COMMENTS
CHRONIQUE DE JURISPRUDENCE

Brooks, Allen & Dixon v. *Canada Safeway Ltd*— A Comment (*Bliss* Revisited)

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Three pregnant employees of Canada Safeway Ltd were denied disability benefits although they were covered by their employer's disability insurance plan. Both the adjudicator and the Manitoba Court of Queen's Bench held that the disability plan was discriminatory, but not on the basis of sex. The Manitoba Court of Appeal affirmed the decisions, holding, further, that the plan was not discriminatory at all. The author examines several types of discrimination and argues that the Canada Safeway plan is discriminatory because it treats pregnant women differently from employees who are otherwise temporarily disabled and thus unable to work. In the leading case of *Bliss* v. *A.G. Canada*, the Supreme Court of Canada held that differential treatment of pregnant women is not discrimination on the basis of sex. It is argued, however, that such treatment is prohibited by various human rights codes, and that the Supreme Court, in deciding *Brooks, Allen & Dixon* v. *Canada Safeway Ltd*, should overrule its holding in *Bliss*.

Canada Safeway a refusé à trois de ses employées enceintes les prestations d'incapacité prévues au régime d'assurance-incapacité de la compagnie. L'arbitre et la Cour du banc de la Reine du Manitoba ont décidé que le régime était discriminatoire mais qu'il ne comportait pas de discrimination sexuelle. La Cour d'appel du Manitoba, en plus de confirmer la décision, affirma que le régime n'était nullement discriminatoire. L'auteure étudie divers types de discrimination et conclut que le régime d'assurance de Canada Safeway est discriminatoire en ce qu'il traite les femmes enceintes différemment des autres employés souffrant d'une incapacité temporaire les empêchant de travailler. Dans l'affaire *Bliss* c. *P.G. Canada*, la Cour suprême du Canada décida que le fait d'accorder un traitement différent aux femmes enceintes ne constituait pas une discrimination sexuelle. L'auteure prétend qu'un tel traitement contrevient à divers codes de droits et libertés et que la Cour suprême devrait profiter de l'affaire *Brooks, Allen & Dixon* pour renverser l'arrêt *Bliss*.

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I. Introdnction

Even in the 1980s women are still striving to achieve equality. One of the key factors influencing women's equality is their ability to bear children. This capacity has long been used to justify differential and discriminatory treatment of women and it continues to stand as an obstacle to their equality. This biological difference between women and men is used to justify "women's inferior social status, reduced workplace opportunities, limited personal options and regulated reproductive freedom."[1] Judicial decisions concerning pregnancy and women's equality have an importance that extends beyond the particular case in issue. These decisions perpetuate stereotypic thinking about women, first and foremost, as wives and mothers, and only secondarily, as legitimate members of the workforce. As well, they allow such stereotyped images to be attributed to "Nature" rather than acknowledging that these restrictions placed on women are the direct responsibility of the legislatures and courts.[2] It is critically important to distinguish between true biologieal differences between women and men and the differences that are perceived to exist because of stereotypes and social expectations about their respective roles. For this reason, the impact of court decisions about pregnancy and sex discrimination cannot be ignored and the decisions must not go unchallenged.

The reasons for judgement in the decision of the Manitoba Court of Appeal in *Brooks, Allen & Dixon* v. *Canada Safeway Ltd*[3] speak volumes by their brevity. The decision is all of two paragraphs in length. It is abundantly clear that to O'Sullivan, Huband and Twaddle JJ.A. the issue of whether pregnancy can form the basis of discrimination because of sex is, in essence, a non-issue.

Various jurisdictions in Canada have had legislation preventing discrimination on the basis of sex for close to twenty years.[4] But only in the late 1970s did the issue of whether pregnancy discrimination could constitute sex discrimination come to the attention of our courts. In 1978, Mr. Justice Ritchie, speaking for a unanimous seven-*man* bench in the Supreme Court of Canada[5] held in *obiter dicta* that differential treatment of pregnant

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[1]K.E. Mahoney & S.L. Martin, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 193.

[2]*Bliss* v. *A.G. Canada*, [1979] 1 S.C.R. 183 at 190, 23 N.R. 527, 92 D.L.R. (3d) 417, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14, 175 [hereinafter *Bliss* cited to S.C.R.], where Mr. Justice Ritchie stated, "Any inequality between the sexes in this area is not created by legislation but by nature."

