



**SUPPORTING MOTHERS  
OR SHUTTING THEM OUT**

*Results of a Court Watch*



## SUPPORTING MOTHERS OR SHUTTING THEM OUT *Results of a Court Watch*

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**West Coast LEAF undertook this research project to begin to explore some of the obstacles to women's access to meaningful justice in the child protection system. Child protection proceedings raise significant issues of gender equality because women, and especially single mothers, are disproportionately affected by these processes. Fairness in child protection law therefore must necessarily involve equality considerations and reflect women's perspectives.**

This project was particularly motivated by concerns shared with us by a community agency that women with drug and alcohol addictions were being denied their rights to participate meaningfully in child protection proceedings and obtain fair outcomes. This is West Coast LEAF's first investigation of the child protection system in British Columbia, and this discussion paper lays the foundation for a number of further avenues of investigation and research.

This report addresses three main issues. The first is meaningful access to justice. Do women whose children have been apprehended have effective access to the justice system? Is there legal representation available to assist them? Is the justice system sufficiently resourced to provide effective justice in child protection cases? How do structural barriers within the justice system itself undermine women's rights and the best interests of children involved in these proceedings?

Second, and related, is the issue of women's right to meaningful participation in child protection proceedings. Are women, particularly marginalized women, able to understand and navigate the complex legal system that governs child protection in BC, and to effectively participate in these proceedings, which have such profound impacts on their rights and lives? What obstacles exist to achieving meaningful participation for marginalized women involved in the child protection system?

Finally, what other obstacles exist to ensuring women with addictions receive fair treatment in the justice system? Ultimately, justice (and child protection legislation) requires that mothers be supported to take positive steps for their own and their children's best interests; are there sufficient resources available to allow them to achieve this goal? What services and supports exist for mothers and pregnant women with addictions?

Parents' meaningful participation in child protection proceedings is compromised by the formality and complexity of the process, a lack of information about their rights, and a legal aid regime that is accessible to only the poorest families. Women, particularly Aboriginal and minority women, women with disabilities and addictions, and women living in poverty, are disproportionately impacted by these structural barriers to their meaningful participation in the court process. Pregnant women and mothers dealing with substance use problems may experience additional barriers to participating in court proceedings due to judicial attitudes and biases that operate to exclude them from the process. West Coast LEAF set out to begin to understand some of these obstacles and barriers in the hopes of identifying recommendations for law reform and further avenues for research.

### *Background to the Project*

West Coast LEAF undertook this project following discussions with staff at Sheway, a community-based health and social service program in Vancouver's Downtown Eastside serving pregnant women and women with infants under 18 months who are dealing with drug and alcohol issues. The focus of Sheway's Pregnancy Outreach Program is to help women have healthy pregnancies and positive early parenting experiences. Sheway's model of care is rooted in the recognition that the health of women and their children is linked to the conditions of their lives and their ability to influence those conditions. In addition to substance use problems, women accessing services at Sheway have lives characterized by poverty, homelessness, malnutrition, gender-based and structural violence, trauma, and a lack of supportive care in many aspects of their lives. Approximately 70% of the women accessing Sheway self-identify as Aboriginal, and the majority of Sheway's clients have themselves spent time in state care as children.

Sheway brings together drug and alcohol counsellors, community health nurses, physicians, social workers, nutritionists, infant development consultants and other professionals to provide pregnant women and mothers with a range of supports including nutrition counselling, parenting support, drug and alcohol counselling, assistance securing housing and social benefits, and practical necessities such as baby food, formula, diapers and toys.

Approximately one-quarter of new mothers who access Sheway presently have their youngest babies placed in state care. While some of these placements are voluntary, most are not. Among the supports provided to women at Sheway are advocacy assistance and accompaniments to court hearings in which custody and access decisions about their infants are made.

Over time, Sheway staff have become increasingly concerned about the ways in which substance-using pregnant women and new mothers are being treated

in court, and the implications of this treatment both for informing judicial decision-making regarding custody issues, and for the ability of highly marginalized women to participate meaningfully in court processes that affect them. The regularity of their clients' troubling experiences led Sheway staff to approach West Coast LEAF with the object of developing and implementing a court watch program to determine the frequency of these instances and to properly characterize the nature of interactions between judges and the women appearing before them.

West Coast LEAF sought to collect data to help determine whether there is a systemic problem with the way in which child protection matters involving substance-using pregnant women and mothers are proceeding, whether judicial attitudes or biases might be precluding the fair and meaningful participation of women with addictions in court cases involving their fundamental rights, and whether laws involving pregnant women's autonomy and reproductive rights are being properly applied.

## *Methodology*

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19 student volunteers participated in the court watch process. Volunteers were recruited at University of British Columbia (UBC) law school events and through email distribution of recruitment materials via various listserves. Additionally, the role of court watcher was offered as a community service learning placement in a UBC Gender Psychology class.

Court watchers were required to attend two three-hour training workshops and observe two sessions of court over the two month court watch process, which ran from mid-March to mid-May, 2012. The first training session for volunteers was hosted by Sheway. Sheway provided volunteers with a broad overview of the supports offered through their organization, and described some of the barriers that women with addictions face during pregnancy and as new mothers. In addition, Sheway shared research addressing best practices for infants born to mothers who were using drugs while pregnant.

The second training took place at West Coast LEAF. This training focused on the child protection system, court processes and completion of the court watch form (Appendix A), and was led by West Coast LEAF's Education Manager and Legal Director. Court watchers were provided with a binder containing court watch forms, instructions on completing the forms (Appendix B) and an overview of the child protection process.

At the completion of the court watch process, West Coast LEAF hosted a small focus group to hear from court watchers about their challenges in observing court and completing the court watch forms. Court watchers frequently noted that

the fast pace of the court process often meant that they couldn't fully complete the forms. Additionally, a lack of familiarity with court proceedings meant that observers didn't always feel that they accurately captured the judge's or ministry lawyer's tone, because they lacked an experience to compare it to.

Child protection proceedings are held on Wednesdays at Vancouver Provincial Court and on Thursdays in Surrey. We had a minimum of one observer at each morning and afternoon session, with a maximum of three observers present. Observers were instructed to make their observations independently, and not to refer to another observer's sheet when recording observations. Originally, West Coast LEAF had hoped to pair a law student with a psychology student to balance court observations, but due to scheduling this was not always possible.

At the conclusion of our observation period, West Coast LEAF court watchers had watched 12.5 days of court and completed 750 forms. Data was coded and entered into an Excel spreadsheet for analysis. Qualitative data in the form of observer comments were also inputted into a computer program, which allowed for an assessment of prevalent themes.

## *The Child Protection Court Process*

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Court watchers mostly observed matters that were in the presentation hearing stage of the child protection court process. Parents are asked to appear in court for a presentation hearing after the Ministry apprehends their child or applies for a supervision order permitting a social worker to monitor the parent's care of the child according to a set of conditions. The hearing must take place within 7 days of a child's removal, or 10 days after the Ministry has applied for a supervision order. The Ministry must present a Report to Court detailing the circumstances that caused the removal, an interim plan of care for the child, information on whether any less disruptive measures were considered prior to removal, and in the case of an Aboriginal child, the steps taken to preserve the child's Aboriginal identity.<sup>1</sup> There is no opportunity for the parents to present their side of the story at the initial presentation hearing.

