

MODULE 3
**Women, Work and Equality:
Remembering Our Struggles,
Defending Our Victories:
Maternity and Parental Benefits**

**Women, Work and Equality:
A Popular Legal Education and Consultation Series**

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**Remembering Our Struggles, Defending Our Victories:
Maternity and Parental Benefits**

Presented by the National Association of Women and the Law (NAWL) in
Collaboration with the Canadian Labour Congress (CLC)

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States parties shall take appropriate measures ... to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

***Convention on the Elimination of All Forms of Discrimination
Against Women (CEDAW) Article 12***

The most vulnerable women in Canada and those working in non-standard work arrangements are those least likely to be eligible for [maternity] benefits. This accounts for a large percentage of Canadian women.

Kirstin Lund, Researcher (Women's Network PEI), *Looking Beyond the Surface: An in-depth Review of Parental Benefits* (2003)

MODULE 3

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1. Workshop Goals, Expectations, and Limitations

- To hear from a diversity of women about issues surrounding maternity benefits and parental benefits.
- To provide an overview of the federal maternity and parental benefits regime and to identify its weaknesses.
- To engage in information-sharing around provincial models and to evaluate their ability to promote women's equality.
- To consult around the implications of various models aimed at improving maternity and parental benefits.
- To strategize lobbying approaches for reforms that will promote women's substantive equality at work, in the family and in society.

2. Why are Maternity and Parental Benefits a Women's Equality Issue?

2.1 The costs that women bear because they have children

What do you make of the following quotes?

“Laws do not support mothers and mothers pay twice for the children they have chosen to mother. This is double jeopardy.”

Lorna Turnbull, *Double Jeopardy: Mother-Work and the Law* (2001: 24)

“Women who are mothers are at a disadvantage in comparison to men who are fathers and in comparison to men and women who do not have children.”

Lorna Turnbull, *Double Jeopardy: Mother-Work and the Law* (2001: 40)

In her book, Professor Turnbull examines how this “double jeopardy” operates for mothers. She found that mothers: (2001:47-48)

- experience a drop in earnings with each additional child;
- tend to be located in part-time work arrangements;
- have little or poor maternity benefits;
- receive less training and promotions;
- take on more flexible jobs with correspondingly fewer benefits;
- experience disadvantage in relation to pensions;
- take on the lion's share of unpaid labour in marriages /civic unions;
- have few family assets and find themselves in poverty post-divorce;
- have their children used as pawns against them in divorce proceedings;
- have insufficient child support (which was taxable income until 1997¹); and

¹ In *Thibaudeau v. Canada* [1995] 2 S.C.R. 627 the Supreme Court determined that this was not a violation of women's equality rights (protected under s.15). It is worth noting that both women on the bench disagreed (dissented) with the majority's decision.

- face considerable barriers when attempting to return to paid employment.

2.2 Maternity and Parental Benefits: An issue for feminists

- Women's right to maternity benefits has its origins in the struggle of pregnant workers for the right to unemployment insurance that other workers were entitled to.
- To do so, women had to challenge the dominant understanding that pregnant women had no business in the workplace.
- At the core of the debate was women's struggle for the right to continue or return to work.
- Obtaining maternity benefits is a fundamental starting point for achieving women formal equality (equal treatment of men and women workers) but it is also **one component** of a broader struggle for substantive equality (accommodation of women workers' needs during pregnancy and childbirth; recognition of "motherwork" and the importance of caring for children; making sure that women do not lose their income when they have children).
- Maternity benefits challenge the dominant understanding of pregnant women and mothers being unfit to work.

These benefits represent just a part of the social and economic costs of having children; this cost should not be born by women alone.

3. Canada's Current Maternity Benefits Regime

3.1 Maternity Leave is not the same as Maternity Benefits

There are a number of differences between maternity and parental **benefits** and maternity **leave**.

- Maternity **leave** is a **legal right** to take **time off work to care for your new baby**. You also have the right to **return to your job** or to a similar job once that leave ends.
- Maternity **leave** is provincially regulated (except for the 10% of workers who are covered under the federal *Labour Code*).
- Maternity **benefits** are federally regulated; they are the compensation you can receive for the salary you lose while you take time off.
- Maternity leave is provincially-administered and the length of time that a woman is required to work in order to qualify, varies with each province.
- If you belong to a union, your collective agreement may have a maternity leave clause.
- Maternity **leave** can be **paid** or **unpaid**. Maternity **benefits** are provided under a regime administered through the federal *Employment Insurance Act* (formerly the *Unemployment Insurance Act*).

3.2 Eligibility for Maternity Benefits

In order to qualify for maternity and parental benefits you have to have worked at least 600 hours in the previous year (“qualifying period”). The current federal regime operates as such:

- Under the *EI Act*, the federal government replaces **55%** of your salary (up to \$39,000 a year) to a maximum of **\$413** a week.
 - This amount is the same even if you give birth or adopt more than one child at the same time.
 - note that the *EI Act* also allows for **a supplement for low-income families with children (the “family supplement”)**. This means that for families with a net family income of \$25,921 or lower and who receive the Canadian Child Tax Benefit (CCTB), the replacement wage increases from **55% to 80%**.
- You do not get any income replacement for the first two weeks of your claim (two-week ‘waiting period’).
- This waiting period can be waived if certain conditions apply.
 - Some employers, especially in unionized workplaces, will continue to pay a mother's salary during this waiting period.
- You can receive maternity benefits for a maximum of 15 weeks.
- If you qualify for maternity benefits you will also be able to claim **parental benefits** if you decide to take parental leave (up to **35 weeks**). This means you can receive benefits for a maximum of **50 weeks**.

- But you may be eligible for an increased number of weeks where specific conditions apply (i.e., sickness benefits).

