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**SUBMISSION OF LEAF AND LEAF-EDMONTON
ON THE MATERNITY AND PARENTAL LEAVE PROVISIONS
OF THE CANADA LABOUR CODE**

October 28, 2005

This submission is sent by the Women's Legal Education and Action Fund (LEAF) and one of its branches, LEAF-Edmonton, to the Federal Labour Standards Review Commission. LEAF is a national, federally incorporated, non-profit advocacy organization founded in April, 1985 to secure equal rights for women in Canada as guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). To this end, LEAF engages in equality rights litigation, research, and public education. Commencing with LEAF's work in the Supreme Court of Canada case of *Andrews v. British Columbia*, [1989] 1 S.C.R. 892, LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada. LEAF has developed and advocated equality rights arguments in contexts where sex inequality is compounded by other prohibited grounds of discrimination such as race, class, aboriginal status, sexual orientation and/or disability. LEAF is a leader in developing legal theory and litigation strategies that recognize women's diversity, and that address the ways in which inequality manifests itself in women's lives.

Summary of the submission of LEAF

LEAF submits, in summary, that the qualifying thresholds for maternity leave and for parental leave in Part III, Division VII of the *Canada Labour Code*, R.S.C. 1985, c. L-2, as am. (the "*Code*"), requiring six consecutive months of continuous employment with an employer before there is entitlement to such leave under the *Code*, should be removed. These qualifying thresholds are inconsistent with the equality guarantees found in s. 15 of the *Charter* and the international human rights covenants to which Canada is a signatory.

1. Sections of the Code at issue

The sections in Part III, Division VII of the *Code* which are the subject of this submission are as follows (emphasis added):

Maternity-related Reassignment and Leave

Reassignment and job modification

204(1) An employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child.

(2) An employee's request under subsection (1) must be accompanied by a certificate of a qualified medical practitioner of the employee's choice indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk.

Employer's obligation

205(1) An employer to whom a request has been made under subsection 204(1) shall examine the request in consultation with the employee and, where reasonably practicable, shall modify the employee's job functions or reassign her.

(2) An employee who has made a request under subsection 204(1) is entitled to continue in her current job while the employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to and shall be granted a leave of absence with pay at her regular rate of wages until the employer

(a) modifies her job functions or reassigns her, or

(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her,

And that pay shall for all purposes deemed to be wages.

(3) The onus is on the employer to show that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable.

(4) Where the employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the employer shall so inform the employee in writing.

(5) An employee whose job functions are modified or who is reassigned shall be deemed to continue to hold the job that she held at the time of making the request under subsection 204(1), and shall continue to receive the wages and benefits that are attached to that job.

(6) An employee referred to in subsection (4) is entitled to and shall be granted a leave of absence for the duration of the risk as indicated in the medical certificate.

Entitlement to leave

205.1 An employee who is pregnant or nursing is entitled to and shall be granted a leave of absence during the period from the beginning of the

pregnancy to the end of the twenty-fourth week following the birth, if she provides the employer with a certificate of a qualified medical practitioner of her choice indicating that she is unable to work by reason of the pregnancy or nursing and indicating the duration of that inability.

205.2 An employee whose job functions have been modified, who has been reassigned or who is on a leave of absence shall give at least two weeks notice in writing to the employer of any change in the duration of the risk or in the inability as indicated in the medical certificate, unless there is a valid reason why that notice cannot be given, and such notice must be accompanied by a new medical certificate.

Maternity Leave

Entitlement to leave

206 Every employee who

- (a) has completed six consecutive months of continuous employment with an employer, and
- (b) provides her employer with a certificate of a qualified medical practitioner certifying that she is pregnant

is entitled to and shall be granted a leave of absence from employment of up to seventeen weeks, which leave may begin not earlier than eleven weeks prior to the estimated date of her confinement and end not later than seventeen weeks following the actual date of her confinement.

