemployment was held against them by the courts. The prevalence of this experience in our sample highlights the intersections between disability, poverty, and discrimination.

In the family court you are a good mother if you work, but I don't work. Due to my disability I was not able to work. I was seen as a lazy person. Sole custody was given to my ex and I was given weekend visitations. — A mother with learning disabilities who suffered trauma and depression as a result of domestic abuse

My ex was deemed healthy [and] seen as the more fit parent. A mother dealing with mental health challenges

The most common experience these mothers reported was being unable to work because of their disability and feeling that their unemployment was held against them by the courts.

Violence and Abuse

Another common theme for the women we spoke to was the prevalence of abuse and violence against the mothers by their ex-partners. One mother who had lost custody of her child to a man who had abused her expressed frustration and despair that the courts had not taken the violence seriously and did not consider the effects of the violence on her mental health. Another mother highlighted how losing custody of her child had negatively impacted her mental health and had exacerbated her challenges. Service providers also noted that the courts are not generally responsive to the realities and impacts of violence on women's health and lives:

There is a failure of the courts, lawyers, legal and child protection system to provide a trauma informed response to mothers who have been living in an abusive relationship. — Social Worker

Disabled mothers face distinct barriers to reporting the violence and fleeing their abusers. Because of the unique situation of these mothers, they have often built a very unique and adapted home environment in which to live and parent their children.¹⁰³ For example, a woman with a mobility disability may have an adapted crib that can be lowered if she uses a wheelchair, or lifts to help her raise and lower her children into the bath. A woman who is blind or low vision will memorize her home, and it will be clear of obstructions. Leaving an

¹⁰² Olkon, *supra* note 100.

¹⁰³ Jewelles Smith, "Disabled mothering: Building a safe and accessible community" (DisAbleD Women's Network), www.dawncanada.net/issues/issues/mothering/disabled-mothering/.

abusive but adapted home can take away a disabled woman's independence and may leave her vulnerable to losing custody of her children.¹⁰⁴

Although women with disabilities experience high rates of domestic violence, many transition houses are unable to accommodate their needs. In a recent survey conducted by the BC Society of Transition Houses, 71 percent of shelters were found to be accessible to women with reduced mobility. Fifty-eight percent provide specialized services for women with disabilities; fifty-one percent provide specialized services for women dealing with substance abuse, and only forty-three provide specialized services for women with mental health issues.¹⁰⁵

In another survey of transition houses nation-wide, many shelters commented that they were willing to accommodate disabled women and their children, but were restricted by finances, with several shelters reporting that funding was a huge barrier to making their spaces more accessible.¹⁰⁶ While many shelters did their best to accommodate the needs of disabled mothers and their children fleeing violence, this gap in services for vulnerable women is deeply concerning.

Many disabled women don't even try to access a transition house as they know their needs will not be met... Transition houses are simply not funded to provide accessibility to women who have disabilities. Thus with the best of intentions, the transition house doors are shut on these women. — Manager of a transition house

Parenting Assessments

Bias on the part of parenting assessors can also contribute to unjust and unequal outcomes for mothers with disabilities. In our report "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women," West Coast LEAF documented a number of concerns about bias and a failure to consider issues of violence by psychologists charged with preparing these assessments for the courts. In a survey of BC judges, sixty percent of responding judges said that they gave considerable or substantial weight to recommendations contained in the reports and see the reports as an independent source of evidence and unbiased information.¹⁰⁷ Given their importance as a tool for judges in making critical decisions about the best interests of children, it is essential that these custody and access reports be as accurate, comprehensive, unbiased, and sensitively prepared as possible.

However, a study of Ontario psychiatrists, psychologists and social workers involved in preparing these assessments suggested that many of these professionals have deeply held personal biases that influence their work, and few of them were aware of how their own

Many shelters commented that they were willing to accommodate disabled women and their children, but were restricted by finances, with several shelters reporting that funding was a huge barrier to making their spaces more accessible.

¹⁰⁴ Ibid.

¹⁰⁵ BC Society of Transition Houses, "Shelter Voices: A day in the life of BC's Transition Housing programs for women and children fleeing violence" (2013).

¹⁰⁶ Smith, *supra* note 103.

¹⁰⁷ Ministry of the Attorney General, "Judges' satisfaction with custody and access reports: A survey of BC Provincial and Supreme Court Judges" (31 March 2005).

attitudes and experiences might influence their assessments and recommendations.¹⁰⁸ One particularly troubling finding from this study was that less than one-third of assessors agreed with the statement that adults rarely lie when they say their ex-spouse has sexually assaulted or hit them. These results suggest that when a woman discloses abuse to a parenting assessor, there is a very good chance that the assessor will not believe she is telling the truth. When this disregard for her experience is reflected in the assessor's report, either by ignoring it or using it to suggest she is lying in an effort to prevent her ex-husband from seeing the child, the resulting custody and access order from the court is highly unlikely to adequately protect the mother's safety or the child's best interests.

Mothers also risk being inappropriately labelled by psychologists conducting parenting assessments, particularly when they express concerns about their children's contact with their father, or refuse to facilitate access because of how the father has treated them. In consultations for our "Troubling Assessments" report, a prominent family therapist and researcher told us: "In my private practice I have seen many abused women who have been wrongly diagnosed with mental health conditions and consequently lost custody of their children. In some cases, the abusive ex-spouse was seen as the 'alienated' and more 'stable' parent."

In a recent family law case that garnered media attention, a woman was diagnosed as having borderline personality disorder by a psychologist she had never met or interacted with.¹⁰⁹ The diagnosis was based solely on input from the woman's ex-partner, with whom she was engaged in a custody dispute. She was also accused of abusing alcohol and illegal drugs. She complained to the College of Psychologists, which concluded that the psychologist's actions did not meet its code of conduct standards, in that he had offered the court a diagnosis "without any opinion or other direct contact with her." He was ordered to write a letter of apology. It was one sentence long.

In April 2014, the BC government amended section 211 of the new *Family Law Act* to provide for the creation of regulations prescribing minimum standards for professionals who prepare custody assessments.¹¹⁰ Under the newly created s. 245.1, the Lieutenant Governor in Council may make regulations respecting these assessments and the training, experience and other qualifications and practice standards those preparing them must meet. The government has indicated that it will be consulting with the family law bar, the College of Psychologists and the College of Social Workers to develop these regulations.¹¹¹ There was no mention of the consultations involving anti-violence workers, women-serving organizations, or disability advocates.

Four of our participants had undergone parenting assessments in the course of a custody case. All four had concerns about how the assessments were prepared, but one in particular stood out for the way in which the mother's disability—multiple sclerosis—was portrayed, and the way in which her physical limitations were not accommodated:

108 PJ Caplan and J Wilson, "Assessing the child custody assessors" (1990) *Review of Family Law* 27(3) 121.

109 "Psychologist diagnoses mental illness in woman he had never met" CBC News (11 April 2014), www.cbc.ca/news/canada/british-columbia/psychologist-diagnoses-mental-illness-in-woman-he-d-never-met-1.2606212.

110 Bill 14: *The Justice Statutes Amendment Act*, s 23. The Bill received Royal Assent on 9 April 2014.

111 Debates of the Legislative Assembly (Hansard), Vol 9 No 3, 27 March 2014 (afternoon session), www.leg.bc.ca/hansard/40th2nd/20140327pm-Hansard-v9n3.htm#bill14-C

Mothers also risk being inappropriately labelled by psychologists conducting parenting assessments, particularly when they express concerns about their children's contact with their father, or refuse to facilitate access because of how the father has treated them.

I did an extensive, and I'm not exaggerating, 700 questions where you would fill the bubbles. She made me do that, and then she said that the answer wasn't what she was looking for, and so I had to do it again. I had to come to her office to do it, and I did it in a couple of hours. And my caregiver would write the bubbles right? I would give the question and she would bubble it. And she [the psychologist] said no, there should be no one helping you, so I had to redo it again. And that was 2009, almost 5 years ago and my hands worked much better, but it was so draining, because they were trying to pinpoint your personality type and all that. And so, I trusted her that she was going to assess me properly, you know? She came to my house assessed my medical equipment, my home, my personality, my relationship to my son, the caregiver's relationship. It was basically like: come in to my underwear drawer and take a look. ... We were outside and playing tic tac toe on the chalkboard, and I couldn't do it very well with my hand. And she had written all of this stuff in the report. Oh, and my medical equipment, because I have a conversion in my van, you know you push a button and the ramp comes out, and she said that that was dangerous for my son. He is 11 now, but he was six then. He knew the equipment since he was two or three. He knows all of the equipment in the house, you know? He knows all of the things and how to use them, but then it was turned around to say that my disability equipment was dangerous and that my caregivers do everything, you know? — A mother with multiple sclerosis

It wasn't done properly. She didn't interview my stepson but she interviewed all three of my kids, she didn't interview his ex-wife or any of his ex-girlfriends but she interviewed my ex-husband. I mean there was just a lot of very untrue, biased things. There were a couple things she said about him in there that were true but most of it was baloney and my lawyer called me and she said "the report came in, just ignore 99 percent of it." But to me, it still isn't right. — A cancer survivor

One participant suggested that the psychologist wanted to make it sound like her disability affected her parenting and the best interests of her child when it did not. When she followed up with her child's school principal about something the principal had apparently told the psychologist, the principal said that the comments were taken completely out of context and weren't what they had meant at all. A similar result occurred when the mother followed up with her neurologist. The neurologist told the mother that she had provided general information about the progress of her disease and how unpredictable that could be from person to person. However, the psychologist's report recommended that the child should live with his dad because the mother would "be a vegetable from her neck down" and would eventually be institutionalized. The neurologist denied that this is what had been discussed.

One participant suggested that the psychologist wanted to make it sound like her disability affected her parenting and the best interests of her child when it did not.

Access to Justice and Legal Aid

You can have the best laws but if one does not have access to justice, it does not matter. — Advocacy Service Provider

West Coast LEAF has written extensively about the crisis in access to justice in BC, particularly in family law matters.¹¹² The lack of legal aid for family law issues disproportionately impacts women, who are more likely to be economically disadvantaged by the breakdown of a marriage and are more likely to need legal assistance in these kinds of cases. Women with disabilities are even less likely to be able to afford to retain a lawyer on their own, and may be additionally marginalized and isolated due to their disability. Moreover, women with disabilities suffer high rates of domestic violence and need access to legal advice about their rights to keep themselves and their children safe. We continue to press the government for a rights-based approach to the provision of legal aid that ensures that everyone has access to the legal assistance they need to obtain fair and just outcomes.

Six participants had accessed or attempted to access legal aid. One had an excellent experience at the Justice Access Centre in Victoria; an Indigenous participant also had a good experience obtaining culturally relevant services in Vancouver:

Legal aid, it's a nonprofit organization, it's all Native orientated, traditional, culturalized, whatever situation they have anywhere from Natives, East Indians, Spanish, like they have all these resource through that. And it's a legal society where they have actual lawyers where they'll fight for you not against your situation. They won't turn around and make you feel like you have to do what they do. They'll fight for you. I think it's a great system they have. — An Aboriginal mother

The other four participants had less positive experiences. One participant was approved for legal aid, but her coverage ran out before her trial:

I never have a good experience with legal aid lawyers, you know. I think they don't solve the problem...I applied but [didn't] qualify for legal aid the second time. I had no lawyer in court and I was in a 5 day trial but it ended in 3 days as I could not take it anymore. — An immigrant mother

Another had a legal aid lawyer who did not appear at her custody hearing, again because of the insufficient number of hours allocated for services. Another participant made slightly over the income cut-off and was refused.

Interviewer: "And did you feel heard at the court?"

Participant: "No because I didn't have a lawyer. That's another thing. People should have a lawyer if they get assaulted." — A mother who experienced domestic abuse

Service providers expressed significant concerns about the lack of legal aid and its impact on women, particularly women with disabilities. They pointed out that many mothers are representing themselves in custody trials, fighting against abusive spouses and trying to keep their children safe without the benefit of legal advice or assistance.

112 See West Coast LEAF, "Legal Aid", www.westcoastleaf.org/index.php?pageID=137&parentid=29.

Service providers expressed significant concerns about the lack of legal aid and its impact on women, particularly women with disabilities. They pointed out that many mothers are representing themselves in custody trials, fighting against abusive spouses and trying to keep their children safe without the benefit of legal advice or assistance. They also spoke to the need to ensure that legal aid intake workers are well-trained to receive and process applications from women with disabilities and that accessibility needs are considered.

Access to sign language interpreters is a key aspect of access to justice for women who are deaf or hard of hearing. Women described the barriers associated with attempting to apply for legal aid without an interpreter:

Legal Services Society does not provide interpretations for the first interview. Even though their policies say that they provide interpretations, it's not offered at the critical stage of first interview. — Service Provider

Women are expected to bring their own [sign language] interpreter for the initial legal aid intake and paperwork. — Service Provider

The Legal Services Society's (LSS) Disbursements Tariff guide for legal aid lawyers states that LSS will pay for certified interpretation services of up to 10 hours per client, paid at a maximum hourly rate of \$50.¹¹³ If more than 10 hours is required, prior authorization from LSS is required before the expense will be covered.

Two deaf service providers described the challenges of accessing legal assistance without the benefit of an interpreter in their own family law cases:

I mean if I could talk I could shop around for different lawyers. And you've got a twenty minute consultation appointment, for hearing people that's fine but with me being reliant on an interpreter I have to pay for an interpreter and of course for deaf people the process is a bit longer, it's like a two hour appointment not twenty minutes, which means more costs for the lawyer. It's been eight years of separation and still no divorce because I've been putting it off for such a long time just because of all this. Generally for a woman getting a divorce is difficult on its own, but to add deafness to that makes it even more difficult. I really commend [deaf] women who are able to go through the family law system and get a divorce; I really don't know how they do it.

