

RECLAIMING THE PUBLIC SPACE: BREASTFEEDING RIGHTS, PROTECTION, AND SOCIAL ATTITUDES

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Breastfeeding is a normal physiological process. Despite the literature that indicates the importance of breastfeeding in terms of maternal and infant health, there is still opposition to women breastfeeding in public spaces. This manifests itself in private commercial establishments preventing mothers from breastfeeding or ordering them to stop. Mothers are thereby discouraged from feeding in public or in private spaces open to the public (quasi-public spaces). In this article, the authors advocate for stronger legal protections for mothers who seek to breastfeed in public or quasi-public spaces. While breastfeeding in such spaces is implicitly protected under human rights law, this in itself does not send a strong enough message. Accordingly governments should amend human rights legislation to explicitly recognize the right to breastfeed in public and quasi-public spaces. Furthermore, the authors contend that governments should make it an offence to prohibit or prevent women from breastfeeding in public or quasi-public spaces. Punishment for breach of the offence could result in a substantial fine. Importantly, it would place the onus of the litigation on the Crown and relieve mothers who are already burdened from having to litigate the matter. It would

L'allaitement est un acte naturel et biologique. Malgré la présence d'études rappelant l'importance de l'allaitement pour la santé des mères et des enfants, l'allaitement dans les espaces publics demeure parfois stigmatisé. Cette opposition se manifeste avant tout dans certains établissements commerciaux qui empêchent ou exigent des mères qu'elles cessent d'allaiter. Ainsi, des mères découragées se voient interdire de nourrir leurs enfants en public ou dans des espaces privés ouverts au public (espaces quasi-publics). À travers cet article, les auteurs proposent donc de renforcer les protections juridiques offertes aux femmes qui souhaitent allaiter dans des lieux publics ou quasi-publics. Si l'allaitement dans de tels espaces est implicitement protégé par les droits de la personne, cette protection demeure parfois insuffisante. Ainsi, l'article propose une modification des lois relatives aux droits de la personne afin de protéger explicitement le droit d'allaiter dans les lieux publics et quasi-publics. De plus, les auteurs affirment que les gouvernements devrait rendre illégal le fait d'interdire aux femmes d'allaiter dans un espace public ou quasi-public. La violation de ce droit pourrait entraîner une amende substantielle. Ce modèle législatif placerait donc le fardeau de la preuve sur

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also demonstrate the State's interest in assisting those who may be more vulnerable.

la Couronne et déchargerait ainsi les mères déjà accablées par les mesures qu'elles doivent entreprendre pour faire valoir leur droit. Ce nouveau modèle législatif démontrerait également l'intérêt de l'État à aider les citoyens plus vulnérables.

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Introduction

A mother who breastfeeds in public can elicit various reactions. Despite the acknowledged public health and other benefits accruing from breastfeeding (as outlined below), mothers who choose to nurse in public are still confronted with recalcitrant attitudes about the appropriateness of doing so. They are given the message expressly or implicitly that doing so constitutes inappropriate conduct because it violates some perceived fundamental socio-cultural norm. This may be manifested through discouraging looks or statements.¹ However, the negative reactions are not limited to this. Increasingly, the public is apprised of incidents where mothers are instructed by a public official or a store employee or manager that they cannot breastfeed on a certain premises or, in the alternative, they are directed to cover themselves or to feed their child in a specified area on the premises – typically a dressing room or the unsanitary confines of a washroom.²

¹ See e.g. Fiachra Gibbons, “In France, breast is definitely not best”, *The Guardian* (1 April 2011), online: The Guardian <www.guardian.co.uk/commentisfree/2011/apr/01/france-breast-breastfed-baby-death>.

² The incidents that have been publicized serve to raise the question of how many others have taken place that have not received media attention because the mothers in questions have chosen to remain silent about their experience. For incidents involving public officials, see *Québec (Commission des droits de la personne et des droits de la jeunesse) et Giguère c Montréal (Ville de)*, 2003 QCTDP 88, 47 CHRR D/67 [*Giguère* cited to CHRR]; “Woman: I was ejected from courthouse lobby for breastfeeding”, *CBS Chicago* (31 May 2012), online: CBS Chicago <<http://chicago.cbslocal.com/2012/05/30/skokie-woman-suing-cook-county-over-right-to-breastfeed/>>. For incidents involving store employees and managers, see e.g. *Québec (Commission des droits de la personne) c Lee*, [2005] RJQ 2807, JE 2005-1845, 2005 CanLII 35842 (QTD) [*Lee* cited to RJQ]; “H&M breastfeeding incident sparks human rights protest”, *CBC News* (6 August 2008), online: CBC News <www.cbc.ca/news/health/story/2008/08/05/bc-breastfeeding-protest-h-m-vancouver.html>; Ann Hui, “Walmart apologizes for asking BC mom to stop breastfeeding”, *The Vancouver Sun* (18 July 2009), online: The Vancouver Sun <www.vancouversun.com/life/Walmart+apologizes+asking+stop+breastfeeding/1804833/story.html>; “Store apologizes to breastfeeding mother”, *CBC News* (10 January 2011), online: CBC News <www.cbc.ca/news/canada/montreal/story/2011/01/10/montreal-breastfeeding-protest.html>; Cheryl Alkon, “Nursing a grudge: breastfeeding in public”, *USA Today – Your Life (Healthy Perspective Blog)* (30 December 2011), online: USA Today – Your Life <<http://yourlife.usatoday.com/health/healthyperspective/post/2011/12/Public-Nursing-Whats-the-Big-Deal-Really/594454/1>>; “NB moms defend right to

This leads to questions about what normative protections can shield mothers and their children from those who would hinder or prevent them from breastfeeding in public, and whether such protections are sufficient. While acknowledging that state norms do not hold a monopoly on governing social conduct,³ they still play a vital role in protecting vulnerable segments of the population from the oppressive dictates of other portions of society. We argue that current protections are not adequately robust and are in need of strengthening. First, we address the noted public health benefits that arise from encouraging breastfeeding. We argue that given the substantial health benefits that come from breastfeeding and its impact on public health, more needs to be done to discourage those who would inhibit its practice. Second, because breastfeeding is intimately bound to issues of gender, we examine some of the feminist literature relating to this practice and the relevance of these perspectives in advancing legal protections against breastfeeding discrimination.

