

# Employment Standards that Work for Women

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## PREFACE

In December 2005, I received an e mail inviting me to attend an *ad hoc* and hurriedly convened meeting in Winnipeg of a small group of feminist lawyers and community activists to discuss the possibility of making submissions to the recently announced Manitoba Employment Standards Review ("the Review.."). Our goal was to ensure that the rights and interests of women would be an integral part of any decision to amend the *Employment Standards Code* ("the Code,).<sup>1</sup> This was a tall order, given that the time frame was tight and we were all busy over the December holiday season: the Review was announced in a press release on 10 November 2005<sup>2</sup> and submissions were due by 16 January 2006. In these circumstances, the brief that was ultimately submitted on behalf of the Manitoba branch of the Women's Legal Education and Action Fund ("LEAF"),<sup>3</sup> the Manitoba Bar Association Equality Issues Section,<sup>4</sup> and the Manitoba Association of Women and the Law ("MAWL")<sup>5</sup> is a significant accomplishment and a testament to the profound commitment

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*Employment Standards Code*, S.M. 1998, c. 29, C.C.S.M. c. E110. The *Code* has since been amended by *The Employment Standards Code Amendment Act*, S.M. 2006, c. 26 (the "amended Code").

Manitoba Government, News Release, "Province Calls for Input on Employment Standards Review" (10 November 2005), online: Manitoba Government <<http://www.gov.mb.ca/chc/press/top/2005/11/2005,11,10-04.html>>.

LEAF Manitoba is a branch of a national voluntary sector non-profit organization, which advances the equality of women and girls in Canada, through strategic litigation, law reform, and education, based on the *Canadian Charter of Rights and Freedoms*.

Members of the Equality Issues Section of the MBA examine equality issues within both the legal system and the profession. This Section also plays a major role in advising the CBA/MBA and government on issues affecting women and the law.

MAWL is a feminist, non-profit organization, an affiliate of the National Association of Women and the Law Inc. whose goals are to promote the equal treatment of Canadian women and men through research, lobbying and education.

demonstrated by members of that *ad lwc* group,<sup>6</sup> and the organizations to which they belong, to see that women's equality rights were represented in this important forum.<sup>7</sup>

What follows is a revised and abridged version of that brief. Since it was submitted, electronic copies of all written submissions made to the Review were posted on the website of the Department of Labour and Immigration<sup>8</sup> and the Department developed a number of proposals to amend the *Code*. Those proposals were considered by a joint Labour Management Review Committee chaired by Michael Werier (who also chaired the Review) and various recommendations were made. Legislation to amend the *Code* was passed in the Legislature and came into force on 30 April 2007 and a new *Employment Standards Regulation*<sup>9</sup> came into force on the same day. A substantial number of changes advocated in our brief have been incorporated into the amended *Code* and Regulation.<sup>10</sup> It was heartening to see, for example, that our recommendations concerning the discriminatory exclusion of domestic workers from *Code* protections were at least partially addressed in the amendments. This matter was not included in the original Discussion Guide for the Review and we understand that it was put on the legislative agenda due to our submissions. While there is still some distance to go to achieve an employment standards regime that truly *works* for Manitoba women, the province has taken some significant steps in that direction.

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I authored the original brief, with contributions from Shannon Carson, Myers Weinberg LLP and Evelyn Braun, LEAF Manitoba, and in collaboration with a working group that also included Veronica L. Jackson, Lorna Turnbull (Associate Dean and Associate Professor of Law, University of Manitoba), Dani Fraser (MAWL), and Sharon Scharfe (MAWL). Shannon Carson's more detailed *Charter* analysis of the discriminatory impact of excluding domestic workers and agricultural workers from the *Code* will be published separately and Evelyn Braun's consideration of the gendered nature of parttime work has been published in her article, Evelyn Braun, "Adverse Impact Discrimination: Proving the Prima Facie Case," (2005) 11 *Rev. Const. Stud.* 119 at 137-141 and 143-147.

We have since learned that other women's organizations such as the Provincial Council of Women of Manitoba, the United Nations Platform for Action (UNPAC) Manitoba group, and the Manitoba Women's Advisory Council, also made submissions concerning women's equality to the Review.

Manitoba Labour and Immigration, *Employment Standards Code Review*, online: Manitoba Labour and Immigration <[http://www.gov.mb.ca/labour/labmgt/emp\\_standards/submissions](http://www.gov.mb.ca/labour/labmgt/emp_standards/submissions)>.

Man. Reg. 6/2007.

<sup>10</sup> Where significant changes were made on the matters raised in our brief, we have mentioned them in footnotes throughout this article.

# I. INTRODUCTION

We commend the Manitoba government on its decision to launch this Review of the Manitoba *Employment Standards Code*. The Discussion Guide<sup>11</sup> alludes to the fact that this Review is long awaited and, in fact, long overdue. Manitoba lags far behind other Canadian jurisdictions in some key areas of worker protection and basic entitlements. Section 62 of the *Code* is just one example of a provision that is out of step with other jurisdictions and indeed with the jurisprudence of the Supreme Court of Canada.<sup>12</sup> It contains a long list of exceptions to the bare minimum requirement that an employer give one pay period notice to terminate a person's employment. Notably, subsections (b) and (c) permit an agreement between employer and employee or the "established practice" of an employer to trump even that minimum notice requirement.<sup>13</sup> The lack of any graduated notice period in the Manitoba legislation is similarly surprising and a source of hardship for low-income and low status non-unionized workers (cf., for example, the Ontario *Employment Standards Act*, which provides for notice up to eight weeks depending on the length of employment).<sup>14</sup>

The Discussion Guide describes the focus of this Review as related to two broad themes:

- Reflecting the realities of the modern economy by increasing flexibility, modernizing protection, coverage and compliance; and
- Reflecting the changing face of today's labour force and the demands of today's families.

We strongly agree that the *Code* must be modernized so that it can function effectively to provide basic protections and entitlements, particularly to vulnerable workers (often non unionized and lacking in bargaining power). We also agree that the face of the labour force has changed in recent decades. Among other changes, women have joined the paid workforce in greater numbers, yet they continue to do the vast majority of unpaid work (child care, elder care, and other household work) and continue to predominate in low-wage, part-time, temporary and other precarious employment sectors. For these reasons, and in light of the legal rights and fundamental interests at stake, we urge the government to make the necessary changes to make the *Code* a

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<sup>11</sup> Government of Manitoba, *Discussion Guide: Employment Standards for Modern Workplaces and Modern Families* (2005), online: Government of Manitoba <<http://gov.mb.ca/labour/labmgt/resbr/pdf/emplstand5.pdf>>.

<sup>12</sup> *See Machtinger v. HOJ*, [1992] 1 S.C.R. 986 [*Machtinger*]. This provision has been repealed as a result of the amendments.

<sup>13</sup> These provisions have been repealed as a result of the amendments.

<sup>14</sup> A graduated notice period is now provided ins. 61(2) of the amended *Code*.

meaningful and enforceable bill of rights for all Manitoba workers and their families. We also urge caution that the desire for increased "flexibility" of the labour force (which is often a euphemism for lower employment standards and greater powers for employers<sup>15</sup>) not be permitted to outweigh the vital interests and rights at stake. Greater "flexibility" in employment relations often leaves workers to fend for themselves in bargaining working conditions, a task that is made nearly impossible for all but a few professional and high-income workers for whom inequality of bargaining power is not as great as it is for most workers.

This Review must be expanded beyond the confines of the current Discussion Guide if it is to produce meaningful results that will improve the plight of Manitoba workers and their families. In addition to the issues raised in the Discussion Guide, the following are just some key areas of inequality and inadequate employment standards, some of which we have addressed in a preliminary way in our submissions but others which require more time (and research) than has been possible for this Review:

- The need for domestic workers to be fully included in the Code's protections;
- The need for a broader definition of "worker" or "employee" that would protect the growing number of "own,account" self-employed (often low, income) workers who are currently considered "independent contractors" and are thus excluded from even the minimal protections of the Code;<sup>iii</sup>
- The elimination of qualifying thresholds for maternity leave and parental leave in light of the disadvantage imposed on women by those provisions<sup>i</sup>
- The overall need for equal pay and equal benefits for precarious work (part,time, casual, temporary, contract, etc.);
- The need to increase the minimum wage to the level of a "living wage";

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<sup>15</sup> The recent experience in British Columbia is instructive. In the name of "flexibility" numerous employment standards have been eliminated or weakened since 2002, to the detriment of workers. See David Fairey, *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards* (Vancouver: Canadian Centre for Policy Alternatives (BC Office), 2005), online: Canadian Centre for Policy Alternatives (BC Office) <[http://www.policyalternatives.ca/documents/BC\\_Office\\_Pubs/be\\_2005/employment\\_standards.pdf](http://www.policyalternatives.ca/documents/BC_Office_Pubs/be_2005/employment_standards.pdf)>. See also, in the Ontario context, Elizabeth Mitchell, "The Employment Standards Act, 2000: Ontario Opts for Efficiency over Rights" (2002) 10 C.L.E.L.J. 300.

<sup>16</sup> See Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*, Report for the Law Commission of Canada, 2002, online: Government of Canada Depository Services Program <[http://dsp-psd.pwgsc.gc.ca/collection\\_2007/lcc-cdc/!JL2-35-2002E.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2007/lcc-cdc/!JL2-35-2002E.pdf)> at 105, recommending that "aU dimensions of labour regulation should be extended to all workers, defined as persons economically dependent on the sale of their capacity to work, unless there are compelling reasons for not doing so."

