The Promise of Brooks v. Canada Safeway Ltd : Those Who Bear Children Should Not Be Disadvantaged

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The Promise of *Brooks v. Canada Safeway Ltd*: Those Who Bear Children Should Not Be Disadvantaged

Lorna Turnbull

This article considers the defining moment embodied in the judgment of Chief Justice Brian Dickson in Brooks v. Canada Safeway Ltd *when he proclaimed that it is "unfair to impose all of the costs of pregnancy upon half the population." The author argues that the case is important because of the history that preceded it and because of the breadth of its promise. She suggests that the promise has been somewhat betrayed by more recent cases dealing with the dual roles of many women as mothers and as workers that suggest a return to the formal approach to equality that* Brooks *clearly rejected.*

Le présent article traite du moment décisif que représente le jugement du juge en chef Brian Dickson dans l'arrêt Brooks c. Canada Safeway Ltd *où il affirme qu'il est « injuste d'imposer tous les coûts de la grossesse à la moitié de la population ». L'auteure soutient que cet arrêt est important en raison de ses antécédents historiques aussi bien que par l'ampleur du changement promis. Elle suggère que cette promesse ne s'est pas réalisée dans les décisions récentes portant sur le double rôle de nombreuses femmes qui cumulent la maternité et le travail, ce qui laisse présager un retour à l'approche formelle de l'égalité que l'arrêt* Brooks *avait clairement rejeté.*

In 1989, Chief Justice Brian Dickson of the Supreme Court of Canada recognized in *Brooks v. Canada Safeway Ltd.*[1] that a woman who was discriminated against because of pregnancy was discriminated against on the basis of sex and that such discrimination was contrary to both human rights legislation and the equality guarantee of the *Canadian Charter of*

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

Rights and Freedoms.[2] With broad language noting the weight of the burden of childbearing borne by women, Dickson C.J.C. proclaimed that it was "unfair to impose all of the costs of pregnancy upon one half of the population." For the unanimous court, he stated "[t]hat those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious."[3] This decision was remarkable for a number of reasons. First, barely a decade before, in 1978, the Supreme Court of Canada had decided in the case of *Bliss v. A.G. Canada* that a woman who had been refused unemployment insurance benefits because of her pregnancy was not discriminated against on the basis of sex.[4] In the intervening years, a formalistic model of gender equality restricted women's ability to challenge discrimination on the basis of pregnancy. Such a dramatic turn around in such a short time was perhaps indicative of a new approach to equality generally and to women's claims in particular. Second, this decision was one of the very earliest equality decisions of the Supreme Court of Canada after section 15 of the *Charter* came into force, and its broad language, which built on *Law Society of British Columbia v. Andrews,*[5] may also have signalled a new approach. The case itself did not arise under the *Charter* but instead under the *Manitoba Human Rights Code*.[6] However, the Court made numerous references to the approach to equality articulated under the *Charter* in reaching the result. Finally, for this author, a young feminist and newly minted law student at the time of the decision, the words of Dickson C.J.C. inspired hope and a belief that gender equality might actually be attainable, and it stood as a defining moment of feminist engagement with the law.

Perhaps the lessons of time, the growing cynicism of passing years, or the hands-on experience of bearing and raising three children in contemporary Canadian society have dampened the hope or tamed the naïveté that the decision originally inspired. It appears now, fifteen years later, that *Brooks* may have failed to live up to its early promise. This article will consider two more recent cases that have dealt with women's dual roles as mothers and workers—cases that show that despite the words in *Brooks* and some other signs of progress, there is much that has not changed in the twenty-five years since *Bliss*.