Third, we discuss current legal protections relating to breastfeeding in Canada and raise some ideas for reform. Our suggestions include making breastfeeding discrimination explicitly prohibited under human rights legislation across Canada and employing penal sanctions already available for violations of human rights laws to deter service providers from discriminating against breastfeeding mothers. To date, there has been a rather modest amount of literature addressing the intersection of human rights and breastfeeding. Much of it, however, is focused on international legal norms and

breastfeed at Moncton Market” CBC (23 June 2012), online: CBC News <www.cbc.ca/news/canada/new-brunswick/story/2012/06/23/nb-breastfeeding-demonstration-401.html> [“NB moms defend right to breastfeed”]; Niamh Scallan, “Breastfeeding mom wants apology from daycare that asked her to leave infant room”, *The Toronto Star* (16 November 2012), online: TheStar.com <www.thestar.com/news/gta/2012/11/16/breastfeeding_mom_wants_apology_from_daycare_that_asked_her_to_leave_infant_room.html>; “Mother angry after being asked to leave Walmart while nursing”, *Global News Calgary* (6 December 2012), online: Global News <<http://globalnews.ca/news/316697/mother-angry-after-being-asked-to-leave-walmart-while-nursing/>>; “‘Nurse in’ interrupted at NS shopping mall”, *CBC News* (31 December 2012), online: CBC News <www.cbc.ca/news/canada/nova-scotia/story/2012/12/31/ns-breastfeeding-protest-dartmouth.html>.

³ See Daniel Jutras, “The Legal Dimensions of Everyday Life” (2001) 16 CJLS 45; Martha-Marie Kleinhans & Roderick A Macdonald, “What is a Critical Legal Pluralism?” (1997) 12:2 CJLS 25 at 31.

does not discuss legal protections at the domestic level in Canada.⁴ This is not to suggest that these international norms are unimportant, but it is useful to remember that as a dualist state, Canada must pass domestic legislation to implement its international legal obligations.⁵ As such, it is crucial to scrutinize how Canada and its constituent provinces and territories have (or have not) addressed these issues.

We note that advancing a legal approach to address breastfeeding discrimination should not be seen as a devaluation of the merits of public education related to breastfeeding. Indeed, there is a rather significant role to be played through public education in changing negative attitudes to breastfeeding in public. The consequences of such a campaign may result in a reduction of breastfeeding discrimination and greater acceptance of breastfeeding in public. However, education alone does not provide a complete remedy. State-based law still plays an important role in prohibiting, deterring, and punishing discriminatory conduct.⁶ The reforms we propose below are intended to do just that.

We wish to emphasize that by advocating a legal approach to protect mothers who choose to breastfeed in public, we in no way intend to produce or perpetuate feelings of guilt that may be experienced by mothers who do

⁴ See e.g. Naomi Bromberg Bar-Yam, "Breastfeeding and Human Rights: Is There a Right to Breastfeed? Is There a Right to Be Breastfed?" (2003) 19:4 J Hum Lact 357; George Kent, "Child Feeding and Human Rights" (2006) 1 Int Breastfeed J 27 [Kent, "Child Feeding and Human Rights"]; George Kent, "Breastfeeding: A Human Rights Issue?" (2001) 44:2 Development 93; Michael C Latham, "A Mother's Right to Breastfeed: Removing the Obstacles" (1999) 20 Food Nutr Bull 293; Michael C Latham, "Breastfeeding: a Human Rights Issue?" (1997) 5:4 Int'l J Child Rts 397 [Latham, "Breastfeeding: a Human Rights Issue?"].

⁵ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, 14 Admin LR (3d) 173 ("[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute" at para 69).

⁶ One American study notes that both breastfeeding initiation rates and rates of breastfeeding at six months were higher in states with legislation that protects and supports breastfeeding in comparison with those that do not. However, the authors cautiously observe that while legislation may raise the profile of breastfeeding as a public health issue, it may also be that legislation in place is merely a proxy for a culture more favourable to breastfeeding already. See Michael D Kogan et al, "Multivariate Analysis of State Variation in Breastfeeding Rates in the United States" (2008) 98:10 Am J Public Health 1872 at 1877.

not breastfeed, either by choice or due to other circumstances.⁷ As Tasnim Nathoo and Aleck Ostry observe, because breastfeeding has become associated with being a “good mother”, some feel a sense of failure, sorrow, and judgment if they do not breastfeed.⁸ Miriam Labbok has written about how the guilt that some non-breastfeeding mothers experience may be due to lack of support by health professionals and the community.⁹ Based on the clinical experience of one of the authors (Srinivasan) and that of other health professionals, women who make an informed decision not to breastfeed and are fully supported in their decision rarely feel guilty. Our objective here is not to impose any judgment on mothers, but to highlight that those who can and choose to breastfeed in public ought to be supported and able to do so without discrimination.

I. Breastfeeding, Public Health, and Other Benefits

For years, health professionals and their organizations have stressed the importance of breastfeeding for the child, mother, and society. Among health care professionals, breastfeeding is considered a normal physiological process that occurs after giving birth to an infant. The World Health Organization (WHO) and UNICEF recommend that infants be exclusively breastfed for the first six months of life, with the introduction of complementary foods and breastfeeding continuation for two years and beyond.¹⁰ This recommendation has been endorsed by Health Canada, the Canadian Paediatric Society, the College of Family Physicians of Canada, and the Canadian Nurses Association, among others.¹¹ The recommended duration of breastfeeding in these

⁷ For a discussion of the experiences of women who did not breastfeed their children, see Kate Williams, Ngaire Donaghue & Tim Kurz, “‘Giving Guilt the Flick’? An Investigation of Mothers’ Talk About Guilt in Relation to Infant Feeding” (2013) 37:1 Psychol Women Q 97.