[3](1986), 42 Man. R. (2d) 27 (C.A.).

[4]See *e.g.*, *British Columbia's Human Rights Act*, S.B.C. 1969, c. 10 and *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

[5]*Bliss*, *supra*, note 2.

women did not amount to discrimination on the basis of sex.[6] He quoted Pratte J. of the Federal Court of Appeal saying:

> Assuming the respondent to have been "discriminated against", it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. If s. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[7]

This case, *Bliss* v. *A.G. Canada*, was significant because it sounded the death knell for the *Canadian Bill of Rights*.[8] Ms. Bliss had failed to meet the requirements to qualify for special maternity benefits under the unemployment insurance program but was capable of meeting the lower standard to qualify for regular unemployment insurance benefits. She sought to claim regular benefits for the time that she was available for work prior to, and following, the birth of her child, but s. 46 of the *Unemployment Insurance Act, 1971*[9] denied regular benefits to pregnant women for a period of 15 weeks surrounding the expected date of birth. Thus, Ms. Bliss was entitled to neither maternity nor regular payments.

The *Bliss* case has been the only pronouncement of the Supreme Court of Canada on this issue and it has had a profound impact on the cases that have followed. Many instances of similar claims have arisen[10] and while

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[6]Courts in both the United States and England have come to similar conclusions. In 1974 (*Geduldig* v. *Aiello*, 417 U.S. 484) and again in 1976 (*General Electric Co.* v. *Gilbert*, 429 U.S. 125), the United States Supreme Court found that comprehensive disability insurance plans that did not cover pregnancy were not discriminatory because the programs did not exclude anyone on the basis of gender, but merely removed one physical condition, pregnancy, from the list of conditions which would be covered. Moreover, there was no evidence that these plans were in fact worth more to men than to women and thus they were found not to have an adverse effect on women. Even more alarming is the English case of *Turley* v. *Allders Department Stores Ltd*, [1980] I.C.R. 66 (Employment Appeal Tribunal). The complainant, who had been dismissed from her job because of her pregnancy, claimed to have been discriminated against on the basis of sex. At the hearing and on appeal, it was held that there was no discrimination because a pregnant woman was not and never could be similarly situated to a man and thus she need not be accorded the same rights or benefits.

[7]*Bliss*, *supra*, note 2 at 190.

[8]Originally enacted as S.C. 1960, c. 44; now, R.S.C. 1970 (Appendix III).

[9]S.C. 1970-71-72, c. 48.

[10]See, *e.g.*, *Leier* v. *C.I.P. Paper Products Ltd* (5 January 1978), Saskatchewan (Norman, Adjudicator), referred to in *Giouvanoudis* v. *Golden Fleece Restaurant* (1984), 5 C.H.R.R. D/1967 (Ontario Board of Inquiry); *Re Wong and Hughes Petroleum Ltd* (1983), 46 A.R. 276, 28 Alta L.R. (2d) 155, 4 C.H.R.R. D/1488 (Q.B.); *Tellier-Cohen* v. *Treasury Board* (1982), 3 C.H.R.R. D/792, 82 C.L.L.C. 17,007 (Canadian Human Rights Review Tribunal) (reversed in part by (1982), 4 C.H.R.R. D/1169, 82 C.L.L.C. 17,016 (Canadian Human Rights Review Tribunal)); and *Holloway* v. *MacDonald* (1983), 83 C.L.L.C. 17,019, 4 C.H.R.R. D/1454 (British Columbia Board of Inquiry) [decided on other grounds].

the adjudicators and tribunals hearing them may have been inclined to find that pregnancy discrimination is synonomous with sex discrimination, they have considered themselves constrained by the *obiter* of the Supreme Court of Canada in *Bliss*.

> [I]n our view, the unanimous *obiter dictum* of the Supreme Court is not an opinion which lesser adjudicators can afford to treat lightly. If discrimination on the basis of pregnancy, or some related condition, is ... said to be sex discrimination, it will be because the Legislature has so decreed.[11]

However, some tribunals have refused to follow *Bliss*. For example, the tribunal in the case of *Tellier-Cohen* v. *Treasury Board* said that it could not

> subscribe to this *obiter dictum*, for it creates a separate sexual category for pregnant women and avoids dealing with the real problem of sexual discrimination.[12]

Several legislatures in the country have been driven by the patent absurdity of the results in those cases where sexual discrimination was denied, to "decree" that pregnancy discrimination is sex discrimination. Canada, Alberta, Saskatchewan, Quebec, Ontario and now Manitoba[13] all have provisions in their human rights codes stating that, for the purposes of the codes, discrimination on the basis of pregnancy will be deemed to be discrimination on the basis of sex.

