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## What We Owe Workers as a Matter of Common Humanity: Sickness and Caregiving Leaves and Pay in the Age of Pandemics

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**What We Owe Workers as a Matter of Common Humanity: Sickness and  
Caregiving Leaves and Pay in the Age of Pandemics\***  
**Eric Tucker,\*\* Leah F. Vosko\*\*\* and Sarah Marsden\*\*\*\***

The law permits [temporary illness] on the ground of common humanity to be offered as an excuse for not discharging duty temporarily and suffers the disabled party to recover wages for the time he is temporarily away from work.<sup>1</sup>

The COVID-19 pandemic has tested the limits of many areas of law and they have been found wanting. Sickness and caregiving leaves, paid and unpaid, are one, and as those limits quickly became apparent, all Canadian jurisdictions expanded workers' leave rights and the federal government created income replacement schemes for workers taking these leaves.<sup>2</sup> Suddenly, entitlements that seemed beyond the realm of the politically possible were enacted into law with little resistance. Perhaps it took a pandemic for us to rediscover or, at least, expand the scope of our common humanity.

A discussion of what is owed workers as a matter of common humanity might proceed purely on a normative basis, but that is not our intention. Rather, we come at this issue from a feminist political economy perspective; we are interested in exploring regimes of sickness and caregiving leaves through an examination of their role in mediating the endemic conflict in

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<sup>1</sup> *Dartmouth Ferry Commission v Marks* (1904), 34 SCR 366 at 374, Davies J.

<sup>2</sup> The changes to sickness and caregiving leads were part of a broader scheme to address mass unemployment, but our focus here is on the leaves.

capitalist regimes between the imperative of continuous and limitless capital accumulation and social reproduction, or the activities centrally involved in life making. At least since industrial capitalism, social reproduction has been separated from market production. However, this separation does not alter the fact that production for the market remains dependent on social reproduction. The capitalist economy cannot survive without people engaging in the multitudinous activities of social reproduction, by which we mean the daily and intergenerational reproduction of life.<sup>3</sup> Yet while it is a condition of its existence, the capitalist economy, to quote Nancy Fraser, “accords [the activities of social reproduction] no monetized value and treats them as if they were free.”<sup>4</sup>

That said, the worlds of production and social reproduction are intimately intertwined. Workers commodifying their time in labour markets have always needed some time off paid work, whether due to illness or injury, or because of childbirth, or because they have other caregiving responsibilities. In short, all paid workers are engaged in social reproduction to one degree or another. Of course, the extent of that engagement is deeply gendered as well as racialized and shaped profoundly by migration status, age, and (dis)ability. Women carry the

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<sup>3</sup> We use the term social reproduction to refer to daily and intergenerational reproduction, in the widest sense. This encompasses training, development, and the continued well-being of workers for the labour process, and “the general standard of living, education and health sustained in society.” Linda Clarke, “Disparities in Wage Relations and Social Reproduction” in Linda Clarke, Peter D Gijzel & Jörn Janssen, eds, *The Dynamics of Wage Relations in the New Europe* (Kluwer Academic Publishers, 2000) 134 at 137. Institutions with a common interest in reproducing the working population include, but are not limited to, the state, the education system, the public sector, the family, firms, and trade unions. Social reproduction occurs at inter- and intra-household levels through unpaid work; at the level of the nation state through direct and indirect government transfers; and internationally through processes of migration. The international level affects temporary migrant workers in Canada acutely, creating a process whereby host states, like Canada, externalize the costs of labour supply renewal in various ways, including the cost of providing for unemployment and other income disruptions, as well as the cost of raising and training the next generation of workers for the labour market. See Leah F Vosko, “Rethinking Feminization: Gendered Precariousness in the Canadian Labour Market and the Crisis in Social Reproduction” (Chairholder lecture delivered at the Robarts Centre for Canadian Studies, Toronto, 2003) at 19. On migration and social reproduction, see especially Michael Burawoy, “The Functions and Reproduction of Migration Labor: Comparative Material from Southern Africa and the United States” (1976) 81 Am J Soc 1050; Saskia Sassen, “Towards a Conceptualization of Immigrant Labor” (1981) 29 Soc Probs 65.

<sup>4</sup> Nancy Fraser, “Contradictions of Capitalism and Care” (2016) 100 New Left Rev 99 at 101.

burden of childbirth and, albeit not inevitably, both historically and contemporaneously of domestic work and childcare as well. But the gendering of labour market participation and caregiving work is not a constant. For example, in the past fifty years in Canada, women's labour market participation has increased dramatically and men's patterns of participation have changed with the spread of precarious employment—and yet, on account of their continuing responsibilities for caregiving, women's total work (including paid and unpaid) continues to exceed that of men.<sup>5</sup> At the same time, labour market incomes have stagnated such that in two-adult households, taken to be the norm at the level of law and policy, both adults must commodify their time to sustain a decent standard of living.<sup>6</sup> And this has occurred within a context in which caregiving responsibilities are increasingly privatized, with the burden of that caregiving (both paid and unpaid) still falling on women,<sup>7</sup> in the sphere of paid work, falling disproportionately on racialized (im)migrant women, including those engaged in precarious domestic work in households and beyond. All these changes shape how conflicts between production and social reproduction are experienced and how they are mediated by legal and social arrangements, including sick and caregiving leaves and pay for workers.<sup>8</sup>

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<sup>5</sup> On women's and men's contributions to total work, including paid and unpaid work, see Melissa Moyser & Amanda Burlock, "Time Use: Total Work Burden, Unpaid Work, and Leisure" (30 July 2018), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54931-eng.htm](http://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/54931-eng.htm)> [perma.cc/HGE5-VEQS]. See also Antonella Picchio, "Wages as a Reflection of Socially Embedded Production and Reproduction Processes" in Linda Clarke, Peter de Gijssel & Jörn Janssen, eds, *supra* note 3, 195.

<sup>6</sup> On caregiving models, see e.g. Nancy Fraser, "After the Family Wage" (1994) 22 *Pol Theory* 591.

<sup>7</sup> See Pat Armstrong et al, eds, *Exposing Privatization: Women and Health Care Reform in Canada* (University of Toronto Press, 2001); Kate Bezanson, "'Childcare Delivered through the Mailbox': Social Reproduction, Choice, and Neoliberalism in Theo-Conservative Canada" in Susan Braedley & Meg Luxton, eds, *Neoliberalism and Everyday Life* (McGill-Queen's University Press, 2010) 90; Pat Armstrong et al, "Privatization of Long-Term Residential Care in Canada: The Case of Three Provinces" in Pat Armstrong & Hugh Armstrong, eds, *The Privatization of Care: The Case of Nursing Homes* (Routledge, 2020); Emma McKenna, "'The Freedom to Choose': Neoliberalism, Feminism, and Childcare in Canada" (2015) 37 *Rev Educ Pedagogy & Cultural Stud* 41.

<sup>8</sup> Although our focus here is the provision of sick and caregiving leaves and pay in Canada, the alternative regime which we envision is inclusive of migrant workers, including those confronting high degrees of temporariness (e.g., temporary foreign workers lacking definitive prospects for return), neglected under the current system. In this context, it is useful to recall Sassen's formative intervention on migrant workers' prominent role in production for surplus and their facilitation of social reproduction by permanent resident and citizen workers in host states, such as Canada. Migrant workers often labour under dangerous and exploitative conditions, enabled by legal structures that

So, when we ask what workers are owed as a matter of common humanity, we do not take “common humanity” as an unchanging legal or social norm. Rather, we understand the answer to the question of what workers are owed as a legal right or social practice to be framed by changing economic, political, and ideological forces that operate at multiple scales—the national, subnational, and indeed transnational. It is also a realm in which the politics of class, gender, migration status, and other social relations are intertwined and intersect, given the inevitable juggling of work in labour markets and in social reproduction, where conflicts are experienced most intensely by low-wage workers who are disproportionately female, racialized, lacking permanent residency status, et cetera.

To this point, we have abjured engagement with the normative question of what we owe workers as a matter of common humanity. However, that is not to say that we come to this discussion without a view. To the contrary, we associate ourselves with an emancipatory project that aims to drastically reduce working time (paid and unpaid), to dramatically improve its quality, and to weaken, if not sever, the link between work and access to the resources necessary for a sustainable process of social reproduction.<sup>9</sup> That said, while we believe it is important to expand our imaginary of what we can and should demand, we wish to focus on something that is within reach right now: a permanent expansion of protected sick and caregiving leave entitlements and access to income while away from work. To advance that project, we identify

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deprive migrant workers of labour mobility, capacity for collective action, and the benefit of entitlements that many permanent resident and citizen workers can obtain. We, and others, have dealt in some detail with these issues elsewhere. See *e.g.* Kendra Strauss, “Social reproduction and migrant domestic labour in Canada and the UK: Towards a multi-dimensional concept of subordination” in Louise Waite et al, eds, *Vulnerability, Exploitation and Migrants* (Palgrave MacMillan, 2015) 59; Malcolm Sargeant & Eric Tucker, “Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK” (2009) 2 *Pol’y & Prac in Health & Safety* 51; Leah F Vosko, *Disrupting Deportability: Transnational Workers Organize* (ILR/Cornell University Press, 2019); Sarah Marsden, *Enforcing Exclusion: Precarious Migrants and the Law in Canada* (UBC Press, 2018).

<sup>9</sup> Kathi Weeks, *The Problem with Work* (Duke University Press, 2011).

four foundational principles (universality, sufficiency, security, and worker-centred flexibility), for constructing such leaves and benefits, each to be pursued on the basis of substantive gender equality.<sup>10</sup>

The article unfolds in four parts. We begin Part I with an overview of the historical development of sickness and caregiving leave and pay regimes, starting with the common law and then turning to statutory measures enacted at the end of the 1960s, chronicling a period in which the male breadwinner/female caregiver model reached ascendancy. However, by that time fault lines were quickly surfacing, and the *dual* breadwinner/female caregiver model began to take shape, resulting in mounting tensions in social reproduction. In the second segment of our historical narrative, we examine the slow development of Canada's welfare state model of sickness and caregiving leaves and benefits over the next five decades, focusing on the federal government's enactment of special employment insurance benefits and statutory leave rights in British Columbia and Ontario, in response partly to these tensions. Part II critically examines the limitations of that statutory regime, as it existed immediately prior to the outbreak of the COVID-19 pandemic in Canada, in light of the imperative of universal breadwinning alongside

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<sup>10</sup> Gender equality is often treated as coterminous with formal equality. Yet even when cis women and men are formally equal before the law, cis women often fall well behind cis men, especially socioeconomically, an outcome often amplified by intersecting axes of inequality (*e.g.*, along the lines of citizenship status, race, and ability). On account of the entrenchment of (often white citizen) male norms, equal treatment is by no means sufficient in forging gender equity. See *e.g.* Leah F Vosko, *Managing the Margins* (Oxford University Press, 2010) [Vosko, *Managing the Margins*]. In response to limitations of a notion of equality centered on "treating likes alike," feminist scholars advance various conceptions of substantive equality. One such conception bridging a range of approaches, articulated well by Fredman and Goldblatt, to which we subscribe, conceives of substantive equality along four dimensions: in lieu of pursuing equal treatment, the first dimension focuses on redressing disadvantage and opening space for different treatment, as appropriate; the second dimension, pursuing "dignity," entails addressing violence and responding to social stigma and prejudice; the third dimension involves acknowledging that barriers to gender equality stem typically from processes that are systemic or rooted in social and institutional structures; the fourth, and final, dimension, entails seeking transformation, which entails redistributing not only material resources but power as well as changing hierarchies and structures contributing to gender subordination. See Sandra Fredman & Beth Goldblatt, "Gender Equality and Human Rights" (2015) Report for the Progress of the World's Women No 4 (UN Women); on the need to reform institutions and structures contributing to gender subordination, see also RW Connell "The State, Gender, and Sexual Politics: Theory and Appraisal" (1990) 19 *Theory and Society* 507.*h*

further privatization of (still gendered) caregiving. Part III considers the expansion of sick and caregiving leave and pay provisions, enacted in response to the pandemic. In part IV, we elaborate on the four principles identified above to guide the development of the sick and caregiving entitlements we owe workers as a matter of common humanity, and we suggest ways of bringing the existing regime more into line with those principles. Finally, we set out a few directions towards imagining a different regime that truly provides workers with what we conceive they are owed as a matter of common humanity.