⁸ Tasnim Nathoo & Aleck Ostry, *The One Best Way?: Breastfeeding History, Politics, and Policy in Canada* (Waterloo, Ont: Wilfred Laurier University Press, 2009) at 211.

⁹ Miriam H Labbok, “Exploration of Guilt among Mothers Who Do Not Breastfeed: The Physician’s Role” (2008) 24:1 J Hum Lact 80 at 82.

¹⁰ World Health Organization/UNICEF, *Global Strategy for Infant and Young Child Feeding* (Geneva: World Health Organization, 2003) at 7-8. The Global Strategy was endorsed on 18 May 2002 by the Fifty-fifth World Health Assembly, Resolution WHA55.25, and on 17 September 2002 by the UNICEF Executive Board.

¹¹ College of Family Physicians of Canada, “Infant Feeding Policy Statement 2004”, endorsement renewed 2011, online: CFPC <www.cfpc.ca>; Health

guidelines is worth noting, as women are often harassed for breastfeeding older children in public. There is no scientific evidence that breastfeeding a child of two years or above is harmful to his or her health. Indeed, it is quite the opposite.¹² Regardless, this act may still draw stares and unwanted attention, discouraging women from breastfeeding in public.

Current evidence demonstrates that breastfeeding is optimal for infant health and development. A 2010 American study calculated that if 90% of families could breastfeed exclusively for six months, an excess 911 deaths a year in that country could be prevented, of which nearly all would be infants.¹³ Infants who are not breastfed have an increased risk of a wide array of infections, sudden infant death syndrome (SIDS), allergies, childhood obesity, diabetes, and certain childhood cancers.¹⁴ Mothers who do not breastfeed may increase their own risk of cardiovascular illness, diabetes, hypertension, breast cancer, and other conditions.¹⁵ Breastfeeding also allows mothers to enjoy a psychological sense of bonding, well-being, and increased self-esteem.¹⁶

Given these benefits, breastfeeding results in healthier children who will be less likely to be a burden on the public health system. The 2010 study cit-

Canada, Canadian Paediatric Society, Dietitians of Canada & Breastfeeding Committee for Canada, Joint Statement, "Nutrition for Healthy Term Infants, Birth to Six Months: An Overview" (September 2012), online: HC < www.hc-sc.gc.ca/fn-an/nutrition/infant-nourisson/recom/index-eng.php>; Canadian Paediatric Society, Hospital Paediatrics Section, Nutrition and Gastroenterology Committee (principal authors Catherine M Pound & Sharon L Unger), "The Baby-Friendly Initiative: Protecting, Promoting and Supporting Breastfeeding" (2012) 17:6 *Paediatr Child Health* 317; Canadian Nurses Association & Canadian Association of Midwives, Joint Position Statement, "Joint Statement on Breastfeeding" (March 2008), online: CAN <www.cna-aiic.ca>.

¹² Kent, "Child Feeding and Human Rights", *supra* note 4 at 6.

¹³ Melissa Bartick & Arnold Reinhold, "The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis" (2010) 125:5 *Pediatrics* 1048 at 1052.

¹⁴ *Ibid*; American Academy of Pediatrics, "Policy Statement: Breastfeeding and the Use of Human Milk" (2012) 129:3 *Pediatrics* 827 at 828-30.

¹⁵ Eleanor B Schwarz et al, "Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease" (2009) 113: 5 *Obstet Gynecol* 974.

¹⁶ See e.g. Miriam H Labbok, "Effects of Breastfeeding on the Mother" (2001) 48:1 *Paediatr Clin North Am* 143 at 144, 154.

ed above calculated not only reduced mortality, but also a savings of \$13 billion a year if 90% of families breastfed exclusively for six months.¹⁷ There is thus a substantial economic benefit that accrues from encouraging women to breastfeed.¹⁸

Despite recommendations and studies, Canadian breastfeeding rates still fall short of goals. According to Statistics Canada, Canadian breastfeeding initiation rates were 87.3% in 2009.¹⁹ However, only 24.4% were breastfeeding exclusively at 6 months.²⁰ For this reason, various Canadian provincial governments have made breastfeeding support and protection a priority.²¹ The adoption of the WHO's Baby-Friendly Hospital Initiative has enabled health care institutions to protect, promote, and support breastfeeding while improving quality of care and decreasing health costs.

¹⁷ Bartick & Reinhold, *supra* note 13.

¹⁸ *Ibid.* See also Breastfeeding Committee for Canada, "Affordable Health Care Begins with Breastfeeding Support and the Use of Human Milk" (Submission to the Commission on the Future of Healthcare in Canada) (2002), online: BCFC <<http://breastfeedingcanada.ca/documents/webdoc47.pdf>>; Infant Feeding Action Coalition (INFACT) Canada, News Release, "Health Protection and Health Care in Canada: Protecting the Health of Canadians and the Health Care System in Canada" (13 February 2002), online: INFACT <www.infactcanada.ca/news_releases_Romanow.htm>.

¹⁹ Health Canada, "Breastfeeding Initiation in Canada: Key Statistics and Graphics (2009-2010)", online: HC <www.hc-sc.gc.ca/fn-an/surveill/nutrition/commun/prenatal/initiation-eng.php>.

²⁰ Statistics Canada, "Breastfeeding 2009", online: SC <www.statcan.gc.ca/pub/82-625-x/2010002/article/11269-eng.htm>.

²¹ See e.g. Nova Scotia, Department of Health & Department of Health Promotion and Protection, "Policy Statement: Breastfeeding in Nova Scotia: Responsibilities of the Nova Scotia Department of Health and the Nova Scotia Department of Health Promotion and Protection" (September 2005), online: Government of Nova Scotia <www.gov.ns.ca/hpp/publications/Provincial_Breastfeeding_Policy.pdf>; Ministère de la Santé et des Services sociaux, "L'allaitement maternel au Québec : lignes directrices" (September 2001), online: MSSS <<http://publications.msss.gouv.qc.ca/acrobat/f/documentation/2001/01-815-01.pdf>>. For an example of a program review, see British Columbia Ministry of Health, "Review of Breastfeeding Practices and Programs: British Columbia and Pan-Canadian Jurisdictional Scan" (March 2012), online: BC MOH <www.health.gov.bc.ca/library/publications/year/2012/breastfeeding-jurisdictional-scan.pdf>.