For a deaf person, hiring a lawyer is a burden because we also have to hire an interpreter. At this time, we really rely on interpreters who are willing to volunteer. Using an interpreter helps tremendously. However when the lawyer says they have half hour consultation time, it adds to the stress of watching the time and expressing yourself. There is a lag of time between expressing and relaying the information to the person... A non-disabled person does not pay for two things, just for the lawyer. What I am saying is that there should be a 'grace' time for those who use sign language interpreters.

These same challenges exist for women with communication barriers caused by a disability's impact on their speech.

“For a deaf person, hiring a lawyer is a burden because we also have to hire an interpreter. At this time, we really rely on interpreters who are willing to volunteer.”

¹¹³ Legal Services Society Disbursements Tariff (April 2012).

For a mother who has a dexterity disability, learning disability, cerebral palsy or brain trauma, as well as women with low vision or who are blind, filling out a form by hand is an all but impossible task.

A deaf participant described the impact of not having an interpreter in a child protection matter:

I wasn't provided an interpreter. And then the court case was just held up and we weren't able to go and it's not the social workers fault either. The social worker never had a deaf person before as a client so it was her first experience. MCFD didn't know how to deal with a deaf person either. So I ended up being without an interpreter as well and I kept trying to tell them that that was a requirement for me.

A deaf participant who is preparing to represent herself in a family law hearing pointed out that videos available on the BC Supreme Court website providing legal information for people representing themselves are not close-captioned or subtitled, making it impossible for her to access this important information.¹¹⁴

Several service providers described the challenges they see for their clients with disabilities accessing the court system:

Women generally have a difficult time navigating the legal system. These challenges multiply for women with other disabilities, including cognitive, mobility etc.

Courts are insensitive to the needs of disabled folks; the system is built around able bodied people.

An additional barrier for women with disabilities attempting to access the courts is the complexity and inaccessibility of court forms. In fact, these barriers exist for a wide range of resources and programs, including social assistance, applying for subsidized housing, and so forth, all of which require applicants to fill out lengthy forms. For a mother who has a dexterity disability, learning disability, cerebral palsy or brain trauma, as well as women with low vision or who are blind, filling out a form by hand is an all but impossible task.¹¹⁵ Court forms, as well as application forms for other government services and programs, must be offered in alternative formats that are accessible to women with disabilities. Often this is as simple as offering online writeable application forms that are also compatible with adapted computer programs.¹¹⁶

114 See Supreme Court of BC, "Court tips for parents", www.supremecourtbc.ca/family/tips-for-parents.

115 Smith, supra note 103.

116 Ibid.

RECOMMENDATIONS

- As in the child protection context, economic support for mothers with disabilities is crucial. Governments must invest in services and supports that meet the particular needs of mothers with disabilities. To flee an abusive situation, women need access to safe, affordable and accessible housing, income assistance that meets their needs, and affordable child care, among other supports.
- The government should invest in improving the accessibility of transition houses for women with disabilities fleeing violence, and in building new ones. Transition houses need adequate resources to enable them to meet their duty to accommodate women with disabilities.
- Government should implement stronger regulation of parenting assessors, as recommended in West Coast LEAF's 2012 "Troubling Assessments" report. In particular, government should mandate a province-wide training for all professionals who prepare custody and access reports, developed in conjunction with anti-violence, women-serving and disability organizations, and should pass regulations requiring parenting assessors to consider and report on issues of family violence in their assessments. These regulations should also be developed in consultation with anti-violence, women-serving and disability organizations.
- Government should invest resources in expanding legal aid coverage to a broader range of family law problems, and should raise the income cut-off so that the working poor can access legal advice and representation.
- Legal information must be made available in formats accessible to people with disabilities, including Braille, large print, and close-captioned video.
- Deaf women must have access to a government-funded sign language interpreter at their intake assessment for legal aid, and, if they are approved, at their first and all subsequent meetings with their legal aid lawyer. Sign language interpreters should be well-versed in legal terminology to provide quality service to deaf clients. Government should also ensure that deaf women have access to interpreter services when they attend court.
- All court forms and application forms for other government services must be made accessible to people who have disabilities that prevent them from filling out the forms by hand.
- The Ministry of Justice should work with disability, women-serving and anti-violence organizations to develop and deliver training for professionals working in the family law system, including lawyers, social workers, mediators, arbitrators, parenting coordinators, and parenting assessors, on the impact (or lack thereof) of disability on the capacity to parent.

Legal information must be made available in formats accessible to people with disabilities, including Braille, large print, and close-captioned video.

Sexual and Reproductive Rights

In addition to these physical barriers, discriminatory attitudes among health care professionals, misconceptions about disabled women's sexuality and stereotypes about their ability to fulfill a parenting role undermine equal access to reproductive health care for women with disabilities.

Women with disabilities experience a number of significant barriers in accessing sexual and reproductive health services. Physicians often lack training and knowledge about sexuality and disability; moreover, their facilities and equipment may be inaccessible to women with certain disabilities, or their services may be provided in a manner that excludes a segment of the disabled population.¹¹⁷ One author describes how “many disabled women can’t access standard diagnostic equipment. We can’t stand before scanners, climb onto high tables, or wrench our legs into stirrups. Consequently, we are less likely to have mammograms and regular Pap tests.”¹¹⁸

In addition to these physical barriers, discriminatory attitudes among health care professionals, misconceptions about disabled women's sexuality and stereotypes about their ability to fulfill a parenting role undermine equal access to reproductive health care for women with disabilities. Women with disabilities are often seen as asexual and unable to procreate; hence, the sexual and reproductive aspects of their health care may be neglected.¹¹⁹ Some of the pervasive myths and biases that women with disabilities face include judgments about women who choose to have children despite the risk of passing along their disability to their child; assumptions that they are incapable of nurturing, caring for or disciplining children; the belief that mobility is essential for child-rearing; and the belief that a mother's disability would be an unfair hardship for her child.¹²⁰

Health care professionals and others routinely express the view that a woman with a disability should not get pregnant or continue a pregnancy if there is a risk that the child could inherit the disability, and some disabled women report being offered a termination of

117 For example in *Eldridge*, supra note 27, the Court held delivering health care services to deaf patients without providing sign language interpretation services is a violation of constitutional equality guarantees.

118 L Hershey, “Rights, realities and issues for women with disabilities” in R Morgan (ed) *Sisterhood is forever: The women's anthology for the millennium* (New York: Washington Square Press) at 233.

119 Roxanne Mykitiuk and Ena Chadha, “Women's sexual, reproductive and parenting rights” in Marcia H Rioux, Lee Ann Bassler & Melinda Jones (eds) *Critical Perspectives in Human Rights and Disability* (Leiden: BRILL, 2011) at 182.

120 L Hershey, “Women with disabilities: Health, reproduction and sexuality”, in C Kramarae and D Spender (eds) *International encyclopedia of women: Global women's issues and knowledge* (Scarborough: Routledge Press, 2000).

their pregnancy before any assessment of their desires or abilities.¹²¹ These discriminatory assumptions and judgments undermine women's sense of self-worth and intensify their insecurities about motherhood.¹²²

THE LAW

International human rights law protects "the right of every person to the highest attainable standard of physical and mental health."¹²³ This includes the right to "a system of health protection which provides for equality of opportunity for people to enjoy the highest attainable level of health."¹²⁴ Specific to women's reproductive rights, the *Convention on the Elimination of all forms of Discrimination Against Women* ("CEDAW"), to which Canada is a party, requires States Parties to guarantee women the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."¹²⁵ The same right is specifically recognized for people with disabilities in Article 23(1)(b) of the *UN Convention on the Rights of Persons with Disabilities*, which Canada ratified in March, 2010.

The *Canada Health Act* states that the "primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."¹²⁶

The Supreme Court of Canada has repeatedly affirmed the equality rights of people with disabilities and their right to equal access to health care. The Court has stated that public officials must be sensitive to differences in the actual needs of vulnerable groups in order to protect their equality rights, and government officials have a positive duty to accommodate those differences.¹²⁷ The Court has also said that accommodating disability is a highly individualized process, which must be sensitive to the unique needs and interests of individuals with disabilities in order to respect and promote their dignity, integrity and empowerment.¹²⁸ The Court has acknowledged that discrimination occurs when people with disabilities do not benefit equally from services offered to the non-disabled.¹²⁹

Consistent with equality and human rights law, the Canadian Medical Association's Code of Ethics imposes a duty on physicians not to discriminate against a patient in providing medical services. While a physician can refuse to accept a patient for legitimate reasons, they

The Court has stated that public officials must be sensitive to differences in the actual needs of vulnerable groups in order to protect their equality rights, and government officials have a positive duty to accommodate those differences.

121 EM Carty, "Disability and childbirth: Meeting the challenges" (1998) 159(4) *Canadian Medical Association Journal* 363.

122 JG Rogers, "Pregnancy and physical disabilities" in DM Krostoski, MA Nosek & MA Turk (eds) *Women with physical disabilities: Achieving and maintaining health and well-being* (Toronto: Paul H. Brooks Publishing, 1996).

123 *International Covenant on Economic, Social and Cultural Rights*, Article 12.

124 Committee on Economic, Social and Cultural Rights, General Comment No 14 at para 8.

125 Article 16(1)(e),

126 RS 1985, c C-6, s 3.

127 See *Eaton*, supra note 32; *Eldridge*, supra note 27; *Grismer*, supra note 28.

128 *Nova Scotia (Workers Compensation Board) v Martin*, [2003] 2 SCR 504.

129 *Eldridge*, supra note 27.

must not discriminate against any patient on prohibited grounds including age, gender, medical condition, or mental or physical disability.¹³⁰

These laws and policies confirm the right of women with disabilities to access the services and support of health care professionals when they are, or wish to become, pregnant.¹³¹ However, research indicates that discrimination and inequality persist for mothers or prospective mothers with disabilities. In this section, we overview four areas of concern: access to sexual health information, contraception, obstetrical care, and assisted reproduction.

EXPERIENCES OF MOTHERS WITH DISABILITIES

Several of our participants described discriminatory treatment and barriers to accessing sexual and reproductive health care. One of our participants who experienced a miscarriage was treated in a prejudiced and insensitive manner by a health professional:

[She told] me it was a good thing that I didn't carry to term because I wouldn't have been able to take care of it myself. ... I was never supported to become a mother. They saw the disability first, not the human. — A mother with mobility and speech barriers

Another experienced similar discriminatory treatment:

When I returned to Canada, I was dealing with the doctor during my pregnancy, and she was trying to get me to have an abortion. She asked me multiple times: 'this is your last chance, you should get an abortion.' — A disabled mother of two

Sex Education and Sexual Health

Comprehensive and science-based sex education is an essential tool for promoting sexual health, preventing disease and unwanted pregnancy, and protecting against sexual abuse and exploitation. Numerous UN committees, including the Committee on the Elimination of Discrimination Against Women, have urged governments to prioritize sexual and reproductive health education and to systematize sex education in schools.¹³² Unfortunately, access to science-based sex education remains uneven across Canada.¹³³ The shortcomings in sex education are particularly grave for the disability community due to an erroneous but commonly held misperception that sex education is inappropriate and unnecessary for people with disabilities.¹³⁴ A World Health Organization (WHO) document suggests that

130 Canadian Medical Association, *Code of Ethics* (2004) cl 17.

131 Mykitiuk and Chadha, *supra* note 119 at 186.

132 See the Centre for Reproductive Rights, "Bringing rights to bear: An advocates' guide to the work of the treaty monitoring bodies on reproductive and sexual rights" (New York: Centre for Reproductive Rights, 2002).

133 Paula Simons, "Christian sex ed in public schools infringes on human rights, Edmonton mother and daughter say in complaint" *National Post* (10 July 2014), <http://news.nationalpost.com/2014/07/10/christian-sex-ed-in-public-schools-infringes-on-human-rights-edmonton-mother-and-daughter-say-in-complaint/>

134 Mykitiuk and Ena Chadha, *supra* note 119 at 164. The authors note that general cultural attitudes characterize the sexuality of people with disabilities as "inappropriate" or "non-existent", and that people with disabilities are often viewed as either uninterested or incapable of sexual expression.

society, families and educational institutions tend to openly “ignore or repress” the needs and self-realization of youth with disabilities regarding their sexuality, and that sexual education for disabled adolescents remains in “nobody’s land.”¹³⁵

Not only does the disabled population require the same basic sexual health information and skills development opportunities as the non-disabled population, but people with physical or developmental disabilities also require information and skills related to sexuality that are specific to their disability. The importance of access to sex education for women and girls with disabilities is particularly acute in light of their disproportionate experience of physical and sexual abuse. Canadian researchers have concluded that more than 70 percent of women with disabilities have been victims of sexual assaults at some time in their lives.¹³⁶ A WHO report notes that factors such as “increased physical vulnerability, the need for attendant care, life in institutions, and the almost universal belief that disabled people cannot be a reliable witness on their own behalf make them targets for predators.”¹³⁷ Research indicates that women with developmental disabilities are extremely vulnerable to sexual abuse, and that women who are unable to have children due to sterilization or birth control use may be at higher risk for sexual abuse if perpetrators know their actions will not be detected through a pregnancy.¹³⁸

A key component of preventing sexual abuse is sex education for women and girls. Unfortunately, however, sex education is insufficiently accessible to women and girls with disabilities. This violates their right to equal access to education, undermines their right to make informed choices about their health and bodies, and renders them more vulnerable to sexual abuse.¹³⁹ Women with disabilities must be guaranteed equal access to sex education, including education and information that is specific to their particular needs. Family members, health care providers, and service professionals also need comprehensive information about the sexual health needs of the disability community.

