

*For the last five years Kelly has been teaching film studies at a number of local colleges. This represents about 50% of her income. She is an artist and also supports herself and her art practice by applying for grants through foundation that fund the arts. Kelly is casual employee at each institution for which she teaches classes. Most colleges in the province are union environments and teaching is generally associated with excellent benefits. However, Kelly cannot join a union until she is hired for a full-time position and full-time opportunities in her area of knowledge have not come up in many years. Therefore, although she sometimes teaches a full-time course load fragmented amongst a number of employers, she faces employment uncertainty at the close of every school term, and has no access to health or other employment benefits. Moreover, for Kelly employment is consistently precarious: every term it is possible that she will not secure any classes or too few to meet her living expenses. In early 2008, Kelly's sister Emily was diagnosed with breast cancer. Emily became very ill as a result of her cancer being extremely progressed and contracting a number of illnesses during her period of treatment. Kelly missed out on two terms of teaching to support her sister into remission. She was not eligible for any benefits through her employer. Because she had been working intensely on her own film in the months leading up to Emily's diagnosis, and teaching only a single weekly class, her Employment Insurance benefits under the Compassionate Care Benefit program were negligible.*

## **CHAPTER 3 – Employment Leave for Family Caregiving**

### **I. Overview of the *Employment Standards Act***

The statute that governs most employment relationships in British Columbia is the *Employment Standards Act*.<sup>74</sup> It sets out minimum rights for certain employees in British Columbia regarding wages and conditions of employment. Comparable legislation exists in all other Canadian jurisdictions including the federal level. The federal legislation, the *Canada Labour Code*, applies to employees working in federally regulated industries, such as telecommunications. The focus of this chapter is the BC Act and mirroring provisions of the *Employment Insurance Act*. The *Canada Labour Code* does not provide significantly different rights and so concerns about the BC Act generally apply to the federal legislation.

The *Employment Standards Act* is the only current legislative source of entitlement in BC legislation for leave in relation to family issues. Part 6 of the Act sets out a number of statutorily protected unpaid leaves: pregnancy leave, parental leave, family responsibility leave, compassionate care leave, reservists' leave, bereavement leave and jury duty leave. The significance of statutory protection is twofold. First, the employer cannot deny the leave request provided the statutory requirements for leave are met;<sup>75</sup> second, the employee must not be prejudiced for taking the leave in the following respects: the employer may not

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<sup>74</sup> *Employment Standards Act*, R.S.B.C. 1996, c.113.

<sup>75</sup> *Ibid.* at s. 54(1)

terminate employment or change a condition of employment because of the leave; the employer must return the employee to the same or a comparable position subsequent to the leave;<sup>76</sup> and employment is deemed continuous for the purpose of calculating vacation pay and pension, medical or other plan benefits.<sup>77</sup> Essentially, the significance of the leave provisions is that both employment and benefits are protected throughout the duration of the leave.

Our caregiver survey results indicate that access to paid employment leave is an issue for BC family caregivers. Just over 8% of respondents were able to take a paid leave and slightly over 20% took unpaid leaves from employment. Close to 25% indicated paid time off work would significantly improve their lives. Only 8% stated they had received employment insurance, and over twice as many caregivers went on income assistance at some point during their period of caregiving. Over 35% used up vacation time and 25% used up sick time in order to meet caregiving obligations without a loss of income. However, access to unpaid leave is also an issue for BC caregivers: close to 25% indicated an unpaid extended leave of absence would assist them.

Employment leave protection is a relatively recent and growing aspect of employment law in BC. When the first comprehensive employment statute came into effect in 1979,<sup>78</sup> the only leave protected under the act was the weeks immediately preceding and following a pregnant woman's due date. This limited maternity leave protection dates back to the *Maternity Protection Act* of 1921,<sup>79</sup> and has grown over the years to include both pregnancy and parental leave, the latter of which is no longer restricted to mothers. Bereavement, jury duty and family responsibility leave were creations of the revised 1995 consolidation of the *Employment Standards Act*, added in response to the recommendations of the Thompson Report on employment law.<sup>80</sup> The most recent addition to the Act is Canadian Forces reservist's leave, added in 2008. Compassionate care leave was added in 2006, following the federal government initiative, which resulted in both entitlement to compassionate care under the *Canada Labour Code*, and the corresponding changes to Employment Insurance benefits (which applies across the country).

Employees may be entitled to additional benefits by virtue of a union collective agreement or other contract negotiated individually with an employer. While employers and employees subject to the *Employment Standards Act* cannot contract out the minimum statutory obligations set out in the Act, they can contract for additional rights and obligations over and above those set out in the Act.