The act of breastfeeding is extremely valuable for the health of mothers, children, and society in the aggregate. It is little wonder that mothers are encouraged and empowered to breastfeed by their health care workers, who attempt to provide them with much-needed support and guidance if difficulties arise. Yet in addition to being a health issue, it is also a compelling and intimate matter for women. In the following section we discuss feminist discourse on the subject of breastfeeding in public.

II. Feminist Perspectives on Breastfeeding

Given women's unique relationship with breastfeeding and its potential impact on their lives, feminists and feminist scholars have articulated important perspectives on the subject. In this section, we examine some of the key scholarship and highlight tensions that exist amongst feminists concerning breastfeeding. We discuss how these perspectives should inform legislation with respect to the prohibition of breastfeeding discrimination.

One key tension is whether the promotion of breastfeeding impacts on women's freedoms, particularly with respect to employment, mobility, and engagement in everyday society.²² Feminism was born out of a social movement and long struggle to emancipate women from the normative strictures of patriarchal societies and the social and familial expectations imposed on them.²³ For many feminists, this oppression included social expectations regarding child rearing. Because breastfeeding required time with, and access to the nursing child, it was viewed as hindering women's autonomy, a central mission of "liberal feminism", along with equality of the sexes.²⁴ Furthermore, WHO recommendations that exclusive breastfeeding should take place for six months, and continue with the addition of complementary foods for

²² See Deborah McCarter-Spaulding, "Is Breastfeeding Fair? Tensions in Feminist Perspectives on Breastfeeding and the Family" (2008) 24 J Hum Lact 206 at 207. See also Judith Galtry, "Extending the 'Bright Line': Feminism, Breastfeeding, and the Workplace in the United States" (2000) 14 Gend Soc 295; P Van Esterik, "Breastfeeding and Feminism" (1994) 47 Int J Gynaecol Obstet S41 at S43 (supplement) ("[for] radical feminists who locate women's oppression in their bodies and their reproductive capacities, lactation could hardly be explored as empowerment" at S44); Paige Hall Smith, "'Is It Just So My Right?' Women Repossessing Breastfeeding" (2008) 3 Int Breastfeed J 12 at 13-14.

²³ McCarter-Spaulding, *supra* note 22 at 207.

²⁴ *Ibid.*

two years and beyond, would seem to require extensive time away from paid work.²⁵

Scholars like Penelope Van Esterik have argued that breastfeeding should not be seen as an oppressive burden. Indeed, Van Esterik, as a self-identified feminist, asserts that breastfeeding empowers women and contributes to gender equality in various ways.²⁶ First, it “confirms a woman’s power to control her own body” and her choice as to how it is to be used, that is, to provide sustenance to her child.²⁷ Second (and connected to the first point), breastfeeding challenges the dominant view of breasts as primarily sexual objects, and by extension the sexualized view of women as well.²⁸ Third, it forces a redefinition of women’s work that “integrates women’s productive and reproductive activities.”²⁹ Breastfeeding is a reproductive right because it is a natural biological process that ensues after giving birth, and a maternal right because it allows women to feed their child in an optimal way.

Notwithstanding the empowering aspects of breastfeeding, one of the greatest impediments to its sustained practice is societal hostility to engaging in it in public.³⁰ One attitude that prompts this phenomenon derives in large part from the social construction of breasts as predominantly sexualized objects.³¹ One scholar posits that many people “think breasts are primarily for enhancing sexual activity, which results in widespread discomfort when they are reminded that breasts go into babies’ mouths.”³² Consequently, as Glenda Wall observes, numerous studies indicate that new mothers report feeling

²⁵ *Ibid.*

²⁶ Van Esterik, *supra* note 22 at S41-S42.

²⁷ *Ibid* at S41. See also Smith, *supra* note 22 at 15.

²⁸ Van Esterik, *supra* note 22 at S45. See also Cindy A Stearns, “Breastfeeding and the Good Maternal Body” (1999) 13 *Gend Soc* 308 (“the very act of breastfeeding, particularly prolonged breastfeeding, is itself a form of resistance to the sexualized image of the breast and the good maternal body” at 322).

²⁹ Van Esterik, *supra* note 22 at S42.

³⁰ Michele Acker, “Breast is Best... But Not Everywhere: Ambivalent Sexism and Attitudes toward Private and Public Breastfeeding” (2009) 61:7/8 *Sex Roles* 476 at 477.

³¹ Glenda Wall, “Moral Constructions of Motherhood in Breastfeeding Discourse” (2001) 15:4 *Gend Soc* 592 at 598; Stearns, *supra* note 28 at 309-10.

³² Jacqueline H Wolf, “Got Milk? Not in Public!” (2008) 3 *Int Breastfeed J* 11.

exposed and vulnerable when breastfeeding in public.³³ As reported in the media, one mother recently commented, “[t]he few women that do breastfeed tend not to do it in public, because it is so stigmatized and it is so over-sexualized, and so we tend to hide.”³⁴ Thus, such attitudes can contribute to mothers’ solitary confinement within the home.³⁵ This sexualisation is accentuated through the sex and beauty industries,³⁶ as well as in popular media, including film, television, and books.³⁷ Consequently, women who breastfeed in public may be castigated as bad mothers and derided for their alleged selfishness and shamelessness.³⁸

Mothers who breastfeed are characterized as selfish for wanting to go out rather than staying at home and tending to their child’s needs.³⁹ Connected to this, others argue that mothers should schedule their breastfeeding around their outings, so as to avoid having to feed in public. However, the importance of breastfeeding “on demand” is vital, especially during the first few months of life. The breastfed infant may get hungry at irregular times, and it is important to be able to feed “on demand” for optimal growth and development. In fact, breastfeeding often, especially initially, helps the mother maintain an adequate milk supply.⁴⁰ Breast milk is also very easily and rapidly digested, often necessitating more frequent feeds compared to formula-fed babies.⁴¹ Critics may say that mothers should bring a bottle of breast milk or formula around with them in case the infant gets hungry. However, giving a bottle may not always be an option, particularly in the case of exclusively breastfed infants, who may not be able to suck from a bottle or may not be able to digest the artificial milk as readily. Furthermore, using a bottle frequently may jeopardize a mother’s breast milk supply because of a decrease in breast stimulation, especially if her supply is already

³³ Wall, *supra* note 31 at 598.

