LEAF FAEJ
Women's Legal Education and Action Fund | Fonds d'action et d'éducation juridiques pour les femmes

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Special Advisors C. Michael Mitchell and the Hon. John C. Murray
Changing Workplaces Review
Employment Labour and Corporate Policy Branch
Ministry of Labour
400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Dear Sirs:

Re: Changing Workplaces Review Submission

1. The Women's Legal Education and Action Fund Inc. (LEAF) is pleased to make this submission to the Ministry of Labour's Changing Workplaces Review.[1] The submission will focus on the effect of scheduling irregularity on women's childcare obligations, income insecurity and participation in the labour force.

2. LEAF is a national organization dedicated to promoting substantive equality for women through legal action, research and public education. Since 1985, LEAF has intervened in dozens of cases before the Supreme Court of Canada, as well as other courts and tribunals, on substantive equality since its founding in 1985 and is a leading expert on issues of inequality and discrimination experienced by women in Canada. For example, in 2014, LEAF intervened in *Canada (Attorney General) v. Johnstone* to argue that Fiona Ann Johnstone's employer discriminated against her on the basis of family status by refusing her a regular shift so that she could make ongoing childcare arrangements.[2] The Federal

[1] For details, see: <http://www.labour.gov.on.ca/english/about/workplace/consultation.php>. LEAF acknowledges with gratitude the contributions of volunteers Claire Mumme, Janina Fogels and Elizabeth Shilton to this submission.
[2] *Canada (Attorney General) v. Johnstone* 2014 FCA 110. This submission relies in part on LEAF's factum in *Johnstone* available online: <http://www.leaf.ca/where-a-workplace-rule-results-

Court of Appeal dismissed her employer's appeal, and rejected a restrictive definition of "family status" that did not include parental obligations such as childcare.

3. The Guide to Consultations identifies non-standard and precarious work as a particular focus of inquiry for the Review. As the Guide notes, since the 1990s non-standard and precarious work has been on the rise in Canada, and in Ontario. The nature of work in Canada has undergone profound changes, including what is often referred to as the "feminization" of the workforce, in which characteristics traditionally associated with work done by women (part-time hours, low pay, insecurity, etc.) have spread beyond traditional "women's work" to different sectors of the economy.[3] Nonetheless, women continue to bear the brunt of precarious work, particularly regarding their childcare obligations.

Women Disproportionately Carry the Responsibility for Caregiving

4. The Supreme Court of Canada has long recognized and given judicial notice to the historical and social reality of the gendered nature of family caregiving obligations in Canadian society. Chief Justice Dickson's statements in *Brooks* in 1989 with respect to women and childbirth are still applicable and equally so for childcare issues. Dickson CJ stated that "accommodating the childbearing needs of working women are ever-increasing imperatives." His reasoning that "those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious" applies not only to those who bear children, but also to those who benefit society by caring for children.[4]

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in-a-bona-fide-childcare-problem-the-workplace-must-accommodate-federal-court-of-appeal-rules/>.

[3] Cynthia Cranford and Leah Vosko, "Conceptualizing Precarious Employment: Mapping Wage Work Across Social Location and Occupational Context" in *Precarious Employment: Understanding Labour Market Insecurity in Canada*, Leah Vosko, ed. (McGill-Queen's University Press, 2006), chapter 2.

[4] *Brooks v Canada Safeway*, [1989] 1 SCR 1219 at para 40.

5. The Supreme Court of Canada has extended this analysis to recognize the gendered nature not only of pregnancy and childbirth, but also childcare. For instance, in *Symes v. Canada,* Iacobucci J. stated for the majority:

> Based upon [the evidence] -- indeed, even based upon judicial notice -- I have no doubt that women disproportionately incur the social costs of child care.[5]

6. The disproportionate responsibilities for childcare and the adverse effects on women in the workplace requiring accommodation under the ground of family status have been recognized by courts, human rights tribunals and commissions, as well as labour arbitrators. Here is just one example:

> We can therefore understand the obvious dilemma facing the modern family wherein the present socio-economic trends find both parents in the work environment, often with different rules and requirements. More often than not, we find the natural nurturing demands upon the female parent place her invariably in the position wherein she is required to strike this fine balance between family needs and employment requirements.
>
> It is this Tribunal's conclusion that the purposive interpretation to be affixed to s. 2 of the *Canadian Human Rights Act* (C.H.R.A.) is a clear recognition within the context of "family status" of a parent's right and duty to strike that balance coupled with a clear duty on the part of an employer to facilitate and accommodate that balance within the criteria set out in the *Alberta Dairy Pool* case. To consider any lesser approach to the problems facing the modern family within the employment environment is to render meaningless the concept of "family status" as a ground of discrimination.[6]

7. In its *Policy and Guidelines on Discrimination because of Family Status*, the Ontario Human Rights Commission similarly notes that because caregiving is

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[5] *Symes v Canada*, [1993] 4 SCR 695 at para 131. See also *Moge v Moge*, [1992] 3 SCR 813 at para 70.

