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

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SUBMISSION OF LEAF AND LEAF-EDMONTON ON THE LENGTH OF SERVICE REQUIREMENT FOR MATERNITY AND PARENTAL LEAVE UNDER THE *CANADA LABOUR CODE*

May 19, 2009

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Introduction

This submission by Women's Legal Education and Action Fund (LEAF) and one of its branches, LEAF-Edmonton (collectively "LEAF") responds to the February 2009 discussion paper by the Labour Program of Human Resources Skills Development Canada ("HRSDC") entitled "Discussion Paper on the Review of Labour Standards in the Canada Labour Code" ("the Discussion Paper"). Specifically, this submission addresses the following two questions raised in the Discussion Paper with respect to amending the six month length of service requirement for maternity and parental leave under the Canada Labour Code:

1. To what extent should parental, maternity and sick leave under Part III be aligned with EI benefits?

2. Would it be reasonable to reduce the current length of service requirement for parental and maternity leave from six months to three months?

Summary of LEAF's Position

LEAF submits that there should be no qualifying threshold for maternity and parental leave. A "no qualifying period" provision is the only principled approach that is consistent with Canada's domestic and international human rights obligations to prevent discrimination in employment arising from pregnancy and child-rearing and to promote women's substantive equality

History of LEAF's Involvement in this Issue

In October 2005, LEAF made a submission to the Federal Labour Standards Review Commission recommending that the qualifying threshold of six months' continuous employment with an employer before an employee is entitled to maternity and parental leave be removed from Part III, Division VII of the *Canada Labour Code,* R.S.C. 1985, c.L-2 as am. ("the Canada Labour Code") . LEAF's submission was that any qualifying threshold is inconsistent with

women's substantive equality and will disproportionately impact the most vulnerable women.[1] LEAF referred to Parliament's expressed commitment to women's equality through s.15 and 28 of the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act* ("the CHRA") and as a signatory to international human rights instruments. A copy of LEAF's October 2005 submission is attached.

In February 2006, the Commission released its report, *Fairness at Work: Federal Labour Standards for the 21st Century* (the "Report"), and made the following recommendation with respect to length of service requirements for maternity, parental and sick leave:

> Employees who do not meet the current length of service requirement under Part III, but who qualify for maternity, parental or sickness benefits under the Employment Insurance (EI) program should be entitled to maternity, parental or sick leave, as applicable.

LEAF's understanding is that the current consultation by HRSDC is part of a process to implement the Commission's recommendations.

"Harmonizing" Maternity and Parental Leave with EI Benefits

LEAF supports the idea that parents who qualify for EI should not face losing their jobs to claim their EI benefits . LEAF disagrees with the Discussion Paper's's proposal of a reduced threshold period for addressing this systemic inequity.

In support of "aligning" or "harmonizing" maternity and parental leave with EI benefits, the Discussion Paper reasons that "it may seem unfair if employees are entitled to parental leave benefits under EI, but not to the leave of absence from that work that would allow them to draw those benefits".

As noted in the Discussion Paper, employees who have worked 600 insurable hours in the previous 52 weeks or since the start of their last claim are eligible for EI maternity and parental leave benefits. These hours can be worked with any number of employers.

Accordingly, there is no principled connection between a new 3 month qualifying period under the Canada Labour Code and the concern with "harmonizing" the Canada Labour Code with EI. A pregnant woman could work a shorter period than the proposed 3 months with a new employer

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[1] In 2005 and today, Aboriginal workers, racialized workers and recent immigrants are much more likely than other workers to be in low-paid and insecure jobs.

and be entitled to EI benefits, without a corresponding entitlement to maternity leave under the Canada Labour Code.

The only approach which would fully align the Canada Labour Code with EI is the complete removal of the qualifying period for maternity and parental leave.

In addition, as emphasized in LEAF's October 2005 submission, it is important to remember that not all women qualify for EI benefits. Women who have caregiving responsibilities which limit the number of hours they work, who are engaged in part-time or precarious labour, or who may only have recently returned to the workforce after an absence to care for other children, may not qualify for EI benefits. Women who are racialized, Aboriginal or immigrants (among others) are disproportionately represented among those engaged in part-time and precarious labour and unable to access EI benefits.

The concern of the Labour Program's current review of the length of service requirement, therefore, should not be limited to whether there is an unfairness that some women (or parents) are entitled to EI but are not entitled to maternity or parental leave. Of equal concern is the situation of vulnerable women who do not qualify for EI and face losing their jobs when they take maternity leave. In LEAF's submission, the length of service requirement must be based in a principled approach consistent with women's rights to equality and non-discrimination in the workplace.

Why three months?

