

## The Equality Rights

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Lynn Smith\*

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I AM DELIGHTED to have the opportunity to comment on Chief Justice Dickson's contribution to the protection of equality rights in Canada. That contribution has been, in a word, enormous, and there is much to say about it. The only drawback to this assignment is that it is difficult to find much negative to say, so as to prove myself to be a properly critical and rigorous academic. Nevertheless, despite this difficulty, I am going to comment mainly on two areas: cases regarding *Charter* equality rights and cases under human rights legislation. "Charter equality rights" will be defined to include the right to reproductive choice, giving me latitude to comment on the Chief Justice's decision in the *Morgentaler* case.<sup>1</sup> I will tend to focus on issues concerning women's equality. This is for two reasons: (1) I have been working most intensively in that area; and (2) Chief Justice Dickson's contribution has been particularly outstanding there. But I will look at other issues as well, including the debate about the significance of "bona fide occupational requirement" language that began in *O'Malley*<sup>2</sup> and *Bhinder*<sup>3</sup> and has resulted in the recent decision in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*.<sup>4</sup>

Serious legal protection for equality rights in Canada only began in the last five years (1985-1990) of Chief Justice Dickson's time on the Supreme Court of Canada. Prior to then, although there were provisions in human rights statutes and the *Canadian Bill of Rights*,<sup>5</sup> the former were limited in scope, and the latter's potential had been

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\* Faculty of Law, University of British Columbia.

<sup>1</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

<sup>2</sup> *Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536.

<sup>3</sup> *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561.

<sup>4</sup> [1990] 2 S.C.R. 489

<sup>5</sup> S.C. 1960, c. 44.

nipped in the bud in the mid-1970s by the Supreme Court.<sup>6</sup> On 17 April 1985, the equality guarantees of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> came into effect. In the next five years, the Supreme Court rendered decisions in human rights, *Charter*, and certain other cases that dramatically changed the extent to which Canadian women and minorities can look to law for support of their equality claims.

Chief Justice Dickson wrote for the Court or wrote a majority opinion in four of the landmark cases: *Action Travail des Femmes* (1987),<sup>8</sup> *Morgentaler* (1988),<sup>9</sup> *Brooks* (1989),<sup>10</sup> and *Janzen* (1989).<sup>11</sup> In one, he wrote a crucial dissent — *Bhinder* (1985).<sup>12</sup> In five others, he signed a majority or unanimous opinion: *O'Malley* (1985),<sup>13</sup> *Andrews* (1989),<sup>14</sup> *Daigle* (1989),<sup>15</sup> *Lavallee* (1990),<sup>16</sup> and *Central Alberta Dairy Pool* (1990).<sup>17</sup> I will discuss these cases in more detail later.

The “look” of Supreme Court decision-making changed in the later 1980’s as well. At his retirement, Chief Justice Dickson presided over a court that was one third female. (By way of contrast, the current representation of women overall on the federally-appointed bench is less than one tenth.)<sup>18</sup> Roughly from the effective date of the *Charter*, interventions from groups normally excluded from the litigation

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<sup>6</sup> The potential was limited by the restriction to the federal sphere and by the status of the legislation (quasi-constitutional at best). The decisions that killed any potential in the *Canadian Bill of Rights* were *Lavell v. A.G. Canada*, [1974] S.C.R. 1349 and *Bliss v. A.G. Canada* [1979] 1 S.C.R. 183.

<sup>7</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>8</sup> *Action Travail des Femmes v. Canadian National Railway*, [1987] 1 S.C.R. 1114.

<sup>9</sup> *Supra*, note 1.

<sup>10</sup> *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

<sup>11</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

<sup>12</sup> *Supra*, note 3.

<sup>13</sup> *Supra*, note 2.

<sup>14</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>15</sup> *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

<sup>16</sup> *R v. Lavallee*, [1990] 1 S.C.R. 852.

<sup>17</sup> *Supra*, note 4.

<sup>18</sup> See I. Grant & L. Smith, “Gender Representation in the Canadian Judiciary” in *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991).

process (such as women and persons with disabilities) began to be permitted, when appropriate, contrary to previous practice. As well, the language of judicial decisions changed. Sometime in the mid to late 1980s, most members of the Court (and certainly Chief Justice Dickson) began to use inclusive (or gender-appropriate) language, rather than the traditional (and obliterating) masculine forms alone. A review of Chief Justice Dickson's extra-judicial writing shows the same shift; sometime between 1980 and the present, the use of the masculine generic forms disappeared.

