Employment Standards that Work for Women[*]

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Submission to the Manitoba Employment Standards Review by:
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A. Introduction

We commend the Manitoba government on its decision to launch this Review of the Manitoba *Employment Standards Code* (the *Code*). The Discussion Guide 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. Debra Parkes, one of the authors of this submission and a Law Professor at the University of Manitoba, frankly admits to being shocked upon reading some of the provisions in the Manitoba *Code* when she first moved to Winnipeg in 2001 and prepared to teach Employment Law. 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,[1] is section 62 of the *Code*, which 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 even the "established practice" of an employer to trump even that minimum notice requirement. Similarly surprising and a source of hardship for low-income and low-status non-unionized workers is the lack of any graduated notice period in the Manitoba legislation (c.f., for example, the Ontario *Employment Standards Act* which provides for notice up to 8 weeks depending on the length of employment).

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 *Employment Standards Code* a 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[2]) not be permitted to outweigh the vital interests and rights at stake. Greater

[1] See *Machtinger v. HOJ*, [1992] 1 S.C.R. 986.

[2] 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*, Canadian Centre for Policy Alternatives (BC Office), November 2005 http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_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 *Canadian Labour and Employment L.J.* 300.

"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 for most workers.

For this Review to produce meaningful results that will improve the plight of Manitoba workers and their families, it must be expanded beyond the confines of the current Discussion Guide. 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*;[3]
- the elimination of qualifying thresholds for maternity leave and parental leave in light of the disadvantage imposed on women by those provisions;
- 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";
- the need for employment equity legislation that applies to both the public and private sectors;
- the need to extend the *Pay Equity Act*[4] 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 currently ongoing Federal Labour Standards Review. 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 includes (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 being conducted in Manitoba in connection with this Review. We are also concerned that the voices and interests

[3] See Judy Fudge, Eric Tucker and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*, Law Commission of Canada, October 25, 2002 at p. 105, recommending that "all 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."

[4] C.C.S.M. c. P13.

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.

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 B). In Part C, 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 vulnerable workers. In Part D, 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 E, with a particular focus on women workers and keeping in mind the relevant social and legal context discussed in Parts C and D. Finally, in Part F, 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.

B. 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.[5] 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.[6] The statutory floor of rights is required for a number of reasons:[7]

- 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[8]) and even unionized workers sometimes have trouble negotiating benefits much in excess of the statutory minima; and

[5] Geoffrey England, *Individual Employment Law* (Toronto: Irwin, 2000), p. 80, 84.
[6] *Machtinger, supra* note 1.
[7] England, *supra* note 5 at p. 80.
[8] Andrew Jackson and Sylvain Schetagne, "Solidarity Forever? – An Analysis of Changes in Union Density," (2004) 4 *Just Labour* 53, p. 62.

- 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.

The Supreme Court of Canada has said of employment standards law: "The 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."[9] 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...[10]

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 protections 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.

C. 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,[11] and is widely acknowledged to be linked to dominant trends in the globalization of trade and the related push to deregulate labour markets.[12] Similarly well-documented is the predominance of women, people with disabilities, Aboriginal people, new immigrants and poor

[9] *Machtinger*, *supra* note 1 at para. 31.
[10] Katherine Swinton, cited in *Machtinger*, *ibid* at para. 31.
[11] See generally Kerry Rittich, *Vulnerability at Work: Legal and Policy Issues in the New Economy*. Report for the Law Commission of Canada. January 25, 2004. <http://www.lcc.gc.ca/pdf/rittich.pdf> and sources cited therein.
[12] See, *e.g.*, Rittich, *ibid*.; Isabella Bakker, "Globalization and Human Development in Rich Countries: Lessons from Labour Markets in Welfare States," Background Papers, UNDP Human Development Report, 1999, vol. 2; and Joanne Conaghan, Richard Fischl, and Michael Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002).

people in low-wage, precarious, and non-standard employment (i.e., part-time, temporary, term, casual on-call and low-income "own account" self-employed workers).[13] 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 1970's,[14] (2) the predominance of women in lower-wage, part-time and other precarious employment sectors,[15] 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, "[i]t 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."[16]

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 protections.[17] 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.

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:[18]

- 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);

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[13] See, *e.g.*, Andrew Jackson, *Is Work Working for Women?* Canadian Labour Congress, Research Paper #22 (May 2003) and Andrew Jackson, *Is Work Working for Workers of Colour?* Canadian Labour Congress, Research Paper #18 (October 2002).
[14] Jackson, *Is Work Working for Women?, ibid* at p. 6.
[15] *Ibid* at p. 8-9.
[16] Rittich, *supra* note 11 at p. 53.
[17] Law Commission of Canada, *Is Work Working? Work Laws That Do a Better Job*. Discussion Paper (December 2004) <http://www.lcc.gc.ca/pdf/work.pdf>
[18] 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 13; Andrew Jackson, *Is Work Working for Workers of, Colour?, supra* note 13, Indian and Northern Affairs, *Aboriginal Peoples in the Workforce: The National Perspective* (2004) <http:www.ainc-inac.gc.ca/ai/awpi/fac_e.html>; Province of Manitoba, *Aboriginal and Northern Affairs*, Chapter 6: Labour & Income <http:www.gov.mb.ca/ana/apm2000/6/e.html>; UN Platform for Action Committee (Manitoba), *Women & the Economy: A Resource Book*, Bk. 1, p. 78; Leah Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000).

