

Policy and Legal Protection for Breastfeeding and Incarcerated Women in Canada

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Abstract

Most incarcerated women in Canada are mothers. Because women are the fastest growing population in carceral facilities, protecting the rights of incarcerated women to breastfeed their children is increasingly important. There is considerable evidence that incarcerated women in Canada experience poor physical and mental health, isolation, and barriers to care. Incarcerated women and their children could benefit significantly from breastfeeding. This Insight in Policy explores policy and legal protection for breastfeeding in Canada as it relates to carceral facilities, considers key cases regarding breastfeeding rights among incarcerated women, and presents recommendations for policy development and advocacy. The Canadian Constitution and human rights legislation across Canada prohibits discrimination on the basis of gender and includes pregnancy and the possibility of becoming pregnant as a characteristic of gender. Some provinces note that breastfeeding is a characteristic of gender. Women's Wellness Within, a nonprofit organization providing volunteer perinatal support to criminalized women in Nova Scotia, conducted a scan of all provincial and territorial correctional services acts and the federal Corrections and Conditional Release Act: none mention breastfeeding. Protocols for breastfeeding during arrest and lockup by police were not available in any jurisdiction across Canada. International law, including the Convention on the Rights of the Child, the Nelson Mandela Rules, and the Bangkok Rules, have application to the rights of incarcerated breastfeeding women. The *Inglis v. British Columbia (Minister of Public Safety)* (2013) and *Hidalgo v. New Mexico Department of Corrections* (2017) decisions are pivotal examples of successful litigation brought forward by incarcerated mothers to advance breastfeeding rights. Improved application and understanding of existent law could advance breastfeeding rights.

Keywords

access to care, breastfeeding, infant care, mother-infant dyad, politics of breastfeeding

Background

Most incarcerated women in Canada are mothers (Picard, 2016). Incarcerated women experience high parity, with an average of four children; one in two have experienced abortion; and an estimated 5% are currently pregnant (Kouyoumdjian, Schuler, Matheson, & Hwang, 2016). Despite declining reported crime in Canada (Canadian Press, 2015), there are 30% more women in federal corrections now than 10 years ago (Zinger, 2017a), with almost 700 women in federal prison today (Burke, 2017). Of more than 200,000 annual admissions to provincial and territorial custody (Statistics Canada, 2017a), 16% are women (Statistics Canada, 2017b). Because women are the fastest growing population in carceral facilities, protecting the rights of incarcerated women to breastfeed their children is increasingly important (Figure 1).

It is well established that a mother's own milk is important for the health of all infants (World Health Organization, n.d). Human milk and breastfeeding support infant and

maternal physical and psychological well-being. There is considerable evidence that incarcerated women in Canada experience poor physical and mental health, isolation, and barriers to care (Ahmed, Angel, Martell, Pyne, & Keenan, 2016; Keenan, Angel, Martell, Pyne, & Ahmen, 2016; Kouyoumdjian et al., 2016). Incarcerated women and their children could benefit significantly from breastfeeding. This Insights in Policy explores policy and legal protection for breastfeeding in Canada as it relates to carceral facilities, considers key cases in the public domain regarding breastfeeding rights

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Figure 1. The breastfeeding rights of incarcerated women.

among incarcerated women, and presents recommendations for policy development and advocacy.

Policy and Legal Framework

Canadian Charter and Human Rights

Section 15 of the Canadian Constitution Act, also called the Canadian Charter of Rights and Freedoms (Government of Canada, 1982), guarantees everyone equal protection under the law regardless of gender. Furthermore, Section 7 protects the right to “life, liberty and security of the person.” Human rights legislation across Canada prohibits discrimination on the basis of gender and includes pregnancy and the possibility of becoming pregnant as a characteristic of gender. Some provinces note that breastfeeding is a characteristic of gender. The Ontario Human Rights Commission (1996) states that it is “illegal to discriminate because a woman has had an abortion, miscarriage, stillbirth, is going through fertility treatments, experiences complications or has specific needs related to pregnancy, or has chosen to breastfeed or not breastfeed her child” (p. 1). In Nova Scotia, “Under the Human Rights Act women are protected from discrimination and harassment because of sex, which includes pregnancy, and family status, which means being in a parent-child relationship” (Nova Scotia Human Rights Commission, 2000, p. 1). These human rights provisions ensure that women have the right to breastfeed in public, prohibit discriminatory treatment of breastfeeding women by employers, and require accommodation to facilitate breastfeeding in the workplace. In Canada, carceral facilities are publicly funded, administered, and staffed. In addition to assignments to maintenance service jobs in carceral facilities, within the federal prison system, imprisoned women may be employed by CORCAN,

an agency of Correctional Services Canada (Bronwell, 2017). On paper if not in practice, human rights provisions apply to everyone.