[6] *Brown v Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) at 20. See also *Patterson v Canada Revenue Agency*, 2011 FC 1398; *Communications, Energy, and Paperworkers Union, Local 707 v SMS Equipment Inc*, 2013 CanLII 71716 (AB GAA).

"closely tied to gender roles and stereotypes," systemic discrimination with respect to family status "will often have an adverse impact on the ground of sex as well."[7]

8. Numerous academic authorities also confirm the adverse consequences of family caregiving obligations on women's ability to fully participate in employment, including forcing women into part-time and other precarious work.[8]

9. The Supreme Court of Canada has directed that workplace standards and human rights law must be developed in a manner that prevents systemic discrimination on multiple grounds.[9] As is well documented in academic literature, constraints created due to discrimination on multiple, intersecting grounds can result in a lack of autonomy in choices relating to family caregiving obligations. For example, Canadian academics Vosko and Clark state:

> The dearth of affordable, high-quality child care compounds patterns of gendered precariousness in the prime working age population….While the division of child care responsibilities continues to be cast as a matter of parental 'choice,' the supply of child care reinforces prime working age women's socially prescribed responsibility for care-giving work (paid and unpaid), perpetuating gendered precariousness in households and the labour force.[10]

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[7] Ontario Human Rights Commission, *Policy and Guidelines on Discrimination because of Family Status*, online (2007): at "Section IV: Relationship Between Family Status and Other Code Grounds," <http://www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status>.

[8] Leah F. Vosko and Lisa F. Clark, "Gendered Precariousness and Social Reproduction" in Leah F. Vosko, Martha MacDonald and Iain Campbell, eds., *Gender and the Contours of Precarious Employment* (New York: Routledge, 2009) 26 at 27-34 and 37-38 ["Vosko & Clark"]; Judy Fudge and Rosemary Owens, "Precarious Work, Women and the New Economy: The Challenge to Legal Norms," in Judy Fudge and Rosemary Owens, eds., *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006) 4 at 14-15.

[9] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union* (BCGSEU) (Meiorin Grievance), [1999] 3 SCR 3 at paras 40-42, 68, 75; *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 58; *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 2013 at para 61; *Egan v Canada*, [1995] 2 SCR 513 (L'Heureux-Dubé J. dissent) at paras 80-82. See also: *Canadian Human Rights Act*, RSC 1985, c H-6, s. 3.1.

[10] Vosko & Clark, *supra* at pp 37-38. See also: Anne Milan et al, "Families, Living Arrangements and Unpaid Work", *Statistics Canada* (Dec 2011) at 21; Statistics Canada, *Women in Canada: A Gender-based Statistical Report* (July 2011) at 117-118; Wallace Clement, et al, "Precarious Lives in the New Economy: Comparative Intersectional Analysis " in Leah F. Vosko, Martha

10. Not only is the burden of family caregiving disproportionately borne by women, but marital status and social, religious or cultural norms can also impact the division of labour of care work in ways that compound the disadvantage experienced by family caregivers in respect of employment.[11]

11. Women are over-represented amongst part-time and temporary workers, and racialized women are particularly affected. Noack and Vosko's 2011 study demonstrates that women constitute only slightly under 50% of the Canadian workforce, but represent 72% of employees in permanent part-time positions, and 60% of those working in temporary jobs.[12] Racialized women make up approximately 12% of the working population in Canada, but hold approximately 40% of temporary jobs, and part time permanent employment.[13] Moreover, single parents (who are predominantly women) are over-represented in part-time permanent and temporary employment.

Challenges for Women in Precarious Work

12. Amongst the numerous challenges imposed by non-standard work is the lack of scheduling security, an issue that can and should be addressed through amendments to the *Employment Standards Act*. A 2008 Statistics Canada study calculates that of approximately 15 million working Canadians, 385 000 work in full-time evening shifts, approximately 270 000 work on regular night shifts, 100 000 work on-call or in casual schedules, and 130 000 work on split shifts.[14] Shift work is most prevalent in the service sector, transport industry and health care.[15]

MacDonald and Iain Campbell, eds, *Gender and the Contours of Precarious Employment* (New York: Routledge, 2009) 240 at 241.

[11] Clement et al, *supra* at 249; Milan et al, *supra* at 12; Statistics Canada, *Women in Canada*, *supra* at 270, 272, 277, 306, 312.

[12] Andrea Noack and Leah Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context*, commissioned by the Law Commission of Ontario Precarious Workers' Project, November 2011 at 19-20.

[13] *Ibid.*

[14] Cara Williams, "Work-Life Balance of Shift Workers", (Aug 2008) 9(8) *Perspectives on Income and Labour*, Statistics Canada.

[15] *Ibid* at Table 3.

Men are more likely overall to work in shift-scheduled jobs than women, but women in shift work are more likely to be in temporary or part-time positions, while men are more likely to be working full-time. Many such workers are scheduled on a "just-in-time" basis, in which they receive little to no advance warning as to when they will be called in to work, and when or whether their shifts will be cancelled.