- 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 for non-Aboriginal Manitobans ($18,258 for non-Aboriginal people; $8,029 for Status Indians; $10,620 for Non-Status Indians; and $12,219 for Métis);

- 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;

- the rate of part-time employment is much higher among women than men (27.7% for women vs. 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 $10.00/hr, and a median weekly wage of $181.25;

- part-time jobs are approximately one-half as likely to provide benefits as full-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.

A phenomenon that is evident in the facts cited above and is of great significance to this Review is the relationship between women and part-time employment.

The evolution of the Canadian labour market over the past fifty years has been marked by the influx of women into the paid labour force and the prodigious growth of part-time work. The vast majority of part-time workers are women. Since the mid-70s, women have consistently accounted for about 7 in 10 of all part-time employees. As reported in Statistics Canada, "Women in Canada, 2000", 28% of employed women work less than 30 hours per week and women constitute 69.7% of all part-time workers.[19]

The statistics on gender are particularly striking when the focus is on adult workers (factoring out retirees and the 15-24 age bracket in which many young men and women combine part-time employment with attending school). Among adult wage earners (age 25 to 54), women constitute the overwhelming majority of part-time workers, outnumbering men by a ratio of four to one.[20]

Women's predominance in part-time work reflects the reality that women have fewer hours to devote to paid employment than do men, because they bear a larger share of the burden of unpaid responsibilities. 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.[21]

Among part-timers, women are much more likely than men to identify child care and other family and personal responsibilities as factors affecting their decision to work part-time. This figure is particularly striking for women in the key child rearing years. Among part-time workers 25 to 44 years old, 32.5% of women cite "Caring for Children" as their reason for working part-time, while only 2.2% of men cite this reason.[22]

This unequal burden was acknowledged by the Supreme Court in *Symes v. Canada*. Iacobucci J., for the majority, noted that the appellant 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.[23] Writing for the minority, L'Heureux Dubé J. also described the benefit to society from a burden borne largely by women:

> While there is a personal component to child raising, and while the care of children may be personally rewarding, this "choice" is a choice unlike any others. This "choice" is one from which all of society benefits, yet much of the burden remains on the shoulders of

[19] Statistics Canada, "Women in Canada, 2000: A Gender-based statistical report", pp. 103, 123.
[20] *Ibid*., p. 124. The percentage of employees working part-time is approximately 4.5% for men, compared with slightly over 22% for women.
[21] *Ibid*., p. 97.
[22] *Ibid*., p. 125.
[23] *Symes* v. *Canada*, [1993] 4 S.C.R. 695, pp. 762-765.

> women. Women "choose" to participate in an activity which is not for their benefit alone, and, in so doing, they undertake a function on behalf of all society.[24]

The dilemma faced by employed mothers has been recognized in human rights jurisprudence. As the Canadian Human Rights Tribunal observed in *Brown v. M.N.R., Customs and Excise*: "More 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."[25] The Tribunal placed a clear obligation on the employer to facilitate and accommodate this balance.

It is well established in European law that discrimination against part-time employees can amount to indirect discrimination against women. "[T]he fact that women continue to bear primary responsibility for childcare means that considerably more women than men work part-time. A condition which makes full time working a prerequisite for access to a range of employment related benefits, such as pensions, protection against unfair dismissal, and equal hourly pay has been held to be indirectly discriminatory."[26]

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

D. Legal Context: Equality, Human Rights, and Meaningful Protections for Workers

1. Domestic Law: Constitution and Human Rights Obligations

The *Canadian Charter of Rights and Freedoms* is the supreme law of Canada[27] and any laws and government (in)action must be consistent with the *Charter*, including section 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, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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 everyone should be

[24] *Ibid*, at p. 804.
[25] 19 C.H.R.R. D/39.
[26] S. Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) at 108.
[27] *Constitution Act*, 1982, s. 52(1).

treated the same), a commitment to substantive equality means recognizing that patterns of disadvantage and oppression exist in society. Furthermore, it requires that law-makers 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*.[28]

Principles of substantive equality and freedom from discrimination have been incorporated into domestic human rights laws. Of significance to the employment context and to this Review is the Manitoba *Human Rights Code*,[29] particularly section 14 prohibiting discrimination in employment, 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 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.

2. 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.)*[30] has been quoted in numerous subsequent employment law decisions such as those dealing with inequality of bargaining power between employees and employers,[31] compensation for bad faith dismissal by employers,[32] and the right of agricultural workers to organize.[33] 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.[34]

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[28] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
[29] C.C.S.M. c. H175.
[30] *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 ("*Alberta Reference*") at p. 368.
[31] *Machtinger , supra* at note 1.
[32] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.
[33] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.
[34] *Alberta Reference*, *supra* note 30 at p. 368.

Of particular relevance to this Review is the Supreme Court of Canada decision in *Machtinger v. HOJ Industries*[35] 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* (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 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.[36]

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.

