

Backgrounder

Family Caregiving

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INTRODUCTION:

What is Family Caregiving?

Taking care of one's own dependent or vulnerable adult family members, rather than contracting this work out to third parties outside the family, is the norm in many cultures around the world. This social phenomenon is known as family or informal caregiving.

Current statistics suggest that 80% of elder care is delivered through informal care arrangements and over 60% of adults with disabilities require the assistance of family members to accomplish daily living activities. The responsibility to provide such care often falls on the women of the family. As the primary caregivers of children mothers often assume care for adult children with disabilities, and as the traditional family caregivers they become caregivers of their elders as well.

Setting aside for now the question of whether this allocation of caregiving labour is reasonable – an issue to which this project will return - recent labour and demographic changes indicate that meeting the demands of care through these channels is becoming more difficult. Family caregiving became the tradition in Western cultures long before women entered the paid work force in large numbers in the last century. Now that women are just as likely as men to maintain paid employment outside the home, there are fewer family members able to assume the responsibility of family care without also assuming the struggle of juggling work place and home responsibilities. This challenge is often falling upon women.

As a function of increasing life spans and declining birth rates, older adults are forming a larger subset of the population of British Columbia. As the population ages, more and more British Columbians will find themselves caring for parents and grandparents, many joining the “sandwich generation” who struggle to provide care simultaneously for both children and parents. Given the costs associated with professional or quality care, the limited number of spaces in care facilities, and reluctance to leave the long term care of a loved one to strangers, many families will opt to continue a family caregiving relationship.

Family caregiving is an issue that could impact any of us at any time. Supporting caregivers is becoming an increasingly pressing social issue.

THE PROJECT

The Law of Family Caregiving in BC

It is against this backdrop that the British Columbia Law Institute and the Canadian Centre for Elder Law embarked on the first legal research project on family caregiving law in BC. The purpose of this project, which is generously funded by the Law Foundation of British Columbia, is to:

- (a) examine the current legal framework governing leave, accommodation and other entitlements available to employees who are providing care for family members;
- (b) consider whether the laws reflect our society's values with respect to care;
- (c) evaluate whether the current laws adequately address the concerns and needs of BC's family caregivers; and
- (d) make recommendations for law reform and future study.

The Family Caregiving Project is both critical and comparative: it will assess whether or not there are deficiencies in the current system and explore the means by which the law could be used to better support family caregiving in BC. This inquiry will involve examining the practices of BC employers, studying the laws of other countries, and consulting with BC caregivers. The project will culminate in the production of a number of tools:

- (1) a study paper including recommendations for law reform;
- (2) a series of educational modules targeting caregivers and employers; and
- (3) a web page highlighting aspects of our research.

We intend this project to provide a snapshot of where BC stands as compared to the rest of the country and the world, and to serve as a springboard to further critical discussion and law reform in this area.

CAREGIVER SUPPORT

Who Needs Leave or Other Accommodation?

If you are a family caregiver, the strain of balancing paid employment and family care will be evident to you from personal experience. If not, the following scenarios may shed light on how family caregiving impacts on the workplace and calls for law and policy.

1. Jane has been employed full time as an associate lawyer with a large firm for 5 years. Her elderly mother, Helen, who has always struggled with mental health issues, has recently become seriously mentally ill. As Jane has no siblings and her mother is divorced, the responsibility for her mother's care has fallen exclusively to Jane. Helen was living alone until Jane discovered how ill Helen had become; now Jane has moved her mother into her own home. When left alone, her mother neglects most of her basic care needs. As a function of her illness she does not trust anyone other than Jane, and will not tolerate the presence of anyone else. In the short term Jane would like to reduce her hours of work and adapt her work schedule to make sure she does not have to leave her mother alone for more than 5 hours at a stretch. She would like to return to her demanding practice schedule once her mother is somewhat better, but cannot anticipate how long this will take.

2. Sunita is a unionized employee working in health care as a nurse. She works a shift schedule set out in her collective agreement: a rotation that includes twelve hour shifts and frequent overnights. Recently her father-in-law suffered a stroke resulting in partial paralysis, and requiring administration of medication at home as well as ongoing accompaniment to medical and rehabilitation appointments. Although the man has many children, the family decided he should live with Sunita who has health care skills, can administer his medication, and can deal best with his other health care providers. The stroke has not significantly compromised his life expectancy providing he is well cared for. Sunita's collective agreement provides for general unpaid leave subject to employer advance approval and her employer is unwilling to allow her take more than a week off to settle her father into his new routine. Her employer has also denied Sunita's request for a set schedule of shorter shift that excludes evenings. Sunita thinks these adjustments are necessary because her father-in-law is at greatest risk of respiration problems when he is sleeping or lying down.