Rule 9(2) of the UN’s Standard Rules on the Equalization of Opportunities for Persons with Disabilities (the “Standard Rules”) states that “persons with disabilities must have the same access as others to family planning methods as well as to information in accessible form on the sexual functioning of their bodies.” Sex education as it is currently delivered in Canada falls short of providing women and girls with disabilities with the educational resources they need. Some barriers include:

- Educational segregation. Sex education classes are often delivered as a component of physical education in elementary and high schools. Young women and girls who are not included in these classes or who are in segregated educational settings may not receive this information.¹⁴⁰

Not only does the disabled population require the same basic sexual health information and skills development opportunities as the non-disabled population, but people with physical or developmental disabilities also require information and skills related to sexuality that are specific to their disability.

135 F Montero, “Sexual and reproductive health for persons with disabilities” (Switzerland: Geneva Foundation for Medical Education and Research), www.gfmer.ch/400_Publications_En.htm.

136 See RA Elman, “Confronting the sexual abuse of women with disabilities” (Harrisburg: National Resource Centre on Domestic Violence, 2005), citing L Stimpson and MC Best, “Courage above all: Sexual assault against women with disabilities” (Toronto: DisAbleD Women’s Network, 1991).

137 Montero, *supra* note 135 at 26.

138 LA Dotson et al., “People tell me I can’t have sex: Women with disabilities share their personal perspectives on health care, sexuality, and reproductive rights” (2003) 26 *Women and Therapy* 195.

139 Mykitiuk and Chadha, *supra* note 119.

140 *Ibid* at 165.

- Failure to address the needs of people with disabilities. Generic teaching materials based on the functioning of non-disabled bodies may not meet the needs of people with disabilities to understand the specific sexual functioning of their own bodies.
- Inaccessible delivery. People with vision impairment, developmental disabilities, or learning disabilities may need information presented in alternative formats or presentation styles (e.g. Braille, simplified diagrams, etc.) that are not readily available.

With respect to adult women with disabilities, very little Canadian research exists examining the nature and extent of sexual education available. In one 2004 report studying issues of sexuality and abuse among people with severe speech impediments, most participants reported that they received no sex education from their parents, at school, or from health care professionals, and expressed “an overwhelming need to learn about and discuss aspects of healthy sexuality.”¹⁴¹ The report found that the lack of information compounded the participants’ communication difficulties and heightened their exposure to sexual abuse. The report also found that many non-disabled people hold significant misconceptions about the sexuality of people with speech disorders and that, to promote healthy sexuality and prevent abuse, family and service providers must also be educated about the sexual needs of people with disabilities.

Women with disabilities do not have the same level of access to sexual health care as non-disabled women do, and face additional barriers to accessing sexual health care including time constraints, costs, lack of child care, language barriers and cultural differences.

Women with disabilities may also face barriers in having their sexual health needs met. Women with disabilities do not have the same level of access to sexual health care as non-disabled women do, and face additional barriers to accessing sexual health care including time constraints, costs, lack of child care, language barriers and cultural differences.¹⁴² Moreover, women with disabilities also face a lack of accessible examination tables in physicians’ offices, and they experience particular challenges in finding a setting that feels safe.

In response to these needs, BC Women’s Hospital in Vancouver has opened the Access Clinic to offer cervical and breast cancer screening to women with disabilities who cannot have the exams done in their doctor’s office. The clinic offers women with a wide range of disabilities the opportunity to access a well-designed, well-equipped, safe environment for gynecological health care, sometimes for the first time in their lives. New patients can self-refer or be referred to the clinic by their physicians or health care providers. Staff are knowledgeable about disability issues, the examining room is equipped with an adjustable examining table, including lift supports, and women have the option to arrange for their own health care provider to perform the screening at the clinic. This is a commendable model of sexual health service delivery that should be replicated across the province.

141 B Collier et al., “Reducing the risk of sexual abuse for people who use augmentative communication: A community response” (Toronto: The Speak Up Project, 2004), www.aacsafeguarding.ca/SUPSummaryReport.pdf.

142 BC Women’s Hospital and Health Centre et al., “Public Service Announcement: Access for Women with Disabilities” (2 April 2007).

Contraception

Women with disabilities can also face difficulties accessing accurate and relevant information about contraception and gaining access to contraceptive devices. While the Society of Obstetricians and Gynaecologists of Canada (“SOGC”) has developed a set of guidelines for contraception which specifically refer to counselling and treatment for women with mental and intellectual disabilities, they do not address the needs of women with other forms of disabilities.¹⁴³ This lack of information and access undermines the ability of women with disabilities to control their fertility, and infringes their equality and security rights.

Medical professionals may also lack information on contraception specific to women with particular disabilities. The impacts of hormonal contraceptives on underlying disabilities or their interactions with certain forms of medication, for example, have not been well-studied.¹⁴⁴ More research is required to establish a better understanding of appropriate contraceptive options for women with disabilities.

Contraception can be expensive, and it is not covered by MSP. An intra-uterine device (“IUD”), for example, can cost up to \$400.¹⁴⁵ For low-income women, many forms of contraception will be simply too expensive for them to access. In March 2010, the BC government eliminated coverage for contraceptive devices for women on disability assistance.¹⁴⁶ While coverage for other medically necessary devices was reinstated in 2012, coverage for contraceptive devices was not.¹⁴⁷ As West Coast LEAF said in a letter to the Premier and Minister of Housing and Social Development at the time: “The government has an obligation to protect its most vulnerable citizens. By failing to adequately fund these services, the government is choosing to place immediate (and minimal) monetary savings over the rights, safety and dignity of vulnerable women and girls.”¹⁴⁸

West Coast LEAF has previously called for free contraception for all people in BC.¹⁴⁹ Free and widely available contraceptives (condoms, birth control pills, emergency contraception, intra-uterine devices, etc.) would reduce unplanned pregnancies, save government money, and advance women’s equality rights, particularly for women living in poverty. In June 2010, long-standing non-profit provider of sexual health services Options for Sexual Health proposed a five-year pilot project to implement a universal contraceptives coverage program in BC.¹⁵⁰ Publicly funded access to contraception would reduce public expenditure, positively impact the private sector, and promote equality for BC residents. The researchers

Medical professionals may also lack information on contraception specific to women with particular disabilities. The impacts of hormonal contraceptives on underlying disabilities or their interactions with certain forms of medication, for example, have not been well-studied.

143 Society of Obstetricians and Gynaecologists of Canada, “Canadian contraception consensus: Clinical Practice Guidelines No. 143”, <http://sogc.org/clinical-practice-guidelines/>.

144 Mykitiuk and Chadha, *supra* note 119.

145 See Everywoman’s Health Centre, “Birth Control”, <http://everywomanshealthcentre.ca/birth-control/>

146 West Coast LEAF, “Disability funding cuts” (March 2010), <http://westcoastleaf.org/index.php?pageID=185&parentid=29>.

147 BC Government Newsroom, “BC government restores medically necessary equipment and supplies” (3 July 2012), www.newsroom.gov.bc.ca/2012/07/bc-government-restores-medically-necessary-equipment-and-supplies.html.

148 Online: <http://westcoastleaf.org/index.php?pageID=185&parentid=29>.

149 West Coast LEAF, “Position paper on access to abortion and contraception” (March 2013), www.westcoastleaf.org/userfiles/file/Position%20Paper%20abortion%20and%20contraception%202013.pdf.

150 Options for Sexual Health, “Universal Access to Publicly Funded Contraception in British Columbia” (updated June 28, 2010).

estimate that the total economic impact of a publicly funded contraception plan would be at least \$95 million a year. We reiterate our support for this plan.

When they are prescribed contraceptives, such as birth control pills and Depo Provera injections, women with disabilities report that they receive insufficient explanation from their doctors about how to use the contraceptives, their side effects, and available alternatives.¹⁵¹ Some disabled women report that they were unaware of what they were using, or even that they were using contraception at all.¹⁵² For women with disabilities, this “serves to perpetuate a lack of control over reproductive choices just as forced sterilization did in the past.”¹⁵³ One researcher describes how women with disabilities are often given Depo Provera, a form of birth control administered by injection that stops menstruation, without their consent or without being informed of its possible harmful side effects.¹⁵⁴ These can include abdominal discomfort, depression, blood clotting problems, and suppression of sexual drive. Depo Provera may also increase the severity and/or frequency of epileptic seizures, vision impairments, diabetes, and limb pain, which is an important consideration for women with such disabilities.¹⁵⁵

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While non-therapeutic and non-consensual surgical sterilization of disabled women was rejected by the Supreme Court of Canada almost 30 years ago as a “grave intrusion on a person’s rights” that could never be justified,¹⁵⁶ many of the same attitudes and prejudices that influenced past sterilization practices remain. In most cases, these attitudes reflect concerns about the impact of a pregnancy on the disabled woman and her family—that she will be unable to manage her own fertility to prevent pregnancy, or, especially in an institutional setting, that her vulnerability will make her a target of sexual abuse that will result in pregnancy.¹⁵⁷

These are real and legitimate concerns. Recently, a woman diagnosed with schizophrenia and deemed mentally unfit to stand trial in the death of her mother became pregnant while living in a secure forensic unit in an Alberta hospital.¹⁵⁸ While it is unclear whether she was impregnated by another patient or a caregiver, the case raises serious questions about the security of vulnerable women in care. It also raises the issue of capacity to consent; a medical ethics specialist pointed out that a severely delusional schizophrenic could not provide informed consent to sex.¹⁵⁹ Protecting disabled women from sexual abuse in care is the responsibility of the institutions in which they reside. The answer to concerns about the increased vulnerability of women in care is not to deprive them of their reproductive autonomy and rights “for their own good.” Like all women, women with disabilities have the

151 Dotson et al., *supra* note 138 at 198.

152 *Ibid.*

153 *Ibid.*

154 Carol Collins, “Reproductive Technologies for Women with Physical Disabilities” (1999) 17(1) *Sexuality and Disability* 299.

155 *Ibid.*

156 *E (Mrs) v Eve*, [1986] 2 SCR 388 at para 86. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of ‘mental defectives’: *The Sexual Sterilization Act*, RSA 1970, c 341, repealed by SA 1972, c 87; *Sexual Sterilization Act*, RSBC 1960, c 353, s 5(1), repealed by SBC 1973, c 79.

157 Mykitiuk and Chadha, *supra* note 119 at 185.

158 Janice Johnson, “Kirsten Lamb pregnancy must be explained: ethics specialist” *CBC News* (12 September 2014), www.cbc.ca/news/canada/edmonton/kirsten-lamb-pregnancy-must-be-explained-ethics-specialist-1.2764061.

159 *Ibid.*

right to make informed reproductive decisions for themselves, and have a right to adequate information to enable them to do so.

Well when I was in the hospital and when I was pregnant, there was a social worker that came and she was talking to me. And she really...yeah, she was not happy for me. She was, sort of like, thinking 'Are you really thinking of your child.' Like, 'I think it would be best for your child if you gave the child up.' And I thought, 'I just delivered a child, I'm lying in bed, and you're telling me this?' I was devastated. — Participant with Cerebral Palsy

Obstetrical Care

There is a lack of knowledge and research about the specific obstetrical issues related to pregnancy and birth for women with disabilities.¹⁶⁰ While the Canadian Medical Association and SOGC have established guidelines for obstetrical care, these guidelines do not address the unique and particular needs of women with disabilities.¹⁶¹ While women with disabilities share the needs and concerns of all prospective mothers, they may also have specific needs and concerns as a result of their disability. The failure to address disabled women's particular obstetrical care needs reinforces stereotypical and discriminatory assumptions about the appropriateness of their becoming pregnant and their capacity to do so, and denies them substantive equality in health services.

Physicians and others involved in providing health care to pregnant women need better information about the individual needs and implications of pregnancy for women with disabilities. The particular risks of pregnancy for women with disabilities, the interactions between a pregnancy and a disability, and the accommodations necessary to make care accessible and supportive for women with disabilities all require further research.¹⁶²

It would have been nice if you know a nurse had come in, or somebody came in and said ok, let's try this, how are you going to pick the baby up, how are you going to carry the baby, how are you going to get the baby in and out of the car. ...I just figured it all out myself. And at the time, for me, I could not find any support groups for disabled women. So when I did go, talk to people, counseling, I was always the only disabled woman. — A mother with limited mobility

The failure to address disabled women's particular obstetrical care needs reinforces stereotypical and discriminatory assumptions about the appropriateness of their becoming pregnant and their capacity to do so, and denies them substantive equality in health services.

Assisted Reproduction

Although most disabilities do not directly interfere with fertility, many women with disabilities have difficulty becoming pregnant.¹⁶³ While we did not have an opportunity to interview any women seeking medical assistance to become pregnant, research reveals that

¹⁶⁰ Carty, supra note 121 at 367.

¹⁶¹ Society of Obstetricians and Gynaecologists of Canada, "Healthy beginnings: Guidelines for care during pregnancy and childbirth" (Ottawa: SOGC, 2000).

¹⁶² Mykitiuk and Chadha, supra note 119 at 188.

¹⁶³ Rosemary Basson, "Sexual health of women with disabilities" (1998) 159 CMAJ 359.