3. 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:

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[35] *Supra*, note 1.
[36] *Ibid*, at p. 1003-1004.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[37]:

Article 3

State 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. State 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;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to 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, State 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 child-care facilities …

[37] U.N. G.A. 18 December 1979, ratified by Canada 10 December 1981.

Covenant on Economic, Social and Cultural Rights (CESCR)[38]:

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 everyone 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 conditions;

(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;

(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.

Covenant on the Rights of the Child (CRC):[39]

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.

[38] U.N. G.A. 16 December 1966, ratified by Canada 19 August 1976.
[39] U.N. G.A. 20 November 1989, ratified by Canada 12 January 1992.

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 E 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.

E. Submissions Relating to Matters Raised in Discussion Guide

1. 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 forty hours per week, without overtime pay, if their hours average out to forty hours per week over time.

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, 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.

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*,[40] provides the necessary protection to employees. They 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 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

[40] [2004] M.L.B.D. No. 13.

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*.

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 changes in the labour market.[41] Women – and particularly women of colour and recent immigrants – predominate in low-wage incentive-based work such as that in the garment industry[42] 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 the exploitation and to redress inequality of bargaining power, incentive-based workers must be guaranteed a fair and reasonable wage. The current unjust practice in Manitoba 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* 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.

A final, related matter of inequality concerns the *Code* provisions and regulations governing "call-in wages." The general rule, set out in s. 51, provides that an employee who is called in to work must be paid for at least three hours or work, even if they work less than that (unless the employee's regular hours are less than three hours per day). However, the *Minimum Wages and Working Conditions Regulation*,[43] s. 10 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,[44] are exempted from even this most basic protection, is an example of the failure of the *Code* 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 call-in wages.

2. 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*,[45] and the *Minimum Wages and Working Conditions Regulation*,[46] the Minister of Labour was required to review the effectiveness of both regulations before January 1, 2005 and, if advisable, recommend that the regulations be amended or repealed. We ask the Minister to make public the reviews and

[41] See generally Kerry Rittich, *supra* note 11.
[42] United Nations Platform for Action Committee Manitoba, *Women and the Economy: Globalization and Clothes*, http://www.unpac.ca/economy/g_clothes.html
[43] Man. Reg. 62/99, s. 10.
[44] Jackson, *Is Work Working for Women?*, *supra* note 13; Canadian Labour Congress, *supra* note 13 at p. 16.
[45] Man. Reg. 60/99, s. 9.
[46] Man. Reg. 62/99, s. 23.

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. 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 protections in their working lives. We submit that all exclusions from employment standards legislation and regulations which apply to both of these groups of workers should immediately be removed, and that the current exclusions violate section 15 of the *Charter*.

Domestic Workers

A domestic worker is defined in section 2 of the *Domestic Workers Regulation* as follows:

> This regulation applies to 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.

The exclusions from minimum standards legislation are different for a domestic worker who works more than 24 hours per week in an employer's home as opposed to the domestic worker who works less than 24 hours per week in an employer's home. Domestic workers who work more than 24 hours weekly have a deemed maximum work day under section 4 of the *Domestic Workers Regulation*: "A domestic Worker who works more than 12 hours in a day is deemed to work 12 hours in that day." However, it would appear that other minimum standards apply to them. By contrast, section 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.) This means that legislative protections as basic as minimum wage, maximum hours of work, overtime pay, vacation and holiday provisions, and termination of employment provisions do not apply at all to domestic workers who work less than 24 hours per week for the same employer.

These exclusions must be considered in the social and economic context of domestic workers. Many domestic workers are foreign citizens working in Canadian homes on a work permit through the Live-in Caregiver Program, a federal government immigration initiative.[47] This program offers foreign citizens the opportunity to apply to be permanent residents of Canada after having completed 2 years of work as a caregiver in an employer's home. The live-in requirement is mandatory. Social advocates and academics have done a lot of analytical work on domestic workers under the Live-in Caregiver Program, and there are recent statistics on the profile of such workers:

[47] The brochure for the Live-in Caregiver Program can be found at http://www.cic.gc.ca/english/pub/caregiver/

97% of domestic workers are women;[48]
77% of domestic workers were Filipinas as of 2000;[49]
A domestic worker's average age is 30, she is relatively well educated, perhaps even as a teacher or a nurse, and she is unmarried although she may have children.[50]

Undoubtedly, there are many more domestic workers working in Canada than those who work under the Live-in Caregiver Program, and not all of them live in their employer's home. However, their numbers and profile are not as well studied and the evidence indicates that the majority of domestic workers are women who were born outside of Canada.

Domestic Workers face a number of vulnerabilities. We address four in particular. Firstly, and directly relevant to the review of the *Employment Standards Code*, are the vulnerabilities in their working conditions: their exempt status from Employment Standards legislation.[51] Secondly, many domestic workers find it difficult to enforce the statutory and contractual rights they do have. Thirdly, domestic workers are vulnerable by virtue of the fact that they work in, and some live in, the private homes of their Employers. Lastly, domestic workers who are not Canadian citizens face additional vulnerabilities. These vulnerabilities provide important context in considering whether their exemptions from employment standards legislation violates the *Charter*.