³⁴ “NB moms defend right to breastfeed”, *supra* note 2.

³⁵ Wall, *supra* note 31 at 598.

³⁶ Van Esterik, *supra* note 22 at S45.

³⁷ Latham, “Breastfeeding: A Human Rights Issue?”, *supra* note 4 at 403.

³⁸ Joanna R Davis, “Bad Breast-Feeders/Good Mothers: Constructing the Maternal Body in Public” (2004) 48 *Berkeley J Sociol* 50 at 56-61.

³⁹ *Ibid.*

⁴⁰ See Ruth A Lawrence & Robert M Lawrence, *Breastfeeding: A Guide for the Medical Profession*, 7th ed (Maryland Heights, Mo: Elsevier Mosby, 2011) at 82.

⁴¹ *Ibid* at 264.

in a vulnerable state due to other reasons.⁴² Breastfeeding in a private place, as some may feel is more appropriate, is also not always possible, especially if such a private place is not readily available when the child is hungry. In particular, breastfeeding in the bathroom is inappropriate due to the potentially unsanitary conditions of such an environment.

Mothers who breastfeed in public are also criticized as shameless for doing so without consideration for others, who may view it as obscene or as a threat to common decency.⁴³ Customers in a store or other commercial enterprise may complain to employees or management, prompting an intervention against the mother. The notion that breastfeeding is not obscene has unfortunately not been sufficiently counteracted by the express exemption from obscenity or indecent exposure laws that have been granted to breastfeeding mothers by courts in Canada and various state legislatures in the United States.⁴⁴

Consequently, we suggest that it is time that the political and legal systems recognize that merely designating public breastfeeding as non-obscene behaviour is insufficient to deter breastfeeding discrimination. As we articulate below, legislatures should set out in clear and unmistakable terms that discrimination against mothers who breastfeed in public or quasi-public spaces is unlawful and a human rights violation. Those found liable should be subject either to damages awarded to the complainant, or to a potential fine if found guilty of committing the act as a penal offence.

III. Breastfeeding Rights and Canadian Legal Protections for Breastfeeding in Public

Does a woman have the right to breastfeed in public or quasi-public spaces? For the purposes of this article, we define a public space as one

⁴² *Ibid* at 82-83, 105.

⁴³ Davis, *supra* note 38. As Heather Maclean asserts, “[d]espite the widespread flaunting of women’s breasts that is so apparent in the media, women who breast feed are encouraged to maintain a virgin-like modesty.” Heather Maclean, *Women’s Experience of Breast Feeding* (Toronto: University of Toronto Press, 1990) at 94.

⁴⁴ See *R v Jacob* (1996), 31 OR (3d) 350, 142 DLR (4th) 411; *Maple Ridge (District of) v Meyer*, 2000 BCSC 902, 77 BCLR (3d) 171; United States Breastfeeding Committee, *State Breastfeeding Legislation* (Raleigh, NC: United States Breastfeeding Committee, 2003), online: USBC <www.usbreastfeeding.org>.

owned and maintained by a government entity that is regularly open to the public.⁴⁵ Such public spaces include parks, airports, and traditional government buildings like courthouses.⁴⁶ Quasi-public spaces, by contrast, are privately owned and operated spaces that are open to the general public.⁴⁷ They can include institutions that receive funding from government sources (such as universities)⁴⁸ or may be strictly private commercial ventures like shopping centres, shops, restaurants, and other commercial venues.⁴⁹ While restrictions on access to government-owned “public” spaces may be subject to *Charter*⁵⁰ and “quasi-constitutional” scrutiny (for example, human rights legislation), in addition to other statutory legal regimes such as labour laws,⁵¹ restrictions on access to quasi-public spaces are not subject to the *Charter*. Human rights legislation, given its importance, is considered quasi-

⁴⁵ There are, not surprisingly, a host of government-owned facilities, such as military bases, that are restricted to the general public. Therefore, the fact that a building or space is owned by the government does not render it automatically open to the public.

⁴⁶ *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385 [*Committee for the Commonwealth of Canada*].

⁴⁷ See Eric J Miller, “Role-Based Policing: Restraining Police Conduct ‘Outside the Legitimate Investigative Sphere’” (2006) 94:3 Cal L Rev 617 at 672; Katherine Astill, “The right to protest in quasi-public space”, *The Guardian* (28 October 2010), online: The Guardian <www.guardian.co.uk>.

⁴⁸ See *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

⁴⁹ It is worth noting that statutes do not always differentiate between public and quasi-public spaces. For instance, the *Smoke-Free Ontario Act*, SO 1994, c 10, s 1(1)(a) stipulates that an “enclosed public space” includes “any place, building or structure or vehicle or conveyance or a part of any of them that is covered by a roof, and to which the public is ordinarily invited or permitted access, either expressly or by implication, whether or not a fee is charged for entry.” By this description, the legislation incorporates both government-owned and privately owned buildings open to the public.

⁵⁰ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For examples of *Charter* restrictions in accessing government-owned property, see *Committee for the Commonwealth of Canada*, *supra* note 46; *R v Behrens*, 2001 CarswellOnt 5785 (WL Can) at paras 102-104, [2001] OJ no 245 (QL) (Ont CT J).

⁵¹ See *Cadillac Fairview Corp v RWDSU* (1989), 71 OR (2d) 206, 64 DLR (4th) 267.

constitutional in nature,⁵² and is available to govern the conduct of private actors, including store or shopping centre owners or employees.