If the parents consent to the child's apprehension at this first step, the Ministry will be granted an interim order to keep the child in their care. The interim order will be in effect for a maximum of 45 days, at which time the parties must return to court for a full protection hearing. If the parents do not consent, the hearing is adjourned to a Judicial Case Manager, who sets another date for the parties to argue the merits of the Ministry's application before a judge. This will be the parents' first chance to present their views to the Court. There is no timeline set in the legislation for when this hearing must occur, and given the busy caseloads

<sup>1</sup> *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 35(1) [CFCSA].

of the courts and lawyers doing child protection work, the delay can be six to eight weeks.<sup>2</sup> The child remains in care throughout this delay, even though a judge has not yet considered the reasonableness of the removal.

At the presentation hearing, the judge will make an interim order either returning the child to the parents, keeping the child in Ministry care, or returning the child to a parent or family member under a supervision order. At the conclusion of the presentation hearing, a protection hearing, where a judge makes a final determination of whether the child is in need of protection, must be scheduled as soon as possible, and within no more than 45 days. In Vancouver, protection hearings are routinely scheduled exactly 45 days away.

The first stage of a protection hearing is the “commencement date,” at which time the parent can either consent to the order sought by the Ministry, or oppose it. Again, a parent is provided no opportunity at this time to argue the merits of her case. If she is opposed to the order the Ministry is seeking, the hearing is again adjourned to the Judicial Case Manager to set a date for a case conference with a judge. At the case conference, the judge acts as a mediator between the parents, Ministry lawyer, social workers and the parents’ lawyer to see if any issues can be resolved without the hearing of evidence. If no agreement is reached, dates will be set for a full trial.

At the conclusion of the protection hearing, the judge must determine whether the child is in need of protection and make one of two orders: a temporary order or a continuing custody order. When a temporary order expires, the parents will have the opportunity to have another protection hearing if the Ministry seeks to extend it. However, a continuing custody order can only be challenged if the circumstances that led to its being ordered change dramatically. Under a continuing custody order, the Ministry becomes the sole guardian of the child, and can consent to the child’s adoption.

## *Guiding Principles and Systemic Issues in Child Protection Law*

Child protection in British Columbia is governed by a number of important guiding principles. The *Child, Family and Community Services Act* (“CFCSA” or “the Act”) emphasizes supporting families to care for children in the home, improving services for Aboriginal families, using apprehension only as a last resort, and reunifying children and parents as quickly as possible when a temporary removal is necessary. A guiding service delivery principle under the Act is that families and children

<sup>2</sup> Pivot Legal Society, *Broken Promises: Parents speak about BC’s child welfare system* (2008), at 80.

should be informed of the services available to them and encouraged to participate in decisions that affect them; another is that the community should be involved, wherever possible and appropriate, in the planning and delivery of services, including preventive and support services to families and children.<sup>3</sup>

However, numerous investigations of BC’s child protection system have concluded that current child protection practices are not adhering to these principles and are failing to meet the objectives set out in child protection law.<sup>4</sup> In particular, the BC government’s lack of commitment to providing publicly funded support services including safe and affordable housing, adequate income assistance, drug and alcohol treatment and harm reduction, mental health services, and supports for victims of domestic abuse, undermines the Ministry of Children and Family’s ability to support families and take a preventive approach to child protection issues. Because apprehensions are most often due to parents’ struggles with poverty, addictions, mental health issues and/or family violence,<sup>5</sup> investing in these supports is crucial to the objectives of keeping families together and using apprehension only as a last resort.

Ultimately, individualistic and case-based intervention is an inadequate response to the myriad contextual factors that affect maternal and fetal health. Maternal substance use cannot be viewed in isolation from its frequent accompaniments: economic deprivation, racial discrimination, and violence. What is required is an approach that takes into account the poverty, racism, sex discrimination, violence, inadequate medical care, poor nutrition, and lack of education that constitute the conditions of many women’s lives, and which seeks to promote more positive interventions. Pregnant women – particularly Aboriginal women, whose health status falls far below that of the rest of the population – need access to quality health care for themselves and their babies, as well as safe housing, access to justice, good nutrition and education and supports. These are the kinds of interventions that will protect babies and fetuses and support women’s recovery, while also respecting their rights to equality and bodily autonomy.

Aboriginal women in particular have borne the brunt of interventionist policies and punishment, including the loss of their children to child welfare agencies. Aboriginal women do not always meet dominant cultural and middle class expectations around motherhood, and have often been stereotyped as “bad mothers” according to

<sup>3</sup> CFCSA, s. 3.

<sup>4</sup> *Broken Promises*, supra note 2; Ted Hughes, *BC Children and Youth Review: An Independent Review of BC’s Child Protection System* (7 April 2006); Representative for Children and Youth, *Honouring Kaitlynn, Max and Cordon: Make their Voices Heard Now*, (March 2012).

<sup>5</sup> *Broken Promises*, supra note 2, at 2.



Western social constructions and norms.<sup>6</sup> Aboriginal women have been denied the right to mother their children for generations, losing them first to residential schools and then to the child welfare system. As the Report of the Aboriginal Justice Inquiry of Manitoba states, after the closure of residential schools in the 1960s:

*...the child welfare system took its place. It could continue to remove Indian children from their parents, devalue Native customs and traditions in the process, but still act "in the best interests of the child." Those who hold this view argue that the Sixties Scoop [the placement of aboriginal children with white families] was not coincidental; it was a consequence of fewer Indian children being sent to residential schools and of the child welfare system emerging as the new method of colonization.<sup>7</sup>*

Aboriginal women in Canada are also three times more likely to be victims of violence generally, and more than twice as likely to be victims of spousal violence as non-Aboriginal women.<sup>8</sup> Harmful behaviour by men towards fetuses has not been subject to similar levels of judicial scrutiny as women's behaviour, despite the fact that male spousal violence against pregnant women has been identified as one of the most unaddressed sources of fetal harm.<sup>9</sup> One Ontario study found that 6.6% of pregnant women receiving prenatal care experienced physical abuse during their pregnancy, and a Canada-wide study concluded that domestic violence often begins or intensifies during pregnancy.<sup>10</sup>

Research also indicates a connection between female substance use and histories of abuse, with one study conducted by the American Medical Association finding that 70 percent of the women in one substance abuse treatment program had been victims of sexual abuse, and 70 percent had also been subject to physical violence.<sup>11</sup> Research on alcohol consumption has yielded similar results, indicating that while under 20 percent of non-abused women drink regularly while pregnant, up to 70 percent of abused women do so.<sup>12</sup> Medical researchers have explicitly acknowledged a causal link between abuse while pregnant and subsequent substance abuse during pregnancy, finding that pregnant women tend to increase their usage of drugs

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6 See M. Kline, "Complicating the ideology of motherhood: Child welfare law and First Nation women" in M. Fineman and I. Karpin, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood*.

