

Theme 1: Mothers at Work

Improving Maternity and Parental Benefits Outside Quebec

Rachel Cox, Attorney

According to NAWL's vision, every mother should receive income replacement and material support during the first years of caring for a child. Bearing and raising children should not impoverish women, as is now the case. No single initiative is sufficient to drastically improve the situation of all mothers in Canada. Nonetheless, several areas of the law cry out for reform by the federal government. Maternity and parental benefits are definitely among them.

Unless parents live in Quebec, maternity and parental benefits are granted through the federal regime set up by the *Employment Insurance Act (EI Act)*. As of 2001, in order to be eligible for these maternity and parental benefits, a person must have accumulated 600 hours of insurable employment during the previous 52 weeks. Women who have given birth are eligible for maternity benefits, while either parent, including an adoptive parent, is eligible for parental benefits. With the exception of the few who qualify for the family supplement, benefits represent only 55% of insurable income and are taxable. As of 2007, the maximum insurable earnings are \$40,000 per year, for a maximum weekly benefit of \$423. A waiting period of two weeks is imposed on one parent, usually the mother, as she is almost always the first parent to draw benefits.

As of January 2006, the Quebec Parental Insurance Plan offers much more generous benefits to a much broader group of new parents, including self-employed parents and the second parent in same-sex families. We think it is time that some key elements of the Quebec plan are introduced into the *EI Act* so that mothers and fathers in the rest of Canada can enjoy similar benefits¹.

Society as a whole benefits in a particular and unique way from childbearing and childrearing. The Supreme Court decision in the *Reference re Employment Insurance Act* underlines this fact, stating that, "Children are one of society's most important assets, and the contribution made by parents cannot be overstated." According to the Court, "An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility."

At the same time, the decision states that: "the social

nature of unemployment insurance requires that Parliament be able to adapt the plan to the new realities of the workplace.²"

We therefore recommend that the current federal benefit regime be expanded through the development of specific rules within EI for workers who apply for maternity and parental benefits. This would bring Canada into line with the 2003 recommendations of a United Nations Committee on Discrimination against Women. This Committee recommended that Canada reform maternity and parental benefits so that they cease to be a source of inequality for women³. Given that society as a whole benefits from the work parents do raising young children, we recommend that the federal government contribute directly to financing this much-needed expansion to the current maternity and parental benefit regime.

Specifically, NAWL recommends that the federal government:

- Abolish the waiting period for workers receiving maternity and parental benefits;
- Convert this two-week period to a period of eligibility for parental benefits;
- Increase benefit levels for maternity and parental benefits (and all other benefits) to 70% of regular earnings;
- Raise maximum yearly insurable earnings to \$51,748, to be indexed annually;
- Calculate benefits on the basis of the best 12 weeks of income in the last year in all regions of Canada;
- Create a family supplement of \$25 per week for one child and \$35 for two or more children for all EI beneficiaries, regardless of family income;
- Lower the eligibility requirement to 360 hours for maternity and parental benefits;
- Respect a distinct entitlement to maternity and parental benefits so that the right to these benefits is not affected by receipt of regular benefits;
- Designate benefits for fathers and second parents;
- Allow a 3 to 5 year reach-back period to qualify for maternity and parental benefits; and,
- Extend coverage to self-employed mothers and fathers.

¹When we use the term "mothers," we are referring to co-mothers in same-sex families as well as mothers in opposite-sex families. Similarly, the term "fathers" includes co-fathers in same-sex families as well as fathers in opposite-sex families.

²Reference re: *Employment Insurance Act* (Can.), [2005] 2 S.C.R. 669 at 54, 66.

³United Nations, *Report of the Committee on the Elimination of Discrimination against Women*, Supplement No. 38 (A/58/38) (2003) on line: http://www.fafia-afai.org/images/CEDAW_UNrecs_to_Canada_2003.pdf

During our consultations on maternity and parental benefits, many participants insisted that all mothers need support, whether or not they have been doing the kind of work that allows them to qualify for EI benefits. We came to the conclusion that a complementary **universal support program** that reaches mothers who do not qualify for benefits under EI or who would receive inadequate benefits under that program is also essential. Such a program would rely on the federal government's spending power to support families with new babies or newly adopted children. At the same time, we recognize Quebec's right to determine its own social policies and thus to opt out of any such program with full financial compensation, if it so wishes.

In Canada, becoming a mother has a dramatic effect on women's economic well-being. If these women are -- or become -- single mothers, they and their children risk a significant drop in their standard of living. For women who already have low incomes, such as many Aboriginal women, women with disabilities and women of colour, the outcome can be grim.

NAWL believes that if our recommendations were implemented, this would be a good first step towards a social policy that is genuinely supportive of families with young children in Canada. In the meantime, mothers continue to pick up the slack, at the price of their own economic independence.

For a more in-depth analysis, see NAWL's Discussion Paper on maternity and parental benefits as well as a complete list of our recommendations; consult the NAWL web site at www.nawl.ca.

Universal Benefits for Mothers and Fathers: A Step Towards Equity and Solidarity!

Hélène Cornellier – Association féminine d'éducation et d'action sociale

Supporting Family Responsibilities for Real!

Founded in 1966, AFEAS (*Association féminine d'éducation et d'action sociale* - www.afeas.qc.ca) brings together 13 000 women from 300 local groups and 12 regions in Quebec. For 40 years, these members have worked on a voluntary basis, seeking to achieve "legal" and "de facto" equality for Quebec and Canadian women.

Over these years, AFEAS has advocated for the recognition of women's and men's unpaid, or "invisible," work as parents, and caregivers. Although the question of caregivers will not be discussed in this text, all family responsibilities must be subject to future discussions and analyses.

QPIP: a major gain, but not for all

Since its coming into force, on January 1, 2006, the Quebec Parental Insurance Plan (QPIP) better supports Quebec mothers and fathers during the year following a child's birth or adoption. Although this regime is more accessible and generous than the Employment Insurance (EI) regime in the rest of Canada, it still excludes too many mothers, and a certain number of fathers. Women and men who have no income or an income of less than \$2,000 during the year preceding the child's birth or adoption are ineligible for QPIP benefits. As for EI, eligibility is based on the number of hours worked (600) during the qualifying period (52 weeks).

In 2006, QPIP gave benefits to 61 841 mothers and 35 851 fathers for 82 500 births and 640 adoptions. On the other hand, 20 659 new mothers did not have access to maternity and parental benefits, representing 26.2% of new mothers in Quebec. In the rest of Canada, the number of mothers excluded from EI is even higher.

Claiming for ALL mothers and ALL fathers

Since August 2000, AFEAS has asked that ALL mothers and ALL fathers have access to benefits following a child's birth or adoption. In advocating for a better parental insurance regime for Quebec and Canadian women, AFEAS proposes minimal weekly benefits, or "universal" benefits, for new mothers who are ineligible for the current Quebec and Canadian regime. This measure would create a minimum floor for benefits for mothers and fathers during the year following a child's birth or adoption.

In concrete terms

The minimal weekly benefits proposed by AFEAS would be equivalent to 70% of minimum wage for a 40-hour week, i.e. the \$224/ week (minimum wage as of May 1st, 2007 in Quebec, i.e. 70% x \$8.00 x 40 hours). The following persons would receive "universal" benefits:

Mothers and fathers excluded from QPIP or EI. These women and men include, for example, seasonal and part-time workers, students or stay-at-home moms, people who are either unemployed, going through career and life transitions (moving, etc.) or self-employed in the rest of Canada, etc.

QPIP or EI eligible mothers and fathers but whose benefits do not reach the minimum established by AFEAS. In Quebec, that would cover QPIP beneficiaries whose income, in 2006, is between \$2 000 and \$16 120.

A Need for Coherent Policies

In 1966, when AFEAS was founded, 70% of women worked at home, caring for their children. In 2001, in Quebec, 73,1% of women, who are in the paid job market, work full time and 27,9% of them work part-time. In 2003, 9,5% of Quebec working women were self-employed.

The current social context, in Quebec as in the rest of Canada, is complex. For example, there has been a decrease in the birth rate and an increase in the population's aging rate. At the same time, we have seen a massive integration of women into the paid job market and, in parallel, changes in the family structure and in work environments. How can we, in such a context, ask women simultaneously to work full time in the paid job market, have babies, and ensure their financial self-sufficiency all their life, without providing them with practical and financial support in return?

Social and Intergenerational Solidarity

In 2007, almost all working age women and men contribute to QPIP (Quebec) or EI (Canada) during a significant part - if not all - of their professional life, i.e. between 18 and 65 years of age.

On the one hand, many of these women and men never have children or have already stopped having children, either by choice, for medical reasons or because of their age. Therefore, although they regularly contribute to either of these parental insurance regimes, they do not enjoy benefits (maternity, paternity, parental or adoption).

On the other hand, excluded women - and men - have contributed to these regimes prior to pregnancy (or their partner's pregnancy) and will continue paying after their return to work.

They lose all the support they have a right to simply because they do not fulfill the regime's criteria during the qualifying period. In fact, most of them will have contributed to the regime for 30 to 40 years but because they did not do so during the qualifying year, they will not have any financial support.