This chapter of *Care/Work* introduces family responsibility and compassionate care leave in BC and considers whether the existing legislation is adequate. The chapter compares the BC framework to the rights and benefits available in other Canadian jurisdictions as well as a number of other countries. The Canadian approach to care leave generally emphasizes end-

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<sup>76</sup> *Ibid.* at s. 54

<sup>77</sup> *Ibid.* at s.56.

<sup>78</sup> *Employment Standards Act*, R.S.B.C. 1979, c.107. Legislation protecting employee rights existed prior to the 1979 Act; however, rights were fragmented into various statutes.

<sup>79</sup> *Maternity Protection Act*, R.S.B.C, 1921, c. 37.

<sup>80</sup> Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* (Victoria: Ministry of Skills, Training and Labour, 1994).

of-life caregiving and provides little recognition for other forms of caregiving other than care for children during the first year of their lives. An international comparison reveals slightly more expansive rights available in Australia and Europe.

## II. Family Care Entitlements under the *Employment Standards Act*

British Columbia employees governed by the *Employment Standards Act* possess two separate and distinct family care leave rights:

1. short-term leave entitlement called “family responsibility leave”; and
2. long-term leave entitlement called “compassionate care leave”.

Both of these rights allow an employee to take unpaid leave to care for a family member, if certain criteria are met. There is no right to paid family leave in British Columbia, that is to say, there is no statutorily-protected right to take any time off work to care for a family member and to still be paid by your employer or the Government for that time. The right is limited to the ability to take leave without jeopardizing your job status.

### A. Section 52 - Family Responsibility Leave

Family Responsibility Leave creates a right to short-term leave. The section does not require the production of a medical certificate and is not restricted to caring for an ill family member. Pursuant to s.52 of the Act, an employee is entitled to take up to 5 days off per year (unpaid) to attend to child care or adult care needs broadly conceived. The section is worded as follows:

Family responsibility leave

52 An employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to

- (a) the care, health or education of a child in the employee's care, or
- (b) the care or health of any other member of the employee's immediate family.

As with all Part 6 leaves, the employer has no discretion to grant or not to grant family responsibility leave to an employee who requests it and is entitled to it. The non-discretionary nature of this leave has been articulated by the Employment Standards Tribunal on several occasions and is well-settled law. As one tribunal member has noted, “family responsibility leave is an employee *entitlement*, not something that may or may not be granted at the discretion of the employer.”<sup>81</sup>

The leave applies to the care of children and immediate family members. Section 1 of the Act (the Definitions section), defines the term “immediate family” as follows:

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<sup>81</sup> *Re Windsor Holdings Ltd.*, [1997], B.C.E.S.T. (October 22, 1997), BCEST #D187/97 (Pawluk). (reconsideration of BC EST #D187/97).

- (a) the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and
- (b) any person who lives with an employee as a member of the employee's family.<sup>82</sup>

The meaning of immediate family thus excludes, for example, aunts, uncles, nieces, nephews, close friends and neighbours.

The Employment Standards Branch (ESB) Manual provides the following by way of clarification of the definition of the term "immediate family":

A broad and liberal interpretation of "immediate family" is considered by the director to include common-law spouses, step-parents, and step-children, or same sex partners and their children.

Any persons will be included as "immediate family" if they reside with the employee as a member of that employee's family.

An exchange student residing with the employee's family would be considered "immediate family."<sup>83</sup>

The ESB Manual neglects to clarify whether common-law spouses, step-parents, step-children, same-sex partners and their children are considered to fall under part (a) of the definition (and thereby do not have a residency requirement) or part (b) of the definition (and thereby do have a residency requirement).

The ESB Manual does address the issue again in its discussion of s.52, stating:

Under s.1 of the Act, "immediate family" means the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with an employee as a member of the employee's family. It includes common-law spouses, step-parents, and step-children, and same sex partners and their children as long as they live with the employee as a member of the employee's family.<sup>84</sup>

A strong argument could be made that the ESB Manual's interpretation is incorrect – one could argue that such persons should fall within the ambit of part (a) of the definition of immediate family, and thereby would not be subject to the requirement that they live with the employee. Same-sex spouses, nowadays, would certainly fall within part (a) and not part (b) of the definition, in light of the recent legalization of same-sex marriage in Canada.

Family Responsibility leave entitlement is broadly defined in terms of the reasons for which one may take leave. Although it must be connected to the "health, care or education" of a

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<sup>82</sup> *Employment Standards Act, supra*, note 74, s.1(1).