Benefits are taxable income (i.e., applicable federal, provincial and territorial taxes will be deducted from your payment).

- If you work while receiving maternity benefits, your earnings will be deducted dollar for dollar from your benefits.
- Note that because benefits are based on an insurance model, eligibility for benefits depends on having made contributions to the fund. This means that it does not apply to women who do not work in paid employment or who are self-employed.
- Québec is the only province that currently offers a maternity **allowance** of \$350.00 to mothers whose annual family income is less than \$55,000.

3.3 Eligibility for Parental Benefits

- In addition to maternity benefits, the *EI Act* provides for **parental benefits**. These apply to both biological and adoptive parents while they are caring for a newborn or an adopted child.
 - Despite the **gender-neutral term**, the majority of recipients of parental benefits are **women** (In 1998, approximately **3%** of applications were made by fathers; in 2001, this percentage had more than tripled to **10%**: Statistics Canada, 2003).
- Parental benefits are available up to a maximum of **35 weeks**. This 35-week period plus the **15 weeks** of maternity leave, means that parents have a maximum of **50 weeks** of combined benefits now available.

- Like maternity benefits, to receive parental benefits, you are required to have worked for 600 hours in the previous year.
- You can still work while receiving parental benefits. You can earn **\$50 or 25%** of your weekly benefits, **whichever is higher**. Any monies earned above that amount will be deducted dollar for dollar from your benefits.
- Parental benefits can be shared between parents. In that case, they may be taken at the same time, consecutively or on alternating weeks, and may be spread out over the 52-week period following the birth or adoption.
- If you share parental benefits, only one two-week waiting period without benefits must be served. Mothers almost always take leave first, so mothers are usually the ones that serve the two-week period without benefits.

Source: Human Resources and Skills Development Canada (HRDSC) *Employment Insurance (EI) and Maternity, parental and sickness benefits*, at: <http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/ei/types/special.shtml&hs=tyt>.

Handout No. 1: Job-protected Maternity and Parental Leave Provisions and Eligibility Requirements by Jurisdiction

3.4 Problems with the current regime

Brainstorm: Who is excluded from the current regime?

- Women, more than men, work in temporary, part-time, seasonal, and/or unstable work situations where meeting these eligibility requirements is most difficult.
- Women constitute 70% of the growing part-time labour force, in part because they still perform two-thirds of unpaid work in the home and are overwhelmingly responsible for childcare. As a result, in 1999, only 33% of unemployed women in Canada qualified for benefits – 11% lower than the comparable figure for men (CLC, 2003).
 - Women continue to make on average 71% of a man's salary in comparable work – this is worse for immigrant women, women of colour, Aboriginal women, and women living with disabilities.
 - Women who cannot meet the requisite hours are denied access to benefits.
 - 600 hours = 11.5 hours/week during 52 weeks.
 - Mothers who work 11.5 hours/week or less or who do not work all year cannot meet the requirement for the minimum number of hours.
 - This is so, **even if** they are obliged to make contributions to the *Employment Insurance Fund*.
- Few mothers with more than one child are eligible: 58% of new mothers with one other child; 43% of new mothers with 2 other children; and only 11% of new mothers with 3 or more children are eligible (Phipps, 2000: 241).

- The system is incapable of providing a reasonable level of income support (55% is not sufficient) and, therefore, some low-income women who may be eligible for benefits simply cannot afford to stop work.
- The family supplement is fixed at about \$25,000 which means that even at a replacement of 80%, many families remain below the low-income cut-off.
- Only to the extent that a province recognizes a lesbian co-mother or lesbian spouse are federal parental benefits available to same-sex families.

In short, the current regime does little to destabilize gender imbalance in the workplace or within the home.

Sources: Phipps, S. A., “Maternity and Parental Benefits in Canada: Are there Behavioural Implications?” *Canadian Public Policy - Analyse de Politiques*, Vol. XXVI, No. 2, 2000.
 Pulkingham, J. & van der Gaag, T. (2004) “Maternity/Parental Leave Provisions in Canada: We’ve Come a Long Way, But There’s Further to Go” *Canadian Woman Studies / les cahiers de la femme*. 23(3,4): 116.
 Women’s Network PEI (2005) “A Principled Evaluation of Maternity and Parental Benefits in Canada” www.mwpei.org
 Canadian Labour Congress (2003) “Analysis of Falling Unemployment Insurance Protection for Canada’s Unemployed”
<http://www.unemployed.ca/Falling%20UI%20Protection%20for%20Canada%27s%20Unemployed.pdf>

4. Remembering Our Struggles, Defending Our Victories: Historical Context to Maternity Benefits

Despite its problems, the federal UI/EI birth benefits remain a victory for Canadian women's labour rights. This is a tremendous and hard-won success, spearheaded by women in unions and the broader labour movement. It is helpful to examine, therefore, some of the changes that have resulted because of women's on-going activism.

- During the 1960s and 1970s, women's groups and unions formed coalitions and alliances to mobilize around the issue of maternity benefits.
- Following recommendations made in the Report of the Royal Commission on the Status of Women, in 1971, maternity benefits were included in the federal *Unemployment Insurance Act (UIA)*.
- As of 1971, the *UIA* provided for a total of 15 weeks of maternity benefits:
 - 8 weeks before birth plus;
 - and
 - 6 weeks after birth.
- However, the *Act* disentitled pregnant women from receiving basic unemployment benefits, restricting them to special maternity benefits during a portion of their pregnancy. And in order to qualify for maternity benefits, women workers had to meet stricter conditions than for regular unemployment benefits

- In 1979 the Supreme Court decided that this was not discrimination against women. Stella Bliss was told that she was not entitled to maternity benefits under *UIA* because she did not meet the stringent requirements; she was also not entitled to regular benefits because she was pregnant.