Parental leave

Entitlement to leave

206.1(1) Subject to subsections (2) and (3), every employee who has completed six consecutive months of continuous employment with an employer is entitled to and shall be granted a leave of absence from employment of up to thirty-seven weeks to care for a new-born child of the employee or a child who is in the care of the employee for the purpose of adoption under the laws governing adoption in the province in which the employee resides.

(2) The leave of absence may only be taken during the fifty-two week period beginning

- (a) in the case of a new-born child of the employee, at the option of the employee, on the day the child is born or comes into the actual care of the employee; and
- (b) in the case of an adoption, on the day the child comes into the actual care of the employee.

(3) The aggregate amount of leave that may be taken by two employees under this section in respect of the same birth or adoption shall not exceed thirty-seven weeks.

Aggregate leave – maternity and parental

206.2 The aggregate amount of leave that may be taken by one or two employees under sections 206 and 206.1 in respect of the same birth shall not exceed fifty-two weeks.

...

General

Notification to employer

207(1) Every employee who intends to take a leave of absence from employment under section 206 or 206.1 shall

- (a) give at least four weeks notice in writing to the employer unless there is a valid reason why that notice cannot be given; and
- (b) inform the employer in writing of the length of leave intended to be taken.

(2) Every employee who intends to take or who is on a leave of absence from employment under section 206 or 206.1 shall give at least four weeks notice in writing to the employer of any change in the length of leave intended to be taken, unless there is a valid reason why that notice cannot be given.

Prohibition

208(1) Subject to subsection (2), no employer shall require an employee to take a leave of absence from employment because the employee is pregnant.

(2) An employer may require a pregnant employee to take a leave of absence from employment if the employee is unable to perform an essential function of her job and no appropriate alternative job is available for that employee.

(3) A pregnant employee who is unable to perform an essential function of her job and for whom no appropriate alternative job is available may be required to take a leave of absence from employment only for such time as she is unable to perform that essential function.

(4) The burden of proving that a pregnant employee is unable to perform an essential function of her job rests with the employer.

Application

208.1 Regardless of the time at which an employee makes a request under section 204, the rights and obligations provided under sections 204 and 205 take precedence over the application of subsection 208(2).

Right to notice of employment opportunities

209 Every employee who intends to or is required to take a leave of absence from employment under this Division is entitled, on written request therefor, to be informed in writing of every employment, promotion or training opportunity that arises during the period when the employee is on leave of absence from employment and for which the employee is qualified, and on receiving such a request every employer of such an employee shall so inform the employee.

Resumption of employment in same position

209.1(1) Every employee who takes or is required to take a leave of absence from employment under this Division is entitled to be reinstated in the position that the employee occupied when the leave of absence from employment commenced, and every employer of such an employee shall, on the expiration of any such leave, reinstate the employee in that position.

(2) Where for any valid reason an employer cannot reinstate an employee in the position referred to in subsection (1), the employer shall reinstate the employee in a comparable position with the same wages and benefits and in the same location.

(3) Where an employee takes leave under this Division and, during the period of that leave, the wages and benefits of the group of employees of which that employee is a member are changed as part of a plan to reorganize the industrial establishment in which that group is employed, that employee is entitled, on being reinstated in employment under this section, to receive the wages and benefits in respect of that employment that that employee would have been entitled to receive had that employee been working when the reorganization took place.

(4) The employer of every employee who is on a leave of absence from employment under this Division and whose wages and benefits would be changed as a result of a reorganization referred to in subsection (3) shall notify the employee in writing of that change as soon as possible.

Right to benefits

209.2(1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from

employment under this Division shall accumulate during the entire period of the leave.

(2) Where contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (1), the employee is responsible for and must, within a reasonable time, pay those contributions for the period of any leave of absence under this Division unless, before taking leave or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period.

(2.1) An employer who pays contributions in respect of a benefit referred to in subsection (1) shall continue to pay those contributions during an employee's leave of absence under this Division in at least the same proportion as if the employee were not on leave unless the employee does not pay the employee's contributions, if any, within a reasonable time.