<sup>83</sup> Ministry of Labour and Citizen's Services, *Interpretation Guidelines Manual: British Columbia Employment Standards Act and Regulations*, online: <<http://www.labour.gov.bc.ca/esb/igm/esa-part-1/igm-esa-s1-immediate-family.htm>> [ESB Manual].

<sup>84</sup> *Ibid.* note 83, online: <<http://www.labour.gov.bc.ca/esb/igm/esa-part-6/igm-esa-s-52.htm>>.

family member, there is no requirement of urgency or emergency. There also does not appear to be any restriction on how much time the employee must take at a time, suggesting that the employee can take as little as a hour or as much as the full five days at a time. Although the Ministry's policy is that any part of a day counts as a full day of time off unless the employee and the employer agree otherwise,<sup>85</sup> the language of the Act does not support this interpretation.

## **B. Section 52.1 - Compassionate Care Leave**

Compassionate Care Leave is a longer-term leave right that requires the production of a medical certificate. This leave entitlement is quite new as it came into effect in BC in 2006. Section 52.1 provides a right to take up to 8 weeks of unpaid leave if the following criteria are met:

1. the leave request must be to care for a family member who is either an "immediate family member" as defined in the Act, or a member of the "prescribed class" set out by regulation;
2. the family member must have a serious medical condition with a significant risk of death within 26 weeks; and
3. the employee must provide a medical certificate from a medical practitioner certifying that the family member has a serious medical condition with significant risk of death within 26 weeks.

Section 52.1 is worded as follows:

Compassionate care leave

- 52.1 (1) In this section, "family member" means
- (a) a member of an employee's immediate family, and
  - (b) any other individual who is a member of a prescribed class.
- (2) An employee who requests leave under this section is entitled to up to 8 weeks of unpaid leave to provide care or support to a family member if a medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks, or such other period as may be prescribed, after
- (a) the date the certificate is issued, or
  - (b) if the leave began before the date the certificate is issued, the date the leave began.
- (3) The employee must give the employer a copy of the certificate as soon as practicable.
- (4) An employee may begin a leave under this section no earlier than the first day of the week in which the period under subsection (2) begins.

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<sup>85</sup> *Ibid.*

- (5) A leave under this section ends on the last day of the week in which the earlier of the following occurs:
- (a) the family member dies;
  - (b) the expiration of 26 weeks or other prescribed period from the date the leave began.
- (6) A leave taken under this section must be taken in units of one or more weeks.
- (7) If an employee takes a leave under this section and the family member to whom subsection (2) applies does not die within the period referred to in that subsection, the employee may take a further leave after obtaining a new certificate in accordance with subsection (2), and subsections (3) to (6) apply to the further leave.

The category of family members captured by the compassionate care provisions appears to be broader than the meaning of “immediate family member”. The *Compassionate Care Leave regulation* sets out a lengthy list that includes step-siblings, aunts, uncles, nieces, nephews, current and former foster parents and children, spouses of sibling, step-siblings, children and step-children, and other family members, and contains the following language that suggests one would be able to take leave to care for a friend one considers to be akin to a close relation:

Whether or not related to the person by blood, adoption, marriage or common law partnership, an individual with a serious medical condition, as described by section 52.1(2) of the Act, who considers the employee to be, or whom the employee considers to be, like a close relative.<sup>86</sup>

Leave can be renewed if family member does not die within 26 weeks. By securing a new medical certificate the employee will be entitled to eight additional weeks of leave within a subsequent 26-week period.<sup>87</sup> Leave under this section must be taken at least one week at a time and cannot be further fragmented.<sup>88</sup>

### III. Comparison with other Jurisdictions in Canada

British Columbia is not lagging behind other Canadian provinces and territories in terms of setting minimum standards for family care leave rights. All jurisdictions, save Alberta, have developed some form of long-term statutory leave entitlement, although Alberta, Yukon, the Northwest Territories, Nunavut, and the Federal government have no short-term statutory leave provisions.

#### A. Short-Term Leave

Although the language of “Family Responsibility” is not invoked across the country, most jurisdictions now have some kind of short-term leave. BC’s five day Family Responsibility leave is longer than the leave protected by the legislation of Manitoba, New Brunswick,

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Employment Standards Act, supra*, note 74, at s. 52.1(5)(b)

Nova Scotia, and Prince Edward Island, which grant employees a right to a leave of up to three days. Saskatchewan, Ontario, Quebec, and Newfoundland have more generous provisions with twelve, ten, ten, and seven days of allowed leave, respectively. The criterion for short-term leave is fairly standard across Canada, although BC's residency requirement for members of immediate family is more onerous than most other provinces.