Most notably, in the last few years, the Court began to show a willingness to recognize that in some respects the law needs to be reappraised where the principles it has developed reflect male norms but do not fit many women's experience, or do not do justice to women. *Lavallee*<sup>19</sup> and *Brooks*<sup>20</sup> provide primary examples.

In this same period, Chief Justice Dickson's speeches and writings evidenced an awareness of the social problems facing women and minorities in Canada. On April 18, 1985, in remarks to a Call to the Bar ceremony in Toronto, he noted that section 15 of the *Charter* had come into effect the previous day. (Section 15 guarantees "every individual" the right to equality before and under the law, and the equal protection and equal benefit of the law without discrimination, including discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.) He quoted that section, then section 28, which provides that *Charter* rights and freedoms are guaranteed equally to male and female persons. His comments are worth repeating:

These sections reflect a profound concern for providing equality of rights and treatment, in a realistic and not merely formal sense, to all the people of Canada. They contemplate equal justice for women, for minority groups, for the disadvantaged, for the disabled. They will give the lawyer in our society a unique opportunity to play a creative role in Canadian social development. The problems presented will be complex, not least because they involve many of the members of our society who traditionally have *not* been the clients of the legal profession. It is profoundly to be hoped that those whose skills have commonly been available only to private and paying clients increasingly will devote some of their skills and talents to extending the blessing of freedom and equality to the legal and social difficulties of the disadvantaged.<sup>21</sup>

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<sup>19</sup> *Supra*, note 16.

<sup>20</sup> *Supra*, note 10.

<sup>21</sup> (1985) 19 L. Soc. Gaz. 118 at 123.

Obviously, the *Charter* does not restrict itself to lawyers in creating "a unique opportunity to play a creative role in Canadian social development." It is now trite to comment that the judges have acquired a new role under the *Charter* — none more so than those on the Supreme Court of Canada. Speculation about what the judiciary would do with its new role was a constant theme of pre-*Charter* commentary.

Permit me to say that if, ten years, ago one had been speculating about what individual members of the Supreme Court would do with respect to equality rights for women, one might not have predicted the creative role that Chief Justice Dickson came to play. A review of his earlier decisions reveals a mixture of cases. Some were heralded, but others were denounced, by academics and women's rights advocates. On the one hand is the *Rathwell* decision,<sup>22</sup> which reversed the extraordinarily punitive decision in *Murdoch*<sup>23</sup> regarding division of matrimonial property. On the other hand there were the decisions in *Bliss*<sup>24</sup> and *Pappajohn*.<sup>25</sup> By the end of his time on the Court, however, Chief Justice Dickson had showed extraordinary leadership with respect to the Court's decision-making about the meaning of human rights legislation and the equality provisions in the *Charter*. The leadership is most obvious in the decisions he authored, but is also apparent in the overall trends in the Court.

To begin to measure the effect of that leadership, a brief historical review of equality rights in Canada is necessary. The early history is simple. Essentially, there were no equality rights in Canada until the advent of human rights legislation in the 1970s. Any search of earlier case law reveals that issues of discrimination simply were not deemed justiciable.<sup>26</sup> The *Canadian Bill of Rights* section 1(b) proved to be entirely ineffective as a guarantee against legislative discrimination by the federal government (the only one to which it applied). The Supreme Court found in *Lavell*<sup>27</sup> that there was no discrimination in the *Indian Act's* removal, from Indian women only, of Indian status

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<sup>22</sup> *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

<sup>23</sup> *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

<sup>24</sup> *Supra*, note 6. The case held that pregnancy discrimination is not sex discrimination.

<sup>25</sup> *Pappajohn v. R.*, [1980] 2 S.C.R. 120. The defence of honest though mistaken belief in consent was confirmed in sexual assault cases.

<sup>26</sup> See W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975).