Stella Bliss lost her job when she became pregnant. She was unable to qualify for maternity benefits under the unemployment insurance program,

2. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
3. *Brooks, supra* note 1 at 1243.
4. *Bliss v. A.G. Canada,* [1979] 1 S.C.R. 183 [*Bliss*].
5. *Law Society of British Columbia v. Andrews,* [1989] 1 S.C.R. 143 [*Andrews*]. *Andrews* was decided just three months before *Brooks* was released.
6. *Manitoba Human Rights* Code, C.C.S.M. c. H175.

but she was capable of meeting the lower standards to qualify for regular unemployment insurance benefits. She sought to claim regular benefits for the time she was available for work prior to and following the birth of her child. Section 46 of the *Unemployment Insurance Act, 1971*[7] denied regular benefits to pregnant women for a period of fifteen weeks surrounding the expected date of birth. Thus, Ms. Bliss found herself entitled to neither maternity nor regular benefits. It was this provision that Stella Bliss challenged as violating her equality rights under the *Canadian Bill of Rights*.[8] The court relied on the logic of "pregnant persons" to find that she had not experienced sex discrimination since the act treated pregnant women differently from other unemployed persons, both male and female, "because they are pregnant and not because they are women."[9] *Bliss* also represents a defining moment of feminist engagement with the law both for the tremendous involvement of the feminist community, through Lynn Smith who was counsel in the case, and for the catalyst that the case provided for feminists engaged in shaping the scope of the equality guarantee contained within the *Charter*. However, while *Bliss* may have represented a moment to react against, *Brooks* looked like it would be a moment to build upon.

Susan Brooks, Patricia Allen, and Patricia Dixon were all employees of Canada Safeway Limited in Brandon, Manitoba. They, along with all of the other employees, were covered by a group disability insurance plan maintained by Canada Safeway. The plan provided for the payment of weekly disability benefits calculated as a percentage of an employee's regular weekly earnings for a range of disabilities. Pregnancy was also included, with the exception of a period starting ten weeks preceding the week of birth and ending six weeks following the week of birth. During these seventeen weeks, a pregnant employee had no coverage whatsoever for any disabilities including those unrelated to the pregnancy. All of the complainants were pregnant, and none was able to recover disability benefits for her time away from work during the seventeen-week period surrounding the birth of her child. Claims of discrimination on the basis of sex were denied at all three levels before the Supreme Court of Canada heard the case in June 1988. At the Supreme Court of Canada, the Women's Legal Education and Action Fund (LEAF) intervened, supporting the equality claims with arguments in favour of a substantive approach to the issues in the case. The Supreme Court of Canada gave life to this approach in its 1989 decision.

7. As amended. *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, reenacted as the *Employment Insurance Act,* S.C. 1996, c. 23.
8. *Canadian Bill of Rights*, S.C. 1960 c. 44.
9. *Bliss*, *supra* note 4.

Patricia Dixon had high hopes for the decision, saying that it was "not really for me anymore . . . But I'm really happy no other woman will have to go through what I did."[10] Patricia Allen echoed her sentiments, declaring "I'm very, very happy for all the women who will benefit from this."[11] For myself, the words of Dickson C.J.C. also represented a triumph. The formal equality logic of *Bliss* had been soundly rejected, and the court was quite clear that "nature" was no excuse: "It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by the legislation . . . The capacity to become pregnant is unique to the female gender . . . Distinctions based on pregnancy can be none other than distinctions based on sex or, at least, strongly 'sex-related.'"[12] Surely, these were definitive words on the subject of discrimination against women because of their childbearing capacity.

The judicial consideration that *Brooks* has received since 1989 tells a rather different story. The case has been cited in more than one hundred subsequent cases, but usually it is only mentioned, and, when it is followed, it is mainly for the proposition that not all members of a group need to be adversely affected by some law or action to find that there is discrimination against the group as a whole. A few of the cases that have considered *Brooks* have been cases involving mothers,[13] and a couple have involved claims brought by mothers for gender equality.[14] These latter cases were not successful. Tellingly, *Brooks* was not even considered by the Federal Court of Appeal in two recent cases that again raised the issue of gender equality as it touched upon women's mother work and market work.