The fact that domestic workers are exempt from the provisions of the *Code* gives rise to an obvious vulnerability. For domestic workers who work more than 24 hours weekly, Manitoba employers are not obligated to pay for more than 12 hours worked in any given day. Any time over 12 hours is worked for free, and if the worker is paid minimum wage, this effectively reduces the minimum wage rate for this employee. Free time is equally valuable to all workers, yet the *Code* gives employers permission to overwork this worker. Of even more serious concern is the fact that domestic workers who work less than 24 hours per week for the same employer lack the most basic minimum standards protection and access to the enforcement procedures under the *Code*. The economic vulnerabilities facing an employee who does not have to be paid minimum wage or overtime rates and who does not have a cap on her hours of work are clear. She is left to negotiate and enforce her own employment contract without the protections under the *Code*.

Another source of vulnerability facing domestic workers is the difficulty many have in enforcing the legislative and contractual employment rights they do have. Surveys done by domestic worker advocacy groups as well as published employment standards decisions show that even

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[48] Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill *L.J.* 681 at 684.
[49] Status of Women Canada Policy Research Fund, *Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail-Order Brides* by Louise Langevin and Marie-Claire Belleau (Status of Women Canada, 2000) at 20.
[50] *Ibid* at 2.
[51] 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 and Daiva Stasiulis, eds., *Not one of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 122.

where formally protected, many domestic workers do not receive their legal entitlements in practice. Miriam Elvir is 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. She writes that "[u]npaid salaries, or lack of payment for overtime, are the main problems home caregivers encounter."[52] She shares the following experience she had when working for one employer:

> I had to do everything for her, from 8:00 in the morning until 11:00 at night. I lived Monday to Friday at my employer's, and Friday night to Sunday I stayed at my friend's home. The first week, I got a cheque for $90; the second week, I got a cheque for $60; and the third week, I got a cheque for $30.[53]

This passage illustrates the long hours of work and dismal pay which some domestic workers face.

There are many published cases of underpayment. A *Globe and Mail* article reported on a case where the London Urban Alliance helped to rescue a domestic worker from abusive employers.[54] Her contract stipulated that she be paid $650 US a month, but she was normally only paid $250 or less. In *Mustaji v. Tjin*, an employment standards decision, a domestic worker was awarded an astonishing $73,778 in lost wages and unpaid benefits.[55] In *Vojdani (Re)*, a domestic worker was awarded $16,395.13 in unpaid wages which had accumulated over 6 months.[56] During this time she was only paid $975. In *Folch (Re)*, a domestic worker was awarded $39,963.73 in unpaid wages.[57] In *Elliot (Re)*, a domestic worker was awarded $22,312.50.[58]

A 1989 survey of 567 domestic workers by Toronto based advocacy group INTERCEDE reveals the startling rate at which minimum standards entitlement was being ignored by employers.[59] 65% of domestic workers reported they were regularly required to work overtime. Of this 65%, only 33% received their statutory entitlement to overtime pay at time and a half. 43.7% reported receiving no pay for overtime whatsoever. In a more recent survey of British Columbia domestic workers, who are fully included in employment standards legislation, 80% were not paid the statutory minimum wage and overtime rate.[60]

Non-compliance with the terms of the employment contract is, unfortunately, also a common reality for domestic workers. In 1990 the West Coast Domestic Workers Association did a survey of domestic workers in British Columbia at a time when they were only entitled to

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[52] 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.
[53] *Ibid*, 150.
[54] "Domestic worker treated like slave" *Globe and Mail* (6 January 1990) A4.
[55] *Mustaji v. Tjin*, [1995] B.C.J. No. 39 (B.C. S.C.)
[56] *Vojdani (Re)*, [1993] O.E.S.A.D. No. 110 (Ontario Ministry of Labour)
[57] *Folch (Re)*, [2000] B.C.E.S.T.D. No. 322 (British Columbia Employment Standards Tribunal)
[58] *Elliot (Re)*, [1996] O.E.S.A.D. No. 73 (Ontario Ministry of Labour)
[59] Fudge, *supra* note 51 at 127.
[60] Abigail B. Bakan and Daiva Stasiulis, "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.

maximum pay of $40 hours/day under that legislation. These workers all had contracts that stipulated better, but these contractual obligations were rarely met:

> in 63% of employment situations, workers received no compensation whatsoever for work in excess of eight hours daily. ... Of those who did receive payment, only one respondent, 5.0%, received it at the rate of time-and-a-half. The rest received the regular hourly rate, less than the hourly rate, erratic payments that varied according to the employer's whim, or time-off in lieu of monetary compensation.[61]

The unfortunate reality is that employers of domestic workers frequently fail to meet their basic obligations under statute and the employment contract. This reality underscores the need for legislative exclusions to be removed so that domestic workers can, at the least, have full and complete access to Employment Standards complaint procedures.