(3) For the purposes of calculating the pension, health and disability benefits of an employee in respect of whom contributions have not been paid as required by subsections (2) and (2.1), the benefits shall not accumulate during the leave of absence and employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

(4) For the purposes of calculating benefits of an employee who takes or is required to take a leave of absence from employment under this Division, other than benefits referred to in subsection (1), employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

Effect of leave

209.21 Notwithstanding the provisions of any income-replacement scheme or any insurance plan in force at the workplace, an employee who takes a leave of absence under this Division is entitled to benefits under the scheme or plan on the same terms as any employee who is absent from work for health-related reasons and is entitled to benefits under the scheme or plan.

Status of certificate

209.22 A medical certificate given pursuant to this Division is conclusive proof of the statements contained therein.

Prohibition

209.3(1) No employer shall dismiss, suspend, lay off, demote or discipline an employee because the employee is pregnant or has applied for leave of absence in accordance with this Division or take into account the pregnancy of an employee or the intention of an employee to take leave of absence from employment under this Division in any decision to promote or train the employee.

(2) The prohibitions set out in subsection (1) also apply in respect of an employee who has taken a leave of absence under section 206.3.

...

2. Equality for women requires the guarantee of maternity/parental leave.

Equality for women in employment in the paid labour force is recognized across Canada and internationally as a fundamental principle.

- *Canadian Human Rights Act*¹:

Purpose

2 The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an equal opportunity with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Prohibited grounds of discrimination

3(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

Multiple grounds of discrimination

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

...

Employment

¹ R.S.C. 1985, c. H-6, as am.

- 7 It is a discriminatory practice, directly or indirectly,
(a) To refuse to employ or continue to employ any individual, or
(b) In the course of employment, to differentiate adversely in relation to
an employee
on a prohibited ground of discrimination.
- Section 15 of the *Canadian Charter of Rights and Freedoms*²:
15(1) Every individual is equal before and under the law and has the right
to the equal protection and equal benefit of the law without discrimination
and, in particular, without discrimination based on race, national or ethnic
origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has
as its object the amelioration of conditions of disadvantaged individuals or
groups including those that are disadvantaged because of race, national or
ethnic origin, colour, religion, sex, age or mental or physical disability.
 - Convention on the Elimination of All Forms of Discrimination against Women
("CEDAW"), Article 3 and Article 11, 18 December 1979, ratified by Canada 10
December 1981³:
Article 3
States Parties shall take in all fields, in particular in the political, social,
economic and cultural fields, all appropriate measures, including
legislation, to ensure the full development and advancement of women, for
the purpose of guaranteeing them the exercise and enjoyment of human
rights and fundamental freedoms on a basis of equality with men.
...
Article 11
1. States Parties shall take all appropriate measures to eliminate
discrimination against women in the field of employment in order to
ensure, in a basis of equality of men and women, the same rights, in
particular ...
 - Canada, Minister of Supply and Services, *Report of the Commission on Equality
in Employment*, Ottawa, 1984

Equality for women must involve full, substantive recognition of women's work,
contributions, and needs associated with mothering.

- Turnbull, L.A., *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach
Press, 2001)

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

³ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/34/46 (1981)

The references to “mother,” “mothering,” “maternity,” and “parenthood” in this submission include all contexts in which women take on the responsibility for and nurturing of infants.

An essential foundation for women’s equality in employment is full, substantive recognition of maternity/parenthood.