Although there is no explicit human right to breastfeed in current Canadian legislation, the Québec Human Rights Tribunal has held in at least two separate cases⁵³ that forbidding a woman from breastfeeding in public or quasi-public spaces violated the complainants' rights under the Québec *Charter of Human Rights and Freedoms*.⁵⁴ The Tribunal found that the complainants' rights were infringed on the basis of their sex in connection with the provision of services. In decisions rendered by the Canadian Human Rights Tribunal and British Columbia Human Rights Council, breastfeeding discrimination was similarly seen as an implied form of sex discrimination (albeit set within the employment milieu).⁵⁵ Thus, while there is no express freestanding human right to breastfeed in public established in Canada, such implied norms are nevertheless part of the corpus of human rights law in certain jurisdictions in this country. However, it is unclear whether the cases above have established sufficient precedent to ensure that breastfeeding in public will be considered an implied human right in other Canadian jurisdictions as well. Case law aside, the Ontario and Nova Scotia Human Rights Commissions have published policies that indicate that preventing a mother from breastfeeding in public constitutes discrimination⁵⁶ within the context of the Ontario *Human Rights Code*⁵⁷ and Nova Scotia *Human Rights Act*.⁵⁸ It remains to be seen whether the Human Rights Tribunals of these provinces will agree with the Commissions' policy positions.

⁵² See *B v Ontario (Human Rights Commission)*, 2002 SCC 66, [2002] 3 SCR 403 ("this Court has repeatedly reiterated the view that human rights legislation has a unique quasi-constitutional nature" at para 44).

⁵³ See *Giguère*, *supra* note 2; *Lee*, *supra* note 2.

⁵⁴ RSQ, c C-12.

⁵⁵ *Cole v Bell Canada*, 2007 CHRT 7 at para 50, 60 CHRR D/216 [Cole]; *Poirier v British Columbia (Ministry of Municipal Affairs, Recreation & Housing)* (1997), 29 CHRR D/87 at para 8 (BCHRT) [Poirier].

⁵⁶ See Ontario Human Rights Commission, *Policy on Discrimination Because of Pregnancy and Breastfeeding* (17 December 2008), at 25-27, online: OHRC <www.ohrc.on.ca/sites/default/files/attachments/Policy_on_discrimination_because_of_pregnancy_and_breastfeeding.pdf>.

⁵⁷ RSO 1990, c H.19.

⁵⁸ RSNS 1989, c 214.

While implied human rights norms are one tool to protect the rights of mothers and children, we argue that federal and provincial governments throughout Canada should also take further steps to deter businesses from prohibiting or otherwise discouraging women from breastfeeding in public.⁵⁹ It has been noted that one of the key obstacles to initiating and maintaining breastfeeding is the lack of community support (this includes businesses).⁶⁰ As Deborah McCarter-Spaulling asserts, the decision to breastfeed is not merely about individual choice but also about the structural factors that impact upon that choice.⁶¹ If social and economic conditions are what make breastfeeding possible, then its promotion must be supported socially, economically, and politically.⁶² On the political front, this includes legislation protecting against breastfeeding discrimination, as advocated by proponents such as George Kent.⁶³ We identify two measures in particular. First, governments at the federal, provincial, and territorial levels can enact legislative provisions that explicitly prohibit breastfeeding discrimination. Second, these governments can classify violations of such provisions as offences subject to punishment by fines, should the Crown choose to prosecute. We deal with each in turn.

A. *From Implied to Explicit Language*

Federal, provincial, and territorial governments in Canada can amend their human rights laws to provide a clear and explicit indication to businesses and other service providers that if they prohibit mothers from breastfeeding on their premises, they will be committing a human rights violation. This legislative approach will also provide clarity to mothers regarding their rights. One way to adopt this approach is to create a stand-alone ground of

⁵⁹ In the United States, efforts have been made to explicitly protect women from being prevented from breastfeeding in public. See e.g. City of Seattle, ordinance No 123863, *An Ordinance Relating to Unfair Public Accommodation Practices; amending sections 14.06.020 and 14.06.030 to add the right of a mother to breastfeed her child in places of public accommodation free from discrimination* (12 April 2012). See also Phuong Le, "Seattle council protects public breastfeeding", *The Associated Press* (10 April 2012), online: Bloomberg Businessweek <www.businessweek.com/ap/2012-04/D9U1LSN03.htm>.

⁶⁰ See Latham, "Breastfeeding – A Human Rights Issue?", *supra* note 4 at 413-14.

⁶¹ McCarter-Spaulling, *supra* note 22 at 210.

⁶² *Ibid.*

⁶³ Kent, "Child Feeding and Human Rights", *supra* note 4 at 9-10.

discrimination: the right not to be discriminated against with respect to breastfeeding. Australian federal law, for example, specifically designates breastfeeding as a prohibited ground for discrimination.⁶⁴ The language of the relevant section is as follows:

a person (the *discriminator*) discriminates against a woman (the *aggrieved woman*) on the ground of the aggrieved woman's breastfeeding if, by reason of: (a) the aggrieved woman's breastfeeding; or (b) a characteristic that appertains generally to women who are breastfeeding; or (c) a characteristic that is generally imputed to women who are breastfeeding; the discriminator treats the aggrieved woman less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat someone who is not breastfeeding.

Such provisions can then be applied to discrimination in various contexts, including denial of services or access to facilities. The state of Hawaii has similar stand-alone anti-discrimination legislation regarding breastfeeding in places of public accommodation. The relevant statutory language states, "[i]t is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodations to a woman because she is breastfeeding a child."⁶⁵ On the basis of these examples, we propose that an anti-discrimination provision with respect to breastfeeding in public and quasi-public spaces more generally could read, "[i]t is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, or facilities situated on public property or private property generally open to the public, to a woman because she is breastfeeding a child."