7 Chapter 14: Child Welfare.

8 Statistics Canada, "Study: Violent victimization of Aboriginal women" (17 May 2011), online: <<http://www.statcan.gc.ca/daily-quotidien/110517/dq110517b-eng.htm>>.

9 Constance MacIntosh, "Conceiving fetal abuse" (1998) 15(2) Can. J. Fam. L. 178 at 187.

10 Cited in MacIntosh, *ibid* at 189.

11 Board of Trustees, American Medical Association, "Legal interventions during pregnancy: Court-ordered medical treatments and legal penalties for potentially harmful behaviour by pregnant women" (1990) 264 *Journal of the American Medical Association* 2663 at 2665.

12 Cited in MacIntosh, *supra* note 9 at 194.

and alcohol following episodes of abuse, and women who are abused often self-medicate with alcohol, illicit drugs and prescription medicine in order to cope with the violence.<sup>13</sup>

Violence, poverty, sex discrimination, racism, and the lasting impacts of colonialism are among the myriad contextual factors that surround women's experiences in the child protection system. This discussion paper does not seek to provide a detailed analysis of these complex issues or make comprehensive recommendations for structural reform. Clearly, improving the material conditions of women's lives, addressing systemic discrimination and ending violence against women will help to dramatically improve the health and safety of women and children and lead to less involvement by child welfare authorities in families' lives. The focus of West Coast LEAF's research, however, was an observation of the child protection court system as it currently operates; these systemic issues impacting why children are removed from the home form the context in which the child protection system operates. The following sections detail the results of our observations and discuss the three issues identified at the outset of this report: meaningful access to justice, barriers to women's participation in child protection proceedings, and the supports available to pregnant women and mothers with substance use problems.

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13 *Ibid*.

# 2

## Discussion of Court Watch Results

**Court watching took place between March 14 and April 12, 2012. Child protection proceedings occur once a week, on Wednesdays in Vancouver and Thursdays in Surrey. Court watchers were present in both courts each week, observing a total of approximately 421 proceedings.<sup>14</sup>**

The vast majority of hearings resulted in a maintenance of the status quo. Most cases were either adjourned or ended with an interim order keeping the child in the Ministry's care.

Adjournment	Interim Custody Order	Continuing Custody Order	Supervision Order	Return of Child	Other
79	164	55	388	18	67

Court watchers were instructed not to guess about the mother's Aboriginal status, any mental health, addiction issues, or physical disabilities she might be experiencing, or her pregnancy status. However, they were to record these factors if they arose or were mentioned during the hearing.<sup>15</sup>

	Mental health	Addiction	Physical disability	Pregnant
Mother presents with (#)	11	24	3	1

Approximately 50 mothers were Aboriginal. A further 24 mothers were visible minorities.

One or more parties had English as a second or additional language in 32 cases. Interpreters were provided in eight cases. In one case involving a deaf parent, no ASL interpreter was present in the court that day, but an order was made for an interpreter to be present at all future hearings. In one case, a Punjabi interpreter was requested, but one could not be found and the hearing proceeded, with duty

<sup>14</sup> The logistics of the court watch and nature of the proceedings mean that some cases may be have been counted twice due to adjournments, cases being stood down, court watcher difficulties in hearing the case numbers and names of the parties, and other challenges. Numbers provided are as accurate as possible within the constraints posed by these difficulties.

<sup>15</sup> For example, someone's Aboriginal status could be identified by the presence of a representative from their Band or the involvement of a delegated agency.

counsel providing assurances that the mother understood the terms of the order as they had reviewed it earlier. In one instance, a son provided Spanish translation for his father.

### Access to Justice

Most parties were represented by duty counsel. Some had their own lawyer with them.

	Unrepresented	Duty Counsel	Own Lawyer
Mothers (%)	23	45	32
Fathers (%)	20	57	23

The parents were not always present for the proceedings. In approximately 25% of the cases, neither parent appeared in court. In 37% of cases, the mother was present alone; in 18% of cases the father was present alone, and in 20% of cases, both parents were present. Grandparents participated in about 4% of the cases; a sibling was present in two cases.

### Legal Representation for Parents

While most parents were represented either by duty counsel or their own lawyer at the hearing, 23% of mothers and 20% of fathers did not have a lawyer assisting them at the hearing. It is not known whether the parents represented by duty counsel at the hearing went on to obtain counsel of their own, either privately or through legal aid.

Child protection proceedings can cause parents great distress, stigma, loss of privacy and disruption of family life. Because of the massive impacts of these state-driven proceedings on parents' Charter-protected right to security of the person, the Supreme Court of Canada has ruled that parents have a constitutional right to state-funded legal counsel in child protection hearings when counsel is required to ensure a fair hearing.<sup>16</sup> Whether state-funded counsel is required depends on the seriousness of the issues at stake, the complexity of the proceedings, and the capacities of the parent.

As a result of the Supreme Court of Canada's decision, child protection matters are among the few areas of law covered by legal aid in BC. However, only parents with extremely low-incomes are eligible. The net monthly income threshold for

<sup>16</sup> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

a family of three, for example, is \$2,640.<sup>17</sup> Of course, many parents earning more than this amount will require legal representation in order to obtain a fair hearing, and will be unable to pay for a lawyer on their own. In a recent BC case known as *T.L.*, the court held that parents earning more than the legal aid income threshold may still be entitled to legal aid coverage for their child protection case if the fairness of the proceedings demands it.<sup>18</sup> The Court recognized that even people working full-time in many low-wages jobs will have considerable difficulties meeting the costs of reasonable living expenses, and are unable to save for unforeseen costs such as legal counsel. As such, they may qualify for state-funded counsel in these important cases impacting on their constitutional rights.

The Court's ruling in *T.L.* is not highlighted on the Legal Services Society's website. Parents may be deterred from applying for legal aid because they exceed the income cut off, unaware of this legal precedent that could entitle them to legal aid coverage.<sup>19</sup>

An important area for further research would be an investigation of the number of applicants refused legal aid in child protection matters who end up representing themselves in these difficult and complex matters because they cannot afford to hire a lawyer on their own. Additionally, the number of potential applicants deterred from applying because they slightly exceed the income cut-off, or who are denied coverage in situations like those present in the *T.L.* case but who lack the means to challenge the denial, would also be important areas for further investigation.

Another area for further research is the extent to which low-income parents access legal aid in child protection matters before their child is apprehended. Financially eligible parents are entitled to legal aid representation in situations where the Ministry has threatened to remove their child, but has not yet done so. Often, removals occur after a long period of involvement by the Ministry in the family's life and an accumulation of concerns about the parents over time. In these circumstances, it would be very useful for parents to have a lawyer involved who could work with the parents proactively to avoid the apprehension of their child. However, research conducted by the Pivot Legal Society found that most parents do not obtain a lawyer until court dates are set, usually after the child has been removed, because they are not aware that they may be entitled to representation through legal aid.<sup>20</sup>

17 Legal Services Society, "Do I qualify for legal representation?" online: <[http://www.lss.bc.ca/legal\\_aid/dolQualifyRepresentation.php](http://www.lss.bc.ca/legal_aid/dolQualifyRepresentation.php)>.