Provincial Correctional Services Legislation

In partnership with a nonprofit organization providing volunteer perinatal support to criminalized women in Nova Scotia (Paynter & Snelgrove-Clarke, 2017), the authors explored existing provincial legislation that would protect the right to breastfeed among incarcerated women. Section 28 of the 2016 Nova Scotia Correctional Services Act (Province of Nova Scotia, 2016) requires accommodation of prisoners because of illness, disability, or injury. Section 29 requires that individuals held in close confinement be visited daily by health care providers. Section 47 requires that care be provided to inmates in need of immediate attention. None of these provisions adequately supports the right to breastfeed.

A volunteer research assistant conducted a scan of all provincial and territorial correctional services acts and the federal Corrections and Conditional Release Act using terms including *breast milk*, *human milk*, *breast feed*, *infant*, *child*, and *woman* and found no mention of breastfeeding or human milk. The acts are all publicly accessible online. Uniquely, Section 36 of the Correctional Services Act of the Province of Manitoba (1998) states,

Where a female inmate of a custodial facility is the primary caregiver of an infant who is the child of the inmate, the commissioner may, on the written request of the inmate, permit the infant child to live with the inmate in the facility if the commissioner thinks that (1) it is in the best interests of the child; (2) the inmate is able to care for the child; and (3) the facility has proper accommodation for the inmate to care for the child.

The commissioner holds discretion in this decision. The authors could not locate a record of there ever being an infant in a provincial facility in Manitoba.

Policy in Police Lockup

In March 2016 in Saskatoon, Saskatchewan, Lilian Desjarlais, a 21-year-old Aboriginal mother of a 4-month-old son, was arrested after a physical altercation with her boyfriend. She was placed in municipal police lockup for 75 hours. She was not allowed to see her son or provided with a breast pump. She reported pain, engorgement, and that her milk turned a “greenish” color (CBC News, 2016). Desjarlais filed a complaint against the police and received an apology (Allen, 2017). In hopes of avoiding this situation in the future, the author and the nonprofit organization met with police in Nova Scotia and contacted Royal Canadian Mounted Police headquarters in each province and territory to discuss police protocol regarding breastfeeding during arrest and lockup. Protocols for breastfeeding were not available in any jurisdiction across Canada. We advised our local police to be aware of the local health authority breastfeeding policy. This is an area in need of greater advocacy and analysis.

International Rights

The World Health Organization (n.d.) recommends exclusive human milk for the first 6 months of life. A child’s right to breastfeed is enshrined in the 1989 United Nations (UN) Convention on the Rights of the Child, to which Canada is a signatory. The UN also recognizes the rights of women to breastfeed. In 2016, the UN stipulated,

Breastfeeding is a human rights issue for both the child and the mother. Children have the right to life, survival and development, and to the highest attainable standard of health. . . . Women have the right to accurate, unbiased information needed to make an informed choice about breastfeeding. (United Nations Special Rapporteurs, 2016)

The UN Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”) (United Nations General Assembly, 2015) stipulate state responsibility for prisoner health and that incarcerated individuals have the right to the same standards of health care as are available in the community. Among the UN Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the “Bangkok Rules”) (United Nations Office on Drugs and Crime, 2010), Rule 47.3 states,

Pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner. Adequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers. Women

prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so. (p. 16)

Incarcerated Women

Incarcerated women in Canada experience multiple social, economic, and political determinants of ill health. Indigenous women and women of color are overrepresented (Zinger, 2017b). Two thirds of federally incarcerated women report sexual trauma, and 90% report histories of physical abuse (Zinger, 2017b). More than half report addiction and mental illness (Zinger, 2017b). Because of their complex and traumatic health histories, incarcerated women especially may benefit from breastfeeding. Breastfeeding may be empowering, rehabilitative, and clinically therapeutic. For infants experiencing neonatal abstinence syndrome resulting from intrauterine drug exposure, breastfeeding reduces the severity and duration of withdrawal (Bagley, Wachman, Holland, & Brogly, 2014). High rates of mental illness put incarcerated women at greater risk for peripartum depression; breastfeeding is a protective factor against the development of peripartum depression (Figueiredo, Canário, & Field, 2014). Research suggests that breastfeeding prevents chronic illness and diseases such as breast cancer (World Cancer Research Fund, 2017).