<sup>27</sup> *Supra*, note 6.

upon marriage to a non-Indian. And in *Bliss*,<sup>28</sup> the Court declared that denial of regular unemployment insurance payments to pregnant women was not discriminatory. Claims based upon age, race or other grounds fared no better — as is well known, *Drybones*<sup>29</sup> was the only section 1(b) case that succeeded until the *Charter* came into effect.

Human rights legislation prohibiting discrimination based on sex, race, religion, and other grounds in employment, rental accommodation and in some other areas (depending upon the jurisdiction) existed in most parts of Canada by the mid-1970s, but it applied only in a limited range of circumstances. By the mid-1980s, some promising directions had begun to appear in human rights cases — in particular, in the Supreme Court of Canada's recognition that the legislation embodied fundamental values and should be given quasi-constitutional status.<sup>30</sup>

When the equality provisions of the *Charter* came into effect on April 17, 1985, many commentators speculated that the Supreme Court would take a different direction than it had under the *Canadian Bill of Rights*, and that it might build its approach to *Charter* equality upon the growing body of jurisprudence from lower courts in human rights cases. The other major competing model was the U.S. experience under the equal protection clause of the Fourteenth Amendment. Building on the Canadian human rights cases would mark a clear departure from the U.S. equal protection model, for two main reasons. First, the human rights jurisprudence seemed to be heading toward a much more substantive or results-oriented understanding of equality than the U.S. model, which had a stronger equal opportunity orientation. Second, the human rights jurisprudence, like Title VII analysis in the U.S., seemed headed towards permitting review of unintended discriminatory effects as well as intentional discriminatory acts. To permit review where no intention could be found under a *constitutional* equality provision would depart from the U.S. pattern in a dramatic way.

The year 1985 seems to mark a turning-point. Cases had been working their way through the courts that would decide this issue under human rights legislation. In giving its reasons in *O'Malley*<sup>31</sup>

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<sup>28</sup> *Supra*, note 6.

<sup>29</sup> *R. v. Drybones*, [1970] S.C.R. 282.

<sup>30</sup> *Action Travail des Femmes*, *supra*, note 8; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

<sup>31</sup> *Supra*, note 2.

and *Bhinder*<sup>32</sup> in 1985, the Court not only reaffirmed the fundamental nature of the values reflected in human rights legislation but recognized the need to make the legislation effective by allowing remedies for unintended discriminatory effects, not just for injuries produced by intentional discrimination. In the *O'Malley* case a Seventh Day Adventist succeeded in a complaint of religious discrimination. Her employer required her to work a certain number of Saturdays but her religion required her to observe a Saturday sabbath. The Court held that there was discrimination, following the American Title VII approach. Further, it held that the employer had a duty reasonably to accommodate the employee, short of undue hardship, which duty had not been discharged in this case. *O'Malley* was written by McIntyre J. and signed by Dickson J. In *Bhinder*, the complaint was by a Sikh whose religion required him to wear a turban, while his employer required him to wear a hard hat. The majority reasons (again written by McIntyre J.) held that the hard hat requirement was a *bona fide* occupational requirement ("BFOR"), and that since the *Canadian Human Rights Act*,<sup>33</sup> under which the *Bhinder* claim was brought, specifically provided for a defence on the basis of a BFOR, the employer had no duty to accommodate Mr. Bhinder.

Chief Justice Dickson dissented in the *Bhinder* case (with Lamer J., as he then was), arguing that an occupational requirement could not be *bona fide* unless the employer had exercised its duty to accommodate those (such as Mr. Bhinder) on whom the requirement would have an adverse impact. The purpose of the legislation, to prevent discrimination, could not be accomplished unless the BFOR encompassed a duty to accommodate. The dissent was echoed by the Canadian Human Rights Commission, which asked Parliament (to no avail) to remedy this problem.<sup>34</sup> It was a serious problem since BFOR language was pervasive in Canadian human rights legislation, and the effect of *Bhinder* seriously undercut *O'Malley*. The dissent has now been vindicated in the recent Supreme Court of Canada decision in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,<sup>35</sup>

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<sup>32</sup> *Supra*, note 3.

<sup>33</sup> R.S.C. 1985, c. H-6.

<sup>34</sup> Canadian Human Rights Commission, *A Special Report to Parliament: The Effects of the Bhinder Decision on the Canadian Human Rights Commission* (Ottawa: Queen's Printer, February 1986).