18 *Attorney-General of British Columbia v. T.L.*, 2010 BCSC 105.

19 The Legal Services Society website contains this disclaimer on its "Do I qualify for legal representation?" webpage: "Only a trained legal intake assistant can determine your financial eligibility for legal aid. The following information is not complete. To find out if you qualify for a legal aid lawyer, it's best to come into a legal aid office and apply."

20 *Broken Promises*, *supra* note 2 at 7-8.

## Judges' Capacity to Manage Caseload

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The BC Provincial Court lost 17 full-time equivalent judge positions between 2005 and 2010. In a 2010 report prepared by the Provincial Court, the authors say:

*Given the reduction in the judicial complement the Court is unable to 'keep pace' with the new cases being presented to it. The current inventory of uncompleted cases is growing markedly, as is the delay for all case types other than youth court prosecutions. Increasingly the Court is failing to meet its legal obligation to provide timely access to justice.<sup>21</sup>*

An update to this report showed that a further three full-time equivalent judge positions were lost between September 2010 and October 2012.<sup>22</sup>

As described above, delay is a common feature of BC's child protection system. Due to busy and understaffed courts and the resulting difficulties scheduling dates that accommodate everyone involved, parents may wait for six to eight weeks to challenge the Ministry's reasons for removing their child at the presentation hearing stage, and the child remains in care throughout this time. In Vancouver, protection hearings are routinely scheduled 45 days from the end of the presentation hearing stage, the maximum time allowed by the legislation. The result is that parents and their children may be separated for months while the process unfolds.

In order to get through the dozens of cases on the docket on a given court day, the judges move through the files extremely rapidly. One consistent piece of feedback from the court watchers was that the court proceedings moved very quickly.

*"The pace of the court was a bit overwhelming so I cannot imagine what it is like for the families involved."*

*"There does not seem to be enough time for the respective parties to consult with duty counsel and, as a result, many of the hearings are delayed, adjourned or stood down."*

*"These proceedings were busy, disorganized and difficult to follow. Applications, on behalf of the director, were continuously filed late and extensions for service were commonly sought."*

21 Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources (14 September 2010) online: <[http://www.provincialcourt.bc.ca/downloads/pdf/Justice\\_Delayed\\_-\\_A\\_Report\\_of\\_the\\_Provincial\\_Court\\_of\\_British\\_Columbia\\_Concerning\\_Judicial\\_Resource.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/Justice_Delayed_-_A_Report_of_the_Provincial_Court_of_British_Columbia_Concerning_Judicial_Resource.pdf)>.

22 Provincial Court Judge Complement, online: <<http://www.provincialcourt.bc.ca/downloads/pdf/Provincial%20Court%20Judge%20Complement%20Requirements.pdf>>. On December 4, 2012, the Ministry of Justice appointed nine new judges to the Provincial Court bench.



There were also some concerns raised about whether the judge was actively participating in the decision-making process. The vast majority of cases concluded with the Ministry obtaining the order it was seeking. The Ministry's position and the input of the social worker were given very significant weight by the Court.

*"After watching a second session with a different judge, [I] realized just how fast this judge had been moving through each case. Took very little time to read the files and received a lot of direction or suggestions from the ministry lawyer."*

*"I have also noticed how much weight is given to the reports to court. The judge seems willing to grant anything after she read a report to court or social worker affidavit."*

Another concern raised by the court watchers regarding judges was whether the judges were familiar with the file and the case before them. In one case, a judge who was new to child protection hearings told counsel that many of his colleagues do not read the files, and asked the Ministry lawyer whether, in the lawyer's experience, judges tended to read the files in advance of the hearings. The judge said that he did read the files, but he wanted the lawyer's perspective. The Ministry lawyer suggested that some judges do read the files and some do not, and that it was up to the judge to decide whether or not he would. A duty counsel lawyer present for the conversation encouraged the judge to always read the files.

*"Judge seemed very disengaged. Did not look at files. Made very few comments. Did not talk to parents except in a few cases of asking for confirmation. Did not make any particularly negative comments. ... For all, the judge was a two or a three for clarity and tone. No attempts made to see if parents understood."*

*"[The judge] was unenthused and tense. He said very little, rarely asked questions and did not take any interest in reading the files."*

A few times the judge appeared to be disengaged and not particularly present for the proceedings.

*"In many cases, judge seemed a little uninterested, staring off into space. Most of the time, his tone was neither supportive nor condescending."*

*"This judge seemed interested and kind in the morning, but by the afternoon, had completely disengaged. Kept checking the clock, and looked extremely bored and tired."*

*"[The judge] was barely present. He only read one of the files and seemed focused on rushing the process."*

However, there were a number of comments suggesting that some judges take their time, read the files, ask questions, and engage actively in the decision-making process.

*"Judge reads information in detail, slows down court in order to do so."*

*"This judge seems attentive, is really thorough, always taking time to read reports to court, affidavits, asking for evidence if dispensing with consents. Seems concerned about parties having representation and seeking legal aid quickly."*

## *Mothers' Ability to Participate Effectively*

Access to a fair court procedure is a principle of fundamental justice and essential to our democracy and the rule of law. As the Supreme Court of Canada has affirmed, in order for child protection proceedings to be fair, parents must have the chance to present their case effectively.<sup>23</sup> Effective parental participation and a fair process in which parents may tell their stories are essential for determining the best interests of the child – the paramount consideration in child protection proceedings. Parents are in a unique position to present relevant information to the court, and if they are denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination, leading to removals or other orders that are not in the child's best interests.

The Supreme Court of Canada has held that the parental interest in raising, nurturing and caring for a child is "an individual interest of fundamental importance in our society."<sup>24</sup> The apprehension of a child from his or her family is a cause of great distress and stigma for parents, and constitutes a profound state interference with parents' security and psychological integrity and a significant intrusion into the intimate sphere of family life. In order for child apprehensions to comport with the principles of fundamental justice enshrined in the *Canadian Charter of Rights and Freedoms*, the process must be fair. Fairness requires that parents have an opportunity to present their cases effectively.

One of the reasons West Coast LEAF embarked on this research was to assess whether judges are creating an atmosphere in their courtrooms that is conducive to mothers' participation in court proceedings. Prior to this study, Sheway clients had experienced a number of instances where they perceived judges to be rude, dismissive, or hostile when they appeared in court, silencing them when they attempted to speak, failing to ensure they understood the decisions being made, and making comments implying that mothers who had used drugs or alcohol during

<sup>23</sup> G.(J.), *supra* note 16 at para. 73.

<sup>24</sup> B.(R.) v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 83.

their pregnancies had engaged in “child abuse”. These experiences led women to feel disconnected from the process, uncertain about their rights, and skeptical about the fairness of the proceedings.

Due to the limited nature of this study, as well as the difficult and emotional nature of child protection proceedings, West Coast LEAF did not attempt to speak to women directly about their experiences in court. We limited our research to observations of the court proceedings, and court watchers recorded their impressions of how well mothers understood the proceedings, whether judges and Ministry lawyers were clear and respectful in their interactions with mothers, and whether mothers had an opportunity to participate in the proceedings.