One researcher describes how a woman who sought motherhood through donor insemination had to write a ten-page essay on how she would take care of her baby at different stages because she was single and had a disability.

many women with disabilities have difficulty finding a specialist who is willing to help them achieve a pregnancy.¹⁶⁴ One researcher describes how a woman who sought motherhood through donor insemination had to write a ten-page essay on how she would take care of her baby at different stages because she was single and had a disability. The women without a disability were not required to do this.¹⁶⁵ In Colorado, a blind woman filed a lawsuit after being denied access to assisted reproductive technologies.¹⁶⁶ According to the fertility clinic, she posed a “direct threat” to the safety of her yet-to-be-conceived baby. Her appeal of the clinic’s decision was denied by the 10th Circuit Court of Appeals in an unreported decision; however, she found another clinic willing to provide her with fertility treatment, and she now has a daughter.

We found no reported Canadian cases in which a person with a disability challenged a clinic’s refusal to provide them with fertility treatment. However, US disability researchers suggest that many prospective parents with disabilities face significant, and sometimes insurmountable, barriers to accessing assisted reproductive technologies (ARTs).¹⁶⁷ They claim that access to ART is often impeded by discriminatory practices against people with disabilities, as well as the high cost of treatment and lack of insurance coverage. There is little reason to think the situation is different in Canada. Assisted reproductive technologies are not deemed medically necessary in BC, and are therefore not covered by the province’s Medical Services Plan. Patients must bear the costs of assisted reproductive services and all required fertility drugs and hormones. Few women with disabilities will have the financial resources to assume such costs, further limiting their access to these services.

In Canada, the *Assisted Human Reproduction Act*¹⁶⁸ (“AHRA”) regulates the use of assisted reproductive technologies. It opens with a declaration of principles, a number of which are particularly relevant to women with disabilities:

- The health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
- The benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
- While all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;

164 Ibid.

165 Collins, *supra* note 154 at 301.

166 See Colorado Cross-Disability Coalition, “Rocky Mountain Women’s Health Care”, www.ccdconline.org/legal-case/07-28-2009/rocky-mountain-womens-health-care.

167 Rocking the Cradle, *supra* note 5 at 205.

168 SC 2004, c 2.

- Persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
- Human individuality and diversity, and the integrity of the human genome, must be preserved and protected.

As part of the process of drafting this legislation, the Parliamentary Standing Committee on Health recommended the inclusion of a specific principle regarding people with disabilities:

*Persons with disabilities can lead full and satisfying lives and enrich the lives of those around them.*¹⁶⁹

However, this principle did not make it into the final version of the AHRA.

Despite the absence of a specific principle pertaining to disability, almost all of the principles set out in the AHRA are relevant to women with disabilities. The protection of human individuality and diversity and the need to promote human dignity and rights in the use of reproductive technologies are principles that women with disabilities could rely on in seeking access to reproductive technologies. Clearly, the rights of children must be prioritized, and this focus on the best interests of children must be based on evidence, and not on misconceptions about the impact of a woman's disability on her potential children.¹⁷⁰ Unfortunately, beyond the statement of principles, the AHRA offers little in the way of guidance in applying them, and they have yet to be interpreted by the courts.

Large tracts of the AHRA were struck down in the *Reference re Assisted Human Reproduction Act*¹⁷¹ — a constitutional challenge on federalism grounds — including the sections establishing a licensing scheme, which was to be supported by regulations. Licensing regulations may well have addressed issues related to access to assisted reproductive technologies, including concerns about biased screening practices. It is now up to the provinces to regulate assisted reproductive technologies. To date, only Québec has done so.¹⁷²

The issue of equitable access to ARTs has been on the table since the public and political conversation about these technologies began in the late 1980s. In 1989, the Government of Canada established the Royal Commission on New Reproductive Technologies and gave it a mandate to examine, among other things, the “status and rights of people using or contributing to reproductive services, such as access to procedures, ‘rights’ to parenthood... and the impact of these services on all concerned parties, particularly the children.”¹⁷³ The Commission heard numerous concerns about access to basic health services and the new technologies. The Commission reported that “there were concerns throughout the country that access to new reproductive technologies is easier for affluent white couples, and that

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169 House of Commons Standing Committee on Health, *Assisted Human Reproduction: Building Families* (2001), www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032041&Language=E&Mode=1&Parl=37&Ses=1.

170 Mykitiuk and Chadha, *supra* note 119 at 189.

171 2010 SCC 61.

172 Juliet Guichon, Ian Mitchell and Christopher Doig, “Assisted human reproduction in common law Canada after the Supreme Court of Canada Reference: Moving beyond regulation by Colleges of Physicians and Surgeons” (2013) 25 *CJWL* 315.

173 Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, (Ottawa: Minister of Government Services Canada, 1993) 3.

minority or low-income people are seen as less deserving of access.¹⁷⁴ A submission from the Women's Network in PEI, for example, noted that existing biases within the medical establishment, which is predominantly male, white, middle class, and heterosexual, determine how new reproductive technologies are applied, and women with disabilities, poor women, single women, and lesbians do not conform to stereotypical notions of what a makes a "good mother," undermining their access to the technologies.¹⁷⁵

Regarding the impact of reproductive technologies on people with disabilities, the Commission noted:

For women with disabilities, new reproductive technologies raise two main concerns: access to services, and the effects of prenatal diagnosis on society's attitudes toward disability. Many women with disabilities have the same desire to bear children as others and argue that they should have equal access to technologies where they are provided. Indeed, the very nature of some disabilities may mean that women will require assistance in order to have children. Thus, they said, disability should not be a factor used to screen out potential candidates for services involving new reproductive technologies.

Indeed, the very nature of some disabilities may mean that women will require assistance in order to have children. Thus, they said, disability should not be a factor used to screen out potential candidates for services involving new reproductive technologies.

Regarding prenatal diagnosis, the Commission reported that people with disabilities "think the use of prenatal genetic diagnosis to identify fetuses with anomalies, possibly leading to abortion, creates a dangerous environment for people with disabilities. As testing becomes more common, will parents face societal disapproval if they knowingly bring a child with disabilities into the world?"¹⁷⁶

The AHRA prohibits pre-implantation genetic diagnosis ("PGD") for sex selection, except to identify a sex-linked disorder, but is silent on the use of PGD for other purposes. Proscribing one use of reproductive technology implicitly allows use of the technology for other purposes, including testing for and aborting fetuses with genetic markers for certain disabilities and disorders.¹⁷⁷ Researchers and disability advocates worry that women with disabilities in particular may feel pressure to make use of reproductive services for these ends.¹⁷⁸

While the possibility of using reproductive technologies to select *out* genetic disabilities is generally met with mainstream approval, the possibility that parents would purposely choose to *have* a disabled child tends to receive a very different response. When two lesbian women gave birth to their second deaf child, conceived via artificial insemination using donor sperm selected specifically to increase the likelihood that the child would be born deaf like his mothers and sister, the child's conception and birth were met with pity and abhorrence by the international media.¹⁷⁹ The reaction seemed to stem from a societal view of disability as a misfortune, bad luck, and a tragedy to be avoided.¹⁸⁰ However, the child's

174 Ibid at 38-39.

175 Ibid at 39.

176 Ibid at 44-45.

177 Mykitiuk and Chadha, *supra* note 119 at 189.

178 Judith Mosoff, "Reproductive technology and disability: Searching for the rights and wrongs in explanation" (1993) 16 Dalhousie LJ 98.

179 Estair Van Wagner, "Equal choice, equal benefit: Gendered disability and the regulation of assisted human reproduction in Canada" (2008) 20 Can J Women & L 231.

180 Ibid.

parents do not see deafness as a disability, but as a cultural identity, which they take pride in sharing with their children.

Since then, commentary in both the media and academia has grappled with the ethics of choosing to have a child with a disability. A 2008 study found that 3 percent of clinics offering in vitro fertilization or PGD in the US had used the technology to select for a disability.¹⁸¹ A UK couple seeking to select an embryo for the presence of deafness launched an ultimately unsuccessful campaign against a clause of the draft *Human Fertilization and Embryology Bill*, which states that embryos known to have a genetic abnormality “with a significant risk for transmitting serious mental or physical disability, serious illness, or any other serious medical condition...must not be preferred to those that are not known to have such an abnormality.”¹⁸² The implications of the clause for the deaf community and the possibility of selecting for a deaf child in the UK remain unclear. While no similar provision exists in Canadian law, one legal scholar argues that any such provision would violate the equality guarantees of Canada’s *Charter of Rights and Freedoms* due to the unequal and discriminatory impact it would have on disabled women and their reproductive choices.¹⁸³

The Royal Commission on New Reproductive Technologies also considered access to in vitro fertilization (“IVF”) treatment specifically, noting that one set of potential barriers was the criteria used by the clinics themselves to refuse treatment. The Commission found that possible reasons for refusing treatment varied from clinic to clinic. While some criteria may have been appropriate (age, duration of infertility), other reasons bore no relation to the likelihood of having a child. The Commission cited a research survey conducted in 1991 of possible or probable reasons to refuse a patient for IVF treatment. Out of the 11 teaching hospitals and five private clinics surveyed, three of the hospitals and two of the clinics cited physical disability as a possible or probable reason for denying IVF treatment; eight teaching hospitals and three private clinics cited doubts about parenting ability as a probable or possible reason; five teaching hospitals and three private clinics cited psychological immaturity as a possible or probable reason; and two teaching hospitals and one private clinic cited below average intelligence as a possible or probable reason. In the Commission’s opinion, “policies and guidelines should not be arbitrary, they should be applied to everyone equally, and they should not be misused in a discriminatory way to deny services. Lack of a partner, sexual orientation, or disability should not be reasons in and of themselves to deny access.”¹⁸⁴

Since the Commission’s report, provincial human rights legislation has been interpreted to apply to assisted reproductive services, meaning that such services must be provided on an equal basis without discrimination on the basis of prohibited grounds, including disability.¹⁸⁵ Additionally, SOGC and the Canadian Fertility and Andrology Society have adopted a Joint

Since the Commission’s report, provincial human rights legislation has been interpreted to apply to assisted reproductive services, meaning that such services must be provided on an equal basis without discrimination on the basis of prohibited grounds, including disability.

181 Susannah Baruch, David Kaufman, and Kathy L. Hudson, “Genetic testing of embryos: Practices and perspectives of U.S. IVF clinics” (2009) 89(5) *Fertility and Sterility* 1053 at 1055.

182 Silvia Camporesi, “Choosing deafness with preimplantation genetic diagnosis: An ethical way to carry on a cultural bloodline?” (2010) 19 *Cambridge Quarterly of Healthcare Ethics* 86.

183 Van Wagner, *supra* note 179.

184 *Ibid* at 551-554.

185 See e.g. *Korn v Potter* (1996) 134 DLR (4th) 437 (BCSC), where the court affirmed the BC Human Rights Tribunal’s decision that a doctor’s refusal to provide artificial insemination to a lesbian couple was a violation of the right to be free from discrimination in health services, as protected under the BC *Human Rights Code*.

Policy Statement on Social Screening and Reproductive Technologies, which recommends that “non-medical, social factors should not impede participation in or use of any reproductive technology...However, individual participation or use of assisted reproduction could be denied for the welfare of the child.”¹⁸⁶

According to the Joint Policy Statement, the overarching concern is for the child to have a “responsible,” “capable” parent—a determination to be made by physicians and supplemented by social workers and/or psychologists.¹⁸⁷ On the particular issue of mental disability, the policy statement provides:

If the person is believed to be a potentially incapable parent, ethically, access to reproductive technologies should be denied. This is also the basis on which those prospective parents who have a mental illness, or who have been abused as children or have themselves been domestic or child abusers, or who are substance abusers, should be screened. The primary concern should always be, not for the ability of a person to have a child, but for the prospective child to have a responsible parent(s). The fact of the new individual to be created demands consideration of his or her general well-being.¹⁸⁸

Acknowledging that these can be difficult questions of ethics for clinicians, the policy statement recommends that “if a physician cannot accept inclusion of a certain group of individuals based on social factors because of personal conscience, the physician is obligated so to inform the patient, and to refer him or her to other qualified medical professionals who will assist the patient in addressing the medical problem(s).”¹⁸⁹ Other reproductive societies in the United States (American Society of Reproductive Medicine) and Europe (European Society of Human Reproduction and Embryology) have similar policy statements.

Until access to ARTs is determined by provincial legislation, clinicians are left to determine access (subject to human rights law). Determinations of access will be based on a clinician’s own norms around child-rearing, and the general language of “capability” to parent in the above ethical guidelines allows for this. As a result, there is bound to be variation in access across clinics in Canada. Given the biases that women with disabilities face when they want to become mothers, there is a very real possibility that physicians will refuse to assist them.¹⁹⁰ Such variable access to treatment is a concern.¹⁹¹

The BC Government should step into the legal void created by the *Reference re Assisted Human Reproduction Act*, in which the Supreme Court of Canada ruled that the regulation of ART must be conducted at the provincial level. The Royal Commission emphasized the importance of government regulation, and rejected the limited regulation by professional bodies such as Colleges of Physicians and Surgeons. Self-regulation is insufficient and problematic, as there is an inherent conflict of interest between the physician as caregiver and

Policy Statement on Social Screening and Reproductive Technologies, which recommends that “non-medical, social factors should not impede participation in or use of any reproductive technology... However, individual participation or use of assisted reproduction could be denied for the welfare of the child.”

186 Canadian Fertility and Andrology Society / Society of Obstetricians and Gynaecologists of Canada, “Joint Policy Statement: Ethical Issues in Assisted Reproduction” (1999) 21(1) *Journal of the Society of Obstetricians and Gynaecologists of Canada* 1 at 35.

187 *Ibid* at 37.

188 *Ibid*.

189 *Ibid* at 38.