BC separates sick leave entitlements from short-term leave, which is done in a minority of Canadian jurisdictions. In most of Canada, any sick leave you take will reduce your short-term leave entitlement. Furthermore, every jurisdiction in Canada combines short-term leave for childcare and adult caregiving. BC, like most provinces, does not have a length of service requirement for eligibility for short-term leave.

## **B. Long-Term Leave**

Every jurisdiction in Canada allows up to eight weeks of long-term leave, except for Quebec and Saskatchewan, which offer more generous provisions. Every jurisdiction in Canada except for Saskatchewan requires that the family member whom the employee is caring for be diagnosed with a serious medical condition with a significant risk of death within 26 weeks. Saskatchewan simply requires that the family member is incapable of working due to illness or injury. The leave must always be taken in weeklong periods. BC and Ontario allow an employee to renew the leave if the family member requiring care does not die within 26 weeks. Saskatchewan grants employee job protection for up to twelve weeks per year due to serious illnesses requiring caregiving and an additional four weeks where the employee is in receipt of EI compassionate care benefits.<sup>89</sup> Quebec allows up to twelve weeks.<sup>90</sup>

Appendix A contains a table that compares employment leave provisions available under the various provincial and territorial employment law statutes.

## **IV. The Unionized Worker**

The rights of unionized employees are, in part, defined by the terms of the collective agreement negotiated between the employer and the union. Potentially, a unionized employee may acquire benefits above the minimum rights set out in the *Employment Standards Act*. However, while there is a fair amount of variety in British Columbia in terms of specific collective agreement language, based on our limited review of collective agreement provisions in this province, they do not contain significantly greater rights in the area of family leave.

In terms of the duration of leave, collective agreements often contain provisions that mirror the limitations of existing employment legislation; however, leaves tend to be with pay, and in this sense collective agreement membership does appear to provide some wage loss protection. Generally, employees tend to be entitled to up to ten days of leave to address family "emergencies", although most employees have access to less than ten days. Some employees are also entitled to an additional Compassionate Leave of up to five days,

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<sup>89</sup> *Labour Standards Act*, R.S.S., 1978, c. L-1, s. 44.2(1)(b)(ii).

<sup>90</sup> *An Act Respecting Labour Standards*, R.S.Q., c. N-1.1, s. 79.7.

distinguished from Compassionate Care Leave, in the event of death or serious illness of a family member. Consistent with the limitations of the *Employment Standards Act*, these leaves are not directed at employees with ongoing caregiving responsibilities, and the leave periods are quite brief in relation to the demands of caregiving.

## V. Employment Insurance and Caregiving Leave

For most workers the challenge associated with taking a leave of absence for caregiving is not job protection, but the loss of income that often accompanies an absence from work. The *Employment Insurance Act* addresses this problem in a narrow set of circumstances. Employees who take time off work to care for a gravely ill family member may be eligible to receive employment insurance benefits under the Compassionate Care Benefits program of the EI Act for part of the time of their leave.<sup>91</sup> However, there is no comparable income replacement available in respect of family responsibility or short-term leave.

Under the Compassionate Care Benefits program, a caregiver is entitled to Employment Insurance benefits for up to six weeks, if certain eligibility criteria are met. The Act provides for up to eight weeks of compassionate care leave if an employee needs to care for a family member, provided the family member has a serious medical condition with a significant risk of death within 26 weeks. However, the EI entitlement is for six weeks of EI benefits, because EI claimants must serve a two-week unpaid waiting period before benefits are payable. The benefits and eligibility criteria mirror the Compassionate Care leave entitlements provided under the BC *Employment Standards Act* such that, effectively, six out of eight weeks of compassionate care leave are potentially linked to EI payments. This benefit is one of several benefits that are called “Special Benefits” under the Act. It is a relatively new benefit, which came into effect in January 2004.

The definition of family member contained in the Employment Insurance Regulation is broad, for it includes the catch-all language of “any person, whether or not related to the individual by blood, adoption, marriage, or common law partnership, who considers the individual to be like a close relative.”<sup>92</sup> This definition matches the language governing entitlement to Compassionate Care Leave under the *Employment Standards Act*. As is the case with all EI benefits, entitlement is limited to employees who have sufficient recent work history in terms of hours of insurable employment. Benefits are a maximum of 55% of weekly insurable earnings subject to caps on insurable earnings set by Service Canada.

Once an employee has successfully applied for EI and created a file with Human Resources and Skills Development Canada, she can claim EI for the weeks within the 26-week window for which she is unable to work as a result of caregiving, and receive benefits for up to six weeks.

The significance of this requirement for sufficient insurable hours of employment is that the benefit is totally inaccessible to caregivers who withdraw from the workplace to focus on care well in advance of the end of life diagnosis. As of January 2010, self-employed

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<sup>91</sup> *Employment Insurance Act*, S.C. 1996, c.23.