Domestic workers face further vulnerabilities in light of the fact that they work (or live) in someone else's home. The work can be isolating and, in some instances, dangerous. Unfortunately, complaints of sexual assault and harassment are common. In *Guzman v. T*, a domestic worker won $6,500 worth of damages from a human rights complaint when her employers did nothing to stop their teenage son from sexually harassing her.[62] In *Singson v. Pasion*, a domestic worker was awarded $3,500 for damages arising out of sexual harassment and inappropriate touching by her male employer. As well, domestic workers who do not have Canadian citizenship or permanent resident status face often fear deportation, and as such, are less likely to make a human rights or employment standards complaint against their employers. This notion of a "chilling effect" which vulnerable workers (in that case, agricultural workers) face has been recognized by the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)*.[63]

We submit that 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 of section 15 of the *Charter*:

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

In *Law v. Canada*, the Supreme Court held that in order to make out a violation of section 15, a claimant must show that she suffers differential treatment based on an enumerated or analogous ground of protection, and that this has a discriminatory effect which denies her essential human dignity.[64] It is our position that the *Law* test for discrimination has brought about a major shift

[61]Macklin, *supra* note 48 at 720.
[62][1997] B.C.C.H.R.D. No. 1 (British Columbia Council of Human Rights).
[63] *Supra*, note 33.
[64]*Supra*, note 28.

away from substantive equality analyses in recent equality jurisprudence as it obscures the meaning of equality and creates unnecessary hurdles for s.15 equality claimants.[65]

Section 15 analyses must be guided by substantive equality principles. First, in order to understand substantive equality it is necessary to start with a clear appreciation of the context of structural inequality. Second, as confirmed by the Supreme Court of Canada in *Auton*, the analysis should not be mechanical or formalistic: "there is no magic in a particular statement of the elements of the test for discrimination."[66] Third, a holistic approach to s.15 is preferable to a disaggregated one, because the latter tends to obscure unequal effects and undermines the purpose of the *Charter* equality rights protection.

The unequal effects of the current legislation on domestic workers are clear. The inequality can be demonstrated through the application of a holistic equality analysis; however, this case also meets the requirements of the 3 step *Law* analysis, as set out below.

The differential treatment of domestic workers by the *Employment Standards Code*, particularly those who work less than 24 hours per week for the same employer, is clear. They lack the same fundamental employment rights and protections that many other Manitoba workers have. We submit that there are several enumerated or analogous grounds on the basis of which the treatment of domestic workers amounts to discrimination. The first and most obvious is sex, as the vast majority of domestic workers are women. Other grounds are race and national or ethnic origin, as many domestic workers are women of colour from countries such as the Philippines. Another potential ground of discrimination, particularly in light of the numbers of domestic workers hoping to gain permanent residency under the Live-in Caregiver Program is citizenship, which has been recognized as an analogous ground in *Andrews*.[67] The grounds of discrimination that are relevant to understanding and remedying the inequality experienced by domestic workers must not be disaggregated. The lived experience of discrimination is not compartmentalized. Rather, the approach is an intersectional one that focuses on, in this case, the intersection of race, gender and often citizenship status.

The discrimination aspect of the *Law* test lists four factors to be considered: pre-existing disadvantage; the relationship between the grounds and the claimant's characteristics or circumstances; the ameliorative purpose or effects of the legislation; and the nature of the interest affected. The application of these factors to the situation of domestic workers easily establishes discrimination. Most obviously, as has been demonstrated, domestic workers are subject to particular vulnerabilities in their working lives. In *Law*, at para. 63, Iacobucci J. wrote that where a claimant is already subject to unfair circumstances and treatment, further differential treatment will generally exacerbate his or her circumstances. Clearly, excluding domestic workers from full employment standards protection can only worsen their employment situation. The "relationship between the grounds and the claimant's characteristics or circumstances" factor is also easily met for domestic workers. The legislation clearly fails to take into account a domestic

[65] For a further analysis of the problems associated with the *Law* analysis, please see Fiona Sampson, "LEAF and the *Law* Test for Discrimination: An Analysis of the Injury of *Law* and How to Repair It" (November 2004) http://www.leaf.ca/legal-pdfs/Law%20Report%20Final.pdf

[66] *Auton (Guardian ad. litem of) v. British Columbia (Attorney General),* [2004] 3 S.C.R.657, at para. 23.

[67] *Law Society of British Columbia et al. v. Andrews et al.*, [1989] 1 S.C.R. 143.

worker's actual employment situation, which often includes chronic overwork and underpay. Moreover, it enables employers to further exploit a domestic worker by failing to provide an adequate floor of minimum rights.

The third factor under the *Law* discrimination analysis is the "ameliorative purpose or effects" of the exclusions. We submit that the exclusions produce no ameliorative purpose or effects for domestic workers whatsoever. Rather, the benefits go to the employers of domestic workers. The fourth factor to be considered is "the nature of the interest affected." As L'Heureux-Dubé J. noted in *Egan*, "the more severe and localized the consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter.*"[68] The Supreme Court of Canada has recognized the fundamental role of work in an individual's life: "[w]ork is one of the most fundamental aspects of 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."[69] A legislative provision which impedes a worker's ability to support herself financially, to access complaint procedures for minimum standards, and to make effective use of her free time away from work has a severe and localized consequence on that worker. We submit that the exclusion of domestic workers from the *Employment Standards Code* is a breach of section 15 of the *Charter*.