190 Mykitiuk and Chadha, *supra* note 119 at 190.

191 The Royal Commission also noted this variable access, *supra* note 173 at 551-554.

the physician as manager of a lucrative economic enterprise.¹⁹² Development of provincial legislation would allow for consultation among stakeholders, and the concerns and interests of community members, including women with disabilities, could be canvassed and considered. The values upon which the legislature should create these regulations are those contained in the AHRA, including non-discrimination; protection and promotion of human health, safety, dignity, and rights; protection of the health and well-being of women; and human individuality and diversity.

RECOMMENDATIONS

- Schools must ensure that all students, including students with disabilities, receive comprehensive, evidence-based sexual education. This will require that materials be accessible and may require the development of materials in alternative formats and presentation (e.g. Braille, simplified diagrams, etc.). The Ministry of Education should also work with sexual health and disability organizations to develop sex education modules for people with disabilities that meet their needs and address their unique concerns. Family members, health care providers, and service professionals also require comprehensive information about the sexual health needs of people with disabilities.
- Models like the BC Women's Hospital's Access Clinic must be expanded throughout the province so that women with disabilities have equal access to sexual health care services.
- More research and information for doctors and other health care providers is needed on how to meet the contraception needs of women with disabilities. Special care must be taken to ensure disabled women are provided with relevant information about contraceptives, their proper use, and potential side effects.
- More research and information for doctors and other health care providers is also needed to meet needs of women with disabilities for obstetrical care.
- The Province should make contraception widely and freely available for all people in British Columbia. At the very least, government must reinstate funding for IUDs for women with disabilities.
- When a woman is unable to become pregnant due to a disability, she should have access to publicly funded assisted reproductive technologies.
- The Province should begin drafting legislation to regulate assisted reproductive technologies in BC, in consultation with key stakeholders — including people with disabilities. Non-discrimination and the protection and promotion of human health, safety, dignity, diversity and rights should be key principles underlying the legislation.

When a woman is unable to become pregnant due to a disability, she should have access to publicly funded assisted reproductive technologies.

¹⁹² Guichon et al., supra note 172 at 336.

Adoption

There is very little research on the experiences of people with disabilities seeking to adopt in Canada. US research shows that lower numbers of people with disabilities apply to become adoptive parents, and few get through the selection and allocation processes and have a baby or child placed with them.¹⁹³ The reasons for this are complex and inter-related, but two issues are particularly relevant: access to resources and support, and the potential for bias and discrimination to influence adoptions workers' assessments of the parenting capacity of people with disabilities.

People with disabilities have pointed out that some of the skills acquired in the course of their experiences with their disabilities, including adaptability, resourcefulness, and patience, make them particularly well-suited to the task of parenting.¹⁹⁴ Parents with disabilities may also have qualities and offer experiences that children value, such as moving at a slower pace with less rushing around, and a greater flexibility around the number of different approaches that can be taken towards reaching a goal or completing a task.¹⁹⁵ The education children receive by living alongside disability in the context of positive, familiar relationships can also be deeply valuable in a society that has so many misconceptions and fears about disabilities.

THE LAW

Adoption in BC is governed by the *Adoption Act*¹⁹⁶ and, with respect to children in state care, by the *Child, Families and Community Services Act*¹⁹⁷ (the "CFCSA"). The Ministry of Children and Family Development ("MCFD") Adoption Services Branch, through its Director of Adoption, is responsible for adoptions of children and youth in care and offers a range of services to birth parents and adoptive parents. The Director of Adoption is also responsible for the provision of services

193 Michele Wates, "Disability and adoption: How unexamined attitudes discriminate against disabled people as parents" (2002) 26(2) *Adoption and Fostering* 49.

194 *Ibid* at 53.

195 *Ibid*.

196 RSBC 1996 c 5.

197 RSBC 1996 c 46.

under the *Adoption Act*, delegating adoption responsibilities to ministry staff, setting adoption policy and practice, licensing adoption agencies, operating and maintaining adoption registries, and providing post-adoption services. The Director is also the central authority for BC on the *Hague Convention on Protection of Children and Co-operation in respect of Inter-Country Adoption* (the “Hague Convention”), which governs international adoption.

The *Adoption Act* applies to both adoptions of children in the care of MCFD and to private adoptions administered by adoption agencies. Only MCFD and non-profit adoption agencies licensed by MCFD are authorized to place children for adoption; there are no alternative adoption arrangements permitted. These agencies must provide a full range of adoption services, including a home study to assess the suitability of people applying to adopt, completion of legal requirements, and post-adoption support.

Private adoptions are very expensive. Agency fees for a domestic adoption are around \$20,000, while international adoptions can cost as much as \$60,000.¹⁹⁸ These costs present significant obstacles for many prospective parents and, given the disproportionate rates of poverty for people with disabilities, are likely to constitute an exclusionary barrier for many disabled women who would like to adopt a child.

One adult or two adults jointly may apply to adopt a child,¹⁹⁹ and a home study of the prospective adoptive parent(s) must be prepared by a social worker. The social worker must consider an extensive list of factors to determine the ability of the prospective adoptive parent(s) to provide for the physical and emotional needs of a child, including:

- how the physical and mental health of the prospective adoptive parents impacts their ability to meet the needs of the child;
- whether the prospective adoptive parents’ life experiences might limit or strengthen their ability to parent an adopted child;
- the developmental, social and behavioural progress of the other child or children of the prospective adoptive parents; how this relates to the prospective adoptive parents’ ability to understand, accept, and meet the needs of another child; the compatibility between the child or children in the home and the child to be adopted;
- the prospective adoptive parents’ ability to provide stable and continuous care of the child;
- a description of the prospective adoptive parents’ personalities, interests and values in order to identify the personal factors that may be helpful or limiting in meeting the needs of the child to be adopted; and
- the results of a medical report from a health-care provider attesting to the prospective adoptive parents’ mental and physical health.²⁰⁰

Costs present significant obstacles for many prospective parents and, given the disproportionate rates of poverty for people with disabilities, are likely to constitute an exclusionary barrier for many disabled women who would like to adopt a child.

198 See Adoptive Families Association of BC, “Fees and Expenses”, <https://www.bcadoption.com/node/564/>.

199 *Adoption Act*, s 5.

200 Adoption Regulation, BC Reg 291/96, s 3.

As this list suggests, a wide range of factors are deemed relevant to a prospective adoptive parent's ability to care for an adopted child. Broad discretion is conferred on the social worker conducting the home study to make their recommendation based on an assessment of how well the prospective adoptive parent meets each of these criteria.

Medical reports attesting to the prospective adoptive parent's mental and physical health are also required. Doctors are asked whether the applicant has ever received or required treatment for any emotional problems, ever received or required psychiatric treatment, or ever received or required treatment because of the use of drugs or alcohol. They are also asked to comment on the applicant's general health, and to give their opinion as to whether "the applicant's physical and mental health enables them to undertake and follow through with the responsibilities of an adoptive parent or foster caregiver."²⁰¹

Both of these evaluations raise the possibility that discriminatory or ill-informed understandings of disability and parenting may have a negative effect on the approval decision. Given that 14 percent of British Columbians do not have a family doctor,²⁰² there is a very real possibility that a prospective adoptive parent would not have access to a physician who knows them well and could provide an informed opinion on their parenting capacity. Overall, the adoption approval process is subjective, and the decision is based on a constellation of factors and the "best interests of the child."²⁰³ This may present significant barriers for prospective adoptive parents with disabilities.

With respect to international adoptions, nations differ on whether they permit people with disabilities to adopt children from their country. Many countries completely disqualify people with disabilities. For example, China recently modified its eligibility requirements to make it impossible for most non-citizens with disabilities to adopt a Chinese child; Russia denies prospective parents with any disability that prevents them from working; and Ukraine denies prospective parents with substance use issues, sexually transmitted infections, and HIV or AIDS.²⁰⁴ The UN Committee on the Rights of Persons with Disabilities recently criticized Sweden for allowing this type of discrimination in facilitating international adoption, expressing concern "that social services can, upon requirement by a country of origin, deny the international adoption of a child to families where one partner has a disability."²⁰⁵ However, it is unclear how a country could do otherwise, as foreign countries are free to implement whatever adoption eligibility requirements they wish. Disability advocates in the US have called for State Department officials to work together to improve access to international adoption for people with disabilities, particularly from nations that have ratified the Hague Convention.²⁰⁶ This will require educating state and private adoption agencies in other countries about the ability of people with disabilities to parent, both with and without adaptive parenting equipment and supportive services.

Overall, the adoption approval process is subjective, and the decision is based on a constellation of factors and the "best interests of the child." This may present significant barriers for prospective adoptive parents with disabilities.

201 Ministry of Children and Families, "Adoption Related Forms", www.mcf.gov.bc.ca/adoption/forms.htm.

202 CBC News, "Family doctor shortage in BC" (20 January 2014), www.cbc.ca/player/News/Canada/BC/ID/2431160162/.

203 *Adoption Act*, s 2.

204 *Rocking the Cradle*, supra note 5 at 201.

205 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Sweden, CRPD/C/SWE/CO/1 (12 May 2014).

206 *Rocking the Cradle*, supra note 5 at 204.

EXPERIENCES OF MOTHERS WITH DISABILITIES

None of our participants had attempted to adopt a child. However, one service provider recalled the experience of one of her clients:

One woman wanted to adopt but because of her visual impairment, she was discouraged by her family, friends, and even by her doctor.

Bias and Discrimination

The possibility that discriminatory attitudes and misconceptions about the parenting capacity of people with disabilities are influencing social workers' and doctors' recommendations cannot be ignored. In a study of 27 US adoption agencies, seven admitted that certain medical conditions would automatically preclude someone from adopting.²⁰⁷ A national study of 1,200 parents with disabilities found that eight percent experienced attitudinal barriers on the part of adoption officials that inhibited or prevented them from adopting.²⁰⁸

As described above, the home study that must precede an adoption is a highly discretionary process, and it is open to the influence of bias, fear, and stereotyping. Some possible assumptions that may be operating include a belief that it would be "unfair" to place a child with a disabled adoptive parent, concerns that the child would be obliged to take on inappropriate caring tasks for their adoptive parent, or concerns that the child would be teased or bullied for having a parent with a disability.²⁰⁹ More immediate and concrete concerns may also be at play, including concerns about the practicalities of child care and the prospective adoptive parent's physical, mental, and emotional capacity to parent a young child.

In the private adoption context, birth parents have final say over who their child is placed with. They may hold biased views of the capacity of people with disabilities to parent, and may refuse to consider placement of their child with a disabled parent.

While these concerns are real, an Adopt Canada! message board thread entitled "Adoptive parent with a disability" contained a number of anecdotal stories of parents with disabilities successfully adopting a child.²¹⁰ According to those who posted to the thread, women with physical disabilities, some who used wheelchairs, and others with MS, had all adopted successfully in the recent past.

The possibility that discriminatory attitudes and misconceptions about the parenting capacity of people with disabilities are influencing social workers' and doctors' recommendations cannot be ignored.

207 Rocking the Cradle, supra note 5 at 189.

208 Ibid.

209 Wates, supra note 193 at 54.

210 Canada Adopts! Discussion Board, "Parents with a disability", www.canadaadopts.com/cgi-bin/ultimatebb.cgi?ubb=get_topic&f=10&t=000620

Resources and Support

People with disabilities may need additional supports in order to effectively parent. Modifications to the family home and to standard equipment such as cribs, highchairs, strollers and changing tables may be necessary for adoptive parents with certain disabilities. Deaf adoptive parents may need other equipment to enable them to respond to their children's cries. However, there may be a tendency to see the need for support as evidence of parental inadequacy, and to regard the existence of support needs as a reason in itself for rejecting a disabled person's application to adopt.

RECOMMENDATIONS

There may be a tendency to see the need for support as evidence of parental inadequacy, and to regard the existence of support needs as a reason in itself for rejecting a disabled person's application to adopt.

- Social workers, who wield considerable power in the adoption process, must receive education and training to enable them assess the parenting capacity of prospective adoptive parents with disabilities in a manner free from discrimination and bias
- Prospective adoptive parents should have the right to request an alternate social worker if they believe the one assigned to their case has shown bias against them due to their disability
- Social workers should be required to discuss with adoptive parents any concerns they have about their parenting capacity. They should proactively inquire about how a person with a disability intends to deal with parenting challenges presented by their disability, and they should take note of the accommodations and modifications the prospective adoptive parent will require in order to parent effectively. The capacity of the prospective adoptive parent to implement those accommodations and modifications, and the available government support, should also be considered.
- Government should make grants available to women who are unable to become pregnant due to a disability to facilitate their access to private adoption services.
- Government should make special funds available to support the needs of adoptive parents with disabilities, particularly those adopting children in the care of MCFD.
- Government officials should work together to improve access to international adoption for people with disabilities, particularly from nations that have ratified the Hague Convention. This will require educating state and private adoption agencies in other countries about the ability of people with disabilities to parent, both with and without adaptive parenting equipment and supportive services.

Economic Security

The *UN Convention on the Rights of Persons with Disabilities* (the “Convention” or the “CRPD”) is premised on the recognition that the inherent dignity, worth and equal human rights of all people form the basic foundation for human freedom. The Convention also reaffirms the “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.”²¹¹

Conceiving of human rights as interdependent and indivisible recognizes that the full enjoyment of any one right requires the guarantee of *all* rights and freedoms, including socio-economic rights such as the right to adequate income, housing, and nutrition. Rights like freedom of speech, freedom of assembly, and the right to vote, all well accepted in Canada, require a certain level of socio-economic security in order to be meaningful to an individual. Without that security, it is incredibly difficult for a person to take advantage of those rights, and existing inequalities and rights infringements are exacerbated.

