Falling Through the Cracks: The Law Governing Pregnancy and Parental Leave

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There are a number of compelling socio-economic factors that indicate that legislative reform of the Employment Insurance Act, 1996, c. 23 is both necessary and timely. The first part of the article includes a brief examination of international practices to illustrate some of the shortcomings in our current regime and concludes by providing insight on models for legislative reform. The second part discusses and critiques how certain judicial, arbitral and human rights decisions have advanced, and in some cases regressed, parents' rights in the workplace. When one views the case law in its entirety, it is evident that a common difficulty plaguing legal analysis in this area is how to situate pregnancy and maternity issues within a standard comparative framework. The decisions demonstrate a wide range of comparative approaches. Exacerbating this ambiguity over the appropriate comparator is a failure on the part of many adjudicators to appropriately contextualize pregnancy discrimination claims. Pregnancy's unique features have resulted in it being treated as an uncomfortable adjunct in the equality analysis, resulting in uncertainty in the law and indicating the need for a new framework. The author concludes that adjudicative reform, without legislative action, is insufficient to help women combine their roles as mothers and workers and achieve substantive equality in the Canadian labour force.

Un nombre de facteurs socio-économiques convaincants démontrent qu'une réforme de la Loi sur l'assurance-emploi, 1996, c. 23, est à la fois nécessaire et opportune. Dans un premier temps, l'article décrit brièvement la pratique internationale afin de souligner certaines lacunes dans notre régime législatif actuel et suggère des modèles possibles pour une réforme législative. Dans un deuxième temps, l'article présente une discussion critique de certaines décisions judiciaires, arbitrales et des droits de la personne qui ont constitué tantôt un pas en avant, tantôt un pas en arrière en matière des droits des parents dans le milieu de travail. Lorsqu'on examine la jurisprudence dans son ensemble, il ressort clairement qu'une difficulté commune qui complique l'analyse juridique dans ce domaine a trait à la façon de situer les questions relatives à la grossesse et à la maternité dans un cadre comparatif normal. La jurisprudence révèle une grande diversité de méthodes comparatives. Exacerbant cette ambiguïté sans égard au comparateur approprié, un bon nombre d'arbitres ont omis de situer dans le bon contexte les plaintes de discrimination fondée sur la grossesse. Les aspects particuliers de la grossesse ont mené au traitement de ces dossiers comme un ajout gênant dans l'analyse de l'égalité, ce qui a révélé les incertitudes de la loi et le besoin d'un nouveau cadre législatif. L'auteure conclut que la réforme du processus juridictionnel, sans une action législative, ne suffit pas à aider la femme à jouer simultanément ses rôles de mère et de travaillante et à réaliser l'égalité véritable sur le marché du travail canadien.

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I. Introduction

WOMEN'S VITAL ROLE within the Canadian workforce is undeniable. In 2002, 76% of women of childbearing age living in Canada were employed[1] and women comprised 46% of the total workforce.[2] The number of working mothers has risen dramatically, from 39% in 1976 to 72% in 2002.[3] Further, the sole breadwinner in 23% of families is a woman.[4] Yet within Canada, there is a widening divergence among the legal rights, protections and financial benefits, which accrue to female workers during pregnancy and the post-partum period. This occurs at a time when the ability of women to successfully balance their work and family is of unprecedented importance. As noted by Gøsta Esping-Andersen:

> There is clearly a strong case for a new 'women-friendly' social contract because improving the welfare of women means improving the collective welfare of society at large. The policy challenge boils down to two principal issues. *First, how to make parenthood compatible with a life dedicated to work.... Second, how to create a new and more egalitarian equilibrium between men's and women's lives*—the gender equality issue.[5]

This paper will examine the efficacy of the law in addressing two issues: the legislative regime in Canada governing pregnancy and parental leave, and recent judicial and arbitral decisions.

The first part of this paper will provide an overview of the current legislative regime facing parents today with a particular focus on the *Employment Insurance Act*[6] as the statutory mechanism with the most potential to provide future benefits to parents. There are a number of compelling socio-econom-

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1. Statistics Canada, *Women in Canada: Work chapter updates* (Ottawa: Statistics Canada, May 2003) at 7 [*Women in Canada*] (This statistic is for women between the ages of 25–44).
2. *Ibid.* at 6.
3. *Ibid.* at 8.
4. Statistics Canada, "The People: The Family Budget," online: Canada e-Book <http://142.206.72.67/02/02d/02d_003_e.htm>.
5. Gøsta Esping-Andersen, *Why We Need a New Welfare State* (Oxford: Oxford University Press, 2002) at 20 [emphasis added].
6. S.C. 1996, c. 23 [*EIA*].

ic factors, such as declining birth rates, the retirement of the baby boomers, and women's growing difficulty in balancing work and family demands, which indicate that legislative reform of the employment insurance ("EI") system is both necessary and timely. This portion of the paper will include a brief examination of international practices to illustrate how some of the shortcomings in our current regime could be improved and will conclude by providing insight on models for legislative reform.

Outside of the legislative regime, workers are challenging the traditional boundaries of maternity and parental leave. The second part of this paper will discuss and critique how certain judicial, arbitral and human rights decisions have advanced, and in some cases, regressed, parents' rights in the workplace. The vast majority of the decisions advancing workers' rights have arisen in the unionized workplace. Challenges to the EI system have fared considerably worse. This may be due to the expertise of arbitrators over Boards of Referees and Umpires,[7] or to the reluctance of decision makers to strike down ameliorative legislation.

When one considers the case law in its entirety, however, it is evident that a common difficulty plaguing legal analysis in this area, regardless of the forum in which the issue arises, is how to analyze and situate pregnancy and maternity issues within a standard comparative equality framework. The decisions discussed in the latter half of this paper will demonstrate a wide range of comparative approaches, including the "similarly situated" test which limited comparisons solely to other pregnant women; comparisons to employees on unpaid leaves; and various comparisons using a quasi-disability model such as sick leave and workers' compensation. Severely exacerbating this uncertainty over comparators is a failure on the part of many adjudicators to appropriately contextualize pregnancy discrimination claims. As Ellen Hodgson has warned, it is more appropriate to acknowledge that pregnancy is a unique feature of women, rather than a "flaw" comparable to disability in men.[8] In sum, pregnancy's unique features have resulted in it being treated as an uncomfortable adjunct in the discrimination analysis, resulting in uncertainty in the law. This debate over the appropriate comparator leads to the conclusion that Miranda Lawrence is correct in suggesting that it is time to recognize that pregnancy does not fit into the comparative analysis model of equality and to consider other approaches to discrimination analysis that do not require inadequate comparators.[9]

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7. Human Resources Development Canada has been investing in training for these decision-makers due to a traditional lack of confidence in their decisions.
8. Ellen E. Hodgson, "Pregnancy as a Disability" (1993) 1 Health L. J. 119.
9. Miranda Lawrence, "Approaches to Gender Equality in the Workplace: *Dumont-Ferlatte v. Canada (Employment and Immigration Commission)*" (1998) 29 Ottawa L. Rev. 477.

II. Overview—Part I—Legislative Reform

THE CANADIAN ECONOMY is in a state of rapid change. The gap between the rich and the poor is widening.[10] The number of families living below the poverty line remains alarmingly high.[11] The demographic effect of declining fertility rates at the same time as the baby boomer generation begins to ease into retirement has caused widespread concern over a skilled labour shortage, the viability of the Canada Pension Plan,[12] and Canada's increasing dependence on immigration to maintain its population.[13] Workers are facing increasing demands from employers to raise productivity rates, and data indicates that difficulty managing work and family life balance is steadily rising.[14] It is against this contextual backdrop which Canada's current legislative regime and dispute resolution mechanisms—as they relate to the challenges faced by those citizens balancing the dual roles of parent and worker—must be measured.

In the first section of this paper, international trends with regard to maternity and parental leave will be analyzed, with a particular focus on Sweden's current system. The impact of unionization, which is widening the gap between unionized workers and the rest of Canadian society will be illustrated by reference to specific clauses in collective agreements. I will argue that the drawbacks of the current *EIA* include its eligibility requirements, which work to exclude those workers who are the most vulnerable members of Canadian society. Further, the low level of benefits often results in a practical exclusion of economically disadvantaged workers, even when they meet the formal eligibility requirements. I will conclude the legislative analysis by briefly suggesting legislative reforms to address some of the barriers that face mothers today.

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10. Canadian Council on Social Development [CCSD], "Census Shows Growing Polarization of Income in Canada" (Ottawa: CCSD, 16 May 2003), online: Analysis of the Spring 2003 Census Release on Income in Canada <http://www.ccsd.ca/pr/2003/censusincome.htm>.
11. Statistics Canada, "Census of Population: Income of individuals, families and households; religion" *The Daily* (13 May 2003), online: The Daily <http://www.statcan.ca/Daily/English/030513/d030513a.htm> (In 1990 and 2000 nearly 1 in 5 children in Canada lived in low-income families); Statistics Canada, *2001 Census: analysis series, Income of Canadian families* (Ottawa: Statistics Canada, May 2003) at 9 (The proportion of income that came from government transfer payments increased in the 1990s for the 30% of families at the bottom end of the income distribution).
12. CPP Consultations Secretariat, *Report on the Canada Pension Plan Consultations* (Ottawa: Department of Finance, June 1996), online: Canada Pension Plan <http://www.cpp-rpc.ca/finrep/cpp-e.txt>.
13. The Canada Employment Insurance Commission, *Employment Insurance 2002 Monitoring and Assessment Report* (Hull, QC: Human Resources Development Canada, 2003) at 7 [*EI 2002 Report*].
14. *Ibid.* at i (Immigration accounts for three-quarters of all labour market growth).

III. Legislative Reform

A. HISTORY OF MATERNITY AND PARENTAL LEAVE IN CANADA

When considering legislative reform, it is necessary to understand the historical origins of the legislation. Thus, I will set out the history of the EI regime and then provide an overview of current legislative protections theoretically available to Canadian parents.

In 1971, amendments to the *Unemployment Insurance Act* created 15 weeks of partially compensated leave from employment for biological mothers.[15] While the initial benefit level was set at the high-water mark of 67% of previous wages, since then, the benefit has been reduced numerous times.[16] In 1980, it was lowered to 60%; in 1993, reduced to 57%; and presently it is at 55%. In 1984, amendments extended benefits to parents of an adopted child.[17] In 1990, maternity leave was restricted to biological mothers, but 10 weeks of parental leave was made available to biological and adoptive parents.[18] When commenting on this continual reduction of benefit levels, Lene Madsen argues that policy makers rely on women's societal role as caregivers to function as "social shock absorbers," filling in the gap created when social provisions such as EI benefits are reduced.[19]

B. CURRENT LEGISLATIVE PROTECTION

1) Employment Insurance–The Current System

Today there are three types of benefits available under the *EIA*. First, there are regular benefits, for those who have lost their jobs and require temporary income support. Second, there are benefits for unemployed fishers. The third category is special benefits, which are either maternity, parental or sickness benefits. Fifteen weeks of maternity benefits are payable to biological mothers who miss work due to pregnancy and childbirth. Parental benefits are payable to biological and adoptive parents who are away from work to care for a newborn or adopted child. Sickness benefits are payable to workers who are too ill to work.[20] This grouping of maternity and parental benefits with sickness benefits indicates a mode of thinking on the part of policy makers that equates pregnancy and childcare with disability.

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15. Lene Madsen, "Citizen, Worker, Mother: Canadian Women's Claims to Parental Leave and Childcare" (2002) 19 Can. J. Fam. L 11 at 41.
16. Anne Helene Gauthier, *The State and the Family: A Comparative Analysis of Family Policies in Industrialized Countries* (Oxford: Clarendon Press, 1996) at 174.
17. Madsen, *supra* note 15 at 41.
18. This change was made in response to the Court of Appeal's ruling in *Schacter v. Canada*, [1990] 2 F.C. 129, 66 D.L.R. (4th) 635 (C.A.) which held that allowing adoptive fathers, but not biological fathers, to access EI benefits violated s. 15 of the *Charter of Rights and Freedoms*.
19. Madsen, *supra* note 15 at 30.
20. The Canada Employment Insurance Commission, *Employment Insurance 2001 Monitoring and Assessment Report*, (Hull, QC: Human Resources Development Canada, 2002) at 25 [*EI 2001 Report*].

Significant changes were made to the *EIA*, effective December 31, 2000.[21] Perhaps the most widely publicized was the extension of parental benefits from 10 to 35 weeks.[22] This raised the combined maximum of maternity, parental and sickness benefits to 50 weeks.[23] A claimant must have accumulated 600 hours[24] in the previous year of employment to qualify for benefits.[25] Claimants are allowed to earn up to $50 per week by working, or 25% of their weekly benefits, without any reduction in benefits.[26] Benefit levels are capped at 55% of previous earnings to a maximum of $413 per week.[27] Additionally, the *Employment Insurance Fishing Regulations* have been amended to allow self-employed fishers to access maternity, parental and sickness benefits.[28]

2) The Family Supplement

There is an exception to the 55% maximum benefit. Those claimants who have a net family income of $25,921 or less, and one dependent child, will qualify for the Family Supplement, which increases the maximum benefit rate to 80%.[29] This is still subject to the maximum of $413 per week.

