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

Susan Brooks

Appellant

v.

Canada Safeway Limited

Respondent

and between

Patricia Allen and Patricia Dixon and the Manitoba Human Rights Commission

Appellants

v.

Canada Safeway Limited

Respondent

and

Women's Legal Education and Action Fund (L.E.A.F.)

Intervener

Indexed as: Brooks *v.* Canada Safeway Ltd.

File No.: 20131.

1988: June 15; 1989: May 4.

Present: Dickson C.J. and Beetz, McIntyre, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

On appeal from the court of appeal for manitoba

The judgment of the Court was delivered by

THE CHIEF JUSTICE -- The principal issue to be considered in these appeals is whether a company accident and sickness plan which exempts pregnant women from benefits during a seventeen-week period discriminates because of sex, as prohibited by *The Human Rights Act* of Manitoba, S.M. 1974, c. 65.

In March of 1983, Susan Brooks, of Brandon, Manitoba, laid a complaint before the Manitoba Human Rights Commission against her employer, Canada Safeway Ltd. (Safeway), on the ground that Safeway's employee benefit plan contravened s. 6(1) of *The Human Rights Act* of Manitoba. Mrs. Brooks said the plan discriminated on the basis of sex and family status in denying certain benefits to pregnant women. At a later date Patricia Allen and Patricia Dixon laid similar complaints. The Attorney General of Manitoba, the Honourable Roland Penner, Q.C., appointed J. F. Reeh Taylor, Q.C., a Board of Adjudication to hear and decide the three complaints. The adjudicator held against the complainants, as did the Court of Queen's Bench and the Court of Appeal for Manitoba. Leave was granted to appeal to this Court, [1987] 1 S.C.R. vi.

I

Facts

Susan Brooks, Patricia Allen and Patricia Dixon were part-time cashiers employed by Safeway. All three became pregnant during 1982. Safeway maintains a group insurance plan that, among other forms of coverage, provides weekly benefits for loss of pay due to accident or sickness. Safeway describes its benefit package to employees in a pamphlet entitled *Group Insurance Benefits For You and Your Dependents* as follows:

> Weekly benefits are payable in event of loss of earnings due to accident or sickness which prevents you from performing any and every duty pertaining to your employment or occupation. You need not be house-confined; however, you must be under the direct care of a physician.

To qualify for coverage under the plan, an employee must have worked for Safeway for three consecutive months. Benefits are payable to a maximum of 26 weeks during any continuous period of disability. Employees receive two-thirds of weekly salary up to a ceiling of $189 per week.

Prior to an amendment on January 1, 1981, pregnancy was exempted from coverage under the plan. At the time each of the appellants became pregnant the plan provided:

> Disability benefits will also be made available for pregnancy related illness. However, disability benefits will not be payable:
>
> a)during the period commencing with the tenth week prior to the expected week of confinement and ending with the sixth week after the week of confinement;
>
> b)during any period of formal maternity leave taken by the employee pursuant to provincial or federal law or pursuant to mutual agreement between the employee and the Company, or
>
> c)during any period for which the employee is paid Unemployment Insurance maternity benefits.

There is no dispute that the Safeway plan treats pregnancy differently from other health-related causes of inability to work. Pregnant employees are excluded from receiving any benefits during what is referred to as the "10-1-6" period, namely, the ten weeks before the anticipated date of birth, the actual birth week, and six weeks after. During this seventeen-week period, the exemption from coverage is absolute regardless of the reason an employee is unable to report to work. Pregnant women suffering from non-pregnancy-related afflictions are ineligible for benefits simply because they are pregnant. Women who are unable to work because of pregnancy-related complications are also not eligible to receive weekly benefits. The mere fact of pregnancy disentitles Safeway's female employees from receiving standard compensation for temporary disability during the "10-1-6" period.

For part of the period during which pregnant women are ineligible to receive disability benefits, some coverage is available under the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, as amended. At the relevant time s. 30 of that Act provided for the payment of weekly benefits for unemployment resulting from pregnancy for a maximum of fifteen weeks in the following periods:

30. . . .

(2) Benefits under this section are payable for each week of unemployment in the period

(*a*) that begins

(i) eight weeks before the week in which her confinement is expected, or

(ii) the week in which her confinement occurs,

whichever is the earlier, and

(*b*) that ends

(i) seventeen weeks after the week in which her confinement occurs, or

(ii) fourteen weeks after the first week for which benefits are claimed and payable in any benefit period under this section,

whichever is the earlier,

if such a week of unemployment is one of the first fifteen weeks for which benefits are claimed and payable in her benefit period.

Section 30 was substantially amended in *An Act to amend the Unemployment Insurance Act, 1971 (No. 3)*, S.C. 1980-81-82-83, c. 150, s. 4.