## **I. The Historical Development of Sick and Caregiving Leaves and Pay Regimes**

### **A. The Common Law in the Era of the Male Breadwinner/Female Caregiver Model**

Since history does not have a beginning, the starting point of a historical account is necessarily a somewhat arbitrary decision, although in our case it is simplified because of our concern with sick and caregiving regimes *under capitalism*, beginning with the rise of industrial capitalism in late eighteenth-century England. However, one cannot understand capitalism's common law without at least some understanding of its earlier roots, and so we must say a few words about the master and servant regime in pre-modern England.

In that context, there was not the same radical separation of production for the market and social reproduction that marked the wage system of industrial capitalism. Work time was not as sharply delineated from the rest of life as it would become, and work was more task oriented and not strictly regulated by the clock.<sup>11</sup> As well, most work contracts were of fixed duration; seven years for apprentices, a presumption of annual hiring for agricultural labourers, and so on. As a result, most employers could not terminate work contracts simply by giving notice. Cause was

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<sup>11</sup> EP Thompson, "Time, Work-Discipline and Industrial Capitalism" (1967) 35 *Past & Present* 56.

required, which might include disobedience or permanent incapacity, but it did not include temporary illness, so long as the servant remained willing to fulfill their obligations when able to do so.

The unwillingness of the courts to treat temporary illness as relieving the master of its obligations to the servant was also rooted in the still prevailing idea that the contract of employment was a contract of mutuality, an idea closely tied to that of common humanity. As long as workers remained willing to work as they were able, they were not dishonouring their contracts. Moreover, most work contracts were entire contracts, which meant that any breach of the contract by the worker would relieve the employer of the duty to pay for the entire period of the contract. If mutuality had any meaning, then surely the temporary inability to work due to illness should not allow the employer to enjoy freely the benefit of work already performed. Finally, operating in the background was the poor law system under which parishes were responsible for providing the necessities to impoverished workers and their families with residence. Relieving the employer of their duty to pay shifted the cost of supporting workers and dependent family members onto the parish.

It is against this backdrop that we can begin to understand the common law's early response to sickness pay in the mid-nineteenth century. The leading English case was *Cuckson v Stones*, although notably the case did not involve a labourer but a master brewer employed under a ten-year contract.<sup>12</sup> *Stones*, the brewer, became ill toward the end of the contract and was off work for several months until he was able to return and complete his service. His employer, however, deducted his wages for the period he was off work due to illness. *Stones* sued and won. The court relied on older case law, including some maritime cases (involving a distinct legal

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<sup>12</sup> [1859] 120 ER 902 (UK KB).

regime governing the work of seamen) and some settlement cases (involving the determination of which settlement was responsible for supporting the worker under the poor laws). The court held that Stones was entitled to recover because workers are only required to provide such service as they are able to perform and thus a temporary illness does not relieve the employer of the duty to continue to pay wages during the period of temporary disability. Although in this case the employer had not terminated the contract, the parties accepted that a temporary illness also did not provide cause for its termination.<sup>13</sup>

The Supreme Court of Canada relied on this principle in the *Dartmouth Ferry* case, quoted at the beginning of the article. In that case, the plaintiff, Jane Marks, a widow, sued for wages she claimed the employer owed her husband for time he was off work sick. However, Mrs. Marks lost because her husband's illness was permanent and fatal, allowing the employer to treat the contract as frustrated and at an end, including their obligation to pay wages.

While the common law adopted a generous approach to temporary sick leaves and pay, its attitude toward caregiving was quite different, perhaps because the plaintiffs were women, not bread-winning men. The leading case on this point is *Turner v Mason*, which involved a domestic servant, Ms. Turner, whose master denied her permission to leave the house for the night to attend to her severely ill mother who was in danger of dying.<sup>14</sup> She went anyway and, upon her return the next morning, her employer summarily dismissed her and refused to pay for the month. Ms. Turner sued for her wages but was unsuccessful. The judges were unanimous. This was a clear case of disobedience, which the daughter's caregiving responsibilities and human need to be with her dying mother did not excuse. Chief Baron Pollock said: "It is very

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<sup>13</sup> For an insightful discussion of this case, see William W Schwarzer, "Wages During Temporary Disability" (1952) 5 Stan L Rev 30.

<sup>14</sup> (1845), 153 ER 411 (UK Ex).

questionable whether any service to be rendered to any other person than the master would suffice as an excuse.”<sup>15</sup> Baron Parke opined: “[T]here is not any imperative obligation on a daughter to visit her mother under such circumstances.”<sup>16</sup> The common law’s common humanity, it seems, was quite limited.

Yet, even where the law appeared to extend common humanity to workers by providing them with paid sick leave, its reach was quite narrow. Stones and Marks were not ordinary industrial workers, but highly skilled senior employees on long-term contracts. By the nineteenth century, most industrial workers were, at best, on contracts of indefinite duration, terminable at any time and for any reason with reasonable notice. While notice entitlements were meaningful for upper-echelon workers, employers could terminate industrial workers on hourly wages with minimal amounts of notice and nothing prevented an employer from terminating temporarily ill workers by giving notice. Sick leave, therefore, was entirely at the discretion of the employer and, even if the employer granted leave and permitted the worker to return to work, the promise of the common law’s right to be paid while off sick was unlikely to be honoured. This is because the common law merely establishes default rules that can be defeated by express contract or custom, as was its default rule on sick leave and pay.

To illustrate the point, the nineteenth-century courts held that workers who were temporarily unable to work due to work-related injuries and disabilities had neither an implied contractual nor a customary entitlement to be paid. Moreover, express provision of compensation was rare. This led some workers to seek compensation from their employers in tort, claiming their employers’ negligence caused their disability, but the common law judges would have none of it. Relying on market principles, not common humanity, the judges created a legal

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<sup>15</sup> *Ibid* at 413.

<sup>16</sup> *Ibid*.

presumption that workers voluntarily assumed the risk of injury by agreeing to perform the work for wages.<sup>17</sup>

The gap between the common humanity promised by the common law and the protection it delivered proved disruptive for social reproduction under industrial capitalism. By the mid-nineteenth century, the male breadwinner model had become the principal way in which most working-class families gained access to the resources they needed to survive. The disablement of the male breadwinner, therefore, was a threat to the family's survival. The failure of the common law to provide compensation for work-related injuries fueled worker discontent, giving rise to class-based politics that attracted support from social reformers and thus a politics of social protection as well. This combination helps explain why workers' compensation laws enacted in the early twentieth century created the first legislative entitlements to sick leave and pay, albeit limited to work-related injuries.<sup>18</sup>

The need for protected leaves and paid time off work, however, did not just arise in the context of job-related work injuries. Although their frequency is variable and their distribution is far from uniform, all human beings are liable to suffer from sickness and injury that require recovery time.<sup>19</sup> Under the male breadwinner/female caregiver model, the breadwinner's disability disrupts access to the income on which the worker and any dependents rely. In the absence of meaningful common law or statutory entitlements, workers sought private solutions.

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<sup>17</sup> The earliest English case is *Priestly v Fowler* (1837), 150 ER 1030 (UK Ex). For a discussion of the Canadian law of employers' liability, see Eric Tucker, *Administering Danger in the Workplace* (University of Toronto, 1990), ch 3.

<sup>18</sup> Eric Tucker, "Compensating Work-Related Disability: Theory, Politics and History of the Commodification-Decommodification Dialectic" in Ravi Malhotra & Ben Isitt, eds, *Disabling Barriers: Social Movements, Disability History and Law* (UBC Press, 2017) 189.

<sup>19</sup> For a prescient discussion of the issue and a call to provide social insurance that would cover sickness and maternity, see Leonard Marsh, *Report on Social Security for Canada: New Edition* (McGill-Queen's University Press, 2017) ("Particularly when [illness] strikes the breadwinner, however, it is also a problem of the interruption of earning power. A serious and prolonged illness means not only medical or hospital bills, but destitution if there are no sources to fill the gap created by the cessation of wages" at 21).

While more research is needed on benefits during the first half of the twentieth century, we know that some unionized workers secured days of paid sick leave and short and long-term health-related insurance benefits. Other workers obtained benefits through the growth of “corporate welfare” programs designed to build employee loyalty and avoid unionization.<sup>20</sup>

Caregiving leaves, however, were likely quite rare. The male breadwinner/female caregiver model assumed there was an unpaid housewife available to fulfill the family’s caregiving responsibilities. The unencumbered male breadwinner did not require caregiving leaves. For similar reasons, leaves related to pregnancy and childbirth were not a high priority. In the normal course, pregnant women were expected to leave the paid labour force permanently, only to return if the male breadwinner became disabled or left the home. Of course, this was not true for all workers, but it was the normative model upon which sick and caregiving leaves and pay were based until the late 1960s.