3) Funding of EI System

The EI system is funded entirely by employer and employee contributions. As of 1999, the EI system was operating in excess of $29 billion, and had been operating at a surplus for at least five years.[30] In 1999–2000, the total spent on maternity and parental benefits was approximately $1.19 billion.[31] Thus, it appears that extending eligibility to currently excluded workers and increasing benefit rates would not require any increase in funding. In fact, in the 2003 Budget, the federal government announced that they would be reducing the premiums for the EI system.

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21. Bill C-32, *An Act to implement certain provisions of the budget*, 2d Sess., 36th Parl., 2000 (tabled in Parliament on 28 February 2000).
22. *EIA*, *supra* note 6, s. 12(2)(b).
23. *Ibid.*, s. 12(3).
24. For regular benefits, claimants must have accumulated between 420 and 700 hours depending upon their geographical region's unemployment rate.
25. *EI 2001 Report*, *supra* note 20 at vi (Parents re-entering the labour force after taking an extended leave to care for children now have the same eligibility requirements as other claimants. Previously, they had a higher threshold).
26. *Ibid.* at iv, 22 (The proportion of individuals who are reporting work while collecting benefits declined. The government is conducting analysis to determine whether a disincentive exists in the design).
27. *EIA*, *supra* note 6, s. 14.
28. Bill C-2, *An Act to Amend the Employment Insurance Act and the Employment Insurance (Fishing) Regulations*, 1st Sess., 37th Parl., 2001 (as assented to 10 May 2001) (The access to maternity, parental and sickness benefits were retroactively granted to 31 December 2000).
29. *EIA*, *supra* note 6, s. 16.
30. *McAllister-Windsor v. Canada (Human Resources Development)* (2001), C.H.R.D. No. 4 (CHRT) at para. 24 [*McAllister-Windsor*].
31. Library of Parliament, *Family-Related Employment Insurance Benefits* (In Brief) by Kevin B. Kerr (Ottawa: Parliamentary Research Branch, March 2001).

4) Leave of Absence

Every Canadian jurisdiction has legislation dealing with maternity[32] and parental leave. Each jurisdiction provides for an unpaid leave of absence to mirror the *EIA* provisions, as long as the employee meets certain minimum requirements.[33] Although the *Employment Standards Act*[34] exempts certain types of employees from various sections under the Act, there are no exemptions under the Maternity and Parental Leave provisions.[35]

Parents in Ontario are also entitled to 10 unpaid days of emergency leave per year to care for their own sick child, step-child or foster child.[36] However, this emergency leave is only granted to employees who are employed in workplaces with 50 or more employees. In 1991, half of the Canadian workforce was either self-employed or employed in a workplace with fewer than 100 employees, leaving a large portion of the workforce without access to this leave.[37]

In January 2004, the EI program introduced compassionate leave benefits to ensure that eligible workers can take up to a six week absence from work to provide care or support to a gravely ill or dying child, parent or spouse.[38]

5) Protection While on Leave

All Canadian jurisdictions prohibit employee dismissal, or other forms of employer reprisal, due to pregnancy, maternity, parental or adoption leave.[39] As well, all jurisdictions have comparable legislation, requiring that an employee returning from leave be reinstated in the same or an equivalent position with equal wages and benefits.[40] Wage rates are also protected in

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32. Often referred to as Pregnancy Leave, such as in the *Employment Standards Act 2000*, S.O. 2000, c. 41, s. 46.
33. Canada, *Work and Family Provisions in Canadian Collective Agreements* by Charles Philipe Rochon, ed. (Hull, QC: Human Resources Development Canada, Labour Program, March 2001), online: <http://labour-travail.hrdc-drhc.gc.ca/worklife/collective_agreement1/> [*Work and Family*] (Employees in almost every jurisdiction must have a minimum period of service with the same employer to be eligible for leave, with the exception of British Columbia and New Brunswick, which do not have length of service requirements. Quebec's length of service is simply that the employee be employed the day preceding the notice of intent to take leave).
34. S.O. 2000, c. 41 [*ESA*].
35. O. Reg. 285/01, Amended to O. Reg. 361/01.
36. *EIA*, *supra* note 6, s. 50 (A spouse or same-sex partner's child is also included).
37. Judy Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour-Relations Policy" in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace & Company, 1996) at 59.
38. *EIA*, *supra* note 6, s. 23.1.
39. Human Resources Development Canada, *Family-Related and Other Leaves* (Hull, QC: Strategic Policy and International Labour Affairs, Labour Branch, September 2001), online: <http://labour-travail.hrdc-drhc.gc.ca/psait_spila/lmnec_eslc/index.cfm/doc/english> [*Family-Related Leaves*]; See *ESA*, *supra* note 34, s. 74.
40. *Family-Related Leaves*, *ibid.* at 14-36.

Ontario by s. 53(3) of the *ESA*.[41] Similar legislation requiring employers to give employees any wage increases or benefits that they would have been entitled to if not on leave can be found in British Columbia, Prince Edward Island, Quebec, Nunavut, the Yukon and the Northwest Territories.[42]

Legislation in jurisdictions such as Ontario, Saskatchewan, New Brunswick and the federal jurisdiction stipulates that an employee's seniority is to accrue during a maternity, parental or adoption leave. For example, s. 52 (1) of Ontario's *ESA* provides that an employee is entitled to accrue not only seniority, but also vacation and any other rights arising from the contract. Other jurisdictions provide more limited protection, and simply stipulate that employees will be entitled to maintain their previous seniority when they return to work.[43] Provincial human rights legislation also provides mothers with a statutory right to be free from discrimination in employment.[44]

6) Who is excluded from EI Maternity and Parental Benefits?

EI benefits, in theory, allow women to have a meaningful choice as to when to return to work during the first year of their infant's life. Allowing women to define when they will seek re-entry into the workforce, rather than forcing them to return for economic reasons, is one means of assisting women in achieving substantive equality in the workplace. Thus, it is essential to understand which women are being excluded from the *EIA*.

In order to be eligible for both maternity and parental benefits under EI, women must have 600 hours of insurable earnings over the 52 weeks prior to application. This excludes both women in informal employment as well as those in the formal labour market who do not accumulate sufficient hours within one year.[45] As noted by Janine Brodie, the changes in the Canadian labour market toward part-time work and short-term contract positions affect women disproportionately,[46] as they are more likely to be in these types of employment due to discrimination and their multiple roles of caregivers and workers. Women account for 68.8% of those who work less than 30 hours per week[47] and unsurprisingly are the majority of claimants for maternity and parental benefits.[48]

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41. *ESA*, *supra* note 34 at s. 53(3) (The employer shall pay a reinstated employee at a rate that is equal to the greater of, (a) the rate that the employee most recently earned with the employer; and (b) the rate that the employee would be earning had he or she worked throughout the leave).
42. *Family Related Leaves*, *supra* note 39.
43. *Ibid.* (These jurisdictions are Nova Scotia, Prince Edward Island, Nunavut and the Northwest Territories).
44. *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(2).
45. Madsen, *supra* note 16 at 42.
46. Janine Brodie, "Canadian Women, Changing State Forms, and Public Policy" in Brodie, *supra* note 37 at 8.
47. *Women in Canada*, *supra* note 1 at Table 7.
48. *EI 2002 Report*, *supra* note 13 at 52.

The self-employed typically do not qualify for employment insurance, although there are some statutory exceptions for certain occupations such as hairdressers[49] and fishers.[50] From 1990 to 1998, the number of self-employed women rose by over 50%, from 591,000 to 891,000.[51] Currently, 15.2% of the population is self-employed.[52] Those who are self-employed are likely to earn less than a salaried employee[53] and therefore have less ability to save money for a leave of absence. Statistics Canada found that 80% of self-employed mothers will return to work by the end of the first month after their child's birth, while only 16% of mothers who are salaried employees would return that quickly.[54] Thus, expanding the maternity and parental leave benefits to include self-employed women would allow this portion of the workforce greater power to determine essential parenting choices such as when to re-enter the paid workforce.

The low benefit level of 55% also ensures that many women, who are theoretically entitled to benefits, are precluded from accessing them for financial reasons. Simply put, a mother without a partner to share the financial burden may not be able to sustain her family while relying on maternity or parental benefits under the current Canadian regime. As noted by Patricia Evans and Norene Pupo:

> At such low levels of earnings replacement, parental leave can only be used by mothers and fathers who are able to absorb a significant drop in income. These are likely to be parents with relatively high and stable alternate sources of income or with substantial savings, and those whose significant working expenses reduce the gap between lost earnings and benefit.[55]

As found by Judy Fudge, "there is a direct correlation between low take-up rates for maternity and parental benefits and low wages for women workers."[56] Canada's policy appears to assume that the majority of women raising children have a partner with a sufficient income to cover the loss of the majority of the woman's earnings. Not only does this perspective contribute to the maintenance of traditional gender roles, it is also based on erroneous data, as the number of households headed by single mothers is rising. One only need compare the 2002 Before-Tax Low Income Cut-Offs, which for a family of

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49. Sylvain Schetagne, "Maternity leave, parental leave, and self-employed workers: Time for action!" *Perception* 23: 4 (Spring 2000), online: Canadian Council on Social Development <http://www.ccsd.ca/perception/234/ml.htm>.
50. See *Employment Insurance (Fishing) Regulations*, S.O.R./2001-74, s. 1.
51. Schetagne, *supra* note 49 (In addition, in 1998, 13.7% of women in the labour market were self-employed).
52. *EI 2002 Report*, *supra* note 13 at 2.
53. Schetagne, *supra* note 49 (For example, average before-tax revenue of self-employed workers with employees was $30,800, which is 91% of the average income of a salaried employee).
54. *Ibid.*
55. Patricia Evans & Norene Pupo, "Parental Leave: Assessing Women's Interests" (1993) 6 C.J.W.L. 402 at 410.
56. Judy Fudge, "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) 60 Sask. L. Rev. 237 at 249 [Fudge, "Using Gender"].

two is $463.02 weekly, and for a family of three is $575.85 weekly,[57] in order to realize the true inadequacy of a 55% benefit rate with a $413 weekly ceiling.[58] Unfortunately, as explained by Nitya Iyer, the poorest women are the most likely to be effectively excluded from coverage, while those in the highest income brackets or who have a partner who can make a substantial financial contribution, have the greatest ability to take leave.[59] Women who are aboriginal, immigrants, visible minorities or who have a disability are amongst the poorest citizens of Canada. In effect then, the 55% entitlement propagates and fosters the systemic cycle of poverty these groups are already trapped in.

When considering what type of legislative reform would best meet the needs of Canadian parents, statistical information can be helpful in providing insight into who is benefiting from the current regime. Critics have suggested that instead of helping the most vulnerable, government and employer income support systems primarily benefit new mothers in high income brackets who work full time: 93% of women making $70,000 to $80,000 will receive maternity benefits, while only 49% of families with incomes under $20,000 will receive benefits.[60] The women most likely to also receive additional income through a Supplemental Unemployment Benefit ("SUB") plan are those working full-time, making a higher income, in the public sector or in another strongly unionized area.[61] What this often means, as observed by Nitya Iyer, is that women who work in part-time or casual employment, but who do not reach the eligibility requirements, are subsidizing women in higher income brackets.[62]

Based on these figures, it appears that raising the level of benefits for maternity and parental leave would have a significant impact on women's economic interests. As 95% of primary caregivers are female, the vast majority of claimants benefiting from such an increase would be women.[63] Most

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57. National Council of Welfare, "Fact Sheet: Poverty Lines 2002," online: Poverty Lines Fact Sheet—National Council of Welfare <http://www.ncwcnbes.net/htmdocument/principales/povertyline.htm> (For cities with more than 500,000 inhabitants).
58. *EIA*, *supra* note 6, s. 14(1).
59. Nitya Iyer, "Some Mothers are Better than Others: A Re-examination of Maternity Benefits" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 168 at 174.
60. Richard Shillington, "Maternity Benefits for All?" *The Catalyst* (October/November 2002), reprinted in Greg deGroot-Maggetti, *Quality over Quantity: Investing in Human Development, Brief to the House of Commons Standing Committee on Finance 2002 Pre-Budget Consultations* (Toronto: Citizens for Public Justice, September 2002) App. D at 24, online: Citizens for Public Justice <http://www.cpj.ca/budget/02/brief02.pdf> (When one considers it from an hourly perspective, 91% of mothers making $15-$25 an hour will receive EI, and only 62% of those earning under $7.50 will receive EI).
61. *Ibid.*
62. Iyer, *supra* note 59 at 176.
63. *Canada (Attorney General) v. Lesiuk* (1998), CUB 51142 (Employment Insurance Commission) at para. 19, online: <http://www.ei-ae.gc.ca/policy/appeals/jurisprudence/50000-60000/51000-51999/51142e.htm>, rev'd [2003] 2 F.C., 697 [C.A.], leave to S.C.C. refused, [2003] S.C.C.A. No. 94 [cited to CUB].

importantly, a reduction in the poverty of mothers impacts the nation at large. As noted by Gøsta Esping-Andersen:

> [F]emale employment is one of the most effective means of combating social exclusion and poverty.... If it yields a private return to individual women, *it also yields a substantial collective return to society at large*. It should, accordingly, be defined as a social investment. There exists a broad consensus on what constitutes women-friendly policy. It includes: 1. Affordable day care....2. Paid maternity but, *arguably much more importantly, also paid parental leave*. A more equal division of family tasks may occur at the margin by encouraging fathers to make use of parental leave entitlements. 3. Provisions for work absence when children are ill.[64]

Arguably, Canada is making attempts in all three of these areas, given the recent reforms to both the *EIA* in terms of lengthening parental leave, in the Ontario *ESA* providing ten days unpaid absence for family emergencies, and in the recent allotments in the 2003 budget for daycare.[65] These are, however, small steps towards a systemic problem, and the women who require the assistance most are, ironically, the most likely to be excluded. Thus, further reform is still urgently required.