The Court ruled that she was not discriminated against because she was a woman. Rather, these were simply special rules for pregnant people - “any inequality between the sexes in this area is not created by legislation *but by nature*”.

Therefore, the Bill of Rights **protection against sex discrimination** did not apply:²

- Despite unacceptable decisions like this one, between 1971 and 1996, due to long-standing activism spearheaded by women in unions, and staunchly supported by women’s groups, maternity benefits were increased and became more accessible.
- In 1975, women acquired the right to use these benefits any time during the period surrounding the birth.
- In 1983 (with Bill C-156) the government introduced 15 weeks of adoption benefits. .In addition, maternity benefits were simplified and adjusted to conform to the *Canadian Human Rights Act*. .The *Unemployment Insurance Act* was amended to provide for 15 weeks of “parental” benefits for one or the other parent that adopts a child.

² *Bliss v. Canada (Attorney General)* (1978), [1979] 1 S.C.R. 183.

- In 1989, the Supreme Court overturned the *Bliss* decision (which stated that pregnancy discrimination was not discrimination against women) with the *Brooks* decision.
- Also in 1989 (with Bill C-21), the federal government provided for 10 weeks of parental benefits, and for the first time, made benefits available to **birth fathers**.
- However, in the 1990s, the federal government changed the rules for unemployment insurance to make it more difficult to become eligible for benefits. In addition, the duration of benefits was shortened.
- In 1996, the federal government's entitlement to benefits shifted from one that was based on weeks of work to one that was based on hours of work. Under the old scheme, an individual needed between 12 - 20 weeks of insurable earnings (where at least 15 hours of work) within the qualifying period to become eligible for full benefits (including maternity benefits).
- After 1996 a claimant needed a minimum of 700 hours of insurable earnings within the qualifying period. To this end, anyone working less than 14 hours a week could not accumulate the required number of hours within the qualifying period of 52 weeks.
- In 2001, the federal government increased the maternity and parental benefits period to 50 weeks. It also reduced the number of hours required to qualify for these benefits to 600 hours. The changes in 2001 to the federal scheme are positive, however, they do not address the more pressing issues: the low level of benefits; the unfair

eligibility requirements; and, the gaps within who has access to these benefits. Nor do they address the fact that in spite of the fact that some fathers are becoming more involved in bringing up their children, mothers still assume a disproportionate amount of “parental” responsibilities.

- Since 2000, the proportion of new mothers receiving paid birth benefits is rising considerably. Between 2000 and 2003 the number of new moms receiving these benefits through EI increased from 54% to 65% (Statistics Canada, 2004).
- Many mothers are able to take more time off: between 2002 and 2003, the time off increased from 6 to 11 months among mothers planning to return to work (Pulkinham & van der Gagg, 2004).
- Women’s eligibility for EI birth benefits is considerably higher than unemployed women’s eligibility for regular EI benefits (Pulkinham & van der Gagg, 2004).

Sources : Cox, R. & National Association of Women and the Law (NAWL) Working Group on Maternity and Parental Benefits. (2004) *The Recent Québec Appeal Court Decision on the Constitutionality of Maternity and Parental Benefits as Employment Insurance Benefits: Some Feminist Reflections*. NAWL: Ottawa.

http://www.nawl.ca/ns/en/documents/Pub_Brief_MPBenefits04_en.doc

Pulkingham, J. & van der Gaag, T. (2004) “Maternity/Parental Leave Provisions in Canada: We’ve Come a Long Way, But There’s Further to Go” *Canadian Woman Studies / les cahiers de la femme*. 23(3,4): 116.

Pulkingham, J. & van der Gaag, T. (2004) “Maternity/Parental Leave Provisions in Canada: We’ve Come a Long Way, But There’s Further to Go”

***Canadian Woman Studies / les cahiers de la femme*. 23(3,4): 116.**

Statistics Canada. (2004) “Employment Insurance Coverage Survey” *The Daily*, 14 January, 2004. On the web: www.statcan.ca

5. The Canadian Government Has a Responsibility to Improve the Current Model

5.1 Equality Law and Maternity Benefits: Key Concerns

Despite improvements, as we have seen many problems have been identified with the current maternity benefits regime. It can easily be argued that the regime amounts to discrimination on the basis of **sex, race, disability, and sexual orientation, among others**. The current regime negatively impacts women much more than men for a number of reasons:

- Only women bear and give birth to children..
 - Women continue to assume the lion's share of parental responsibilities (and eldercare responsibilities).
 - A mother remains the parent most likely to absent herself from work to take care of a child or children.
 - The majority of recipients of parental benefits are women.
 - Even so, there remains a large minority (35%) of mothers who do not have access to any paid benefits.
 - Women with children earn less than men and earn less than women without children.

Source: Samson, F. (2004) "LEAF and the *Law Test for Discrimination: An Analysis of the Injury of Law and How to Repair It*" Legal Education and Action Fund (LEAF): Toronto : <http://www.leaf.ca/legal-pdfs/Law%20Report%20Final.pdf>

5.2 Equality Law in Canada: A Review

Section 15 of the *Charter of Rights and Freedoms* says that everyone is equal before and under the law AND has the right to the equal protection and equal benefit of the law without discrimination based on: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- Note that other grounds have been “read in” to this list, such as sexual orientation and citizenship.
- This section is Canada's “equality” guarantee. It is mainly concerned with the **impact** of a law or an action by a “governmental actor.”
- Therefore, section 15 is also meant to remedy both (1) differential treatment that results in inequality, as well as (2) identical treatment that may produce inequality.
- For section 15 purposes, **discrimination** is defined as a **distinction**, intentional or not, that is based on the **personal characteristics** of the individual or group concerned.
- This distinction has the effect of imposing disadvantages that are not imposed on others or of withholding access to advantages or benefits available to others.