- The need for employment equity legislation that applies to both the public and private sectors;
- The need to extend the *Pay Equity Act*<sup>17</sup> to apply to the private sector; and
- The need to recognize form over substance in the use of serial term employment contracts that effectively amount to long.-term employment rather than short.-term contract employment.

The incomplete nature of the Discussion Guide and the proposed scope of this Review is linked to other concerns we have about this process, such as, for example, the short time frame for submissions prescribed, the lack of resources for research and to facilitate stakeholder input, and the apparent absence of any commissioned research to provide the necessary factual context for the Review. In this vein it is useful to contrast the Manitoba Review with the recently completed Federal Labour Standards Review.<sup>18</sup> While it is acknowledged that federal resources are likely greater than those enjoyed by Manitoba, the contrast between the reviews is stark. The Federal Review included (in addition to Commissioner Harry Arthurs) three expert advisors (with backgrounds in law, business, and arbitration), four stakeholder advisors (two from labour and two from business), and a staff of 10. Furthermore, no less than 38 academics from a wide variety of disciplines were consulted and 23 independent research papers were commissioned from those and other academics. We are not aware of any independent research conducted in Manitoba in connection with this Review. We are also concerned that the voices and interests of marginalized and vulnerable workers will not be adequately addressed. The groups that represent people in those categories are not-for-profit, largely volunteer run organizations like our own, which, absent targeted funding from the government, do not have staff or resources to undertake research and make the necessary recommendations to truly address their realities. Therefore, we ask that the government commit to extending this Review and to resourcing it at a level consistent with the importance of the issues raised. We stress that the majority of Manitobans are governed by provincial employment standards legislation as opposed to federal legislation.

In the submissions that follow, we first briefly discuss the purpose and role of employment standards legislation as a "floor of rights" for workers (Part II). In Part III, we locate this Review and its implications, particularly for women, in the context of global and domestic labour market changes that have been described as the "feminization of labour" and the increase of precarious or

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<sup>17</sup> S.M. 1985-86, c. 21, C.C.S.M. c. P13.

<sup>18</sup> Harry W. Arthurs, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Ottawa: Publication Services, 2007), online: <[http://www.hrsdc.gc.ca/en/labour/employment\\_standards/arthur\\_report/pdf/final\\_report.pdf](http://www.hrsdc.gc.ca/en/labour/employment_standards/arthur_report/pdf/final_report.pdf)>

vulnerable workers. In Part IV, we move on to consider the legal context for this Review, focusing on both domestic (the *Charter*, human rights law, and employment law) and international (Canada's international human rights commitments) law. Our submissions on the various matters raised in the Discussion Guide are found in Part V, with a particular focus on women workers and keeping in mind the relevant social and legal context discussed in Parts III and IV. Finally, in Part VI we indicate our ongoing interest in these issues, as well as those not raised in the Discussion Guide, and call on the Manitoba government to make good on its promise to workers represented by the Review.

## II. THE PURPOSE AND ROLE OF EMPLOYMENT STANDARDS LEGISLATION

From their inception, legislated employment standards have been aimed at providing a statutory "floor of rights" below which no worker should be permitted to fall.<sup>19</sup> It is important that any proposed changes to the *Employment Standards Code* be consistent with the spirit and principles of minimum employment standards, which can be improved upon by workers with greater bargaining power, particularly those represented by unions, but cannot be contracted out of by workers.<sup>20</sup> The statutory floor of rights is required for a number of reasons:<sup>21</sup>

- The vast majority of employment relationships are characterized by a profound inequality of bargaining power, belying the myth of the common law model of "freedom of contract" and making workers vulnerable to "agree" to work for low wages, for little or no benefits, or in unsafe working conditions;
- Unionism has not succeeded in protecting the majority of workers in Canada (union density declined through the 1980s and 1990s, falling from 41.8% in 1984 to 32.2% in 2002<sup>22</sup>) and even unionized workers sometimes have trouble negotiating benefits much in excess of the statutory minima; and
- The rights and entitlements under employment contracts are unenforceable in practice by most workers due to the prohibitive cost and delays associated with civil litigation.

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<sup>19</sup> Geoffrey England, *Individual Employment Law* (Toronto: Irwin, 2000) at 80, 84.

<sup>20</sup> *Machtinger*, *supra* note 12.

<sup>21</sup> England, *supra* note 19 at 80.

<sup>22</sup> Andrew Jackson and Sylvain Schetagne, "Solidarity Forever? - An Analysis of Changes in Union Density" (2004) 4 *Just Labour* 53, at 62.

The Supreme Court of Canada has said of employment standards law: "[t]he harm which the [Ontario *Employment Standards*] Act seeks to remedy is that individual employees, and in particular non.-unionized employees, are often in an unequal bargaining position in relation to their employers.,<sup>23</sup> Iacobucci J. went on to cite Professor Katherine Swinton, who has noted:

... the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer...<sup>24</sup>

When left to negotiate their conditions of employment on the market, workers lack the power to seek guarantees of safe working conditions, adequate income, and fair termination and notice. Without legislated protections, workers who seek to enforce their rights risk being fired or forced to quit. The Manitoba government, along with other Canadian governments, has legislated in a number of areas-including most recently to impose a province.-wide no. smoking ban-in recognition of the reality that workers are entitled to protection such as clean air at work, even though they could not negotiate such terms on their own or even collectively, in some cases.

To perform its role as a meaningful floor of rights, employment standards legislation must keep pace with changes in the labour market and in society more generally, must comply with Canada's international and domestic human rights commitments, and must be rigorously enforced. Each of these criteria will be described before turning some of the specific areas of concern in the *Code* and measuring the current law against those criteria.

### III. SOCIAL AND ECONOMIC CONTEXT: VULNERABLE WORKERS AND THE FEMINIZATION OF LABOUR

It is vital that any revisions to the *Code* be made with the impact of changing labour market patterns in mind, and more particularly, with a view to redressing rather than exacerbating the negative impact of some of those changes on Manitoba's most vulnerable workers.

The increasing number of "vulnerable" or "precarious" workers in the new economy is well.documented,<sup>25</sup> and is widely acknowledged to be linked to

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<sup>23</sup> *Machtinge*; *supra* note 12 at para. 31.

<sup>24</sup> Katherine Swinton, cited in *Machtinger*, *ibid.*

<sup>25</sup> See generally Kerry Rittich, *Vulnerability at Work: Legal and Policy Issues in the New Economy*, Report for the Law Commission of Canada, 2004, online: Government of Canada Despositmy Services Program <[http://dsp-psd.pwgsc.gc.ca/collection\\_2007/lcc-cdc/JL2-42\\_2004E.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2007/lcc-cdc/JL2-42_2004E.pdf)> and sources cited therein.

dominant trends in the globalization of trade and the related push to deregulate labour markets.<sup>26</sup> The predominance of women, people with disabilities, Aboriginal people, new immigrants and poor people in low-wage, precarious, and non-standard employment (e.g., part-time, temporary, term, casual on-call and low-income "own account" self-employed workers) is similarly well-documented.<sup>27</sup> Researchers have described the "feminization" of the Canadian workforce, a concept which speaks at once to: (1) the steadily increasing participation rate of women in the labour market since the 1970s;<sup>28</sup> (2) the predominance of women in lower-wage, part-time and other precarious employment sectors;<sup>29</sup> and (3) the (unacknowledged and unaccounted for) non-market work done by women and its connection to women's predominance in precarious employment sectors. As noted by Kerry Rittich,

It is not accidental that women form a large contingent of those in unregulated, unprotected and vulnerable work: their disadvantaged status at work is often connected to the presence of non-market obligations, the limits those obligations place on labour market participation, and the failure to adequately reflect those obligations in workplace rules and norms.<sup>30</sup>

In the Law Commission of Canada's recent Discussion Paper, *Is Work Working?*, one of the key problems associated with the growth of non-standard work is the lack of access to important statutory benefits such as employment standards protection.<sup>31</sup> Our employment laws—including notably Manitoba's employment standards regime—were designed decades ago with the standard worker in mind: a permanent, full-time (usually male) worker who was assumed not to have primary family responsibilities. They have not kept pace with changes in the labour market and have failed to protect those most in need of their protection.

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<sup>26</sup> See, e.g., Rittich, *ibid.*; Isabella Bakker, "Globalisation and Human Development in the Rich Countries: Lessons from Labour Markets and Welfare States" in *Human Development Report: Globalization with a Human Face. Background Papers: 1999* (Oxford: United Nations Development Programme/Oxford University Press, 1999) at 29; and Joanne Conaghan, Richard Fischl & Michael Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002).

<sup>21</sup> See, e.g., Andrew Jackson, *Is Work Working for Women?* Canadian Labour Congress, Research Paper #22 (2003), online: Canadian Labour Congress <<http://canadianlabour.ca/updir/womenen.pdf>> and Andrew Jackson, *Is Work Working for Workers of Colour?* Canadian Labour Congress, Research Paper #18 (2002), online: Canadian Labour Congress <[http://canadianlabour.ca/updir/AJ\\_paper-IsWork-Working-for-Workers-of-ColourENG.pdf](http://canadianlabour.ca/updir/AJ_paper-IsWork-Working-for-Workers-of-ColourENG.pdf)>.