<sup>92</sup> Employment Insurance Regulations, SOR/96-332, s.41.11(1).



individuals became eligible for Compassionate Care Leave benefits and other Special Benefits.<sup>93</sup> Reductions in income prior to applying for leave can also have negative consequences on the amount of the benefit.

## **VI. The Results of our Survey of BC Employers**

Even amongst leading employers, adult caregiving leave appears to be a rare benefit. Most firms with policies in this area had documented leave entitlement consistent with the minimums set out in the *Employment Standards Act*, and in many instances even the five days of family responsibility leave were unpaid. Compassionate care leave was also unpaid in a number of instances. Interestingly, even a number of those employers we spoke with who were recorded in other surveys as providing a top-up during compassionate care leave indicated that in fact they did not top-up EI benefits. Some employers do provide a full salary during the EI deductible period and a top-up to full salary for six weeks, effectively insuring eight weeks of paid leave for end-of-life caregiving. Only one employer had created an eldercare specific policy. This policy provided for one day off with pay in the event that a parent developed a serious illness.

Most of the employers we spoke with indicated that an extended unpaid leave of up to six months is available to employees under general discretionary leave of absence policies. In these instances leave requests are determined on a case-by-case basis, taking into consideration the circumstances of the employee, the business needs of the employers, and often the degree of dispensability of the employee is a factor in terms of both access to leave and the length of the period of leave available. These general leaves have been taken to address personal health, education, travel and volunteerism as well as family caregiving. Eldercare was not an issue employers appear to have encountered: only one human resources manager that we spoke with was aware of an employee having taken a leave for adult family caregiving; this manager indicated that the employee took an unpaid six months leave and returned to work for financial reasons.

As an alternative to short or long-term leave, a number of employers allow employees to earn paid personal days off by essentially banking time. Policies ranged from two to seventeen days per year. Some employers permit employees to carry forward into subsequent years unused earned days off, thereby creating a bank of paid time from which employees can draw in order to address some of their family caregiving obligations.

## **VII. Comparisons with other Leave Rights in BC**

There is inconsistency as between the family members for which one may take leave under the Family Responsibility, Compassionate Care and Bereavement leave provisions. The

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<sup>93</sup> Bill C-56, An Act to amend the Employment Insurance Act and to make consequential amendments to other Acts, 2<sup>nd</sup> Sess., 40<sup>th</sup> Parl., 2009, c.152.06 (Royal Assent, December 15, 2009), online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Pub=status&Language=E&Mode=1&Parl=40&Ses=2&File=1 - DOC--FE197B48B58140F2965B2C577C6088FD>

rationale for this disconnect is unclear. In BC compassionate care leave captures the broadest group of family members, potentially including close friends and neighbours.

The rationale for the length of either leave is similarly unclear. By way of comparison, other leave entitlements provided under the *Employment Standards Act* include:

1. vacation entitlement:

- at least two weeks of paid vacation, after 12 consecutive months of employment, and
- at least three weeks of paid vacation, after five consecutive years of employment<sup>94</sup>

2. Pregnancy leave:

- 17 weeks of unpaid leave, and in some cases six additional weeks<sup>95</sup>

3. Parental leave

- 35 weeks of unpaid leave, and in some cases up to 37 weeks of unpaid leave
- if the child has a physical, psychological or emotional condition, up to five additional weeks of unpaid leave<sup>96</sup>

4. Bereavement leave

- three days unpaid leave on the death of an “immediate family” member<sup>97</sup>

5. Jury Duty

- unpaid leave, for as long as is necessary to complete the jury duty<sup>98</sup>

6. Reservists leave

- unlimited, for the duration of the reservist’s deployment combined with pre and post-deployment activity<sup>99</sup>

As compared with other forms of family caregiving, employment standards legislation places significantly greater value on infant care. The current laws permit new parents to jointly take up to one year off work in order to care for a new baby.<sup>100</sup> Leaving aside the issue of whether one year is adequate, the lack of entitlement to take a comparable leave for caregiving of older adults and other family members raises the question of why other forms of caregiving are not also worth recognition. The goal of this study is certainly not to undermine maternity and parental leave benefits, but rather to query why other forms of care are not similarly valued. There is no question that the purpose of maternity and parental leave would be different from the purpose of adult caregiving leave, as the former is associated with breast-feeding, post-natal recovery and bonding with infants – purposes

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<sup>94</sup> *Employment Standards Act*, *supra*, note 74 at s.57.

<sup>95</sup> *Ibid.* at s.50.