Is such a policy acceptable? While QPIP and EI are insurance regimes, we should not base eligibility for benefits (i.e. maternity, paternity, parental or adoption) strictly on contribution during the year preceding birth or adoption. Otherwise, women and men beyond child rearing age or who do not wish to have children should be entitled to refuse to pay contributions to these regimes.

Of course, such a refusal is inappropriate. Indeed, these "parental insurance" regimes, while based on contributions, are prefaced upon solidarity among all workers, whether they have children or not. In this spirit, why not extend solidarity to ALL mothers and ALL fathers? For AFEAS, this is a matter of equity and solidarity.

Financing in solidarity

In answering the question "Who will pay for this?" we must consider all relevant factors. If, as a society, we consider that children are a social responsibility as much as a family responsibility, financing parental insurance regimes must be coherent and focused on the parents' needs, no matter what their status and income. Thus, such a regime must be financed by premiums (workers and employers) and by a direct contribution from government. In Quebec, the *Regroupement pour un régime québécois d'assurance parentale* and the QPIP Board of Directors have made this recommendation to the responsible Minister who, unfortunately, rejected it.

Theme 2: Mothers in the family

Custody and Access and Violence Against Women: The Ontario Model

Pamela Cross, Executive Director – National Association of Women and the Law – NAWL

Women with children who leave an abusive or controlling relationship are faced with the need, usually urgent, to make arrangements for custody of and access to their children. This has long been a difficult experience for most women, one that is often fraught with danger for themselves and/or their children.

One of the most significant reasons for this difficulty is the way in which most courts in Canada have interpreted the “best interests of the child” test, which is the sole determining factor in custody and access cases.

The test itself is spelled out somewhat differently from province to province as well as federally. For instance, the federal *Divorce Act* simply states that custody and access determinations are to be made using the best interests of the child test. Many provincial and territorial statutes provide lists of criteria that generally include, but are not necessarily limited to, such considerations as:

- the affection between the child and anyone pursuing custody or access;
- the child’s views and preferences;
- the ability of anyone seeking custody to provide the child with appropriate guidance and the necessities of life;
- the stability of the family unit in which it is proposed the child will live; and,
- future plans for the child by each person seeking custody.

Notably absent from the various best interests tests has been any reference to violence within the family. While individual judges have been willing to consider such violence in specific cases, this has generally required the parent raising the issue of violence (most often the mother) to show that this violence has a direct negative impact on the best interests of the children. This is often difficult to do.

For many years, NAWL has led a national campaign to seek reforms to the *Divorce Act* to require courts to consider violence against women as part of the best interests of the child test in custody cases. Women’s equality-seeking organizations have also worked for similar changes at the provincial/territorial level.

There has been little success.

At the federal level, it has been difficult to make family law reform of any kind a political priority. We have faced strong opposition from the so-called “fathers’ rights” movement, which has many friends in government. Now, we face opposition as well from organizations such as REAL Women, which has the ear of government.

However, there is good news from Ontario, where the government has recently passed amendments to the *Children’s Law Reform Act* to require that violence and abuse be considered as part of the best interests of the child test.

Section 24(2) sets out the factors to be considered in applying the best interests of the child test to custody and access cases. As of February 14, 2006, a new factor has been included in this list:

- (g) the ability of each parent applying for custody of or access to the child to act as a parent;

Section 24 further states:

- (4) In assessing a person’s ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against:
 - (a) his or her spouse;
 - (b) a parent of the child to whom the application relates;
 - (c) a member of the person’s household; or
 - (d) any child.
- (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

These amendments allow women and their lawyers to raise the issue of violence and/or abuse in custody applications, without having to show that the children were directly involved in or affected by the violence. The amended sections also provide some protection for women who may have used physical force to protect themselves or their children from violence initiated by the primary aggressor.

Joint Custody: Let's Face it

Julie Lassonde¹ - NAWL

It is, of course, too early to be able to assess the impact of the revisions to the *Children's Law Reform Act*, but there can be little doubt that this is an important step in ensuring that women with children who leave abusive relationships have greater protection and more likelihood of a just outcome in custody and access proceedings.

This is especially so when these changes are considered in conjunction with a recent Ontario Court of Appeal decision. In the case of *Kaplanis v. Kaplanis* (January 2005), the Court of Appeal unanimously overturned a trial court decision that had ordered two parents to share the custody of their young daughter and instead granted sole custody to the mother.

In this case, the trial judge ordered joint custody despite the clear evidence that the parents could not cooperate or communicate without screaming at one another. In so ordering, the judge said:

"In my view, considerations of the best interests of [the child]... must not preclude joint custody merely because the parties, fresh from the wounds of their failed marriage, find it difficult to be civil to each other.... as responsible parents, they have a long standing obligation and responsibility to enhance [the child's] relationship with both parents."

The Court of Appeal saw matters differently when it wrote:

[H]oping that communication between the parties will improve once litigation is over does not provide a sufficient basis for the making of an order of joint custody.... In this case, there was no evidence of effective communication. The evidence was the contrary.... As in any custody case, the sole issue before the trial judge was the best interests of the child.

As the father did not request sole custody and did not submit a detailed parenting plan, the Court of Appeal awarded sole custody to the mother.

Perhaps a light at the end of the tunnel is beginning to emerge with respect to custody and access in cases involving violence against women.

Awarding sole custody to the mother is no longer a preferred practice. We now live in a world where custody is frequently shared, and where, in fact, joint custody is often perceived as the best option. However, the basic question at separation or divorce remains the same: what arrangement best serves the interests of the child? This question must be asked in the particular context of each family without presuming in advance that a specific form of custody is preferable. Too often, however, the reverse happens: joint custody is presented as the option that is in the best interests of the child, and only then, are the particular family circumstances examined. This legal update offers a critique of this common practice by pointing out some of the difficulties associated with joint custody.

No presumption, but almost...

There is no presumption in favour of joint custody under Canadian law². Judges are not obliged to favour this type of custody over others. So why, nonetheless, do they increasingly do so?³

One of the answers lies in the criteria used to evaluate the best interests of the child, and more specifically in the notion of maximizing contact with both parents⁴. On the basis of this principle, joint custody is often perceived as ideal. We often forget, however, that this type of arrangement requires much more collaboration and communication between parents than when the child only occasionally sees one of his or her parents.

According to several authors, the key to success in joint custody arrangements is good communication between parents and the absence of conflict⁵.

¹The author would like to thank Andrée Côté for her helpful comments on previous drafts.

²For Ontario, see *Kaplanis v. Kaplanis* (2005), 249 D.L.R. (4th) 620; [2005] CanLII 1625 (C.A. Ont.). For Quebec, see *P.(V.) c. S. (G.)*, [2000] J.Q. no 5380 (QL) (C.A.), cited in Michel Tétrault, *La garde partagée et les tribunaux: une option ou la solution?*, Cowansville : Les Éditions Yvon Blais, 2006 at 34-35. Note that in Quebec, according to s. 599 of the Quebec Civil Code, parents must exercise parental authority jointly, which is not automatically the case in Common Law. *Ibid.*, Tétrault, at 34.

³*Ibid.*, Tétrault, at 2.

⁴See among others the *Divorce Act*, 1985, ch. 3 (2e suppl.), ss. 16(10), 17(9).

⁵Tétrault, *supra* note 2, at 89. Philip Epstein explains that Justice Wilson's dissent in *Kruger v. Kruger* (1979), 25 O.R. (2d) 673 (C.A. Ont.) revealed the current tendency to order shared custody. Epstein however reminds us that Justice Wilson only envisioned this option in that precise case because the concerned parents had a good capacity to collaborate. Philip Epstein, "Joint Custody with a Vengeance: The Emergence of Parallel Parenting Orders" (2004) 22 C.F.L.Q. 1, at 1, 19.

Studies demonstrate that joint custody is, in fact, not in the best interests of the child in conflict situations⁶. According to Michel Tétrault, for example, conflict between parents cancels any benefits that joint custody may provide⁷. In recognition of this reality, Quebec case law requires proof of the parents' capacity to communicate with each other before ordering joint custody. Tétrault notes, however, that even in Quebec, courts take this requirement less seriously than they used to⁸.

Because a lack of communication prevents joint custody from being successful, where there is violence against women, this type of custody should not be considered as an option. To the contrary, custody arrangements must offer protection against violence for both the child and the mother⁹. As a result, NAWL proposes legislative reform establishing a rebuttable presumption against giving custody – sole or joint – to a violent parent (most often the father)¹⁰. In ordering custody arrangements that are in the best interests of the child, courts must consider the links between violence against women and harm to the child¹¹.

Parallel parenting as a conflict resolution mechanism: a new phenomenon

In their rush to embrace joint custody, courts sometimes consider parallel parenting as a way to address conflict between parents.

Parallel parenting is a form of joint custody that enables each parent to exercise exclusive parental authority in specific spheres. Typically, parental authority is divided temporally: when a child is with one parent, this parent has the authority to make any decisions in relation to the child's care, without consulting the other parent. Sometimes, however, the court excludes one of the parents from certain types of decisions. For example, a tribunal might give the choice of school exclusively to the mother.

Civil and Common Law authors alike express serious concerns about parallel parenting¹². In Quebec, s. 606 of the Civil Code permits this kind of arrangement only exceptionally, by modifying the attributes of parental authority.

⁶Helen Rhoades & Susan B. Boyd, "Reforming Custody Laws: A comparative study" (2004) 18 International Journal of Law, Policy and the Family 119, at 126.