Furthermore, it is difficult to imagine how the exclusions could be justified under section 1 of the *Charter*. A government wishing to uphold a discriminatory piece of legislation has the onus of showing that it serves a pressing and substantial purpose, that there is a rational connection between the exclusion and the pressing and substantial purpose, that the rights which are breached are "minimally impaired" and that there is proportionality between the effects of the purpose and the effects of the breach. When this government considers what changes should be made to the *Employment Standards Code* and its regulations, we invite it to comment on how the exclusion of domestic workers is justifiable under section 1 of the *Charter*. In addition, we make the following observations. Coopers and Lybrand did a study of the impact of changes in domestic worker wages and overtime on employer use of domestic labour.[70] They found that if wages were raised 25%, 71% of employers would change their use of domestic workers. If employers were required to pay full time and a half for overtime, 32% would change their use of domestic workers. Changes would include ceasing to employ a domestic worker (for employers in lower income brackets), ensuring that a domestic worker did not work more than 44 hours per week, and splitting the workload between two domestic workers. The majority of employers would still employ a domestic if they had to pay overtime premiums.

Moreover, Manitoba's exclusion of domestic workers is out of line with employment standards legislation in several Canadian jurisdictions where domestic workers are no longer excluded at all. In British Columbia[71], Ontario[72], New Brunswick, Newfoundland, and the Northwest

[68] *Egan v. Canada,* [1995] 2 S.C.R. 513 at para 63.
[69] *Supra*, note 30 at p. 368.
[70] Referenced in Ontario Task Force on Hours of Work and Overtime, *Domestic Workers and the Employment Standards Act* by Monica Townson (Toronto: Department of Labour, 1987) at 39-43.
[71] For information on British Columbia's standards for domestic workers, see http://www.labour.gov.bc.ca/esb/domestics/

Territories, there are no exclusions from employment standards legislation which apply to domestic workers. To the contrary, section 14 of British Columbia's *Employment Standards Act*[73] provides protection to domestic workers by requiring 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. It also provides that if a domestic worker is required to work beyond the hours in the contract, the employer must add those hours to the pay period. Furthermore, in B.C., employers of domestic workers must register the employee with the Director of Employment Standards.[74] Ontario's *Exemptions, Special Rules and Establishment of Minimum Wages Regulation*[75] also requires a written contract to be given to domestic workers.

The fact that domestic workers are included in minimum standards legislation in other provinces is strong evidence in favour of the argument that Manitoba's exclusions could not be justified under s. 1 of the *Charter*. As such, we submit that there can no longer be any justification, economic or otherwise, for upholding the exclusion of domestic workers from Manitoba's *Employment Standards Code*. All exclusions should be removed immediately, and we submit that a provision should be added to the *Cod*e requiring employers to provide a written contract to domestic workers setting out their duties, hours of work, and rates of pay. There should also be a provision of the *Code* expressly stating that employers must pay domestic workers for all hours of work performed. A requirement that employers register information about domestic workers with the Director of Employment Standards would help to monitor compliance.

Agricultural Workers

Section 3 of the *Minimum Wages and Working Conditions Regulation* 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. These employees thus do not benefit from the majority of the minimum standard protections in the *Code* and, like domestic workers, they consequently lack access to the employment standards complaint process to enforce basic employment rights and obligations.

Like domestic workers, agricultural workers are a particularly vulnerable type of worker, as the Supreme Court of Canada recognized in *Dunmore v. Ontario*.[76] In *Dunmore,* a group of employees and the United Food and Commercial Workers Union brought a Charter challenge to Ontario's *Labour Relations and Employment Statute Law Amendment Act, 1995* which repealed legislation passed by a predecessor government giving agricultural workers the right to unionize and participate in the collective bargaining regime. The exclusion was challenged on the basis of section 2(d) of the *Charter,* the right to freedom of association, as well as section 15, the equality guarantee. The majority of the Court, per Bastarache J., found that the exclusion violated section 2(d) and could not be justified under section 1, and did not go on to address section 15.

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[72] For Ontario's "fact sheet" on domestic workers, see http://www.labour.gov.on.ca/english/es/factsheets/fs_domestics.html
[73] R.S.B.C. 1996, c. 113
[74] *Employment Standards Regulation*, B.C. Reg. 396/1995, s. 13.
[75] Ont. Reg. 258/01, s. 19
[76] *Supra*, note 33.

L'Heureux-Dubé J., in her concurring judgment, held that section 15 was also violated by the exclusion.

The court's judgment recognizes and confirms that agricultural workers are a particularly vulnerable group of employees. For example, at paragraph 41, Bastarache J. characterized agricultural workers as the type of employees "… who have no recourse to protect their interests aside from the right to quit … ." He goes on to describe them as follows:

> Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are 'poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility' … .

At para. 102, L'Heureux-Dubé J. describes agricultural workers as follows:

> And, at least insofar as agricultural workers are concerned, working conditions are characterized by long hours, low wages, little job security of social recognition, and few employment benefits beyond those strictly mandated by law … As Sharpe J. noted in his reasons, 'agricultural workers are a disadvantaged group.'

Charter jurisprudence has suggested in the past that occupational status is generally not an analogous ground of discrimination under section 15 of the Charter. However, in her Section 15 analysis, L'Heureux-Dubé J. suggested that the occupational status of an agricultural worker does amount to an analogous ground under the *Charter*. At para. 166 she writes that:

> In *Law v. Canada* … the Court held, at para. 93, that the determination of whether a ground or confluence of grounds is analogous to those listed in s. 15(1) is made on the basis of a complete analysis of the purpose of s. 15(1), the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group. A ground or grounds will not be considered analogous under s. 15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity.