As an alternative to a stand-alone anti-discrimination provision, another option is to expressly designate breastfeeding discrimination as a form of sex discrimination. This is presently done with pregnancy discrimination. For instance, section 10(2) of the Ontario *Human Rights Code* provides within its interpretation section of the statute that "[t]he right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."⁶⁶ Just as

⁶⁴ *Sex Discrimination Act* 1984 (Cth), s 7AA.

⁶⁵ Hawaii Rev Stat §489.21 (2000).

⁶⁶ *Supra* note 57, s 10(2).

discrimination in connection with pregnancy is explicitly made a form of sex discrimination, the Ontario *Code* and other human rights legislation across the country could be similarly amended to include breastfeeding within the definition of sex discrimination. We propose that the following or similar language can be employed in connection with breastfeeding rights within legislation: "The right to equal treatment without discrimination because of sex includes the right of a woman to breastfeed her child at any location on public property or privately owned property that is open to the public."⁶⁷ Such language is meant to encompass both refusals to allow women to breastfeed on the premises altogether as well as restrictions or conditions placed on breastfeeding women, such as requiring that they use washrooms, dressing rooms, or other designated spaces. Although our focus is primarily on preventing and prohibiting discrimination with respect to "services, goods, and facilities," such language in the context of the Ontario *Human Rights Code* would also be applicable to discrimination arising in relation to accommodation and employment.⁶⁸

Basing the prevention or prohibition of a mother's ability to breastfeed on the grounds of sex discrimination is logical and appropriate. Like pregnancy, breastfeeding is a condition unique and exclusive to women.⁶⁹ To borrow from the logic and language of the Supreme Court of Canada, discrimination on the basis of a mother's choice to breastfeed is a form of sex discrimination because of the basic biological fact that only women have the capacity to lactate and breastfeed.⁷⁰ This analogy was upheld by the Canadian Human Rights Tribunal and the British Columbia Human Rights Council in workplace-

⁶⁷ Some authors have argued that discrimination related to pregnancy also incorporates breastfeeding. Put another way, the period following birth and activities affiliated with motherhood, such as breastfeeding, are included as part of pregnancy. However, this approach to the issue of breastfeeding discrimination is counter-intuitive. After all, pregnancy is generally understood as the period encompassing fertilization to birth. Because breastfeeding can only take place after the end of pregnancy (and continues many months after the end), it makes better sense to protect breastfeeding on its own terms.

⁶⁸ *Supra* note 57, s 1.

⁶⁹ See *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 59 DLR (4th) 321.

⁷⁰ *Ibid.*

related cases⁷¹, and by the Québec Human Rights Tribunal in the service-related cases mentioned above.⁷²

Whether a jurisdiction chooses to adopt a stand-alone anti-discrimination provision with respect to breastfeeding as exemplified under Australian or Hawaiian law, or an interpretive provision as in the Ontario *Human Rights Code*, it is important that breastfeeding rights be protected in an obvious and explicit way. Defendants in a potential action, typically service providers in the case of service-related breastfeeding discrimination, will thereby be made aware that denying a breastfeeding mother equal treatment will likely attract liability. Furthermore, given the broad language of the statutory provisions discussed above, one might argue that persons who do not provide service directly (that is, who are not owners or employees) may also incur liability if through their actions, they cause a breastfeeding mother to be denied equal treatment in connection with access to goods, services, or facilities. It would, however, be wise for legislators to establish parameters for the conduct that may lead to personal liability in these contexts. For example, the expression by a customer of mere disapproval of a mother breastfeeding in a space, however unpleasant, should not by itself constitute denial of equal access to goods, services, or facilities resulting in liability. Yet, if such disapproval reaches beyond simple verbal expression and veers toward harassing behaviour or is accompanied by physical or threatening gestures that effectively deny a mother and child the ability to breastfeed in safety, it may be appropriate to extend liability to the aggressor. Liability should also be considered if service-providers witness harassing conduct on their premises and do nothing to halt it.

Inserting more robust and explicit language into federal, provincial, and territorial human rights legislation would also further Canada's international human rights commitments respecting the elimination of sex discrimination. In article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), States Parties have vowed to take "all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; [and] all appropriate measures, including legisla-

⁷¹ *Cole*, *supra* note 55 at para 50; *Poirier*, *supra* note 55 at para 8.

⁷² *Lee*, *supra* note 2 at paras 44-46; *Giguère*, *supra* note 2 at paras 63-64.

tion, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.”⁷³

If breastfeeding discrimination is considered a form of sex discrimination flowing from Canada’s commitments to CEDAW and the provisions cited above, governments should undertake to make breastfeeding discrimination more explicit and clear. In addition, governments can punish those who violate a mother’s choice or need to breastfeed. We discuss this below.

B. Convictions and Fines for Breastfeeding Discrimination

The standard way in which human rights legislation is enforced is through the filing of a complaint by the aggrieved individual. If the human rights tribunal determines that the complainant’s rights have been violated, damages may be awarded. This is certainly an acceptable way to enforce one’s rights but as many mothers already struggle to balance the many demands made on them, the added burden of pursuing human rights litigation and the economic and emotional strain it may produce may discourage many from litigating. Thus, a further way in which governments across Canada can deter breastfeeding discrimination is by passing legislation making it an offence punishable by fine to deny a breastfeeding mother equal treatment in public and quasi-public spaces. Whereas the human rights approach requires an action to be brought by the mother, the mode of enforcement here would be the Crown prosecuting on behalf of the province or territory.

How might such an offence be drafted? Drawing once again from the Ontario *Human Rights Code*, section 46.2 provides that a person who infringes rights protected under Part I of the *Code* is “guilty of an offence and on conviction is liable to a fine of not more than \$25,000.”⁷⁴ Manitoba’s *Human Rights Code* also penalizes, more broadly, persons who contravene “a[ny] provision of this Code” or “deprives, abridges or restricts, or attempts to deprive, abridge or restrict, any other person in the enjoyment of a right under this Code.”⁷⁵ Similar provisions are in place in human rights legislation in New Brunswick,⁷⁶ Nova Scotia,⁷⁷ Newfoundland and Labrador,⁷⁸ and

⁷³ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, art 2, 19 ILM 33 (1980) (entered into force 3 September 1981) [emphasis added].