<sup>28</sup> Jackson, *Is Work Working for Women?*, *ibid.* at 6.

<sup>29</sup> *Ibid.* at 8-9.

<sup>30</sup> Rittich, *supra* note 25 at 53.

<sup>31</sup> Law Commission of Canada, *Is Work Working? Work Laws That Do a Better Job*. Discussion Paper (Ottawa: Law Commission of Canada, 2004), online: Government of Canada Depository Services Program <<http://www.lcc.gc.ca/pdf/work.pdf>>.



To be clear, those most in need of the protection of employment standards legislation are women, Aboriginal people, recent immigrants and people of colour, people with disabilities, low-wage workers, and non-standard workers generally, as exemplified by the following facts:<sup>32</sup>

- Almost one in three women (31.5%) compared to one in five men (19.5%) are low-wage workers (meaning that they earned less than two-thirds of the national median wage);
- The percentage of low-wage workers in Manitoba is higher than the Canadian average (31.1% and 25.3% respectively) and in Manitoba, more women than men work for low wages (36.5% and 25.8% respectively);
- Women who work in the private sector are much less likely to be unionized than men (one in seven for women and one in four for men);
- The average annual earnings of women represent 63.9% of the average annual earnings of men;
- The median individual income for Aboriginal people in Manitoba is substantially lower than that of non-Aboriginal Manitobans (\$18 258 for non-Aboriginal people; \$8 029 for Status Indians; \$10 620 for Non-Status Indians; and \$12 219 for Metis);
- The rate of unemployment of Aboriginal people is twice the Canadian average (and three times the Canadian average for those living on reserve);
- More than 42% of Aboriginal women in Manitoba live in poverty;
- Women with disabilities are at a greater disadvantage in the labour market than men with disabilities and women without disabilities (in 1998, just 28.1% of all women with disabilities were employed for the whole year, compared to 64.8% for women without disabilities and 39.2% for men with disabilities);
- Women with disabilities aged 35-49 earn a median hourly wage of \$12.36, compared to \$15.05 for women without disabilities and \$16.07 for men with disabilities in the same age group;
- Two-thirds of adult women with disabilities live in poverty;

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<sup>32</sup> See Molly McCracken et al. *Young Women Work: Community Economic Development to Reduce Women's Poverty and Improve Income* (Winnipeg: Prairie Women's Health Centre of Excellence, 2005); Jackson, *Is Work Working for Women?*, *supra* note 27; Andrew Jackson, *Is Work Working for Workers of Colour?*, *supra* note 27; Province of Manitoba, *Aboriginal and Northern Affairs-Chapter 6: Labour & Income*, online: Province of Manitoba <<http://www.gov.mb.ca/ana/apm2000/6/e.html>>; UN Platform for Action Committee (Manitoba), *Women & the Economy: A Resource Book*, Bk. 1 at 78; Leah Vasko, *Temporary Work: The Gendered Rise Of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

- The rate of part time employment is much higher among women than men (27.7% for women compared to 10.9% for men) and while part, time work may be a choice for some, at least one in four women part-timers report that they would rather have full,time paid jobs (which does not include women who work only part.- time due the unavailability and/or the prohibitive cost of child care);
- In 2002, part.-time jobs held by women paid a median hourly wage of \$10, and a median weekly wage of \$181.25;
- Part.-time jobs are approximately one, half as likely to provide benefits as fu,time jobs; and
- Relative to their participation in the labour market generally, women are overrepresented among temporary workers, holding 57% of contract employment, 31% of seasonal employment, 61.1% of casual employment and 47.3% of employment obtained through agencies.

The relationship between women and part.-time employment is a phenomenon that is evident in the facts cited above and it is of great significance to this Review.<sup>33</sup> This reality is linked to the disproportionate share of unpaid labour done by women in relation to men, leaving them fewer hours to devote to paid employment. A recent study by Statistics Canada reveals that just under 70% of part,time workers are women and over a quarter of all women in the labour market do less than 30 hours of paid labour per week.<sup>34</sup> Factoring out retirees and the 15-24 age bracket (the latter being a period when young women and men often combine part.-time employment with attending school), the predominance of women in part.-time work is even more striking. Among workers age 25-54, women outnumber men by a ratio of four to one.<sup>35</sup> As described by Statistics Canada,

There is a distinct division of labour between the sexes. [In 1998,] women spent an average of 2.8 hours daily on paid work and 4.4 hours on unpaid work, whereas the situation for men was the reverse: they spent 4.5 hours on paid work and 2.7 hours on unpaid work. ...[D]espite the increased participation of women in the labour market, women's share of unpaid work hours has remained quite stable since the early 1960s at about two thirds of the total.<sup>36</sup>

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<sup>33</sup> Evelyn Braun, *supra* note 6 at 145-146.

<sup>34</sup> Statistics Canada, *Women in Canada 2000: a gender based statistical report* (Ottawa: Minister of Supply and Services Canada, 2000) at 103, 123.

<sup>35</sup> *Ibid.* at 124. The percentage of employees working part time is approximately 4.5% for men, compared with slightly over 22% for women.

<sup>36</sup> *Ibid.* 97.

When asked about their decision to work part-time, 32.5% of women in their key child-rearing years (24-44 years) cited "caring for children", while only 2.2% of men in the same age group cited this reason.<sup>37</sup>

The reality of this unequal burden has been acknowledged by the Supreme Court of Canada and in human rights law both domestically and internationally. In *Symes v. Canada*, Iacobucci J., for the majority, noted that Beth Symes had "overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms" and unequivocally acknowledged that women disproportionately incur the social costs of child care.<sup>38</sup> In a similar vein, the Canadian Human Rights Tribunal observed in *Brown v. M.N.R., Customs and Excise* that "[m]ore often than not, we find the natural nurturing demands upon the female parent place her invariably in the position where she is required to strike this fine balance between family needs and employment requirements."<sup>39</sup> The Tribunal placed a clear obligation on the employer to facilitate and accommodate this balance. Finally, European law recognizes that discrimination against part time employees can amount to indirect discrimination against women.<sup>40</sup>

The gendered nature of much part-time work has implications for a number of the employment standards cited in the Discussion Guide. In Part V we will highlight those areas and make recommendations consistent with gender equality and Manitoba's legal obligations.

#### IV. LEGAL CONTEXT: EQUALITY, HUMAN RIGHTS, AND MEANINGFUL PROTECTIONS FOR WORKERS

##### A. Domestic Law: Constitutional and Human Rights Obligations

The *Canadian Charter of Rights and Freedoms* is the supreme law of Canada<sup>41</sup> and any laws and government (in)action must be consistent with the *Charter*, including s. 15 of the *Charter*, which provides:

(1) Every individual is equal before and under the law and has the right to the equal protection of the Law and equal benefit of the law without discrimination and, in particular, without discrimination based on race) mental or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those

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<sup>37</sup> *Ibid.* at 125.

<sup>38</sup> *Symes v. Canada*, [1993] 4 S.C.R. 695 at 762-765.

<sup>39</sup> 19 C.H.R.R. D/39.

<sup>40</sup> Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) at 108.

<sup>41</sup> *Canadian Charter of Rights and Freedoms*, s. 52(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The concept of equality adopted by the Supreme Court of Canada is unequivocally one of substantive equality. In contrast to simple formal equality (or the idea that "likes should be treated alike"), a commitment to substantive equality means recognizing that patterns of disadvantage and oppression exist in society. Furthermore, it requires that lawmakers and government officials take the unequal position of individuals and groups in society into account in their decisions and actions. Substantive equality requires careful examination of the impact and effects of law in its surrounding social context to make sure that laws and policies promote full participation in society by everyone, regardless of personal characteristics or group membership. In addition, substantive equality requires challenging common stereotypes about group characteristics that may underlie law or government action as well as ensuring that important differences in life experience, as viewed by the equality-seeker, are taken into account. The Supreme Court of Canada has repeatedly affirmed its commitment to a substantive equality approach, including in its unanimous decision in *Law v. Canada*.<sup>42</sup>

Principles of substantive equality and freedom from discrimination have been incorporated into domestic human rights laws. The Manitoba *Human Rights Code* is of significance to the employment context and to this Review,<sup>43</sup> particularly s. 14, which prohibits discrimination in employment and is broadly defined. In the same vein as s. 15(2) of the *Charter*, s. 11 of the *Human Rights Code* also recognizes the need for positive measures to make human rights and freedom from discrimination a reality for disadvantaged groups, and it protects measures taken by government and private employers aimed at ameliorating the disadvantage experienced by groups such as women, religious, ethnic and racial minorities, and people with disabilities.

## B. Domestic Law: The Supreme Court on Employment Law

A number of decisions of the Supreme Court of Canada in recent decades have emphasized the importance of employment to individuals and society, and the corresponding imperative that the law ensure fair and just conditions of employment and protect vulnerable workers. The statement of Dickson C.J. (as he then was) in *Reference Re Public Service Employee Relations Act (Alta.)*<sup>44</sup> has been quoted in numerous subsequent employment law decisions such as those

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<sup>42</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

<sup>43</sup> S.M. 1987-88, c. 45, C.C.S.M. c. H175.