She notes that the Court has "… repeatedly recognized that employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, self-worth and emotional well-being … ." In *Delise v. Canada*,[77] which involved a *Charter* challenge by R.C.M.P officers to their legislated prohibition against unionization, L'Heureux-Dubé J. wrote as follows about occupational status as a ground of discrimination:

> Occupation and working life are often important sources of personal identity, and there are various groups of employees made up of people who are generally disadvantaged and vulnerable. Particular types of employment status, therefore, may lead to discrimination in other cases, and should be recognized as analogous grounds when it has been shown that to do so would promote the purposes of s. 15(1) of preventing discrimination and

[77] [1999] 2 S.C.R. 989

> stereotyping and ameliorating the position of those who suffer social and political disadvantage and prejudice.[78]

At para. 168, she concludes that "… there is no doubt that agricultural workers, unlike the RCMP officers in *Delisle*, do generally suffer from disadvantage, and the effect of the distinction is to devalue and marginalize them within Canadian society." (Emphasis added) She went on to suggest that:

> 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'' Thus, the critical question here is whether the government has a legitimate interest in expecting agricultural workers to change their employment status to receive equal treatment under the law.

L'Heureux-Dubé J. concludes that this question must be answered in the negative. 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.

L'Heureux-Dubé J. goes on analyze whether discriminating against the occupational status of agricultural workers by excluding them from the labour relations regime can be justified under section 1 of the *Charter*. The two justifications offered by the respondent Employer and the Ontario government in this case were that "Ontario agriculture has unique characteristics as a result of which it is incompatible with legislative collective bargaining, and second that the LRA's purposes could not be realized in the agricultural sector." L'Heureux-Dubé J. states that neither of these arguments is persuasive. There is nothing "unique" about producing agricultural products, nor can it be accepted that none of the LRA's purposes could be realized in the agricultural sector. At paragraph 182, she states that "The 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 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." (Emphasis added) At para. 188, L'Heureux-Dubé J. finds that the complete exclusion of an occupational class from a labour relations scheme does not achieve the balance between labour interests, employer interests and the Canadian public. "This is further aggravated because those affected by the exclusion are not only vulnerable as employees but are also vulnerable as being members of society at large with low income, little education, scant security or social recognition." (para. 189) The wholesale exclusion of agricultural workers was not sufficiently tailored to balance the interests of agricultural workers and the social interest in a harmonious labour market.

L'Heureux-Dubé J. also criticizes the use of an argument for preserving the "pastoral image" of the family farm when such an image is no longer the current reality (para. 194.) To the contrary, Ontario's agricultural sector includes "sophisticated, well-run business and, in terms of employee

[78] Cited in *Dunmore*, *supra* note 33 at para. 167.

relations, much more analogous to an employer in the industrial sector". 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." (para. 197) The wholesale exclusion of agricultural workers could not be justified.

We submit that L'Heureux Dubé J.'s *Charter* analysis of the exclusion of agricultural workers from the collective bargaining legislation is even more pertinent to an analysis of their exclusion from the bulk of the *Employment Standards Code*. Employment standards legislation provides for the bare minimum employment laws which protect Manitoban employees in their working lives. By contrast, unionized employees generally enjoy higher wages and better working conditions, they have much greater job security than non-unionized employees, and they have access to the grievance and arbitration procedure to resolve workplace differences. If the exclusion of agricultural workers from the collective bargaining regime violates the *Charter*, than the exclusion of agricultural workers from the most basic employment protections constitutes an even greater and more pressing violation which requires immediate legislative remedy.

The comparison of provisions affecting agricultural workers in Manitoba's *Employment Standards Code* versus the legislation in other provinces, as summarized in the government's *Inter-Jurisdictional Comparison: Employer/employee Rights and Obligations* document shows that Manitoba has a broader exclusion of agricultural workers than most other provinces. Manitoba also excludes agricultural workers from more minimum standards than other jurisdictions. Clearly, the time for change has come. However, we submit that merely adopting a regime for excluding agricultural workers because other jurisdictions have similar exclusions does not satisfy this government's obligations to enact legislation which complies with the *Charter*. Other jurisdictions are in violation of the *Charter* as well. We submit that agricultural workers should be <u>fully included</u> in Part 2 of the *Code*, and that the needs of industry can be met in a way which complies with the *Charter* by allowing specific employers on a case-by-case basis the ability to apply for variances. This system would recognize an agricultural worker's right to equality before the law based on his or her occupational status, and it would allow for employer interests to be met only where minimal impairment of the breach has been demonstrated.

3. 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.[79]

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 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%[80] 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 with remedies are meaningless, yet the sad reality is that for many Manitoba workers the current *Employment Standards Code* is not worth the paper it's written on. The following are just some of the measures that should be adopted to promote compliance:[81]

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

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[79] England, *supra* note 5 at 84-85.

