

which saves laws that can be “demonstrably justified in a free and a democratic society.” The present benefit scheme might be defended successfully on the following grounds:

- It constitutes a special program having as its object the amelioration of the conditions of a disadvantaged group — in this case, women — and as such is permissible under section 15(2) of the *Charter*;
- it recognizes and deals with women’s essential difference from men by compensating women for time lost due to childbirth and early child care; and
- it encourages and supports the dual role of women as mothers and workers and is necessary to deal with a condition that relates to women alone.

Even if a court were prepared to find the present sex-based limitations on benefits to be in violation of section 15, it is doubtful that a court would have an appropriate remedy at its disposal, because courts can generally strike down but not add to legislation. Any inequality in this area requires the kind of remedy that Parliament is best able to provide.

A Proposal for Maternity and Parental Benefits

Several organizations recommended to the Committee that, to accommodate the guarantee of equal protection and benefit of the law, the law should provide a two-tier system of benefits surrounding childbirth to recognize the physical needs of the mother who has just given birth and to recognize the period of adjustment required by the parents and the new child. The Canadian Human Rights Commission stated in its brief to the Committee that maternity leave and benefits should be composed of two distinct periods, one relating to the physical incapacity of the natural mother, the other relating to social adjustment. The Commission recommended that the *Unemployment Insurance Act* be amended to ensure that the portion of maternity leave relating to social adjustment or infant care be available to either parent.

We agree with this recommendation. The law should recognize the father’s role in child care and enable him to take part in this important period of bonding with the newborn child. There is no doubt in our minds that the traditional emphasis on the mother as the primary care-giver has played a part in holding women back from full participation in society. Encouraging the participation of fathers at the earliest stage of a child’s life can have only positive results for both men and women.

It is important, however, that a mother have sufficient time set aside during the late part of her pregnancy and the period following birth to recover and to nurse her child for a time, if she wishes. It is our view that the law should provide benefits during the childbirth period, but that either parent should be eligible for benefits during the subsequent parenting phase. We see these two distinct periods as having distinct rationales.

We did not determine the precise amount of benefits or length of the benefit period, as this is not within our mandate. We note, however, the concern expressed to us by several women’s groups that, by expanding the recognition of the role of fathers in the early parenting period, we not take away from natural mothers the benefits to which they are now entitled. There are real reasons, related to the health of both the mother and the child, why women are eligible for maternity benefits. Legislation must not lose sight of these concerns.