<sup>44</sup> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368 [*Alberta Reference*].

dealing with inequality of bargaining power between employees and employers,<sup>45</sup> compensation for bad faith dismissal by employers,<sup>46</sup> and the right of agricultural workers to organize.<sup>47</sup> As stated by Dickson C.J.:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self worth and emotional well-being.<sup>18</sup>

Of particular relevance to this Review is the Supreme Court of Canada decision in *Machtinger v. HOI Industries*,<sup>49</sup> where the Court was called on to determine the consequences of employees signing written employment contracts that purported to provide for less than the minimum notice of termination provided in the Ontario *Employment Standards Act* ("ESA"). In *Machtinger*, one employee purported to agree to no notice at all; the other for two weeks. The Court gave a robust interpretation to the section of the ESA, stating that any purported waiver of an employment standard in the *Act* is null and void (Manitoba's *Code* does not exclude such an explicit statement, although s. 4 provides that a purported agreement to work for lower standards can not be used by an employer as a defence to a proceeding or prosecution under the Code). Since the term of the written employment contract was null and void, the employer in *Machtinger* argued that the Court should substitute the minimum ESA notice period (in this case, four weeks each) on the basis that the low/no notice provisions in the contracts were evidence of the parties' intention to contract for the minimum notice period possible. However, the Supreme Court disagreed, holding that the employees were entitled to pay in lieu of reasonable notice at common law (seven months and seven and one half months respectively). An illegal and void agreement could not be used as evidence of the parties' intentions. Furthermore, on policy grounds, Iacobucci J. stated that the inequality of bargaining power between workers and employers, combined with the fact that employees often do not know and cannot effectively enforce their rights, means that employment standards legislation must be given a robust and broad interpretation in favour of worker protection. He stated,

... an interpretation of the [Employment Standards] Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance.... If the only sanction which employers potentially face for failure to comply with the minimum

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<sup>45</sup> *Machtinger*, *supra* note 12.

<sup>46</sup> *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

<sup>17</sup> *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

<sup>48</sup> *Alberta Reference*, *supra* note 44 at 368.

<sup>49</sup> *Supra* note 12.

notice periods prescribed in the Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with the Act.<sup>sc</sup>

The Supreme Court has recognized that employees do not enjoy equal bargaining power with their employers, that meaningful and enforceable employment standards are necessary to protect workers, and that measures to promote compliance by employers are also necessary.

### **C. International Law: Human Rights Obligations**

Canada also has obligations under international human rights law, obligations and commitments that are consistent with fundamental Canadian values of fairness, equality, and social justice. Many of these obligations—including those concerning employment rights and the fair treatment of workers—can only be fulfilled by the provinces, in light of the division of powers in the Canadian Constitution. The following are just some of Canada's international obligations with which Manitoba's employment laws must comply, and which must guide the instant Review:

*Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).<sup>51</sup>

#### Article 3

States Parties shall take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

#### Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, in a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

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<sup>50</sup> *Ibid.* at 1003-1004.

<sup>51</sup> 18 December 1979, 1249 U.N.T.S. 13 (ratified by Canada 10 December 1981).

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity w work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of childJcare facilities ...

### *Covenant on Economic, Social and Cultural Rights (CESCR):*<sup>52</sup>

#### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### Article 7

The States Parties to the present Covenant recognize the right of a"eryone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditionsj

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

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<sup>52</sup> 16 December 1966, 993 U.N.T.S. 3 (ratified by Canada 19 August 1976).

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

*Convention on the Rights of the Child (CRC):*<sup>53</sup>

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

In Part V below, we consider the various issues raised in the Discussion Guide, as well as some related issues, and urge action consistent with Canadian and international law and the social and economic context of today's workers.

## V. SUBMISSIONS RELATING TO MATIERS RAISED IN THE DISCUSSION GUIDE

### A. Hours of Work and Overtime

Any attempt to build more "flexibility" into hours of work and overtime must be considered skeptically, with the purpose of minimum employment standards in mind. Given the well-recognized inequality of bargaining power between employers and employees, Manitoba should not make it easier for employers to secure "averaging agreements, whereby employees may be required to work more than eight hours per day or more than 40 hours per week, without overtime pay, if their hours average out to no more than 40 hours per week over a longer period of time.

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<sup>53</sup> 20 November 1989, 1577 U.N.T.S. 3 (ratified by Canada 12 January 1992).



Averaging agreements are often sought in industries where women and low wage, vulnerable workers predominate, such as the retail and service industries, health care, home care, and group homes. If averaging agreements are to be permitted at all, the previous legislation in British Columbia serves as a model: employers should be required to secure the agreement of 65% of affected workers, as well as the approval of the Employment Standards Director. The role of the Director is to safeguard the interests of workers and, before approving an averaging agreement, they should carefully consider a number of factors such as whether the workers receive some other comparable benefit in exchange for forgoing overtime wages, whether the employer has any current or past contraventions of the legislation, and whether the agreement is consistent with the health and safety of the employees.<sup>54</sup>

With respect to salaried employees, including those that might be considered managers, the current provisions of the *Code*, essentially as interpreted by the Manitoba Labour Board in *Michalowski v. Nygard*,<sup>55</sup> provide the necessary protection to employees. Employees should be entitled to assume that a salaried position entails that they will work normal full-time hours and, if more hours are to be worked, that those hours will be compensated at the overtime rate (to be calculated at an average hourly rate equal to their salary, rather than simply at minimum wage). The Labour Board correctly interpreted "employer" strictly so as not to include relatively low level managers such as Michalowski. If this Review recommends that a definition of "manager" be included in the *Code*, we submit that any such definition should be narrow and should only include senior managers whose work is wholly supervisory and managerial in nature and who do not spend any significant time doing the same basic tasks as their "subordinates". Salaried and low or mid.level managerial employees are entitled to the protections of the *Code*.<sup>56</sup>

The situation of incentive.based workers also deserves the careful attention of this Review. Incentive.based workers denote those whose compensation is based on piece.work, a flat rate, or commission. The idea that most incentive..based workers are essentially entrepreneurs is out.of..step with reality and with

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<sup>54</sup> Sections 12-15 of the amended *Code* authorize the Director of Employment Standards to issue permits to employers for increased standard hours and averaggh agreements. Section 14(3) provides that the Director must consider circumstances similar to those found in the B.C. legislation in deciding whether to issue a permit.

<sup>55</sup> [2004] M.L.B.D. No. 13.

<sup>56</sup> Section 2(4) of the amended Code provides that the standard hours of work and overtime provisions do not apply to "an employee who performs management functions primarily" or to "an employee who has substantial control over his or her hours of work and whose annual wage is at least two times the Manitoba industrial average wage, as defined by regulation." In 2006, the Manitoba average industrial wage was \$35 195.16. Therefore, this exemption only applies to employees having an annual wage greater than \$70 390.32. These provisions seem to address the concerns outlined in this section of our brief.

changes in the labour market.<sup>57</sup> Women-and particularly women of colour and recent immigrants-predominate in low-wage incentive,based work such as that in the garment industry<sup>58</sup> and are vulnerable to exploitation and inadequate compensation for their work.

Again, keeping in mind the purpose of employment standards legislation to protect workers from exploitation and to redress inequality of bargaining power, incentive,based workers must be guaranteed a fair and reasonable wage. The current Manitoba practice of deeming all incentive,based workers to be paid at the minimum wage for the purposes of calculating entitlements such as overtime rates under the *Code* is unjust and must be changed. Manitoba should adopt the Ontario approach, which calculates an incentive-based worker's hourly wage as the amount earned in a given week divided by the number of non,overtime hours worked in that week.<sup>59</sup>

A final related matter of inequality concerns the *Code* provisions and regulations governing <sup>11</sup>call.in wages., The general rule, set out ins. 51, provides that an employee who is called in to work must be paid for at least three hours of work, even if they work less than that (unless the employee's regular hours are less than three hours per day). However, s. 10 of the *Minimum Wages and Working Conditions Regulation*<sup>60</sup> exempts employees who work in theatres, hotels, restaurants, or rural areas, as well as all children, from the call,in wage provision. The fact that children and workers in the service sector (hotel and restaurant)-a sector in which women predominate<sup>61</sup>-are exempted from even this most basic protection is an example of the *Code's* failure to comply with the substantive equality rights of women and children guaranteed in the *Charter* and under international human rights law. We call on this Review to recommend the repeal of the exemptions from caU.in wages.<sup>62</sup>

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<sup>57</sup> See generally Rittich, *supra* note 25.

<sup>58</sup> United Nations Platform for Action Committee Manitoba, *Women and the Economy: Globalization and Clothes*, online: United Nations Platform for Action Committee Manitoba <[http://www.unpac.ca/economy/g\\_clothes.html](http://www.unpac.ca/economy/g_clothes.html)>.

<sup>59</sup> Section 18 of the Regulation provides a formula to calculate overtime wage rates for employees receiving incentive pay in a manner similar to the Ontario model.

<sup>60</sup> Man. Reg. 62/99, s. 10.

<sup>61</sup> Jackson, *Is Work Working for Women?*, *supra* note 27 at 16.

<sup>62</sup> The exemptions from call-in wages have been repealed by the amendments. However, s. 51 of the amended Code allows employers to schedule workers for shifts of less than three hours and to pay them for that short shift (for example, for one or two hours only). The only protection is against being called in for a three hour or longer shift and then being paid for less than three hours.