<sup>96</sup> *Ibid.* at s.51.

<sup>97</sup> *Ibid.* at s.53.

<sup>98</sup> *Ibid.* at s.55.

<sup>99</sup> *Ibid.* at s.52.2

<sup>100</sup> *Ibid.* at s.50 and 51.

clearly not linked to adult caregiving. However, the current framework accords little value to caregiving aside from infant care. While these forms of caregiving meet different social and economic objectives, both activities are crucial given our aging population and de-institutionalization of components of the Canadian health care system.

The *Employment Standards Act* does accord value to forms of civil service. Both reservist and jury duty leave are subject to no temporal restrictions. Why are these leaves distinguished for special treatment? Likely, because in both instances the leaves are provided to serve the state – in the military and the court system – and hence these activities are deemed valuable in terms of unpaid leave – and as both are associated with a stipend Employment Insurance does not come into play in terms of valuation. Family caregiving is not similarly viewed as a service to the state, although this approach may require re-evaluation in the context of the current downloading of care to the family. In a social welfare state, where aspects of health care are subsidized by the government, family caregiving might be more properly viewed as a form of service to the state and community.

## VIII. Problems with the Employment Standards / Employment Insurance Framework

It is for this reason that numerous reports and consultations recommend an expansion of benefits available to family caregivers. Characterizing family care as “a cornerstone of our communities and health care systems” the Final Report of the Special Senate Committee on Aging recommends that the *Employment Insurance Act* be amended to: eliminate the two-week waiting period; increase benefits to 75% of pre-leave earnings; increase the length of the leave to thirteen weeks; and expand entitlement beyond end-of-life caregiving.<sup>101</sup> The Romanow Report recommended more generally that relevant areas of government work together on proposals to support informal caregivers to take time off work to provide home care at “critical times”, stating that “home care could not exist in Canada without the support of social networks and informal caregivers.”<sup>102</sup>

Under the current legislation there is essentially no entitlement to unpaid or paid leave for the purpose of providing care to adult family members who are not expected to die within 26 weeks. The language of Compassionate Care provisions is unequivocal that these benefits were created to support palliative and end-of-life care. They were not designed to support caregivers to sustain other caregiving relationships. Family responsibility leave, providing only five days of relief, does not address the actual ongoing care needs of most recipients of family care, and being unconnected to any income replacement measures through the Employment Insurance system, provides for no paid leave. The purpose of family responsibility leave is rather to allow the worker to take a day off work here and there. Comparison with legislation across the country and the language of collective agreements confirms that the intention of Family Responsibility was not to address ongoing family caregiving; rather, it is intended to permit employees to respond to unexpected family concerns and emergencies. Ultimately, employment standards do not recognize the

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<sup>101</sup> Special Senate Committee on Aging, *Canada's Aging Population: Seizing the Opportunity* (Ottawa: 2009) at 117 and 127.

<sup>102</sup> Romanow Report, *supra* note 29 at page 183.

demands ongoing family caregiving places on the worker. Rather, caregiving is viewed as a temporary digression from work that does not generally interfere with labour force activity.

Section 2 of the *Employment Standards Act* sets out the purposes of the Act, the last of which is directly relevant to the issue of family care. One of the goals of the act is “to contribute in assisting employees to meet work and family responsibilities.” Although significant changes have been made to the Act over the years, especially with respect to infant care and maternity leave, the Act currently meets this goal only in a very limited sense. The fact is that Compassionate Care leave is limited to a small community of potential recipients, leave being limited to end-of life care circumstances in which a physician can prognosticate death within 26 weeks. This is reflected in the very low uptake of the EI benefit: less than 4% of the funds budgeted for this benefit were utilized in the 2004-2005 fiscal period,<sup>103</sup> suggesting that the Government of Canada actually intended this innovation to benefit a much broader community of caregivers.<sup>104</sup>

The 2006 Arthurs Report, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century*,<sup>105</sup> reviewed many aspects of the *Canada Labour Code*, the federal equivalent of the *Employment Standards Act*.<sup>106</sup> The report to some extent recognized this hole in the employment law framework. It recommended that Compassionate Care Leave be redefined in the *Canada Labour Code* and the *Employment Insurance Act* to include circumstances where the recipient of care is not facing imminent death, allowing the employee to provide care for a family member who is “seriously ill or who has had a serious accident.”<sup>107</sup> Certainly this change would expand the accessibility of benefits to caregivers.

Another problem with delivering family caregiving benefits through the Employment Insurance system is that the amount of the benefit is tied to earnings, and people with non-linear, fragmented or precarious employment arrangements may have access to lower benefits or no benefits at all. Low-income earners receive less by way of financial assistance than higher income earners. While there is a rationale for partial income replacement, the implication that the caregiving labour of lower income people is worth less is problematic.