### **B. The Welfare State and the Dual Breadwinner/Female Caregiver Model**

Labour market insecurity, and its implications for social reproduction, is obviously not limited to earnings interruptions due to sickness and caregiving responsibilities. In the twentieth century, workers began to press the state to enact measures to address these problems. Workers’ compensation, discussed in Part I(A), above, was among the first legislative schemes enacted to protect interruptions of labour market incomes. It took several decades of struggle and the upheaval caused by the Great Depression to move the federal government to enact a general scheme of unemployment insurance in 1935. The courts held the federal government lacked jurisdiction to enact such a scheme, which necessitated a constitutional amendment before a

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<sup>20</sup> For a discussion of some early schemes, see Margaret E McCallum, “Corporate Welfarism in Canada, 1919–1939” (1990) 71 *Can Hist Rev* 46.

valid scheme came into force in 1940.<sup>21</sup> The normative male breadwinner model was interrupted by World War II when women were recruited into industrial workplaces to replace the masses of men conscripted into military service, but at the war's end women were pushed out and the model was restored.<sup>22</sup> Again, we emphasize that the model was normative, rather than universal, based on a set of assumptions about the gender contract that informed public policy.<sup>23</sup>

By the late 1960s, however, the normative male breadwinner/female caregiver model contract was coming undone. Women's labour force participation rate, which had sunk after World War II to less than 25 per cent in the early 1950s, began to increase, so that by 1970 it reached 40 per cent and continued to rise steadily until the late 1980s, slowing but still crossing the 80 per cent threshold in the early 2000s.<sup>24</sup> This is not to suggest that women engaged in the labour force on the same basis as men, or that the labour market as a whole was not changing in significant ways. Amongst other developments, the standard employment relationship (*i.e.*, full-time permanent employment on the employer's premises under direct supervision, paid by a social wage) began to erode over this period, particularly in the wake of the oil shocks of the late 1970s. The feminization of employment, or as Leah Vosko prefers, gendered precariousness,<sup>25</sup>

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<sup>21</sup> Leslie A Pal, *State, Class, and Bureaucracy* (McGill-Queen's University Press, 1988).

<sup>22</sup> Joan Sangster, "Canadian Working Women" in WJC Cherwinski & Gregory S Kealey, eds, *Lectures in Canadian Labour and Working-Class History* (Committee on Canadian Labour History, 1985) at 59-78; Judy Fudge & Leah F Vosko, "Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law and Policy" (2001) 22 *Econ & Indus Democracy* 271.

<sup>23</sup> In the case of unemployment insurance, the program gradually became more gender neutral on its face from the 1950s onwards, but it still pivoted on the male norm of the standard employment relationship, and has never fully accommodated the reality of workers engaged in forms of part-time and temporary work, let alone self-employment. Certain groups of seasonal workers eventually gained coverage, but they rarely qualified for full benefits. See Leah F Vosko, "Irregular Workers, New Involuntary Social Exiles: Women and UI Reform" in Jane Pulkingham & Gordon Ternowetsky, eds, *Remaking Canadian Social Policy: Social Security in the Late 1990s* (Fernwood Press, 1996) at 265; Leah F Vosko, "Recreating Dependency: Women and UI Reform" in Daniel Drache & Andrew Ranikin, eds, *Warm Heart, Cold Country* (Caledon Press, 1995) at 213; "Alternative Federal Budget 2018, Employment Insurance," online (pdf): *Canadian Centre for Policy Alternatives* <[www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/AFB%202018%20Employment%20Insurance%20Chapter.pdf](http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/AFB%202018%20Employment%20Insurance%20Chapter.pdf)> [perma.cc/QS6L-WU5E].

<sup>24</sup> "The Surge of Women in the Workforce" (17 May 2018), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015009-eng.htm](http://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015009-eng.htm)> [perma.cc/PY7C-MTAY].

<sup>25</sup> Vosko, "Rethinking Feminization," *supra* note 3.

was an important phenomenon that shaped the development and impact of sick and caregiving leave and pay policies throughout this period. As well, household composition was changing, marked by an increase in lone-parent-headed households, four-fifths of which were headed by women in 2015.<sup>26</sup>

These developments, in conjunction with the ongoing problem of income disruption due to illness and disability and the privatization of caregiving of various sorts, childcare, eldercare, and healthcare chief among them, generated a crisis of care, predominantly borne by women who, despite returning to paid labour, still performed (and continue to perform) the majority of caregiving work.<sup>27</sup>

Some employers responded to their employees' needs to take time off for sickness by providing paid sick days, even in the absence of a statutory duty to do so, while others acceded to collective bargaining demands from their unionized employees. While we do not have data on the availability of employer-provided benefits in the last decades of the twentieth century, by 2016, according to data from Statistics Canada's General Social Survey, about 42 per cent of employees reported having paid sick leave. However, access to paid sick leave varied significantly by industry (*e.g.*, education and public administration higher than hospitality and construction), occupation (white collar higher than blue collar), education (university educated higher than high school or lower) and visible minority status (non-visible minority higher than visible minority).<sup>28</sup> Another study, based on an online survey in 2019, found that employers paid 38 per cent of illness or disability leave and 23 per cent of family responsibility leaves. However,

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<sup>26</sup> "Lone Parent Families" (27 November 2015), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/75-006-x/2015001/article/14202/parent-eng.htm](http://www150.statcan.gc.ca/n1/pub/75-006-x/2015001/article/14202/parent-eng.htm)> [perma.cc/CG3E-BGNC]; "The Rise of the Dual Earner Family with Children" (24 August 2018), online: *Statistics Canada* <[www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016005-eng.htm](http://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2016005-eng.htm)> [perma.cc/BUZ3-QSU4].

<sup>27</sup> Moyser & Burlock, *supra* note 5.

<sup>28</sup> Statistics Canada, *Assessing Job Quality in Canada: A Multidimensional Approach*, by Wen-Hao Chen & Tahsin Medhi (Ottawa: Statistics Canada, 10 December 2018) at 14, 16 (Tables 2 & 3).

the proportion of paid leaves varied significantly by income decile and job type (higher paid and permanent employees being far more likely to have paid leaves than are lower paid and casual or seasonal employees).<sup>29</sup> Finally, the results of a 2019 survey of British Columbian workers were similar. Less than half had employer-provided paid sick leave, with access varying depending on income, job type, unionization, immigration status, and indigeneity, among others.<sup>30</sup> The shortfall in voluntary or negotiated arrangements, particularly for those most disadvantaged, continues to fuel demands for statutory rights to leaves and benefits.

Limited access to employer-provided benefits failed to solve the growing crisis of caregiving, which put pressure on the Canadian state to address the shortfall. An early response was to provide households comprised of Canadian citizens and permanent residents with greater access to low-wage racialized domestic workers through migrant worker programs. Beginning in the 1960s and extended significantly in the 1970s, these programs targeted, in particular, women from the Caribbean and the Philippines, to ease the burden of socially reproductive labour and enable and normalize a dual-earner model among Canadian citizens and permanent residents.<sup>31</sup> These vital migrant workers were afforded constrained access to long-term or permanent residency and its rights and associated entitlements, which precluded them from being

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<sup>29</sup> David Macdonald, *COVID-19 and the Canadian Workforce* (Canadian Centre for Policy Alternatives, March 2020) at 5-6 (Figures 1 & 2). Some employers offer flexible work arrangements, although the incidence is unclear. See Employment and Social Development Canada, *Flexible Work Arrangements: What Was Heard* (Employment and Social Development Canada, September 2016), online: *Government of Canada* <[canada.ca/en/employment-social-development/services/consultations/what-was-heard.html](http://canada.ca/en/employment-social-development/services/consultations/what-was-heard.html)> [perma.cc/R74R-US54]. The responses cannot be read as representative since nearly 75 per cent of the respondents were federal employees (*ibid*).

<sup>30</sup> Iglia Ivanova & Kendra Strauss, “Paid Sick Leave Finally on the Agenda: And Here’s Why it Matters” (27 May 2020), online: *Policynote* <[www.policynote.ca/paid-sick-leave](http://www.policynote.ca/paid-sick-leave)> [perma.cc/BZ5R-FQW9].

<sup>31</sup> Makeda Silvera, *Silenced: Talks with Working Class Caribbean Women about Their Lives and Struggles as Domestic Workers in Canada* (Sister Vision Press, 1983); Sedat Arat-Koc, “Good enough to work but not good enough to stay: Foreign domestic workers and the law” in Elizabeth Cormack, ed, *Locating Law: Race, Class, Gender Connections* (Fernwood Press, 2005) 121.

accompanied by their own dependents initially and for an extended period, in effect shifting major aspects of the crisis of caregiving onto their shoulders and overseas communities.<sup>32</sup>

A second branch of the Canadian state's response was to create and then incrementally expand federal employment insurance (EI) caregiving benefits, often matched with amendments to employment standards laws, to provide covered workers with protected unpaid leave rights.<sup>33</sup> In the remainder of this section, we briefly trace these developments.

Table 1, below, provides an overview of the development of sick and caregiving leaves and benefits. Although maternity and parental leave benefits are not a focus in this article, we have included them here because they are important for understanding the historical development of these kinds of provisions. As Table 1, below, shows, with one exception, that the development of sickness and caregiving leaves, broadly defined, begins in the 1970s. As well, we can see these leaves and benefits developed in two waves.<sup>34</sup> The first, roughly from 1970 to 1990, straddles the shift from the era of Keynesian-style welfare state expansion (marked by the creation of public health insurance in 1966) to the period of growing neo-liberal austerity (marked by the imposition of wage and price controls in 1976). The second wave begins around the turn of the twenty-first century, a period in which neoliberalism was definitively ascendant, characterized by the dual imperative towards universal breadwinning and the further privatization of (still gendered) caregiving.

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<sup>32</sup> Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill LJ 681; Sedef Arat-Koç, "Whose Social Reproduction? Transnational Motherhood and Challenges to Feminist Political Economy" in Kate Bezanson & Meg Luxton, eds, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (McGill-Queen's University Press, 2006) 75.

<sup>33</sup> Ironically, many of these benefits and leaves would not be available to foreign domestic workers who were, in any event, required to leave their children and other dependents in their home countries as a condition of their entry into Canada.

<sup>34</sup> For a fuller discussion of the evolution of parental leave benefits and thoughtful reflections on COVID's impact and their future development, see Andrea Doucet, Sophie Mathieu & Lindsey McKay, "Reconceptualizing Parental Leave Benefits in COVID-19 Canada: From Employment Policy to Care and Social Protection Policy" (2020) Can Pub Pol'y (advance online publication), DOI: 10.3138/cpp.2020-091 ["Reconceptualizing"].