3. John and his partner have three adopted children. Their eldest son has been subject to many different diagnoses over the years as health professionals attempted to characterize the source of his behavioural problems and developmental delays. He is unable to read and write, and he has been expelled from many schools over the years. At the age of 20 their son has finally been diagnosed with schizophrenia, and he appears to be unable to take care of himself. John's partner has steady employment that involves a great deal of overnight travel, and so John is the primary caregiver for the boys. However, he must work outside the home as well in order to meet the family's financial needs. The couple is concerned about leaving their son either home alone, or with the younger children. John would like to take four to six months off work to try to work more closely with his son to develop a routine to manage his illness. He is a non-unionized employee. He does not appear to be eligible for compassionate care leave or benefits. His employer has denied his request for an unpaid leave, and John is afraid of losing his job.

EARLY FINDINGS OF THE PROJECT

An Overview of the Laws of BC

Not surprisingly, there is no centralized caregiving legislation in BC. Rather, the landscape is impacted by both provincial and federal legislation including:

- The BC Employment Standards Act*
- The Employment Insurance Act of Canada*
- The Canada Labour Code*
- The BC Labour Relations Code*
- The BC Human Rights Code*
- The Canadian Human Rights Act*
- The Income Tax Acts of BC and Canada*
- Collective agreements between trade unions and employers

Diverse solutions may assist family caregivers. Existing legal provisions fall into three different categories:

(1) Compassionate care or family responsibility leave

These provisions allow workers to take time off work to focus temporarily on caring for a family member. A leave may be paid or unpaid. The right to a leave may arise out of the language of a collective agreement (essentially the contract between a trade union and an employer about the terms and benefits of employment).

A worker might also be entitled to an unpaid leave under the *Employment Standards Act* and entitled to corresponding Employment Insurance benefits during that period of time. Among its many problems, legislated leave provisions have limited application because they require a certificate from a qualified family practitioner stating that the family member in question is at risk of death within 26 weeks. Outside of this these laws there is no specific provision granting workers entitlement to paid leave.

(2) Work place flexibility

Such arrangements allow workers and employers to find creative solutions to balance workplace and family caregiving responsibilities. In the absence of an understanding employer, there is little legislative support for the right to work place flexibility other than the BC *Human Rights Code* or the *Canadian Human Rights Act* (some workers, such as telecommunications employees, fall under the jurisdiction of federal law; most workers are subject to the BC Code).

The *Human Rights Code* prohibits an employer from discriminating against a person regarding employment or any term or condition of employment because of, amongst other things, gender or family status, unless the term is a legitimate occupational requirement for the position in question. In some instances women returning to work after maternity leave have been able to use this language to successfully argue for accommodations in the work place, the job description, their work schedule, or their location. Roughly speaking, the argument is that where an employer is unwilling to allow an employee to make adjustments to her work schedule to accommodate her family responsibilities, the employer's facially neutral rule (e.g. everyone must work full time and from the office) has a discriminatory effect upon a prohibited ground on an employee or group of employees in that it imposes, because of characteristics this group, obligations, restrictions or penalties not imposed on other members of the workforce. Using the family status provision an analogous argument might be possible in relation to family care responsibilities. However, compared to sex discrimination, family status discrimination has been relatively unexplored by courts and tribunals. The success of such an argument is by no means guaranteed, and succeeding with such an argument would be costly and time-consuming. This route by no means presents an ideal or accessible solution to the family caregivers.

(3) Benefits and other entitlements

A number of laws create benefits that aim to offset the loss of income associated with assuming family caregiving responsibilities. For example, there exist a number of tax credits, such as the In-home Care of a Relative credit, the Dependent tax credit, the Wholly Dependent Person tax credit, the Equivalent to Spouse credit and the Infirm Dependent credit. The value of the above credits varies from year to year. It is also possible to claim some of a dependent family member's medical expenses against the caregiver's income. These various tax credits assist the family caregiver who is employed by reducing her tax payable.

INTERNATIONAL RESEARCH – EARLY FINDINGS

Innovations in Supporting Family Caregivers

Other countries have taken different approaches to supporting family caregivers. Here are a few examples to assist your own creative thinking about how to approach this problem.

1. The United Kingdom's *Employment Rights Act* includes the *Flexible Working Regulations*. These Regulations codify the worker's right to request changes to working hours, times and location in order to assist accommodation of care responsibilities.
2. UK law contains a number of legislative provisions according to which a person requiring care may receive a caregiver's allowance that can be passed onto a family caregiver.
3. The UK and Australia maintain the carer's allowance, which is a small direct stipend paid to the family caregiver.
4. France's Family Caregiving Leave legislation allows a worker to receive up to one year of unpaid leave.
5. In Norway caregivers receive modest pension credits in respect of their caregiving labour.

CONSULTATION

Are you a Family Caregiver?

What do you think about the Laws of BC?

To assist our research the BC Law Institute is interested in hearing from the family caregivers of BC. We are interested in learning about your particular caregiving circumstances, your experience of accessing BC laws to improve your lives, and what kinds of supports you have received or have been denied in your ongoing struggle to balance work and caregiving. We are also interested in your perspective on how laws, policies and practices should or could be reformed and how you think our society should value family caregiving.

Please see our website at <http://www.bcli.org/ccel/projects/family-caregiving> for a link to our Caregivers Survey. The survey should be accessible in late March. Also feel free to contact us directly at familycare@bcli.org. Your input will assist us in our assessment of the strengths and weaknesses of the current legal framework.