The Discussion Paper appears to suggest a three month qualifying period on the basis of the following two expressed concerns, neither of which are related to the "ever-increasing imperatives" of accommodating "the childbearing needs of working women"[2]:

1. "It may be inconsistent to have different length of service requirements for sick leave on the one hand and parental and maternity leave on the other hand"; and

2. "...it may be unreasonable to expect employers to provide unpaid leave on the same terms as EI benefits".

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[2] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 ("Brooks") at 1243-1244.

Maternity/Parental Leave and Sick Leave are Conceptually Distinct

The primary purpose of maternity and parental leave provisions is to recognize that:

- Women have been and continue to be discriminated against in employment as a result their child-bearing role;
- Child-bearing benefits society as a whole; and
- The financial and social burdens associated with having children should not rest entirely on women.[3]

The Supreme Court of Canada in *Brooks v Canada Safeway Ltd.* confirmed that pregnancy is not properly characterized as a sickness or an accident, although it is a valid health-related absence from work.[4]

In determining that maternity and parental benefits under employment insurance legislation were within federal jurisdiction in *Reference re Employment Insurance Act (Can.) ss. 22 and 23*[5], the Supreme Court of Canada characterized the purpose of income replacement for women who leave the workforce primarily with regard to the economic impact on women of their childbearing and caregiving roles.[6]

The recognition of the health-related aspect of pregnancy has been applied by Tribunals and Courts to challenge regimes which discriminate against pregnant women by excluding them from sick leave and disability benefits.[7] The underlying context in many of these claims, however,

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[3] As stated in *Brooks, supra*, at para. 40: "That those who bear children and benefit society as a whole should not be economically or socially disadvantaged seems to bespeak the obvious".

[4] *Brooks,* supra.

[5] 2005 SCC 56

[6] For example, at paragraphs 23 and 77: "The entry of large numbers of women into the labour market led to an awareness of their role and of the very real loss of income they suffered when their work was interrupted as a result of pregnancy. This is the context in which maternity benefits were adopted: *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48 ("UIA, 1971"), s. 30(1)". (para. 23) and "The evolution of the role of women in the labour market and of the role of fathers in child care are two social factors that have had an undeniable economic impact on individuals who are active participants in the labour market. A generous interpretation of the provisions of the Constitution permits social change to be taken into account. The provincial legislatures have jurisdiction over social programs, but Parliament also has the power to provide income replacement benefits to parents who must take time off work to give birth to or care for children". (para. 77)

[7] See for example, *Brooks, supra* note 3; *Parcels v. Red Deer General & Auxiliary Hospital and Nursing Home Dist. No.* 15 (1992), 15 C.H.R.R. var'd in part on other grounds (1992) 1 Alta. L.R. (3d) 332 (challenge to the employer's practice of requiring those on maternity leave to pre-pay 100% of their benefit plan premiums, while those on sick leave to pay 25% of their premiums); Crook *v. Ontario Cancer Treatment and Research Foundation* (1998), 38 O.R. (3d) 72, 156 D.L.R. (4th) 174 (Gen. Div.)(claimant successfully challenged employer's denial of her request for paid sick leave when she suffered from post partum depression.); *Regina School Division No. 4 v. Teachers of*

has been the more advantageous benefits available to sick employees, particularly with respect to income replacement during the period of the leave.

LEAF is concerned by the suggestion in the Discussion Paper that sick leave and maternity leave be aligned for "fairness". This suggestion:

- inadequately recognizes the purpose of maternity and parental leave of removing barriers to women in the workforce and recognizing the overall societal benefit of childbirth and childrearing;

- fails to recognize maternity as a unique reality; and

- contributes to the simplistic and problematic conflation of "pregnancy" and "illness"[8].

LEAF submits that if the Labour Program intends to consider the qualifying thresholds for maternity and parental leave in tandem with sick leave, it must articulate and clarify the relationship between the two provisions. LEAF would welcome the opportunity to provide additional feedback once the basis for the Labour Program's concerns have been articulated. LEAF does not offer an opinion on the threshold requirement for sick leave in this submission, but notes that human rights considerations on the ground of disability would be relevant to any such analysis.[9]

It is also noted that the Commission's Report does not make specific recommendations with respect to consistency of treatment between sick leave and parental and maternity leave.

Saskatchewan (1996), 140 D.L.R. (4th) 300, 148 Sask. R. 81 (C.A.) (grievance with respect to entitlement to supplementary unemployment benefits following delivery); *O.S.S.T.F., District 34 v. Essex County Board of Education* (1996), 136 D.L.R. (4th) 34, 91 O.A.C. 253 (Div. Ct.), rev'd on other grounds (1998), 164 D.L.R. (4th) 455, 113 O.A.C. 45 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 519 (upheld the teacher's request to utilize sick leave benefits from the date when she ceased work due to her pregnancy, to when her physician certified her as being able to return to work).