7) Usage Statistics on EI Claimants in 2001/02

The Employment Insurance 2002 Monitoring and Assessment Report, created by the Canadian Employment Insurance Commission, submitted statistics on EI usage for the period from April 1, 2001 to March 31, 2002 reflecting a full year with the extended parental leave provisions.[66] Since the introduction of the extended parental leave provisions, fathers' claims for benefits increased by 77.8%, from 13,000 to 23,120.[67] However, nearly 90% of parental leave claims during the 2001–2002 period were brought by mothers.[68] The share of Family Supplement benefits paid to women accounts for nearly 75%,[69] which indicates that the poorest recipients in the system are more likely to be women. The average weekly benefit for those claiming maternity benefits was $294 per week.[70] Again, these statistics indicate that changing the eligibility requirements and level of benefits provided would primarily affect women. In addition, the increased utilization rate by fathers demonstrates that legislative design in Canada can impact on traditional gender roles.

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64. Esping-Andersen, *supra* note 5 at 94 [emphasis added].
65. Canada, Department of Finance, *The Budget Plan 2003* (Ottawa: Public Works, 2003) at p.89, online: Department of Finance <http:// www.fin.gc.ca/budget03/PDF/bp2003e.pdf>.
66. *EI 2002 Report*, *supra* note 13 at 1.
67. *Ibid.* at 18.
68. *Ibid.* at 31.
69. *Ibid.* at 53.
70. *Ibid.* at 18.

C. INTERNATIONAL LESSONS

1) International Instruments

The International Labour Organization ("ILO") has stated that the most common legislative gap in protection in ILO member states is the situation also faced by many Canadian women today: "a right to a maternity leave under a general labour code, but no right to cash benefits under social security because coverage for cash benefits is narrower than that for maternity leave."[71] Article 6(1), (2) of the ILO's C183 *Maternity Protection Convention, 2000* recommends that benefits during maternity leave should be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.[72] Article 6(3) states: "Where...cash benefits...are based on previous earnings, the amount of such benefits shall not be less than two-thirds of the woman's previous earnings."[73] Similarly, Article 10 of the *International Covenant on Economic, Social and Cultural Rights* states that women should be accorded special protection during the period before and after childbirth and that working mothers should be provided with paid leave.[74] If Canada were to adopt a benefit rate of 67% as recommended by the ILO, this would simply represent a return to what Canadian women were entitled to in 1971.

2) Sweden's Parental Leave System

Sweden's parental leave provisions, along with its universal daycare system, have been the study of academic commentary for many decades. Thus, when considering legislative reforms to Canada's system, Sweden's system may provide valuable lessons for policy makers in Canada.

Swedish women have had the right to unpaid maternity leave since 1939 and paid maternity leave since 1962.[75] Both of these advancements were made in response to specific events facing Sweden. The first was extremely low birth rates during the 1930s.[76] However, as a result of maternity leave, Sweden benefited from increased fertility rates, particularly among older

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71. International Labour Organization, *ILC87–Report V(1)Maternity protection at work*, 87th Sess., (Geneva: International Labour Office, 1999) online: International Labour Organization <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-v-1.htm> [*Report V(1)*].
72. International Labour Organization, *C183 Maternity Protection Convention, 2000*, in R. Blanpain, ed., *International Encyclopaedia for Labour Law and Industrial Relations*, Codex (The Hague: Kluwer Law International, 1999) at 488.41, online: International Labour Organization http://www.ilo.org/ilolex/english/convdisp1.htm (entered into force 7 February 2002).
73. *Ibid.*
74. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 23 March 1976, accession by Canada 19 May 1976).
75. Siv Gustafsson & Frank P. Stafford, "Three Regimes of Child Care: The U.S., the Netherlands, and Sweden" in Rebecca M. Blank, ed., *Social Protection versus Economic Flexibility: Is There a Trade-Off?* (Chicago: The University of Chicago Press, 1994) 333 at 339 [Gustafsson & Stafford].
76. Lesley J. Wiseman "A Place for 'Maternity' in the Global Workplace: International Case Studies and Recommendations for International Labor Policy" (2001) 28 Ohio. N.U. L. Rev. 195 at 221.

and more educated women.[77] This correlation between the implementation of family-friendly policies and increased fertility rates was also observed in the Netherlands.[78] The second event was a severe labour shortage in the 1960s, which resulted in family-friendly policies, including paid maternity leave.[79] The declining birth rates and labour shortage of Sweden's past are eerily reminiscent of what Canada is facing in the near future.

Currently, expectant mothers in Sweden who are unable to work because of the demands of their job are entitled to 50 days leave at 80% of their income.[80] In addition, Swedish parents are entitled to 480 days of parental leave, 390 days of which are compensated by social insurance at 80% of the parent's previous salary and may be taken by either parent or divided between the parents.[81] The remaining 90 days are paid at a base amount of SEK 60[82] per day.[83] The leave can be taken from birth or time of adoption until the child is eight years old.[84] It is also possible to use the leave to return to work part-time.[85] Those who do not have a past earning history on which to calculate the 80% are entitled to receive the flat payment of SEK 150 per day.[86] The bulk of the Swedish parental leave program is funded through social security, but employers pay 7% of the cost.[87] In addition, if a Swedish woman has a second child within two and a half years of her first child, her benefits are calculated on her earnings before the first birth.[88]

Swedish families with children also receive a national child allowance, payable at a flat rate of SEK 950[89] per month for each child until the child reaches 16 years of age. Families with more than three children receive additional compensation.[90] Parents in Sweden are also entitled to take a leave, at

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77. Gustafsson & Stafford, *supra* note 75 at 343.
78. *Ibid.* at 335.
79. *Ibid.* at 339.
80. Ministry of Health and Social Affairs, "Swedish family policy" (Fact Sheet) (Stockholm: Ministry of Health and Social Affairs, no. 14, September 2003), online: <http://www.sweden.se> ["Swedish family policy"].
81. The Swedish Institute, "Social Insurance in Sweden" (Fact Sheets on Sweden) (Stockholm: The Swedish Institute, 16 Jan 2004), online: The Swedish Institute <http://www.sweden.se/templates/FactSheet_3978.asp> ["Social Insurance in Sweden"]; Gustafsson & Stafford, *supra* note 75 at 343 (This amount is subject to a ceiling, however, only 1% of women and 10% of men were affected by it in 1985).
82. Approximately $11 Cdn.
83. "Social Insurance in Sweden", *supra* note 81.
84. *Ibid.*
85. Michele Ashamalla, "A Swedish Lesson in Parental Leave Policy" (1993) 10 B.U. Int'l L.J. 241 at 243.
86. "Swedish family policy", *supra* note 80.
87. Sheila B. Kamerman, Alfred Kahn & Paul Kingston, eds., *Maternity Policies and Working Women* (New York: Columbia University Press, 1983) at 22–3, cited in Wiseman, *supra* note 75 at 222.
88. Siv Gustaffson, "Single Mothers in Sweden: Why is Poverty Less Severe?" in Katherine McFate, Roger Lawson & William Julius Wilson, eds., *Poverty, Inequality, and the Future of Social Policy: Western States in the New World Order* (New York: Russell Sage Foundation, 1995) 291 at 311 [Gustaffson].
89. Approximately $170 Cdn.
90. "Social Insurance in Sweden", *supra* note 81.

80% of their qualifying income, to care for a sick child.[91] This leave includes up to 120 days, but on average, parents only use seven days per year per child.[92]

The social insurance system in Sweden is characterized by universalism.[93] All parents are entitled to a benefit, even those who are self-employed and those without any earnings. This trend towards broader inclusion is evident in other international jurisdictions. For example, self-employed women are included in paid parental leave provisions in Finland, Spain, Portugal and Luxembourg.[94]

Sweden also has a strong focus and commitment to gender equality in all aspects of society. This commitment extends to the domestic sphere, resulting in successful attempts by the Swedish government to increase men's usage of parental leave.[95] The rate of men using parental cash benefit days in Sweden has increased from 3% in 1974 to 13.8% in 2001.[96] There have been advertising campaigns emphasizing the importance of early bonding between fathers and children and encouraging fathers to utilize their leave.[97] Fathers of newborn children are entitled to 10 days of temporary parental benefit days, referred to as "Dad's days." They were introduced to encourage more men to take leave, and as of April 2002, usage rate of these "Dad's days" is almost 100%.[98] The usage rates by men in all the Nordic countries are rising as a result of similar incentive programs.[99]

In summary, Sweden's system is more likely to promote the goal of substantive gender equality for the following reasons. First, generous parental leave policies, which can be used by either parent, promote gender equality more effectively than a lengthy maternity leave policy. As explained by Lesley Wiseman, focusing on maternity leave rather than familial leave[100] "perpetuates the myth that women are particularly suited or disposed towards childrearing, and does nothing to alleviate the pressure of performing dual roles of worker and caregiver."[101] The Swedish design seems to be working as "Sweden holds the international record in terms of husbands'

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91. "Swedish family policy", *supra* note 80.
92. *Ibid.*
93. "Social Insurance in Sweden," *supra* note 81.
94. *Report V(1)*, *supra* note 71 at 18.
95. Nancy E. Dowd, "Envisioning Work and Family: A Critical Perspective on International Models" (1989) 26 Harv. J. on Legis. 311 at 317.
96. "Swedish family policy," *supra* note 80.
97. *Ibid.*
98. *Ibid.*
99. Esping-Andersen, *supra* note 5 at 92 (The male share of total child leave days certainly remains modest, but it is rising); NOSCO, 2001: Table 4.6, cited in Esping-Andersen, *supra* note 5 at 92 (In the 1990s, the paternal share rose by 32% in Denmark, 67% in Finland, and 45% in Sweden).
100. Wiseman, *supra* note 76 at 228 (referring to art. 11, s. 2(b) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1 March 1980, 19 I.L.M. 33 (entered into force 3 September 1981), which mandates the implementation of paid maternity leave, and art. 4, s. 1 of the *Maternity Protection Convention, 2000*, *supra* note 72, which requires that maternity leave last a minimum of fourteen weeks).
101. *Ibid.*

contribution to unpaid, domestic work: an average of 21 hours a week... Women average 25–30 hours a week."[102] Equally important, having the focus on parental leave and accompanying incentives to encourage men to use this leave reduces the perception that women are more costly employees.[103] Second, the flexibility built into the system, such as allowing the leave to be taken up until the child is eight years old provides women with greater choice and control over how best to manage their dual roles of worker and mother. Third, its universality eliminates the socio-economic stratification apparent in Canada's regime.

D. INCENTIVE FOR LEGISLATIVE REFORM IN CANADA

1) Child Poverty and Single Parent Families

One reason that an adequate financial benefit should be provided to parents in Canada is the increasing number of poor single-parent families. Over half of single-parent families in 1997 were poor.[104] The proportion of poor households headed by a single mother rose from 22.5% in 1981 to 28.4% in 1997.[105] Child poverty in Canada is also rising, from 14.9% in 1981 to almost 20% in 1997.[106] In sharp contrast to this, only 2.7% of Swedish children live in poverty.[107] Even within this desperately poor segment of society, visible minorities are still likely to be the worst off. For example, 39% of Aboriginal single mothers earn less than $12,000 per year.[108] It is not only single-parent families getting poorer. For families with children in the lowest 20% of income brackets, average net wealth fell between 1984 and 1999 by more than 51%.[109] Similarly, young couples with children experienced a 30% decline in their median wealth between 1984 and 1999.[110]

These types of statistics impact not only on the directly affected individuals, but also on Canadian society as a whole. For example, in the U.S., which has the highest levels of child poverty of the industrialized nations,

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102. Esping-Andersen, *supra* note 5 at 92.
103. Wiseman, *supra* note 76 at 228.
104. David P. Ross, Katherine J. Scott & Peter J. Smith, *The Canadian Fact Book on Poverty, 2000* (Ottawa: Canadian Council on Social Development [CCSD], 2000), online: CCSD <http://www.ccsd.ca/pubs/2000/fbpov00/hl.htm> (56% according to the authors).
105. *Ibid.*
106. *Ibid.*
107. *Ibid.*
108. *The Progress of Canada's Children, 2002* (Ottawa: Canadian Council on Social Development [CCSD], 2002), online: CCSD <http://www.ccsd.ca/pubs/2002/pcc02/index.htm> [*Progress of Canada's Children*].
109. *Ibid.*
110. René Morissette, Xuelin Zhang & Marie Drolet, "Wealth Inequality" (February 2002) 3 *Perspectives on Labour and Income, Online Edition* 1 at 3, online: Statistics Canada <http://www.statcan.ca/english/studies/75-001/0020275-001-XIE.html>, cited in Greg deGroot-Maggetti, "Quality over Quantity: Investing in Human Development, Brief to the House of Commons Standing Committee on Finance 2002 Pre-Budget Consultations" (Toronto: Citizens for Public Justice, 2002), online: Citizens for Public Justice <http://www.cpj.ca/budget/02/brief02.pdf> at 4.

there are correspondingly high rates of child aggression, child obesity and higher infant mortality rates.[111] In order to combat child poverty, legislators must strive towards removing substantive barriers to women's full participation in the workforce. Reform to the EI system is one such method, such as increases in the benefit rate and broadening eligibility to ensure those who need it most can access it; judicial reform through human rights decisions is another.