The appeal from the Manitoba Court of Appeal's decision in *Brooks, Allen & Dixon* v. *Canada Safeway Ltd*[14] was heard by the Supreme Court of Canada on June 15, 1988. After a decade of living with the aftermath of *Bliss*, the Court now has the opportunity to correct the mistakes of the past. This is a decision that bears watching carefully.

II. The Facts and Judicial History of the Case

The complainants, Ms. Brooks, Ms. Allen and Ms. Dixon were all employees of Canada Safeway Ltd in Manitoba. They, and all other employees, were covered by a group disability insurance plan maintained by Canada Safeway. The plan provided for the payment of weekly disability benefits

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[11] *Leier* v. *C.I.P. Paper Products Ltd* (5 January 1978), Saskatchewan (Norman, Adjudicator), cited in W.S. Tarnopolsky, *Discrimination and the Law including Equality Rights under the Charter* (rev'd ed. by W.F. Pentney) (Toronto: De Boo, 1985) at 8-13.

[12] *Supra*, note 10 at D/794.

[13] *Canadian Human Rights Act*, S.C. 1976-77, c. 33, as am. S.C. 1980-81-82-83, c. 143, s.2; *The Individual's Rights Protection Act*, S.A. 1972, c. 2, as am. S.A. 1980, c. 27, s. 27; *Saskatchewan Human Rights Code*, R.S.S. 1979, c. S-24.1, s. 2(o); the Quebec *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6, as am. S.Q. 1982, c. 61; Ontario's *Human Rights Code*, S.O. 1981, c. 53, as am. S.O. 1986, c. 64, s. 18(7); Manitoba's recently amended *Human Rights Act*, S.M. 1974, c. 65, as am. S.M. 1987, c. 45, s.9(2).

[14] *Supra*, note 3.

based on 67% of an employee's regular weekly earnings, calculated as an average over the 12 weeks immediately preceding the onset of his or her disability. The benefits covered a range of disabilities. Pregnancy was also included, with the exception of a period of ten weeks preceding the week of birth and six weeks following the week of birth. During these 17 weeks a pregnant employee had no coverage whatsoever for *any* disabilities including those unrelated to the pregnancy such as a broken leg.[15]

Pregnant employees were not compelled to cease work during the 17 week period and were still entitled to their regular wage if they did continue to work. However, if an employee did decide, or was obliged for health reasons, to stop working during that 17 week period, the only benefits she could claim would be unemployment insurance maternity benefits, if she qualified for them. The unemployment insurance benefits are calculated as 60% of the average earnings for the previous 20 weeks of employment. For most employees, this resulted in a smaller recovery from unemployment insurance than that which they would have been eligible to recover if their claims had been allowed under the group disability insurance plan.

Brooks, Allen and Dixon were all pregnant and were unable to recover disability benefits for their time away from work during the 17-week period surrounding the births of each of their children.

Reeh Taylor, the adjudicator at the hearings for Brooks[16] and for Allen and Dixon[17] held in both cases that the Canada Safeway insurance plan does discriminate against pregnant employees because the result of applying its 17-week exemption period is that pregnant employees receive fewer benefits than other employees suffering a temporary disability.

He then went on to hold that such discrimination was not discrimination because of sex. He held that "sex" was to be narrowly construed as "gender" and that the correct analysis was that articulated by Ritchie J. in *Bliss*: if these individuals are treated differently than others it is because they are pregnant and not because they are women. In any event, even if Taylor did not agree with Mr. Justice Ritchie's reasoning in *Bliss*, he felt bound by the higher authority and would have arrived at the same result.

Simonsen J., speaking for the Manitoba Court of Queen's Bench[18] affirmed Taylor's decision. The Court confirmed that the plan did "in fact discriminate against pregnant employees" and agreed that this discrimi-

[15] *Brooks* v. *Canada Safeway Ltd* (1985), 6 C.H.R.R. D/2560 at D/2561.