One of these cases originated, like *Brooks*, in Manitoba. Kelly Lesiuk was a registered nurse in Brandon who later moved to Winnipeg. Already the mother of a three-year-old child, she was employed on a part-time basis when she became pregnant with her second child. On her doctor's advice in April 1998, she stopped working and applied for employment insurance maternity benefits. She was turned down because she had worked only 667 hours in the qualifying period instead of the 700 hours required to demonstrate workforce attachment. Ms. Lesiuk unsuccessfully appealed this

10. Heidi Graham, "Court Victory in Almost Forgotten Fight Delights Women," *Winnipeg Free Press*, 6 May 1989, 3.
11. *Ibid.*
12. *Brooks*, *supra* note 1 at 1244.
13. See, for example, *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753; *Willick v. Willick*, [1994] 3 S.C.R. 670; *Symes v. Canada,* [1993] 4 S.C.R. 695 [*Symes*]; *R. v. Sullivan*, [1991] 1 S.C.R. 489; and *Schafer v. Canada* (1997), 35 O.R. (3d) 1 (C.A.).
14. *Symes, supra* note 13; and *Thibaudeau v. Minister of National Revenue*, [1994] 2 F.C. 406 (C.A.).

denial to a Board of Referees. On a further appeal to the umpire, she argued that the 700-hour eligibility requirement violated her equality rights. The umpire agreed, finding that the requirement discriminated against those whose childcare responsibilities made it more difficult to meet the requirement, predominantly women who are employed an average of thirty hours per week compared to men's average of thirty-nine hours per week. At these rates, women would have to work for twenty-three weeks on average before qualifying whereas men would meet the requirements in eighteen weeks on average.[15] The umpire also found that these eligibility requirements undermined the human dignity of women by promoting the view that women are less capable or valuable as members of Canadian society because they must work longer to demonstrate their attachment to the workforce. The attorney general sought a review of the umpire's decision by the Federal Court of Appeal, and, in January 2003, the court held that Kelly Lesiuk was not discriminated against by the eligibility requirements of the employment insurance scheme because her human dignity was not demeaned.[16]

Just months earlier, in October 2002, Joanne Miller was told by the Federal Court of Appeal that she was not entitled to full employment insurance benefits when she lost her job because she had previously received maternity and parental benefits in the same benefit period.[17] The court held that provisions of the *Unemployment Insurance Act*,[18] which limit the receipt of regular benefits when claimants have already received special benefits, were not contrary to the equality provisions of section 15 of the *Canadian Charter of Rights and Freedoms*. Ms. Miller had been employed at the Native Canadian Centre of Toronto since 1992. In 1995, she became pregnant with her second child. She went on maternity leave from her employment in March 1996 and applied for and received fifteen weeks of maternity benefits and ten weeks of parental benefits. Four days before she was due to return to her job, Ms. Miller was informed by her employer that her position was no longer available. Finding herself jobless, she applied for regular unemployment insurance benefits to replace her income while she sought new employment. On the basis of the weeks of insurable employment, a claimant in Ms. Miller's situation who became unemployed would ordinarily be entitled to forty weeks of regular benefits. However, since Ms. Miller had already received twenty-five weeks of maternity and parental benefits, she was only entitled to fifteen weeks of regular benefits because the

15. The 700-hour figure is based on the ideal worker working thirty-five hours per week for twenty weeks, which was the requirement under the previous legislation.
16. *Canada (Attorney General) v. Lesiuk*, 2003 F.C.A. 3.
17. *Miller v. Canada (Attorney General)*, 2002 F.C.A. 370.
18. *Unemployment Insurance Act, supra* note 7.

operation of the act has the effect of deducting from the maximum number of weeks of entitlement for regular benefits any weeks of special benefits received during the same benefit period.[19]

In the cases of *Lesiuk* and *Miller,* as well as the other related challenges to the restrictions on maternity and parental benefits that have been brought over the past few years,[20] the courts and tribunals appear to have ignored the context within which women engage in market work and mother work, despite the efforts of the intervenors in these cases to present ample evidence of women's lived experiences.[21] Even in today's society where nearly three quarters of mothers with children under the age of sixteen are working full-time in the paid workforce, women continue to shoulder the bulk of the domestic labour associated with caring for children and running a household.[22] After a child is born, it is almost always the mother who takes leave from her employment to care for the newborn or adopted child. At the time these cases were being litigated, women represented 98 per cent of the recipients of maternity and parental benefits under the employment insurance scheme.[23]

Women in Canada continue to experience economic disadvantages relative to men as evidenced by the continuing wage gap. Women on average earn anywhere from $0.76 to $0.52 for every dollar earned by men, depending upon the way in which the figures are calculated. Only unmarried women aged twenty-five to forty-four who are employed full-time approach men's earnings. These women earn $0.97 for every dollar full-time employed men earn.[24] Structural characteristics of the workplace also serve to marginalize mothers as workers. Inflexible work hours and increased employer demands for overtime and shift work act as barriers to people with childcare responsibilities. Economic changes and globalization have also lead to increased contract and part-time work, particularly in sectors of the economy where women have traditionally found employment.[25] The result is increasing instability and vulnerability for workers, especially women.