[8] See for example the discussion of the difficulties with a comparative analysis of discrimination on the basis of pregnancy in, Meehan, K., "Falling Through the Cracks: The Law Governing Pregnancy and Parental Leave", (2003 - 2004) 35 Ottawa L. Rev. 211 - 253

[9] It is noted that the length of service requirement for sick leave, to the extent it is provided for at all in provincial employment standards legislation, varies. For example, under the Manitoba *Employment Standards Code*, C.C.S.M., c.E110, an employee must work for 30 days before being entitled to a "family leave" of a maximum of three days of unpaid leave a year, to the extent necessary, for the health of the employee. Under the Ontario *Employment Standards Act, 2000,* S.O. 2000, c.41, there is no length of service requirement for an "emergency leave" of 10 unpaid days for illness, but the provision applies only to employers who employ 50 or more employees.

The Primacy of the CHRA

Section 7 of the CHRA prohibits discrimination in employment, such as by terminating a woman's employment because of maternity. Accordingly, a pregnant woman who does not meet the length of service requirement – be it three months or six months - may nevertheless be entitled to maternity leave as a workplace accommodation under the CHRA.[10] As legislation with quasi-constitutional status, the CHRA takes precedence over any inconsistent provisions of the Canada Labour Code.

The Ontario Human Rights Commission's *Policy on Discrimination because of Pregnancy and Breastfeeding* states: "Where there is a conflict between rights under the [Ontario Human Rights] Code and rights under other legislation, the [Ontario Human Rights] Code has primacy unless the legislation specifically states otherwise".[11] The government of Alberta in its publication *Becoming A Parent in Alberta* also specifically advises equality seekers that human rights take precedence over conflicting minimum labour standards.[12]

At pages 14-16 of its October 2005 submission, LEAF discussed the application of the Canadian Human Rights Act to the length of service requirement, including noting the confusion of enacting legislation which is inconsistent with the Canada Labour Code:

> A further problem is that the [Canada Labour] 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.

The proposed three month length of service requirement is subject to the same concerns and difficulties as articulated by LEAF in relation to the six month requirement.

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[10] LEAF's October 2005 submission discusses the uncertainty with an accommodation approach and emphasizes the need for a right to maternity and parental leave which is not subject to a *bona fide occupation requirement* limitation.

[11] Ontario Human Rights Commission, *Policy on Discrimination because of Pregnancy and Breastfeeding* (updated April 2009) at page 13, downloaded from http://www.ohrc.on.ca/en/resources/Policies/PolicyPregBreastfeedEN/pdf.

[12] Government of Alberta, Employment and Immigration, *Becoming a Parent in Alberta* (1999) at p.23, downloaded from http://employment.alberta.ca/documents/WRR/WRR-ES-PUB_becomingparentE.pdf

Amendments to the Canada Labour Code should not be made in a manner which is likely to put the Canada Labour Code in conflict with the CHRA and which communicates to employers and pregnant employees a standard which falls below human rights entitlements.

The Stringent Test for Undue Hardship

The Discussion Paper's concern for whether it is "unreasonable" to expect employers to provide an employee with maternity or parental leave if the employee has worked for the employer for less than 3 months is not supported by social science or other evidence. There is thus no basis for assuming that such an obligation constitutes a hardship for employers.

LEAF submits that if the basis for a three month (or any other) qualifying threshold is a concern with imposing a burden on employers, the alleged burden must meet the "uncompromisingly stringent" undue hardship standard.[13]

Given that in two other jurisdictions, British Columbia and Quebec, there has been no minimum length of service for maternity and parental leave benefits for many years, it is doubtful that a similar provision would be inappropriate under the Canada Labour Code. Further, LEAF submits that the federal government should display leadership with respect to protecting and promoting women's substantive equality.

CONCLUSION

LEAF is pleased that the Labour Program is considering the recommendations of the Commission and is seeking feedback.

For the above reasons, LEAF submits that the removal of the length of service requirement from the Canada Labour Code is the only approach which is principled, coherent and consistent with substantive equality. It is also the only approach which will achieve the goal of harmonizing EI entitlements with maternity and parental leave entitlements for all eligible employees. LEAF further submits that harmonization with EI should not be the only consideration for HRSDC and that protecting vulnerable workers, particularly women engaged in part-time, temporary and precarious labour who may not be entitled to EI, should be paramount.

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[13] *Lavoie v. Treasury Board of Canada* 2008 CHRT 27

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APPENDIX "A"

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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 1981[3]:
  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)

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[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 10[4]:

  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., "CRIAW 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.fls-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 woman 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*, [1993] 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	*Employment Standards Act,* R.S.B.C 1996, c. 113
Alberta	52 consecutive weeks with same employer	*Employment Standards Code,* 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	*The Labour Standards Act,* R.S.S. 1979, c.L-1, s.23

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

Jurisdiction	Qualifying period for maternity/parental leave	Legislation
Federal jurisdiction	6 months with same employer	*Canada Labour Code*, 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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