[16] *Ibid.*

[17] *Dixon & Allen* v. *Canada Safeway Ltd* (1985), 6 C.H.R.R. D/2840 (Manitoba Board of Adjudication).

[18] *Brooks, Allen & Dixon* v. *Canada Safeway Ltd* (1985), 38 Man. R. (2d) 192, 7 C.H.R.R. D/3185, 86 C.L.L.C. 17,010.

nation was not because of the employees' sex. Simonsen J. too, cited the now famous *obiter* of Mr. Justice Ritchie and appears to have adopted it as his own — at the very least he saw no reason to question it.

Brooks, Allen and Dixon appealed to the Manitoba Court of Appeal[19] and the Court disposed of the appeal with astonishing expediency. In less than 85 words they stated that they "substantially agree[d]"[20] with Simonsen J. and that they would "go further and say [they] are not satisfied that in the context of this case there was any discrimination at all."[21] The Court also questioned the decision of the complainants not to bring an action against their union which was responsible for having negotiated the disability benefits package with Canada Safeway.[22]

III. Have Brooks, Allen and Dixon Been Discriminated Against?

A. Discrimination Defined

Discrimination is defined in the *Canadian Living Webster Encyclopedic Dictionary of the English Language* as:

> the making of a difference in particular cases, as in favor of or against a person, particularly when influenced by race or creed rather than individual merit ... .[23]

The making of distinctions that are harmful to members of specified classes is precisely the type of behaviour to which the human rights codes in Canada are directed. Discrimination, in the sense of making unfavourable distinctions, is generally recognized to take three forms:[24]

(i) malicious and intentional drawing of distinctions against a particular group;

(ii) "adverse effect" discrimination where a rule that appears neutral on its face has a disparate, negative impact on a particular group; and

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[19]*Supra*, note 3.

[20]*Ibid.* at 28.

[21]*Ibid.*

[22]The Court seems to imply that because Brooks, Allen and Dixon chose not to sue their union, which had bargained for the disability benefits plan, they should not have been able to succeed in their action against Canada Safeway either. The choice of whom to bring the action against is strictly that of the complainants (and the Commission) and has no bearing on the responsibility of Canada Safeway for discriminating against Brooks, Allen and Dixon. This issue did not warrant the attention given to it by the Court.

[23]Vol. 1 (Chicago: English Language Institute of America, 1974) at 286.

[24]W.S. Tarnopolsky, *Discrimination and the Law including Equality Rights under the Charter* (rev'd ed. by W.F. Pentney) (Toronto: DeBoo, 1985).

(iii) differential treatment that, while not necessarily motivated by malice, results in harm to the group so treated.

The first form of discrimination is easily understood and our horror as a society at its existence needs no explanation. The second and third forms of discrimination require more detailed explanation, in order to determine if this disability benefit plan did, in fact, discriminate against a particular group.

(ii) Adverse Effect

Until 1985, only harm which was caused by differential treatment was recognized by the Supreme Court of Canada as discrimination.[25] But in that year, the Court, adopting the reasoning of the United States Supreme Court in *Griggs* v. *Duke Power Co.*[26] recognized "adverse effect" discrimination. Mr. Justice McIntyre, speaking for the unanimous Court in *Ontario Human Rights Commission and O'Malley* v. *Simpson-Sears Ltd*,[27] said that such discrimination arises where

> an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[28]

Proof of adverse effect discrimination requires evidence of (i) a neutral rule (ii) that applies to all or most employees (iii) but that has an adverse effect on a particular employee or group of employees (iv) because of some special characteristic of the group. In this context, malicious intent need not be shown and is, by definition, irrelevant since it is a neutral rule that is in issue.

In this case, there was no adverse effect discrimination. It was not a neutral rule that applied to most or all employees. The rule in this case specified different treatment for different groups: non-pregnant persons were

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[25]However, several tribunal decisions had gone beyond the differential treatment concept. See, *e.g.*, *Singh (Ishar)* v. *Security and Investigation Services Ltd* (Ontario, 1977) [unreported]; *Rand* v. *Sealy Eastern Ltd* (1982), 3 C.H.R.R. D/938 (Ontario Board of Inquiry); *Marcotte* v. *Rio Algom Ltd* (1982), 5 C.H.R.R. D/2010 (Canada Human Rights Commission Review Tribunal); and *Christie* v. *Central Alberta Dairy Pool* (1984), 6 C.H.R.R. D/2488 (Alberta Board of Inquiry).