- A recent Supreme Court of Canada decision, however, found that to be discriminatory, a law must violate a person's **dignity**³. The decision in *Law v. Canada* involves a widow's claim that her equality rights were violated when she was denied a Canada Pension Plan because she was under age 35. (Note that Ms. Law did not make any arguments about discrimination on the basis of sex.)
- A major concern about the *Law* test is its emphasis on human dignity and to issue of proof that something has violated a woman's sense of dignity. Basically, the person claiming that their equality rights have been infringed must show that the distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society.
- As a result, the challenges in meeting that standard have increased because the concept of "dignity" is abstract and it is difficult to fit within an analysis of human rights violations that looks at context and historical disadvantage (LEAF, 2004).
- The Lesiuk case is an example of the negative outcome of relying on a focus on "dignity".

Handout No. 2: Case Study: Kelly Lesiuk

- The Brooks case however, does provide strong arguments acknowledging the social and collective dimension of child rearing. It will help us argue that the government has an obligation to improve maternity and parental benefits.

³ *Law v. Canada* [1999] 1 S.C.R. 497

- Three pregnant Winnipeg women who worked at Canada Safeway were denied access to company accident and sickness benefits during the period in which they were eligible for UI maternity benefits.

The Court said that “pregnancy discrimination” is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant:

“... The fact that only some women are affected by pregnancy-related discrimination does not mean that it is not discrimination because of sex. Only women are affected by this form of discrimination and they are discriminated against because of their gender.”

- The Supreme Court also emphasized that bearing children benefits society as a whole and women should not be economically or socially disadvantaged due to their childbearing capacity.⁴

Handout No. 3: Case Study: Susan Brooks

⁴ *Brooks v. Canada Safeway Ltd.* [1989] 1 S.C.R. 1219.

5.3 International Human Rights Protection for Maternity Benefits

Women's groups and unions have also looked to international human rights law to support the idea that women's equality rights mean that the government has to set up an income replacement program during maternity and parental leave.

International law sets out obligations for the government to act to promote and protect women's equality:

- Maternity benefits should be viewed as basic social and economic rights for women.
- Governments have an obligation to act in a manner that enables women to have and raise children without falling into poverty.
- International human rights provide for a "positive right" (i.e., the government must do something) to a certain level of social security.
- The international community has recognized that childbirth is a social responsibility.

Handout No. 4: International Human Rights Protection for Maternity Benefits

6. Guiding Principles: Maternity and Parental Benefits as a Component to Women's Equality

Better maternity benefits will only advance substantive equality if there are corresponding changes relating to pay equity, the division of paid and unpaid labour, responsibility for child and elder care, universal, high quality accessible childcare (with fair salaries for workers).

Handout No. 5: PEI Women's Network's Guiding Principles.

7. Brainstorm: Examining other Models and Strategizing for Change

7.1 The Québec Model and Issues of Jurisdiction

- In the late 1980s, there was growing recognition in Québec that the federal maternity and parental benefit program under UI had major deficiencies. It was based on traditional ideas that reflect and shape the reality that most of the social, professional, and economic consequences of motherhood rest on women's shoulders.
- A vast social mobilization emerged and in 1997, after years of struggle, women's groups and trade unions successfully won the right to improved maternity and parental benefits.
- In 2001, the Québec National Assembly **unanimously** adopted a parental benefits law that was significantly more generous than the federal regime.

7.1.1 What does Quebec's model look like?

Québec's approach to maternity and parental benefits has many advantages over the current federal model: it is more generous than any similar employment insurance-based plan in the country.

Some of the more positive aspects include:

- eligibility as of a minimum income of **\$2,000/year** (instead of the 600 hour requirement);
 - maximum insurable earnings of \$56,000 indexed annually (instead of \$39,000 at the federal level);

- a maximum weekly benefit that can reach \$830 (rather than \$413, under the federal scheme);
- there is no two week “waiting period”;
- a more advantageous method of calculating benefits for seasonal and occasional workers and students;
- a self-employed woman can benefit from the program as soon as she earns \$2,000/ year (the issue then becomes who will pay the employers’ share); and
- under Québec's *Civil Code*, lesbian co-mothers are eligible for parental benefits.

Workers have two options:

f Option “A”

- 43 weeks of benefits at 75% of regular salary which means:
 - 15 weeks of maternity benefits + 25 weeks of parental leave + an additional 3 weeks for the other parent (non-transferable).

OR

f Option “B”

- 55 weeks of benefits of which the first 30 weeks are at 70% of regular salary and the rest are at 55% of regular salary which means:
 - 18 weeks of maternity benefits + 32 weeks of parental leave + an additional 5 weeks for the other parent (non-transferable).

Essentially, mothers can receive a larger income for a shorter leave, or they can receive a smaller percentage of their usual income for a period just short of a year. And fathers / other parent can receive 5 weeks of paid parental leave.

Handout No. 6: Quebec's Parental Insurance Plan

7.1.2 The federal government has been slow to act

- The implementation of this legislation was stalled because the federal government would not agree on the amount of money that the Québec government would be able to keep in order to fund its program.
- In a move to force the Federal government to negotiate, the Quebec government asked the Québec Court of Appeal to rule on the constitutionality of the *EI* provisions on maternity and parental benefits.
- In March 2005, Québec and Ottawa finally reached a deal allowing the province to run its **own parental leave program**.
- It is interesting to note that the Quebec Minister of Employment and Social Solidarity, Michelle Courchesne, is promoting the program as a means of “boosting” the province's birth rate:

“We feel that this sort of program will definitely encourage families to give birth and maybe have more children” (CBC, 2005).