TABLE 1. THE ORIGINS OF SICK AND CAREGIVING LEAVES (ONTARIO, BRITISH COLUMBIA) AND FEDERAL EMPLOYMENT INSURANCE BENEFITS

<b>Maternity/Pregnancy Leaves and Benefits</b>	
1921	BC - Maternity Leave
1970	ON - Maternity Leave
1971	Federal - EI Benefits
<b>Sick Leave and Benefits</b>	
1971	Federal - EI Benefits
2000	ON – Personal Emergency Leaves (ten days)
2017	ON – replaced by two paid sick days
2018	ON – replaced by three unpaid days
2020	BC – three unpaid days
<b>Parental Leaves &amp; Benefits</b>	
1990	Federal - EI Benefits
	ON - Parental Leave
1991	BC – Parental Leave
<b>Family Responsibility/Personal Emergency Leave</b>	
1995	BC – Family Responsibility Leave (five days)
2000	ON – Personal Emergency Leave (ten days) for employers with fifty-plus employees
2017	ON – Personal Emergency Leave for all; two paid sick days
2018	ON – three unpaid sick days/two days bereavement/three days family responsibility

<b>Compassionate Care Leaves/Benefits (End of Life)</b>	
2003	Federal - EI Benefit
2004	ON - Family Medical Leave
2006	BC - Compassionate Care Leave
<b>Family Care Giver – Critically Ill Children</b>	
2012	EI Benefit
2014	ON – Critically Ill Child Leave
2019	BC Family Care Giver Leave (adults and children)
<b>Family Care Giver Leave – Serious Medical Conditions</b>	
2014	ON – eight weeks leave to care for family member with serious medical condition
<b>Family Care Giver – Critically Ill Adults</b>	
2017	EI Benefit
2017	ON – Critical Illness Leave
2019	BC - Family Caregiver Leave

The first wave of leaves and benefits addressed sickness and maternity and parental responsibilities. EI sick benefits were created in 1971 at the same time as maternity benefits, driven, on the one hand, by the common law’s failure to presume a contractual entitlement to sick pay and, on the other, by a growing women’s movement, whose demands were amplified by the Report of the Royal Commission on the Status of Women (RCSW), which documented how women in the labour force were compelled to use sick days and/or leave to cover some of their maternity leave. It also found that women used more sick leave than men because of various family responsibilities and underscored the tight connection between sickness and women’s

poverty. By drawing attention to these interactions, the RCSW reinforced pressure on the government to introduce both sickness and maternity benefits in the same bill. The women's and labour movements lobbied hard for legislation, which resulted in the enactment of the 1971 EI amendment providing sickness and maternity benefits.<sup>35</sup>

With regard to sickness, the legislation provided up to fifteen weeks of benefits after a two-week waiting period.<sup>36</sup> However, the provinces did not immediately enact statutory sick leave rights to protect the jobs of workers collecting sick benefits. Ontario enacted protected sick leaves in 2000 and BC only in 2020.<sup>37</sup> Prior to statutory sick leaves, an employer could have terminated a worker who was off work temporarily because of sickness by giving notice. Moreover, for much of that time, sacking workers for being ill was not unlawful discrimination since, prior to 1981 in Ontario and 1984 in BC, human rights codes did not prohibit discrimination based on disability.<sup>38</sup>

The creation of maternity benefits aimed to eliminate policies explicitly discriminatory to women by beginning to accommodate the reality of women's labour force participation during pregnancy and after childbirth.<sup>39</sup> Like those providing for sickness benefits, they provided up to fifteen weeks of benefits, again with a two-week waiting period, providing income security

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<sup>35</sup> See Canada, *Report of the Royal Commission on the Status of Women in Canada* (Information Canada, 1970) (Chair: Florence Bird) at 397-98 (recommendations 9-10), online: *Library and Archives Canada* <epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/bird1970-eng/bird1970-eng.htm> [perma.cc/FY5T-QHVE]. See also *Unemployment Insurance Act, 1971*, SC 1971, c 48.

<sup>36</sup> Prior to 1971, a 1955 amendment to the unemployment insurance scheme enabled workers who became temporarily sick while collecting unemployment to continue to do so. See *Unemployment Insurance Act*, SC 1955, c 50, s. 66.

<sup>37</sup> Ontario's statutory sick leave rights were reformed by the Liberal government in 2017 to provide for up to two paid sick days, but the Conservative government repealed and replaced this provision in 2018. See *Employment Standards Act, 2000*, SO 2000, c 41 [ESA, 2000]; SO 2017, c 22, Sched 1; SO 2018, c 14, Sched 1. For BC, see SBC 2020, c 6.

<sup>38</sup> See *An Act to revise and extend the Protection of Human Rights in Ontario*, SO 1981, c 53; *Human Rights Act*, SBC 1984, c 22. It should be noted that the prohibition against discrimination on the basis of disability does not apply to "ordinary" illnesses, like the flu. See *Burgess v College of Massage Therapists of Ontario*, 2013 HRTO 1960 [Burgess].

<sup>39</sup> Ann Porter, *Gendered States* (University of Toronto Press, 2003) at 118, 125; Pal, *supra* note 21 at 78-80.

which in BC and Ontario supplemented existing unpaid maternity leave entitlements for maternity. The creation of the EI maternity benefit was an important but limited breakthrough, reflected in the requirement that to qualify, a woman had to have a “major” attachment to the labour force and satisfy the so-called “magic ten” rule designed to ensure she was working at the time she became pregnant.<sup>40</sup>

The second wave of leaves to address caregiving was slower in coming. While the Canadian Union of Postal Workers pioneered the struggle for parental leaves, successfully striking for such a benefit in 1981,<sup>41</sup> government action took much longer, despite the growing caregiving crisis fueled by increasing women’s labour force participation and the two-earner family, and the failure of the federal government to develop a national childcare strategy.<sup>42</sup> In 1990 the federal government introduced ten weeks of parental benefits that could be taken by either parent or split between them, and the provinces supported these EI entitlements (and their subsequent expansion) with matching statutory leave rights.<sup>43</sup> This EI benefit and associated leave rights were extended to thirty-five weeks in 2000.<sup>44</sup> However, by this time governments were becoming more focused on shrinking the welfare state than expanding it by making it more

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<sup>40</sup> Leslie A Pal, “Maternity Benefits and Unemployment Insurance: A Question of Policy Design” (1985) 11 Can Pub Pol’y 551. The magic ten rule was modernized but not eliminated in the 2010s. See Vosko, “Rethinking Feminization,” *supra* note 3.

<sup>41</sup> Carol Bruman, “Birth of a Parental Benefit,” *Maclean’s* (1981), online: <archive.macleans.ca/article/1981/11/23/birth-of-a-parental-benefit> [perma.cc/Q8DN-EALX].

<sup>42</sup> Monica Townson, *Paid Parental Leave Policies: An International Comparison, with Options for Canada* (National Action Committee, 1985), online (pdf): *Rise up Feminist Archive* <riseupfeministarchive.ca/wp-content/uploads/Parentalleavepolicies-Townson-1985-1.pdf> [perma.cc/RJQ2-BMMM]; Annis May Timpson, *Driven Apart: Women’s Employment Equality and Child Care in Canadian Public Policy* (UBC Press, 2001).

<sup>43</sup> Ontario provided eighteen weeks of unpaid leave in 1990 and BC twelve weeks in 1991. See SO 1990, c 26; SBC 1991, c 3.

<sup>44</sup> Katherine Marshall, “Benefiting from Extended Parental Leave” (2003) 4 Persp on Lab & Income 5, online (pdf): <www150.statcan.gc.ca/n1/pub/75-001-x/75-001-x2003003-eng.pdf> [perma.cc/2UMB-48LC].

difficult for workers to qualify for EI benefits. As a result, while the duration of parental benefits was increasing, the proportion of workers who qualified for them was decreasing.<sup>45</sup>

Other caregiving needs, however, were addressed, if at all, more slowly and in more limited ways. BC first provided five days of unpaid protected family and emergency leave in 1995. Ontario followed suit in 2000, providing ten days of leave, but only in workplaces with fifty or more employees.<sup>46</sup> In both BC and Ontario, leave could be taken to attend to the medical needs of family members, as well for “urgent” personal or family matters. As well, in Ontario the leave could be used for personal sickness, but that was not the case in BC. While these leaves might have provided a foundation on which to expand sickness and caregiving entitlements, matched by EI benefits, that was not to be the case. Instead, the federal government created new caregiving benefits and leaves to address only the direst circumstances.

The first of these was the compassionate care benefit, introduced by the Conservative federal government which took effect in 2004. The benefit provided six weeks of EI benefits for eligible workers taking time off to provide care for their gravely ill or dying child, parent, or spouse, but like other EI benefits, they required a two-week waiting period. The same year, Ontario created a family medical leave to protect the job rights of covered workers taking such leaves, and BC provided similar leave protection in 2006. To be eligible for either of these, workers must provide medical documentation that the person for whom they are providing care faces a significant risk of death within twenty-six weeks. Since their creation, the duration of the benefit has been increased from six to twenty-six weeks (matched by protected leave rights) and

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<sup>45</sup> For example, federal government rolled back EI by making it more difficult to qualify, sharply reducing the percentage of the unemployed eligible for benefits. See Leah F Vosko, “The Challenge of Expanding EI Coverage” in Keith Banting & Jon Medow, eds, *Making EI Work: Research from the Mowat Centre Employment Insurance Task Force* (McGill-Queen’s University Press & Queen’s School of Policy Studies, 2012) 57.

<sup>46</sup> SBC 1995, c 38; *ESA, 2000*, *supra* note 37; On the Ontario statutes, see Judy Fudge, “Flexibility and Feminization: The New Ontario Employment Standards Act” (2001) 16 *JL & Soc Pol’y* 1.

the range of included caregiving relationships has been broadened. However, the “significant risk of death” requirement remains.

The 2012 federal family caregiver benefit effectively expanded the compassionate care benefit to provide care for a family member whose baseline state of health has changed significantly because of illness or injury and, as a result, their life is at risk. The government makes clear that this benefit is not available for chronic health conditions, unless the person’s health changes significantly because of a new and acute life-threatening event.<sup>47</sup> The benefit initially was only available to care for critically ill children, but in 2017 it was extended to care for adults (eighteen and over), although with fewer weeks (up to thirty-five for children and fifteen for adults). Ontario enacted two corresponding leave entitlements in 2014. The first, the critically ill child leave, complemented the federal benefit, while the second, the family caregiver leave, covered a much wider range of circumstances. It provided eight weeks of unpaid leave to care for a family member, broadly defined, with a serious medical condition, including a chronic or episodic condition. The leave could be taken without there being a serious risk of death. Then, in 2017, in response to the expansion of the federal family caregiving benefit under EI to critically ill adults, Ontario extended the critically ill child leave accordingly. BC only provided leaves corresponding to the federal family caregiver benefits in 2019.

In sum, governments initially responded to the breakdown of the family breadwinner model and the urgent need to address the reality of women’s labour force participation by providing maternity benefits and leaves for eligible women. This intervention barely touched the surface of caregiving needs, but it took nearly twenty years until government addressed another narrow slice of them: parental benefits and leaves to care for newborn and newly adopted

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<sup>47</sup> “EI Caregiving benefits and leave: What caregiving benefits offer” (6 April 2020), online: *Employment and Social Development Canada* <[www.canada.ca/en/services/benefits/ei/caregiving.html](http://www.canada.ca/en/services/benefits/ei/caregiving.html)> [perma.cc/9AES-CFN9].

children. Provincial governments began to address other caregiving responsibilities in a limited way through unpaid leaves for which no EI benefits were available. When the federal government did expand special EI benefits for caregiving, they opted to do so only for end-of-life or critical illness situations.