## B. Exclusions from the *Code*

The Discussion Guide asks for submissions on the exclusion of agricultural workers under the *Employment Standards Code*. Surprisingly, there is no request for submissions on the exclusions facing domestic workers. Under the *Domestic Workers Regulation*<sup>63</sup> and the *Minimum Wages and Working Conditions Regulation*<sup>64</sup> the Minister of Labour was required to review the effectiveness of both regulations before 1 January 2005 and, if advisable, recommend that the regulations be amended or repealed. We ask the Minister to make public the reviews and consultations required to be done, particularly as they pertain to exclusions facing domestic workers and agricultural workers.

While the Discussion Guide does not request submissions on the exclusions of domestic workers, we submit that this particular exemption should be considered as well.<sup>65</sup> It is beyond dispute that both agricultural workers and domestic workers are especially vulnerable groups of employees, and both have a strong need for legislative protection in their working lives. As discussed below, we submit that the current exclusion of both of these groups of workers from the *Code* and relevant regulations violates s. 15 of the *Charter* and, therefore, should be repealed immediately.

### I. Domestic workers

The exclusion of domestic workers from employment standards legislation has a long and sorry history in Canada, subjecting this group of vulnerable workers to inhumane and unjust working conditions.<sup>66</sup> Paid domestic work is highly gendered and racialized. In fact, 97% of domestic workers are women.<sup>67</sup> A majority of domestic workers were born outside Canada, including many women from the Philippines.<sup>68</sup> Many are foreign citizens working in Canadian homes on

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<sup>63</sup> Man. Reg. 60/99, s. 9.

Man. Reg. 62/99, s. 23.

<sup>65</sup> We are pleased that this issue was subsequently placed on the legislative agenda, at least in part due to our brief, and that the amendments have extended some further, minimal protections to domestic workers in Manitoba. However, we remain concerned that further efforts need to be made, particularly on the enforcement side, to ensure that domestic workers' equality rights are protected.

<sup>66</sup> For a history of the legislative exclusion of domestic workers in Ontario, see Judy Fudge, "Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario" in Abigail B. Bakan & Daiva Stasiulis, eds., *Not one of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 122.

<sup>67</sup> Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill L.J. 681 at 684.

<sup>68</sup> Louise Langevin & Marie-Claire Belleau, *Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live in Caregivers and Mail-Order Brides*

a work permit through the Live in Caregiver Program, a federal government immigration program<sup>69</sup> that offers foreign citizens the opportunity to apply to be permanent residents of Canada after having completed two years of work as a caregiver in an employer's home. The live.in requirement is mandatory, meaning that domestic workers are often isolated and, in some cases, subjected to sexual harassment and assault.<sup>70</sup>

Section 2 of the *Domestic Workers Regulation* defines a "domestic worker" as "an employee who is employed as a domestic worker in a private family home and is paid by a member of the family; and employed for more than 24 hours per week in the home." This group of workers is protected by some provisions of the *Code* (although they are not entitled to be paid for any hours they work in excess of 12 per day<sup>71</sup>). However, s. 4 of *Minimum Wages and Working Conditions Regulation* states that a domestic worker who works less than 24 hours per week for the same employer is exempt from Part 2 of the *Code* (minimum standards) except for Division 9 (maternity and parental leave) and Division 14 (employment of children and adolescents).<sup>72</sup> This means that legislative protection as basic as minimum wage, maximum hours of work, overtime pay, vacation and holiday provisions, and termination of employment provisions do not apply to domestic workers who work less than 24 hours per week for the same employer. She is left to negotiate and enforce her own employment contract without the protections of the *Code*.

Even those domestic workers who work more than 24 hours per week for one employer are extremely vulnerable to exploitation and a failure to enforce their rights. Miriam Elvir, a former domestic worker, a member of L'Association pour la Defense Des Droits du Personnel Domestique, and a nominee to the Quebec Labour Standards Board, writes that "[u]npaid salaries, or lack of payment for overtime, are the main problems home caregivers encounter."<sup>73</sup> For example, in

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(Ottawa: Status of Women Canada, 2000), online: Status of Women Canada <[http://www.swc-cfc.gc.ca/pubs/pubspr/066231252X/200010\\_066231252X\\_e.pdf](http://www.swc-cfc.gc.ca/pubs/pubspr/066231252X/200010_066231252X_e.pdf)> at 20.

<sup>69</sup> The website for the Live-in Caregiver Program can be found at <<http://www.cic.gc.ca/english/pub/caregiver/>>.

<sup>70</sup> For example, in *Guzman v. T.*, [1997] B.C.C.H.R.D. No. 1, a domestic worker was awarded \$6 500 in damages for a human rights complaint when her employers did nothing to stop their teenage son from sexually harassing her.

<sup>71</sup> Section 4 of the *Domestic Workers Regulation* provides that "a domestic worker who works more than 11 hours in a day is deemed to work 12 hours in that day."

<sup>n</sup> The amended *Code* and Regulation have lowered to 12 the minimum number of hours a domestic worker needs work to claim the protection of the minimum standards provisions of the *Code*. However, the particularly vulnerabilities experienced by this group of workers mean that further protections are required, as discussed in this section.

<sup>73</sup> Miriam Elvir, "'The Work at Home is not Recognized': Organizing Domestic Workers in Montreal" in Abigail B. Bakan and Daiva Stasiulis eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 154.

a 1995 employment standards decision from British Columbia, a domestic worker was awarded an astonishing \$73 778 in lost wages and unpaid benefits.<sup>74</sup> A recent survey of British Columbia domestic workers, who are fully included in employment standards legislation in that province, found that 80% were not paid the statutory minimum wage and overtime rate.<sup>75</sup> This reality underscores the need for legislative exclusions to be removed so that domestic workers can at least have full and complete access to Employment Standards complaint procedures. Meaningful enforcement of those rights is a further challenge that must be met with adequate resources and training for Employment Standards staff.

The vulnerabilities facing domestic workers make anything less than their complete inclusion in the protections of the *Employment Standards Code* unconstitutional. The exclusions violate the equality guarantee in s. 15 of the *Charter*, whether one employs the analysis articulated by the Supreme Court of Canada in *Law v. Canada*<sup>76</sup> or a more holistic approach that we suggest is more consistent with the substantive nature of equality rights.<sup>77</sup> The exclusions from the *Code* treat domestic workers differently than other Manitoba workers, denying them basic fundamental employment rights designed to address the inequality of bargaining power between employers and workers. This differential treatment is based on the enumerated grounds of sex and race, and often the analogous ground of citizenship status,<sup>78</sup> as well as the intersection of these grounds, in a manner that amounts to discrimination in a substantive sense. Finally, it is difficult to imagine how the Manitoba government could meet its burden of proving that the discriminatory exclusions are reasonable limits on equality rights under s. 1 of the *Charter*. The government would have to articulate a "pressing and substantiar" objective for the exclusion and establish that it minimally impairs equality rights,<sup>79</sup> a difficult task in light of the fact that

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<sup>74</sup> *Mustajiv. Tjin*, [1995] B.C.J. No. 39 (B.C.S.C.).

<sup>15</sup> Abigail B. Bakan & Daiva Stasiulisj "Negotiating the Citizenship Divide: Foreign Domestic Worker Policy and Legal Jurisprudence" in Radha Jhappan, ed., *Women's Legal Strategies in Canada* (Canada: University of Toronto Press, 2002) at 256.

<sup>16</sup> *Supra* note 42.

<sup>77</sup> For a discussion of the ways in which the "Law test" has brought about a major shift away from true substantive equality analyses in recent jurisprudence by obscuring the meaning of equality and creating unnecessary hurdles for s.15 equality claimants, see Fiona Sampson, "LEAF and the Law Test for Discrimination: An Analysis of the Injury of Law and How to Repair It" (2004), online: LEAF <<http://www.leaf.ca/legal-pdfs/Law%20Report%20Final.pdf>>.

<sup>78</sup> Citizenship status was recognized as an analogous ground of discrimination protected by s. 15 in *Law Society of British Columbia et al. v. Andrews et al.*, [1989] 1 S.C.R. 143.

<sup>19</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 69 and 70.

several Canadian jurisdictions such as British Columbia<sup>80</sup> and Ontario<sup>81</sup> have fully included domestic workers in employment standards legislation, and even provided enhanced protections to this group,<sup>82</sup> apparently without adverse consequences.

In light of the serious equality issues at stake in excluding domestic workers from the basic protections of the *Code*, all exclusions should be repealed. The law also must be clear that domestic workers are entitled to be paid for all hours of work performed. Furthermore, the *Code* should be amended to require employers to provide a written contract to domestic workers setting out their duties, hours of work, and rates of pay and to require employers to register information about domestic workers with the Director of Employment Standards to assist in monitoring compliance.

## 2. Agricultural workers

Agricultural workers are denied the basic protection of employment standards law in Manitoba.<sup>83</sup> In *Dunmore v. Ontario*,<sup>84</sup> the Supreme Court of Canada has recently recognized that this is a particularly vulnerable group of workers. In *Dunmore*, the exclusion of agricultural workers from the Ontario *Labour Relations Act* ("LRA")<sup>85</sup> was found to unjustifiably infringe the workers' s. 2(d) *Charter* right to freedom of association. The majority of the Court, per Bastarache J., did not go on to address the plaintiffs' s. 15 equality argument. However, L'Heureux, Dube J., in her concurring opinion, would have found an

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<sup>80</sup> For information on British Columbia's standards for domestic workers, see Government of B.C. Ministry of Labour and Citizens' Services, *Information for Domestic Workers and Employees*, online: Government of B.C. Ministry of Labour and Citizens' Services <<http://www.labour.gov.bc.ca/esb/domestic/s/>>.