⁷Tétrault, *supra* note 2, at 20-21.

⁸Tétrault, *supra* note 2, at 33-34.

⁹See generally NAWL Working Group on Family Law Brief, "Response to Bill C-22: An Act to Amend the Divorce Act," (July 2003) online: http://www.nawl.ca/ns/en/documents/Pub_Brief_DivorceAct03_en.pdf (accessed: April 9, 2007) at 6.

The basic assumption is that parallel parenting should be avoided. In the rest of Canada, the status of parallel parenting is unclear but courts seem to increasingly tolerate this arrangement. Indeed, as Epstein notes, many courts think that solving communication problems between parents is as simple as handing them a communication book¹³!

Take, for example, the *Ursic* case in Ontario¹⁴. The trial judge ordered joint custody in the form of parallel parenting, with a detailed schedule for the parents to follow. The mother then went to court, seeking to obtain sole custody. The Court of Appeal rejected her appeal and maintained parallel parenting.

Interestingly, the mother in this case accused the trial judge of accepting reasoning drawn from the "fathers' rights movement" and, putting the father's interests before those of the child¹⁵. She also accused the trial judge of applying a presumption in favour of joint custody¹⁶.

The Court of Appeal rejected these arguments but repeated what the trial judge had already stated, i.e. that parallel parenting is never anyone's first choice¹⁷. The Court also agreed with the trial judge that, in this case, parallel parenting was in the best interests of the child because it would allow the father to fully participate in the child's care¹⁸. Despite the outcome of the case, the Court of Appeal was apparently conscious of the problems with parallel parenting. In particular, the Court of Appeal refused to give the choice of the child's school exclusively to one of the parents¹⁹. In short, it did not push parallel parenting to its extreme.

¹⁰Ontario's Women's Network on Custody and Access, *Brief to the Federal, Provincial, Territorial Family Law Committee on Custody, Access and Child Support* (June 2001) online: (June 2001) online:

http://www.nawl.ca/ns/en/documents/Pub_Brief_Custody01_en.pdf (accessed: April 9, 2007) at 1: There must be a rebuttable presumption against custody and for limited parental contact and decision making in cases of woman abuse. This must be accompanied by strong direction about the criteria by which courts can vary orders to prevent abusers from using family law to harass and abuse their former partners.

¹¹Tétrault, *supra* note 2, at 23. In Ontario, this link is starting to be recognized in the *Children's Law Reform Act*, R.S.O. 1990, ch. C-12.

¹²Tétrault, *supra* note 2, at 8; Epstein, *supra* note 5, at 2.

¹³*Ibid.*, Epstein, at 16.

¹⁴*Ursic v. Ursic*, [2006] O.J. No. 2178 (QL); 32 R.F.L. (6th) 23; 149 A.C.W.S. (3d) 38 (C.A. Ont.), reversing *Ursic v. Ursic*, [2004] O.J. No. 3550 (QL) (C.S.Ont.).

¹⁵*Ibid.*, at ¶ 21.

¹⁶*Ibid.*, at ¶ 23.

¹⁷*Ibid.*, at ¶ 24.

¹⁸*Ibid.*

¹⁹*Ibid.*, at ¶ 32.

The fathers' rights movement

Despite the victories and benefits associated with the notion of “substantive equality”²⁰ in our society, the fathers' rights movement argues for a presumption in favour of joint custody. This would result in a return to “formal equality.” In the context of joint custody, the fathers' rights movement insists, for example, on equally sharing the time that each parent spends with their child²¹.

However, the notion of substantive equality²², which is the result of decades of feminist analysis, requires more than a mere calculation of the number of hours spent with a child to evaluate appropriate custody and access arrangements. In considering joint custody, it is important to ensure that the historic parenting patterns of the family as well as the issue of woman abuse are considered. Both parents must be capable of taking full responsibility for their child, and must, in fact, do so after the court case is completed.

The use of gender-neutral language distracts courts from the task of evaluating the actual effects of parents' behaviour on their child's wellbeing. Such language leads to poor gender analysis and does not help address the best interests of the child. In particular, the historic tendency not to consider violence by the father towards the mother, has resulted in inappropriate joint custody awards.

It is far more appropriate for courts to consider these substantive issues – who provided most of the care to children before separation, the presence of woman abuse, etc. – than to be preoccupied with minute calculations as to the number of minutes a child is in the care of each parent when deciding on custody and child support arrangements.

²⁰Susan B. Boyd, “Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes” (2004) 6:1 *Journal of the Association for Research on Mothering* 52, at 64. Note that the Fathers' Rights Movement is not a homogeneous group. Different participants have different points of view. However, in this article, we only deal with the spirit of formal equality, which is a common point for these groups. See, for example, “Canadian Equal Parenting Groups Directory,” online: <http://www.canadianequalparentinggroups.ca> (accessed: April 9, 2007). It is also important to note that by referring to the Fathers' Rights Movement, we of course exclude pro-feminist men's groups. See, for example, “Le Collectif masculin contre le sexisme,” online: <http://www.antipatriarcat.org/cmcs/> (accessed: April 9 2007).

²¹Boyd, *supra* note 18, at 64. See also Rhoades & Boyd, *supra* note 5, at 131, regarding this same tendency in Australia.

²²See, for example, Karen Schucher & Judith Keene, “Statutory human rights and substantive equality – why and how to avoid the injury of the law approach” (March 5 2007), online: http://www.leaf.ca/Paper_LEAF_Human_Rights_Law_Importation_Final_March_5_2007%20_2_.pdf (accessed: April 9 2007), at 6 (“A substantive

Conclusion: Facing reality

Joint custody is not necessarily in the best interests of the child, particularly in cases involving violence against women or where the parents cannot communicate with one another.

As a result, any legislative proposal for a presumption in favour of joint custody is dangerous.

Far from discouraging fathers' involvement in children's care, we encourage parents to fully share not just time but substantive responsibilities in the spirit of true equality between all persons. However, despite the increasing interest many fathers display in their parental role, according to the latest statistics, mothers are still primarily responsible for most child rearing activities in our society. Anyone involved in child custody cases (judges, mediators, lawyers, parents, etc.) must face this reality.

Ontario Bans Religious Arbitration in Family Law

Pamela Cross – NAWL

After much public and legislative discussion, the Ontario government passed *Bill 27, The Family Statute Law Amendment Act* on February 14, 2006, which requires that all family law arbitration in Ontario be conducted only in accordance with Canadian (including Ontario) law.

The new legislation contains a number of very important and positive provisions:

1. Section 1 of the *Arbitration Act* now states that family arbitration must be “conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction”;

2. Section 2 now provides that both the *Arbitration Act* and the *Family Law Act* govern family arbitrations and, when a conflict arises between the two, it is the *Family Law Act* that will prevail;

3. Parties entering into a family arbitration must have independent legal advice;

approach to equality looks at the nature and impact of the law (or other impugned action), as well as looking at whether the law applies universally to the persons for whom it is intended”).

²³Tétrault, *supra* note 1, at 10.

4. Parties entering into a family arbitration cannot waive their right to appeal the arbitration if they are not satisfied with it;

5. Family law arbitrators will be regulated for the first time in Ontario, and will be required to undergo training, including training in how to screen for family violence and power imbalances;

6. Arbitration will be monitored through mandatory record keeping; and,

7. Parties can no longer enter into advance agreements to arbitrate family disputes; such agreements can only be made at the time of the dispute.

In addition to banning the use of religious laws in the arbitration of family law disputes, *Bill 27* tackled the issue of custody and access. In Ontario, custody and access are dealt with in the *Children's Law Reform Act*, which requires that decisions be made using the best interests of the child test.

Ontario's best interests of the child test has been expanded by *Bill 27* to include consideration of "the ability of each person applying for custody of or access to a child to act as a parent." The legislation also states that:

In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against (a) his or her spouse; (b) a parent of the child to whom the application relates; (c) a member of the person's household; or (d) any child.

This legislation is of considerable importance to women and children, especially those fleeing abusive situations. It is also important because it came about directly as the result of law reform lobbying by a broad coalition of organizations committed to women's equality rights. However, the legislation is not without its shortcomings:

- While it is extremely positive to see an end to the use of religious laws in the arbitration of family law disputes, NAWL would have preferred a complete ban on arbitration in family law; and
- Without a change to the present legal aid criteria – which do not allow legal aid assistance for arbitration - the requirement that all parties to a family arbitration have access to independent legal advice is largely meaningless for low-income women.

And more remains to be done:

- Regulations to support the legislation, in particular the sections dealing with training, regulation and monitoring of arbitrators have yet to be written. Until they are, those sections are not in force;

- Massive community outreach and education are necessary to ensure that all women – but especially those from marginalized communities – know what their rights are under Canadian law.

- Research to evaluate the impact of this legislation on women is important, especially research monitoring underground religious arbitration networks that may possibly develop and put women at risk.

NAWL remains active on this issue. The Ontario Women's Directorate has recently entered into a contract with a consortium of community-based organizations, including NAWL, to develop and produce public education materials on various family law related matters aimed at vulnerable and isolated women.

To read more about the Bill, visit the Ontario government website at:

www.ontla.on.ca/Library/bills/382/27382.htm.