- *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (“Brooks”)
- *United Nurses of Alberta, Local 115 v. Calgary Health Authority* (2004), 21 Alta. L.R. (4th) 1 (C.A.), 2004 ABCA 7
- *Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No. 15* (1992), 15 C.H.R.R. 21, var’d in part on other grounds (1992) 1 Alta. L.R. (3d) 332 (*sub nom. Alberta Hospital Assn. v. Parcels*)
- *Ontario Cancer Treatment and Research Foundation v. Ontario (Human Rights Commission)* (1998), 156 D.L.R. (4th) 174 (Ont. Div. Ct.)
- *Carewest v. Health Sciences Assn. of Alberta (Degagne Grievance)*, [2001] A.G.A.A. No. 2 (Moreau, Arbitrator)
- *H.S.A.B.C. v. Campbell River & North Island Transition Society* (2004), 240 D.L.R. (4th) 479 (B.C.C.A.)
- International Covenant on Economic, Social and Cultural Rights, in force 3 January 1976, ratified by Canada 19 August 1976, Article 10⁴:
 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
- CEDAW, Article 11, s. 2:
 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
 - (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
 - (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;...

Women continue to bear the dual role of earning income and raising their children in the year 2005. Women should not be forced to choose between work in the paid labour force and family due to legislation that fails to recognize the need of supporting women to bear the next generation of our society.

⁴ G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16), doc. A/6316 U.N. (1966)

An essential component for equality is the right to job protection for women who need to be away from work because of pregnancy/maternity/parenthood. The guarantee of job protection comes through sections of the *Code* including sections 206, 206.1, 209.1, 209.3. It is these sections which guarantee that women will have the right to be away from work for a period of time when they become mothers, that they will not be terminated from their employment, and that they will be able to return to their work. These sections establish an entitlement for women. The entitlement is not subject to employer justifications for non-compliance.

These guarantees are the most basic kind of protection for women's equality in the paid labour force. Without such guarantees, women face significant economic and social disadvantage. These guarantees are essential for women's economic security both in the short term and the long term, and for their dignity.

As stated by Chief Justice Dickson, writing for the unanimous Supreme Court of Canada in *Brooks* (at 1243 – 1244):

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one-half of the population.

3. Disentitlement to maternity/parental leave through an eligibility threshold disadvantages women and impacts most severely on the most vulnerable.

Sections 206 and 206.1 of the *Code* provide that these basic guarantees are not available to those women who have worked less than six consecutive months of continuous employment for the same employer. In other words, for any woman who has not met the eligibility threshold, there is no guaranteed job protection when she becomes a mother. These women are vulnerable to losing their jobs because they became mothers. Whether only one woman is affected or thousands of women are affected is irrelevant. What is relevant is that Parliament and the Federal Government are not fully giving basic job protection under the *Code* during maternity/parenthood.

The fact that other women (who have worked longer than six consecutive months for the same employer) are entitled to job protection guarantees under the *Code* does not solve the problem for the women who are excluded. The maternity/parental leave provisions in the *Code* are under-inclusive. They leave out a segment of women who are just as much in need of equality protection relating to their role as mothers. In determining whether discrimination exists, it does not matter whether all members of the vulnerable group are affected. This was confirmed by the Supreme Court in *Janzen v. Platy Enterprises*,

[1989] 1 S.C.R. 1252, which held that sexual harassment constitutes sex discrimination, even though not all women are sexually harassed, and even though some men may be sexually harassed.

Lack of job protection in the context of maternity/parenthood places women in a socially and economically vulnerable position. The effects of such vulnerability can last a lifetime. Such vulnerability is inconsistent with Canada's commitment to women's equality.

The exclusions in the maternity/parental guarantees of the *Code* perpetuate the vulnerability of women given the severity of women's poverty in Canada. Women are at greater risk of poverty than men. Statistics show that one in seven Canadian women is living in poverty – that is 2.4 million women. Poverty crosses all ages of women: 51.6% of single mother families are poor; 41.5% of senior women who are single, widowed, or divorced are poor; 19.3% of all senior women live in poverty, while only 9.5% of senior men live in poverty; 35% of unattached women under 65 live in poverty; and 37% of women of colour live in poverty. The eligibility thresholds in Part III, Division VII of the *Code* fail to respond to this problem.