### Mothers’ Voices and Understanding

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As described above, presentation hearings do not provide parents with an opportunity to explain their side of the story to the Court or have the Court make a determination on the merits of their case. The parents are only able to consent to or oppose the Ministry’s application. If a parent does not consent to their child’s removal at this preliminary stage, the hearing is adjourned to a Judicial Case Manager, who will set another date for the parties to argue about the merits of the Ministry’s application. There is no timeline for when this hearing must occur, meaning that the child remains in the Ministry’s custody even though the legitimacy of the removal is being challenged by the parent and has not been reviewed by a judge.

Court watchers observed that many parents attending the hearings seemed to expect that they would have the opportunity to tell their story to the judge and ask for their child’s return. They seemed to be unaware that this was not the case, and that there were many steps involved before they would have a chance to argue about the merits of the Ministry’s actions.

More generally, parents’ ability to participate meaningfully in child protection proceedings is also constrained by the complexity and formality of the process, and by the multiplicity of challenges they may be experiencing. Decisions made in child protection proceedings have massive consequences for parents, many of whom are additionally marginalized by poverty, race, immigration status, disability and other factors. For the proceedings to be fair and credible, it is essential that the court system treats parents with respect and ensures they understand their rights and the nature of what is happening. Pivot Legal Society interviewed mothers about their experiences in the child protection system; a common thread in these interviews

was that mothers found the court system to be confusing, disempowering, alienating and difficult to participate in.<sup>25</sup>

Much of the child protection process proceeds by consent, meaning that the parents will often agree to supervision arrangements, continuing care orders, and other interim measures sought by the Ministry. This can speed up the court process and may be looked upon favourably by Ministry social workers. However, meaningful consent can only be given by parents who understand their rights and the implications of agreeing to the terms the Ministry lawyer is seeking. One court watcher observed a case in which a mother had given written consent to the Ministry’s terms in advance of the hearing, but the form she signed did not clearly set out what she was consenting to. In another case, a mother consented to the terms prior to receiving any advice and without having an interpreter present. Duty counsel expressed opposition to the Ministry’s practice of seeking consent without ensuring the mother has had the opportunity to obtain legal advice.

In one case, a mother gave consent to the Ministry’s continuing care of her teenaged child, but expressed sadness and reservation, saying that she wanted her child returned, but felt the child had been turned against her through the child protection proceedings. The judge told her that if she consented, she would not have to return to court on the matter. She agreed and quickly left the courtroom.

*“Mother does not understand completely but consented.”*

*“Ministry made comments about how mother had lots of time to be in touch. Father consenting. Mother eventually consented, but definitely did not seem like mother understood.”*

*“Mother is in a transition home due to domestic violence. Two week adjournment was asked so that they could get counsel. Judge was about to grant since both duty counsels said their clients agree. Sister in law approached the court and said the duty counsel is pushing the mother to agree. It is then that the judge asked the mother to say something. Mother was upset and the whole time she seemed to be struggling to understand what was going on.”*

Court watchers were asked to make a subjective assessment of the mother’s degree of understanding in each case. This is not a simple task, and many court watchers declined to assign a rating in this category. The average rating given was 3.47. Many of the comments suggest that judges attempt to clarify the proceedings and the terms of any orders they are making; occasionally they actively seek the mother’s input and participation. Court watchers observed no instances of a mother wishing to speak to the Court and being denied that opportunity by the judge.

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25 Broken Promises, supra note 2.

*“Judge spoke directly to the mother, and wanted to make sure she understood. Father was not present. Lawyer seemed a little defensive. Judge wanted to ensure mother’s understanding and concerns for each step. Judge explained all legal matters to mother.”*

*“Judge asks mother if she understands order, and explains it again.”*

*“Director proposes case conference. Father is given chance to speak and is in anger management. Judge interrupted, wants to hear from mother to make sure she understands.”*

*“Judge is very supportive of mother. Mother presented her own case. Judge does seem to rely on ministry lawyer for her feedback and ideas on the case presented by the mother. At the beginning she does this, but eventually the judge makes her own decision. Judge does explain well and further explain things to the mother. Ministry did apologize when accidentally interrupted the mother. Judge did direct to get an early case conference date due to mother’s request.”*

*“The judge asked the mother if she understood and got the sheriff to write everything down for her, and [told her to] talk to legal aid or duty counsel.”*

*“After the mother explained her story, the judge was actively listening, but the Ministry lawyer gave no response to the woman’s story. The judge was very patient and respectful in hearing the woman’s concerns, which were often repeated. The mother had a hard time understanding that the judge could not grant her custody right there and then. The judge had to explain this to her a couple of times, but did it in a calm and respectful manner.”*

*“At the beginning of this hearing, the judge spoke very formally and the mother seemed nervous and intimidated. It seems that the judge was receptive to the mother’s discomfort, and he began to speak at a more appropriate level. He adjourned the hearing in order for the mother to speak to duty counsel and get a better understanding of the proceedings.”*

## Ministry Lawyers

Court watchers observed that the child protection proceedings are very much driven by the lawyers for the Ministry of Children and Families. Judges relied heavily on the Ministry lawyers, who set the pace of the hearings, provided a history of the case and often explained the law to the Court.

Court watchers were asked to rate the Ministry lawyers’ tone during each proceeding. Overall, court watchers rated the Ministry lawyers’ tone favourably; the average

rating was 3.97. The average rating was substantially the same in cases where addiction issues were identified.

*“My impressions of both the judge and the ministry lawyer were fairly neutral. I did not detect a prejudicial tone by either of them, and I felt that every party had an uninterrupted opportunity to speak.”*

*“Ministry lawyer similarly was polite and clear. No distinction in either judge or ministry lawyer’s approach to parties. Similar tone with everyone, professional and concise.”*

*“Ministry lawyer has a kind, non-aggressive tone.”*

*“The ministry lawyer at this afternoon session was very good. He spoke clearly and respectfully to all parties. He was especially concerned that each party understood the nature and terms of a consent/supervision order, if applicable.”*

In a number of instances, however, problematic comments by Ministry lawyers were observed. In particular, it was observed in five cases that the Ministry lawyer interrupted a mother who was attempting to address the Court.

*“The ministry lawyer was more formal and aggressive than previous ministry lawyers that I have observed. He tended to interrupt the mothers on a constant basis.”*

*“Ministry lawyer is a bit tense and intimidating. Ministry lawyer interrupts mother, constantly.”*

*“One negative interaction involved a Black mother requesting a date be set for a case conference. Both lawyer and judge made a big deal about her not knowing who the father was and about affidavit evidence only disclosing a first name. They were both condescending about setting a case conference date.”*

*“The ministry lawyer’s body language was bad, such as rolling eyes and shaking head.”*

*“There were a few instances where the Director’s lawyer for Vancouver used particular language that was negative to the mother, suggesting they were not interested in being involved in the process or that their personal problems, such as addiction, were an issue.”*

In one case involving an Aboriginal mother whose child had been recently removed from her care, the Ministry lawyer emphasized the mother’s addiction issues and speculated that the removal “did not help”, and was probably the reason why she was not present in court, implying that she was using drugs to cope with the removal and was incapacitated at the time of the court hearing. In a subsequent



case the same lawyer stated that the mother “was obviously not interested” in the proceedings, as she had not returned voicemails from a social worker, demonstrating little consideration or concern for other issues that may have prevented her from returning the calls or participating in the hearing.