## IX. International Review – Alternative Approaches

In comparison with other countries, the Canadian Compassionate Care Leave and benefit program is rather generous in terms of paid leave for palliative and end-of-life care. However, viewed through a broader family caregiving lens, where the care recipient is often

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<sup>103</sup> Allison Williams et al., “Canada’s Compassionate Care Benefit: Views of Family Caregivers in Chronic Illness”, (2006) 12(9) *International Journal of Palliative Nursing* 438 at 444.

<sup>104</sup> The initial more restrictive definition of eligible family member is also likely partly responsible for low uptake of the benefit when it was introduced and this barrier to access has since been removed by the introduction of the more expansive current definition discussed in this chapter.

<sup>105</sup> Arthurs Report, *supra* note 29.

<sup>106</sup> The *Canada Labour Code* is much broader in application than the *Employment Standards Act* as it also governs federal labour law and health and safety standards, whereas in BC we have distinct laws, including the *Labour Relations Code* and the *Workers Compensation Act*. The *Canada Labour Code* applies to federally regulated employees such as telecommunications workers, regardless of the province or territory in which they are employed.

<sup>107</sup> Arthurs Report, *supra* note 29 at 159.

not facing imminent death, the family leave provisions, providing only two weeks of job protection and no paid leave, become comparatively weak in relation to a number of key countries, including Australia, the United Kingdom, France, the Netherlands and the U.S.

Australian employment legislation gives workers a right to two weeks paid carer's leave to support immediate family members or household members in the event of illness, injury or unexpected emergency.<sup>108</sup> This is balanced against an entitlement to only two days paid compassionate care leave each time a family member faces a life-threatening illness<sup>109</sup> and two days unpaid leave to respond to family illness, injury or emergency once paid carer's leave is exhausted.<sup>110</sup> So overall, the Australian approach to leave is conservative.

In the U. K. and France there is no entitlement to paid caregiving leave; however, employment legislation grants employees the right to much more lengthy periods of time off work without pay in order to respond to caregiving obligations. A U.K. employee may take a "reasonable amount of time" in relation to dependent care and illness. The *Employment Relations Act* states:

57A Time off for dependants

- (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
- (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
  - (b) to make arrangements for the provision of care for a dependant who is ill or injured,
  - (c) in consequence of the death of a dependant,
  - (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
  - (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.<sup>111</sup>

The U.K. legislation provides a useful model for crafting broad access without relying on the term "serious". "Dependent" is also broadly defined to include a spouse, child, parent, or person who lives in the same household, including employees, tenants, lodgers and boarders.

In France, two kinds of extended unpaid family leave are available under the French labour code: the equivalent of compassionate care leave, family solidarity leave, is a three-month leave that may be renewed once and taken on a part-time basis;<sup>112</sup> family assistance leave is a three month renewable leave with a one year limit per person per working lifetime.<sup>113</sup>

The Netherlands offers employees the broadest protection in relation to paid care leave. Their equivalent to our family responsibility leave entitles employees to ten days paid leave.

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<sup>108</sup> *Workplace Relations Act 1996* (cth), s.244 [WRA 1996].

<sup>109</sup> *Ibid.* s.250.

<sup>110</sup> *Ibid.* s.257.

<sup>111</sup> *Employment Relations Act 1999* (U.K.), 1999, c. 26, Schedule 4, Part II, s.57A.

<sup>112</sup> *Code du Travail*, Article L3142-16.

<sup>113</sup> *Code du Travail*, Article L3142-22.

The benefit is at least 70% of their wage and 100% of minimum wage.<sup>114</sup> Compassionate care leave benefits are also provided for a period of six weeks at 70% of employment wages and the leave may be taken on a part-time basis and spread out over an eighteen-week period. In both cases the right is not, however, absolute, and the employer has limited discretion to deny leave for operational reasons. An approach unique to Netherlands is career interruption leave, according to which an employee may take up to six months leave for caregiving or educational purposes. If the employer is able to replace the person on leave with someone who is otherwise unemployed or excluded from the labour market, the employee will receive a benefit equivalent to 70% of their pre-leave wage.<sup>115</sup>

In the U.S. the state of California has taken the approach recommended by most criticisms of the Canadian Compassionate Care benefit by expanding the scope of paid leave beyond end-of-life care to include all seriously ill family members.<sup>116</sup> Infant care and adult care are addressed under related provisions, with neither singled out for prioritization. However, the amount and duration of the benefit mirror the Canadian approach.