A person with a disability in Canada is twice as likely to be poor than the rest of the population, and women with disabilities are slightly more likely than their male counterparts to live below the low-income cut-off.²¹² Poverty affects the health and well-being of women with disabilities and hinders their ability to improve their life conditions. Poverty also leaves women with disabilities—as it does women generally—vulnerable to violence, exploitation and coercion.²¹³

The Convention recognizes the role that poverty plays in the lives of people with disabilities. It highlights the fact that the majority of people with disabilities live in conditions of poverty and recognizes the critical need to address its negative impact.²¹⁴ In addition, it contains strong provisions requiring States Parties to “ensure access by persons with disabilities, in particular women and girls with disabilities, and older persons with disabilities, to social

A person with a disability in Canada is twice as likely to be poor than the rest of the population.

211 Preamble at (c).

212 Council of Canadians with Disabilities, “Briefing Note: Rights of Persons with Disabilities in Canada”

213 Fiona Sampson, “Globalization and the inequality of women with disabilities” (2003) 2 *JL & Equality* 18.

214 Preamble at (f).

protection programs and poverty reduction programmes,” and to “ensure access by persons with disabilities and their families in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care.”²¹⁵

THE LAW

Section 36 of Canada’s Constitution states that the federal and provincial governments are committed to promoting equal opportunities for the well-being of Canadians and providing essential public services of reasonable quality to all Canadians. In addition, Canada’s *Charter of Rights and Freedoms* protects the right to security of the person, which many academics and some judges believe should be read to ensure that basic minimum standards of living are met. While economic and social rights like the right to housing and adequate living standards are enshrined in international human rights documents to which Canada is signatory, Canada has failed to live up to its obligations under these international treaties, and courts have resisted finding constitutional protection for economic and social rights.²¹⁶ Nevertheless, the door remains open to the courts to find that the Constitution does offer some protection from poverty for people in Canada.

Women described how challenging it is to raise children on low incomes, and identified low income assistance rates, unaffordable housing, and barriers to employment as key issues affecting their security, health, and well-being.

EXPERIENCES OF MOTHERS WITH DISABILITIES

Poverty and economic insecurity was raised as a pressing concern for the vast majority of our participants. Women described how challenging it is to raise children on low incomes, and identified low income assistance rates, unaffordable housing, and barriers to employment as key issues affecting their security, health, and well-being.

Now, I have to listen to my kids tell me that they are hungry because I don’t have any money to feed them. And, to me, giving them Kraft Dinner isn’t an option. It should be illegal to force people into this situation. — A mother with a work-related injury

I’m living off welfare. I have to sell all my stuff every month just to get food. — A disabled mother living in poverty

The challenge is extreme poverty. That is the biggest problem for me. I lost my WCB [appeal] recently. So, I get zero compensation, zero retraining, zero therapy, zero. — A disabled mother living in poverty

Poverty is the biggest disability for women. — Family Lawyer

215 Preamble at (t); Article 28 at 2(b) and (c).

216 *Gosselin v Quebec (Attorney General)*, 2002 SCC 84; *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410.

Disability Assistance Rates

Current levels of disability income support in BC do not allow people with disabilities to meet their basic living costs, and do not provide them with the support they need to live in dignity and participate equally in their communities. Approximately one in five people with a disability in BC lives in poverty—over 193,500 people.²¹⁷ Of these, almost half (49 percent) are in single person households, and their reliance on a single income makes them particularly vulnerable.

Individuals relying on the Persons with Disability benefit (“PWD”) receive \$906 each month in assistance (\$10,872 annually), and live significantly below the Low Income Cut Offs (LICO) established by Statistics Canada. The Disability Without Poverty Network has analyzed the growing gap between what people with disabilities require in order to meet their basic needs, and what they receive on PWD.²¹⁸ Since 2001, the costs of basic essentials such as food, clothing, transportation, health, personal care and shelter have increased significantly, while the PWD rate has increased by only \$120 per month. This has resulted in greater challenges and a diminished capacity for people relying on PWD to meet their basic needs. The problem in Vancouver, where average housing costs are \$810 per month (median = \$750 per month), is particularly dire. The Survey of Household Spending shows that the average household needs about \$1,400 per month to meet the cost of basic necessities, including an estimated \$768 for rent (a conservative estimate given the high cost of rent in many BC cities), \$478 for food, \$76 for clothing and \$48 for basic communication.²¹⁹ The PWD benefit provides almost \$500 less than the amount needed to cover these basic essentials. In addition, people with disabilities may have ongoing expenses related to their disability, such as non-prescription medical goods and user fees for various health care services, which are often not covered by PWD.

BC ranks 6th among Canadian provinces and territories in its overall provision of disability benefits.²²⁰ Alberta has raised its disability assistance rate to \$1,588/month, and the Yukon has begun indexing its assistance rates to the rate of inflation. The BC Government recently indicated, as part of its goal to “make BC the most progressive province in Canada for people with disabilities,” that it would “consider disability assistance rate increases as the fiscal situation allows,” at some point before 2024.²²¹ The promise was met with derision from disability and anti-poverty advocates, who know that people receiving PWD need and deserve better now.²²² Given the high cost of living in BC and the significant and growing gap between

Approximately one in five people with a disability in BC lives in poverty—over 193,500 people

217 Disability Without Poverty Network, “Overdue: The case for increasing the Persons with Disabilities benefit in BC” (July 2012), www.disabilityalliancebc.org/docs/overdueincreasepwd.pdf. [Overdue]

218 Ibid.

219 BC Stats, 2009 Survey of Household Spending (SHS), Canada, British Columbia, and Vancouver, Statistics Canada, December 2010.

220 Overdue, *supra* note 216 at 9.

221 Government of BC, “Accessibility 2024: Making BC the most progressive province in Canada for people with disabilities” (June 2014), www.newsroom.gov.bc.ca/downloads/Accessibility_Summit.pdf. [Accessibility 2024]

222 Kendra Milne, “BC’s new plan for people with disabilities isn’t good enough” *The Province* (2 July 2014), <http://blogs.theprovince.com/2014/07/02/kendra-milne-b-c-s-new-plan-for-people-with-disabilities-isnt-good-enough/>; Trish Garner, “Where’s the fanfare for tackling poverty effectively?” *The Straight* (29 July 2014), www.straight.com/news/696061/trish-garner-wheres-fanfare-tackling-poverty-effectively.

what PWD recipients need to live with safety and dignity and what they receive, the Province must raise its rate of PWD assistance and index it to inflation.

I understand... that I am on disability, and it is not meant for me to live extravagantly, but we should still be able to feed our children. — A mother with physical disabilities and mental health challenges

It [the system] is completely broken. All I see is that it is a trap. It is an absolute trap and then you have the elite complaining that people are on welfare. Well let me get off. Give me a chance. Let me re-train. Do something about WCB maybe. That would be a good place to start. — A mother of two struggling to make ends meet

Child Support Clawbacks

The provincial government is violating the rights of children by taking that money away from them. In addition, they are withholding income intended for children who in single parent families on income and disability assistance — some of the most vulnerable children in the province.

Not only are PWD rates in BC too low to allow recipients to meet their basic needs, but single parents are also unable to supplement this income with money they receive as child support. Since 2002, the BC government has been clawing back every dollar of child support paid to families on social assistance — both regular welfare and disability assistance. Mothers make up the vast majority of custodial parents in Canada, and are much more likely to receive child support than fathers.²²³ This reflects single mothers' challenges in maintaining paid work while also caring for their children, the fact that they may only be able to work part time, and the difficulties they may have finding affordable child care. Additionally, women tend to be paid less than men, and are more likely to be economically disadvantaged by the breakdown of a marriage.²²⁴ This is particularly true for mothers with disabilities.

It is a fundamental principle of family law that children have a right to support from their parents. The right to support endures any breakdown in the parents' relationship. Importantly, the Supreme Court of Canada has affirmed that the right to child support is the right of the child, not the parent.²²⁵ The provincial government is violating the rights of children by taking that money away from them. In addition, they are withholding income intended for children who in single parent families on income and disability assistance — some of the most vulnerable children in the province. Meager social assistance rates place these lone-parent families well below the poverty line, and government policy preventing them from receiving child support helps keep them there.

Yeah it is unbelievable the things that happen, because they think that we are stupid... It's what they get away with because they think that we are ignorant and stupid just because we are poor and don't deserve fair treatment or respect or dignity. — Mother living in poverty

Single mothers with disabilities receiving PWD have taken action against this unfair and discriminatory government policy, organizing rallies and press conferences and attending

223 Lorne D. Bertrand et al., Phase 2 of the Survey of Child Support Awards: Final Report (Department of Justice, 2005).

224 See Women's Legal Education and Action Fund, "Equality Rights in Family Law: Spousal and Child Support", <http://leaf.ca/education/documents/FamilyLawBook.pdf>.

225 *DBS v SRG* 2006 SCC 37 at para 38.

the BC legislature to speak out.²²⁶ Numerous advocacy organizations, including West Coast LEAF, have also called on government to amend the policy, and litigation alleging that the clawback violates the Charter's equality protections is pending.²²⁷ The government allows people receiving PWD to keep \$800/month of "earned income." However, child support is deemed "unearned income" and is therefore clawed back dollar for dollar, with disproportionate impacts on single mothers on PWD, who are more likely to receive child support and less likely to be in a position to earn an income, often because of child care obligations. One mother identified the discrimination inherent in the government's clawback policy:

Well when you are disabled, you can earn up to \$800. But because we don't earn that money [child support], it is as if it is handed to us, as if we don't do anything looking after these children in the first freaking place... they say it is not earned, so they take it. — A mother living on PWD and supporting her child

In its Accessibility 2024 Action Plan, the Government has said it will "consult on family maintenance payments for families receiving disability and income assistance."²²⁸ Given the extreme poverty these families are enduring and the discriminatory impact the policy has on single mothers, consultation is unnecessary and will only result in additional desperate months for low income parents. The clawback should be ended immediately.

So, I was getting child support and then they take it off of my cheque. It's a huge issue. Because women are only getting 25-50 bucks from these stupid men anyways, but I get a little bit more and I sure could use it. They shouldn't take it at all. They are taking children's money. — A mother living on PWD and supporting her child

Administrative Issues

BC's Auditor General released a report earlier this year looking into the BC Ministry of Social Development and Social Innovation's ("SDSI" or the "Ministry") disability assistance program.²²⁹ Among other things, the Auditor found that the system was complex and difficult to navigate, and that staff need additional training to provide sensitive and respectful treatment to people with a wide range of barriers and disabilities. He also found that eligibility decisions were not always made in a timely way. Most significantly, he found that the Ministry was unable to demonstrate that the program was contributing to improving the lives of clients, and there was no comprehensive tracking of indicators relating to clients' health and social well-being. Moreover, he found that clients were at risk of not having their basic needs met. The Ministry has not defined what standard of living the program is intended to achieve for clients, and "given the level of assistance provided, clients would likely need to turn to charitable donations, family support and other sources of assistance to obtain appropriate shelter and other basic necessities."²³⁰

Given the extreme poverty these families are enduring and the discriminatory impact the policy has on single mothers, consultation is unnecessary and will only result in additional desperate months for low income parents. The clawback should be ended immediately.

226 Andrea Macpherson, "Disabled mothers in BC rallying against child support clawbacks" News1130 (22 April 2014), www.news1130.com/2014/04/22/disabled-mothers-in-bc-rallying-against-child-support-clawbacks/.

227 Ian Mulgrew, "Poverty lawyers consider legal challenge to child support clawbacks" Vancouver Sun (24 April 2014).

228 Accessibility 2024, supra note 221.

229 Auditor General Russ Jones, "Disability assistance: An audit of program access, integrity and results" (15 May 2014).

230 Ibid at 29.

The Auditor General recommended that the Ministry develop a comprehensive evaluation framework for PWD that sets objectives, targets and benchmarks to define what it means to meet clients' basic needs; sets standard measures to track whether clients can access appropriate shelter, food and other necessities; and defines, tracks and monitors a range of health and social indicators to assess this broad range of outcomes.

The newly upgraded, \$200 million computer system the Ministry uses to administer disability and income assistance cheques has also come under fire from disability advocates and the Representative for Children and Youth due to repeated crashes, slowdowns and outages.²³¹ When the system crashed for six days in May 2014, many people in need went without important services and supports.²³² Many people had to wait until the system was working again before their needs for food, shelter or medication could be addressed.

Two mothers shared their frustration with the disability assistance system and shared the challenges they have faced in obtaining the benefits they're entitled to.

Most of the cases the Tribunal took over were denials of disability benefits, which have immense consequences for the individuals involved; unresolved benefits claims by people unable to work due to their disability can result in a slide into poverty and, ultimately, homelessness.

I have had problems with [the disability office] since I have been on disability. They screwed up my cheque. This month, they actually screwed up my cheque and they didn't even send it to me, they told me that I have to wait Thursday or Friday to get my cheque. It's ongoing, they always screw up my cheque somehow. — A mother living on PWD and supporting her child

I can barely take care of myself. It takes me all day to make dinner. ...They are saying that I am disabled but they won't give me the money that they owe me. — A disabled mother living in poverty

At the federal level, there is a massive backlog of unprocessed appeals of denials of Canada Pension Plan ("CPP") disability benefits.²³³ The newly created Social Security Tribunal, ostensibly established to provide a more efficient appeal process for employment insurance, Canada Pension Plan and old-age security decisions, concluded just 461 hearings in its first year of existence, compared to thousands of hearings held the previous year under the old regime. The Tribunal has been critically understaffed, with several full-time positions remaining vacant for its first year of operation.

Most of the cases the Tribunal took over were denials of disability benefits, which have immense consequences for the individuals involved; unresolved benefits claims by people unable to work due to their disability can result in a slide into poverty and, ultimately, homelessness. Adequate resources must be invested in the Tribunal to ensure that decisions can be made in a timely way in accordance with the principles of procedural fairness.