[26]401 U.S. 424 (1971).

[27]*Ontario Human Rights Commission and O'Malley* v. *Simpson Sears Ltd*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 12 O.A.C. 241, 52 O.R. (2d) 799, 64 N.R. 161, 9 C.C.E.L. 185, 17 Admin. L.R. 89, 86 C.L.L.C. 17,002 [hereinafter *O'Malley* cited to S.C.R.].

[28]*Ibid.* at 551.

to be provided full coverage at all times that they suffered a temporary disability, whereas pregnant persons were to be barred from any coverage for an arbitrary 17-week period.

(iii) Differential Treatment

Professor Blumrosen,[29] in tracing the evolution of the concept of discrimination in the United States, describes the concept of differential treatment as follows:

> Discrimination consists of causing economic harm to an individual by treating members of his minority group in a different and less favorable manner than similarly situated members of the majority group. Proof involves evidence of differential treatment and harm.[30]

From the fact of differential treatment that results in a disadvantage to the target group it is possible to infer or impute a malicious intent. However, such intent need not be shown; it is sufficient to demonstrate differential treatment and resulting harm. For example, the requirement that a native Indian pay in advance for a hotel room when no such demands were made of other persons in identical circumstances, is discriminatory.[31]

B. Is there Discrimination in Canada Safeway's Benefits Plan?

The answer to this question must surely be "yes!". Canada Safeway's policy excluding a woman from coverage for 17 weeks surrounding the birth of her child clearly has an adverse impact on the woman concerned. There are several ways of measuring this impact. Most obviously, such a woman would not be protected for *any* risk for a period exceeding four months, while other employees are not subjected to such a prolonged lapse in coverage and protection. Secondly, even though there may have been some other type of insurance coverage available to this woman, its value would be less than that available to other employees suffering a temporary disability who were entitled to claim under the plan (*i.e.* unemployment insurance was calculated at 60% of 20 weeks whereas the Canada Safeway disability benefits were at 67% of 12 weeks).

The basis of this adverse impact on the women working at Canada Safeway is differential discrimination. The evidence shows the differential treatment and the harm.

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[29]"Strangers in Paradise: *Griggs* v. *Duke Power Co.* and the Concept of Employment Discrimination" (1972-73) 71 Mich. L. Rev. 59.

[30]*Ibid.* at 67.

[31]*Ermine* v. *United Enterprises Ltd and Capri Motor Inn* (Saskatchewan Human Rights Commission, 1976), referred to in Tarnopolsky, *supra*, note 24.

It is difficult to imagine how the Manitoba Court of Appeal could have concluded that these facts showed *no* discrimination. Possibly, they are still operating on the now outmoded assumption that proof of discrimination requires proof of malicious intent. However, the written judgement is so brief that it is difficult to glean their reasons. Nonetheless, it is clear from numerous judgements of the Supreme Court of Canada that malice is not required.[32] The emphasis is on discriminatory *effects* and this is entirely in keeping with the broad purpose of the codes to eliminate discrimination.

> [The] main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.... If its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.[33]

Based on the conclusion that pregnant persons were the subject of discriminatory treatment by the provisions of Canada Safeway's benefits plan, the question remains whether such discrimination was discrimination on the basis of sex.

IV. Does the Canada Safeway Plan Discriminate Because of Sex?

A. Not All Group Members Affected

The primary reason of the Manitoba Court of Appeal for holding that the exclusion of Brooks, Allen and Dixon from disability benefits was not discrimination based on sex seems to be — at least to the extent that it can be gleaned by tracing back through the reasons of the Manitoba Court of Queen's Bench to those of the adjudicator[34] — that the impugned provisions

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[32]See, *e.g.*, *O'Malley, supra*, note 27; *Bhinder* v. *Canadian National Railways*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481, 63 N.R. 185, 9 C.C.E.L. 135, 17 Admin. L.R. 111, 86 C.L.L.C. 17,003, 7 C.H.R.R. D/3093; and *Action Travail des Femmes* v. *Canadian National Railways*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193, 76 N.R. 161, 87 C.L.L.C. 17,022.

[33]*O'Malley, supra*, note 27 at 547.