### Judges’ Tone and Clarity

The court watchers were asked to provide an assessment of how clear the judge was in each case, based on whether the judge took the time to explain the proceedings, answer questions, and respond to mothers’ concerns. The court watchers were also asked to rate the judge’s tone on a scale of 1 to 5, from “rude/dismissive/impatient” to “very kind and respectful”. The average rating for judges’ tone was 4.08; the average rating for judges’ clarity was 4.00.

*“The judge was, to my surprise, very patient and respectful to the families in court. She let the parties speak when they wanted to and tried to explain the issues of the court to them. One family that stood out was one mother who was unrepresented, as well as the aboriginal father, and the mother asked to speak. The judge listened to her story and tried several times to explain the powers of the court to the mother. The mother was confused and repeated herself, however the judge remained calm. Overall, it was great to see such a caring judge.”*

*“At the beginning of the session, [the judge] addressed the parties quite formally. As the hearings progressed, however, he seemed to appreciate the discomfort of the parties and the emotional nature of the hearings. His tone and choice of language changed noticeably.”*

*“Judge had a friendly demeanour and seemed to be working for child’s best interest.”*

*“Judge was overall very clear, polite and respectful. She allowed all parties to speak and never appeared condescending or cut off parties.”*

*“[The judge] spoke clearly and addressed the parties, not just their lawyer, at every hearing. She also made eye contact with the parties. She said good morning to each party that was unrepresented which appeared to put the parties at ease.”*

*“The judge explained everything to the family and ensured they understood everything. Judge was very calm and polite. Seemed to care about the clients. Wanted new dates to be set as early as possible to avoid delays for parents. Seemed respectful to parents, although, did not address them.”*

## *Supports for Pregnant Women with Addictions*

An additional reason West Coast LEAF embarked on this research was to assess whether laws pertaining to women’s equality, autonomy and reproductive rights are being properly applied by judges in child protection cases. Sheway raised concerns that judges in their clients’ cases were making decisions that implied that an unborn fetus has rights separate from its mother, and that mothers’ use of drugs and alcohol while pregnant constitutes “child abuse”. Such a position is contrary to Canadian law, and expression of such a view by a child protection court judge is deeply concerning.

Canadian law is clear that a fetus is not a legal person, and does not come within the definition of “child” for the purposes of child protection legislation.<sup>26</sup> However, evidence of what has happened to a fetus in utero can be used as proof that the child, once born, is in need of the state’s protection.<sup>27</sup>

In some cases, however, child welfare authorities have tried to apprehend an unborn fetus and deem the fetus to be a child in need of protection, which raises issues involving “fetal rights” and the rights of pregnant women to bodily autonomy and freedom from state interference. In one early BC case involving an application for a pre-birth apprehension order, the judge noted that for the apprehension to be effective there would have to be a measure of control over the woman’s body, thus directly and fundamentally affecting her rights.<sup>28</sup> The judge held that a fetus was not a “child” within the terms of the child protection legislation and denied the application.

Subsequent decisions of the Supreme Court of Canada have held that a fetus is not a legal person under Canadian law, finding that “to make orders protecting fetuses would radically impinge on the fundamental liberties of the pregnant woman, both as to lifestyle choices and how and as to where she chooses to live and be.”<sup>29</sup> The issue of legal intervention in the lives of pregnant women raises significant equality concerns and points to an issue of sex discrimination, given that it is only women who may become pregnant. To treat pregnant women differently – to allow the state to mandate their medical treatment or to impose a different standard of behaviour on them – is to treat pregnant women as a special category of individuals who do not enjoy the same rights and freedoms as others. This constitutes

26 *Winnipeg Child and Family Services v. G.(D.F.)*, [1997] 3 S.C.R. 925 and *infra*.

27 *Re Children’s Aid Society for the District of Kenora and J.L.* (1981), 134 D.L.R. (3d) 249 (Ont. Prov. Ct.) and *Re Superintendent of Child and Family Services and MacDonald* (1982), 135 D.L.R. (3d) 330.

28 *Re Baby R* (1988), 53 D.L.R. (4th) 69 (B.C.S.C.).

29 *Winnipeg*, *supra* note 26 at para. 55. See also *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at para. 23: “for reasons of public policy, the Court should not impose a duty of care upon a pregnant woman towards her foetus or subsequently born child. To do so would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women.”



a fundamental breach of women's equality rights, protected by section 15 of the *Canadian Charter of Rights and Freedoms*.

Intervention policies also reflect the intersections between sex, race, class, and other forms of discrimination, as a disproportionate level of intervention has typically fallen on poor women, women of colour, Aboriginal women and women who are already the subject of state scrutiny through, for example, their receipt of social assistance.<sup>30</sup>

Given the complete dependence and profound connectedness of a fetus with the body of the woman carrying it, virtually every act of a pregnant woman will have some effect on the fetus. Attempts to control a woman's autonomy in the interest of protecting her fetus have led some to suggest that a woman could be held liable for poor nutrition, smoking, negligent driving, exposing herself to workplace hazards, vigorous exercise, or involvement with abusive men.<sup>31</sup> The Supreme Court of Canada has recognized that the control of women's autonomy in the interest of protecting their fetuses would lead to a slippery slope:

*Are children to be permitted to sue their parents for second-hand smoke inhaled around the family dinner table? ... Are children to be permitted to sue their parents for spanking causing psychological trauma or poor grades due to alcoholism or a parent's undue fondness for the golf course? If we permit lifestyle actions, where do we draw the line?*<sup>32</sup>

A 1993 report by the Royal Commission on New Reproductive Technologies explicitly rejected state intervention in pregnancy and birth, emphasizing the need to support maternal and fetal health without intruding into the liberty, autonomy and bodily integrity of pregnant women.<sup>33</sup> The Commission underlined that allowing judicial intervention in pregnancy would have "serious implications for the autonomy of individual women and for the status of women collectively in our society."<sup>34</sup> Recognizing the right of all individuals "to make personal decisions, to control their bodily integrity, and to refuse unwanted medical treatment," the report emphasized: "[t]hese are not mere legal technicalities; they represent some of the most deeply held values in society and the basis for fundamental and constitutional rights."<sup>35</sup> The Commission recommended that child welfare legislation "never be used to control a woman's behaviour during pregnancy or birth", and called on all provinces

30 Emilia Ordolis, "Maternal substance abuse and the limits of the law: A relational challenge" (2008-2009) 46 *Alta. L. Rev.* 119 at 126.

31 Dawn E. Johnsen, "The creation of fetal rights: Conflicts with women's constitutional rights to liberty, privacy, and equal protection" (1986) 95 *Yale L.J.* 599 at 605-6.

32 *Winnipeg*, *supra* note 26 at para. 33.

33 *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 2 (Ottawa: Minister of Government Services, 1993).