231 Justin McElroy, "Government software glitch delaying assistance for British Columbians" Global BC (6 May 2014), <http://globalnews.ca/news/1315383/government-software-glitch-delaying-assistance-for-british-columbians/>.

232 Michael Smyth, "BC's problem plagued computer system puts kids at risk—and costs taxpayers" The Province (8 May 2014), www.bcgeu.ca/michael-smyth-bc%E2%80%99s-problem-plagued-computer-system-puts-kids-risk-%E2%80%94-and-costs-taxpayers.

233 Le-Ann Goodman, "Fewer hearings held by new social security tribunal; dismissal rate high" The Canadian Press (25 August 2014), www.news1130.com/2014/08/25/fewer-hearings-held-by-new-social-security-tribunal-dismissal-rate-high/.

Housing

There is a severe lack of affordable and accessible housing in BC and Canada-wide. The challenges for mothers with disabilities are particularly grave, as they must find accommodation that is both accessible and suitable for their children, or face the possibility that social workers will use the insufficiency of their housing as grounds for removing the children.

The Convention requires the elimination of obstacles and barriers to housing accessibility, and requires States Parties to ensure that “persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obligated to live in a particular living arrangement.”²³⁴ The Convention also requires that people with disabilities “have access to a range of in-home residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation and segregation from the community.”²³⁵ Finally, as part of its article on adequate standards of living, the Convention requires that States Parties “ensure access by persons with disabilities to public housing programmes.”²³⁶

People with disabilities need access to flexible, affordable, safe and accessible housing and, at the current PWD rates, many are unable to secure it. As discussed above, the cost of living greatly exceeds the monthly amount allocated to people receiving disability assistance, and this is particularly acute with respect to housing costs. As of April 2013, average rent in BC was \$1069 for a 2-bedroom, and \$918 for a one-bedroom.²³⁷ Average rents are even higher in Metro Vancouver: \$1255 for a two-bedroom and \$995 for a one-bedroom.

A person receiving PWD benefits receives \$375 per month for housing and \$531 per month for other basic living expenses such as food, clothing, transportation and personal care. As shelter costs increase, people are forced to use an even greater portion of their support to pay for housing, leaving them increasingly unable to afford basic necessities.

I was paying more than half of my [income] on housing I couldn't afford. — Mother living on PWD and supporting her child

As part of its Accessibility 2024 Plan, the Government has set the goal that BC will have more accessible housing options than other provinces in Canada by 2024, which will be measured by the percentage of publicly-owned housing that is accessible and the percentage of new homes that are built to be accessible. The City of Vancouver took important steps towards improving housing accessibility last year by passing a new building bylaw that, for the first time in Canada, will require all new homes to be adaptable for seniors and people with disabilities. All new single-family, townhouse and laneway homes must meet minimum accessibility standards. Mandatory features include wider doors, hallways and stairs, lever faucets on sinks, accessible door viewers, and accessible showers or the infrastructure to

As discussed, the cost of living greatly exceeds the monthly amount allocated to people receiving disability assistance, and this is particularly acute with respect to housing costs.

234 Article 19(a).

235 Article 19(b).

236 Article 19(c).

237 Canada Mortgage and Housing Corporation, “Rental Market Report: BC Highlights” (Spring 2013).

later adapt them.²³⁸ The city is also doing an 18-month study of the feasibility of insisting new homes have at least one exterior doorway with direct access to the ground without stairs.

For its part, the Province has promised in its Accessibility 2024 Report to introduce measures requiring a percentage of new homes to be constructed to include adaptability requirements; to develop a checklist to make existing housing more accessible; and to continue to explore options for a registry of accessible housing in BC.²³⁹

These steps to improve housing accessibility are crucial and long overdue. Also necessary is support for parents to adapt their homes to facilitate their parenting needs. For example, mothers who are deaf or hard of hearing need devices that light up when their child cries; mothers with mobility limitations need cribs, changing tables, and bathtub lifts that accommodate their disabilities. Government should support parents to adapt their homes to meet their particular parenting needs.

Housing affordability is not mentioned in the Province's Accessibility 2024 report, despite the fact that the government-led consultations highlighted it as a key concern. Nor is the importance of building *new* affordable and accessible public housing mentioned, another key recommendation from the consultations.

The Disability Without Poverty Network has made the following three recommendations to address the shortage of affordable, accessible housing options in BC, and West Coast LEAF agrees that these measures are necessary to ensure safe, accessible housing for mothers and all people with disabilities in this province:

- Increase the social housing stock available in BC;
- Increase access to private market housing options through a rental assistance program for people with disabilities; and
- Provide financial grants or supplements to cover the costs of accessibility changes or renovations that may be required so that a person with disabilities can reside in a given residence in a safe and accessible manner.²⁴⁰

Employment

I am on [Disability Assistance]. I am trying to find advocates to help me fight the CPP disability. They say I have to find a job with three fingers and a thumb and zero training. And because they denied me, I have no access to the training programs that CPP disability has. They sent me a list of things that they want me to do, but I cannot access them because I am not considered disabled by the federal government. So, everywhere you turn it is no. — A mother living on PWD and supporting her child

238 Yolande Cole, "Changes approved to Vancouver building bylaw include more accessibility" The Georgia Straight (25 September 2014), www.straight.com/news/431531/changes-approved-vancouver-building-bylaw-include-more-accessibility.

239 Accessibility 2024, *supra* note 221.

240 Disability Without Poverty Network, "What would it take to make British Columbia the most progressive jurisdiction for people with disabilities?" (March 2014), <http://blog.bccpd.bc.ca/wp-content/uploads/2014/03/Disability-Without-Poverty-Submission-March-2014.pdf>.

The UN Convention on the Rights of Persons with Disabilities contains a number of provisions designed to protect the right to employment for persons with disabilities. It requires States Parties to:

- Promote awareness of the capabilities and contributions of persons with disabilities;
- Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and redress of grievances;
- Enable persons with disabilities to have access to general technical and vocational guidance programmes, placement services, and vocational and continuing training;
- Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining, and returning to employment;
- Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programs and incentives;
- Promote the acquisition by persons with disabilities of work experience in the open labour market; and
- Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

In BC, the employment rate for people with disabilities is significantly lower than for the general population.

In BC, the employment rate for people with disabilities is significantly lower than for the general population.²⁴¹ These individuals are thus more likely to earn low incomes during their working years, and to be excluded from many social and economic opportunities. Women with disabilities are more adversely affected with respect to employment and income than are men, although both groups are significantly disadvantaged.²⁴²

Approximately one-quarter of participants expressed frustration that they could not access employment as a result of their disability:

I can't work and had to go to welfare. — A mother living on PWD and supporting her child

My disabilities prevented me from maintaining employment since 2006. — A disabled mother living in poverty

Participant: Well- I've been at many um interviews, but I've never gotten past that.

Interviewer: What's your experience in the interviews?

Participant: "We're proud of you". Reassuring, but apparently somebody had more experience than me, so they got the job.

²⁴¹ Auditor General's report, supra note 229.

²⁴² ARCH report, supra note 10, citing Statistics Canada's 2006 Participation and Activity Limitation Survey.

None of our participants specifically described experiences of discrimination in their employment. However, three disability advocates described the discrimination they saw occurring for their clients:

Employment discrimination is very big for women with cerebral palsy.

Employers discriminate against women with disability, but often the discrimination is very subtle.

One main concern that employers have about hiring a person with visual impairment is that they may take too much sick time, even though the rate of absenteeism is quite high in able-bodied folks.

Under human rights law, all employers have a duty to accommodate employees with disabilities up to the point that the duty imposes an undue hardship on the employer. The employer is allowed to discriminate in hiring or continuing to employ a person with a disability *only* if the employee or prospective employee cannot fulfill a legitimate job requirement (a “bona fide occupational requirement”). This is a high standard. Where the capabilities of a person are restricted due to a disability, a reasonable accommodation, such as the purchase of an assistive device, or the restructuring of certain components of their job, may be required in order to allow the disabled person to apply their skills and abilities on a level playing field while still participating in the workforce.²⁴³

Employers also have a duty to accommodate the child care obligations of their employees.²⁴⁴ Women bear a disproportionate responsibility for child care, and the grave insufficiency of BC’s affordable child care options has a disproportionate adverse impact on women, which undermines their ability to participate in the paid labour force and forces them into part-time and unstable work.

Mothers with disabilities have a particular need for quality, affordable child care; they may also need unique accommodations from their employer to allow them to fulfil their parenting responsibilities. Employers must take care to ensure that reasonable accommodations are offered to mothers with disabilities to allow them to meet their parenting responsibilities without incurring disadvantage in their employment.

Several participants described the way in which their disability and resulting unemployment was used against them in other contexts, including the child protection context:

The child protection system uses my depression and anxiety to discriminate against me, and I feel I have lost my children due to this discrimination because I don’t work. — An Aboriginal mother with mental health challenges

My disabilities were used against me because I was unable to work due to them and my unemployment was looked upon unfavourably. — An immigrant mother who lost custody of her child

243 BC Human Rights Coalition, “FAQ: Duty to Accommodate”, www.bchrcoalition.org/files/faq_DTA.html

244 *Canada (Attorney General) v Johnstone*, 2014 FCA 110.

Under human rights law, all employers have a duty to accommodate employees with disabilities up to the point that the duty imposes an undue hardship on the employer.

Service providers echoed these concerns:

Women living with mental health issues struggle to keep their jobs, and yet when they are unable to work and are having housing issues, they are deemed unfit mothers.

[A mother's] limited resources...are often used against her. For instance if she is unable to afford to go to counseling or maintain a job, she is deemed as not the best parent for the child. Often no consideration is given to her disability.

One advocate succinctly summarized the relationship between disability, employment, and poverty for many women:

Employment is interrupted due to mental health challenges, which results in poverty.

The BC Government's goal is for BC to have the highest labour participation rate for persons with disabilities in Canada by 2024.²⁴⁵ It has committed to improving WorkBC services for persons with disabilities; investing in a pilot program for training and initiatives at public post-secondary schools to increase the success of persons with disabilities in trades and technical programs; and providing \$3 million in annual funding for assistive technologies that support employment for persons with disabilities. In October 2012, the BC Government also increased the earnings exemption for people receiving disability assistance, raising it from \$500/month to \$800/month. This means that a person receiving PWD can earn up to \$800 per month without affecting their support, allowing them to return to the workforce incrementally and to work part-time as their condition allows. The Government has also rolled out annualized earnings exemptions, which allow individuals on disability assistance to use their earnings exemption on an annual, instead of monthly basis, and without a monthly maximum. The intent is to better assist individuals whose ability to earn fluctuates during the year due, for example, to medical conditions.²⁴⁶

These are critical initiatives, but more remains to be done, particularly for people with disabilities living in rural and remote communities with fewer employment options. The particular needs of mothers with disabilities must also be prioritized in government-led employment initiatives. Finally, it must be remembered that some people with disabilities are simply unable to work due to their condition. They too deserve to live with freedom, dignity and security. To this end, PWD rates must be immediately increased.

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CPP Disability

While this report is focused on mothers with disabilities, there are also many grandparents raising their grandchildren in circumstances where the child's parent(s) are unable to care for their child. A full exploration of the issues impacting grandparents raising grandchildren

²⁴⁵ Accessibility 2024, supra note 221.

²⁴⁶ Ministry of Social Development and Social Innovation, "Annualized Earnings Exemption 2014", www.sdsi.gov.bc.ca/pwd/aee/index.html.

is beyond the scope of this report.²⁴⁷ However, one issue that affects grandparents with disabilities requires immediate reform.

People receiving Canada Pension Plan (“CPP”) Disability Benefits are eligible for an additional “children’s benefit” to help them provide for children in their care. The child must be under the age of 18, or under 25 and in full-time attendance at a recognized school or university.²⁴⁸ However, when the recipient of the CPP Disability Benefit recipient turns 65, they automatically become “regular” CPP recipients, and the children’s benefit is lost, no matter what the child’s age. For grandparents raising grandchildren, the loss of this benefit—\$228.66 as of January 2013—constitutes a significant hardship.

As one grandparent told advocates at Family Support Services BC: “It does seem neither fair, nor reasonable that [my granddaughters] will lose the income benefit due to my age. My age, not theirs, determines the end of their benefit. This seems to be a very punitive policy. I can see that my age could change my benefit, but it should not change theirs.”²⁴⁹

We agree with Family Support Services BC that this punitive and discriminatory policy needs to change. Like child support, these benefits should be viewed as belonging to the child, and should not be taken away due to the circumstances of their caregiver. Children should retain the benefits provided to their caregiver under the CPP Disability Benefits scheme until they turn 18 (or 25 if they are attending school), regardless of their caregiver’s age.

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RECOMMENDATIONS

- Government must immediately raise the income assistance rate for people with disabilities to \$1200, as recommended by the Disability Without Poverty Network, and index the rate to inflation.
- Government must also end its discriminatory policy of clawing back every dollar of child support paid to a single parent—mostly mothers—on income assistance (including disability assistance).
- The Ministry of Social Development and Social Innovation must act on the Auditor General’s recommendations to make the disability assistance system more accessible, user-friendly, and easier to navigate.
- The federal government must provide adequate resources and staff to the Social Security Tribunal so that disability appeals can be processed in a timely way and in accordance with the principles of procedural fairness.
- The BC Government must prioritize building new affordable social housing throughout the province that is accessible to people with disabilities. Government

247 For more information about grandparents raising grandchildren, see Parent Support Services Society of BC, <http://news.parentsupportbc.ca/>.