[34]An examination of the case of *Janzen & Govereau* v. *Platy Enterprises Ltd*, [1986] 2 W.W.R. 273, 38 Man. R. (2d) 20 (*sub nom. Janzen and Govereau* v. *Pharos Restaurant* (Q.B.)); reversed, [1987] 1 W.W.R. 385, 43 Man. R. (2d) 293 (C.A.) [hereinafter *Janzen* cited to 43 Man. R. (2d) (C.A.)], helps to shed light on *Brooks, Allen & Dixon* v. *Canada Safeway Ltd.* The decision in *Janzen* was given by Twaddle and Huband JJ.A., both of whom participated in the *Brooks* case. The reasons for judgement span more than two paragraphs and the assumptions that inform their reasoning are much more apparent. In the following discussion of *Brooks* reference will be made to the *Janzen* case to support the inferences drawn about the reasoning in *Brooks*. In *Janzen* two complainants filed human rights complaints alleging sexual harrassment by their employer. They claimed that such harrassment constituted discrimination on the basis of sex, contrary to the Act. Both the adjudicator and the Court of Queen's Bench found that sexual harrassment was discrimination on the basis of sex, but the Manitoba Court of Appeal disagreed. They found that not all women were harrassed, but only those with certain attributes were and thus this could not be discrimination on the basis of sex. They also held that because "discriminating" was analogous to "making a selection", and "harrassing" was analogous to "assaulting", harrassing could not be discriminating.

"apply to women, [but have] no application to women who are not pregnant and [have] no application, of course, to men."[35] The underlying reasoning here is that because not all women are affected at one time by the provisions, such provisions cannot be described as discriminating between men and women[36] but only as discriminating between pregnant people and non-pregnant people or between two classes of women, neither of which is a prohibited ground. This demonstrates further that the Manitoba Court of Appeal's decision is premised on an understanding of the concept of discrimination that has been overtaken by recent Supreme Court rulings and is not in line with the purpose of the human rights codes that have been enacted across the country.

It is not necessary that a whole class be adversely affected by the offending provisions before discrimination within the meaning of the codes can be found.[37] In *R.* v. *Drybones*,[38] the Supreme Court of Canada found discriminatory treatment where the facts disclosed that only *some* Indians, namely those who were drunk and off the reserve, were treated more harshly than whites. More recent Supreme Court authority supporting this position can be found in *O'Malley*[39] (although this case was cited at the hearing, there is no indication in their decision that O'Sullivan, Huband and Twaddle JJ.A. considered *that* authority to be relevant).

A rule or practice is discriminatory if it affects "a person *or a group of persons*"[40] adversely because of some special characteristic of the group of which they are a member. The provisions in the Canada Safeway disability benefits package have a discriminatory effect upon a group of people (pregnant persons) because of the special characteristic (the ability to become pregnant) of the group (women) to which they belong.

In this case, Canada Safeway's benefit package discriminates on the basis of sex. Brooks, Allen and Dixon were treated more harshly than other employees of Canada Safeway, and this harsher treatment flowed entirely from their pregnant condition, a condition unique to women. Thus, it is only women who are subject to the employment losses associated with this provision. Only women can become pregnant and this is the most significant

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[35]*Brooks, Allen & Dixon* v. *Canada Safeway Ltd, supra*, note 18 at D/3188 (citing Ritchie J. in *Bliss, supra*, note 2 at 183, citing Pratte J. in *Re A.G. Canada and Bliss*, [1978] 1 F.C. 208, 77 D.L.R. (3d) 609 at 613 (C.A.)).

[36]Similar reasoning can be seen in the *Janzen* case, *supra*, note 34.

[37]Tarnopolsky, *supra*, note 24.

[38][1970] S.C.R. 282, 9 D.L.R. (3d) 473, 71 W.W.R. 161, [1970] 3 C.C.C. 355, 10 C.R.N.S. 384.

[39]*Supra*, note 27.