34 *Ibid* at 955.

35 *Ibid*.

and territories to ensure that they have in place "counselling, rehabilitation, outreach and support services designed specifically to meet the needs of pregnant women with drug/alcohol addictions."<sup>36</sup>

West Coast LEAF's court watchers did not observe judges make any statements equating a fetus to a child or implying that an unborn fetus holds rights separate from its mother. In only one case was it obvious to the court watcher that the mother involved had recently given birth; the mother had used drugs while pregnant and the Ministry lawyer asserted that the baby had been born addicted. The court watcher ranked both the judge's and Ministry lawyer's tone in this case favourably – a 5 and a 4, respectively.

*"In this hearing, the mother's addiction and drug use was highlighted by the ministry lawyer. Although the ministry lawyer highlighted the issue, she did not use an accusatory tone. She was respectful and was quick to mention that the mother was engaging in services at [a recovery facility]. The mother seemed to understand the order and the judge made few additional comments."*

In their 1993 report, the Royal Commission on New Reproductive Technologies called on all provinces and territories to ensure that they have in place "counselling, rehabilitation, outreach and support services designed specifically to meet the needs of pregnant women with drug/alcohol addictions."<sup>37</sup> However, twenty years later, one of the major impediments to maternal and fetal health continues to be the lack of effective and available treatment services for drug and alcohol dependent pregnant women.<sup>38</sup> Despite the great demand for treatment, the vast majority of pregnant women seeking assistance to overcome drug dependency cannot obtain the help they need; drug treatment programs routinely deny admission to pregnant women because they lack the resources and/or facilities to accommodate them, and the few that will treat pregnant women have long waiting lists, often longer than the duration of the pregnancy itself.<sup>39</sup>

Reducing delays in access to treatment is particularly important in the context of maternal alcohol and drug use, as the highest risk of harm to fetal development occurs during the first trimester of pregnancy.<sup>40</sup> Further, providers of health care and drug and alcohol treatment find that women are highly motivated during their pregnancy to seek help in overcoming their addictions because they want

36 *Ibid* at 964-5.

37 *Ibid*.

38 Ordolis, *supra* note 30 at 137.

39 *Ibid*.

40 *Ibid*. It is important to note, however, that the health effects of drug and alcohol during pregnancy are not well understood, and may be less severe than was previously thought: see Barry M. Lester et al., "Substance use during pregnancy: Time for policy to catch up with research" (2005) 1 *Harm Reduction J.* 5.

to minimize risks to fetal development and deliver healthy babies.<sup>41</sup> The overwhelming majority of women who use substances during pregnancy do so because they suffer from strong physical and psychological dependencies.<sup>42</sup> The Supreme Court of Canada acknowledged this in a case about whether the courts have the power to confine a substance-using pregnant woman in order to protect her fetus, with McLachlin J. (as she then was) for the majority writing:

*A further problem arises from the fact that lifestyle “choices” like alcohol consumption, drug abuse and poor nutrition may be the products of circumstances and illness rather than free choice capable of effective deterrence by the legal sanction of tort.*<sup>43</sup>

The Fir Square Combined Care Unit at BC Women’s Hospital is the first program in Canada to provide care for substance-using women and substance-exposed newborns in a single unit.<sup>44</sup> The program helps women and their newborns stabilize and withdraw from substances, while keeping mothers and their newborns together whenever possible. The unit has five antepartum and six postpartum beds for women wishing to stabilize or withdraw from drug use during pregnancy. There is also a centralized nursery for babies in need of special treatment. Women at Fir Square have access to counselling and instruction to enhance critical life skills, parenting techniques and coping mechanisms, and babies receive specialized care to meet their needs. The philosophy of care is one of harm reduction. The aim is to help reduce substance use and risky behaviours that can cause harm to mothers and their babies. Mothers and their babies are supported to safely stay together after they leave hospital, and assistance is offered to mothers to help them gain confidence in parenting.

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

Fear of losing their children is one of the major barriers to women accessing treatment for their addictions. Studies have shown that many pregnant women

41 Dawn Johnsen, “Shared interests: Promoting healthy births without sacrificing women’s liberty” (1992) 43 *Hastings L.J.* 569 at 575.

42 *Ibid.*

43 Winnipeg, *supra* note 26 at para. 41.

44 BC Women’s Hospital and Health Care Centre, “Substance use and pregnancy” online: <<http://www.bcwomens.ca/Services/PregnancyBirthNewborns/HospitalCare/SubstanceUsePregnancy.htm>>.

with addictions actively hide their substance use habits from their health care providers, undermining the health of both the woman and her fetus.<sup>45</sup> Fear of reporting erodes trust between patient and doctor, and may deter women from seeking treatment, causing more harm to the fetus than the drug use itself due to lack of proper nutritional advice and other prenatal care.<sup>46</sup> Research indicates that allowing mothers to keep custody of their children while seeking treatment for their addictions means more women will seek out such treatment, and that those who abuse drugs may be better able to take care of their children than the foster care system, especially when they are provided with the material supports they need.<sup>47</sup>

In British Columbia, the Peardonville House Treatment Centre, funded by the Fraser Health Authority, is one of the only treatment facilities that accept mothers and pre-school-aged children. Women come from all over the province for the program, which has eight spaces for kids and usually has a two- to three-month waiting list.<sup>48</sup> The Elizabeth Fry Society’s Firth Residence in Abbotsford provides transitional housing and support services to women in recovery and accepts women with children, but does not receive any additional funds from the province to provide for the children’s needs.<sup>49</sup> At Peardonville, if women are on social assistance the Ministry covers their \$40 fee, as well as the \$40 fee for each child, but the working poor, who scrape by without social assistance, are unable to afford the centre’s services. The situation is worse on Vancouver Island, which has outpatient treatment services available, but no residential options for mothers with children.<sup>50</sup>

Maternal and infant health is greatly improved when women have access to a range of options in the provision of support services and resources that allow them to make choices that promote healthy births. Most pregnant women share state objectives of promoting healthy births, but existing obstacles – not bad intentions – impede the attainment of this common goal.<sup>51</sup> Rather than depriving women of the right to make judgments about their lives or punishing them for making the ‘wrong’ choices, both maternal and fetal health are best enhanced by expanding women’s choices and improving their access to prenatal care, adequate food and shelter, and treatment for drug and alcohol dependency.

45 Nancy Poole and Barbara Isaac, “Apprehensions: Barriers to treatment for substance-using mothers” (2001), online: <<http://www.hcip-bc.org/readings/documents/apprehensions.pdf>>.

46 Seema Mohapatra, “Unshackling addiction: A public health approach to drug use during pregnancy” (2011) 26 *Wis. J.L. Gender & Soc’y* 241 at 256.

47 Lester, *supra* note 40 at 26.

48 Lindsay Kines, “Province urged to treat addicted parents without separating them from their kids” *Times Colonist* (30 November 2012).