7.1.3 Maternity Benefits as “social programs”: The Québec Court of Appeal

- In January 2004, the Québec Court of Appeal (“QCA”) ruled that the maternity and parental benefits provided in the *Employment Insurance Act* fall under the provincial jurisdiction rather than the federal jurisdiction:

Section 91 of the Constitution Act was amended in 1941 to give the federal government power over unemployment insurance (“federal jurisdiction”).

Section 92 of the Constitution Act has historically given provinces power over matters of “local nature” and “property and civil rights” (“provincial jurisdiction”).

- The QCA found that these benefits are part of the “social” program (provincial) rather than being an “unemployment” measure (i.e., federal).
- That is, they are "social" in nature and meant to respond to a "personal condition" that is freely “chosen” by the worker.
- It determined that maternity and parental benefits are designed to assist families and children rather than aimed at protecting workers against the loss of income caused by an outside risk, as is the case for “true” unemployment.
- What is troubling for women’s groups and labour is that the QCA decision revolves around the division of powers instead of using an equality lens.
- The QCA also embraces a vision of motherhood as an “individual choice” (a personal condition) and therefore, an individual, rather than a social, responsibility.
- The decision, therefore, reflects a vision of women where they can be mothers or workers but **not both**.

7.1.4 The Supreme Court Decision

The federal government appealed the QCA decision to the Supreme Court of Canada who rendered a decision on October 20, 2005. If the Supreme Court had upheld the QCA decision, the current federal program would have been abolished.

However, the Supreme Court decided that the federal government had jurisdiction over maternity and parental benefits.

Fortunately, by the time the Supreme Court's decision was handed down, Québec and Ottawa had already concluded the deal that allows Québec to run its own parental insurance program. Consequently, the decision should not affect Québec's Parental Insurance Plan.

Handout No. 7: Highlights of the Supreme Court Decision

But...is all well that ends well?

7.1.5 Recognition of Québec's Distinct Status

In grappling with how to support Québec's more progressive model while still struggling for a stronger and more effective federal maternity and parental benefits plan, the concept of "asymmetrical federalism" may be useful.

Asymmetrical federalism permits us to acknowledge and respect Québec's distinctiveness and its own unique (and often more progressive) approach to social programs (and maternity benefits in particular) while struggling for clearer and more meaningful federal benefits throughout Canada.

Another way of framing this approach was adopted by the Canadian Women's March Committee 2000, which worked very closely with women's groups in Quebec. The Women's March demands for national

standards in areas of provincial jurisdiction were made on the following basis: “the Canadian Women’s March demand is made to the federal government with the understanding that Quebec has the right to determine its own standards, programs and policies in this area”.

Sources: Cox, R. & National Association of Women and the Law (NAWL) Working Group on Maternity and Parental Benefits. (2004) *The Recent Québec Appeal Court Decision on the Constitutionality of Maternity and Parental Benefits as Employment Insurance Benefits: Some Feminist Reflections*. NAWL: Ottawa.
http://www.nawl.ca/ns/en/documents/Pub_Brief_MPBenefits04_en.doc
 CBC (2005) Québec, Ottawa to sign parental leave deal.
<http://montreal.cbc.ca/regional/servlet/View?filename=qc-parent20050301>

7.2 Different Approaches Internationally to Maternity Benefits

Women’s Network PEI has done an international review of maternity and parental benefits models and has identified a number of countries with interesting benefits schemes:

- In **Sweden**, the first 13 months of maternity or parental leave is paid at 80% of wages up to a ceiling + 3 months at a low flat rate + 3 months unpaid. A non-working mother is entitled to the minimum flat rate benefit. This is part of the *Parent Insurance Benefit*; it is a universal social insurance benefit to which all parents are entitled.
- In **France**, parental leave or “child rearing leave” is up to 3 years and can be extended by one year in case of sickness, accident, or handicap of the child. This leave can be full-time or part-time and either parent qualifies. The benefits amount to 80% of earnings up to a maximum. Parental benefits are paid at the maximum benefit covered under social security.

- In **Norway**, the parental leave and benefit lasts either 52 weeks at 80% or 42 weeks at 100% of earnings.
- In **Germany**, maternity benefits are at 100% of earnings (up to a maximum) and the employer pays an additional amount during protected maternity leave. Parental leave includes a child-rearing allowance, which provides an income-tested flat rate, which can be collected either over 2 years or over 12 months (at a substantially higher level). The third year of parental leave is usually unpaid.

In **Luxembourg**, the Family Benefit Fund pays parental leave as a monthly fixed benefit. This benefit is exempt from taxes and social contributions (except for health care and the dependant's contribution). The State pays for the pension contribution.

**Sources: Women's Network PEI (2004) "International Best Practices for Maternity and Parental Benefits": www.wnpei.org
The Clearinghouse on International Developments in Child, Youth and Family Policies. Columbia University. <http://www.childpolicyintl.org>**

8. Improving the Employment Insurance Act

Given the constraints of provincial and federal jurisdictions, one clear area of reform is to improve the Employment Insurance Act.

There are several possibilities. We could include a specific program on maternity and parental benefits within the EI Act based on the Quebec model which we have reviewed. The Canadian Labour Congress proposed overall reforms which would improve access and benefits for all, and would benefit women in particular. The Women's Network of PEI also has a series of proposals aimed at improving maternity and parental benefits within the EI Act.