## X. Conclusion

Under the provincial *Employment Standards Act*, most BC employees have the right to take a very limited amount of time off work to care for an adult family member without losing their job. In addition to maternity and parental benefits, two types of leave have been introduced into the Employment Standards framework to address the family responsibilities of employees: family responsibility leave and compassionate care leave. Although both leaves are unpaid, an employee eligible for compassionate care leave may also be entitled to Employment Insurance Compassionate Care Benefits, which provide for limited income replacement during a leave.

This international review highlights a number of the weaknesses of the current legislative regime in BC and Canada in relation to caregiving leave. The most significant is the limitation of paid leave to circumstances where the care-recipient faces a “significant risk of death within 26 weeks”. Studies of caregiving unilaterally recommend expanding the scope of paid leave entitlement to include other forms of family caregiving,<sup>117</sup> a change that would

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<sup>114</sup> *Work and Care Act*, cited in Netherlands Ministry of Social Affairs and Employment, “SWZ – Leave – Short-term care leave” online:

<[http://english.szw.nl/index.cfm?menu\\_item\\_id=14640&hoofdmenu\\_item\\_id=14632&rubriek\\_item=392437&rubriek\\_id=391971&set\\_id=3591&doctype\\_id=6&link\\_id=166653](http://english.szw.nl/index.cfm?menu_item_id=14640&hoofdmenu_item_id=14632&rubriek_item=392437&rubriek_id=391971&set_id=3591&doctype_id=6&link_id=166653)>. See also Canada, HRSDC, “The Netherlands Improving Work-Life Balance - What Are Other Countries Doing?” (2004) at 29, online:<<http://www.hrsdc.gc.ca/eng/lp/spila/wlb/iwlb/14netherlands.shtml>>; and National Alliance for Caregiving, “The Netherlands’ Caregiving Legislation”, online:

<<http://www.caregiving.org/intcaregiving/netherlands/netherlands2.htm>>[NAC Netherlands]

<sup>115</sup> *Paid Employment and Care Act*, cited in HRSDC, “The Netherlands”, *ibid.* See also Netherlands Ministry of Social Affairs and Employment, “SWZ – Leave – Long-term care leave” online:

<[http://english.szw.nl/index.cfm?menu\\_item\\_id=14640&hoofdmenu\\_item\\_id=14632&rubriek\\_item=392437&rubriek\\_id=391971&set\\_id=3591&doctype\\_id=6&link\\_id=123323](http://english.szw.nl/index.cfm?menu_item_id=14640&hoofdmenu_item_id=14632&rubriek_item=392437&rubriek_id=391971&set_id=3591&doctype_id=6&link_id=123323)>; and NAC Netherlands, *ibid.*

<sup>116</sup> *California Unemployment Insurance Code*, §3300, online: <<http://www.leginfo.ca.gov/calaw.html>>.

<sup>117</sup> See, for example: Abord-Hugon & Romanin, *supra* note 25; VON Canada, *supra* note 26; HRSDC, *supra* note 26; Janet E. Fast and Norah C. Keating, *Informal Caregiving in Canada: A Snapshot*, Report to the Health Services Division, Health Policy and Communications Branch, Health Canada, 2001; Arthurs Report, *supra* note 29.

require reform of both provincial employment standards legislation and the federal *Employment Insurance Act*. This raises the question of what should be the length of term of leave protected under provincial legislation and what portion of this leave should be linked to entitlement to corresponding EI benefits.

The question also arises as to whether it is appropriate to limit leave to intervals of one week and to full days, as is the case under current provincial law. A more flexible and responsive regime that acknowledged the fluctuating and episodic nature of some caregiving relationships would permit the employee to take single and partial days off work without prejudice. This raises challenging questions in terms of how to dovetail such protection with the EI regime in order to permit income protection. However, a responsive framework may require such flexibility in order to avoid privileging some kinds of caregiving relationships over others. Similarly, the Dutch approach of permitting a part-time leave with income replacement may be more responsive to the circumstances of some caregivers than our current system. However, an alternative to making part-time leave available is to build such rights to make work hours adjustments into work flexibility or human rights legislation. This problem is explored in the following chapter.

Finally, the linking of entitlement to income replacement to Employment Insurance will exclude the underemployed and people who have insufficient hours of insurable employment leading up to a period of intensive caregiving. Connecting entitlement to financial benefits partly subsidized by government exclusively to labour force earnings creates an inequity in the valuation of care labour: higher earnings may mean higher benefits during a period of caregiving and a poor work history means no benefits at all. In this sense EI must always be understood as a partial response to the challenge of supporting family caregivers. Chapters 5 and 6 address other approaches to income replacement for caregivers.