2) Smaller Families

Research has shown that government policy towards paid maternity leave influences when a woman will have her first child, and the time period she waits before having her second child, if she has one at all.[112] In 1999, Canada's birth rate, at 1.52 children per woman, was at its lowest point in history.[113] Canadian women were also having babies at older ages.[114] As discussed above, declining birth rates in Sweden during the 1930s and 1940s triggered a series of reforms to family-friendly legislation and benefits, which are still being held up as models worldwide. In 1997, the Canadian Council on Social Development ("CCSD") warned that falling Canadian birth rates indicated that "children are being priced out of the market; children are becoming a luxury that many average income-earners feel they cannot afford."[115] Thus, legislative reform that would ease the financial burdens imposed by childbirth would benefit not only individual women, but also Canadian society as a whole by contributing to increased birth rates.

Canada is also relying heavily on immigration to boost its population, taking twice as many immigrants per capita as either Australia or the United States.[116] In 2002, Citizenship and Immigration Canada Minister Denis Coderre stated: "In the next five years, we will be in deficit of one million skilled workers."[117] Although this estimate is debatable, industrialized nations are facing an aging population base that is irreversible and the Organization for Economic Co-operation and Development ("OECD") has recommended that developed nations take measures to ensure that all available workers, including women and older citizens, are active in the labour

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111. Ross, Scott & Smith, *supra* note 104, c. 10.

112. Women's Electoral Lobby Australia Inc. [WEL]., Media Release, "Making Babies and Work Possible for Women" (4 July 2002), online: WEL Australia <http://www.wel.org.au/issues/work/0207pml.htm>.

113. Statistics Canada, "Trends in Canadian and American Fertility" (*The Daily*, catalogue 11-DO1E, 3 July 2003) (Ottawa: Minister of Industry, 2002) at 2, online: Statistics Canada <http://www.statcan.ca/Daily/English/020703/d020703.pdf>.

114. *Progress of Canada's Children*, *supra* note 108 (There was a 21% increase in births among women aged 40 to 44 and a 13% drop in births to women aged 20 to 24).

115. Ross, Scott & Smith, *supra* note 104, c. 10.

116. Organization for Economic Co-operation and Development [OECD], *Trends in International Migration*, SOPEMI, 2001 ed. (Paris: OECD, 2001) at 278, Table A.1.1.

117. Mary Janigan, "Immigrants: How Many is Too Many? Who Should Get In? Can We Tell Them Where to Live and What to Do?" *Maclean's* 115:50 (16 December 2002) 20 at 23–24.

force.[118] Indeed, the Ontario government has recently introduced legislation to eliminate mandatory retirement[119] and Human Resources Development Canada ("HRDC") predicts that by 2015 "labour force growth will be a third of the current growth rate and increasingly dependent on immigration."[120] These concerns are echoed by Gøsta Esping-Andersen, who argues that countries must adopt a "concerted child-focus" in order to sustain huge retirement populations in a knowledge-based economy.[121] Having a legislative regime that allows women to more easily balance their dual roles of worker and parent could assist in staying or reversing Canada's declining birth rates, reduce dependence on immigration and assist in providing a future skilled workforce.

3) Difficulty Managing Work and Family Responsibilities

Finally, balance between work and family is putting increasing stress on Canadian parents. As explained by the CCSD, in 2001, 55% of working fathers and 74% of working mothers reported having too much to do.[122] Sadly, women with children reported higher levels of depression than did women without children.[123] From 1991 to 2001, the average weekly hours of work increased from 42 hours to 45, and time spent with dependents in family activities decreased from 16 hours to 11 hours per week.[124] Further, the number of employees reporting high stress jobs more than doubled from 13% to 27%.[125]

Canadian mothers between the ages of 25 and 44 years spend an average of 35 hours a week on unpaid work, on top of working a full work week.[126] It is clear that social policy can have an impact on a parent's ability to manage the dual role of worker and parent. A study conducted by Siv Gustafsson and Frank Stafford found that Swedish women with children under the age of two report an increase in time spent on personal care and rest, of up to three hours.[127] This may be contrasted sharply with the results from U.S. women, who report a 10 hour deficit in free time![128]

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118. OECD, *Ageing Societies and the Looming Pension Crisis–Background Reading*, Social Effects of Ageing, online: OECD <http://www.oecd.org/document/59/0,2340,en_2649_34757_2512699_1_1_1_37435,00.htm>.
119. Bill 68, *Mandatory Retirement Elimination Act*, 2003, 4th Sess., 37th Leg., Ontario, 2003, online: Legislative Assembly of Ontario <http://www.ontla.on.ca/documents/Bills/37_Parliament/Session4/b068_e.htm> (First Reading on division 29 May 2003, coming into force 1 January 2005).
120. *EI 2002 Report*, *supra* note 13 at 9.
121. Esping-Andersen, *supra* note 5 at 28.
122. *Progress of Canada's Children*, *supra* note 108.
123. *Ibid.*
124. *EI 2002 Report*, *supra* note 13 at 8.
125. *Ibid.*
126. Statistics Canada, *The People: Unpaid Work* (Canada e-Book), online: Statistics Canada <http://142.206.72.67/02/02d/02d_004_e.htm>.
127. Gustaffsson & Stafford, *supra* note 75 at 348.
128. *Ibid.*

E. IMPACT OF COLLECTIVE AGREEMENTS

Parents covered by a collective agreement have two additional means of protection with regards to maternity and parental leave. The first level of protection is the bargaining power to achieve more favourable provisions in the collective agreement. Work-life balance is now third in priority among the demands of unions.[129] The second level of protection is access to the grievance and arbitration mechanisms that clarify rights arising out of the collective agreement and how such provisions interrelate with minimum standards legislation.[130] Some collective agreements simply reiterate minimum standards legislation, but many provide extra benefits for employees taking maternity or parental leave. A comprehensive review of clauses dealing with pregnancy and parental leave is provided in the report "Work and Family Provisions in Canadian Collective Agreements" published by HRDC.[131]

However, unionized jobs are being threatened as the current trend towards contingent and part-time work increases[132] and women are already less likely to receive the protection of a collective agreement.[133] This widening gap between the unionized worker and the non-unionized worker, as well as the decreasing unionization rate, both suggest that reform to the EI system is important.

1) Extended Leave

Extended leave is an additional benefit to which many unionized workers are entitled. Some clauses provide parents with significantly longer periods of maternity, paternity, parental, and adoption leave than do statutory standards. Seventeen percent of major collective agreements surveyed by HRDC provided for more than 25 weeks of maternity leave.[134] Another 5.5% provided for between 27 and 51 weeks of maternity leave, while another 4% provided for over 52 weeks of maternity leave.[135] The extended leave is often granted once the initial period of maternity and/or parental leave has expired. One such example found in an education collective agreement states:

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129. Canadian Association of Administrators of Labour Legislation (CAALL), *Work-Life Balance: A report to Ministers responsible for Labour in Canada* (CAALL Ad Hoc Committee on Work-Life Balance, February 2002) at 5, online: Work-Life Balance <http://www.hrsdc.gc.ca/en/lp/spila/wlb/pdf/wlbc-ctvpc-en.pdf> [*Work-Life Balance*].
130. See *Re Toronto (City) and Toronto Civic Employees' Union, Loc. 416* (A-01-19) (2001), 98 L.A.C. (4th) 321 (Ont.).
131. *Work and Family*, *supra* note 33.
132. Isabella Bakker, "Deconstructing Macro-economics Through a Feminist Lens" in Brodie, *supra* note 37 at 33.
133. Statistics Canada, *Perspectives on Labour and Income: Unionization* (Autumn 2000, Vol. 12, No 3) (Ottawa: Minister of Industry) at 40 (the historical gap between men and women's unionization rate has closed substantially over the last decade, with women's unionization rate in 2000 at 30.7% in contrast to 32.2% among men).
134. *Work and Family*, *supra* note 33.
135. *Ibid.*

> Extended Parental Leave may be granted at the discretion of the Board to an employee who has been on Pregnancy, Parental or Adoption Leave. Subject to operational requirements, requests for Extended Parental Leave will not be unreasonably denied. The total period of Pregnancy, Parental, Adoption and Extended Parental Leave shall not exceed thirty-six (36) months.[136]

Eight and one-fifth percent of collective agreements in Canada today grant parents the right to an unpaid leave of absence to care for a child. Such clauses allow parents to prioritize their child-care responsibilities and re-enter the labour force after an extended absence without concern for their jobs. For example, employees of the federal government have a SUB plan topping up their income to 93% during maternity and parental leave and may be able to take an unpaid leave of up to five years to care for pre-school age children.[137] Collective agreements may also assist employees in the return to work transition by providing for increased flexibility, priority in shift scheduling, or allowing the employee to return to work on a part-time basis.

2) Supplemental Unemployment Benefit (SUB)

The report, "Work and Family Provisions in Canadian Collective Agreements,"[138] found that a key concern of many unions when bargaining maternity-related benefits is to reduce any adverse financial impact on pregnant employees during a leave of absence. The most common way to do this in a collective agreement is through a SUB plan where the employer tops up what the employee receives from EI (55% of previous earnings) to a certain percentage of salary.[139] Even those employees who are not eligible for EI may still be entitled to an employer allowance. EI benefits will not be reduced by a SUB plan as long as the employee's combined income does not exceed 100% of an employee's normal weekly salary.[140] The collective agreement may also require the employer to provide employees with their salary during the two-week waiting period for EI benefits.

As of March 2003, 235 of the 890 collective agreements surveyed by HRDC had some type of SUB plan.[141] Similarly, 13% of collective agreements grant adoptive parents a SUB plan and 4.6% of collective agreements entitle those on parental leave to a SUB plan.[142] Finally, 6.1% of collective

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136. *Ibid.* at 53 (Collective Agreement of Ottawa Board of Education and the Branch Affiliates of the Women Teachers' Associations of Ontario and Ontario Public School Teachers' Federation (1996–1998)).
137. *Work-Life Balance*, *supra* note 129 at 30.
138. *Work and Family*, *supra* note 33.
139. *Ibid.*
140. Human Resources Development Canada [HRDC], *Digest of Benefit Entitlement Principles, Maternity, Parental and Sickness Benefits*, online: HRDC <http://www.hrdc-drhc.gc.ca/ae-ei/loi-law/guide-digest/5_5_0_e.shtml>.
141. Email from Sandy Bergeron, Workplace Information Directorate, containing Tables of Collective Agreements (March 2003) Hull, Human Resources Development Canada.
142. *Ibid.*

agreements in Canada stipulate that women on maternity leave are entitled to utilize short-term disability.[143]

3) Continuation of Benefits and Seniority

As noted above, some jurisdictions allow employees to maintain a number of benefits, such as pension, life insurance, accidental death, medical and dental plans, during their leave if the employee pays their share of the premiums.[144] Again, collective agreements provide additional financial assistance to employees through clauses such as:

> The Company will continue at no expense to the employee, Life Insurance, Drug Insurance, Dental, Extended Health, Semi-private Hospital and Ambulance Insurance Plans for the duration of an approved maternity leave.[145]

Seniority, always a primary concern of unions, is beginning to play a bigger role in bargaining for enhanced maternity and parental leave. As noted earlier, only some Canadian jurisdictions provide for seniority accrual during leave. Now, 40% of major collective agreements provide for at least partial accumulation of seniority during maternity leave.[146] In some cases, employees on leave are treated more favourably than employees at work. For example, the clause mentioned above provides employees on leave with additional protection with regards to layoffs, which the HRDC report describes as a form of "super-seniority:"

> No employee can be laid off while on leave under these Clauses.... However, this shall not prevent the Company from laying off active employees who are senior to him/her during his/her leave of absence under this Clause.[147]

IV. Summary: Part I—Legislative Reform

ACADEMICS AND POLITICIANS ALIKE have been advocating for legislative reform.[148] Upon examination of the statistical data indicating who uses EI, Richard Shillington argues that necessary reform includes adjusting the qualifying requirements to benefit more women in the lowest income brackets.[149]

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143. *Ibid.*
144. British Columbia, Manitoba, Ontario, Quebec, Saskatchewan, and federal jurisdiction.
145. *Work and Family*, *supra* note 33 at 61 (Collective Agreement of Bristol Aerospace Limited (St. James Plant) and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW), Local 3005 (1996-1999)).
146. *Ibid.*
147. *Ibid.* at 65 (Collective Agreement of Canadian Airlines International and International Association of Machinists and Aerospace Workers (Technical Services), District Lodge 721 (1996-2000)).
148. Sue Baily, "Liberal MPs call for billions in national child care spending" *Canadian Press* (24 November 2002), online: ChildCare Resource and Research Unit <http://www.childcare canada.org/ccin/2002/ccin11_24_02.html>.
149. Shillington, *supra* note 60 at 24.