Family Patrimony Protection In Quebec

Marie-Claire Belleau – Université Laval

Introduction

In Quebec, at the time of dissolution of marriage or civil union¹, members of a couple equally share property that was used for the family and was acquired during their conjugal relation. The family patrimony regime is based on solidarity between spouses or partners² in the context of what is now designed as an economic "family enterprise." This mandatory regime applies no matter what matrimonial regime was adopted by partners at the time of their marriage or civil union.

¹Note that in Quebec, marriage may be celebrated either religiously or civilly, with identical legal effects. Civil unions, created in 2002 in recognition of same-sex partners (before same-sex marriage was legalized in 2004), are a different institution. However, civil unions produce the same effects as marriage, except with regards to separation. For example, although religious or civil marriage dissolution requires a judicial divorce, a civil union can be dissolved through a notarized declaration by the spouses.

²The term "partner," in this context, refers to partners in Quebec in a civil union as opposed to a "de facto union." Note also that the regime governing civil unions in Quebec is distinct from the regime governing "common law partners" in the rest of Canada.

Part I - Why a Mandatory Family Patrimony Regime in Quebec?

In 1866, the Civil Code of Lower Canada established married women's legal incapacity under all then-existing matrimonial regimes. The Code also relegated such women to the category of persons deprived of the power to independently exercise their civil rights, along with minors and those banned from doing so for reasons of insanity or prodigality. The prevailing legal matrimonial regime was that of "community of property," according to which the husband, as the head of the family, controlled all property.

In contrast to the "community of property" regime, a wife "separated as to property" by marriage contract was able to manage her own property. With some exceptions, women under this regime remained free to administer and dispose of their property. However, they could not alienate their property without their husband's consent. Married women under the "separation as to property" regime maintained their legal capacity. This capacity, however, came at the expense of giving up in advance all rights to their husband's existing and future property. The "separation as to property" regime, nevertheless, remained popular as a way to avoid the legal incapacity of married women. Only in 1964 did the Quebec Parliament put an end to the legal incapacity of married women. Social habits, however, took longer to change. In addition, notary practices favouring the "separation as to property" regime persisted beyond the 1960s.

In 1968, divorce became accessible and socially accepted. Civil marriage, as opposed to religious marriage, was also legally recognized. Given the accessibility of divorce, the "separation as to property" regime created significant injustices and inequities. The typical case was that of the housewife married under the "separation as to property" regime, where all property is registered under her husband's name. At the time of marriage dissolution, the husband owned all the couple's property, and the woman, financially dependant because she took care of children during their conjugal life, ended up without property or any source of income.

Successive legislation has sought to remedy these injustices. For example, in 1970, the "partnership of acquiescence" regime was introduced, and, in 1980, compensatory allowance followed.

However, in 1985, following several conservative decisions from Quebec tribunals, the government began contemplating legislation regarding the family patrimony, legislation that was finally adopted in 1989.

The aim of the legislation establishing the family patrimony was to prevent some of the negative effects of the "separation as to property" regime on women, by requiring that spouses share all family property upon break-up.

Part II - What is the Quebec Family Patrimony Regime?

The family patrimony regime's philosophy is based on the idea that, in cases of marriage or civil union dissolution, partners equally share the family's property, acquired through their respective contributions to the "family enterprise." Under the changes brought about by this legislation, all contributions to the "family enterprise," whether paid or unpaid work, are recognized.

The family patrimony, therefore, now includes all property that was put to the family's use during the family relationship, no matter when it was acquired. In particular, it includes:

The residences of the family or the rights which confer use of them, the movable property with which they are furnished or decorated and which serves for the use of the household, the motor vehicles used for family travel and the benefits accrued during the marriage under a retirement plan.

The only exception to this rule is related to retirement plans and gains registered during the marriage in the name of each spouse under the *Act respecting the Quebec Pension Plan*. In this case, only the portion accumulated during marriage or civil union is part of the family patrimony. The legislation also stipulates that family patrimony is equally shared between spouses or partners at break-up, or to their assignee at death.

The family patrimony provisions were adopted on June 21, 1989 and entered into force on July 1, 1989. The legislation gave this new regime general and universal effect as well as an absolute and public order character. As a result, all marriages (religious or civil), and all civil unions, no matter which matrimonial regime is adopted, and irrespective of whether they were contracted before or after the legislation's coming into force, are subject to the new provisions (with the exception of rare allowed disengagements). The regime is an effect of all marriages and civil unions. In other words, the content of the family patrimony is not subject to negotiation prior to the marriage because it is determined by law.

Conclusion

The family patrimony regime ensures that family property acquired during the conjugal relationship is shared. This equal sharing between spouses or partners enables the recognition of unpaid work and counters the negative effects of combining revenues as well as inequalities related to marriage or civil union dissolution.

However, in Quebec, the effects of sharing family patrimony, although significant, remain limited, as 30% of couples do not marry or civilly unite. More and more couples live in free unions, and marriage continues to lose its popularity. In fact, Quebec has an unusually high level of de facto unions in comparison with the rest of Canada, the United States and even the rest of the world, preceded only by Sweden and closely followed by the Netherlands.

Theme 3: Mothers and Citizenship

Reclaiming Our Way of Being: Matrimonial Real Property On Reserve

Beverley Jacobs - Native Women's Association
of Canada

The connections of Aboriginal peoples to our lands and territories are very sacred and historical. Aboriginal peoples have been living on their traditional territories since time immemorial. There are many diverse Aboriginal communities with many diverse processes to address specific land issues. At the present time, the majority of First Nations communities are governed by the *Indian Act* unless they have developed their own Self-Government Agreements. Some First Nations outright reject the *Indian Act* system. The *Indian Act* is a piece of colonial legislation that was created to promote government assimilation and cultural genocidal policies. It has and continues to have detrimental impacts upon our communities. Due to colonization, First Nations relationship to the land has been severely impacted. One of the impacts is the issue of matrimonial real property (MRP) on reserve. The problem was not created by Aboriginal peoples. NWAC therefore believes that our communities need to resolve the impacts of colonization and to assist in building healthy communities in order to resolve the MRP problem.

Throughout the years, when the *Indian Act* was amended, it was done unilaterally by the federal government. When the *Indian Act* was amended in 1985 (Bill C-31), NWAC made contributions prior to any amendments being implemented. However, these amendments were, again, created unilaterally by the federal government.

We have learned many lessons from that process. One of them is that we do not want to be used as pawns to justify government processes. We will not get caught in the divide and conquer tactics.

The patriarchal and patronizing actions of government have had numerous negative impacts upon First Nations individuals, families, communities and Nations. There has been much discrimination in the past and it continues to this day. Human rights violations occur on a daily basis, especially for Aboriginal children and women, who are often victims of physical and sexual abuse, sexualized and racialized violence, blatant

systemic discrimination, emotional and mental abuse, poverty, suicide and murder . This discrimination has created detrimental impacts upon many generations of youth, women, men, families, and communities across this country.

The *Indian Act* does not contain provisions governing MRP on reserve. However, in 1986, the Supreme Court of Canada ruled that provincial and territorial laws on MRP do not apply to reserve land. These decisions create a gap in the law, which has produced serious negative consequences, especially for Aboriginal women and their children. When couples separate or divorce, part of the process under provincial or territorial law is to divide assets acquired during the marriage. All couples, when living off reserve, are entitled to include their matrimonial home as part of those assets. The courts decide how to divide the assets equally. As a result of the legislative gap, however, couples living on reserve are not entitled to this same process.

Couples who do agree on how to deal with their MRP do not have a comprehensive legal framework through which to give effect to their intentions. Worse yet, where couples do not agree, there is no mechanism for resolving their disputes. Without legal protection, Aboriginal women experiencing the breakdown of their marital relationship (whether living common law or married), confronting domestic violence, or dealing with the death of their partner, often lose their homes on reserves.

NWAC has long recognized that the lack of MRP law has negative consequences for Aboriginal women and children. We have participated in various efforts to resolve this situation. In 2006, NWAC received funding from the Department of Indian Affairs to participate in an initiative to identify solutions for the MRP legislative gap. NWAC believes that it was critically important to hear the voices of those Aboriginal women and youth who directly experienced the negative effects of losing their homes after a marital breakdown. The process for hearing these women's voices was considered the "bridging" point between the long fight for the recognition of Aboriginal women's rights and issues arising out of the MRP cases. It was an opportunity for participants to speak their truth.

NWAC asked women to suggest the best possible solutions to facilitate meaningful access to matrimonial real property protections.

¹The author would like to thank NWAC staff member, Elizabeth Bastien, who assisted in writing the first draft of this article.

We heard many personal and emotional stories from women who were violated in many ways. They spoke about the barriers they faced and what they needed to move forward. Many of them were still recovering from the pain and suffering in having to part with the home in which they raised their children.

The proposed solutions encompassed judicial and legal changes, which may be rooted in Indigenous traditional teachings and processes, as well as changes to improve social and economic well-being. Six broad themes emerged, which NWAC sorted into short, medium and long term solutions: intergenerational impacts of colonization, violence, justice, accessibility of supports, communication and education, and legislative change.

Solutions from Aboriginal women: Six Broad Themes

1) Intergenerational Impacts of Colonization

Aboriginal peoples, in general, confront the negative intergenerational impacts of government's assimilation and cultural genocidal policies. These impacts have had a specific detrimental impact on Aboriginal women. The fundamental Indigenous teachings about relationships between women and men, as well as the responsibilities each had to the other, to their extended families, to their communities, to their Nations, and to Creation were negatively impacted or totally ignored by notions that flowed from the larger society where women were viewed very differently. The result has been a devaluing of the role of women in Aboriginal societies and cultures.