We explore the limitations of this bundle of benefit and leave provisions in the next section of this article.<sup>48</sup>

## **II. The Era of Universal Breadwinning and Still Gendered Caregiving Prior to the COVID-19 Pandemic**

As the preceding section has shown, some support for illness and disability is relatively longstanding, whereas caregiving, beyond the relatively narrow coverage of the parent–child relationship in the early years of life, has only recently been included in the basic package of minimum standards and social insurance benefits for workers. In this section, we offer a critical examination of contemporary support for both types of leave—sick and caregiving—considering federal employment insurance benefits and protected leave rights in Ontario and British Columbia.

These benefits and rights are framed as universal in the sense they serve as a floor for the many workers who do not have access to collective bargaining or beneficial employment contracts. Functionally, however, leaves entitlements under the federal employment insurance benefits, in particular, are far from universal. Many workers long marginalized in the labour

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<sup>48</sup> We do not examine in this article another avenue for accommodating caregiving responsibilities or family status discrimination. It provides that, in very limited circumstances, an employer is under a legal duty to accommodate an employee's family caregiving responsibilities. In BC, family status discrimination only applies to caregiving for children and the employers' duty only arises in extremely limited circumstances. See *Envirocon Environmental Services ULC v Suen*, 2019 BCCA 46. In Ontario, the duty covers child and eldercare, and the test for establishing the duty to accommodate is less stringent than in BC. See *Misetich v Value Village Stores, Inc.*, 2016 HRT0 1229.

force are excluded by way of eligibility and/or entry requirements that rely on anachronistic and deeply gendered assumptions about what constitutes “work,” who qualifies as a “worker,” and the degree to which supports for daily and intergenerational reproduction are necessary for continued well-being of workers engaged in the labour force. Alongside these exclusionary features, we consider the sufficiency of available supports to maintain an adequate standard of living, which arguably represents a form of partial exclusion.

### **A. Sickness Benefits and Leaves**

Under federal Employment Insurance, sickness benefits, which are the second most significant in volume among special benefits,<sup>49</sup> provide income replacement in the case of injury, illness, or quarantine. Some workers, however, are ineligible—specifically, self-employed workers who have not registered for special benefits or have been registered for fewer than twelve months.<sup>50</sup> Workers who are otherwise eligible may be excluded at the point of entry, by way of hours requirements in the case of employees, and earnings requirements in the case of registered self-employed workers in good standing (*i.e.*, who have paid premiums for twelve months). To be eligible, workers who are employees must have accumulated six hundred hours of insurable employment in the fifty-two weeks preceding the claim, and those that are self-employed must meet an equivalent minimum earnings requirement (*e.g.*, those qualified to claim benefits in

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<sup>49</sup> In 2019, just as family caregiving leaves beyond the parent–child relationship came on stream, sickness benefits accounted for approximately 31 per cent of new special benefit payouts, ahead of maternity benefits, which represented approximately 20 per cent, and following parental benefits, which accounted for approximately 47 per cent, not surprisingly since parental benefits can be sustained for much longer periods than sickness benefits. See “Employment insurance benefit characteristics by class of worker, monthly, unadjusted for seasonality,” table 14-10-0007-01, online: *Statistics Canada* <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410000701](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410000701)> [perma.cc/Y57Y-H9RF].

<sup>50</sup> Until 2010, only employees were eligible for sickness benefits. At that time, self-employed workers who are citizens or permanent residents of Canada were given the option of registering for special benefits and paying an equivalent amount in premiums as regular employees. For details, see “EI Special Benefits for Self-employed People: Overview” (6 April 2020), online: *Employment and Social Development Canada* <[www.canada.ca/en/services/benefits/ei/ei-self-employed-workers.html](http://www.canada.ca/en/services/benefits/ei/ei-self-employed-workers.html)> [perma.cc/5N9R-4V8S].

2020 had to earn a minimum of \$7,279 in 2019). These entry requirements are most likely to disadvantage the most precariously employed workers who are disproportionately women, youth, recent immigrants, rural workers, and sales and service workers.<sup>51</sup>

For workers who qualify, the basic benefit rate is set at 55 per cent of the recipient's average insurable earnings (based on a formula that accounts for the best earning weeks and the level of unemployment in the region) up to the maximum insurable earnings (which was \$54,200, or the equivalent of \$573 a week in 2020). Because benefit rates are based on earned income, they are lower for workers who earn less, whether due to relatively low hourly wage rates, relatively low weekly hours, or employment contracts of short duration in which, once again, workers historically marginalized in the labour force are likely to be overrepresented. The impact of dimensions of labour market insecurity, particularly low wages, on sickness benefits is one of many ways in which certain social groups shoulder a disproportionate share of the impact of falling real wages, growing precariousness in employment writ large, and increasing wealth polarization. By way of example, an employee working in Vancouver at a minimum wage (\$13.85 an hour) part-time job (25 hours a week) would have earned \$346.25 weekly during the qualifying weeks and would be entitled to a (wholly insufficient) sickness benefit of \$190.44 per week.

Workers in low-income households with dependent children are eligible for a family income supplement, increasing the maximum benefit rate that a single individual in that household can receive from 55 to a maximum of 80 per cent.<sup>52</sup> While originally attached to the income of the individual worker, the supplement now is pegged to family income on the

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<sup>51</sup> Vosko, "The Challenge of Expanding EI Coverage," *supra* note 45.

<sup>52</sup> *Employment Insurance Regulations*, SOR/96-332, s 34 [*EI Regulations*].

assumption that resources are shared in households.<sup>53</sup> However, it is long-documented that this assumption disadvantages women,<sup>54</sup> who represent the majority of low-income beneficiaries. Furthermore, the low-income supplement is not available to families without dependent children, regardless of financial need or presence of dependents such as elders. This narrow conception of dependency limits access to the low-income benefit and may thereby amplify the marginalization of social groups of workers long marginalized in the labour force (*e.g.*, older workers, recent immigrants living in multigenerational households, et cetera).<sup>55</sup>

On a positive note, sickness benefits provide some flexibility and opportunity for increased income for those who are able to perform some paid work despite their condition: Eligible workers may retain fifty cents for every dollar earned up to 90 per cent of their weekly insurable earnings.<sup>56</sup> In circumstances where they exceed fifty cents for every dollar earned, income from sources such as self-employment, workers' compensation, group health insurance or wage replacement, and retirement income, may be deducted from these benefits but income from other sources, such as disability benefits and survivor or dependent benefits, may be retained.

While federal sickness benefits provide partial short-term income replacement for a subset of workers, they do not address job security—that is, provide for job-protected leave—during a period of illness; instead, provincial employment standards laws play this role for most

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<sup>53</sup> Vosko, “The Challenge of Expanding EI Coverage” *supra* note 45 at 21.

<sup>54</sup> Joan Acker, “Class, Gender, and the Relations of Distribution” (1988) 13 *Signs* 473.

<sup>55</sup> In the transition from Unemployment Insurance to Employment Insurance alone, between 1995 and 1996 and 1997 and 1998, the percentage of women receiving a low-income supplement declined by 21 per cent, and the percentage of older workers (*i.e.*, workers without dependent children in households) declined by 43 per cent. See Canada Employment Insurance Commission, *Monitoring and Assessment Report 1999: Employment Insurance* (Publications Services, Human Resources Development Canada, 2000), online (pdf): <publications.gc.ca/collections/Collection/MP43-192-1-2001E.pdf> [perma.cc/9KH9-FJHJ].

<sup>56</sup> “Employment Insurance—Working While on Claim” (22 January 2019), online: *Employment and Social Development Canada* <www.canada.ca/en/employment-social-development/programs/ei/ei-list/working-while-claim.html> [perma.cc/N2ZF-3BU3].

workers.<sup>57</sup> In Ontario, employees who have been employed for a minimum of two weeks are entitled to three unpaid sick days annually, with the right to return to their position and protection from dismissal for taking the leave.<sup>58</sup> Prior to the COVID-19 crisis, BC's employment standards had no sick leave whatsoever, but, in March of 2020, it added a three-day provision alongside the COVID-19 specific leave we discuss below.<sup>59</sup>

There is a substantial mismatch between EI sickness benefits and leave protection. On the one hand, the *Employment Standard Act (ESA)* leave entitlements may fail to protect workers collecting EI benefits. For example, EI is available to some self-employed workers, but they have no protection against contract termination because of taking time off for sickness. As well, an eligible worker fulfilling qualifying requirements may receive up to fifteen weeks of EI benefits, but their job protection ends after three days. Indeed, because of the one-week waiting period before EI benefits begin, workers will likely have lost their leave protection before they start collecting them.

On the other hand, *ESA* leave rights may be available to workers who cannot collect EI benefits. For example, leave rights kick in for covered employees after two weeks of employment, but they may not have accumulated sufficient hours to collect EI.<sup>60</sup> It also follows that because of the mismatch, workers taking advantage of the three-day protected leave have no

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<sup>57</sup> Approximately 10 per cent of workers are employed by federally regulated private sector employers and subject to a parallel federal legal regime, which we do not discuss in this article.

<sup>58</sup> *ESA, 2000, supra* note 37, ss 50-53. Sickness entitlements have been contentious: The prior Liberal government provided a more open-ended personal emergency leave of ten days, two of which were paid. The current Conservative government repealed the entitlement to two paid leave days and divided personal emergency leave into three unpaid sick days, three unpaid personal emergency days, and two unpaid days for bereavement. See SO 2018, c 14, Sched 1, s 19.

<sup>59</sup> Bill 16, *Employment Standards Amendment Act (No 2)*, 2020, 5th Sess, 41st Leg, British Columbia, 2020.

<sup>60</sup> We do not address the issue of exclusions and special rules that limit workers' employment standards coverage entitlements here. For an examination of this important issue in Ontario, see Mark Thomas et al, "The Employment Standards Enforcement Gap and the Overtime Pay Exemption in Ontario" (2019) 84 *Labour/Le Travail* 25; Leah F Vosko, Andrea Noack & Mark Thomas, *How Far Does the Employment Standards Act, 2000, Extend and What Are the Gaps in Coverage?: An Empirical Analysis of Archival and Statistical Data* (Queen's Printer for Ontario, 2016).

statutory entitlement to income support during this time. This absence will discourage workers who do not have collective bargaining or contractual entitlements to sick pay from taking sick leave and will most affect workers historically marginalized in the labour force.<sup>61</sup>

The collective consequences of inadequate sick leave and the exclusion of large numbers of workers from income support while sick came into sharp relief during the COVID-19 pandemic, an issue that we revisit in Part IV, below, exploring the potential for long-term change to sick leave policy.

## **B. Caregiving Benefits and Leaves**

As we have seen, caregiving benefits and leaves, beyond those associated with the birth and infant care needs of a child, are relative newcomers to the bundle of entitlements flowing from paid work. However, both benefits and leaves are limited to specific, well-documented circumstances where either the terminal or critical illness of another person is involved.