Similarly, authors such as Clarence Lochhead and Katherine Scott advocate broadening the pool of women who can access EI benefits and raising the benefit rate.[150] Sylvain Schetagne also advocates increasing benefits from 55% to 70%.[151] The Government of Quebec has adopted Bill 140, *la loi sur l'assurance parentale*, which allows self-employed workers to access maternity and parental benefits.[152] The Canadian Bar Association has twice adopted Resolutions, in 1995 and in 2003, urging the federal government to extend maternity and parental benefits to self-employed individuals.[153] When one considers the rising shortage of skilled workers, the growing numbers of single-parent families, rising child poverty rates and the decrease in birth rates, it seems clear that there are a number of compelling socio-economic factors indicating that the time for legislative reform is here. Thus, as a result of the foregoing, it is suggested that policy makers consider amending the *EIA* in the following ways.

First, the historical connection between regular unemployment insurance benefits with maternity and parental leave benefits should end with recognition by policy-makers that the fundamental goals behind each type of benefit are distinct. Presumably, one of the policy reasons underlying a benefit rate of 55% is to act as an incentive for the unemployed worker to actively seek employment. However, parental benefits are to allow employed workers time off to care for their infant children. Procreation and childcare are essential and necessary services that benefit the state.

Once the historical connection between regular benefits and maternity/parental benefits is broken, a second crucial reform is to increase the benefit level for maternity and parental leave to the ILO's recommended 67% of previous earnings and to raise the $413 ceiling to at least meet the Before Tax Low-Income Cut-Off rates established by the National Council of Welfare.[154] This would allow those women in lower earnings brackets to survive on the EI benefit rate, rather than be forced to return to work or seek other means of social assistance.

Third, the eligibility requirements should be broadened. One option would be to provide universal access to benefits. Currently, Canada's system bases eligibility and level of entitlement on formal labour market contributions by individual women. Changing it to a universal benefit regardless of

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150. Status of Women Canada, *The Dynamics of Women's Poverty in Canada* by Clarence Lochhead & Katherine Scott, (Ottawa: Status of Women Canada, 2000) at 42, 53 (this report also advocates providing affordable and an accessible public child care system).

151. Schetagne, *supra* note 49.

152. Bill 140, *An Act respecting parental insurance*, 1st Sess., 36th Leg., Quebec, 2000. See also *Procureur général du Québec c. Procureur général du Canada*, [2004] J.Q. No. 277 (Que. C.A.) (QL).

153. *Employment Insurance Maternity and Parental Leave Benefits*, Resolution 03-03-M, Canadian Bar Association, 2003, online: Canadian Bar Association <http://www.cba.org/cba/resolutions/2003res/03-03-M.asp>.

154. See Iyer, *supra* note 59 at 173 ("The need for sufficient financial resources to subsist with a new baby on no income at all for two weeks also excludes many women").

market contribution would be a step towards providing the most disadvantaged mothers—mothers who are single, aboriginal, disabled, immigrant or members of a visible minority—with a decent standard of living. This would break the systemic cycle of poverty that children in these families currently face. A more incremental approach would be to adjust the eligibility requirements to allow self-employed, part-time and casual workers some access to benefit coverage. As noted earlier, self-employed fishers already have access to EI benefits.[155] One method of doing this would be to allow anyone who has worked 600 insurable hours in his or her lifetime access to parental benefits.

Fourth, the Canadian government, in consultation with employer and employee groups, should design policies to encourage more men to utilize parental leave. Maternity and parental leaves have been criticized as short-term solutions to the systemic problem of gender inequality in the workplace. However, providing incentives for fathers to utilize parental leave may have farther-reaching implications than simply the period of paid leave itself. It would ease some of the burden imposed on women as dual caregiver and worker, help equalize the number of years that women are in the workforce as opposed to men and reduce employer prejudice to women on the basis of maternity leave.[156]

In summary, in light of the shortfalls in the current EI system, international trends in the area of maternity leave and a number of urgent socio-economic and demographic factors, the time is right for legislative reform to the EI system. Reforms should be aimed at providing more women with actual choices, such as the ability to decide when to have children and when to re-enter the paid workforce, without being forced to return immediately for economic reasons. Underlying any reform, there needs to be explicit recognition of women's valuable contribution to Canadian society when they choose to have children and raise these future members of the labour force. The next part of this paper will discuss how effective adjudicative mechanisms have been in fostering substantive equality in the workplace, including two recent *Charter*[157] challenges to the EI system.

V. Overview—Part II—The Case Law

WHILE LEGISLATIVE REFORMS such as the lengthening of parental leave have contributed to the ability of Canadian workers to successfully manage both

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155. *Employment Insurance (Fishing) Regulations*, *supra* note 50, s. 1(1).

156. See Fudge, "Using Gender", *supra* note 56 at 248 ("The problem with protective legislation that takes women's sexual difference as its starting place is that it reinforces the male standard worker, contributes to women's ghettoization in certain occupations and industries, increases the costs of employing women, and ignores other bases of inequality in the workplace that ought to be challenged").

157. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

work and family, paralleling this has been the struggle at the adjudicative level to clarify and advance women's rights within the workplace. The contrasting results in these decisions illustrate one of the difficulties that have repeatedly plagued adjudicators when applying the current discrimination analysis to issues involving pregnancy: Who is the appropriate comparator? Should women on maternity leave more properly be compared to someone on sick leave, or to someone on an unpaid educational leave? Or, as Miranda Lawrence argues, should pregnancy be recognized, due to its unique status, as requiring another approach to equality, one that does not require false comparators?[158]

This difficulty is referred to by the Human Rights Commission on its website, which explains in its policy statement that "[a]fter several years of debating whether or not pregnancy is 'akin' to sickness or disability, the courts and provincial legislatures have acknowledged that the *special needs* associated with pregnancy do not correspond to any other health-related condition."[159] I maintain that this statement is both overly optimistic and incomplete. While it is certainly true that there has been an evolution of the comparative approach, from the similarly situated test in *Bliss v. Canada (Attorney General)*[160] to the quasi-disability model adopted in decisions such as *Alberta Hospital Assn. v. Parcels*[161] and *O.S.S.T.F., District 34 v. Essex County Board of Education*[162] and the contextual model used in recent decisions such as *Carewest v. H.S.A.A. (Degagne)*,[163] adjudicators are still struggling with defining the appropriate comparator groups for maternity and parental leave. Nor, as I argue above, has the legislature acknowledged the fundamental difference between maternity/parental leave benefits and regular benefits under the EI system. Further, the emphasis should not only be on the *needs* of the pregnant woman, but also on the corresponding societal *benefits* derived from her ability to successfully manage both the procreative and employment related aspects of her life. Thus, as Miranda Lawrence suggests, it is time to recognize that pregnancy does not fit into the comparative analysis model of equality and to consider other models of equality that do not require inadequate comparators.[164]

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158. Lawrence, *supra* note 9 at 494.
159. Ontario Human Rights Commission, "Policy on Discrimination Because of Pregnancy and Breastfeeding" at n. 16, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/english/publication/pregnancy-policy.shtml> [emphasis added].
160. [1978] 1 F.C. 208, 77 D.L.R. (3d) 609 (F.C.A.), aff'd [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417 [*Bliss* cited to S.C.R.].
161. (1992), 1 Alta. L.R. (3d) 332, 90 D.L.R. (4th) 703 (Q.B.) [*Parcels* cited to D.L.R.].
162. (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 [*Essex County* cited to D.L.R.].
163. *Carewest v. H.S.A.A. (Degagne)* (2001), 93 L.A.C. (4th) 129 [*Carewest*].
164. Lawrence, *supra* note 9.

The question then becomes: what model? While I do not align myself with a particular alternative model of discrimination analysis, I agree with Diana Majury's suggestion that contextualization, including a recognition of inequality between men and women in the workplace, is of crucial importance as a starting point for the analysis.[165] As stated by Kathleen Lahey, "[j]udges will have to insist on contextualizing the issues they are analyzing, taking into account the history of the rule or practice in question, the realities of the social, economic and legal relations that surround it, and the fact that the private oppression of women has been very much a part of the public agenda."[166] Further, I suggest that this contextualization process must embrace the principle first enunciated in *Brooks v. Canada Safeway Ltd.*:[167] procreation is beneficial to society, and thus pregnancy and parental leave are fundamentally different than all other types of workplace leaves. I argue that two recent decisions, *Carewest v. H.S.A.A. (Degagne)*[168] and *McAllister-Windsor v. Canada (Human Resources Development)*,[169] provide reason for optimism as they illustrate that adjudicators are beginning to apply this contextualization process in an attempt to move towards substantive equality.

VI. The Case Law

A. DEVELOPMENT OF AN EQUALITY ANALYSIS: FROM *BLISS V. CANADA (ATTORNEY GENERAL)* TO *BROOKS*

In order to understand the legal gains that parents have made in the last twenty-five years, one must start with an examination of *Bliss v. Canada (Attorney General)*.[170] *Bliss* demonstrates how pregnant women and new mothers have been treated unjustly by both Parliament and the judiciary. It thus provides an effective foil for contrasting past and present gains and, in turn, should prevent both complacency and cynicism on the part of adjudicators hearing current challenges.

The facts in *Bliss* are straightforward. Stella Bliss had nine and a half weeks of employment before she was forced to cease working due to the birth of her child. Regular benefits under the *Unemployment Insurance Act*[171] required eight weeks of insurable earnings. However, workers who were unable to work due to pregnancy were required to have ten weeks, and so

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165. Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1991) 4 C.J.W.L. 407. See also Diana Majury, "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall L.J. 297 at para. 40.
166. Kathleen Lahey, "Feminist Theories of (In)Equality" in Sheila L. Martin and Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 83.
167. [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321 (S.C.C.) [*Brooks*].
168. *Carewest*, *supra* note 163.
169. *McAllister-Windsor*, *supra* note 30.
170. *Bliss*, *supra* note 160.
171. S.C. 1971, c. 48.

Ms Bliss was denied maternity benefits. After the birth of her child, she unsuccessfully sought employment and then applied for regular benefits and was denied these as well. She contended that imposing more stringent requirements on pregnant workers violated section 1(b) of the Canadian *Bill of Rights*.[172] On appeal, the Umpire agreed. Upon judicial review at the Federal Court of Appeal, Justice Pratte, speaking for a unanimous court, held that, as the impugned provision had no application to women who were not pregnant, or to men, it could not be discriminatory.[173] This is a flawed approach to determining the appropriate comparator group, as the "similarly situated" test of discrimination has since been abandoned as an appropriate test, at least in theory.[174] However, this decision was upheld on appeal to the Supreme Court of Canada where Justice Ritchie, again speaking for a unanimous court, found that the statutory requirements affected only women, not men, and therefore could not be discrimination on the basis of sex.

The reasoning in *Bliss* is unsound. The similarly situated test is an invalid method of analyzing discrimination as it requires a pregnant woman to demonstrate that she was discriminated against as compared to other pregnant women. Thus, equality in any substantive sense is nearly impossible to achieve. Unfortunately, *Bliss* was followed in Canada for more than a decade and the judiciary in both England and the U.S. concluded that discrimination on the basis of pregnancy was not discrimination on the grounds of sex.[175]

This was the equality analysis applied to challenges involving pregnancy and childbirth until Justice Dickson's seminal decision in *Brooks*. The unionized plaintiffs in *Brooks* challenged their group insurance plan that provided benefits to employees who were sick or injured, with the exception of pregnant women. This exception applied regardless of whether the pregnant women were off work due to a non-pregnancy related illness. The human rights adjudicators, the Manitoba Court of Queen's Bench[176] and the Manitoba Court of Appeal[177] all considered themselves bound by *Bliss* and held that sex discrimination did not include pregnancy.[178] The Women's Legal Education and Action Fund (LEAF) intervened at the appeal to the Supreme Court of Canada.

Dickson J.'s reasons in *Brooks* present a clear and principled approach to pregnancy-related discrimination. First he applies the definition of dis-

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172. S.C. 1960, c. 41 at s. 1(b) ("the right of the individual to equality before the law and the protection of the law").
173. *Bliss*, *supra* note 160 at 613 (F.C.A.).
174. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [*Andrews*].
175. *Brooks*, *supra* note 167 at 14.
176. (1986), 38 Man. R. (2d) 192, [1985] M.J. No. 486 (Q.B.).
177. (1987), 42 Man. R (2d) 27, [1986] M.J. No. 253 (C.A.).
178. *Brooks*, *supra* note 167 at 14.

crimination enunciated in the leading case of *Andrews*[179] and concludes that the plan had an adverse impact on any pregnant woman. Second, Dickson J. considers the employer's argument that pregnancy is neither a sickness nor an accident and dismisses it:

> It is, however, a *valid health-related reason for absence* from the workplace and as such should not have been excluded from the Safeway plan.... *Viewed in its social context* pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan.[180]

In sharp contrast to Pratte J.'s dismissal of pregnancy as a condition that is "usually voluntary", Dickson J.'s analysis is rich and contextual and includes a consideration of the benefits that society reaps from procreation. *Brooks* established that once an employer decides to provide an employee benefit package, it must do so in a non-discriminatory fashion and include pregnancy as a health related absence from work.