8.1 The Canadian Labour Congress

- The **Canada Labour Congress** (CLC) has argued that the federal government has complete authority to set up an **employment insurance scheme that includes benefits** in case of loss of employment because of pregnancy or childcare responsibilities.
- The CLC stresses that equality rights should inform our interpretation of the term “unemployment insurance” and that the federal government can, therefore, offer maternity and parental benefits as a kind of employment insurance without exceeding its jurisdiction.
- The CLC has made the following recommendations:
 - 360 hours to qualify for **any** type of EI benefit, anywhere in Canada;
 - benefit rate should be at least two-thirds (66%) of normal earnings;

- annual increase in the \$413 maximum weekly benefit;
- the 2-week waiting period should be eliminated;
- and
- workers over 45 should be guaranteed benefits for a year and a half.

8.2 Women's Network of PEI

Here are the WNPEI recommendations.

- **Eligibility**

We recommend that the federal government extend eligibility for maternity and parental benefits by allowing self-employed individuals the option to pay into the Employment Insurance program.

We recommend that the federal government extend eligibility for maternity and parental benefits by enacting a 360-hour qualification requirement, regardless of regional unemployment rates.

We recommend that the federal government extend eligibility for maternity and parental benefits by allowing an option for parents to “look back” or reach back hours over a three- to five-year period prior to the birth of a child.

- **Length and Value of Benefits**

We recommend the federal government eliminate the current two-week waiting period for maternity and parental benefits.

We recommend the federal government offer an additional two weeks of paid benefits, commencing immediately when an eligible worker files a claim.

We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the weekly payable

benefits from 55% of insurable earnings to 65% of insurable earnings, based on the best twelve weeks of earnings in the last three to five years. We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the maximum insurable earnings to \$57,000, indexed annually.

We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the current Family Supplement rate to 100%.

We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the Low Income Cut-Off from \$25,921 to \$30,000.

• **Employment Protection**

We recommend the federal government undertake consultation with the provinces in order to establish national standards for employment protection as it relates to maternity and parental leave, based on best practices and gender-based analysis.

Handouts No. 6, 8, 9

Sources: Canadian Labour Congress (2004). *Factum of the Intervener, Attorney General of Canada v. Attorney General of Québec*” Supreme Court of Canada, File No. 30187.
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Looking Beyond the Surface: An In-Depth Review of Parental Benefits (Interim Report), Women’s Network PEI, 2005. Available on line: <http://www.wnpei.org/interim.pdf>.

9. Brainstorm and Wrap-Up

What are the advantages of different approaches to maternity and parental benefits? Which seems most appropriate for securing women's human rights in your area?

How can we ensure that the most vulnerable women, those who are currently excluded from the federal plan, have access to meaningful benefits?

Should we be working toward a stronger federal model or focus on individual provincial schemes?

How can jurisdictional issues be addressed? Is asymmetrical federalism a viable option?

How can we ensure that maternity and parental benefits are situated within a human rights / equality framework?

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⁵ This sample bibliography was prepared with the assistance of Magdalena Wojda, LL.B. student, University of Victoria, for NAWL.

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HANDOUTS

Handout No. 1

Job-protected Maternity and Parental Leave Provisions and Eligibility Requirement by Jurisdiction

| Jurisdiction | Maternity Leave | Parental leave | Seniority | Labour Force Attachment |
|-----------------------|-----------------|----------------|-------------|---|
| Federal Government | 17 weeks | 35-37 weeks | Accumulates | 6 months-continuous with same employer |
| British Columbia | 18 weeks | 35 weeks | Accumulates | None |
| Alberta | 15 weeks | 37 weeks | Maintained | 52 consecutive weeks- one employer |
| Saskatchewan | 18 weeks | 35-37 weeks | Accumulates | 20 weeks- one employer during last 52 weeks |
| Manitoba | 17 weeks | 37 weeks | Maintained | 7 consecutive months- one employer |
| Ontario | 17 weeks | 35 weeks | Accumulates | 13 weeks - one employer |
| Quebec | 18 weeks | 52 weeks | Accumulates | No requirement |
| New Brunswick | 17 weeks | 37 weeks | Accumulates | No requirement |
| Nova Scotia | 17 weeks | 35 weeks | Maintained | One year- one employer |
| Newfoundland | 17 weeks | 35 weeks | Maintained | 20 weeks-continuous |
| Prince Edward Island | 17 weeks | 35 weeks | Accumulates | 20 weeks continuous- one employer |
| Northwest Territories | 17 weeks | 37 weeks | Accumulates | 12 months-continuous |
| Nunavut | 17 weeks | 12 weeks | Maintained | 12 months-continuous |
| Yukon | 17 weeks | 37 weeks | Accumulates | 12 months-continuous |

Source: Derived from, Alberta *Employment Standards Code*, <http://www.qp.gov.ab.ca/documents/acts/E09.cfm>; British Columbia *Employment Standards Act*, http://www.qp.gov.bc.ca/statreg/stat/E/96113_01.htm; Canada Labour Code, <http://laws.justice.gc.ca/en/L-2/text.html>; Manitoba *Employment Standards Code*, <http://web2.gov.mb.ca/laws/statutes/ccsm/e110e.php>; New Brunswick *Employment Standards Act*, <http://www.gnb.ca/acts/acts/e-07-2.htm>; Newfoundland *Labour Standards Act*, <http://www.gov.nf.ca/hoa/statutes/102.htm>; Northwest Territories *Labour Standards Act*, [#a3](http://bsa.cbcs.org/gol/bsa/interface.nsf/engdoc/6.11.4.html); Nova Scotia *Labour Standards Code*, <http://www.gov.ns.ca/legislature/legc/statutes/labourst.htm>; *Consolidation of Labour Standards Act* (Nunavut), http://www.nunavutcourtofjustice.ca/library/consol-stat/1999_CSNu_106_Labour_Standards.pdf; Ontario *Employment Standards Act*, 2000, http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/00e41_e.htm; Prince Edward Island *Employment Standards Act*, http://www.gov.pe.ca/law/statutes/pdf/e-06_2.pdf; Quebec: *Act Respecting Employment Standards*, http://www.cnt.gouv.qc.ca/en/lois/normes/table_matiere.asp; Saskatchewan *Labour Standards Act*, <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L1.pdf>; Yukon *Employment Standards Act*, <http://www.canlii.org/yk/sta/pdf/ch72.pdf>.