<sup>35</sup> *Supra*, note 4.

where the facts were again that an employee's religion conflicted with his employer's work schedule. There appears to be some difference between the majority (Wilson J. with Dickson C.J.C., L'Heureux-Dubé and Cory JJ.) and the minority concurring justices (Sopinka J. with LaForest and McLachlin JJ.) as to the precise reasoning behind the rejection of *Bhinder*. (It is arguable that the minority is closer in reasoning to Dickson C.J.'s dissent in *Bhinder* than is the majority, of which he was a part.) The majority holds, in fact, that BFOR only applies when there is direct as opposed to unintended discrimination. The result, however, is that the *Bhinder* restriction has been laid to rest — the existence of a "bona fide occupational requirement" defence does not remove the employer's obligation reasonably to accommodate its employees' needs where those are based upon factors covered in human rights legislation. This decision has important consequences, particularly for religious minorities and persons with disabilities.

The next step, after the break-through in *O'Malley*, was to recognize that discrimination can occur in a systemic way — that is, as a result of a system or pattern in which there is no single clear-cut refusal or discriminatory requirement. Rather, a number of factors work together to exclude a group. That next step was taken in 1987 in a case about systemic discrimination against women in the blue collar workforce, involving the propriety of an affirmative action remedy for that discrimination. In *Action Travail des Femmes*,<sup>36</sup> the Chief Justice led a unanimous Court in emphasizing that human rights legislation reflects fundamental values of Canadians. He went on to describe the way in which systemic discrimination works:

[It results from] the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job."<sup>37</sup>

The decision upheld the affirmative action remedy, based upon the need to get women into the previously closed workforce in order to defeat further intentional discrimination, to counter stereotyping, and to build a "critical mass" of women there.

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<sup>36</sup> *Supra*, note 8.

<sup>37</sup> *Ibid.* at 1139.

After these two decisions (*O'Malley* and *Action Travail des Femmes*), the possibility of pulling these themes into the section 15 analysis became apparent.

Some foreshadowing of a trend in *Charter* equality cases appeared in *Edwards Books*<sup>38</sup> (which concerned the validity of Ontario Sunday closing legislation in the light of the *Charter* guarantee of freedom of religion.) There, Chief Justice Dickson, having discussed the vulnerability of retail employees, said:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the conditions of less advantaged persons.<sup>39</sup>

The consciousness of the risks inherent in relentless enforcement of individual rights is significant, and so is the use of language referring to "less advantaged persons." They clearly reflect an approach which looks for equality of results — substantive and not merely formal equality.

Three years later, in 1989, the Supreme Court gave its decisions in *Andrews*<sup>40</sup> and *Turpin*,<sup>41</sup> indicating the direction for section 15 interpretation. It is a direction away from the U.S. approach and consistent with Canadian human rights jurisprudence. (Some recent decisions pronounced after this paper was delivered in October, 1990 show that there are still many forks in the road — but that is not my topic here).<sup>42</sup> The Court found that the purpose of section 15 is to assist persons who are denied equality on a basis that is "discriminatory" in the sense that it is based upon a factor referred to by section 15 (personal characteristics such as race, religion, sex, age, disability, ethnic or national origin) or a factor analogous to those. Section 15 is not about attempting to guarantee fairness in the world in some overall way, as for example between opticians and optometrists who might labour under different regulatory schemes. Rather it is about the alleviation of the disadvantage of persistently disadvantaged groups.

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<sup>38</sup> *Edwards Books & Art Ltd. v. R.*, [1986] 2 S.C.R. 713.

<sup>39</sup> *Ibid.* at 779.

<sup>40</sup> *Supra*, note 14.

<sup>41</sup> *R. v. Turpin*, [1989] 1 S.C.R. 1296.

<sup>42</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *R. v. Hess*, [1990] 2 S.C.R. 906.