19. See Lorna A. Turnbull, "How Does the Law Recognize Work?" (2004) 6 Journal of the Association for Research on Mothering 58, for a further discussion of these two cases.
20. *Sollbach v. Canada (Attorney General)* (1999), 252 N.R. 228 (F.C.A.); *Krock v. Canada (Attorney General)*, 2001 FCA 188; and *Canada (Attorney General) v. Brown*, 2001 FCA 385.
21. Women's Legal Education and Action Fund, in particular, presented such evidence.
22. Norene Pupo, "Always Working Never Done: The Expansion of the Double Work Day," in N. Pupo, Ann Duffy, and Daniel Glenday, eds. *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the Twenty-First Century* (Toronto: Harcourt Brace and Company, 1997) at 545–6; Statistics Canada, *Women in Canada 2000,* File 89-503-XPE (Ottawa: Statistics Canada, 2000) at 100.
23. Statistics Canada, *supra* note 22 at 109, 133.
24. Lorna A. Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001) at 22.
25. Statistics Canada, *supra* note 22 at 103.

Related to women's disadvantaged position in the workforce is the fact that women are also generally at a greater risk of poverty than men and, when in poverty, they experience a greater depth of poverty. Women who are already disadvantaged as racialized women, Aboriginal women, lone parents, immigrants, or disabled women are even more likely to face these risks.[26] Recent work by authors in Canada, the United States, and Europe now reveals that some of the economic disadvantages that women experience are attributable to the responsibilities many women bear as mothers. Laws and policies that do not take account of the impact of caregiving responsibilities on earnings and workforce participation compound the disadvantages that women already experience.[27] While these data show how deeply implicated women are in the work of caring for children, it is not the intention of this author to suggest that this should be, or always will be, the case. Just as importantly, it is also not my intention to suggest that only women should be caregivers or that men are unsuited to caregiving.

In practical terms, the claims of both Lesiuk and Miller failed because of the court's failure to truly appreciate the lived experiences of women who are attempting to do mother work and market work in Canada at the turn of the twenty-first century. Legally, their claims were unsuccessful because the court found that being denied maternity/parental benefits could not possibly offend a woman's human dignity (under the *Law* test[28]) and because the court (reminiscent of the "pregnant persons" logic of *Bliss*) considered that a mother who had received maternity/parental benefits was just like any other recipient of special benefits in respect of regular benefits should she lose her job. Miller and Lesiuk have asked the questions (Does gender equality include women who are mothers? Can a woman belong fully to

26. Marika Morris, "Women and Poverty: A Fact Sheet" (Ottawa: Canadian Research Institute for the Advancement of Women: March 2002), available online at <http://www.criaw-icref.ca/povertyfactsheet.htm; Statistics Canada, *supra* note 22.
27. See generally Turnbull, *supra* note 24.
28. The proper approach to equality claims is now accepted as being the one set out by the Supreme Court of Canada in 1999 in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The *Law* approach has been critiqued by a number of authors who note that it risks allowing the courts to slip back into the old relevancy test from earlier case law and places the burden of proof upon the claimants rather than upon the state. See generally Beverley Baines, "*Law v. Canada*: Formatting Equality" (Spring 2000) 11 Constitutional Forum 65; June Ross, "A Flawed Synthesis of the Law" (Spring 2000) 11 Constitutional Forum 74; Craig B. Davis, "*Vriend v. Canada, Law v. Canada, Ontario v. M and H.*: The Latest Steps on the Winding Path to Substantive Equality" (1999) 37 Alberta Law Review 683; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 Review of Constitutional Studies 291; and Donna Greschner, "Does *Law* Advance the Cause of Equality" (2001) 27 Queen's Law Journal 299.