- Morris, M., "CRIAOW Factsheet: Women and Poverty," Canadian Research Institute for the Advancement of Women, updated 2005 by Tahira Gonsalves (<http://www.criaw-icref.ca/factSheets/Women%20&%20Poverty%202005.pdf>)
- Canada, Status of Women, "The Dynamics of Women's Poverty in Canada" (http://www.swc-cfc.gc.ca/pubs/pubspr/0662281594/200003_0662281594_2_e.html)

The eligibility thresholds in Part III, Division VII of the *Code* impact most severely on the most vulnerable women. Although women have entered the paid labour force in increasing numbers, more and more of those in paid employment are working in non-standard jobs, including temporary jobs. Precarious jobs are highly racialized as well as highly gendered. Aboriginal workers, workers of colour, and recent immigrants are much more likely than other workers to be in low-paid and insecure jobs. The women in temporary jobs are excluded from maternity/parental leave provisions in the *Code*. The *Code* now excludes from its protection those who are most in need of its protection.

- Townson, M., *Women in non-standard jobs: the public policy challenge* (Ottawa: Status of Women Canada, 2003)
- Jackson, A., "Is Work Working for Women?" Research Paper #22, Canadian Labour Congress, May 2003
- Canadian Labour Congress, "Labour Standards for the 21st Century: Canadian Labour Congress Issues Paper on Part III of the *Canada Labour Code*" (http://www.flis-ntf.gc.ca/en/sub_fb_03.asp)
- Human Resources Development Canada, "Gender Equality in the Labour Market: Lessons Learned, Final Report," October 2002 (<http://www11.hrdc-drhc.gc.ca/pls/edd/SPAH14910.lhtml>)

Statistics indicate that a significant number of Canadian women are employed in temporary work. In 2003, 13% of women in Canada were employed in temporary work positions: 28% of women between the ages of 15-24 and almost 10% of women between the ages of 25-54 (Statistics Canada, 2003). If such percentages are similar in the federal sector regulated by the *Code*, then it is likely that a significant number of women are working in temporary employment and may be excluded from the maternity/parental leave guarantees in the *Code*.

The temporary work industry represented 1/5th of the overall growth in paid employment in Canada from 1997-2003. Persons between the ages of 25 – 54 years represent more than half of the total number of temporary workers in Canada, a number which reached 809,200. Among this age group, women were overrepresented, holding 57.2% of contract employment, 31% of seasonal employment, 68.1% of casual employment and 47.3% of employment obtained through agencies. Temporary work is not a choice. Statistics show that in 1994, two thirds of temporary workers wanted to secure permanent employment.

- Galarneau, D., “Earnings of temporary versus permanent employees”, in *Perspectives on Labour and Income* (Statistics Canada: January 2005, Vol. 6, No. 1)

Studies have confirmed the presence of mainly women, Aboriginals, immigrants, and people of colour in the Canadian temporary work industry. Further, immigrant women are often forced to remain in the temporary work industry due to potential employers requiring Canadian work experience, and the refusal of the temporary work industry to provide its workers with references regarding their Canadian work experience. This creates a vicious cycle of trapping immigrant women in precarious employment.

- Vosko, Leah F., *Temporary Work: the Gendered Rise of a Precarious Employment Relationship*, (Toronto: University of Toronto Press Incorporated, 2000) at 190 – 195.

“A growing body of Canadian studies suggests that the creation of flexible work arrangements has particularly disadvantaged racialized groups,⁵ especially racialized women. Racialized groups experience disproportionate access to sectors and occupations where non-standard forms of work are dominant. Given as well the impact of persistent discriminatory labour market structures, what emerges is a deepening of racial segmentation of the labour market, racialization and segregation of low-income neighborhoods, and intensification of social exclusion. Racialized groups’

⁵ Galabuzi, G.E., defines racialized groups as follows: persons other than Aboriginal peoples, who are non-Caucasian in race or non white in colour, and include Chinese, South Asian, black, Arab/West Asian, Southeast Asian, Filipino, Latin American, Japanese, Korean and Pacific Islanders. However, the impact of temporary work on Aboriginal people is clearly recognized in the studies conducted by Leah F. Vosko.

disproportionate participation in precarious work is central to the growing racialization of the division of labour.”