Solutions proposed were to ensure that culturally based healing and wellness programs continue to address the harm done in communities, to address membership issues in First Nations communities, and to financially compensate Aboriginal women and their descendants who have suffered losses, lack of protections and disenfranchisement.

2) Violence

Violence in any form is unacceptable. Communities free of violence foster trust amongst their members and re-instill pride in their peoples.

Proposed solutions to address violence were to develop a collective, culturally based approach to resolving conflict, to develop a national strategy to end violence against Aboriginal women, children and families that contributes to marital breakdown, to address policing issues on reserve to enforce court orders that protect women and their children living on reserve, to develop

and to provide transitional housing accessible to women, especially to those living in remote or isolated areas. Another proposed solution was transitional housing for men during times of marital difficulty to ensure that women and children remain in the family home, which also means that there would be less disruption for the children in the home. NWAC also suggests that impact assessments should be conducted for existing family violence related programs, both to measure effectiveness and to identify where additional resources are needed.

Justice

Justice, access to legal services, and enforcement of court orders were common themes raised and that must be improved. NWAC heard the frustration of many of the participants who tried to access judicial processes but were unsuccessful due to barriers linked to cost, distance, lack of services, and lack of knowledge by legal professionals about First Nations issues. It was noted by many Aboriginal women that the justice system must improve the enforcement of court orders, band bylaws, and other legal orders for women living on reserve. They also recommended that an independent body or multi-staged system of Aboriginal mediation or other appropriate practices for justice and decision-making be implemented. There were a variety of possible approaches, including the use of an independent Aboriginal women's representative, mediation, arbitration; all premised on the use of culturally based processes, including languages and cultures to achieve sound and appropriate solutions.

Accessibility of Support

Issues related to the accessibility of support included geographic location, eligibility criteria, and band membership. It was noted that the accessibility of support and different programs decreased following the breakdown of the marriage or relationship. It was noted by some Aboriginal women that the funding of programs to support Aboriginal families and healthy relationships as well as to provide supports to them during a marital breakdown would be beneficial.

Communication and Education

The MRP solution initiative brought to light the lack of knowledge of MRP issues and the rights of Aboriginal women. NWAC repeatedly heard the call for more information and education, primarily around MRP, as a way of empowering Aboriginal women. Participants called upon NWAC to be resourced so that they may provide leadership on this solution.

It was noted that additional resources were needed for education and upgrade training to increase employability of Aboriginal women. A fund for Aboriginal women to access economic development opportunities and to support small business development was also needed. All of these supports will enable Aboriginal women to rebuild their families, communities and nations and to have the necessary resources and rights-based knowledge to build those healthy, viable and sustainable communities.

Legislative Change

There are a variety of legislative approaches that could be employed and each has to be considered in relation to the standards required as part of the law-making process, including the duty to consult, Aboriginal and treaty rights, the equality of men and women, international law and human rights law. In the short term, until First Nations communities can develop their own laws the majority of the Aboriginal women who were consulted wanted overarching substantive federal legislation to protect the rights of women and children living on reserves. This legislation should include opt-out and compensation clauses.

Participants expressed concerns about the lack of resources, capacity, consistency and consensus necessary for First Nations to move towards enacting its own MRP laws. While there was strong support for traditional approaches and the use of First Nations laws, participants also expressed that some communities followed different paths and that these difference must be respected. NWAC recommended that an enabling body of Aboriginal women and First Nations representatives should facilitate consultation and development processes based on Indigenous legal approaches that are appropriate for each First Nation.

When discussing each of these six themes, the issue of the housing crisis on reserve was a recurring topic. This is an issue that the Department of Indian Affairs must rectify immediately as it is the federal department that is responsible for providing the appropriate financial resources for housing on reserve. There must be subsidized and affordable housing provided both on and off reserve for Aboriginal women and their children. Until appropriate MRP solutions (whether legislative or non-legislative) are in place, NWAC is asking for a moratorium on evictions on reserve as a first protective step.

It was also reiterated throughout the discussion of each theme that the issue of Aboriginal women living in remote or isolated First Nations communities must be taken into consideration. In particular, concerns were expressed regarding the ability of such women to access services, supports

and programs, accessing judicial processes that are outside of their communities, and the cost associated with accessing judicial processes. Therefore any solutions must also take into account the unique needs of those living in remote or isolated communities.

Conclusion

The MRP solutions process did not occur without limitations. There were very serious concerns raised by the participants regarding the short time frame for consultations and the turn around time for the consultation process. As noted in submissions in the House of Commons Standing Committees on Human Rights and Aboriginal Affairs, NWAC advised that it needed a full year for these consultations to occur. However, NWAC was only given three months. Many participants were sceptical of this process because they viewed it as government driven but delivered by Aboriginal organizations. And, based on the way the phases were developed, with only three months of consultation, they were justified in their scepticism.

On April 20, 2007, the Minister of Indian and Northern Affairs, Jim Prentice released a 500-page MRP Report by Wendy Grand-John, the Ministerial Representative, with the aim of using this report as a guide to drafting a key piece of federal legislation aimed at ensuring there is balance, fairness and respect for all parties on reserve when they have separated, divorced or become widowed.

However, while governments need to provide the necessary resources, it is essential that communities lead the change. We all must remember that it was the government's assimilationist policies that have brought us to where we are today. It's time for serious action and NWAC believes in strong and healthy women, which in turn develop strong and healthy communities. The participants we consulted with want movement towards successful change and are hopeful that, with their participation, any amendments, legislative change, or creation of new legislation will build upon the contributions they provided in this process. The whole MRP solutions process aimed to re-establish pride and self worth in the lives of participants who felt they were never heard, often forgotten, and disenfranchised. They want their rightful place in society.

The women who provided the solutions in this process are daughters, sisters, mothers, grandmothers and granddaughters. They want the intergenerational cycle of abuse and marginalization to end. They want this to be a collective effort to bring the required change in their communities. Through the creation of a responsive and comprehensive MRP process, they want to heal and come together to reclaim their way of being now more than ever.

Family Reunification for Live-in Caregivers

Evelyn Calugay – PINAY – Filipino Women’s Organization of Quebec

Background on the Live-in Caregiver Program

The collapsing Philippine economy is based on an outdated agricultural model, involving feudal relationships, which is under the control of foreign monopoly interests. The Philippine government's solution to this collapsed economy is to export people abroad, who in turn send home US\$10 billion in remittances per year. The latest statistics indicate that there are 3000 Filipinos leaving the country each day in search of jobs abroad. This labour export policy is big business for the Philippine government.

As a result, many Filipinos end up in Canada. There are approximately 450 000 Filipinos in Canada. They make up the 4th largest visible minority group in Canada. According to Statistics Canada, the average income of Filipinos working in Canada is CAN\$2000 less than that of the average Canadian worker. Since the 1980’s, more than 100 000 have Filipinos entered as domestic workers, first under the Foreign Domestic Program, and then through the Live-in Caregiver Program (LCP), which replaced it in 1992. Based on 2003 data from Statistics Canada, more than 90% of people entering Canada through the LCP are Filipino.

Canada aggressively recruits nannies from the Philippines. There are about 800 special “schools” across the Philippines training Filipinos to work as caregivers in Canadian homes. Would-be nannies, who attend the (legitimate or dubious) special schools, learn how Canadians like their shirts ironed and their meat cooked! These nannies-in-training are told that if they complete 24 months of work within a 3-year period in Canada, they will then qualify for Canadian permanent residence. This, however, is misleading! Things get much more complicated when they arrive in Canada. As a result of difficulties in obtaining permanent residence, Filipino women face serious family reunification problems. This is why PINAY, the Filipino Women’s Organization of Quebec, believes that Filipino Live-in caregivers should be given permanent residency immediately upon arrival.

The Problem of Family Reunification

Although Filipino caregivers working through the LCP send money home to support their families, their primary objective remains family reunification in Canada. Filipino nannies can be separated from their family for 3 to 15 years while working in Canada and elsewhere.

Many caregivers work in Hong Kong, Singapore or the Middle East, and sometimes at all three locations, prior to participating in the LCP in Canada. After leaving their children behind for many years, they hope to bring them closer again.

When families finally reunite in Canada, it is a long and hard process of adjustment for all involved. Families frequently end up breaking apart because family members do not manage to reconnect after years of separation. They have become strangers to each other. In addition, families have to adjust to a constantly fluctuating economic status. Caregivers endure difficult conditions in Canada while their families’ economic status back home improves due to their financial contribution. When these family members then move to Canada to join caregivers, they see their economic status drop again, in comparison to other Canadians. Caregivers have to deal with the frustrations these changes in economic status create. Despite these difficulties, many caregivers feel that the LCP is their only chance to have a better life.