Chief Justice Dickson did not write a separate opinion in the case, but concurred with Madame Justice Wilson in *Andrews*, who said:

[The determination about whether a group is analogous to those specified in s. 15] is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.<sup>43</sup>

And, as Professor Gibson puts it, “[a]fter discarding jurisprudence under the American and Canadian Bills of Rights, Justice McIntyre [writing for the majority on this point] warmly endorsed a third source of inspiration: experience under federal and provincial human rights legislation.”<sup>44</sup> McIntyre J. said that the language of section 15 “reflected the expanded concept of discrimination being developed under the various Human Rights Codes. . .”<sup>45</sup> The definition of “discrimination” was clearly inspired by the human rights jurisprudence, in particular cases such as *O’Malley* and *Action Travail des Femmes*.

Finally, in *Andrews*, the “similarly situated” test (used in United States equal protection analysis) was roundly rejected. Some commentators (including this one) have noted that this aspect of the *Andrews* case is somewhat problematic unless it is clearly understood what is being rejected. In my view, what is being rejected is the fallacy that a command to ‘treat similarly situated persons similarly, and differently situated persons differently’ is informative. In fact, this injunction does not provide a test. Rather, it is like a matrix — it only becomes informative once a decision has been made about the variables which will be plugged in. To use an example, in the *Bliss* case<sup>46</sup> the issue was whether the *Unemployment Insurance Act*<sup>47</sup> discriminated against women by disentitling pregnant women from regular benefits during a particular period of time around the date when they were expected to give birth. You get different answers as to whether the “similarly situated” test was violated depending upon whether you view Stella Bliss as similarly situated to other employees who had worked and paid premiums for the same period of time that she had,

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<sup>43</sup> *Supra*, note 14 at 152.

<sup>44</sup> See Dale Gibson ???.

<sup>45</sup> *Supra*, note 14 at 170.

<sup>46</sup> *Supra*, note 6.

<sup>47</sup> R.S.C. 1985, c. U-1.

and who were ready, willing and able to work (then there *was* a violation) or as similarly situated to other pregnant employees who had not worked long enough to qualify for the special maternity benefits (then, as the Court decided, there was *not* a violation). You need another principle (or a meta-rule) to assist in deciding which variables to use. *Andrews* and *Turpin* suggest such a principle: the elimination of disadvantage based upon personal characteristics such as race, religion, sex, disability and age. Once that principle is determined, it becomes a considerably more straightforward matter to decide whether or not there has been a violation in a given case, and the temptation to mistake the "similarly situated" formula for a test can be more easily resisted.

Having seen that in a sense the Chief Justice's reasons in *Edwards Books* foreshadowed the approach taken in *Andrews*, it is interesting to note that the approach in *Andrews* in turn foreshadowed the 1989 decision in *Brooks v. Canada Safeway*,<sup>48</sup> overruling the Court's own earlier decision in *Bliss*.

*Bliss*<sup>49</sup> was a unanimous Supreme Court decision in 1978 under the *Canadian Bill of Rights*. The Court found statutory discrimination based on pregnancy not to amount to sex discrimination. It provided a series of controversial justifications for its decision: the discrimination was created by "nature" not the statute; all pregnant persons were treated alike (so the "similarly situated" test was passed); there was a valid federal objective for the legislation as a whole; and the claim was based upon denial of a benefit rather than imposition of a burden. Mr. Justice Dickson, as he then was, participated in that decision. He and others subsequently explained the *Bliss* case as driven by judicial reluctance to strike down legislation under a mere statute (the *Canadian Bill of Rights*). Nevertheless, *Bliss* was followed in numerous contexts in Canadian law, including cases under human rights statutes and in the *Morgentaler* case at the Ontario Court of Appeal level<sup>50</sup> (where the Court said there could not be a denial of equality to women resulting from criminalization of abortion). It stood rather clearly for the proposition that if women are discriminated against for something that happens only to women (such as pregnancy), that does not count as sex discrimination.

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<sup>48</sup> *Supra*, note 10.

<sup>49</sup> *Supra*, note 6.

<sup>50</sup> *R. v. Morgentaler* (1986), 22 D.L.R. (4th) 641 at 683.

*Bliss* was overruled in 1989 in *Brooks*,<sup>51</sup> a human rights case involving similar issues. An employer's disability plan excluded coverage for pregnant women during the later part of their pregnancies. The Manitoba Court of Appeal had held that this was no violation of the provincial Human Rights Code. The Supreme Court held that it was, and that pregnancy discrimination is sex discrimination. Chief Justice Dickson wrote reasons for a unanimous court (which included Mr. Justice Beetz, the only other member who had also sat on the *Bliss* case ten years earlier) saying:

It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult . . . . In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.

Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose, which was noted earlier in the quotation from *Andrews, supra*, is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan.<sup>52</sup>

Considerably less dramatic reasoning could have been used to justify the decision in *Brooks*. Conceivably, *Bliss* could have been distinguished. It would also have been possible to overrule *Bliss*, and hold that discrimination based on pregnancy is sex discrimination, simply on the strength of the logical argument that discrimination against part of a group is still discrimination on the basis of membership in the group. For example, a rule that disadvantaged married women, but not married men, would be discriminatory against women even though single women were not encompassed by it. Those possibilities, and others along a spectrum, would have recognized the validity of the complaint but would have failed to address the fundamental issues at stake.

Those fundamental issues have to do with the meaning of pregnancy in our society. Should we view pregnancy essentially as a private, voluntary activity on the part of a woman, in which society has no particular role, and for which the individual woman should bear the costs (along with an individual man if one is in the picture)?

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<sup>51</sup> *Supra*, note 10.

<sup>52</sup> *Ibid.* at 1237-38.

Or should we view pregnancy in a more complex way, taking into account some aspects of pregnancy that have always been wholly outside legal cognizance? To view pregnancy in a more complex way, we would have to consider the following matters:

(a) Pregnancy is very often not voluntary for particular women. Women can and do become pregnant as a result of forced or coerced sexual activity, and as a result of failed or inadequate birth control. Indeed, pregnancy may often be the unintended consequence of voluntary activity, similar to rugby or skiing injuries (which are not typically excluded from disability plans.) It is a strange usage of "voluntary" to refer to unintended consequences as "voluntary."<sup>53</sup>

(b) Most importantly, pregnancy is not really a voluntary matter for women as a group. As a species we wish to continue to exist, and women are the members of the species who carry and give birth to the children. This is not to invoke biological determinism, but to point to another aspect of the usage of "voluntary" here — if it makes sense at all, it is only for individual women, one at a time.

(c) That observation logically leads one to question the very assumption that reproduction is a "private matter." It is certainly true that our social, political, and economic life have traditionally been defined in a way which renders reproductive work (and work in the home) invisible. The work that women have done in the "domestic sphere" has not counted as "work" in societal, political, or economic terms. The recognition that the societal accounting and reward system is skewed in ways that inevitably subordinate women, has led feminists to argue that the "private/public" distinction itself needs to be wholly re-examined.<sup>54</sup>

In the *Brooks* case, Chief Justice Dickson refused to duck those fundamental issues. The recognition that women are socially disadvantaged by pregnancy, that this should not be the case, and that human rights legislation provides a vehicle for remedying particular instances of such disadvantage, marks a straightforward rejection of the argument that women's reproductive activity is an individually

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<sup>53</sup> M. O'Brien, *The Politics of Reproduction* (Boston: Routledge & Kegan Paul, 1981); C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); R. West, "Jurisprudence and Gender" (1988) 55 U. of Chicago L.R. 1.

<sup>54</sup> H. Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" (1986) 10:2 Dalhousie L.J. 107; J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; M.J. Horowitz, "The History of the Public/Private Distinction" (1982) 130 U. Penn. L. Rev. 1423.

voluntary and private matter. In *Janzen v. Platy Enterprises Ltd.*,<sup>55</sup> another human rights case from Manitoba argued and decided at the same time as *Brooks*, Chief Justice Dickson wrote reasons for the Court recognizing that sexual harassment is a form of sex discrimination prohibited under human rights legislation. Again, the reasons showed a new understanding of the nature of the problem — power imbalance — as may be seen in this passage:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment....When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.<sup>66</sup>

*Brooks* and *Janzen*, taken together, clearly preclude the old view of sex equality — that women have the right to be treated the same as men only so far as and to the extent that they are the same as men. Instead, sex-specific conditions (pregnancy and vulnerability to sexual harassment) are recognized as a basis for claims of discrimination.