- Galabuzi, G.E., “Racializing the Division of Labour: Neoliberal restructuring and the Economic Segregation of Canada’s Racialized Groups” in Stanford, J. and Leah F. Vosko, eds., *Challenging the Market: The Struggle to Regulate Work and Income* (Montreal: McGill-Queen’s University Press, 2004) 176 at 183.

The existence of an eligibility period may also exclude a woman who has previously had a long term commitment to the labour force followed by a brief lapse in employment for any number of reasons.

- Labour Canada, *Maternity and Child Care Leave in Canada* (Ottawa: Publications Distribution Centre, 1983) at 21

The *Code* eligibility threshold may function as an incentive to employers to put women in more vulnerable, short-term jobs, so that they may avoid the requirement to provide maternity/parental leave under the *Code*.

A guarantee of basic job protection during maternity/parenthood is the most basic form of equality promotion for participation of women in the paid labour force. Denial of job protection to a group of women is a failure to address women’s basic needs, and is an affront to their dignity. Those court decisions concluding that certain provisions of the *Employment Insurance Act* are not discriminatory deal with different issues and do not govern the issue here. It is LEAF’s position that these decisions do not meet the threshold for substantive equality for women, but, in any event, they are distinguishable in relation to the issue addressed in this submission. Both *Canada (Attorney General) v. Lesiuk*⁶ and *Manoli v. Canada (Employment Insurance Commission)*⁷ dealt with monetary benefits under the contributory insurance scheme under the *Employment Insurance Act*. As explained by the Supreme Court of Canada in *Reference re Employment Insurance Act (Can.) ss. 22 and 23*,⁸ the purpose of the maternity/parental benefits under the Employment Insurance system is to provide to women who have contributed to the plan the right to receive income replacement benefits. The *Lesiuk* decision dealt with the eligibility requirements of hours of work to qualify for those monetary benefits. The *Manoli* decision dealt with the reduction of monetary benefits as a result of lower insurable earnings because during her pregnancy Ms. Manoli had stopped working at one of her part-time jobs through exercising her statutory right to preventive withdrawal from work. Both of these decisions dealt with monetary benefits from a contributory social insurance scheme; neither of these decisions dealt with the guarantee of basic job protection during maternity/parenthood. Further, it is submitted

⁶ [2003] 2 F.C. 697 (C.A.), [2003] F.C.J. No. 1, 2003 FCA 3, leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 94

⁷ [2005] F.C.J. No. 839 (C.A.), 2005 FCA 178

⁸ 2005 SCC 56, para. 24

that the approach of the Federal Court of Appeal in *Lesiuk* and *Manoli* has been superseded by the Supreme Court's recent re-affirmation of society's obligation to address women's equality needs in maternity. As stated by the Supreme Court:⁹

A growing portion of the labour force is made up of women, and women have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility.

The outcomes in *Lesiuk* and *Manoli* therefore should not govern the issue addressed in this submission.

The international conventions referred to above set out the commitment for all women to job protection and maternity leave.

4. The women excluded from protection under the *Code* are not sufficiently protected under the reassignment and job modification provisions of the *Code* or under human rights law. Therefore, it is essential that they have access to the maternity/parental leave provisions under the *Code*.

Although pregnant women and mothers who have not worked for the same employer for six consecutive months of continuous employment may seek the protections of the *Code*'s reassignment and job modification provisions and of the *Canadian Human Rights Act*, those protections do not sufficiently meet the equality needs of these women.

The reassignment and job modification sections of the *Code* (ss. 204 – 205.2) provide for a leave of absence during pregnancy or nursing, but the availability of such leave is conditional. Section 205(6) provides for a leave of absence where:

- The woman has requested the employer to modify her job functions or reassign her (s. 204(1));
- The request is accompanied by a certificate from a qualified medical practitioner (s. 204(2));
- The employer has concluded that a modification of job functions or a reassignment is not reasonably practicable (s. 205(4)).