Complex Mothering Relationships – a By-Product of Failed Family Reunification

Mothering at a Distance

Delia De Veyra took a 6-month training in the Philippines and then came to Canada under the LCP. She has now been separated from her children for almost 3 years. She goes through roughly 5 phone cards every week to stay in touch with her three teenagers. Mothering at a distance for Ms. De Veyra, as for many caregivers, is an experience of profound loneliness and guilt. “There are no words to describe this feeling,” says Ms. De Veyra, “I can’t do anything to provide for them.” She explains that her husband who still lives in the Philippines is forced to take on a caregiver role with respect to her children, which adds another layer of gendered difficulties to her family situation. Gender roles are reversed. She is the breadwinner - ironically as a caregiver in Canada, a traditionally feminine role - and he is the caregiver at home. Although she sends them money regularly, Ms. De Veyra believes that her children do not completely understand why she is away.

Mothering Other People’s Children

In Canada, Ms. De Veyra makes a living by caring for other people’s children, as a “second mother” to these children. As a result, Canadian parents often tell caregivers that they are “part of the family.” However, according to Ms. De Veyra, “parents use this expression at their convenience and they don’t really recognize our contribution.” For example, they will tell a caregiver that she can take any food she wants and then point out when food is missing from the fridge.

Law Reform for Lesbian Mothers (in a System that Likes to Find Fathers for Children)¹

Susan Boyd and Fiona Kelly
Faculty of Law, UBC

More significantly, they may also refuse to raise wages, sometimes even using the idea that caregivers are “part of the family” to justify their refusal. Although some caregivers develop strong ties with their “Canadian children,” Ms. De Veyra believes that it is impossible to develop a real attachment in the circumstances and that this second mothering relationship is always superficial. Ms. De Veyra explains that Canadian mothers often feel the need to affirm their authority by ordering caregivers around, especially when they feel that the caregiver is developing an attachment to the child.

Giving Permanent Resident Status to Caregivers upon Arrival

As stated above, one of PINAY’s demands to Canadian policy makers is to give caregivers permanent resident status upon arrival. That way, caregivers would be able to bring their families to Canada, either by sponsoring family members or by including them as dependents in their application form. This would avoid much suffering and would promote healthier relationships between Filipino and Canadian families.

At the moment, in order to be eligible to obtain permanent resident status, caregivers must work 24 months out of 36 in Canada under the strict LCP conditions. Caregivers are given a work permit that is only valid to work for one specific employer. The process of changing employers is long and costly. It costs \$325.00 and takes between four to six months to obtain a new work permit. During the waiting period, caregivers struggle to survive and risk being unable to complete the required 24 months of work. If they fail to satisfy this requirement, they have to go back home.

Conclusion

Filipino women not only make an important contribution to the Philippine economy, they also contribute to the Canadian economy by freeing Canadian men and women - in highly gendered terms - to work and create gains for Canadian society. In return, however, they receive no recognition, no protection and no security.

In order to respect Filipino women’s mothering roles, both with regard to their children and other people’s children, Canada needs to solve the family reunification problem. Canada should give caregivers permanent residence upon arrival, or at the very least, work permits that are NOT employer specific, in order to make it easier for them to eventually obtain permanent residence. This, of course, is only one of the many ways in which Canada can give minimum recognition to Filipino and other women who do work on which the Canadian economy and many Canadian families rely.

Numerous changes in law and society have enhanced the visibility of lesbian relationships and instituted a legal framework that recognizes them. Same sex marriage has been legalized and unmarried same sex partners are legislatively recognized for many purposes. Law reform on same sex parenting has, however, lagged behind. Provinces have been slow to initiate legislative change. Changes to heterosexist definitions of parenthood have, as a result, occurred largely through court challenges brought by lesbian mothers.

Some provinces such as British Columbia have, however, recently begun a process of comprehensive family law reform and consultation. It is therefore of the utmost importance that proposals for legal change, particularly with regard to issues such as lesbian parenting, be proactively generated by groups such as NAWL. Law reformers are faced with complex questions arising from various, sometimes contradictory, trends such as: (a) increased use of reproductive technologies, which challenge any easy assumptions about parents sharing a genetic tie with children; (b) the influence of the fathers’ rights movement, which tends to emphasize the genetic tie between fathers and children; (c) the increased recognition of lesbian co-mothers who do not share a genetic tie with a child; and (d) parenting arrangements that involve more than two adults. How to balance factors such as intention to create a family in a particular form versus bio-genetic ties is unclear.

Our goal is to provide a context for this law reform discussion and to offer some strategies².

Despite the enormous increase in lesbian motherhood and the numerous legal victories mothers have been recently achieved, lesbian mothers remain legally vulnerable. Non-biological mothers in particular are subject to the whim of both biological mothers and the courts, while the legal status of known sperm donors remains largely unresolved. It is not yet certain, except possibly in Quebec, that a married lesbian couple will be automatically recognized as the exclusive legal parents of a child born into their marriage if a known sperm donor or genetic father exists or makes a claim.

¹This update draws on Susan Boyd’s article “Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility” (2007) Windsor Yearbook of Access to Justice (in press), draft available at http://faculty.law.ubc.ca/boyd/pdf/Boyd_WYAJ.pdf, and Fiona Kelly’s doctoral dissertation “Transforming Law’s Family: The Legal Recognition of Planned Lesbian Motherhood”.

²Not dealt with in this article is an equally concerning legal issue: section 10 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, which makes self-insemination illegal in Canada. The implications of this new law are yet to be felt within the lesbian and gay communities, and there is little indication in the various positive judgments around lesbian parenting that judges are even aware of the Act’s prohibition.

In a legal climate which appears to prioritize both finding fathers for children and paternal genetic ties³, a lesbian-headed family that chooses not to involve a genetic father remains an anomaly. Such families may be threatened should law reformers adopt as a model for all families the outcome in the recent Ontario decision recognizing three legal parents⁴. The challenge is how to develop a framework for lesbian motherhood in a climate in which fathers' claims to formal equality in relation to children have obtained considerable purchase.

Defining legal parenthood within lesbian headed families has emerged as one of the most contentious issues within modern family law. In the mid 1990s, a series of *Charter* challenges forced a number of provinces to extend and adapt adoption principles so that a non-biological lesbian mother could, with consent, adopt a child born to her partner without the biological mother losing her parental rights⁵. In other words, a child could have two legal mothers. More recently, equality-based challenges that compared the legal treatment of lesbian couples who conceive using donor insemination with heterosexual couples who conceive using the same method, forced five provinces to create gender neutral birth certificates permitting two women to be listed on a child's birth certificate⁶. Finally, in a recent Ontario case brought by two lesbian mothers together with their donor "dad", it was declared that a child could have three legal parents⁷.

While these victories have improved the legal framework for lesbian parenting, they are by no means complete solutions. Second parent adoptions still rely on the consent of the biological mother (and the biological father in the case of a known donor), involve a waiting period, usually require hiring a lawyer, and cost several thousand dollars. The waiting period and the ease with which biological mothers can withhold or withdraw consent leave non-biological mothers particularly vulnerable⁸.

Moreover, the value of the new birth certificates as actual proof of legal parentage is unclear. As well, they can only be used when a child is conceived via anonymous donor sperm.

This latter fact points to the failure of the current system to define the rights or responsibilities (if any) of known sperm donors. Even Ontario's three parent decision proves unhelpful on this issue, as the mothers *chose* to put the donor on the child's birth certificate, avoiding the question of whether he would be a legal parent in a contested case.

Recognizing the need to involve lesbian mothers in the process of law reform, interviews were conducted in 2005 with 49 lesbian mothers living in B.C. and Alberta⁹. Three key issues emerged. First, the women were frustrated by the law's failure to automatically recognize both mothers as legal parents. They were particularly concerned with the ongoing vulnerability of non-biological mothers. Second, the women felt that the law should be capable of recognizing more than two legal parents (or only one legal parent) *provided* that was the arrangement to which the parties had agreed. Finally, and in light of the increased emphasis on the rights of genetic fathers, the mothers wanted the law to clarify – and sometimes limit – the rights and responsibilities of known donors. While they supported expansion of the legal family to include a donor when the parties had agreed to this arrangement, they also wanted the ability to exclude a donor in situations where he was not intended to parent¹⁰.

Reflecting their key concerns, most mothers supported a law reform model that combined parental presumptions grounded in the intentions of a couple (or the primary parent), with opt-in mechanisms that allowed the family, with the consent of the primary parent(s), to expand beyond the nuclear model. The presumptive elements, which draw their inspiration from Quebec's filiation laws¹¹, would grant couples or individuals automatic and full legal protection as parents in situations where they have, by mutual agreement, conceived a child using third party gametes, such as donated sperm. In other words, biological assumptions are de-centred, and intention becomes the focus. Provisions similar to this, but applying only to heterosexual couples, already exist in a number of Canadian provinces.

³*Trociuk v. British Columbia* [2003], 1 S.C.R. 835; *Johnston-Steeves v. Lee* (1997), 29 R.F.L. (4th) 126 (Alta. Q.B.); aff'd (1997), 33 R.F.L. (4th) 278 (C.A.).

⁴*A.A. v. B.B.*, [2007] O.J. No. 2.

⁵E.g., *Re K* (1995), 15 R.F.L. (4th) 129 (Ont. Prov. Ct.); *Re A* (1999), 74 Alta. L. R. (3d) 1 (Q.B.) (Fam. Div.) (per Martin J.).

⁶E.g. *M.D.R. v Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (Sup. Ct. J.); *Gill v. Murray*, 2001 BCHRT 34.

⁷*A.A. v. B.B.*, *supra* note 4.