The maternity benefits available under the *Unemployment Insurance Act, 1971* did not constitute an exact substitute for the coverage that would be provided by the Safeway plan. Women were only entitled to a maximum of fifteen weekly payments under the *Unemployment Insurance Act, 1971* but were deprived of seventeen weeks of benefits under the Safeway plan. For two weeks Safeway employees unable to work by reason of pregnancy were without a source of unemployment benefits. Employees also received less money per week under the *Unemployment Insurance Act, 1971* provisions than they would have if they were entitled to recover under the Safeway plan. Benefits under the *Unemployment Insurance Act, 1971* were calculated on the basis of 60 per cent of eligible income. The Safeway plan, in contrast, provided 66 2/3 per cent of weekly earnings. The qualifying period for benefits under the *Unemployment Insurance Act, 1971*was also significantly longer than the qualifying period under the Safeway plan. During the relevant period, s. 30(1) of the *Unemployment Insurance Act, 1971* required a woman to have ten weeks of insurable earnings in the twenty-week period immediately preceding the thirtieth week before the expected date of childbirth, in other words, to have commenced work at least forty weeks before the anticipated date of birth. The Safewayplan entitled employees to full coverage after only three months of employment.

All three appellants applied for weekly benefits under the Safeway plan for a period of pregnancy related disability that included the seventeen-week disentitlement period. All three claims were refused. The appellants applied for, and received, pregnancy benefits under the *Unemployment Insurance Act, 1971*. Each appellant received less money than she would have received had she been eligible under the Safeway plan. We were told, for example, that in the case of Mrs. Brooks, Unemployment Insurance provided $133.47 weekly, compared to approximately $188 weekly she might have received under the Safeway plan.

Each of the appellants filed a complaint with the Manitoba Human Rights Commission alleging that the differential treatment of pregnancy in the Safeway plan constituted discrimination on the basis of sex and on the basis of family status contrary to s. 6(1) of *The Human Rights Act* of Manitoba.

II

Legislation

At the time of the applications, the relevant sections of the Manitoba *Human Rights Act* provided:

Discrimination prohibited in employment

6 (1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment or in respect of training for employment or in respect of an intended occupation, employment, advancement or promotion, and in respect of his membership or intended membership in a trade union, employers' organization or occupational association; and, without limiting the generality of the foregoing

(a) no employer or person acting on behalf of an employer, shall refuse to employ, or to continue to employ or to train the person for employment or to advance or promote that person, or discriminate against that person in respect of employment or any term or condition of employment;

(b) no employment agency shall refuse to refer a person for employment, or for training for employment, and

(c) no trade union, employers' organization or occupational association shall refuse membership to, expel, suspend or otherwise discriminate against that person; or negotiate, on behalf of that person, an agreement that would discriminate against him;

because of the race, nationality, religion, colour, sex, age, marital status, physical or mental handicap, ethnic or national origin, or political beliefs or family status of that person.

Exception

7 (2) No provision of section 6 or subsection (1) shall prohibit a distinction on the basis of age, sex, family status, physical or mental handicap or marital status

(a) of any employee benefit plan or in any contract which provides an employee benefit plan, if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted;

In 1987 the Manitoba *Human Rights Act* was repealed and replaced by *The Human Rights Code*, S.M. 1987-88, c. 45. Section 6 of the former Act was replaced by s. 9 which prohibits discrimination on a number of grounds including:

9 (2) . . .

(f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

The Human Rights Tribunal

1. *The Complaint of Susan Brooks*

The complaint of Mrs. Brooks was heard before the complaints of the other two appellants: (1984), 6 C.H.R.R. D/2560. Adjudicator Taylor concluded that the complaint of Mrs. Brooks had been filed out of time. Section 19 of *The Human Rights Act* required a complaint to be filed with the Commission "not later than 6 months after the date of the alleged contravention or, where a continuing contravention is alleged, after the date of the last alleged contravention . . ." Mrs. Brooks filed her complaint on March 22, 1983. The adjudicator found that the contravention, if any, occurred at the beginning of the disentitlement period, on or about August 30, 1982, when Safeway notified Mrs. Brooks that she was denied benefits. Adjudicator Taylor did not regard Safeway's refusal to pay benefits throughout the seventeen-week period as a continuing contravention within the meaning of the statute.