<sup>81</sup> For Ontario's "fact sheet" on domestic workers, see Government of Ontario Ministry of Labour, *Domestic Workers*, online: Government of Ontario Ministry of Labour <[http://www.labour.gov.on.ca/english/es/factsheets/fs\\_domestics.html](http://www.labour.gov.on.ca/english/es/factsheets/fs_domestics.html)>.

<sup>82</sup> For example, both British Columbia and Ontario require that employers provide written contracts to domestic workers which clearly set out their duties, hours of work and wages, and charge for room and board, among other targeted protections. See, e.g., *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 14. See also *Employment Standards Regulation*, B.C. Reg. 396/1995, s. 13 which requires employers of domestic workers to register the employee with the Director of Employment Standards.

<sup>83</sup> Section 3 of the *Minimum Wages and Working Conditions Regulation*, Man. Reg. 62/99 (March 19, 1999) provides that the minimum standards in Part 2 of the *Code*, other than Division 13 (equal wages) do not apply to an employee in agriculture, fishing, fur farming or dairy farming, or the growing of horticultural or market garden products for sale. This exclusion remains in the amended *Code* despite a proposal from the Department that some coverage be extended to workers in industrial agriculture settings such as hog barn operations.

<sup>84</sup> *Supra* note 47.

<sup>85</sup> S.O. 1995, c. 1, Sch. A.

unjustified breach of the agricultural workers' s. 15 rights. We submit that her analysis of the discriminatory impact of excluding agricultural workers from labour relations law (*i.e.*, protections for forming trade unions, collective bargaining, and related activities) is even more apt to highlight the discriminatory effect of denying this group of vulnerable workers the protection of employment standards law.

Agricultural workers are treated differently from other workers in a manner that amounts to substantive discrimination, given their pre-existing group disadvantage and the vital nature of the interests affected. Both the majority opinion (on s. 2(d)) and the minority opinion (on s. 15) in *Dunmore* note the degree to which agricultural workers as a group lack political power and resources, often have low levels of education, income and limited employment mobility.<sup>86</sup> As noted by Bastarache J., they generally have "no recourse to protect their interests aside from the right to quit."<sup>87</sup> The key issue is whether the differential treatment is based on an analogous ground of discrimination, namely occupational status as an agricultural worker. While *Charter* jurisprudence to date has suggested that occupational status is generally not an analogous ground, L'Heureux, Dube J. makes a compelling case for why occupational status as an agricultural worker meets the doctrinal standard established in earlier cases. She states,

I believe it safe to conclude of agricultural workers what Wilson J. concluded of non-citizens in *Andrews v. Law Society of British Columbia* ... namely that they "are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending.'"<sup>86</sup>

Occupational status as an agricultural worker also meets the test of "constructive immutability" articulated by the Supreme Court in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*.<sup>89</sup> Because of their low levels of skill and education, their relative status, and their limited employment mobility, agricultural workers can only change their occupational status at great cost, if at all.

The key objective put forward in *Dunmore* for excluding agricultural workers from the LRA was the protection of the "unique nature of agriculture," in particular the family farm. As noted by L'Heureux Dube J.,

[T]he government is entitled to provide financial and other support to agricultural operations, including family farms. What is not open for the government to do is to do

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<sup>86</sup> *Dunmore*, *supra* note 47 at para. 41 *per* Bastarache J. and 102 *per* L'Heureux-Dube J.

<sup>87</sup> *Ibid.* at para. 41.

<sup>88</sup> *Ibid.* at para. 168.

<sup>89</sup> [1999] 2 S.C.R. 203.

so at the expense of the *Charter* rights of those who are employed in such activities, if such a policy choice cannot be demonstrably justified. This they have failed to do.<sup>90</sup>

She goes on to note the extent to which the "pastoral image" of the family farm is inconsistent with the current reality of agribusiness and factory farming.<sup>91</sup> She concludes that,

... we are being asked by the respondents, without being presented with credible pressing and substantial reasons, to justify distinguishing workers who sort and pack chicken eggs in a factory,like environment from workers who pack and sort Easter eggs in a factory,like environment."<sup>92</sup>

Her conclusion that the wholesale exclusion of agricultural workers could not be justified is even more apt in the context of denying this group of workers very basic level of protection, such as governing minimum wages and hours of work.

Manitoba has a broader exclusion of agricultural workers, and excludes them from more minimum standards than other jurisdictions. However, merely bringing Manitoba's exclusions in line with other jurisdictions does not satisfy this government's obligations under the *Charter*, as a substantive equality analysis indicates that other jurisdictions are in violation of the *Charter* as well. Agricultural workers should be *fully included* in Part 2 of the *Code*. The needs of industry can be met in a way that complies with the *Charter* by allowing specific employers on a case by-case basis the ability to apply for variances where compelling circumstances exist and minimal impairment of the rights can be established.

### C. Promoting Compliance

Geoffrey England, a leading expert on employment law in Canada, describes the sorry state of enforcement of employment standards legislation in virtually every Canadian jurisdiction, including Manitoba:

The most impressive code of substantive legal rights is only as good as the machinery enforcing it. Regrettably, securing compliance with employment standards acts has proven extremely difficult, especially for "atypical" workers, such as part-timers, casuals, and homeworkers. Since a major purpose of employment standards acts is to provide workers with a practical means of enforcing their employment rights--civil litigation to enforce the employment contract being beyond the means of most workers--this is a most serious failure.<sup>93</sup>

This is one area in which the lack of commissioned research associated with this Review is striking and problematic. There appears to be no information in the public domain about compliance rates, frequency and scope of investigations, or

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<sup>90</sup> *Dunmore*, *supra* note 47 at para. 182.

<sup>91</sup> *Ibid.* at para. 194.

<sup>92</sup> *Ibid.* at para. 197.

<sup>93</sup> England, *supra* note 19 at 84-85.



other important matters relating to enforcement and compliance in Manitoba. However, we do know that in the federal sector, compliance with employment standards legislation was found to be only 25%,<sup>94</sup> and it is safe to assume that the situation is likely as bad or worse in Manitoba in light of the relatively weak enforcement and compliance mechanisms relative to other jurisdictions. The Discussion Guide candidly admits that "there are no significant deterrents to violating the legislation."

It is trite to say that rights without remedies are meaningless, yet the sad reality is that for many Manitoba workers, the current *Employment Standards Code* is not worth the paper on which it is written. The following are just some of the measures that should be adopted to promote compliance:<sup>95</sup>

- The immediate infusion of more resources to hire inspectors and other staff to respond promptly to complaints and to do compliance inspections, audits and spot checks of workplaces;
- The immediate infusion of resources to fund community based advocacy groups to assist employees with complaints;
- Provisions requiring the mandatory posting of a plain language version of key employment standards provisions in all workplaces;
- Provisions for comprehensive audits of employers that are the subject of repeated complaints;
- Provisions for detailed compliance orders to be issued without delay after inspections;
- Provisions requiring targeted inspections of identified "high risk" sectors where vulnerable workers are predominant;
- Provisions for complaining employees to remain anonymous;
- Provisions for strong protection against reprisals for employees;
- In addition to the current provisions for payment of monies owed to employees, provisions for escalating fines (made payable through issuance of an administrative ticket) to reflect the seriousness of the violation(s) and punish repeat violators; and

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<sup>94</sup> Human Resources Development Canada, *Evaluation of Federal Labour Standards (Phase I) Final Report* (1997) at 41, cited in Workers Action Centre Employment Standards Work Group, *Modernizing Part III of the Canada Labour Code: Submissions to the Federal Labour Standards Review* (2005), online: Government of Canada Federal Labour Standards Review <[http://www.fls-ntf.gc.ca/doc/sub\\_fb\\_67.pdf](http://www.fls-ntf.gc.ca/doc/sub_fb_67.pdf)> at 6.

<sup>95</sup> For these and other recommendations, see Workers Action Centre Employment Standards Work Group, *ibid.* at 8-18 and Income Security Advocacy Group, *Submission to the Federal Labour Standards Review Commission* (2005) online: Government of Canada Federal Labour Standards Review <[http://www.fls-ntf.gc.ca/en/sub\\_fb\\_17.asp](http://www.fls-ntf.gc.ca/en/sub_fb_17.asp)> at 8. All written submissions to the FLSR are available at <[http://www.fls-ntf.gc.ca/en/subJist\\_dat.asp#al](http://www.fls-ntf.gc.ca/en/subJist_dat.asp#al)>.

- Provisions for prosecutions to take place where collection strategies fail (e.g., fail to recover unpaid wages for employees).