[80] Human Resources Development Canada, "Evaluation of Federal Labour Standards (Phase I) Final Report, August 1997, p. 41, cited in *Modernizing Part III of the Canada Labour Code: Submissions to the Federal Labour Standards Review*, Workers Action Centre Employment Standards Work Group, October 2005, p. 6.

[81] For these and other recommendations, see *Modernizing Part III of the Canada Labour Code: Submissions to the Federal Labour Standards Review*, Workers Action Centre Employment Standards Work Group, October 2005, p. 8-18 and *Submission to the Federal Labour Standards Review by the Income Security Advocacy Centre*, September 2005, p. 8. All written submissions to the FLSR are available at http://www.fls-ntf.gc.ca/en/sub_list_dat.asp#a1

In short, the investigation, enforcement and compliance provisions of the *Code* require a substantial overhaul. Along with a number of proactive measures (e.g., posting standards in workplaces, 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 Ac*t 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 has been only 18 in the previous four years!) In one of those prosecutions, an employer had failed to pay 14 workers about $74,000 in wages. The company was fined $142,000; one director was personally fined $17,000 and jailed for 60 days, and another director was fined $11,100. Enforcement of this kind creates a meaningful incentive for employers to comply with the law.

4. 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 entitled to at least one week per year of service up to a maximum of ten weeks.[82]

A further necessary measure is the repeal of the long list of exclusions in s. 62 from the minimum notice requirement for termination of employment by the employer. Most problematic are subsections (a), (b) and (c) authorizing the unilateral decision of an employer or "agreement between employer and employee" to provide notice <u>below</u> 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 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

[82] 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.

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, but more importantly, 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 and employee as is required from and employer. Eight Canadian jurisdictions (including Ontario, BC, 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.

5. Statutory Holiday Pay for Part-Time Workers

As discussed in Part C, 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). 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."[83] Finally, it would be consistent with the 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."[84]

6. 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

[83] NDP publication, "Quick Facts: Today's Working Families," prepared and distributed during the 1999 election campaign.
[84] Resolution 05-JE-46.

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 BC, Ontario, PEI, and the Yukon where no deductions from wages are permissible. In any event, if deductions are permitted in limited circumstances, the *Code* should provide that such deductions can never be permitted to take an employee's earnings below the level of minimum wage.

7. 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 US 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.[85]

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 sections 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.[86] This Review must take seriously the rights of children. Therefore, we submit that this Review recommend the adoption of specific, enforced standards to protect young, vulnerable workers, such as: [87]

- 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);
- 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 pm and 6:00 am).

Furthermore, any attempt to make more "flexible" the 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

[85] Kristoffel Lieten and Ben White, "Children, Work and Education: Perspectives on Policy," in Leiten and White, eds., *Child Labour: Policy Options*, Amsterdam: Askant, 2002, p. 6.
[86] See s. 83(4).
[87] Specific standards such as those listed below are found in most other jurisdictions such as Ontario, Alberta, Nova Scotia, New Brunswick, PEI, Quebec, Saskatchewan, and others.

children and youth were relaxed in amendments to the BC *Employment Standards Act* in 2003. 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). A recent study[88] of young people aged 12-18 years who are employed in BC 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.[89] This includes a number of youth aged 12 to 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 BC 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 that their initial experiences with the working world are regulated according to acceptable standards, and that these standards are followed.[90]

8. 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*[91] and 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.[92] 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 affects 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

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[88] John Irwin, Stephen McBride, and Tanya Strubin, *Child and Youth Employment Standards: The Experience of Young Workers Under British Columbia's New Policy Regime*, Canadian Centre for Policy Alternatives: BC Office, 2005. http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2005/child_youth_employment.pdf

[89] *Ibid* at p. 23-25.

[90] *Ibid*, at p. 32.

[91] S.C. 1996, c. 23.

[92] See generally, Lorna Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).

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 the Dickson C.J., writing for the unanimous Supreme Court in *Brooks v. Canada Safeway Ltd*[93] in the context of maternity leave:

> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a while 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.

Consistent with the equality guarantees in the *Charter*, Manitoba should extend job protection to workers who take leaves to care for children, 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 bread-winner earning a "family wage" in mind, and has failed to address 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 BC) 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.

The reality is that taking an 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* (e.g., those providing 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,

[93] [1989] 1 S.C.R. 1219, p. 1243-1244.

short-term jobs to avoid having to provide leaves to those women. The Supreme Court has recently reaffirmed[94] that addressing the equality rights of women, particularly needs related to maternity and parenting is a societal responsibility:

> 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.[95]

In fact, a growing number of provinces (BC, 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 for the previous 30 calendar days.[96] We call upon the Manitoba government to uphold equality rights by removing the eligibility threshold for maternity and parental leave (currently 7 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.

F. 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 clear 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 highlighted areas. We also request that when the Review is made public that it include a record of all oral and written submissions made to the Review.

We have expressed in these submissions 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. 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

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[94] *Reference re Employment Insurance Act (Can.)* ss. 22 and 23, 2005 SCC 56.
[95] *Ibid*, para. 66.
[96] Manitoba Labour, *Employment Standards Fact Sheet: Compassionate Care Leave* http://www.gov.mb.ca/labour/standards/pdf/compassionate_care_leave.pdf

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.