The compassionate care benefit, discussed in Part I(B), above, is available to eligible workers who take time off work to care for terminally ill family members. While originally limited to parents, spouses, and children, and providing income support for six weeks, in 2016 benefits were extended to twenty-six weeks, and the scope of eligible relationships expanded to include many immediate and extended family members, as well as any person who is “like a close relative” in relation to the worker.<sup>62</sup> As with sickness benefits, workers must have engaged in six hundred hours of insurable employment in the fifty-two weeks preceding the claim; they must also demonstrate that their regular weekly earnings from work have decreased by more than

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<sup>61</sup> As discussed above, human rights protection against discrimination will only be available to workers whose illnesses qualify as disabilities, and tribunals have held that this label does not attach to “ordinary” illnesses like the flu. See *Burgess*, *supra* note 38.

<sup>62</sup> Self-employed workers fulfilling the same requirements as those established under other special benefits are eligible for these benefits. See *EI Regulations*, *supra* note 52.

40 per cent for at least one week due to caregiving for a family member or equivalent person.<sup>63</sup> A medical certificate confirming likelihood of death, as well as an attestation form from the family member with regard to the relationship, are also required.

Family caregiver benefits, also discussed in Part I(B), above, are available on parallel bases, in the case of critically ill adults for up to fifteen weeks, and critically ill children for up to thirty-five weeks.<sup>64</sup> A worker claiming the benefit must provide a medical certificate stating that the person they are caring for is critically ill and requires the support of a family or family-like member. The certificate must also indicate the anticipated duration of the support period.<sup>65</sup>

For both types of benefit, the level of income replacement is similar to that for sickness benefits (55 per cent of best weekly income up to a maximum, plus a low-income supplement available to eligible claimants in low-income families), with all the attendant problems discussed earlier. As well, there is a one-week waiting period before benefits are available. Finally, it is important to emphasize the limited circumstances in which these benefits are available: end of life care and critical illnesses and injuries where the patient's life is at risk and there has been a significant change in the patient's baseline state of health.

On a positive note, all three caregiving leaves can be shared between multiple caregivers—even more than assumed typically in the case of parental leaves—and claimants can decide how to divide the weeks themselves.<sup>66</sup> Caregiving benefits can also be claimed at any

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<sup>63</sup> “EI Caregiving benefits and leave: Eligibility” (1 January 2020), online: *ESDC* <[www.canada.ca/en/services/benefits/ei/caregiving/eligibility.html](http://www.canada.ca/en/services/benefits/ei/caregiving/eligibility.html)> [perma.cc/VL38-7J4C].

<sup>64</sup> “Evaluation of the Employment Insurance Parents of Critically Ill Children benefit” (last updated 3 July 2019), online: *Employment and Social Development Canada* <[www.canada.ca/en/employment-social-development/corporate/reports/evaluations/parents-critically-ill-children-benefit.html](http://www.canada.ca/en/employment-social-development/corporate/reports/evaluations/parents-critically-ill-children-benefit.html)> [perma.cc/63UX-MFQS]; Canada, Department of Finance, *Budget 2017* (Department of Finance Canada, 2017), online (pdf): *Government of Canada* <[www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf](http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf)> [perma.cc/HH2T-U59U].

<sup>65</sup> *Employment Insurance Act*, SC 1996, c 23, ss 23.2(1), 23.3(1).

<sup>66</sup> “Digest of Benefit Entitlement Principles Chapter 22 - Section 2: 22.2.9. Sharing Family Caregiver Benefits” (28 January 2019), online: *Employment and Social Development Canada* <[www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-22/family-caregiver-benefits.html#a22\\_2\\_9](http://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-22/family-caregiver-benefits.html#a22_2_9)>

time during the fifty-two-week benefit period and claimants can opt to stagger their benefits or take them concurrently.<sup>67</sup>

Provincial job security provisions are much better coordinated with federal income support in the case of caregiving than is the case with sickness. As discussed earlier, both Ontario and British Columbia enacted caregiving leave entitlements to match EI entitlements. These leaves effectively provide job security to workers relying on federal income security benefits in two specified instances of caregiving: for terminally ill and critically ill family members or persons with whom one has a family-like relationship. In both provinces, the definitions of illness and list of included family members are also designed to cohere with those under federal income support programs for critical and terminal illness.<sup>68</sup>

There are, however, some mismatches between EI benefits and leave protections. First, some workers will qualify for EI caregiver benefits but will not be entitled to protected leaves while they are off work. For example, in Ontario (but not BC), employees are only entitled to take critical illness leaves (which match family caregiver EI benefits) if they have been employed by their current employer for at least six consecutive months.<sup>69</sup> Thus, some Ontario workers who qualify for the benefit will not qualify for the leave because they do not have six months of consecutive employment with their current employer. As well, self-employed workers cannot qualify for protected leaves even though they have registered for EI and meet its qualifying conditions for special benefits.

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[perma.cc/5DA8-2DZW] [Employment and Social Development Canada, Section 2: 22.2.9]; “Digest of Benefit Entitlement Principles Chapter 23 - Section 2: 23.2.9. Sharing Compassionate Care Benefits” (28 January 2019), online: *Employment and Social Development Canada* <[www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-23/compassionate-care-benefits.html#a23\\_2\\_9](http://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-23/compassionate-care-benefits.html#a23_2_9)> [perma.cc/JG6Q-ALUY].

<sup>67</sup> Employment and Social Development Canada, Section 2: 22.2.9, *supra* note 66.

<sup>68</sup> *ESA, 2000*, *supra* note 37, ss 49.3-49.5; *Family Member Regulation*, BC Reg 137/2019.

<sup>69</sup> *ESA, 2000*, *supra* note 37, ss 49.4(2), 49.4(5).

The reverse is also true: Some workers qualify for leaves but not EI benefits. One example is Ontario's family caregiver leave to care for family members with serious medical conditions, for which there is no EI benefit. Thus, workers must be able to afford to take this leave without income replacement. Another situation arises in relation to compassionate care benefits. Neither BC nor Ontario place any duration of current employment qualifications on taking the matching provincial leaves, and BC does not place any such requirement to access family caregiver leaves. As a result, there will be many employees entitled to such leaves who do not qualify for EI benefits because they do not meet its six hundred-hour requirement. For these employees, the leave entitlement is impractical unless they can afford to take it without any income replacement, affecting most severely those workers who are the most marginalized and precarious.

While the shortfalls we have identified in the design of the current regime are serious, rectifying them would not be enough. The problem is more deeply rooted and lies in the regime's core assumption that sickness, and especially caregiving responsibilities, are not the norm, but rather are exceptional events that can be addressed through narrowly defined and restrictive benefits and leaves. The regime treats caregiving work performed outside of the labour force as an aberration from the desired norm of full-time, permanent, paid employment, in which care work remains necessary, but is assumed to be absorbed without cost, often by workers long marginalized in the labour force. Limiting caregiving benefits and leaves to terminal and critical situations falls far short of meaningful recognition of the multiple forms of caregiving work that are central to the lives of workers and to social reproduction generally.

While the recognition of illness, for some fifty-years in the case of EI, and the fairly recent recognition of caregiving beyond the parent–infant relationship is a welcome start, the

COVID-19 crisis opens space for—and underscores the necessity of—making radical, rather than incremental, and indeed ad hoc, reforms. Indeed, it presents an opportunity to construct a new, inclusive regime, which reconceives what is “standard” to reflect the lived realities of diverse workers, and which reverses the trend toward universal commodification in ways that are materially beneficial to all workers.

### **III. Temporary Measures Responding to the 2020 COVID-19 Crisis**

Shortly after the World Health Organization declared COVID-19 a global health pandemic, the federal and provincial governments likewise declared states of emergency, locking down non-essential aspects of Canada’s economy. Simultaneously, in recognition of the limits of sick and caregiving leaves and challenges to accessing regular benefits in the face of massive full or partial layoffs, the federal government announced the Canada Emergency Response Benefit (CERB), and followed-up in late spring with a related but lesser benefit for students enrolled in or just completing post-secondary education premised along similar principles.<sup>70</sup> A taxable benefit, the CERB provided recipients with a taxable benefit of \$2000 a month (\$500 a week) for a maximum duration of sixteen weeks in the period between 15 March and 3 October 2020. It required no waiting period so that applicants received their first payment within ten days of applying.

The CERB was available to workers (paid employees and the self-employed): who reside in Canada (including non-citizens and permanent residents with a valid Social Insurance Number) and are at least fifteen years old; and who stopped working because of reasons related

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<sup>70</sup> For a useful summary of these benefits, see “Accessing Income Support in the Wake of COVID-19” (26 March 2020), online: *Income Security Advocacy Centre* <[incomesecurity.org/public-education/accessing-income-support-in-the-wake-of-covid-19-updated-march-26](http://incomesecurity.org/public-education/accessing-income-support-in-the-wake-of-covid-19-updated-march-26)> [perma.cc/6A6A-VLQ4].

to COVID-19, or who qualified for EI regular or sickness benefits, or who had exhausted their EI regular benefits between 29 December 2019 and 3 October 2020. To qualify, workers must also have earned at least \$5,000 in 2019 or in the twelve months before they applied. This included income earned outside of Canada, as well as income from EI pregnancy or parental benefits. It did not include income earned from disability benefits such as ODSP, CPP-Disability, or WSIB loss of earnings benefits. In addition, workers who earned up to \$1,000 per month (before taxes) were able to keep that income in addition to the \$2,000 CERB benefit. “COVID-19 related reasons” included some caregiving responsibilities, including taking time off work to care for a family member with COVID-19 or, for parents, to care for children due to school closures. The CERB covered situations outside the parameters of EI caregiving benefits and, in any event, was more accessible because of the reduced qualification for the CERB.

The CERB also interacted with EI sickness benefits. Workers in receipt of sick benefits prior to March 15 continued to receive those benefits. Applicants whose claims for sickness or quarantine started after March 15 received the CERB. If their sickness or quarantine was COVID-19 related, they did not need to qualify for EI benefits to receive the CERB. If their sickness was not COVID-19 related, then they still needed to qualify for benefits, but were not required to provide a medical certificate and the normal one-week waiting period would be waived.