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

50 Kines, *supra* note 48.

51 Johnsen, *supra* note 41 at 574.

**This court watch project represents West Coast LEAF's initial steps in assessing how child protection hearings impact marginalized women, with a view to better understanding some of the obstacles to women's access to meaningful justice in the child protection system. We identified insufficient legal aid coverage for low income parents, barriers to mothers' effective participation, and a lack of supports and services for pregnant women and mothers with addictions as among the crucial issues that must be addressed to improve the health and welfare of mothers and babies and promote just outcomes in the child protection system.**

The findings of this research point to the following recommendations for reform:

- Sufficient funding for the provincial court system, including an adequate number of judges, to ensure proceedings happen in a timely way and judges have the time to read files and prepare for hearings
- Adequate translation services for child protection hearings so that women for whom English is not their first language are able to understand and participate in the proceedings, and do not have to rely on interpretation through duty counsel
- Expanded legal aid funding to ensure women involved in the child protection system can access legal representation when they cannot realistically afford to pay for counsel themselves, and to ensure that lawyers have the time they need to meet with clients and adequately prepare the cases
- More funding for detox and treatment programs and expanded facilities for pregnant women and mothers that allows children to remain with their parents
- Better information about their rights in the child protection process should be provided to women, particularly their right to legal aid prior to the apprehension of their child

Overall, the results of our court watch indicate that child protection court judges in BC treat marginalized women with dignity and respect. Bias against women with addictions, including improper and inaccurate comments about pregnant substance-using women committing "child abuse" against their unborn fetuses, was not observed. This is reassuring; all participants in the justice system should be able to expect to be treated with dignity and respect, and to have the law applied accurately in their case.

There are many systemic issues at play in the child protection system, including poverty, sex discrimination, racism, violence against women, and the ongoing impacts of colonialism and discrimination against Aboriginal peoples. Achieving justice in child protection matters will require grappling with all of these complex issues. This report is intended as one small contribution to what must be a deep and ongoing conversation.

# Appendix A

## Checklist for Child Protection Court Watch Program

Date: \_\_\_\_\_

<b>1. File #</b>  <b>Name:</b> _____	<b>2. Order Sought</b>  _____	<b>3. Sections of CFCSA cited</b>  _____	<b>4. Outcome</b> <input type="checkbox"/> Order granted: _____ _____ <input type="checkbox"/> Adjourned: <input type="checkbox"/> to speak to duty counsel <input type="checkbox"/> to get lawyer <input type="checkbox"/> Judicial Case management <input type="checkbox"/> other: _____
<b>5. Parties:</b> <input type="checkbox"/> Parent 1: Mo / Fa Represented? <input type="checkbox"/> Duty Counsel <input type="checkbox"/> Own Lawyer <input type="checkbox"/> Unrepresented  <input type="checkbox"/> Parent 2: Mo / Fa Represented? <input type="checkbox"/> Duty Counsel <input type="checkbox"/> Own Lawyer <input type="checkbox"/> Unrepresented  <input type="checkbox"/> Grandparent _____  <input type="checkbox"/> First Nation/Band  <input type="checkbox"/> Relative: _____  <input type="checkbox"/> Advocate  <input type="checkbox"/> Social Worker  <input type="checkbox"/> Other: _____	<b>6. Mother presents with:</b> <input type="checkbox"/> Physical disability  <input type="checkbox"/> Mental Health issue  <input type="checkbox"/> Addiction  <input type="checkbox"/> Pregnant  <input type="checkbox"/> English as additional language: _____ Translation provided? Y N  <input type="checkbox"/> Visible Minority  <input type="checkbox"/> Aboriginal	<b>7. Access</b>  Access ordered? Y N  Supervised? Y N  Access request raised by: <input type="checkbox"/> Ministry lawyer <input type="checkbox"/> Judge <input type="checkbox"/> Party	<b>8. Opportunity to speak</b>  Did mother have an opportunity to speak? Y N  Was she denied an opportunity to speak when it seemed she wanted to? Y N  Denied by: <input type="checkbox"/> lawyer <input type="checkbox"/> judge  Details: _____ _____ _____ _____ _____ _____
<b>9. Mother's Understanding? (1-5)</b>  1 2 3 4 5	<b>10. Judge's clarity? (1-5)</b>  1 2 3 4 5	<b>11. Judge's Tone? (1-5)</b>  1 2 3 4 5	<b>12. Ministry lawyer's tone? (1-5)</b>  1 2 3 4 5
<b>Comments:</b> _____ _____ _____ _____ _____			



1. The Ministry lawyer will call each case, announcing the **File Number** and the party's **name(s)**. If you miss it, the information is also posted on a list outside the courtroom door.
2. The **Order Sought** is what the Ministry lawyer is asking the court to do. For example, the Ministry might be asking the court to issue an interim supervision order or a continuing custody order.
3. The **CFCSA** (*Child, Family, and Community Services Act*) is the legislation governing child protection matters in BC. Note any sections of the legislation referred to by the lawyers or the judge.
4. The **outcome** of the case will generally be an **order** from the judge as to what happens next. Many cases will be **adjourned** to allow the parent to get a lawyer, or in order to set a date for a future hearing.
5. Who is present at the hearing? If the parent is not present, but their lawyer there to represent their interests, please check "Own Lawyer" and write in Mo or Fa beside it. Only check the parent box if the parent is present.
6. Please **do not guess** about whether someone has a **mental health** or **addiction** issue. Only check the box if it is mentioned during the proceedings. Use the space provided (including the Comments section if needed) to describe what was said. If someone clearly has a **physical disability** (for example, if they are visually impaired or use a wheelchair), write down what you see. If English is an additional **language** for a party, note what their primary language is. If **translation** is provided, who is providing the translation service?
7. The issue of **access** (aka visitation) to the child by the parent may or may not be raised at the hearing. If it is, note who raised the issue and, if the judge grants the request, whether the visits will be **supervised**.
8. We are interested in the extent to which marginalized women are able to participate in child protection hearings about their children. When the mother has a lawyer, she often will not attempt to speak, and no efforts will be made to have her speak – her lawyer does the talking. In this case the answer would be No to both questions. However, sometimes she will try to speak and will be interrupted or shut down by the judge or the Ministry lawyer. If this happens, try to describe the interaction as fully as possible in the comments section.
9. How well did the mother seem to **understand** the court proceedings? This is a very subjective question. If she is asking a lot of questions, this may be an indication that she does not understand what's happening. Or, if she is silent and non-responsive, this also may mean she is not sure what's happening. 1 = doesn't seem to understand at all ... 5 = seems to understand completely. **You may simply not be able to tell. In this case write Unsure.**
10. How **clear** was the judge in explaining to the parties what the ruling or order meant, or what would be happening next? 1 = not at all clear... 5 = perfectly clear.
11. What was the **judge's tone** like? Was the judge respectful towards the mother? 1 = rude/dismissive/impatient ... 5 = very kind and respectful. **Please describe any interaction lower than 3 in the comments section.**
12. What was the **Ministry lawyer's tone** like? Was the lawyer respectful towards the mother? 1 = rude/dismissive/impatient ... 5 = very kind and respectful.

**Comments:** Use this space to record any other impressions. Use arrows to connect your comments to relevant boxes, if applicable. **In particular, note any references to a fetus and what judges say about protection of the fetus.**





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