⁸E.g. *K.G.T. v. P.D.* [2005], B.C.J. No. 2935 (SC) (per A.F. Wilson J.).

⁹These interviews were conducted by Fiona Kelly for her dissertation research.

¹⁰Of the 12 families who had conceived using the sperm of a known donor, only two families considered their donors to be "parents." Parental status was awarded in these families on the basis of the significant caregiving role the men played in the children's lives.

¹¹Art. 538 C.C.Q.

The opt-in procedures that form the second part of the proposal, and which draw their inspiration from NZ law¹² as well proposed reform in Australia¹³, would allow additional parents to join the legal family *with the consent* of the presumptive parents. Through the opt-in mechanisms the two parent lesbian family remains central, but becomes one of several options, providing the opportunity for multiple parent families to be legally recognized in certain circumstances.

This law reform proposal provides a promising mix of certainty and flexibility in defining legal parenthood for lesbian headed families.

¹²Section 41 of the *Care of Children Act 2004* (NZ) expressly sanctions formal agreements that address the role of a known donor in a child's life. The agreement itself cannot be enforced under the Act, but a court may, with the consent of all parties to it, make a consent order that embodies some or all of the terms of the agreement. That order, insofar as it relates to contact with the child, can be enforced under the Act as if it were a parenting order relating to contact.

¹³Victorian Law Reform Committee (Victoria, Australia), *Assisted Reproductive Technology and Adoption: Position Paper Two – Parentage*, Melbourne, July 2005, at ¶ 4.32.

It would also generate a legal framework of parental recognition that reflects the roles that adults are playing in a particular child's life, gives some priority to birth mothers, and does not make problematic assumptions about genetic ties (especially paternal ties) being inevitably relevant. No model can avoid the possibility of custody disputes arising when adult relationships break down, but this one might at least provide a basic framework of parental recognition within which to adjudicate those disputes.

Theme 4: State Obligations to Mothers

Childcare and Women's Equality

*Jody Dallaire, Chairperson and Tammy Findlay,
Senior Researcher
Child Care Advocacy Association of Canada*

A pan-Canadian, publicly-funded, universal, non-profit child care system has been a central demand of the Canadian women's movement since before the Royal Commission on the Status of Women, 35 years ago. The struggle for a child care system continues because it is fundamental to women's equality.

Quality child care supports women in their multiple roles. It supports the 72% of women with children who are in the paid labour force. It supports women who are studying or doing job training. It supports women who work in the home and want early learning and education opportunities for their children.

Quality child care recognizes the under-valuing of the largely female child care workforce. The wages of child care workers in Canada are some of the lowest in the country. Child care workers earn only 62% of women's average earnings. This statistic reflects the undervaluation of traditional women's work and the lack of recognition of this undervaluation in most of

Quality child care helps women balance work and family. There continues to be a gendered wage gap – women earn only about 73% of what men earn. Part of the reason is that women (much more often than men) work part-time, or must take time away from paid work for family responsibilities.

Quality child care can help to address women's (and therefore children's) poverty. Especially for the more than 50% of female lone parents who are poor, a child care system improves training and job opportunities. Quality child care strengthens women's economic independence and can provide options for women and children leave abusive relationships.

Ambivalence about Women's Roles

The lack of a child care system in Canada is a persistent reminder that addressing women's equality is not high on our government's list of priorities. It is also a reflection of the ongoing ambivalence, and in some circles, hostility, towards mothers in the paid labour force.

To this day, there are strong views of child care as a parental responsibility, with government intervening only to support the labour force participation of low-income families.

In this way, it is seen as mom's primary responsibility to take care of the children.

While also an important element of child care, the emphasis on child development is indicative of this ambivalent attitude about women in the workforce. Child development research is increasingly being used to support public funding for programs that focus more narrowly on early learning and education, rather than programs that also incorporate non-parental care thereby supporting women's labour market participation.

The Result? A Child Care Patchwork Outside Quebec

As a result of mixed feelings about women's role in society, child care in most of Canada is a patchwork of generally under-funded services that are neither affordable nor available to the majority of Canadians, and often pay low wages to the child care workforce. There are not enough spaces to meet the demand of families, fees are high, and quality is inconsistent.

Quebec is the exception to this observation, as its \$7-per-day child care system provides 43% of Canada's regulated child care spaces, even though the province has only 23% of Canada's children under 13. Furthermore, since the 1997 introduction of its family policy, including universal child care services, Quebec has been the only province to show consistent declines in its child poverty rate.

Nonetheless, according to the Organisation for Economic Cooperation and Development, the overall patchwork of child care programs in Canada puts us at the bottom of the heap in comparison to other countries. Canada ranks last out of 14 countries in public spending on child care programs as a percent of gross domestic product, and last out of 20 countries in terms of access for 3-6 year olds to quality child care programs.

The Current Political Context

Unfortunately, given the current political context across Canada, and the recent budget announcements, it is unlikely that we will see substantial progress in turning this patchwork into a system. In fact, we've experienced some major setbacks both federally and in provinces such as British Columbia.

The current federal government cancelled the Agreements-in-Principle on Early Learning and Child Care (Bilateral Agreements). While not perfect, the Bilateral Agreements signalled some important commitments to system-building in provinces and territories, which have now been removed.

The Bilateral Agreements for regulated early learning and child care services have been replaced with \$250 million in annual federal transfers to provinces and territories, with no clear spending guidelines. This is actually a reduction of \$950 million – almost 80% – from the Bilateral Agreement commitment made by the previous federal government for 2007. Furthermore, it is a reduction of 62% from the \$650 million that the current federal government provided to provinces and territories in 2006, related to the Bilateral Agreements.

In addition, the current federal government still plans to provide a 25% investment tax credit to businesses that create child care spaces in the workplace, up to a maximum of \$10,000 per space. This is despite evidence showing that tax incentives to business have been tried elsewhere and failed.

The federal government, notwithstanding evidence indicating its necessity, is not investing substantial public funds in child care system-building. This government *is*, however, investing substantial public funds in income supports for families. A taxable family allowance of \$100 per month for each child under age six began in July 2006. In the 2007 budget, an additional \$1.5 billion was announced for a new child tax benefit. While effective income supports are a valid public policy goal, the evidence is clear – tax credits, subsidies and taxable allowances do not build a child care system.

Together, the taxable family allowance (an estimated \$2.6 billion in 2007/2008) and the new money (\$1.5 billion), totals \$4.1 billion – almost enough money to operate a pan-Canadian universal child care system for all 3 to 5 year olds!

The CCAAC Plan

The good news is that despite the current patchwork and political challenges, there is a way forward. The CCAAC vision is one where families are supported in their communities with quality child care services that are publicly funded like schools and libraries. Child care programs should be an expected part of our neighbourhoods, available and accessible to all who choose to use them. Services will be totally inclusive, providing the additional supports required by families with varying needs and honouring the diversity of our communities. Licensed family homes and centres will be staffed by qualified personnel who are fairly compensated for the vital services they provide.

The money for the system must flow to provinces AND be used accountably to improve access to quality, affordable services.

This would include not only making spaces available but also using public funds to ensure that qualified staff would receive the wages that their profession deserves.

These goals must be enshrined in national legislation.

CCAAC has proven that this vision is not only possible – it is doable and affordable. *Child Care Policy: Making the Connection* is our three-year project intended to build the capacity of the child care community, provincial and territorial governments, and other interested community members to better understand, comment on and promote effective child care policy and investments.

The project has developed strategies and tools to show that building a quality child care system in Canada is not only socially and economically essential, but also financially possible. With public funding in place, these tools can assist in the development of a quality, universal child care system that would provide services for children aged 3-5 by 2010 and for all children by 2017.

When it comes to child care in Canada, most of the puzzle pieces seem to be in place. We have research that proves the multiple benefits of child care, we have ‘on the ground’ evidence of the need for a system, and we have plans with timelines and targets for achieving our goals. We have consistent federal and provincial surpluses that make our plans affordable. We have all three opposition parties agreeing on the importance of child care, and we have a vocal and mobilized advocacy movement still demanding a national child care system.

So what’s missing? Poll after poll indicates widespread support for publicly funded child care, yet pockets of resistance remain in communities, in business and in governments.

Much of this resistance revolves around the ongoing ambivalence about the role of women in our society.

In other words, in order to advance child care we need to advance women’s equality. The Child Care Advocacy Association of Canada is pleased to work with our partners in the women’s movement and with many other groups across Canada to help achieve these shared goals.

The Child Care Advocacy Association of Canada is a pan-Canadian, non-profit, membership-based organization dedicated to promoting quality, inclusive, publicly-funded, non-profit child care that is accessible to all.

Our membership reaches more than 4,000,000 Canadians, including parents, caregivers, researchers and students as well as women’s, anti-poverty, labour, social justice, disability and rural organizations at the provincial, territorial, regional, and pan-Canadian levels.

Tax Policy and the Traditional Family Model

Kathleen Lahey -Faculty of Law, Queen’s University

Canadian income tax policy and many direct spending measures have historically been constructed around idealized images of the heterosexual ‘nuclear’ family. Even though there is ample evidence that substantial numbers of women in Canada have always worked for wages outside the home, and that single parents, inter-generational households, blended households, queer parents, and cohabiting couples have always existed in Canada, the original income tax rules in Canada were deliberately constructed around the assumption that people either do or ought to form male-female pairs raising children, preferably with one income-earner and a stay-at-home domestic worker.