In anticipation of the two other complaints, and in the event he had erred in holding the complaint by Mrs.Brooks to be out of time, Adjudicator Taylor dealt with the merits of Mrs. Brooks' complaint. He considered first the question whether the Safeway plan did in fact discriminate against pregnant employees. The adjudicator made the following remarks (at p. D/2562):

> It is a simple fact, undisputed by the Respondent, that the treatment accorded a pregnant employee under the Canada Safeway Limited accident and sickness plan is markedly different from that accorded any other employee. Indeed, it is not merely pregnancy-related problems that are not covered under the plan during the seventeen-week period referred to above; any accident or sickness, whether pregnancy-related or not, occurring during the same seventeen weeks is

> excluded from the Canada Safeway Limited plan, and the pregnant employee must, during that limited time, rely upon benefits obtainable from the Unemployment Insurance Commission. Even if she qualified to receive U.I.C. benefits during the entire seventeen weeks, the pregnant employee will receive a lesser amount during that period than would a non-pregnant employee who was away from work by reason of some other physical disability.

Adjudicator Taylor had no difficulty in concluding that Safeway's plan, "while by all accounts a generous one, does in fact discriminate against pregnant employees."

Having established the existence of pregnancy-based discrimination, the adjudicator then focussed his attention on the question whether to discriminate against someone because of her pregnancy is to discriminate against her "because of (her) sex or family status". He was of the view that the concept of family status was inapplicable to pregnancy since in his view an unborn child is not yet a member of a "family" and therefore could not be considered as part of a complaint of discrimination because of family status.

Adjudicator Taylor then rejected the argument that discrimination on the basis of pregnancy is discrimination on the basis of sex. He relied on the decision of this Court in *Bliss v. Attorney General ofCanada*, [1979] 1 S.C.R. 183. In *Bliss*, the Court held that s. 46 of the *Unemployment Insurance Act, 1971*, which disentitled pregnant women from receiving basic unemployment benefits, restricting them to special maternity benefits during a portion of their pregnancy, did not deny women the right to equality free from discrimination on the basis of sex, guaranteed by s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. Adjudicator Taylor noted that *Bliss* had been followed across the country and that courts in England and in the United States had also concluded that discrimination on the basis of pregnancy did not amount to sex discrimination. He observed that after the Supreme Court of the United States of America had held in*Geduldig v. Aiello*, 417 U.S. 484 (1974), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville*

Gas Co. v. Satty, 434 U.S. 136 (1977), that discrimination by reason of pregnancy was not synonymous with discrimination by reason of sex, the Congress of the United States enacted a bill amending Title VII of the*Civil Rights Act of 1964* so as to include, within the meaning of discrimination on the basis of sex, discrimination based upon pregnancy, childbirth or related medical conditions. The adjudicator also pointed to the fact that some provinces had amended their human rights legislation in the wake of *Bliss* to add pregnancy as a prohibited ground of discrimination. Adjudicator Taylor interpreted these amendments as recognition that sex discrimination does not include discrimination on the basis of pregnancy. Absent a broadened definition, the adjudicator concluded he was bound by *Bliss* to hold that discrimination on the basis of pregnancy was not sex discrimination.

2. *The Complaints of Patricia Allen and Patricia Dixon*

The complaints of the appellants Mrs. Allen and Mrs. Dixon were heard by Adjudicator Taylor one month after the decision in Mrs. Brooks' complaint. For the reasons given in *Brooks*, the adjudicator held that the appellants had not suffered discrimination on the basis of sex or family status contrary to s. 6(1) of the Manitoba *Human Rights Act*: (1985), 6 C.H.R.R. D/2840.

IV

The Manitoba Court of Queen's Bench

Mrs. Brooks, Mrs. Allen, Mrs. Dixon and the Human Rights Commission of Manitoba appealed the decisions of Adjudicator Taylor. Simonsen J. delivered brief reasons: (1985), 38 Man. R. (2d) 192, 86 CLLC {PP} 17,010, 7 C.H.R.R. D/3185. He began by rejecting the adjudicator's conclusion that the complaint of Mrs. Brooks was out of time. In Simonsen J.'s

view, the refusal to pay benefits for seventeen weeks amounted to continuing discrimination. There was nothing in the Manitoba *Human Rights Act* requiring the limitation period to commence during the first week for which benefits could have been claimed. Simonsen J. took the view that the alleged seventeen weeks of discrimination commenced on August 21, 1982 and ended on December 22, 1982 and that the limitation period would begin to run on the later date. Mrs.Brooks' complaint, filed on March 22, 1983, was therefore timely, that is, within the six-month limitation period.

Simonsen J. agreed with the adjudicator's finding, as well as his reasoning, that the Safeway plan discriminated against pregnant employees. He said:

> It must be recognized . . . that no benefits were payable for accident or sickness to a pregnant employee during the 17 week exclusion period whether related to pregnancy or not. Coverage under the policy for a pregnant employee was suspended for 17 weeks.