Breastfeeding and Incarcerated Women

The Federal Mother-Child Program

The Mother-Child Program, established in 2001, allows children under the age of 7 years to stay with their mothers in the six federal women’s facilities (Correctional Service Canada, 2016). Women must meet strict criteria, and approval is subject to local child protection authority discretion. There are 10 times more women in provincial facilities than in federal prisons (Picard, 2016), so most incarcerated women are ineligible, as they are not serving federal sentences. Remand periods (indefinite) and provincial sentences (up to 2 years less a day) are long enough to disrupt breastfeeding. Only the provincial facility in British Columbia has an active mother child program. Published analysis of the federal Mother-Child Program is scant. Brennan (2014) found that from 2001-2012, participation in the Mother-Child Program fell from 12 participants in 2001 to 3 or fewer participants from 2009 to 2012. During that time, the federally incarcerated women’s population expanded from 375 to 603 (Brennan, 2014). No breastfeeding data are available.

Alouette Provincial Program

In 2006, charged with killing her abusive partner, Lisa Anne Whitford was remanded to the Alouette Correctional Centre provincial jail for women in British Columbia (Cohen, 2015).

Whitford, an Indigenous woman, experienced rape and assault in childhood, and began using drugs and alcohol at age 11 (Cohen, 2015). Pregnant when first remanded, in 2007 Whitford gave birth to an infant who stayed with her (Strickland, 2008). Whitford pled guilty; she and the child were sent to the Fraser Valley Institute for Women federal prison. Although approximately 100 infants used the Alouette program before Whitford (Mulgrew, 2013), and this or similar British Columbia provincial programs had been in place since 1973 (*Inglis v. British Columbia [Minister of Public Safety]*, 2013), after the high profile of her case, the Alouette program closed in February 2008. With the support of the University of British Columbia's Indigenous Community Legal Clinic, former inmates of Alouette and two of their children acted as plaintiffs in a suit against the British Columbia Department of Corrections on the grounds that the closure violated the Canadian Charter of Rights and Freedoms (Government of Canada, 1982) (*Inglis v. British Columbia [Minister of Public Safety]*, 2013).

In 2013, Justice Carol Ross ruled in favor of the women. Ross stated that separation of mothers and infants violates security of the person by interfering with bonding and breastfeeding. In 2014, the Alouette program relaunched and 2 years later had an infant in residence for the first time in 8 years (Cohen, 2016). The litigation did not precipitate nationwide change: Alouette remains the only functioning provincial program in the country. Correctional administration and infrastructure continue to interfere with breastfeeding: restricted contact visits with children and access to pumping equipment, milk storage, and transport remain significant barriers.

New Mexico

In the United States, a pivotal 2017 case (*Hidalgo v. New Mexico Department of Corrections*, 2017) relied on equality arguments to secure breastfeeding rights. Monique Hidalgo sought permission to breastfeed her 5-week-old daughter at a New Mexico state prison during weekend visits. Hidalgo breastfed the baby in the hospital during the infant's recovery from neonatal abstinence syndrome and had a physician order to continue. When denied by the state Department of Corrections, and with the support of the New Mexico Breastfeeding Taskforce, she sued (Sheppard, 2017). Judge David Thomson found that prohibiting breastfeeding constituted gender discrimination and violated the state constitution's equal rights amendment (Haywood, 2017). Only women (or more accurately and inclusively, people with breasts) can nourish their children from the breast. Harm or inconvenience to the Department of Corrections cannot be used to justify denying the right to breastfeed (Haywood, 2017).

Recommendations

There is a need for legal recognition that it is the biological norm for the mother to be the infant's sole source of food for

the first 6 months of life and an important source of nourishment and nurturing thereafter. Health care providers who support breastfeeding mothers should develop an understanding of national, provincial and territorial, and international laws that support breastfeeding when incarcerated. Identify local resource people familiar with carceral contexts to assist with developing a network of support. Health care providers and breastfeeding advocates can directly support the right to breastfeed through affidavits and expert testimony about the right to breastfeed for consideration in presentence custody, sentencing, and parole decisions.

The absence of breastfeeding from corrections acts allows a status quo in which mothers are usually separated from their children and denied breastfeeding education and support, carceral budgets fail to include pumps and refrigeration, and there are inadequate provisions to ensure safe milk storage and transport. To support breastfeeding and women's health, federal and provincial and territorial correctional services acts and policies should specifically address facilitation of breastfeeding. Police services must be alert to the needs of breastfeeding women and ensure that infants are fed and women are protected from harm.

International, national, and provincial human rights law and constitutional law should be mobilized to protect breastfeeding. To enhance application of the human rights codes to breastfeeding rights, codes could specify breastfeeding as a gendered activity. Policy makers can play an important role in addressing gaps in legislation through policy directives specific to the rights and needs of breastfeeding women.

Conclusions

Incarcerated women and their children could greatly benefit from breastfeeding, yet they face significant barriers. Separation through incarceration impinges on the child's right to breastfeed and the mother's right to nourish her child. Protective provisions exist at the national, provincial, and international levels, but they are often not employed or enforced. Health care providers can collaborate with legal and community-based supports for incarcerated women to ensure these rights are understood and upheld.

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