Simultaneously, provinces like British Columbia and Ontario amended their employment standards legislation to provide leave entitlements during declared emergencies and infectious disease emergencies. These laws provide employees with unpaid leave entitlements if they are not performing work because of emergencies declared under provincial emergency powers legislation or for reasons related to a designated infectious disease. Reasons include that the

employee is under medical investigation or treatment, is acting pursuant to an order of a health authority, is in quarantine pursuant to an order, or is providing care or support to a family member, broadly defined. The leave lasts for as long as the employee is not performing work because of one of the above reasons. Employers may require employees taking such a leave to provide reasonable evidence that they are entitled to the leave but cannot require a medical certificate.<sup>71</sup>

There are reasons to commend the CERB and its associated leave protections. Our focus here is just on its relation to pre-existing sick and caregiving benefits and leaves. There are several features that constituted an improvement over that regime. First, there were no hours-of-work or attachment to one's current employer requirements of the kind that characterize the existing regime. Second, the CERB provided a flat \$500 a week entitlement, which was lower than the maximum EI entitlement of \$573 but greater than the EI entitlement of 84 per cent of claimants laid off prior to the COVID-19 crisis.<sup>72</sup>

Yet, despite these and other improvements, the response was still firmly rooted in the assumptions of the pre-existing model. For example, there was still a labour force attachment qualification. While a \$5,000 earnings level before ceasing work may not seem like a high barrier, it disproportionately affected those most precariously employed and those who already took time away from paid work to fulfill caregiving responsibilities. However, the most important, overarching limitation was that the benefit and leave, like the others, is exceptional and only available in the direst circumstances. Once the declared or infectious disease emergency

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<sup>71</sup> *ESA, 2000, supra* note 37, s 50.1, as amended by SO 2020, c 3; *Employment Standards Act*, RSBC 1996, c 113, s 52.12

<sup>72</sup> David Macdonald, "Which Unemployed Canadians Will Get Support?" (2 April 2020), online: *Behind the Numbers* <[behindthenumbers.ca/2020/04/02/which-unemployed-canadians-will-get-support](https://behindthenumbers.ca/2020/04/02/which-unemployed-canadians-will-get-support)> [perma.cc/F2CW-NMV4].

ends, protected leaves will cease. . Also, as of the end of August, 2020, while the federal government announced that the CERB will be extended an additional four weeks to be followed by a series of measures that will temporarily reduce qualifications for EI and improve minimum benefits and create temporary COVID-related benefits for those who are ineligible for EI, we will return to the status quo ante unless permanent measures are introduced.

#### **IV. Giving Workers What They are Owed: Principles and Policy Options to Guide the Development of the Sickness and Caregiving Benefits**

Thus far, we have argued that prior to the COVID-19 pandemic, the sick and caregiving leave and benefit regime was only a partial response to the need to provide workers with income security adequate to enable them to take time off work to recover from illness and injury and to participate in the multitudinous activities of social reproduction. Moreover, the partiality of that regime was not evenly distributed; rather, its limitations disproportionately affected women, racialized workers, workers without legal status in Canada, and other groups congregated in the most precarious jobs and vulnerable social locations. The COVID-19 pandemic made the inadequacy of the regime particularly glaring, requiring governments to enact emergency measures to provide workers with greater access to income security so that they could, *inter alia*, take time off work to protect their health and the health of co-workers and those with whom they might come into contact, recover from sickness, and care for family members. We have also pointed to the limitations of these emergency measures but, most importantly, they are temporary such that we will revert to the pre-existing regime with all its limitations when the emergency ends.

By way of conclusion, we address the question of what we owe workers as a matter of common humanity. In order to begin to answer this question, we have to face an issue we have avoided to this point: the principles we believe should guide us. Hence, this is where we will begin. However, we also recognize that our guiding principles—which we conceive as a package, that is, to be respected simultaneously—often lead us to reject wholesale the existing regime, a result not in the offing for the moment. Thus, while it is neither our project nor within the scope of our analysis to chart the costs of our proposals in any detail, we also feel compelled to speak to the political possibilities of our time (*i.e.*, arrangements possible in the context of prevailing regimes drawing on a cost-sharing arrangement between workers and employers, amplified by government support through general tax revenues as necessary), a time when certain meaningful reforms to that regime, which may not have been possible before the pandemic, are potentially within reach. Therefore, we begin with suggestions to reform the existing regime in ways that would bring some amelioration to those most adversely affected. We conclude briefly with some thoughts about the kinds of arrangements our common humanity truly requires if sickness and caregiving are to be recognized as normal features of the human condition, rather than exceptional circumstances.

## **A. Principles**

We have identified four principles that should inform how we think about what we owe workers to enable them to have time away from paid work for sickness and caregiving, remembering that each is to be pursued on the basis of substantive gender equality.<sup>73</sup>

### **1. Universality**

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<sup>73</sup> See Vosko, *Managing the Margins*, *supra* note 10; Fredman & Goldblatt, *supra* note 10; Connell, *supra* note 10.

We start from the premise that, at a minimum, all workers engaged in paid work, regardless of gender, are liable to become temporarily ill or disabled and that they have caregiving responsibilities. As a result, a sickness and caregiving regime must be available to all paid workers, regardless of their status as employees or independent contractors, or their status in Canada as citizens, permanent residents, migrants, or undocumented workers. As well, universality dictates that all paid workers be eligible to secure the regime's benefits regardless of the number of paid hours they have worked in the past year or the duration of their contract with their current employer(s).

As well, the premise of universality, as applied particularly to caregiving, requires that workplace and institutional arrangements be based on the assumption that *everyone* has important caregiving responsibilities and that these are shared equitably within and often between households and across communities. Central to this principle is the de-gendering of care so that it ceases to be constructed as women's (unpaid) work. This assumption lies at the foundation of what Nancy Fraser has aptly described as the Universal Caregiving model and Eileen Applebaum's parallel conception of "shared work and valued care."<sup>74</sup> It is also central to other compatible conceptions, such as working towards *global* Universal Caregiving, that seek to expand the notion of community membership towards denationalizing access to social and labour protections to address the situation of migrants.<sup>75</sup> While caregiving leaves and benefits might be a part of the design of such a model, much more would be required for its realization. Nevertheless, universality must be at the core of leave provisions.

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<sup>74</sup> Nancy Fraser, *Justus Interruptus* (Routledge, 1997); Eileen Applebaum, "Introductory Remarks: Shared Work/Valued Care: New Norms for Organizing Market Work and Unpaid Care Work" in Peter Auer & Bernard Gazier, eds, *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers* (Proceedings of the France/ILO Symposium, 2002) 93.

<sup>75</sup> For a discussion of scholarship gesturing towards this model, see Vosko, *Managing the Margins*, *supra* note 10.

## **2. Sufficiency**

The principle of sufficiency requires that when workers are required to take time to attend to their own illnesses, avoid infecting others, or provide caregiving, they are provided with sufficient benefits to avoid poverty and exploitation. Sufficiency also requires that the true costs of social reproduction are recognized so that capital and the state cannot free ride on unpaid labour, performed principally by women and social groups long marginalized in the labour force (*e.g.*, older workers, recent (im)migrants living in multigenerational households, *et cetera*). This principle is particularly important for the lowest income earners who simply cannot afford a reduction in income given their baseline income and their lack of savings to fall back on.

## **3. Security**

The principle of security requires that workers should not lose their jobs or contracts because of taking time off for sickness or caregiving. The application of this principle to the varied situations to which it would apply may be complicated because of the universality principle. Nevertheless, a sickness and caregiving regime must seek to maximize the security it provides.

## **4. Worker-Centred Flexibility**

The principle of flexibility requires that we recognize that the need for time off for sickness and caregiving is going to vary substantially between workers and that workers need flexibility to make arrangements that are suitable to their situation. For example, while some sicknesses are short-term and one-off events, others are chronic or episodic. Sickness regimes must be able to accommodate the different needs generated by these conditions. Similarly, the requirements of caregiving and the situation of caregivers will vary enormously. For example, childcare and eldercare will be both ongoing and episodic in their demands, and the resources available will

differ substantially depending, for example, on whether there is more than one caregiver involved.

## **B. Applications**

We can think about the application of these principles at two levels. At one level, we may conclude that the current regime cannot be adequately reformed to provide workers what they are owed as a matter of common humanity and a regime change is required. This is arguably the case for caregiving leaves and benefits although not necessarily for sickness. At another level, even if we conclude that regime change is necessary, the application of these principles to the existing regime can produce some much-needed amelioration. Therefore, in what follows, we talk principally about changes to the existing regime and conclude by affirming the need for imagining an alternative one built upon the foundation of these principles.

### **1. Reforming the Existing Sickness and Caregiving Benefits and Leave Regime**

#### **i. Sick Leaves**

We have identified multiple gaps in the current regime, particularly related to its lack of universality, the insufficiency of benefits, and gaps in security. We have said less about the issue of flexibility, but we will identify some reforms that address this shortfall as well. As we have seen, the benefits regime is far from universal. Collective agreement and employer provided benefits are available to less than half the workforce; EI claimants must have six hundred hours of paid employment in the previous year; self-employed workers are only eligible if they have registered, paid premiums for at least one year prior to their claim and earned at least a defined minimum income during the previous calendar year (\$7,279 in 2019).

There are limitations to what can be done to expand universality within the limits of a regime that is funded by employer and worker contributions as it would be difficult to build in coverage for those who have not contributed or who have limited contributions because of a lack

of hours or length of registration. Nevertheless, it is important to emphasize that temporary unemployment due to sickness, or for that matter, to fulfill caregiving responsibilities, is distinct from unemployment for economic reasons. Moreover, there is nothing magical about the existing contribution requirements, which could be reduced significantly. For example, instead of six hundred hours, employees could be required to have 360 hours of insurable earnings, as demanded by workers' rights advocates pre-COVID 19—and that requirement might be further reduced in the face of a force majeure, such as a global health pandemic, as workers' advocates have also argued.<sup>76</sup> The eligibility requirements for self-employed workers should be reduced accordingly to make the benefit more accessible, and contributions should be made mandatory for all self-employed workers. Finally, the federal government could be required to contribute to the insurance fund, funded through a *progressive* tax system, to cover deficits resulting from expanded eligibility. The federal government fully funds the CERB, setting a precedent for such an arrangement.

The existing regime also fails on the principle of sufficiency. Eligible workers are entitled to 55 per cent of their average weekly insurable earnings, up to a current maximum of \$573, although those with a family income of \$25,921 or less are eligible for the highly problematic family supplement. Only a minority of workers receive the maximum and many, if not most, low-wage workers will find themselves with benefits leaving them well below recognized poverty lines. Again, using the CERB as a precedent, a minimum of \$500 after tax income per week (a \$573 benefit before taxes), adjusted annually to the rate of inflation to keep pace with

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<sup>76</sup> Advocates base this number on twelve weeks (the pre-1996 minimum entry requirement) multiplied by thirty hours, as thirty has represented the average actual hours for hourly paid workers for many years now, although this number is somewhat less for hourly paid workers in the service sector. See “Employment, average hourly and weekly earnings, and average weekly hours by industry, monthly, seasonally adjusted” (21 June 2020), online: *Statistics Canada* <[www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=1410022101](http://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=1410022101)> [perma.cc/7Z8V-RWG5]. This is nevertheless a concession as the hours-equivalent pre-1996 was lower, amounting to 180 hours (twelve weeks multiplied by fifteen hours minimum).

change, might be a starting point, with graduated earned income-based deductions following. However, this level of benefits would still leave recipients in dire economic circumstances, especially if they are unable to work for the entire benefit period (fifteen weeks).