248 Service Canada, “Benefits for children under 25”, www.servicecanada.gc.ca/eng/services/pensions/cpp/child.shtml.

249 Parent Support Services Society of BC, “CPP disability benefits unfair to children in kinship care” (9 September 2014), <http://news.parentsupportbc.ca/cpp-disability-benefits-unfair-children-kinship-care/>.

should also increase access to private market housing options through a rental assistance program for low-income people with disabilities, and provide financial grants or supplements to cover the costs of accessibility changes or renovations that may be required so that a person with disabilities can reside in a given residence in a safe and accessible manner. These should include adaptations needed to facilitate parenting.

- The BC Government should follow the lead of the City of Vancouver and pass legislation setting minimum accessibility standards for new residences.
- Ensure the needs of rural and remote communities are addressed in government-sponsored employment initiatives.
- The federal government should amend the CPP Disability Benefits policy so that children in the care of a person receiving CPP Disability Benefits do not lose their benefit when their caregiver turns 65.

Immigration and Refugee Law

Immigrant and refugee women living and seeking to live in Canada face significant obstacles to realizing their rights to equality, security and safety in this country.

Immigrant and refugee women living and seeking to live in Canada face significant obstacles to realizing their rights to equality, security and safety in this country. In this section, we describe two government policies that seriously undermine Canada's claim to be welcoming nation to new Canadians: the exclusion of people with disabilities deemed likely to be an "excessive demand" on Canada's medical system, and the denial of essential health care to certain categories of refugees and refugee claimants.

EXPERIENCES OF MOTHERS WITH DISABILITIES

We spoke to only one disabled mother who described experience with Canada's immigration system. This participant was sponsored to come to Canada by her spouse, who began to beat her on the third day after she arrived. She had no other family or community in Canada, and felt she had nowhere to turn. Her husband was extremely abusive towards her throughout their relationship, and after numerous violent incidents, he nearly killed her by stabbing her repeatedly, leaving her paralyzed. He was arrested and is currently serving a prison sentence for attempted murder.

After her horrendous experience, this participant was fortunate to have an extremely positive experience with Canadian immigration and social service agencies, who offered her resources and support.

The social worker and my doctor wrote to the immigration people to give my sister a visa so she could come from [my home country] to Canada and support me. They told the immigration people that I need my family here as I had no one here. They helped me then and they are still helping me so much. At first my sister got a six month visa, then my doctor, counsellor, social worker helped her to get the extension for a two year visa, and now they are saying that will make her permanent resident here. The police, counsellors, social workers, doctors, everyone has been so helpful. I don't know what I

would have done in this strange country without so much help and support. They are very nice to me and my sister. I get more support than I can ever imagine getting if this happened to me in [my home country].

I often wonder, why did all this have to happen... why did he do this to me? If he did not like me then why did he bring me to Canada? It was in his hands to sponsor me — if he did not like me, he should have never sponsored me and let me just stay in [my home country]. If he hated me he could have sent me back — at least I would have not been paralyzed forever. I would have been normal and functional. Now I belong nowhere — not here in Canada, nor can I now go back to [my home country] like this.

This woman's story, while horrifying and tragic, illustrates what is possible when government agencies and departments come together and commit to ensuring the health and well-being of people with disabilities. Everyone should be able to expect the kind of support and assistance she received. Her story also illustrates the extreme vulnerability of women who are sponsored to come to Canada, and the importance of ensuring they have access to culturally and linguistically appropriate information and resources if they are being subjected to abuse. As recommended elsewhere by West Coast LEAF and other advocates,²⁵⁰ sponsored women should also be guaranteed access to social services, income assistance, subsidized housing, and other needed supports regardless of immigration status if they must flee an abusive sponsor.

Exclusion from Immigration

People with disabilities have been singled out for heightened scrutiny, and at times absolute exclusion, in Canadian immigration policy from the earliest legislation to the present day *Immigration and Refugee Protection Act*²⁵¹ ("IRPA"). Canada's first immigration legislation, enacted shortly following confederation, was typical of 19th century legislation immigration, providing that "all such passengers as be lunatic, idiotic, deaf and dumb, blind or infirm" be assessed by a medical officer in order to determine whether it was likely they would become a permanent public charge."²⁵²

While the 19th century concern with disability was at least on its face directed at avoiding placing a financial burden on the state, early 20th century legislation was more explicitly motivated by the growing popularity of the eugenics movement among politicians, the helping professions and leading social reformers. The ascendancy of eugenics theory was reflected not only in the introduction of provincial sterilization legislation, but also amendments to federal immigration legislation that from 1910 to 1952 enacted an absolute prohibition on individuals deemed "mentally defective," regardless of family support or ability to earn a living independently.²⁵³

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250 West Coast LEAF, "Position paper on women without status in Canada" (May 2012) and Sheryl Burns, "Mothers without legal status in Canada" (YWCA, March 2010).

251 SC 2001 c 27.

252 See Roy Hanes, "None is Still too many: An historical exploration of Canadian immigration legislation as it pertains to people with disabilities" 37(1) Developmental Disabilities Bulletin 91 at 95.

253 Ibid.

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While legislation overtly discriminating on the basis of race, gender or sexual orientation has largely been amended over the course of the second half of the 20th century, similar reforms have eluded people with disabilities. In fact, discrimination on the basis of disability remains firmly entrenched in Canada's immigration regime through section 38 the IRPA. Specifically, section 38(c) of the Act provides that a "foreign national is inadmissible on health grounds if their conditions might reasonably be expected to cause excessive demand on health or social services." Excessive demand is defined in the IRPA regulations as "costs [that] would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years" or which would add to waits lists so as to increase the mortality rate of existing residents.²⁵⁴ While several important exemptions have been added as a result of legal challenges in recent years, most notably for refugees under the UN Convention on the Status of Refugees and the children or spouse of a family class sponsor, the legislation sends a clear message that disabled applicants are less desirable than non-disabled applicants.

These provisions have been used to refuse entry to a number of mothers with disabilities. In one case, a mother with a heart condition was refused entry despite medical evidence that she was fully capable of carrying out everyday tasks and that the medical costs associated with her condition were likely to be relatively minor.²⁵⁵ Her son had hoped to sponsor her to Canada in order to reunite the family, and she would have provided needed child care support for his children. The provisions have also been used to exclude a mother with osteoarthritis,²⁵⁶ a mother with diabetes living in deplorable conditions in Pakistan as a result of an earthquake,²⁵⁷ and a mother with cirrhosis of the liver who was not experiencing any symptoms or problems as a result of her condition.²⁵⁸

West Coast LEAF shares the view of the Canadian Council for Disabilities²⁵⁹ that these provisions are antithetical to the equality rights protected under Canadian human rights law and must be abolished.

Refugee Health Care Cuts

For more than 50 years, the Government of Canada funded comprehensive health insurance coverage for refugee claimants through the Interim Federal Health Program ("IFHP"). The program paid for basic health care for refugee claimants and refused claimants until they were removed from the country or became eligible for provincial health care. In 2012, the Governor in Council passed two Orders in Council which significantly reduced the level of health care coverage available to many of these individuals. The effect of these changes was to deny funding for life-saving medications such as insulin and cardiac drugs to impoverished refugee claimants from war-torn countries such as Afghanistan and Iraq, and for basic

254 Immigration and Refugee Protection Regulations (SOR/2002-227).

255 *Cheema v Canada (Minister of Citizenship and Immigration)*, [2004] IADD 387.

256 *Mohammad-Esmaei v Canada (Minister of Citizenship and Immigration)*, [2009] IADD 339.

257 *Akbar v Canada (Minister of Citizenship and Immigration)*, [2009] IADD 293.

258 *Bariana v Canada (Minister of Citizenship and Immigration)*, [2008] IADD 1129.

259 Council of Canadians with Disabilities, Submission to Parliament on immigration and disability (23 March 2012), www.ccdonline.ca/en/socialpolicy/immigration/immigration-and-disability-23March2012.

pre-natal, obstetrical and pediatric care to women and children seeking the protection of Canada from “Designated Countries of Origin” such as Mexico and Hungary.

In February 2013, Canadian Doctors for Refugee Care (CDRC) and the Canadian Association of Refugee Lawyers (CARL), along with three individual patients, asked the Federal Court to declare that federal government’s cuts to health care for refugee claimants were unconstitutional and therefore illegal.

Affidavits filed in the case highlighted the significant impacts the cuts had on mothers and pregnant women, among other vulnerable groups. A lawyer from Ottawa described the situation of a refugee mother facing mental and physical health issues as a result of years of physical, sexual and psychological abuse who lost coverage for needed medications and dental treatment as a result of the cuts. A support worker from Vancouver described the uncertainty and anxiety experienced by one of her clients as a result of the cuts and the impact it was having on her husband and teenage daughter, which compounded the trauma they had experienced in their home country.

A number of doctors testified to the massive impact of the cuts on pregnant women: the pregnant woman suffering severe abdominal pain who left the emergency room after being told she would have to sign a document stating that she would be responsible for the costs of her visit; a woman who was raped repeatedly in her home country and arrived in Canada in the third trimester of her pregnancy, without access to health insurance and prenatal support; the pregnant woman who fled her country of origin in a rush to protect her 13 year-old daughter from genital mutilation and incurred a large hospital bill as a result of delivering her newborn without IFHP coverage; and numerous other women who were terrified at the prospect of giving birth without a doctor’s support after learning their IFHP coverage had been cut.²⁶⁰

Many other health care professionals also spoke out against the cuts. In a June 6, 2012 letter to the Minister of Citizenship and Immigration, the Canadian Psychiatric Association asked: “[h]ow are we to tell a woman with PTSD that she can no longer receive an anti-depressant or an anxiolytic to help her cope with the effects of trauma?...How should we tell a recently arrived mother fleeing from danger and suffering from depression that neither she nor her child are eligible for care, simply because of their country of origin?”²⁶¹ A group of health professionals at the McGill University Department of Psychiatry noted their concerns with the changes, observing that, “for example, a rape victim from a Designated Country of Origin suffering from severe depression would not be entitled to either health care or anti-depressant medication unless she is viewed as a threat to others.”

In July, 2014, the cuts to the IFHP were ruled unconstitutional by the Federal Court of Canada. The judge found that the cuts amounted to “cruel and unusual treatment” that intentionally targeted a poor, vulnerable and disadvantaged group.²⁶² The Federal Court ruled that the executive intentionally targeted poor and vulnerable refugees and refugee claimants “for the express purpose of inflicting predictable and preventable physical and psychological

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²⁶⁰ Affidavits on file with the author.

²⁶¹ Quoted in *Canadian Doctors For Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para 627.

²⁶² *Ibid* at para 689.

suffering on many of those seeking the protection of Canada.”²⁶³ The judge also found that the cuts violated the equality rights of refugee applicants by drawing a discriminatory distinction between applicants from certain “designated countries of origin” and applicants from other countries, and offering even fewer benefits to applicants from the designated countries of origin.²⁶⁴ The federal government has appealed the decision.

RECOMMENDATIONS

- Ensure immigrant and refugee women and mothers have access to culturally and linguistically appropriate information and resources about their rights in Canada.
- Ensure sponsored women who are fleeing an abusive sponsor have access to social services, income assistance, subsidized housing, and other needed supports, regardless of their immigration status.
- Repeal section 38 of IRPA.
- Reinstatement of the Interim Federal Health Program for refugees and refugee claimants in Canada.

²⁶³ Ibid at para 587.

²⁶⁴ Ibid at para 871.

Conclusion

Women with disabilities are subject to the discriminatory attitudes of a disabling society on a daily basis. When they become or seek to become mothers, these same biases too often influence the views of those best positioned to support them, including government officials, health care professionals, child protection workers, and parenting assessors. Their particular parenting needs go unmet, with negative consequences for both mothers and their children.

Disabled mothers face many barriers to their parenting. Whether it is due to inaccessible resources and services that would support them to maintain custody of their children, discriminatory attitudes about their parenting abilities on the part of health care professionals, or laws and policies that have a disproportionate adverse impact upon them, these women face distinct challenges as a result of the intersections between their gender, disability, and status as parents. Women who are additionally marginalized by age, race, sexual orientation, gender identity, and other intersecting factors face particular challenges. Indigenous women, whose parenting has been policed by the state for generations, are especially vulnerable. Additional factors including poverty and violence disproportionately impact women with disabilities, with significant implications for their safety, autonomy, dignity, and rights as parents.

Challenging and ultimately unravelling the discriminatory attitudes that influence professional and societal views about disabled mothers will take time and hard work on the part of disabled women and their advocates and allies. While changing views takes time, in this report we have presented a wide range of concrete steps government could take *today* to better respect, protect, and fulfill the legal rights of women with disabilities, and to assist them to parent in the best interests of their children. Ensuring that mothers with disabilities do not live in poverty and have access to safe and affordable housing, especially in cases where they are fleeing abuse, is a critical first step that must be taken immediately.

The overarching recommendation emerging from this report is that the state must provide the supports necessary to ensure that children are able to remain with their parents when it is in their best interests to do so. The legal rights of both children and their mothers—the rights of children to be raised in a supportive and loving environment, and the rights of mothers not to be discriminated against because of their perceived disabilities—demand nothing less.

The overarching recommendation emerging from this report is that the state must provide the supports necessary to ensure that children are able to remain with their parents when it is in their best interests to do so.

West Coast LEAF works to advance women's equality and human rights through legal interventions, law and policy reform, and public legal education in British Columbia.

West Coast LEAF is an incorporated BC non-profit society and federally registered charity. It is governed by an elected Board of Directors and supported by active members, committed volunteers, and a dedicated staff.

westcoastleaf.org



555 — 409 Granville Street
Vancouver, BC, V6C 1T2
604.684.8772
toll free 1.866.737.7716
info@westcoastleaf.org