13. Scheduling irregularity places a significant burden on parents' ability to locate and afford secure childcare, elder care or to make arrangements for other caregiving relationships between adults.[16] Workers report scrambling for someone to look after their children when called in at the last minute, as well as having shifts cancelled *en route* to a job site, thereby forfeiting the promised income and wasting costly childcare for that period of time.[17] At an average cost of $677 per month in Ontario (up to a high of an average $1676 per month in Toronto), childcare is prohibitively expensive in Ontario, and often difficult to access.[18] Workers without the stability of full-time work are more likely to use unregulated childcare services, to rely on the kindness of family members and friends, and to take less secure shift jobs or have one partner not employed.[19]

14. Very few childcare providers offer services in the evening, except at significant extra cost, and even fewer, if any, provide overnight care for those working night shifts. The lack of legal regulation concerning scheduling regularity is visible, amongst other ways, in the increasing numbers of family status

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[16] Research suggests that irregular work schedules have a detrimental impact on children's behaviour and cognitive development. See Leila Morsy and Richard Rothstein, "Parents' Non-Standard Work Schedules Make Adequate Childrearing Difficult: Reforming Labor Market Practices Can Improve Children's Cognitive and Behavioral Outcomes", Economic Policy Institute, August 6th, 2015.

[17] Noam Scheiber, "The Perils of Ever-Changing Work Schedules Extend to Children's Well-Being", *New York Times*, August 12, 2015; Sara Mojtehedzadeh, "Wild West' scheduling holds millions of Ontario workers hostage", *Toronto Star*, May 3, 2015; Sara Mojtehedzadeh "Patchwork of employment perpetuates poverty cycle for Toronto family", *Toronto Star*, November 19th, 2014; Tavia Grant, "The 15-hour workweek: Canada's part-time problem", *Globe and Mail*, Oct. 04, 2014; Jodi Kantor, "Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos", *New York Times*, August 13th, 2014.

[18] David Macdonald and Martha Friendly, "The Parent Trap: Child care fees in Canada's Big Cities", Canadian Centre for Policy Alternatives Report, November 2014 at 7.

[19] Poverty and Employment Precarity in Southern Ontario Research Group, *The Precarity Penalty,* May 2015 at 117.

discrimination claims made under human rights legislation. Both human rights tribunals and arbitrators are seeing an increasing number of family status discrimination cases, as women seek alternative means by which to balance their competing work and family obligations.[20]

15. The challenges of locating and affording childcare often limit one parent's ability to work.[21] Women report more frequently than men that their reasons for part-time employment relate to childcare obligations.[22] Indeed, as opposed to securely employed men, precariously employed men are much more likely to have a partner who is not employed for pay or who does not work full-time.[23] In this way, precarious employment and scheduling irregularity has a direct impact on women's labour force participation.

16. As it currently stands, the *Employment Standards Act* does not require equal pay as between full-time employees and part-time and non-standard workers, incentivizing employers to increase their temporary and casual workforce at the expense of creating full-time employment.[24] Moreover, the ESA does not regulate the scheduling process for shift work. The ESA does not impose minimum working hour requirements, does not require advance notice of scheduling, and does not require employees to be paid for shifts cancelled at the last minute. Currently the *Act* addresses questions of minimum working hours in only one provision. Section 5(7) of the Minimum Wage Regulation (O.Reg. 28/01) requires employers to pay employees for a minimum of three hours if they are called in to work and then sent home within three hours of their shift's start, but only if the

[20] See, for example, Social Justice Tribunals of Ontario Annual Report (Human Rights Tribunal of Ontario) 2013-2014 at 29. At arbitration, these cases have had very variable results: see, for example: *SMS Equipment Inc. v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162; *Siemens Milltronics Process Instruments Inc. v Employees Association of Milltronics,* 2012 CanLII 67542 (ON LA); *International Brotherhood of Electrical Workers, Local 636 v. Power Stream Inc. (Bender Grievance)* [2009] OLAA No. 447, 186 LAC (4th) 180.
[21] *The Precarity Penalty*, *supra* at 114-116 and 118-119.
[22] Noack and Vosko, *supra* at 9-10.
[23] *The Precarity Penalty, supra* at 118-119.
[24] *Employment Standards Act, 2000*, SO 2000, c.41 ("ESA").

employee regularly works more than three hours a day, and only for purposes of calculating whether they have been paid minimum wage.

Conclusion

17. LEAF supports reforms to employment standards that reduce the negative impact of scheduling uncertainty on precariously employed workers, and supports strengthened enforcement of *ESA* standards across the province.

18. The increase in family status discrimination complaints is indicative of the changing workplace environment, and the *Johnstone* decision underscores the need for employers to acknowledge and accommodate employees with caregiving responsibilities. LEAF calls upon the Special Advisors to take into consideration the intersectional discrimination experienced by so many women in precarious work and the disproportionate burden carried by these women as caregivers in their families.

19. LEAF trusts that the Ontario government will respond proactively to the evidence and proposals put forward by various experts during this consultation to attain better and fairer workplaces in Ontario.

All of which is respectfully submitted,

The Women's Legal Education and Action Fund Inc. (LEAF)