Any remaining confusion over *Bliss* was eliminated by specifically overruling it, a rare step for the Supreme Court:

> I am prepared to say that *Bliss* was wrongly decided.... 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.... *As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population.*[181]

Brooks thus represented an advance for women on several fronts and resolved the predominant flaws in Ritchie J.'s reasoning in *Bliss*. First, it firmly established that discrimination on the basis of pregnancy does fall within the ambit of the protected ground of sex. Second, it rejected the narrow similarly situated test for comparators. Instead of comparing the claimant to other pregnant women, the claimants were compared to other employees who had a valid health related reason for being absent from work. Third, Dickson J. took a broad and contextual approach to the societal benefits of pregnancy and childbirth and carefully weighed these benefits in the discrimination analysis. The thread running throughout *Brooks* is that procreation is beneficial to society at large, and finding ways to assist women to successfully balance the dual demands that motherhood and employment impose is an entirely appropriate paradigm to apply to the discrimination analysis.[182]

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179. *Andrews*, *supra* note 174 ("Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society" at para. 37).
180. *Brooks*, *supra* note 167 at 28 [emphasis added].
181. *Ibid.* at 40 [emphasis added].
182. *Ibid.* at 28.

Thus, *Brooks*, *prima facie*, provides sufficient principles to address many of the challenges that will be discussed below, however adjudicators have failed to appropriately contextualize pregnancy. This failure has resulted in inappropriate comparators and pregnancy becoming an uncomfortable adjunct in the discrimination analysis. The classification of pregnancy not as a sickness or illness, but as a valid health related reason for absence, has led to an onerous burden of proof being placed on female employees to demonstrate that they are disabled. Many decisions have failed to take heed of Dickson J.'s explicit statement of the importance of the societal value of procreation and the corresponding need to ensure the costs are not borne disproportionately by women. Thus, the true aims of substantive equality and the values underlying the *Charter* and human rights legislation are often unmet.

B. DIFFICULTIES IN APPLYING A COMPARATIVE APPROACH

Brooks has been cited in many cases since 1989. Many of these have involved discrimination complaints on a wide number of protected grounds.[183] For the purposes of this paper, only recent cases relating to pregnancy and maternity and parental leave will be discussed. Two of the earliest cases to consider *Brooks* in the context of pregnancy are *Alberta Hospital Assn. v. Parcels*[184] and *Dufferin-Peel Roman Catholic Separate School Board v. Ontario English Catholic Teachers Association*.[185] In these initial cases, adjudicators clearly struggled, with varying success, to determine the appropriate comparator for pregnancy.

In the decision of the Alberta Court of Queen's Bench in *Parcels*, it was held that the employer discriminated on the basis of sex by requiring those on maternity leave to pre-pay 100% of their benefit plan premiums, while those on sick leave had to pay 25% of their premiums. Thus, the employer was not allowed to treat women on maternity leave differently from employees absent due to illness for that period of maternity leave when women are recovering from childbirth. The court specifically referred to the difficulty in classifying maternity leave, foreshadowing the difficulty later adjudicators would have in applying a comparative approach to pregnancy discrimination. The court applied a bifurcated comparative approach where the portion of maternity leave which was health related must be compared to sick leave, while any "voluntary" maternity leave must not be treated as identical to other leaves due to its uniqueness.[186]

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183. See *e.g. Vriend v. Alberta* [1998] 1 S.C.R. 493, 212 A.R. 237 (discrimination on the basis of sexual orientation); *Falkiner v. Ontario (Ministry of Community and Social Services)* (2000), 188 D.L.R. (4th) 52, 134 O.A.C. 324 (Gen. Div.) aff'd 59 O.R. (3d) 481, 212 D.L.R. (4th) 633 (Ont. C.A.) (discrimination on the basis of receipt of social assistance).

184. *Parcels*, *supra* note 161.

185. (1994), 72 O.A.C. 389 (Div. Ct.) [*Dufferin-Peel*].

186. *Parcels*, *supra* note 161 at 711.

In contrast to *Parcels*, the arbitration board in *Dufferin-Peel* decided that the appropriate comparator was an employee on unpaid leave. In this decision, the employer had been prorating teachers' sick leave credits for the portion of the year before they left for maternity leave. The employer also did this for employees on unpaid leave of absences and unpaid sabbaticals, but did not prorate credits of those on workers' compensation or sick leave. The grievance was upheld, but not on the basis of discrimination. With regards to the discrimination argument, the Board distinguished *Brooks* and found that there was no discrimination on the grounds that other employees on leave were also being prorated, and thus, not only pregnant employees were being affected. The Board failed to contextualize pregnancy appropriately and to consider Dickson J.'s statement that pregnancy is unique due to the benefits that accrue, not only to the individual, but also to society at large. On judicial review, the Divisional Court declined to consider the Arbitration Board's interpretation of *Brooks*.[187]

The vast majority of decisions advancing women's rights have arisen out of the arbitration process, where unions have resourcefully used the quasi-disability aspects of pregnancy to enhance their members' financial interests. This has been particularly apparent in the educational sector. For example, the grievor in *Regina School Division No. 4 v. Teachers of Saskatchewan*[188] asserted that she was entitled to seven weeks under the SUB plan on the basis of the following clause: "[t]he teacher must be unable to teach for health related reasons due to pregnancy, delivery, and post-delivery."[189] Her employer only granted her two days under the SUB plan for post-delivery time spent in hospital. The arbitration board decided that employees on sick leave were the appropriate comparator group, and that for this group, there was no requirement of total disability. Rather, both groups need only establish a valid health related reason for their absence.[190] After considering expert medical evidence, the board determined that the grievor was entitled to eight weeks under the SUB plan. The trial judge set aside this award but the Saskatchewan Court of Appeal restored it.

Two years later, a similar argument faced the Divisional Court in *Ontario Cancer Treatment & Research Foundation v. Ontario Human Rights Commission*.[191] When the claimant's baby was born, she requested sick leave on the basis of postpartum depression because the sick leave provided higher benefits than EI. The employer refused on the basis that the plan did not provide sick leave benefits to anyone on an unpaid leave of absence. The

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187. *Dufferin-Peel, supra* note 185.

188. (1995), 130 Sask. R. 315, [1995] S.J. No. 208 (Q.B.), rev'd (1996) 140 D.L.R. (4th) 300, 148 Sask. R. 81 (C.A.) [*Regina School Division* cited to D.L.R.].

189. *Ibid.* at 304 (C.A.).

190. *Ibid.* at 306 (C.A.).

191. (1998), 38 O.R. (3d) 72, 156 D.L.R. (4th) 174 (Gen. Div.) [*Ontario Cancer*].

Human Rights Board of Inquiry found this to be discrimination on the basis of sex, and the employer appealed on two grounds: first, that it is not discriminatory to bar women on unpaid leave from the sick leave plan after childbirth; and second, that even if it were discrimination, the combination of section 25(2) of the *Human Rights Code* and the *ESA* regulations regarding benefit plans provided a defence. The Divisional Court held that as the employee had not taken maternity leave under the *ESA*, the above provisions did not apply. The Court also stated that even if she had been on maternity leave, section 25(2) would not provide a defence. Applying the principle that defences to human rights violations are to be construed narrowly, the Court held that section 25(2) did not apply to self-funded sick leave plans. Decisions such as *Brooks* and *Ontario Cancer* have resulted in changes to minimum standards legislation, and regulations under the *ESA* now require employers to provide employees on pregnancy and parental leave with benefits provided to employees on other leaves.[192]

One of the seminal decisions since *Brooks* is *O.S.S.T.F., District 34 v. Essex County Board of Education*.[193] This case involved a teacher's request to utilize her 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. The collective agreement provided for sick leave where an employee suffered from a "sickness, or physical or emotional disability". The employer argued that a normal delivery did not constitute a disability, whereas the union argued that the employer's refusal to provide sick leave constituted sex discrimination.

The majority of the arbitration board upheld the employer's position on the basis that disability due to pregnancy and childbirth was specifically recognized in the *ESA*'s maternity leave provisions, and thus, the collective agreement should be interpreted to exclude them.[194] The majority saw sick leave and maternity leave as two mutually exclusive types of leave, indicating that the comparator group chosen was those on unpaid leave. This decision was found to be patently unreasonable by the Divisional Court due to its conflict with fundamental human rights, public policy and the principles expressed in *Brooks*.[195]

The Court of Appeal held that the collective agreement discriminated on the basis of sex and that a delivery without complications satisfied the ordinary interpretation of being physically disabled.[196] Thus, the chosen comparator group was disabled employees. However, the Court of Appeal refused to remit the matter back to the board of arbitration on the basis that

192. O. Reg. 286/01, s. 10.
193. *Essex County*, *supra* note 162.
194. *Ibid.* at para. 12 (Div. Ct.).
195. *Ibid.*
196. *Ibid.* at para. 19 (Ont. C.A.).

the grievor's physician had failed to provide sufficient evidence as to the length of time the grievor was disabled. Thus, the decision established that women on maternity leave could access sick leave benefits, but left the amount of time of the leave open for future debate.[197] To put the Court of Appeal's decision on the evidence into context, one should note that the grievor's physician provided written documentation indicating that it was obvious that she could not work and deliver her baby on the same day, and that the standard for obstetrical care was a six week recovery period on the basis of several listed symptoms. This preoccupation with determining the exact length of time a woman is disabled by childbirth continued in several later decisions discussed below.

Following *Essex* was *Hamilton-Wentworth District School Board and O.S.S.T.F. (Chaikoff)(Re)*.[198] In this decision the grievors sought sick leave, which paid the equivalent of their salary, after giving birth.[199] The first grievor sought six weeks of sick leave immediately following delivery. The second grievor sought 19 weeks after delivery, during which she had surgery for removal of her gallbladder. The employer's previous practice had been to not pay sick pay to employees while they were on an unpaid leave of absence.

The collective agreement stipulated that a certificate of illness was required to qualify for sick leave. Expert evidence was accepted indicating that pregnancy and delivery do not constitute an illness, therefore the arbitration panel found that based solely on the provisions of the agreement, the grievors would not be eligible for sick leave. However, the panel relied on *Brooks* for the proposition that pregnancy is a valid health related reason for absence from work. As such, it must be treated in the same manner as an accident or illness, and therefore the sick leave provisions must be available to women after childbirth.[200] Here, the comparator group used was those off work due to illness or accident, despite the expert evidence indicating that pregnancy is not an illness.

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197. See also *Dufferin-Peel Roman Catholic Separate School Board and O.E.C.T.A*, (1998), 80 L.A.C. (4th) 149 (the arbitration board held that a teacher is entitled to sick leave provided under the collective agreement during the period she is physically disabled and unable to work as a result of her normal pregnancy and the birth of her child, even if this period of disability occurs during her pregnancy or parental leave).
198. (2000), 89 L.A.C. (4th) 194 [*Hamilton*].
199. *Ibid.* at 198 (Art. 20.9(a) of the agreement read, "A Member granted a statutory pregnancy leave of absence shall be compensated by the Board under a U.I.C. approved Supplementary Unemployment Benefit (SUB) Plan, provided the Member: (i) is eligible for pregnancy leave benefits under U.I.C. (ii) makes a claim to the Board on a form to be provided indicating the weekly amount payable by U.I.C. (b) No supplementary benefit will be paid under this Plan for any week in the waiting period which falls outside the Member's normal employment period (July and August if ten (10) month employment)").
200. *Ibid.* at 233.

Argument was then heard on the length of time the grievors were disabled[201] and the panel found that both grievors were entitled to be away from work for six weeks postpartum.

In *Hamilton*, Member Capstick partially dissented on the basis that there was insufficient evidence demonstrating that the grievors could not return to work earlier than six weeks and raised the concern that the panel was allowing "all females who are pregnant...to receive six (6) weeks of sick pay with no questions asked."[202] Interestingly, Member Capstick goes on to clarify that he agrees that pregnancy provides a valid health-related reason for absence, but:

> My argument is with the use of sick pay to compensate an employee on pregnancy leave. From a social perspective, this creates yet another form of discrimination. Those employees who are fortunate enough to have a sick leave plan will be provided financial support of some kind while those that do not will still be disadvantaged.[203]

Member Capstick's comments reflect a heightened concern over extending benefits to mothers, and seem to be implicitly suggesting a return of the similarly situated test by indicating that the appropriate comparator group is other pregnant women. Further, Member Capstick's comments regarding creating another form of discrimination are surprising as one of the principal reasons for unionization is to provide the members with additional protections and benefits in the workplace.

It appears that this recurring preoccupation with medical evidence may be waning. For example, when one contrasts the result in *Peel Board of Education and O.S.S.T.F. (Bennett)(Re)*[204] with Member Capstick's fears in *Hamilton*, the difference in perspective is striking. In *Peel*, the employer agreed that the employees were able to access sick leave, but was insistent that each entitlement be established on the basis of individual evidence. Arbitrator Kaplan heard expert evidence that the six week recovery period is accepted by the majority of medical practitioners regardless of the length of labour or mode of delivery. Considering this evidence within a contextual framework, the arbitrator found that forcing each woman to go to her doctor during the second or third week postpartum to obtain a doctor's note was counter-productive to the well-being of the woman, her child, and social interests considered more generally. Thus, the appropriate comparator group is still sick or disabled employees, but only for a six week period.

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201. *Ibid.* at 234 (Interestingly, the employer's counsel argued that the employer could have accommodated the women after they left the hospital by allowing them to return to modified duties on a part-time basis. The panel refused to consider this argument, as the employer had done nothing to communicate this option to the grievors at the appropriate time).
202. *Ibid.* at 245.
203. *Ibid.* at 246.
204. (2000), 92 L.A.C. (4th) 289 [*Peel*].