In short, the investigation, enforcement and compliance provisions of the *Code* require a substantial overhaul. Along with a number of proactive measures (e.g., requiring that standards be posted in workplaces and conducting audits and spot checks), there must be a cost for breaking these laws. Manitoba should look to Ontario as an example of a jurisdiction that is beginning to take violations—and therefore the rights of workers—seriously. Recognizing that the Ontario *Employment Standards Act* already contains significant penalties and other enforcement measures currently lacking in the Manitoba *Code*, in 2004, the Ontario Ministry of Labour announced the initiation of 226 new prosecutions. (There had been only 18 in the previous four years!) A perusal of recent convictions and penalties under the Ontario Act reveals that most are still in the \$300-\$400 range. However, there are some very significant fines, including one for \$177 500 in 2005.<sup>96</sup> Enforcement of this latter kind carries with it some hope of creating meaningful incentives for employers to comply with the law.<sup>97</sup>

#### D. Termination Notice

As the Inter-Jurisdictional Comparison accompanying the Discussion Guide makes clear, Manitoba is vastly out-of step with other jurisdictions when it comes to the minimum notice required to terminate an individual's employment. The *Code* provisions are completely inadequate to protect the most vulnerable workers (non-unionized, low-wage workers) who are not in a position to seek enforcement of their common law right to pay in lieu of reasonable notice. Unlike all other jurisdictions, under s. 61 of the *Code*, Manitoba does not have any minimum graduated notice periods, instead providing only one pay period's notice no matter how long the employment. At a minimum, the *Code* should be amended to provide for similar graduated notice provisions as those provided in Ontario, meaning that an employee be

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<sup>96</sup> Ontario Ministry of Labour, *Employment Standards Convictions Archive* (2005), online: Ontario Ministry of Labour <[http://web.archive.org/web/20060421235312/http://www.labour.gov.on.ca/english/es/report\\_card/rc\\_archive-conv.html](http://web.archive.org/web/20060421235312/http://www.labour.gov.on.ca/english/es/report_card/rc_archive-conv.html)>.

<sup>97</sup> The amended *Code* (s. 138.1) and Regulation (s. 29) provide for new "administrative penalties" in the amount of \$500 to \$1 000, the aim of which seems to facilitate a more streamlined enforcement procedure, while still leaving the option of the more involved process of mounting prosecutions for offences under the *Code*. There is no evidence on the Employment Standards website of any increased enforcement capacity in the form of budget or additional staff.

entitled to at least one week per year of service up to a maximum of eight weeks.<sup>98</sup>

The repeal of the long list of exclusions in s. 62 from the minimum notice requirement for termination of employment by the employer is a further necessary measure. Subsections (a), (b) and (c) are the most problematic. They authorize the unilateral decision of an employer or "agreement between employer and employee" to provide notice *below* the one pay period *Code* minimum. Again, such provisions are an invitation to exploit vulnerable workers and fly in the face of the basic premise of employment standards legislation that inequality of bargaining power is recognized and that unilateral or bilateral "agreement" to work for less than the *Code* minima is not permitted. In fact, in *Machtinger*, where the employees had signed agreements that their employment could be terminated for no notice or two weeks notice respectively (in both cases below the Ontario ESA minimum), the Supreme Court declared the provisions null and void and enforced a meaningful remedy for workers who had purported to agree to such substandard and illegal conditions. The common law of reasonable notice was deemed to apply and the dismissed employees were awarded seven months and seven and one-half months pay in lieu of notice respectively. In *Machtinger*, the court was dealing with a purported agreement between employer and employee to a "no notice" provision, while the Manitoba *Code* goes even further by allowing employers to unilaterally create a "no notice" policy. The facts and approach taken in *Machtinger* demonstrate the degree to which the approach in the Manitoba *Code* is out of step with other jurisdictions, none of which permit such an evasion of even the most basic of employment rights. More fundamentally, *Machtinger* shows Manitoba's *Code* is inconsistent with the basic principles and functions of employment standards legislation.

Finally, Manitoba also lags behind other jurisdictions and imposes unjustified burdens on employees by requiring the same notice of termination from an employee as is required from an employer. Eight Canadian jurisdictions (including Ontario, B.C., Saskatchewan, and others) do not require any notice from employees, recognizing that employees and employers are in fundamentally different positions with respect to the impact of a terminating employment. Manitoba should bring its law in line with these other jurisdictions.<sup>99</sup>

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<sup>98</sup> Section 57 of the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 provides for notice from one week to eight weeks, depending on the length of service. Manitoba's amended *Code* provides ins. 61(2) for graduated notice along similar lines, to a maximum of eight weeks.

<sup>99</sup> The amended *Code* continues to require employees to provide notice when they terminate their employment. For employment of less than one year, the employee must give one week notice and for employment lasting one year or longer, two weeks notice is required.

## E. Statutory Holiday Pay for Part-Time Workers

As discussed in Part III, the predominance of women in part time employment is related to the unequal share of unpaid work they do in the form of child care, elder care, and other household work. The failure to recognize the unequal burden of non-market work and the fact that part-time work is often not an unfettered choice means that women do not enjoy the equal benefit or protection of the law, contrary to s. 15 of the *Charter*.

To remedy this situation, the *Employment Standards Code* should be amended to mandate that part-time workers are entitled to all the protections of the *Code* (including holiday pay calculated at a rate of at least 5% of gross earnings, as in Saskatchewan and Ontario)!<sup>100</sup> It is also necessary to ensure that part-time workers are entitled to participate in all health, dental, insurance and other group employment benefit plans, in the same manner as full-time workers, on a proportionate basis to their time worked. Such measures would bring the Manitoba government into compliance with the equality provisions of the *Charter*. Furthermore, it would allow the NDP government to finally make good on its promise in its 1999 election platform that "Today's NDP will work with employers to bring the benefits for part-time workers in line with those of full-time workers."<sup>101</sup> Finally, it would be consistent with resolutions passed over the years at NDP policy conventions, including at the 2005 convention, resolving that "this convention urge the government to enact legislation providing for pro-rated benefits for all workers."<sup>102</sup>

## F. Wage Deductions

The current law, which allows an employer to make deductions from a worker's pay with that worker's consent, is an invitation to exploitation. As noted in the Discussion Guide, this practice is common in the retail and services sectors in which women and low-wage work predominate. In light of the inequality of bargaining power experienced by employees in relation to employers, such an agreement cannot be understood to be a free choice. The purpose of employment standards legislation is to remedy exactly these kinds of situations: where workers do not receive anything in exchange for their "agreement" to have wages deducted, nor are they free to disagree and bargain for a different arrangement. Manitoba should adopt the position in B.C., Ontario, P.E.I., and the Yukon, where no deductions from wages are permissible. In any event, if deductions are permitted in limited circumstances, the *Code* should provide

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<sup>100</sup> The amended *Code* provides for this change ins. 23(2).

<sup>101</sup> NDP publication, "Quick Facts: Today's Working Families," prepared and distributed during the 1999 election campaign.

<sup>102</sup> Resolution 05.JE-46.

that such deductions can never be permitted to take an employee's earnings below the level of minimum wage.<sup>103</sup>

## G. Employment of Children

In light of the purpose and function of employment standards legislation to recognize and counteract the inequality of bargaining power between employees and employers, as well as Canada's international commitments to protecting the rights of children, it is crucial that the protections for children be robust and consistent with children's rights. It is tempting, but inaccurate, to consider child labour and the exploitation of young workers a problem largely confined to developing countries. While we do not have data on the scope of child and youth work in Manitoba, research indicates that the number of young people under the age of 16 in wealthy countries such as the U.S. and Britain who regularly work (*i.e.*, participate in the labour market) is actually higher than that of some developing countries such as India, Kenya and Thailand.<sup>104</sup>

Article 32 of the *International Convention on the Rights of the Child* enshrines the rights of children to legislated-and enforced-regulation of minimum working age, hours and conditions of employment, safe and healthy work environments, and the right not to have employment interfere with the right to education. The current weak protections in ss. 83 and 84 of the Manitoba *Code* leave young workers vulnerable to exploitation. In particular, the *Code* does not provide parameters and limits on the employment of children beyond the requirement of a permit to employ anyone under the age of 16 and a prohibition on employing children in a job that substantially involves machinery.<sup>105</sup> This Review must take the rights of children seriously. Therefore, we submit that this Review recommend the adoption of specific, enforced standards to protect young, vulnerable workers, such as:<sup>106</sup>

- A prohibition on employing young people under 16 in high risk industries (such as, for example, forestry, automobile service stations, window cleaning, and any other industries where there is more than a minimal risk to the health and safety of children);

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<sup>103</sup> Section 19 of the Regulation provides that deductions from wages are not permitted, except for those required by law (such as to garnish wages under court order) or where there is a direct benefit to the employee. For greater certainty, deductions for such things as uniforms, faulty work, damage, or cash shortages are prohibited.

<sup>104</sup> Kristoffel Lieten & Ben White, "Children, Work and Education: Perspectives on Policy" in Leiten & White, eds., *Child Labour: Policy Options* (Amsterdam: Askant, 2002) 6.

<sup>105</sup> See *supra* note 1 at s. 83(4).

<sup>106</sup> Specific standards such as those listed below are found in most other jurisdictions, such as Ontario, Alberta, Nova Scotia, New Brunswick, P.E.I., Quebec, Saskatchewan, and others.