[40]*Ibid.* at 547 (emphasis added).

difference between men and women. To ignore this is to avoid the key issue.[41] As stated by Wright J. in *Canada Safeway Ltd* v. *Manitoba Food and Commercial Workers Union*:

> [T]he fact is discrimination can occur when one sex is given an advantage over the other due to some particular characteristic common to one sex but not to the other. The adjective "unique" is often used in this context.
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> Pregnancy is an example. A rule [affecting] pregnant women ... affects all women, not just some women. It affects their right to be pregnant. It applies only to women and places women in a less advantageous, or potentially less advantageous, position in relation to employment than men. *The essential reason a woman is in that position is because of her sex.* Since there is no rule of like kind — as there cannot be — that applies to men, the result is a rule that is clearly discriminatory *because of sex.*[42]

B. The Interpretion of "Sex"

The second reason that the Manitoba Court of Appeal found that the discrimination against Brooks, Allen and Dixon could not be discrimination on the basis of sex is that they interpret "sex" as synonymous with "gender"; this is a very narrow ground.[43] They conclude that if there had been any intent on the part of the legislature to include pregnancy within the meaning of "sex" then there would have been specific provisions to that effect such as those that are included in the codes of other jurisdictions.[44] Thus, in the absence of such a broadening of the term, "sex" should be narrowly construed.[45] But human rights codes are not to be narrowly construed. The Supreme Court of Canada has made this clear in numerous decisions.[46]

> It is not ... a sound approach to say that according to the established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable a Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ... and to give it an interpretation which will advance its broad purposes. Legislation of this

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[41] *Tellier-Cohen* v. *Treasury Board, supra*, note 10.

[42] (1984), 5 C.H.R.R. D/2133 at D/2137 (Q.B.).

[43] In *Janzen, supra*, note 34 at 303, the Court refers to *Re University of Saskatchewan & Saskatchewan Human Rights Commission* (1976), 66 D.L.R. (3d) 561, [1976] 3 W.W.R. 385 (Q.B.) [hereinafter cited to D.L.R.], stating that "sex" in the Code means the male or female gender of a person.

[44] See *supra*, note 13.

[45] *Supra*, note 18 at D/3188.

[46] See, *e.g.*, *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145, 137 D.L.R. (3d) 219, 43 N.R. 168, [1982] 1 I.L.R.1-1555; *Winnipeg School Division No. 1* v. *Craton*, [1985] 2 S.C.R. 150, [1985] 6 W.W.R. 166, 61 N.R. 241, 21 D.L.R. (4th) 1, 38 Man. R. (2d) 1; and *O'Malley, supra*, note 27.

> type is of a special nature, not quite constitutional but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.[47]

The purpose of the codes in prohibiting discrimination is to eliminate broad assumptions about classes of people and to require decisions to be made on the basis of relevant, objective reasons and on the basis of individual capabilities.[48] To narrow the definition of sex to the simple question of the possession or not of the Y chromosome, and to ignore all the other attributes associated with the possession of that chromosome, is to fail to promote the purpose of the code in listing sex as a prohibited ground. Women have long been discriminated against. One of the major justifications for this was that women were different because of their ability to bear children. Women may well be different, but this "differentness" *should* be of no relevance in this employment context.

A pregnant woman who is obliged to take time away from work is no different from any other employee who is temporarily disabled. Both suffer a loss of income arising from their inability to work. The insurance plan exists to help alleviate the economic burden caused by loss of income and incurrence of medical expenses.[49] And yet these similarly situated individuals may be treated differently to the detriment of one, according to the Manitoba Court of Appeal.

Even if a narrow "sex equals gender" view is taken, as was the case in *Re University of Saskatchewan & Saskatchewan Human Rights Commission*,[50] gender still comprises an "immutable sex characteristic."[51] The *ability* to get pregnant is an immutable sex characteristic — it is beyond the power of the individual to change it. The *choice* to get pregnant, to have children, is a personal one which should not be premised on extrinsic, employment related factors, but which should rather be a protected choice of a nature similar to religion.

C. "Voluntariness" not a Consideration

The third reason supporting the Court's holding that pregnant women are not the victims of discrimination on the basis of sex, is that pregnancy is a condition that a woman voluntarily assumes. This is untenable for several reasons. First, "voluntariness" is an irrelevant basis for making decisions about who is eligible for coverage. The plan covers numerous other temporary disabilities that are equally as "voluntary" as pregnancy.

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[47] *O'Malley, supra*, note 27 at 546-47.
[48] *Giouvanoudis* v. *Golden Fleece Restaurant, supra*, note 10.
[49] *Ibid.*
[50] *Supra*, note 43.
[51] *Ibid.* at 565.

These include elective surgery, accidents incurred in sporting activities and alcohol related illnesses.