The *Brooks* and *Janzen* cases, then, seem to me to mark some profound theoretical advances. First, retaining wholly male-defined norms for the workplace is identified as problematic. Second, social disadvantage for women centred on women's role in procreation or vulnerability to sexual harassment is recognized and this recognition is incorporated into the test for whether there has been a violation of the anti-discrimination guarantee. Third, there is a departure from the strictures of the public/private distinction that marked the *Bliss* case. Finally, in rejecting the "similarly situated test" and the same-treatment model with which it is associated, the Court allowed for the possibility of a new, uniquely Canadian, vision of equality.

It is apparent that these theoretical advances are grounded in an understanding of the concrete and would not have been possible without such an understanding. For example, *Action Travail des Femmes* is striking for the detail in the Chief Justice's recital of the facts. The facts showed the various ways that women had been

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<sup>55</sup> *Supra*, note 11.

<sup>56</sup> *Ibid.* at 1284.

systemically excluded from blue collar employment with C.N. Rail. Without studying and considering as a whole this mass of detail about specific instances, the Court's generalizations about systemic discrimination might not have been possible and certainly would not have been well grounded.

That same grasp of the factual basis for women's equality claims may be found in the Chief Justice's reasons in the *Morgentaler*<sup>57</sup> case. Detailed evidence about the inaccessibility of safe medical abortions led the majority to the conclusion that former section 251 of the *Criminal Code* violated women's right to security of the person under section 7. Dickson C.J. and Lamer J. also observed that every pregnant woman was told by the section that she could not submit to a generally safe medical procedure that might be of clear benefit to her unless she met criteria entirely unrelated to her own priorities and aspirations. The removal of decision making power not only threatened women in a physical sense, but also the indecision inflicted emotional stress, violating security of the person rights. A similar point can be made about the *Daigle* case,<sup>58</sup> where an individual woman's decision-making power over her own body was threatened in a dramatic way. The comprehension of her situation must have grounded the Court's decision to hear the case in such extraordinary circumstances, and to give reasons that made it clear that other women could not be subjected to the same ordeal.

The outcomes in both the *Morgentaler* and the *Daigle* case were tremendously important for Canadian women. Although *Morgentaler* was not argued as an equality rights case, *Daigle* was and, I am convinced, other cases involving attempts to restrict women's reproductive choice will be. Such an equality rights approach would weave in a number of the threads I have mentioned here: (1) recognition of the concrete and pervasive disadvantaging of Canadian women, particularly women of colour, with disabilities, of different sexual orientation than the majority; (2) recognition that women's exercise of reproductive capacities frequently is the occasion for increased disadvantaging, particularly in the paid workforce but not only there; (3) an approach to equality that focuses on alleviating disadvantage of subordinated groups; (4) looking at decisional rights and equality rights together — it is not just that we have, as a society, placed a high premium on the ability to preserve bodily integrity (as Dickson

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<sup>57</sup> *Supra*, note 1.

<sup>58</sup> *Supra*, note 15.

J. points out in *Morgentaler*) but that when we look at the number of ways in which women have been vulnerable to interference with bodily integrity (physical and sexual abuse, forced child-bearing, forced denial of child-bearing through sterilization) we see a pattern of systemic discrimination that has served to keep women in a subordinate position; (5) seeing the *Charter* equality sections as, at a minimum, a guarantee that the law will not *worsen* disadvantage.

## CONCLUSION

IT WOULD BE PRESUMPTUOUS for me to speculate about how or why Chief Justice Dickson became a leader on women's equality issues. However, this occasion does allow me to remark that his decisions in the area of equality rights for women (and equality rights in general) seem to disprove the hypothesis that direct experience is the only way to gain a meaningful and useful understanding of inequality problems. Probably the chances are greater that some women, moved by their own experiences, will understand issues like systemic discrimination, sexual harassment, the effects of denial of reproductive choice, and the arbitrariness of relegating reproductive work to the realm of the invisible better than a man will. But it does not follow that it is impossible for anyone not personally implicated to understand these problems in a useful way. The understanding will be different because vicarious, but that does not make it illegitimate or ineffective.

Chief Justice Dickson obviously has had the capacity to put himself in others' shoes and the inclination to remedy disadvantage where the legal tools are available. To have had a Chief Justice of Canada with that capacity, that inclination, and the ability to write decisions of a clarity and directness that is seldom equalled, has been an enormous stroke of good fortune for the women of Canada.