Further, the leave entitlement is “for the duration of the risk” (s. 205(6)) – a period of time of uncertain duration, and most likely less than the length of leave under s. 206 (17 weeks) and s. 206.1 (up to 37 weeks) of the *Code*. A leave under these provisions, therefore, is not equivalent to the right to maternity and parental leave (for those who meet the eligibility threshold) under ss. 206 and 206.1 of the *Code*.

Section 205.1 also provides for a leave of absence for an employee who is pregnant or nursing, but such leave is conditional on the woman providing the employer with a certificate of a qualified medical practitioner indicating that she is unable to work by

⁹ Note 8, para. 66

reason of the pregnancy or nursing and indicating the duration of that inability. This section addresses health-related needs, but does not fully provide for the needs associated with mothering and is not a substitute for the entitlement to maternity leave and parental leave under ss. 206 and 206.1 of the *Code*. Mothering is more than a health-related condition. The decisions in *Brooks* and *Parcels* clearly established that maternity is not a disability or merely a health-related condition. Maternity is a unique reality. The equality rights and needs of women related to maternity/parenting extend beyond the health-related period associated with pregnancy and childbearing. A further reason why s. 205.1 does not serve as a “substitute” to maternity and parental leave under ss. 206 and 206.1 is that the length of leave under s. 205.1 is uncertain. The length of leave depends on the physician’s certification of the “duration of the inability.” The woman has no way of knowing in advance the period of time for which she will have a leave. She is dependent on the physician’s determination of the length of leave.

Exclusion of certain women from the guarantees to maternity/parental leave under ss. 206 and 206.1 of the *Code* (based on the eligibility threshold) is not resolved by the leave provisions under job reassignment or the medical inability sections.

The women who are not eligible under the current wording of the *Code* for maternity/parental leave may still seek some period of leave through the *Canadian Human Rights Act* prohibition of discrimination in employment based on sex or family status. However, the protections under the *Canadian Human Rights Act* do not fully meet the equality needs of the women who are excluded from the guarantees under the *Code*. There are two reasons why, in relation to job protection during maternity/parenthood, the protections under the *Canadian Human Rights Act* appear to be insufficient as compared to the guarantees that would be provided by the *Code* if the eligibility thresholds were removed:

1. The protection in the no-discrimination provision is qualified by available defences, whereas the *Code* guarantees under ss. 206 and 206.1 are not subject to defences.
2. The period of job protection during pregnancy/maternity that may be available to a woman under the *Canadian Human Rights Act* is uncertain.

While s. 7 of the *Canadian Human Rights Act* prohibits discrimination in employment (such as terminating a woman’s employment because of maternity), such prohibition is qualified. Section 15(1)(a) of the *Canadian Human Rights Act* provides that it is not a discriminatory practice if any refusal, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement. Under s. 15(1)(a), it is open for employers to seek to justify terminating the woman’s job if they can show that it would be “undue hardship” to accommodate the woman by maintaining her employment so that she can return after maternity/parental leave. Although the Supreme Court of Canada has made clear in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3

S.C.R. 3 that the test in human rights analysis for justification of a *prima facie* discriminatory term of employment is stringent, the protections in Part III, Division VII of the *Code* are not subject to defences. Therefore, a mother faces greater uncertainty as to protection of her job under human rights legislation as compared with the *Code*.

Under human rights legislation, the length of leave that may be available is uncertain. Because the leave would be made available as an "accommodation" rather than a legislatively guaranteed right, the length of each leave would depend on (a) the woman's needs, and (b) the employer's position as to what length of leave could be accommodated.

A further problem is that the *Code* does not cross-reference the protections provided through the *Canadian Human Rights Act*. An employer or an employee who merely looks at the *Code* will see that maternity and parental leave do not have to be provided to a woman who has worked less than six continuous months for the same employer. The language of the *Code* is potentially misleading, putting both employers and women in a position where equality rights are not recognized and women lose their jobs.