⁷⁴ *Supra* note 57, s 46.2.

⁷⁵ *The Human Rights Code*, CCSM c H175, s 51(1)(a)-(b).

⁷⁶ *Human Rights Act*, RSNB 2011, c 171, s 25.

the Northwest Territories.⁷⁹ These penalties are directed at human rights violations in general. As such, they are a tool available for a provincial or territorial Crown to use with respect to breastfeeding discrimination.

Provincial and territorial governments across Canada can pass legislation making it an offence to commit a human rights violation in connection with breastfeeding and other forms of discrimination. Using their power under section 92(15) of the Constitution, provincial governments may impose punishment such as fines, penalties, or imprisonment for enforcing any law falling under their jurisdiction.⁸⁰ Legislative bodies within the territories are similarly empowered by federal legislation to impose such punishments as well as means to enforce territorial legislation.⁸¹ The advantage of this option is that rather than having aggrieved mothers pursue litigation, the Crown would litigate such cases as offences, thus engaging more resources than an individual claimant could access.⁸² Given the overall health benefits derived from breastfeeding, provinces and territories have an incentive to prosecute those who violate human rights norms with respect to breastfeeding.

Designating conduct of this type as an offence is unusual but not completely unheard of. In 2004, the Scottish Parliament passed a law imposing fines on businesses if they were found guilty of preventing or stopping a woman from breastfeeding on their premises.⁸³ In 2009, Indonesia passed a more far-reaching law whereby if a company, co-worker, or family member prevents a mother from breastfeeding, the guilty party may face a year in jail

⁷⁷ *Human Rights Act*, RSNS 1989, c 214, s 38.

⁷⁸ *Human Rights Act, 2010*, SNL 2010, c H-13.1, s 45.

⁷⁹ *Human Rights Act*, SNWT 2002, c 18, s 72.

⁸⁰ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(15), reprinted in RSC 1985, App II, No 5.

⁸¹ See *Northwest Territories Act*, RSC 1985, c N-27, s 16(u); *Yukon Act*, SC 2002, c 7, s 18(1)(y); *Nunavut Act*, SC 1993, c 28, s 23(1)(w).

⁸² As indicated in the legislation discussed above that allows for prosecution of human rights violations, in most cases, the authority to prosecute must come from the Attorney General or other designated minister in the government.

⁸³ *Breastfeeding etc (Scotland) Act*, ASP 2005, c 1; see also Angus MacLeod, "Scotland makes it a crime to prevent public breastfeeding", *The Times* (19 November 2004), online: Times Online <www.thetimes.co.uk/tto/news/uk/article1919203.ece>.

and/or IDR 100,000,000 (approximately CAD \$10,000) in fines.⁸⁴ While the Indonesian legislation provides for the possibility of imprisonment, such a severe penalty would likely be seen as excessive and unwarranted under Canadian human rights statutes. We would argue that a penalty in the form of a substantial fine would likely be sufficient as punishment. Furthermore, the potential for bad publicity in addition to a fine may prompt more businesses to be vigilant against engaging in such discrimination and to encourage their employees to be aware of their responsibilities under human rights law.

Naturally, such legal initiatives collide with the perceived rights of businesses to exclude people and regulate activity on their property. The right to exclude is often seen as the quintessential right of property owners.⁸⁵ However it is not without limits. The right to exclude is already tempered by human rights legislation that restricts a business owner or employee's ability to discriminate against a customer on the basis of, *inter alia*, race, sex, religion, sexual orientation, family status, and disability.⁸⁶ Legislation that makes it an offence for store or shopping mall owners to prevent a mother from breastfeeding in quasi-public spaces represents a similar and fair restriction on the right to exclude. Furthermore, it takes the burden of pursuing an action off the complainant-mother and places it on the State, which has an interest in ensuring non-discrimination against mothers and their children. It fosters an ethic of inclusivity in public and quasi-public spaces. It also champions and advances the various reasons for which breastfeeding should be promoted in the name of public health.

⁸⁴ *Undang-Undang Tentang Kesehatan [Health Law]*, Number 36 of 2009, arts 128, 200. See also Cat Wise, "New Indonesia law: allow breastfeeding, or face punishment" *PBS Newshour* (5 July 2011), online: PBS Newshour <www.pbs.org/newshour/runtdown/2011/07/in-indonesia-allow-breast-feeding-or-face-punishment.html>; "Mothers face jail sentence for refusing to breastfeed", *The Jakarta Post* (10 August 2010), online: JP <www.thejakartapost.com/news/2010/08/10/mothers-face-jail-sentence-refusing-breastfeed.html>.

⁸⁵ See *Vancouver (City of) v Burchill*, [1932] SCR 620 at 625, [1932] 4 DLR 200 ("[t]he land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property" at 625); *National Trust v Bouckhuys* (1987), 61 OR (2d) 640, 43 DLR (4th) 543 (Ont CA) ("[t]he notion of 'property' imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right" at para 24); Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730 at 730.

⁸⁶ See e.g. Ontario *Human Rights Code*, *supra* note 57, ss 1, 5.

Conclusion

Mothers and their children should not be restricted in their ability to access social spaces by the conceptual limitations of those who do not approve of breastfeeding in public. Prohibiting behaviour that hinders a mother's freedom to nurse her child in public or quasi-public spaces offers some minimal protection to breastfeeding women. It also serves as a disincentive, if not a deterrent, to individuals who would otherwise intervene against breastfeeding in public. Legal measures are admittedly only part of the solution. Public education can also play a significant role in addressing breastfeeding discrimination. Nonetheless, as with other forms of discrimination, public education alone will not suffice. Society must also come to terms with the idea that a woman's breasts can have a dual role, one of which is being an invaluable and normal part of their infants' lives through the act of breastfeeding. Legislation as proposed in this article may help members of society recognize the importance of breastfeeding, or at least deter those who might consider stopping a woman from breastfeeding in public.