Source: Web site of HRSCC at <http://www.hrsdc.gc.ca>

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Handout No. 2

Case Study: Kelly Lesiuk

In 1998, Kelly Lesiuk moved to Winnipeg, Manitoba with her family. For five years prior to the move, she had been employed as a part-time registered nurse and was the primary care-taker for her and her husband's daughter. Ms. Lesiuk was pregnant with her second child and her doctor had advised her not to work because of the heavy physical demands of her job. Shortly after arriving in Winnipeg, she applied for Employment Insurance benefits but the Employment Insurance Commission denied her claim. Kelly Lesiuk was not entitled to regular, maternity or sickness benefits because she was **33 hours** short of the "hours threshold" for qualifying for benefits (set at a minimum of 700 insurable hours in the previous 52 weeks).

Ms. Lesiuk appealed the Commission's decision to the Employment Insurance Umpire, arguing that the new EI eligibility rules discriminated against women because they make up the majority of part-time workers, and that despite being responsible for the lion's share of child-care, they are the least likely to receive maternity and parental benefits.

In 2001, the Umpire found that the eligibility requirements of the *EIA* violated Ms. Lesiuk's right **to be free of discrimination on the basis of sex (protected under s.15 of the Charter)**. The 700 hours threshold demeaned the essential human dignity of women who make up the majority of part-time workers because they must work for longer periods than full-time workers in order to demonstrate their work force attachment.

Disappointingly, the Umpire's decision was overturned by the Federal Court of Appeal in January 2003. The Court determined that there was insufficient evidence to establish a history of disadvantages, stereotyping, vulnerability and prejudice against women. Justice Létourneau wrote that:

"These requirements do not create or reinforce a stereotype that women should stay home and care for children. Nor do these requirements affect the dignity of women by suggesting that their work is less worthy of recognition."

Ms. Lesiuk appealed this decision to the Supreme Court of Canada, but the Court denied her leave to appeal, thereby closing off the legal system as an avenue to address this injustice.

Even more disturbingly, the Supreme Court ordered Ms. Lesiuk to pay the costs associated with her appeal application.

**Sources: Lesiuk v. Canada (Employment Insurance Commission) [2001]
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Handout no. 3

Case Study: Susan Brooks

In the 1980's, Susan Brooks worked as a cashier at the Canada Safeway Supermarket in Manitoba. Usually, she was covered by an insurance plan that included weekly benefits in case of loss of pay because of sickness or accident.

However, Ms. Brooks discovered that during the last 10 weeks of her pregnancy and for the first six weeks following the birth of her child, she was not covered by the insurance plan. Even if she couldn't work because she had broken her arm, for example, because she was pregnant, she was not eligible for benefits.

In 1983, Ms. Brooks and other pregnant workers decided to challenge their exclusion from the benefit plan. They filed a complaint with the Manitoba Human Rights Commission.

Before the courts, Safeway argued that because pregnancy is "a voluntary state", it should be dealt with like other forms of "voluntary" leave. For Safeway, given that:

"pregnancy is neither "a sickness or an accident" ..., it need not be covered by a sickness and accident plan".

The Supreme Court rejected these arguments. It affirmed the fundamental importance of pregnancy in our society. The Court decided that pregnancy is without a doubt a valid health-related reason for being absent from work.

Furthermore, the Court ruled that human rights prevented the cost of procreation being placed exclusively on pregnant women:

... It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women....

Ms. Brooks and the other cashiers won their case.

The Supreme Court declared that human rights legislation prohibits discrimination based on pregnancy as just another manifestation of discrimination based on sex.

Reference: *Brooks v. Canada Safeway*, [1989] 1 S.C. R. 1219. On line: www.lexum.umontreal.ca/csc-scc/en/pub/1989/vol1/html/1989scr1_1219.html.

Handout No. 4

International Human Rights Protection for Maternity Benefits

Article 5 of the *Convention on the Elimination of All Forms of Discrimination against Women*⁶ states that all parties take all appropriate measures:

...(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 11(2) of the *Convention on the Elimination of All Forms of Discrimination against Women* reads as follows:

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

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

⁶ The Convention, which entered into force on 3 September 1981, has, as of March 2004, 176 States parties.

<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

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www.nawl.ca/www.canadianlabour.ca

Article 10 of the *International Covenant on Economic, Social and Cultural Rights*⁷ (ICESCR) provides that:

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children....
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits....

Finally, the **International Labour Organisation's *Maternity Protection Convention***⁸ (which has existed since 1919) has called on countries to establish maternity benefits.

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⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976.

http://www.unhchr.ch/html/menu3/b/a_cesr.htm

⁸ C103 *Maternity Protection Convention* (Revised, 1952)

<http://www.itcilo.it/english/actrav/telearn/osh/wc/c103.htm>

Handout No. 5

Women's Network PEI - Guiding Principles⁹

The Women's Network PEI has recently developed some guiding principles in addressing issues around maternity and parental benefits:

1. Raising children is a critical and valuable contribution to Canadian society.
2. The Canadian Government has a role to play in eliminating poverty of women, children and families and ensuring that their basic needs are met.
3. Policies around maternity and parental leave must recognize the traditional role that women have played, and continue to play, in raising children while encouraging fathers to take on a more active role in parenting.
4. Policies around maternity and parental leave must take into consideration the disadvantage that vulnerable groups of women face, including single mothers, low income women, immigrant women, Aboriginal women, women with disabilities, visible minority women and women with low education.
5. Women must not be disadvantaged in the workplace and in society by the decision to have a child or by their intrinsic role in child bearing.
6. Access to maternity and parental benefits should be such that families are not discouraged from having children.
7. Every newborn and newly adopted child has an equal right to the stable presence of a parent or other primary care giver in the early stages of life or transition to a new family.