Recently, there have been cases that have moved away from the quasi-disability comparator debate and instead have focused more appropriately on how best to remove gender-related barriers. In *Carewest*,[205] the grievor was terminated when she was unable to return to work at the end of her leave. At the time her leave of absence ended, the grievor's infant had suffered from an illness and its only source of nourishment was breast milk. Initially, the grievor attempted to characterize the issue as one that required a health related leave of absence, but the employer refused and characterized her request as one "based on a personal choice."[206] The grievor then requested a general leave of absence, or in the alternative, a compassionate leave.

Arbitrator Moreau applied the principles in *Brooks* and was careful to contextualize the issue. Breast-feeding, although a matter of choice, was found to be "an immutable characteristic, or incident of gender and a central distinguishing feature between men and women."[207] There was no confusion with regards to the appropriate comparator group or human dignity, and Arbitrator Moreau held that the employer's position was *prima facie* discriminatory on the basis of gender because a woman who breast-feeds her child when she is scheduled to return to work may be unable to perform her duties in the same way she did before she was breast-feeding.[208] In addition, he found that breast-feeding benefited the child, the woman, and society as a whole, was intimately connected to childbirth and was deserving of protection under the principles enunciated in *Brooks*.[209] The Arbitrator relied on *Meiorin*,[210] particularly in the area of a contextual approach to creating standards in the workplace: "By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the *standards governing the performance of work should be designed to reflect all members of society*, in so far as this is reasonably possible."[211] The employer failed to meet the accommodation threshold. Decisions such as *Carewest* illustrate the potential for the duty to accommodate to be used to remove barriers facing women when they return from parental leave.

In *British Columbia (Public Service Employee Relations Committee) and B.C.G.E.U. (Reaney) (Re)*,[212] the grievor was an adoptive mother whose

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205. *Carewest, supra* note 163. See also *Poirier v. British Columbia (Ministry of Municipal Affairs, Recreation and Housing)* [1997] B.C.H.R. (T.D.) No. 14 (another decision allowing a grievance on the basis of breastfeeding).
206. *Carewest*, ibid. at 136.
207. *Ibid.* at 160.
208. *Ibid.* at 161.
209. *Ibid.* at 160 (Detailed expert evidence was heard regarding the benefits and effects of breastfeeding on mother and child).
210. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin)* [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1, rev'g (1997), 149 D.L.R. (4th) 261 (B.C.C.A.), aff'g (1997), 58 L.A.C. (4th) 159 (Chertkow) [*Meiorin* cited to S.C.R.].
211. *Carewest, supra* note 163 at 159 [emphasis added].
212. (2000), 92 L.A.C. (4th) 64, aff'd (2002), 216 D.L.R. (4th) 322, 4 B.C.L.R. (4th) 301 (C.A.) [*Reaney* cited to D.L.R.].

employer provided a SUB plan. The grievor was entitled to EI parental leave benefits, but not maternity leave benefits, and thus, her SUB plan payments were less than a biological mother would have received. She alleged that this treatment constituted discrimination on the basis of family status. Arbitrator Germaine succinctly summed up the issue:

> This case, then, is about the benefits provided by the collective agreement to an employee who is an adoptive mother. But it is also about a social movement dedicated to the eradication of the persistent view that adoption is a second class method of forming a family.... The premise is that an adoptive mother's stresses and burdens are different from those of a biological mother, but they are not less.[213]

Arbitrator Germaine, although he considered himself bound by *Schafer v. Canada (Attorney General)*,[214] nonetheless made a considered analysis of precedent and public policy underlying the distinction between adoptive and biological parents. Despite the result, his analysis is compelling, certainly challenges the status quo, and leaves the door open to future advancements in this area of the law. He accepts that both adoptive and biological mothers have been subjected to significant disadvantages in the workplace on the basis of presumed group-related characteristics and that as such, the denial of benefits under the collective agreement could constitute a violation on the grounds of family status and sex.[215] Arbitrator Germaine's decision was upheld by the Court of Appeal, where Justice Lambert was explicit in that the purpose of maternity leave benefits was the protection of the health and well-being of pregnant women and biological mothers following the strain of the birth process.[216] Thus, the quasi-disability comparator, although successful in many cases at achieving enhanced financial protection postpartum for biological mothers, in this case forestalled similar claims by adoptive mothers and could act as a similar constraint on future claims by fathers.

Another case that illustrates the continual difficulty adjudicators face in determining the appropriate comparator for maternity and parental leave is *Re British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*.[217] Arbitrator Dorsey was faced with the issue of whether a notice of layoff received before an employee went off on a leave of absence allowed the employer to lay off the employee while she was still on leave, or whether the notice of layoff was suspended until the end of the leave.[218]

Arbitrator Dorsey held that a teacher would not be insulated from layoff during a leave, where leave was taken after the notice of layoff was given,

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213. *Ibid.* at para. 6.
214. (1997), 149 D.L.R. (4th) 705, 102 O.A.C. 321 (C.A.) [*Schafer* cited to D.L.R.].
215. *Reaney, supra* note 212 at para. 84.
216. *Ibid.* at para. 17.
217. (2002), 108 L.A.C. (4th) 351 [*Teachers' Federation*].
218. *Ibid.* at 353 (Both parties agreed that a teacher already on leave was insulated from layoff until she returns to work).

but before the effective date of the layoff, except for workers on pregnancy, parental, long-term medical leave or workers' compensation.[219] All of these decisions are linked together by Arbitrator Dorsey's specific reference to the worker's incapacitation, which indicates that the ruling is based on disability. However, Arbitrator Dorsey does make an imprecise distinction between pregnancy/parental leave and long-term disability or workers' compensation leaves:

> [I]f the leave...is a pregnancy/parental leave the teacher's status cannot be changed from being on pregnancy/parental leave to laid off.... *Similarly, but for different reasons*, a teacher who commences long-term medical or worker's compensation or other leave because of incapacitation before the effective date of the layoff cannot have his or her status changed to laid off.[220]

Arbitrator Dorsey's decision is noteworthy for the inclusion of not just pregnancy, but also parental leave, with other medical related leaves. This may demonstrate a willingness to break away from the bifurcated approach adopted in *Parcels*, which created a strict demarcation between the disabled and voluntary stages of the leave.

Re Region 6 Hospital Corporation and New Brunswick Public Employees' Association[221] represents a step backwards in the pregnancy discrimination analysis. The grievor argued that her pay increases, which were based on "regular hours of work", should have included her maternity leave.[222] Her argument was that classifying maternity leave as an unpaid leave, and its impact on her pay increment calculation, violated human rights legislation. Arbitrator McEvoy utilized the factors expressed in *Law v. Canada (Minister of Employment and Immigration)*[223] in his analysis, which conflicts with the normal practice of limiting *Law* to *Charter* challenges. The difficulty with this approach is its inherent subjectivity, as indicated by the arbitrator's wording:

> I fail to appreciate how [classifying] maternity leave as leave without pay reflects stereotyping or perpetuating a false view of the capabilities of female employees. It is leave without pay because it is essentially a *lengthy personal leave without a link or benefit to the employer*. In contrast, educational leave is an example of a leave with pay with obvious advantages to the employer by enhancing the value of the employee to the workplace.[224]

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219. *Ibid.* at 364.
220. *Ibid.* at 366 [emphasis added].
221. (2002), 109 L.A.C. (4th) 150 [*Re Region 6*].
222. *Ibid.* at 153 (The relevant clauses of the collective agreement were as follows: 17.02 "In the case of absence without pay, the pay increment date shall be adjusted accordingly"; and 22.02(a) "When an employee has been granted leave of absence without pay the seniority of such employee shall be retained but seniority and any benefits measured by length of service shall not accumulate during such leave of absence." The grievor's primary argument was that this was an improper interpretation of the collective agreement. For the purposes of this paper I shall only examine the secondary argument which was based on discrimination).
223. [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].
224. *Re Region 6, supra* note 221 at para. 17 [emphasis added].

In ruling against the discrimination argument, the arbitrator found that the proper comparator was a male employee on unpaid leave.[225] This led to the result that female employees on maternity leave were perceived by the arbitrator to be treated more favourably than male employees, as female employees accumulated seniority while the male employees on unpaid leave did not. This decision is in clear contradiction with *Brooks* because, as explained by Dickson C.J.C., maternity leave benefits all of society and describing it as a leave without benefit to the employer is misleading. Further, the decision demonstrates the shortfalls inherent in the comparative approach. As Miranda Lawrence persuasively argues, women on pregnancy leave do not really have a comparable group, and thus a "new approach to equality analysis is needed. A substantive equality or feminist analysis of equality would not have forced the court to make a false comparison but would have allowed the court to consider context, history and factors such as whether the rule further subordinates or empowers women."[226]

C. *LESIUK V. CANADA (ATTORNEY GENERAL)*: MOVE TO CONTEXTUALIZATION NOT UPHELD BY HIGHER COURTS

One of the most recent significant cases arising out of the EI arena was *Lesiuk v. Canada (Attorney General)*,[227] which came about when the 1996 *EIA* changed the minimum eligibility requirements [MERs] from a minimum number of 15-hour weeks to a range of 420–700 hours cumulative over the year. Ms Lesiuk asserted that this change had an adverse impact on women and thus violated section 15(1) of the *Charter*.[228] As the primary caregiver for her child, Ms Lesiuk worked part-time and had accumulated 667 hours, instead of the required 700. The Commission denied her claim, which was upheld by the Board of Referees.

Ms Lesiuk appealed to the Umpire, and LEAF was granted intervener status. Umpire Salhany applied the tripartite discrimination analysis from *Law*. He concluded that the MERs had a differential impact on Ms Lesiuk.[229] Expert evidence indicated that women are more likely to be in part-time

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225. *Ibid.* at para. 13.
226. Lawrence, *supra* note 9 at 70.
227. *Lesiuk*, *supra* note 63.
228. *Charter*, *supra* note 157, s. 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").
229. *Lesiuk*, *supra* note 63, Umpire Salhany ("As already noted, men work, on average, 39 hours per week, while women work, on average, 30 hours per week in paid employment. Thus, a standard based on 35 hours per week clearly leaves the average woman at a disadvantage. Moreover, as the evidence noted indicates, women continue to perform two-thirds of unpaid labour, leaving them with fewer hours to devote to paid employment. Some women, like the appellant, with children, not yet of school age, face the toughest challenge. They are required to alter their paid work arrangements to meet demands of unpaid work, while the age or presence of children has little impact on men's paid or unpaid work patterns" at para. 50).

work due to the societal assumptions that women should undertake the bulk of childcare and domestic obligations,[230] and that in 1998, 50% of women and only 20% of men worked less than 35 hours per week.[231] Thus, Umpire Salhany accepted that a strictly hours-based standard excluded more women than men from benefits.[232]

At the second stage of analysis,[233] the Attorney General argued that the appropriate comparator group was other women with children. Again, this is the similarly situated test, which seems to never die. Ms Lesiuk's counsel argued that the differential impact was based on two grounds, sex and parental status, and that the appropriate comparator was a male in his prime working years. The umpire concluded that parenthood is an analogous ground.[234]

The third stage of analysis was whether the effect of the law was substantively discriminatory. The Attorney General, after arguing that the legislation did not promote a stereotypical view of young women with children, argued that most women with young children had a husband working full-time on whom they could rely for financial support.[235] Umpire Salhany concluded that the legislation placed a higher value on intensive short-term employment, which was more likely to be achieved by males, than on consistent part-time employment.[236] Thus, the legislation forced women, regardless of their unpaid responsibilities, to assume a male working pattern in order to receive benefits from the EI system.[237] This violated women's dignity by defining them as unworthy of benefits. When applying the *R. v. Oakes*[238]

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230. *Ibid.* at para. 19.
231. *Ibid.* at para. 24.
232. *Ibid.* at para. 29.
233. *Ibid.* at para. 54.
234. *Ibid.*, Umpire Salhany ("Parenthood is central to one's identity and personhood; it is a status that is immutable. It is true that the status will change when the children are no longer in need of a caregiver, but that does not change the fact that their status is immutable until that time comes" at para. 59. He also decided that Ms Lesiuk's status as a primary caregiver for her children was not one in which the government had a legitimate interest in changing).
235. *Ibid.* at para. 63.
236. *Ibid.* at para. 65.
237. *Ibid.* at para. 67.
238. [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes*] (With regards to an analysis under section 1 of the *Charter*, the Court asks two questions to determine whether a law is constitutional: 1) Does the legislation infringe a *Charter* right? If no, it is constitutional; 2) If yes, is the infringement of that right justified as a limitation under section 1 of the *Charter*? According to s.1, *Charter* rights can be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The *Oakes* test is the method described by the Supreme Court for determining whether a law that violates a fundamental right or freedom should be saved as a reasonable limit under section 1. The test is as follows: 1) The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important; 2) Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must: (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom in question as "little as possible"; and (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective).

test, the MERs were found to lack a pressing and substantial objective and a rational connection, as they did not discourage misuse, nor ensure a major workforce attachment in a more effective fashion than the previous requirements.[239]

Umpire Salhany's reasons indicate a modern day awareness of underlying *Charter* values and the importance of contextualization. However, on judicial review, the Federal Court of Appeal overruled his decision. A request by LEAF to change the original comparator was denied and the original comparison to all males as originally suggested by Ms Lesiuk's counsel was adopted. The Court accepted that Ms Lesiuk suffered differential treatment as a result of her parental status and gender.[240] However, Létourneau J.A. held that Ms Lesiuk failed to establish that "there was a past and long history of disadvantages, stereotyping, vulnerability and prejudice caused by the MERs under the old system. Indeed...the respondent would like to return to the old system."[241] With respect, this reasoning suggests that anyone attempting to challenge a current legislative regime is required to demonstrate that earlier legislation was discriminatory.