Tax policy and fiscal measures still reproduce this model in one of three basic ways: (a) by failing to adjust tax liability to take the gendered realities of poverty and economic marginalization into account; (b) by continuing to enact tax provisions that directly and unambiguously reinforce the economic dependency of women on higher-income partners (usually men); and (c) by continuing to withhold the real social and employment benefits from women that they need to escape from the ‘female economy’ of unpaid, underpaid, and marginal paid work.

So deeply entrenched are these three forces that even when budget measures (such as the March 2007 federal budget) appear to tackle one or more of them, the ‘reform’ provisions themselves will almost always reinforce women’s economic marginalization.

A - Failure to adjust tax liability to women’s economic realities

Tax policy does not create women’s economic marginalization – cultural stereotypes, deeply engrained social values and expectations, and outright discrimination have produced and now continue to sustain barriers to women’s economic equality.

Continual monitoring of women's work opportunities and incomes makes it clear that women literally inhabit a separate economy, with their average earnings *in their peak earning years* rising to just 67 percent of men's average incomes (In 2004, the peak earning age for women was age 50; in that year, the average 50-year-old woman's income was \$34,367 while that for a 50-year-old man was \$50,862.).

The income tax rates on people with low incomes are quite high. Only the first \$9,000 of earned income is completely tax exempt. Even very low incomes of \$10,000, \$14,000, and \$20,000 are subject to income taxes of at least 20% (B.C., Ont., and Nunavut) and can go as high as 25% (Alberta, N.B., P.E.I, Nfld.) and even 31% (Que.) (these are combined federal and provincial income tax rates). With an additional 15% tax for GST and provincial sales taxes, those with low incomes lose a lot of income needed for bare subsistence to taxes. The low-income credits and GST tax credit do not really repair the damage.

Failure to adjust tax liability for the realities of poverty means, given that women more than men face low average incomes throughout life, that women's low incomes are heavily taxed and thus become even lower.

In turn, this means that failure to adjust tax liability to the economic realities of poverty sets women up for economic dependency, and thus for involvement in family relationships that look like the 'traditional family' model. In Canadian society, there is no shame in a woman becoming economically dependent on a spouse. At the same time, it is still considered to be 'manly' for a man to be able to support a spouse – especially if there are children – on his income alone. People feel quietly sorry for men whose wives earn more than they do. Canadian culture is scarcely neutral about women who 'choose' to work instead of 'having' to work to help the family meet its expenses.

The March 2007 budget proposals for a working income tax benefit (WITB) and for new child tax credits will somewhat reduce the tax load on women. However, the WITB is an extremely small earned income credit – the maximum credit for a single person is \$500, and is phased out for incomes over \$9,500, while the maximum credit for either a single parent or a couple is \$1,000, and is phased out for incomes over \$14,500. The new child tax credit will only assist single parents and couples, and is not intended to ameliorate the high income tax rates on low incomes. Thus, it is fair to say that since the lowest federal tax rate was raised from 6% to 17% in 1988, the income tax rates in Canada have placed constant pressure on women—who represent the bulk of low-income taxpayers – to 'choose' economic dependency instead of seeking self-dependence.

B - Tax provisions that reinforce 'traditional' family models

Tax policies that either allocate tax benefits to households in which women are economically dependent or that impose tax penalties on women's paid work will reinforce the pre-existing pressure on women to accept 'traditional' family economic relations.

There are numerous tax provisions that have this effect. Some provisions link couples' incomes with each other, and use their aggregate incomes to limit their tax benefits. Other provisions, like the tax exemption of women's unpaid work, generate tax benefits for the family, but push women to withdraw from paid work because it is more 'profitable' for them to concentrate on unpaid work in the home. The main offenders are these:

Dependent spouse credits: Gives tax benefits to spouses who can earn enough to support the household; this credit literally gives tax subsidies to single-income households in which one spouse earns a high enough income to support the household.

Transferable credits: There are many personal tax credits (for age, pension income, disability, etc.) that can be transferred from a dependent spouse to the supporting spouse. This increases the tax subsidy paid to the income-earner and reinforces the economic dependency of the other spouse.

Tax exemption of unpaid domestic work: Because unpaid domestic work is exempt from income tax, women who cannot earn very high incomes can literally add more value to the family economy by foregoing paid work and working in the home.

Caregiver tax credits: These small tax credits turn unpaid elder care and dependent care into small tax credits. They are overwhelmingly claimed by women, and reinforce the pre-existing expectation that caregiving work is 'women's work.'

Refundable child tax credit: Uses the same 'family income' cut-off for single parents and for couples, so that a mother loses her child tax benefits if her partner's income takes her over the top of the creditable range. Her 'deemed dependency' can become actual dependency if loss of the child tax credit then places pressure on her to rely on her partner for financial support.

Child care expense deduction limits: The biggest work-related expense that women face is for child care. If they do not work for pay, then they do not need child care, but when wages are too low, they cannot afford adequate child care and probably cannot benefit from the deduction anyway; if their incomes are high enough to pay for fulltime child care, the limits in the child care deduction rules prevent them from deducting the full amount spent for child care.

Tax-back of child care expense deductions: Low-income women who receive the National Child Benefit, a supplemental tax credit paid with the Canada Child Tax Benefit, have to repay 25% of any deductions they claim for child care expenses; this repayment is done by reducing their National Child Benefit credits by the 25%. This makes it much harder for women trying to support themselves but who need child care to earn a living wage. This in turn reinforces economic dependency.

Non-deductibility of work-related expenses: Paid work generates many extra expenses besides child care expenses. Most of these expenses are completely non-deductible. Transportation, meals while working, clothing, work supplies, loss of time for unpaid work – all increase the costs of working, and if they are not deductible, reduce how much a woman will ‘profit’ from paid work.

Universal child care allowance: The Harper government introduced a small direct benefit of \$1,200 per year to all single and coupled parents with children under the age of 6. This further enhances the many tax benefits that flow from a woman’s ‘choice’ to withdraw from waged work, but it is woefully inadequate to meet the real child care needs of women who are in paid work, and the funding for this bonus was taken directly out of money earmarked for expansion of national child care resources.

Income-splitting for retirement incomes: Income-splitting retirement incomes produces open-ended tax benefits that grow larger as the incomes of supporting spouses increase. The tax benefits of income splitting are highest for single-income couples and disappear completely when spousal incomes are equal. This new tax provision (fall, 2006) is one of the strongest tax rewards to ‘traditional families.’

The negative effects of the dependent spouse credit and the transferable spousal amounts will be exacerbated in the coming years because, in the March 2007 budget, the government increased the amount of the dependent spouse credit by nearly 20%, and has also tied future increases in this amount to increases in the basic personal credit.

C - Tax provisions that fail to provide real benefits for women

Women who do work full time or part time for wages do not have access to the full tax benefits of paid work. Part time workers rarely qualify for employment benefits such as medical, dental, or extended medical care, etc. Women who do qualify for such benefits theoretically receive them on a tax-favoured basis, because many of these employment benefits are tax-exempt. If their partner already receives these benefits, women’s employment benefits are not of much use to them, but they cannot usually elect to receive monetary payments in lieu.

These benefits can have a value of almost 20% of actual wages. So in a sense, qualification for these benefits and their tax-favoured status does nothing for women. Compared with other workers, they are then actually underpaid.

The employment benefits that are of most value to women are child care resources. Although few employers offer such benefits, when they are available, they are not tax-exempt benefits, but are fully taxable.

Women in paid work contribute to the Employment Insurance and Canada Pension Plan. But because their incomes are much lower on average than men’s, the size of their benefits under these plans are lower too. Too low, usually, to ‘choose’ economic self-dependence. Women in paid work may be required to contribute to employee pension plans. Again, lower wages mean lower pension payments. Women in paid work can, if they can afford it, contribute to Registered Retirement Pension Plans on top of their employment pension plans. But the contribution limits are pegged to total earned income, and the lower the woman’s earned income, the lower her RRSP contributions will be, which in turn means she will receive small RRSP payout payments. At the same time, spouses who can afford it can contribute to the other spouse’s RRSP and claim a tax deduction for that contribution, which means that women who are married to or cohabiting with higher-income partners can end up with larger RRSP accounts than can women who are completely self-dependent.

Conclusion

The gendered allocation of incomes and poverty in Canada sets women up for lifelong economic dependency. The vulnerability of women to becoming (or remaining) economically dependent is reinforced by virtually every tax measure that touches on adult and parent-child relationships. As was illustrated by the Supreme Court of Canada in the 1995 *Thibaudeau* decision, women simply do not exist as individuals in tax policy – they are part of ‘the family,’ and so long as tax measures appear to benefit ‘the family’ as a whole, their negative effects on women are considered to be of little consequence.

Tax policy measures that can free women from the image of the ‘traditional family’ model are those that eliminate tax subsidies for women’s economic dependence and that free women income-earners from the tax penalties on paid work.

Many of the policies outlined in these notes have been criticized for more than 30 years now, beginning with the Royal Commission on the Status of Women. Almost nothing has changed since then. The disparities between male and female incomes have been reduced somewhat, but women are still most significant in Canadian tax policy for the tax benefits they can confer on their supporting partners.