Canadian society as both a mother and a worker?) that one might have considered to have already been answered in the affirmative by Dickson C.J.C.'s words in *Brooks*.

Denise Reaume maintains that all feminist approaches are fundamentally concerned with the harm of exclusion.[29] In addressing exclusion, she targets implicit exclusion, which occurs when rules or laws are drafted using men as the norm. Such gender-neutral rules do not encompass the lived experiences of women in their design, and, in their operation, they exclude women from full participation in the larger society.[30] Reaume offers *Bliss* as the classic example of such implicit exclusion. The *Miller* and *Lesiuk* cases provide contemporary examples of the same kind of implicit exclusion.[31] The spirit of *Brooks* is nowhere to be found.

Donna Greschner has argued that the primary purpose of the equality guarantee is to protect each person's interest in belonging simultaneously to several communities. She maintains that the historical, philosophical, and linguistic underpinnings of section 15 all support the conclusion that it is intended to protect belonging.[32] Belonging is particularly relevant in the situation where what is at stake is a mother's interest in belonging to the "public" sphere of employment, even while she also continues to belong in the "private" sphere of child nurture. The sense of connection, of a non-autonomous identity that the word "belonging" implies, captures the encumbered reality of a mother's experience.[33] It is perhaps this sense that they should belong to both public and private spheres that motivated Lesiuk and Miller and others like them to challenge the courts to broaden their understanding of equality to include such gender-specific claims. These women were asking the courts to recognize that they are workers *and* mothers. Recognition of a woman's identity as a worker should not be limited to the situations where she suppresses her mothering role in order to appear more like an ideal—typically male—worker. The law should support the recognition of workers who have other important social commitments such as raising children. Mothers should not be treated as "less than full members, and not permitted to participate fully in the opportunities and riches of society."[34]

29. Denise Reaume, "What's Distinctive about Feminist Analysis of Law?" (1996) 2 Legal Theory 265.
30. *Ibid.* at 273.
31. *Ibid.* at 281.
32. Greschner, "Purpose of Canadian Equality", *supra* note 28 at 315.
33. See the discussion in Turnbull, *supra* note 24 at 9 and 45–6, of the theoretical challenges posed by mothers to liberalism because they are not autonomous individuals, but rather encumbered ones.
34. Greschner, "Purpose of Canadian Equality," *supra* note 28 at 306.

This area of women's gendered lives is one that poses challenges for theorists[35] and courts alike, and the need to address it properly is vital in promoting women's equality. It is still the case that however integrated women may have become in the public spheres of life, most continue to have children. How we as a society allow for a "fit" between the worker and the mother roles of women determines how real equality will be for us. Perhaps it will be possible to breathe life into the words of Dickson C.J.C. in *Brooks*: "Combining paid work with motherhood and accommodating the childbearing needs of women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious."

Perhaps, to me, the words of Dickson C.J.C. ring so true because, as a feminist, I feel there can be no debate about the idea that women should not be economically or socially disadvantaged because they are the ones who bear and raise children. I have spent most of my career, whether as a student, a mother, an academic, or an activist working to bring this aspiration to life. What I have come to appreciate far more deeply than ever before, however, is just how much debate there is, and should be, about how to give effect to it. Perhaps the slow pace of change that has taken place since *Brooks* was decided has allowed some of these debates to occur and will result in an equality that is much more inclusive of all women and mothers from all of their variety of mothering experiences. Perhaps this is the defining moment and the promise of *Brooks*.[36]

35. Patrice di Quinzio, *The Impossibility of Motherhood: Feminism. Liberalism and the Problem of Motherhood* (New York: Routledge, 1999) at vii-xx; Turnbull, *supra* note 24.
36. In October of 2005, in a decision where a majority of the judges were women, the Supreme Court stated that "a growing portion of the labour force is made up of women [who] have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility." *Employment Insurance Act (Can.)* ss.22 and 23, 2005 SCC 56 at para. 66. Perhaps the strong statements of the public, collective responsibility for the work of raising future generations show that the promise of *Brooks* may yet be fulfilled.