The Court dismissed Umpire Salhany's conclusion that requiring women to adopt male working patterns in order to qualify for benefits accords women's labour less recognition and worth, stating that anyone who wants to qualify simply needs to work more. Further, the Court states that "[i]t would stretch reason to imagine that reasonable persons in the respondent's situation would feel themselves any less valuable as a worker or as a member of society by the mere fact of having narrowly fallen short of qualifying for EI benefits."[242] An opposing viewpoint to the Court's conclusion is the perspective of Nitya Iyer who considers the issue within a contextual framework and compellingly argues that "[d]enying the maternity benefits to these women is one way in which they are denied public recognition and support as mothers.... In a deeply sexist society, in which the ultimate in feminine achievement is motherhood, a refusal to recognize some women as mothers is to relegate them to the margins of their gender."[243]

The Court upheld the MERs under section 1 of the *Charter*.[244] It appears that the Court mischaracterized the issue and analyzed it as if Ms Lesiuk was asserting that the 700 hours requirement should simply be lowered to 667 hours or removed entirely, stating that the *absence of a threshold* would change the EI system from insurance to social assistance.[245] With

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239. *Lesiuk*, *supra* note 63 at paras. 70–71.
240. *Ibid.* at para. 33 (F.C.A.).
241. *Ibid.* at para. 45.
242. *Ibid.*
243. Iyer, *supra* note 59 at 178.
244. See *supra* note 238.
245. *Lesiuk*, *supra* note 63 at para. 69 (F.C.A.).

respect, this was not the legal question posed to the Court. The focus should be whether the eligibility requirement's design, based *solely on hours*, minimally impairs Ms Lesiuk's rights while still meeting its objective. In other words, would another formula or means of calculating a threshold requirement also achieve the same aims without having a disproportionate impact on women?

In summary, the Federal Court of Appeal's judgment in *Lesiuk* is problematic in several ways. The mischaracterization of the issue leads to an implicit concern threading throughout the judgment that if the challenge was successful, the floodgates would be opened for other claimants until "there is no threshold."[246] Second, it does not recognize the principles articulated by the Supreme Court regarding blanket thresholds and the importance of individual, flexible standards whenever possible.[247] Third, there is a failure to contextualize. The Court failed to frame the analysis with the recognition that women have historically been disadvantaged by having to disproportionately bear the burdens of procreation. The Court also did not acknowledge the societal benefit derived from procreation and childcare.

Leave to appeal to the Supreme Court was recently denied to Kelly Lesiuk on July 17, 2003.[248] Interestingly, the requirements for accessing maternity benefits were reduced to 600 hours after Ms Lesiuk's claim was initiated. In the most recent report of the EI Commission, it is estimated that this reduction increased the percentage of women accessing maternity and parental benefits by 5%, resulting in 84% of mothers with insurable employment receiving benefits.[249]

D. MOVING FORWARD: APPLICATION OF *MEIORIN* IN *MCALLISTER-WINDSOR*

Juxtaposed against the Federal Court of Appeal's disappointing decision in *Lesiuk* is the Canadian Human Rights Tribunal (CHRT) decision in *McAllister-Windsor*. The issue was whether the maximum cap in the EI legislation[250] on combining sick, maternity and parental leave had a discriminatory effect on women on the basis of disability and sex. Ms McAllister-Windsor had a medical condition during her pregnancy. She collected 15 weeks of EI sickness

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246. *Ibid.* ("Indeed, in case of simply lowering the MERs, members of the respondent's group or of these other groups who would not meet the new lowered threshold would still be entitled to make the same claim on the same basis. Challenges could be made by the remaining members of these groups until, in the end, there is no threshold" at para. 16).
247. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385.
248. *Lesiuk, supra* note 63.
249. *EI 2002 Report, supra* note 13 at iii.
250. *McAllister-Windsor, supra* note 30 (At the time of Ms. McAllister-Windsor's application for benefits, the insurance scheme was "Unemployment Insurance." On 30 June 1996, the name was changed to "Employment Insurance", and thus this terminology is used throughout the CHRT's decision).

benefits and after giving birth, collected 15 weeks of maternity benefits. Her claim for parental benefits was denied, as section 11(5) of the *Unemployment Insurance Act*[251] stipulated that anyone claiming sickness, maternity and parental leave would be limited to a maximum of 30 weeks combined.

Evidence was given regarding the purpose of the legislation,[252] which indicated that the original purpose of EI was to provide a temporary income replacement for unemployed individuals during their reintegration into the workforce. In 1971, the scheme was modified to provide coverage for pregnancy, which represented a fundamental change from a purely insurance-based scheme to one with a social element. The Tribunal took note of two reports. First, a 1962 report in which a Commission of Inquiry recommended that maternity benefits should be dealt with separately from unemployment insurance. Second, the 1985 Report of the Parliamentary Committee on Equality Rights which recommended that maternity and parental benefits, as a normal consequence of women's full participation in the workforce, should not be dealt with in the same context as sickness benefits.[253]

The Tribunal decided that the appropriate comparator group was individuals claiming illness, maternity or parental benefits. The Tribunal concluded that the only people who would have their benefits limited by the cap would be pregnant women who claimed sickness benefits and that this was *prima facie* discriminatory. The Tribunal then applied the unified test laid out in the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin)*.[254] The cap was found to be rationally connected to the purpose of short-term income replacement and was set in good faith. Evidence was provided that removing the maximum cap would add an additional $2,789,928 annually. However, the EI fund had been in surplus since 1996 and at the time of the decision had an excess of approximately $29 billion. Thus, the evidence provided by HRDC failed to show that accommodating women in the situation of Ms McAllister-Windsor by removing the cap would cause undue hardship. HRDC was ordered to cease applying the cap and the order was suspended for 12 months.

McAllister-Windsor is highly significant in several ways. First, it is important simply as a rare example of where this legislative scheme has been successfully challenged. Sociologist and legal scholar Gaile McGregor conducted a survey of Federal Court of Appeal decisions and found a problem-

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251. R.S.C. 1985, c. U-1.
252. *McAllister-Windsor*, *supra* note 30 (Evidence given by Mr. McFee, the Director of Policy and Legislation Development in the Insurance Branch of HRDC at para. 10).
253. *Ibid.* at para. 18.
254. *Meiorin*, *supra* note 210.

atic lack of success of *Charter* challenges to the EI system.[255] Most claimants in the EI appeal system are unrepresented and as noted by Gaile McGregor, EI jurisprudence has, until very recently, been insulated from objective scrutiny. Second, it recognizes the fundamental difference underlying the purpose of maternity leave benefits versus regular benefits under the employment insurance scheme. Third, the application of *Meiorin* in *McAllister* versus the application of *Law* in *Lesiuk* is critical. Under *Meiorin*, if the complainant can demonstrate a *prima facie* case of discrimination, then the onus shifts to the respondent to satisfy the unified test. Of those cases arising from the workplace, there is generally little dispute over the *prima facie* discrimination threshold, particularly when the argument is based in part on the ground of disability. The third stage of the test, the focal point for legal debate, requires the respondent to demonstrate that it is impossible to accommodate the complainant without incurring undue hardship. This limits the available scope of judicial subjectivity that occurs when *Law* is applied. Thus, challenges arising out of the workplace are more likely to be successful under the human rights analysis than those challenging the EI regime under the *Charter*. This again suggests the legislature must take action and amend the *EIA*.

VII. Conclusion

WHILE ON THE SURFACE IT APPEARS that pregnancy-related discrimination analysis has come a long way since *Bliss*, the above decisions indicate there is still much work to be done, as evidenced by the strange and vacillating evolution of the comparative approach. First, there is the application of the similarly situated test in *Bliss*; then there is the quasi-disability comparison made in *Brooks*: a valid health related reason for absence. The reasons in *Parcels* demonstrate the Court's struggle with defining the appropriate comparator due to the unique and hybrid nature of pregnancy. As a result of this struggle, adjudicators began to apply a bifurcated approach and to divide maternity leave into two mutually exclusive time periods during which the comparator is an individual on either a health-related or voluntary leave. This in turn forced adjudicators to choose between competing experts to determine the time period during which the woman was disabled. This quasi-disability comparison, while effective in some cases in advancing

255. Gaile McGregor, "Lesiuk versus the Employment Insurance Commission: Fighting for *Charter* Rights in an Anti-*Charter* Environment" (March 2002) [unpublished] at 13 (Out of the 24 decisions, only four find in favour of the appellant and two of these arise from the human rights system. The other two were not *Charter* challenges to the substance of legislative regime. Of the 24, none reversed a lower level decision in favour of the claimant). For a more general discussion of shortcomings in the EI appeals system, see Gaile McGregor "Anti-Claimant Bias in the Employment Insurance Appeals System: Causes, Consequences, and Public Law Remedies" (2002) 15 Can. J. Admin. L. & Prac. 229.

women's financial interests, is now acting as a restraint on adoptive mothers, as seen in *Reaney*. Another decision, which indicates that the comparison approach is still evolving, is *Re Region 6* where the choice of comparator was a male employee on an unpaid leave. This unsuitable comparator is a result of a failure to appropriately contextualize the issue. Had the arbitrator started from the proposition that inequality exists in the workplace, that procreation benefits all of society, and that women should not have to bear this burden alone, the choice of a male employee on unpaid leave would have been seen as inappropriate.

Yet, certainly progress has been made. Two of the most recent decisions, *Carewest* and *McAllister-Windsor*, represent a shift away from the comparison debate, instead concentrating the analysis on how best to address barriers facing mothers in the workplace. Both decisions illustrate the importance of a contextual approach, and incorporated within this seems to be an underlying, although unstated, recognition that one must begin with the presumption of inequality, not equality. In decisions such as *Carewest*, where the threshold for showing discrimination is whether the rule or policy had an adverse impact on the respondent on the basis of a protected ground,[256] the real argument centres on the duty to accommodate, moving the focus from the debate over the appropriate comparator group to how best to remove barriers to substantive equality. Conversely the emphasis on *Law*'s human dignity factor, as in *Lesiuk* and *Re Region 6*, allows too much scope for adjudicative subjectivity, rendering the law less certain and, in a still male-dominated society, less favourable to women.[257]

The majority of the decisions resulting in favourable outcomes for women arose predominantly out of the unionized workplace, again illustrating the widening gap between unionized and other workers. Union membership provides appropriate counter pressure in a relationship that has traditionally been composed of a power imbalance, with the employer having the financial ability as well as access to legal expertise, to minimize its

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256. See *e.g.*, the arbitrator's decision in *Meiorin*, *supra* note 210 at 206 (L.A.C.) ("As a group, therefore, women are clearly adversely effected when the employer set the 50 VO [2] max standard which, although neutral on its face, has a discriminatory effect on women, one of whom was the grievor.") (accepted by the Supreme Court in *Meiorin*, *supra* note 210 (S.C.R.)).

257. For a rare favourable application of the human dignity factor involving maternity leave, see Marshall J.A.'s dissenting opinion in *Power v. Canada (Attorney General)* (2003), 224 Nfld. & PEIR 332, 105 C.C.R. (2d) 227 (Nfld. C.A.) ("As counsel for the appellants intimates, to treat these five individuals unequally to these similarly attached to the fishery who had been capable of working, simply because those five had been unable to work for specific finite periods in the past by reason of disability, illness, pregnancy and family responsibilities...places the appellants on the same plane as persons uninterested in working. This would constitute an assault upon their human dignity, sense of identity, self worth, and emotional well-being. By the same token, granting access to full TAGS benefits to co-workers, who were able to log sufficient time in the qualifying period, whilst denying them to the appellants who were unable to record sufficient time because of the respective situations then confronting them, would constitute an affront to their human dignity, and undermine their self-worth on any reasonably objective assessment of that differentiation" at para. 151).

obligations to employees. The remainder of the population is left with civil litigation, the EI regime, or the Human Rights Commission. The Commission represents a solution which normally only impacts one individual and human rights claims are notorious for the lengthy delay in resolving claims.[258] Many workers are denied access to civil litigation due to the prohibitive cost. For non-unionized workers, many of the decisions above will have little to no immediate impact on their working lives. This indicates that adjudicative reform alone is insufficient to help women in all tiers combine their roles as mothers and workers and to achieve substantive equality in the Canadian labour force.

Legislative reform to the *EIA* is also critical. As noted by Gøsta Esping-Andersen, "the compatibility of motherhood and careers is contingent on the nature of institutional support."[259] The Canadian government should sever the historical connection between regular benefits and maternity/parental benefits in recognition of the fundamentally different policy reasons underlying both types of benefits. The benefit rate for those on maternity and parental leave should be increased to 67% and the maximum cap of $413 per week increased to meet the Before Tax Low-Income Cut-Off rates established by the National Council of Welfare. Following the trend already beginning in other jurisdictions, the eligibility requirements should be broadened to encompass those who are most in need. Should these reforms be implemented, the EI system could be a crucial mechanism for narrowing the gap between the unionized worker and those who are apt to be the most vulnerable members of society.

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258. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 190 D.L.R. (4th) 513.
259. Esping-Andersen, *supra* note 5 at 71.