⁹ <http://www.wnpei.org/parentalbenefits/>

8. Policies around maternity and parental benefits must focus on healthy child development as well as on the health of mothers and other care givers.
9. Access to maternity and parental leave is an issue not solely connected to paid work or employment history; but also to supporting families.
10. All parents must have access to easy-to-understand information about benefits and supports for parents and families.

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Handout No. 6

Québec's Parental Insurance Plan

Québec's approach to maternity and parental benefits has many advantages over the current federal model:

- self-employed workers are eligible;
- there is no 2 week “waiting period”; and
- benefits are more generous.

Workers have two options:

f Option “A” - Higher benefits for just 43 weeks

- A total of 43 weeks of benefits at 70% of regular salary comprised of:
 - 15 weeks of maternity benefits + 25 weeks of parental leave + an additional 3 weeks for the other parent (non-transferable).

OR

f Option “B” - Somewhat lower benefits for 55 weeks

- 55 weeks of benefits of which the first 30 weeks are at 70% of regular salary and the rest are at 55% of regular salary comprised of:
 - 18 weeks of maternity benefits + 32 weeks of parental leave + an additional 5 weeks for the other parent (non-transferable).

Some of the more positive aspects of the Québec model include:

- eligibility as of a minimum income of **\$2,000/year** (instead of the 600 hour requirement);
- maximum insurable earnings of **\$56,000** indexed annually (instead of \$39,000 at the federal level);
- a maximum weekly benefit that can reach **\$830** (rather than \$413, under the federal scheme);
- a more advantageous method of calculating benefits for seasonal and occasional workers and students;
- Because the Québec Civil Code recognizes them as spouses, lesbian co-mothers are eligible for parental benefits

Handout No. 7

Highlights of the Supreme Court Decision on Maternity and Parental Benefits

In upholding the federal power to provide maternity and parental benefits as part of the Employment Insurance scheme, the Supreme Court recognized the economic value of motherwork.

The Court held that the maternity and parental benefits were essentially a:

“mechanism for providing replacement income during an interruption of work. This is consistent with the essence of the federal jurisdiction ... namely the establishment of a public insurance program the purpose of which is to preserve workers’ economic security and ensure their re-entry into the labour market...” (para. 68).

The Court recognized the benefit society derives from women’s work as mothers :

“... the benefit derived from procreation extends beyond the benefit to the parents. Children are one of society’s most important assets, and the contribution made by parents cannot be overstated.... The decision to offer women the possibility of receiving income replacement benefits when they are off work due to pregnancy is therefore a social policy decision that is not incompatible with the concept of risk in the realm of insurance, and that can moreover be harmoniously incorporated into a public unemployment insurance plan.” (para. 54 & 56).

The decision also seems to recognize that maternity and parental benefits are different from regular unemployment benefits because they are designed to meet the particular needs of women:

“The extent of the protection required by Canadian society changes with the needs of the labour force. 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.”(para. 66).

This is quite a strong statement of public responsibility for the work of raising children!

To read the Supreme Court’s decision, visit:

<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/2005scc056.wpd.html>

Handout No. 8

Reform of the *Employment Insurance Act*: The CLC's Approach

Rather than targeting reform of maternity and parental benefits, the CLC recommends changes to the entire *Employment Insurance Act*. These changes would have a positive impact on access to maternity and parental benefits.

The CLC is proposing the following changes to the *EI Act*:

- 360 hours to qualify for **any** type of EI benefit, anywhere in Canada;
- benefit rate should be at least two-thirds (66%) of normal earnings;
- annual increase in the \$413 maximum weekly benefit;
- the 2-week waiting period should be eliminated; and
- workers over 45 should be guaranteed benefits for a year and a half.

**Handout No. 9:
PEI Women’s Network’s Recommendations for Reform of
Maternity and Parental Benefits**

1. Eligibility

We recommend that the federal government extend eligibility for maternity and parental benefits by allowing self-employed individuals the option to pay into the Employment Insurance program.

We recommend that the federal government extend eligibility for maternity and parental benefits by enacting a 360-hour qualification requirement, regardless of regional unemployment rates.

We recommend that the federal government extend eligibility for maternity and parental benefits by allowing an option for parents to “look back” or reach back hours over a three- to five-year period prior to the birth of a child.

2. Length and Value of Benefits

We recommend the federal government eliminate the current two-week waiting period for maternity and parental benefits.

We recommend the federal government offer an additional two weeks of paid benefits, commencing immediately when an eligible worker files a claim.

We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the weekly payable benefits from 55% of insurable earnings to 65% of insurable earnings, based on the best twelve weeks of earnings in the last three to five years.

We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the maximum insurable earnings to \$57,000, indexed annually.

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We recommend the federal government improve the wage replacement for maternity and parental benefits by increasing the Low Income Cut-Off from \$25,921 to \$30,000.

3. Employment Protection

We recommend the federal government undertake consultation with the provinces in order to establish national standards for employment protection as it relates to maternity and parental leave, based on best practices and gender-based analysis.

Source: *Looking Beyond the Surface: An In-Depth Review of Parental Benefits (Interim Report)*, Women's Network PEI, 2005. Available on line: <http://www.wnpei.org/interim.pdf>.

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benefits.