Second, although most pregnancies are voluntary, some are not. Many factors that influence whether a woman becomes pregnant are beyond her control. Even assuming the woman actually has intercourse voluntarily,[52] no birth control method is one hundred percent effective, and should it fail, there may be no possibility of free choice as to whether or not to continue the pregnancy.[53] Furthermore, even if contraception were one hundred percent effective, the dictates of a woman's religion might prohibit its use.

Lastly, voluntary or not, pregnancy, as part of procreation, is necessary for the perpetuation of humanity. Discriminatory rules and practices which make women's two roles (*i.e.* worker and childbearer) incompatible risk causing one of the roles to fall by the wayside. There is social value in both roles and women should not be forced to sacrifice one for the sake of the other.

In summary, it would appear that, in light of recent Supreme Court authority, the Manitoba Court of Appeal may have misinterpreted the provision in the Manitoba Code prohibiting discrimination on the basis of sex.

V. Conclusion

A decision such as this one of the Manitoba Court of Appeal is symptomatic of the attitudes of our predomoninantly middle-class male judiciary to the issue of gender equality.[54] Underlying this decision is undoubtedly the stereotypic belief that a woman's role is primarily that of childbearer and caregiver, and only secondarily, that of a full-fledged member of the work force. Sex roles are deeply ingrained in our society. This may make it difficult for a male judge to understand the struggles of a woman who is seeking a different role in life than one which was so "gratefully accepted by his grandmother, mother, and wife."[55]

The prevailing attitude seems to be that "when childbearing and work conflict the woman as a worker has no claim to protection because she chose which of these two mutually exclusive routes to take."[56] The idea that women have the right to have a career and children (just as men do) is a

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[52]*I.e.*, excluding rape.

[53]See M.E. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L.J. 337.

[54]For extensive discussion of this topic, see K.E. Mahoney & S.L. Martin, *supra*, note 1.

[55]K.T. Bartlett, "Pregnancy and the Constitution: The Uniqueness Trap" (1974) 62 Calif. L. Rev. 1532 at 1564.

[56]D. Réaume, "Women and the Law: Equality Claims Before Courts and Tribunals" (1979) 5 Queen's L.J. 3 at 21.

new one,[57] and many people, including judges, have not yet realized that childbearing and rearing is not of benefit only to women but also to men and to society as a whole.[58]

I submit that the Manitoba Court of Appeal was mistaken in its conclusion in this case. Ms. Brooks, Ms. Allen and Ms. Dixon were not covered by their group insurance plan because they are women. This case demonstrates the challenge for the judiciary to look at this issue from a broad perspective, leaving behind the cultural baggage that has traditionally dictated that a woman's primary role in our society is that of wife and mother. This means realizing that a "like for like" comparison is not one between a pregnant woman and a man who can never be pregnant, but rather is one between a man who is experiencing a temporary disability which prevents him from working and a woman who is *similarly* prevented from working.[59] It also requires recognition that gender and pregnancy *are* inextricably linked and that it is illogical to hold otherwise. Only with such an understanding will it be possible to overcome the remaining inequalities for women. As stated in the preface to *Equality and Judicial Neutrality*,[60] "as social attitudes and conditions change, judges must also change. If not, the societally induced values they hold may operate to prevent groups and individuals from achieving equality."

In conclusion, this decision cannot be supported in light of recent Supreme Court of Canada human rights pronouncements like *O'Malley*.[61] The Manitoba Court of Appeal has not promoted the purposes of the Code by giving it a broad and generous interpretation. Instead, the Court has emasculated (or should we say "effeminated"?) the Code's protection against sex discrimination. It is anticipated that the Supreme Court of Canada will correct this, and will use the opportunity to undo the harm which was wrought by the decision in *Bliss* in 1978. Until this wrong is righted, however, it appears that women may only expect equality as long as they behave like men and do not venture into those activities (childbearing being the most obvious) "that make them, well — somehow — different."[62]

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[57]See *Giouvanoudis* v. *Golden Fleece Restaurant*, *supra*, note 10.
[58]D. Réaume, *supra*, note 56.
[59]*Turley* v. *Allders Department Stores Ltd.*, *supra*, note 6.
[60]*Supra*, note 1.
[61]*Supra*, note 27.
[62]K.T. Bartlett, *supra*, note 55 at 1566.