Another gap in relation to sufficiency is the one-week waiting period for benefits. This could be addressed in one of two ways, both within the limits of the regime. First, the waiting period for EI could be abolished. If that was done, and the regime was truly universal, there would be no need for employer-funded sick leaves. However, since reform at that level is unlikely, we need to build in a role for employer-paid sick days. Historically, Canadian governments at a variety of levels have strongly resisted such measures. Currently, employees in only two provinces (Prince Edward Island and Quebec) and federally regulated employees are entitled to employer-paid sick days. Moreover, the entitlements are minimal: federal (three days), Quebec (two days), and PEI (one day and only after five years with the current employer). Nevertheless, so long as we do not have universal social insurance to cover sickness, it is essential that employers be required to shoulder some of the responsibility. The federal government and worker advocates have called for ten days of employer-paid sick leave, a measure that we too endorse.<sup>77</sup>

Still another gap in sufficiency, tied also to flexibility, relates to the maximum duration of sick leave. As it takes many workers with serious illnesses longer than fifteen weeks (which amounts to under four months for those that are full-time) before returning to work, it would be advisable to extend benefits to fifty weeks as advocated by workers' advocates as well as the Liberal party pre-election.

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<sup>77</sup> Catharine Tunney, "Ottawa Talking to Provinces about Bringing In Paid Sick Leave: Trudeau," *CBC News* (25 May 2020), online: <[www.cbc.ca/news/politics/debate-continues-over-monday-return-to-parliament-1.5582850](http://www.cbc.ca/news/politics/debate-continues-over-monday-return-to-parliament-1.5582850)> [perma.cc/2TMH-L8LC].

With regard to security, currently only employees enjoy protected unpaid sick leaves, leaving the self-employed with no protection. Admittedly, designing security for truly self-employed workers is not a simple task, but some protection against contract termination because the worker is unable to perform work because of sickness should be considered. But even employees receive very limited security. Ontario's *ESA*, for example, only provides for three days of protected unpaid sick leave. After that, an employer can terminate a sick worker by giving notice, although in some cases workers might receive additional protection against termination from human rights codes that prohibit discrimination on the basis of disability. Provincial employment standards laws should be amended to provide protection of job security to match the length of time for which federal benefits are available.

Finally, the current regime fails to live up to the requirement of worker-centred flexibility. Although EI permits workers to continue to reduce their hours of work and still collect sick leave, the regime is not responsive to workers with chronic episodic conditions who may take numerous short leaves in response to changes in their day-to-day health status. Similarly, the leave protections are far too short to address these situations. Although human rights laws require employers to accommodate workers with disabilities to the point of undue hardship, there are limits to those accommodations and, in any event, accommodation does not require employers to provide paid leaves beyond whatever employer-provided benefits might be available.

## **ii. Caregiving<sup>78</sup>**

With respect to caregiving leaves and benefits, to promote universality, there is a fundamental need—which predates the state of emergency, albeit exacerbated by the global health

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<sup>78</sup> The following discussion does not specifically address parental leaves and benefits. For an insightful discussion of these issues, see “Reconceptualizing,” *supra* note 34.

pandemic—to expand the scope of caregiving leaves beyond those of critically and/or terminally ill adults and children. To address the mounting crisis in social reproduction, caregiving leaves must enable workers, whether they are employees or self-employed, to fulfill caregiving obligations of other sorts, including, but by no means limited to, caring for a chronically ill or disabled child or adult. In this instance, Ontario’s family caregiver leave offers a preferable model to compassionate and caregiver benefits under EI as it provides protected leaves to care for those with serious medical conditions, without a significant risk of death. Even broader in its scope is Ontario’s very limited family responsibility leave, which provides protected leaves to provide care in the event of an “illness, injury or medical emergency” or for “an urgent matter.”

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There is also a need to expand the range of relationships for which caregiving benefits and leaves are available. Although the current ESA contains an open-ended provision for some leaves that covers caregiving for “a person who considers the employee to be like a family member,” it is not available for all. Moreover, the restriction to family or “like” family might preclude drawing on broader networks of support in a time of need.<sup>80</sup>

Alongside expanding the scope of caregiving for which benefits and leaves are available, and also in the interest of universality, it is necessary to reduce entry requirements along the lines of what we propose with respect to EI sickness benefits. This reduction is required to bring the precariously employed and social groups long marginalized in the labour force (*e.g.*, older workers, recent (im)migrants living in multigenerational households, *et cetera*), two groups which overlap, into the fold. As we argued, the six hundred-hour threshold for qualification for

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<sup>79</sup> SO 2000, c. 41, s. 50.0.1(1).

<sup>80</sup> Leave taking to care for “like family members” is available for family medical leave (s. 49.1(3) 12), critical injury leave (s. 49.4(1) and emergency leave: declared emergencies and infectious disease emergencies (s. 50.1(8) 12). It is not available for family caregiving leave (s. 49.3(5) and family responsibility leave (s. 50.0.1(3).

employees, and the twelve-month waiting period (together with a minimum income from self-employment) for the self-employed, are too onerous. They simply make these leaves inaccessible to workers most in need of the benefits they offer. So, too, is the one-week waiting period for receipt of benefits, especially for those engaged in low-wage work, which also diminishes their sufficiency. Why not, therefore, as we suggest with respect to sick leave, make contributions into all special benefits mandatory for all workers, eliminating the need for a twelve-month waiting period for self-employed workers opting to self-insure, and institute a uniform 360-hour qualifying requirement for employees and an equivalent minimum amount of insurable income for the self-employed workers?<sup>81</sup>

We have already discussed the insufficiency of special benefits in the context of sick leaves. The problems are similar for caregiving. As with sick benefits, caregiving benefits must clearly increase. Standing at 55 per cent of best weekly income up to a specified maximum (plus a low-income supplement for eligible claimants in low-income households), the prevailing level of benefits makes taking this leave untenable for many workers that manage to qualify, especially the precariously employed. This benefit should be replaced by a flat rate benefit akin to that proposed above for sick leave. Creating a universal level of benefits would go a long way towards improving access and equity in benefit entitlement.

With regard to security, we have previously noted that provincial job security provisions and federal income supports for caregiving are in much better sync than is the case for sickness. Still, employment standards laws do not cover self-employed workers and thus they do not enjoy any contract security even if they are entitled to EI caregiving benefits, although as we

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<sup>81</sup> The calculation of benefits as a percentage of earned income reproduces the longstanding gender wage gap and in a male–female couple creates a strong incentive for the lower paid partner, typically the female, to take caregiving leave in order to reduce the family’s loss of income. For an extensive discussion of this issue in the context of family caregiving, see “Reconceptualizing,” *supra* note 34.

acknowledged, designing such protections will require careful thought. We also noted the mismatch between entitlement to family caregiver EI benefits and statutory leave rights in Ontario. This disjunct can be rectified easily by removing the requirement that to access this leave workers must have been employed for six months by their current employer.

Caregiver leaves, moreover, need to take on board and develop further the principle of flexibility, already established under existing caregiver leaves, of allowing for multiple caregivers. They also need to provide greater leeway in how they are taken up. For example, in the return to “normal” after the first wave of the global pandemic, daycares and schools are running on different schedules with reduced contact hours, calling on parents, caregivers, and other community members to engage in greater caregiving alongside paid work in new and complex ways. In response to changing gender, household, and community norms, the notion that care recipients and caregivers must, at a minimum, have a “family-like” relationship should likewise be abandoned—which would obviate the need for formal attestations of “family-like” relationships.

Also, to further facilitate caregiving by multiple individuals, that is, across the generations and genders and across communities, a desirable equity objective tied to the normative objective of universal caregiving, the requirement that workers demonstrate that their regular weekly earnings from employment have decreased by more than 40 per cent for at least a week due to caregiving responsibilities should likewise be reduced or eliminated. For the precariously employed, enduring a 40 per cent reduction in what are often exceedingly low weekly earnings from employment is difficult to sustain—even for a week. Such a change would also address the principle of sufficiency.

## V. In Lieu of a Conclusion: Considering our Common Humanity

Having laid out a menu of options for changing the existing sickness and caregiving regimes within the horizon of possibility, imagining transformative alternatives built upon the principles of universality, sufficiency, security, and flexibility is clearly necessary. Although our project herein has entailed a critical evaluation of these regimes towards their amelioration, having now undertaken this exercise we are convinced of the inherent limits of models of entitlement for leaves and benefits created within a narrowly profit-driven system in which government is routinely pressed to give priority to cost-containment over fairer and more equitable social and economic arrangements. Within such narrow confines, prevailing leaves and benefits are, of necessity, premised on exceptionalism—cast falsely as accommodations—as though responsibilities for care are aberrations rather than ongoing in workers’ everyday lives across the lifecycle, and the requirement for sick leave is a rarity that few workers will confront. In this context, sick leave and benefits represent the most normalized exception. Yet, even here, workers taking sick leave are often stigmatized and the validity of their disablement from work doubted. Moreover, most workers do not have access to short-term paid sick leave. The most socially acceptable and financially supported sick leaves are for grave illness or injury and/or significant risk of death. Among caregiver leaves, the analogue is the compassionate care sub-regime, which assumes the imminent or likely death of the care recipient. That is, as a society, we imagine only the most horrific life circumstances allowing for legitimate time away from paid work, *i.e.*, necessitating support that is less than sufficient and security that is less than full.

It is nevertheless possible to design and implement high-quality public provisions for caregiving funded through both social insurance and a more progressive tax system. In more ideal circumstances, moving in this direction would entail enabling workers to move more freely

within and between vital and socially-necessary activities, such as, but by no means limited to, child and elder care, activities vital to social reproduction that we should all be encouraged to engage in to the best of our abilities. As well, and as the global pandemic illustrates vividly, there must be extensive public support for caregiving delivered in the public sector (by well-paid public sector workers). Presently, nowhere is the case for public provision clearer than in the long-term care sector.<sup>82</sup> Yet the enduring case for high quality publicly-provided care for children—both preschool and school-aged—is equally compelling, especially with the developing “she-session.” In both instances, no less is required than flexible (in terms of its availability at different intervals and in different settings) and sufficient (in terms of caregiver to care-recipient ratios, adequate personal protective equipment, et cetera) child and elder care, that is universally accessible and that secures workers’ jobs, including the jobs of (the) precariously employed women, (im)migrants, youth, and older workers already marginalized in the labour force that staff both domains.

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<sup>82</sup> Pat Armstrong et al, “Reimagining Long-term Residential Care in the COVID-19 Crisis” (April 2020), online (pdf): *Canadian Centre for Policy Alternatives* <[www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2020/04/Reimagining%20residential%20care%20COVID%20crisis.pdf](http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2020/04/Reimagining%20residential%20care%20COVID%20crisis.pdf)> [perma.cc/365Z-5NK7]; Michel Gagnon & Samantha Pollex, “The Case for Public Long-Term Care Insurance” (25 May 2020), online: *Policy Options* <[policyoptions.irpp.org/magazines/may-2020/the-case-for-public-long-term-care-insurance](http://policyoptions.irpp.org/magazines/may-2020/the-case-for-public-long-term-care-insurance)> [perma.cc/XJX3-LBRP].