- Restrictions on the hours a child can work on school days and non-school days; and
- A prohibition on late, night and early morning employment (e.g., between the hours of 9:00 p.m. and 6:00 a.m.).<sup>107</sup>

Furthermore, any attempt to make more "flexible"<sup>11</sup> requirements for employing children should be resisted. The recent experience in British Columbia serves as a cautionary tale in this regard. In the name of "flexibility" and "efficiency," employment standards protections for children and youth were relaxed in amendments to the B.C. *Employment Standards Act* in 2003.<sup>100</sup> For example, the amendments included a move toward parental regulation and approval of children's employment, rather than regulation and approval by the Employment Standards Division (including, for example, parental evaluation of the health and safety of the workplace).<sup>109</sup> A recent study<sup>110</sup> of young people aged 12-18 years who are employed in B.C. reveals some of the detrimental impact of these relaxed standards, including the employment of children as young as 12, the lack of adequate (or in many cases, any) review of workplace health and safety conditions, the lack of supervision, and a host of other ESA violations. More than one in five children and youth in the study reported having been injured on the job, while nearly 30% reported feeling unsafe at work. This group includes a number of youth aged 12-14. Manitoba needs to guard against proceeding down this road and must instead act to protect the rights of young workers, as described in the recent B.C. report:

The formative years for children and youth aged 12 to 18 are vital to their education and experience. Gaining work experience can be an important part of the growth and development of children in this age group. But society owes it to its young to ensure

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<sup>107</sup> The amended *Code* (ss. 83-86) and Regulation (ss. 25-26) provide some new protections for child workers in Manitoba. For example, a permit from the Director is required for any employment of children under 16 years of age. Workers under that age also cannot work more than 20 hours during a week of school or at all between 11:00 p.m. and 6:00 a.m. Sixteen and 17-year-olds cannot work alone between 11:00 p.m. and 6:00 a.m. There are also a variety of prohibitions against anyone under the age of 18 working in certain dangerous industries, although the Director retains the power to issue permits for such employment if he or she determines that it is not likely to adversely affect the safety, health or well-being of the child.

<sup>108</sup> Bill 37, *Skills Development and Labour Statutes Amendment Act*, 4th. Sess., 37th. Leg., British Columbia, 2002.

<sup>109</sup> *Ibid.* at cl. 3.

<sup>110</sup> John Irwin, Stephen McBride & Tanya Strubin, *Child and Youth Employment Standards: The Experience of Young Workers Under British Columbia's New Policy Regime* (Vancouver: Canadian Centre for Policy Alternatives (BC Office), 2005), online: Canadian Centre for Policy Alternatives (BC Office) <[http://www.policyalternatives.ca/documents/BC\\_Office\\_Pubs/be\\_2005/child\\_youth\\_employment.pdf](http://www.policyalternatives.ca/documents/BC_Office_Pubs/be_2005/child_youth_employment.pdf)>.

<sup>111</sup> *Ibid.* at 23-25.

that their initial experiences with the working world are regulated according to acceptable standards, and that these standards are followed.m

## H. Unpaid Leaves and Work-Life Balance

It is important that issues related to leaves and "work-life balance" be considered in their social and economic context, namely that women continue to do the vast majority of unpaid care work, including child care and the care of family members who are elderly or have disabilities. In light of the constitutional reality that the federal government has jurisdiction over income replacement through the *Employment Insurance Act* ("EIA")<sup>113</sup> and that the provinces have jurisdiction over employment standards, the issue of "unpaid leaves" is really one of job protection for leaves required by employees.

As described earlier in this submission, the feminization of the Canadian workforce has meant a double-bind for women: they are participating in the paid labour market in greater numbers (although often in low-wage, part-time and other precarious employment), while still performing a disproportionate share of unpaid care work in the home.<sup>114</sup> Thus, until the division of unpaid labour becomes more equal between men and women, the failure to provide job protection for necessary leaves to care for family members will continue to affect women more than men. As such, the way the law does or does not accommodate the realities of (predominantly women's) unpaid care work is a gender equality issue. Fulfilling the substantive equality guarantees enshrined in the *Charter* as well as international and domestic human rights law requires meaningful and substantive recognition of the work of mothering, parenting and caring for children and other family members, work that benefits society as a whole. As recognized by Dickson C.J., writing for the unanimous Supreme Court in *Brooks v. Canada Safeway Ltd.*<sup>115</sup> in the context of maternity leave:

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

Unfortunately, Manitoba has not kept up with the trend in other Canadian jurisdictions with regard to job protection for leaves and removing eligibility thresholds for leaves.

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<sup>112</sup> *Ibid.* at 32.

<sup>113</sup> S.C. 1996, c. 23.

<sup>114</sup> See generally, Lorna Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).

<sup>115</sup> [1989] 1 S.C.R. 1219 at 1243-1244.

Consistent with the equality guarantees in the *Charter*, Manitoba should extend job protection to workers who take leaves to care for children or other family members or for bereavement, recognizing that a disproportionate share of care work is done by women, and that limitations on, or the non-existence of, job protection for such leaves disproportionately affects women. The failure to provide leaves in these areas is further evidence of the degree to which the *Code* was designed with the standard male breadwinner earning a "family wage" in mind and continues to ignore the realities of women workers and changing labour market conditions. In addition to the new compassionate care provisions (which only apply to caring for a terminally ill immediate family member), the Manitoba *Code* should be amended to provide for at least 10 days leave to be taken by employees as "emergency leave" (as in Ontario), "family responsibility leave" (as in B.C.) or "obligation leave" (as in Quebec). Such a leave should be divisible and flexible, such that it may be taken by employees to care for ill family members or otherwise to attend to other emergencies or urgent matters involving the employees themselves, their family members, or others close to them.<sup>116</sup>

The reality is that taking unpaid leave from employment is difficult (and even impossible) for many workers, particularly low-income workers and single parents who simply cannot afford to do so. For this reason, we call on the Manitoba government to lobby the federal government to expand the income replacement provisions of the EIA (i.e., those that provide benefits for maternity, parental, sick, and compassionate care leave) such that generous leaves are provided and that income is replaced for all workers during leave periods. We urge the Manitoba government to lobby the federal government to make income replacement benefits under the EIA more accessible to workers, particularly women and others who do part-time and temporary work.

With respect to all leaves (including maternity, parental, compassionate care, and emergency/family responsibility), we submit that any eligibility threshold will operate to the disadvantage of women because of their predominance in part-time and temporary work and is, therefore, inconsistent with the substantive equality guarantees in the *Charter*. Eligibility thresholds may, in fact, function as an incentive to employers to put women in more vulnerable, short-term jobs to avoid having to provide leaves to those women. The Supreme Court has recently reaffirmed<sup>117</sup> that addressing the equality rights of women, particularly needs related to maternity and parenting, is a societal responsibility:

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<sup>116</sup> The amended *Code* provides two new unpaid leaves, one for family responsibilities or the workers' own health (s. 59.3 permits up to three days per year) and the other for bereavement (59.4 permits up to three days for the death of a family member).

<sup>117</sup> *Reference re Employment Insurance Act (Can.)* ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669.



A growing portion of the labour force is made up of women, and women have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility.<sup>118</sup>

In fact, a growing number of provinces (B.C., Quebec, and New Brunswick) have removed eligibility thresholds for maternity and parental leave and for other leaves (e.g., Ontario has no eligibility threshold for family medical/compassionate care leave) in recognition of their discriminatory impact. It appears that even Manitoba has recognized that the trend is toward lower, if any, eligibility thresholds, as evidenced by the fact that the new compassionate care leave (which corresponds to the federal benefits for compassionate care of a terminally ill family member) can be taken by any employee who has worked for an employer during the previous 30 calendar days.<sup>119</sup> We call upon the Manitoba government to uphold equality rights by removing the eligibility threshold for maternity and parental leave (currently seven months with the same employer) and other leaves.

Finally, the *Code* should be amended to require employers to give employees at least five paid sick days per year. This basic protection is particularly important for low income, vulnerable workers who often go to work when they are extremely ill because they do not want to lose their job and cannot afford to be sick. Bereavement leave of five paid days per year (not to be carried over if unused) should also be provided so that all workers, including low-income workers, are provided with some necessary time to grieve the loss of a family member.

## VI. CONCLUSION: MAKING GOOD ON THE PROMISE TO MANITOBA WORKERS

In conclusion, we welcome this Review and the opportunity to make these submissions. As set out in our submissions, we think it is dear that there is much to be done to bring Manitoba's employment standards legislation into compliance with the substantive equality guarantees of the *Charter*, the trends in other Canadian jurisdictions and at the Supreme Court, and international human rights law. We urge this Review to make the necessary recommendations to protect the fundamental rights and interests of Manitoba workers and to remedy the current ineffectiveness of the *Code* in a variety of

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<sup>118</sup> *Ibid.* at para. 66.

<sup>119</sup> Government of Manitoba, *Employment Standards Fact Sheet: Compassionate Care Leave*, online: Government of Manitoba <<http://www.gov.mb.ca/labour/standards/doc/compassionateleave,factsheet.html>>.

highlighted areas. We also request that, when it is made public, the Review include a record of all oral and written submissions made to it.<sup>120</sup>

We have expressed our concerns about the time frame for this Review and the apparent lack of independent research and funding to facilitate the input of those most affected by the current legislative gaps in these submissions. We hope that the Review will be expanded to address some of the key gaps that we have identified in our submissions, as well as those that may emerge through further research. Finally, we wish to make it clear that members of our organizations are willing and able to provide ongoing input and involvement in the Review through further consultation, preparing and reviewing draft legislation, and otherwise assisting to make the promise of the Review, namely "employment standards for modern workplaces and modern families," a reality.

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<sup>120</sup> The written submissions have been posted on the Department website: [http://www.gov.mb.ca/labour/labmgt/emp\\_standards/submissions/](http://www.gov.mb.ca/labour/labmgt/emp_standards/submissions/).