5. Those provinces with employment standards legislation containing no eligibility thresholds for maternity/parental leave are in compliance with equality guarantees. Those provinces and territories, and the federal jurisdiction, with employment standards legislation containing eligibility thresholds are not in compliance with equality guarantees.

Three provinces have no eligibility thresholds for maternity/parental leave in their employment standards legislation. They are in compliance with equality guarantees. The fact that there are provinces and territories with varying eligibility thresholds does not justify an eligibility threshold. Rather, it shows that those provinces and territories are not giving full, substantive recognition to women's equality.

The comparison of eligibility thresholds across Canada is as follows:

Jurisdiction	Qualifying period for maternity/parental leave	Legislation
British Columbia	No minimum time	<i>Employment Standards Act</i> , R.S.B.C 1996, c. 113
Alberta	52 consecutive weeks with same employer	<i>Employment Standards Code</i> , R.S.A. 2000, c. E-9, s. 45, s.50(1)(b)(c)
Saskatchewan	20 weeks out of last 52 weeks with same employer	<i>The Labour Standards Act</i> , R.S.S. 1979, c.L-1, s.23

Jurisdiction	Qualifying period for maternity/parental leave	Legislation
Manitoba	7 months with same employer	<i>The Employment Standards Code</i> , C.C.S.M., c. E110, s.53
Ontario	13 weeks with same employer	<i>Employment Standards Act</i> , R.S.O. 2000, Chapter 41, s. 46
Quebec	No minimum time	<i>An Act Respecting Labour Standards</i> , R.S.Q., c. N-1.1
New Brunswick	No minimum time	<i>Employment Standards Act</i> , S.N.B. 1982, c. E-7.2
Nova Scotia	12 months with same employer	<i>Labour Standards Code</i> , R.S.N.S. 1989, c. 246, s. 59, s. 59B
P.E.I.	20 consecutive weeks with same employer	<i>Employment Standards Act</i> , R.S.P.E.I. 1988, c. E-6.2, s. 19, s. 22
Newfoundland & Labrador	20 weeks with same employer	<i>Labour Standards Act</i> , R.S.N.L. 1990, c. L-2, s. 40, s. 43.3
Yukon	12 months with same employer	<i>Employment Standards Act</i> , R.S.Y. 2002, c. 72, s. 36, s. 38
Northwest Territories	12 consecutive months with same employer	<i>Labour Standards Act</i> , R.S.N.W.T. 1988, C.L-1 <i>Pregnancy And Parental Leave Regulations</i> , R.R.N.W.T. 1990, C. 8 (Supp.)
Nunavut	12 consecutive months with same employer	<i>Labour Standards Act (Nunavut)</i> , R.S.N.W.T. 1988, c.L-1, s. 31, S. 34 <i>Pregnancy and Parental Leave Regulations</i> , R.R.N.W.T. 1990, C.8(Supp.)

Jurisdiction	Qualifying period for maternity/parental leave	Legislation
Federal jurisdiction	6 months with same employer	<i>Canada Labour Code</i> , R.S.C. 1985, c. L-2, as am., s. 206, s. 206.1

Those provinces with no eligibility thresholds show that an equality-compliant approach to maternity/parental leave is possible in Canada. Federal-jurisdiction employers regulated by the *Code* should not build their economic position at the expense of women, particularly the most vulnerable women.

6. LEAF urges the Federal Labour Standards Review Commission to recommend an amendment to the *Canada Labour Code* eliminating eligibility thresholds for maternity/parental leave.

Parliament has expressed its commitment to women's equality through the *Canadian Human Rights Act* and through s. 15 and s. 28 of the *Canadian Charter of Rights and Freedoms*. The international obligations to which Canada is a signatory also express the commitment to women's equality.

LEAF urges the Federal Government to fulfill its commitment to equality and to bring the *Code* into compliance with s. 15 of the *Canadian Charter of Rights and Freedoms* and with international standards by seeking an amendment to the *Code* so as to eliminate the eligibility thresholds for maternity/parental leave.

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