He continued:

> Was it discrimination to have a group policy which suspended coverage to a pregnant employee for the 17 week period during which some alternate coverage in the form of unemployment insurance was available? There was no obligation on the pregnant employee to take leave for the 17 week period but when leave was taken unemployment insurance was the only option available.
>
> The learned adjudicator found discrimination. I agree with his reasoning and conclusions.

Simonsen J. then considered whether discrimination on the basis of pregnancy was prohibited by the Manitoba *Human Rights Act*. He agreed with the adjudicator's conclusion that pregnancy was not encompassed in "family status" and held that the Safeway plan could not be faulted for discriminating on the basis of family

status. Simonsen J. was also of the view, largely on the authority of *Bliss* and cases subsequent to that decision, that the adjudicator was correct in finding that discrimination on the basis of pregnancy was not included in the phrase "discrimination by reason of sex". In the absence of an expanded statutory definition of sex, Simonsen J. felt he could reach no other conclusion.

V

The Court of Appeal of Manitoba

In very brief reasons, the Manitoba Court of Appeal (O'Sullivan, Huband and Twaddle JJ.A.) unanimously dismissed the appeal: (1986), 42 Man. R. (2d) 27, 7 C.H.R.R. D/3475. The decision of the Manitoba Court of Appeal may be set out in full:

> The facts are amply canvassed by Simonsen J., with whose reasons we substantially agree, but we go further and say we are not satisfied that in the context of this case there was any discrimination at all.
>
> It may be noted that the disability plan in question is only part of a health benefit package agreed to between employer and union. One questions why complaint was not made against the union as well as against the company.
>
> The appeal is dismissed with costs.

VI

Issues and Interventions

The appellants appealed the decision of the Manitoba Court of Appeal on the following issues:

1. Did the Court of Appeal for Manitoba err in concluding that the disability plan offered by the respondent to its employees was not discriminatory?

2. Did the Court of Appeal for Manitoba err in law in adopting the conclusion of the learned judge and adjudicator below that discrimination due to "pregnancy" does not constitute discrimination because of "sex", as prohibited by the Manitoba *Human Rights Act*?

3. Did the Court of Appeal for Manitoba err in law in adopting the conclusion of the learned judge and adjudicator below that discrimination due to "pregnancy" did not constitute discrimination on "family status", as set out in the Manitoba *Human Rights Act*?

The question of the timeliness of Mrs. Brooks' complaint was not raised before this Court.

The Women's Legal Education and Action Fund (L.E.A.F.) intervened in support of the appellants' position.

VII

Was the Disability Plan Discriminatory?

What does discrimination mean? The most recent pronouncement on this point will be found in the judgment of my colleague, McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 173-75:

> What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is

little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer . . . adopts a rule or standard . . . which has a discriminatory effect upon a prohibited ground on one employee or 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". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At page 547, this proposition was expressed in these terms:

> The Code aims at the removal of discrimination. This is to state the obvious. Its 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 it does, in fact, cause discrimination; 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.

In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, better known as the *Action Travail des Femmes* case, where it was alleged that the Canadian National Railway was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, in denying employment to women in certain unskilled positions, Dickson C.J. in giving the judgment of the Court said, at pp. 1138-39:

> A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.

> Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .

> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above. I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The first issue in these appeals is whether the complete disentitlement of pregnant women during a seventeen-week period from receiving disability benefits under the Safeway plan constitutes discrimination by reason of pregnancy. In my view, this ground of appeal may be addressed briefly. I have no difficulty in concluding that the Safeway sickness and accident plan discriminates against pregnant women.

As I have indicated, Adjudicator Taylor found the treatment accorded a pregnant employee (at p. D/2562):

. . . markedly different from that accorded to any other employee. Indeed, it is not merely pregnancy-related problems that are not covered under the plan during the seventeen week period . . . ; any accident or sickness, whether pregnancy related or not, occurring during that same seventeen weeks is excluded . . . .

He also observed that even if the employee qualifies for maternity benefits from the Unemployment Insurance Commission, the pregnant employee would receive (at p. D/2562):

> . . . a lesser amount during that period than would a non-pregnant employee who was away from work by reason of some other physical disability.

Simonsen J. shared the view that the plan discriminated against pregnant women.

The Court of Appeal for Manitoba was not satisfied that in the context of the case there was any discrimination at all. Apart from noting that the disability plan in question was only part of a health benefit package agreed to between employer and union, the Court gave no reason for finding an absence of discrimination.

In my view, it is beyond dispute that pregnant employees receive significantly less favourable treatment under the Safeway plan than other employees. For a seventeen-week period, pregnant women are not entitled to any compensation under the plan, regardless of the reason they are unable to work. During those seventeen weeks, even if a pregnant woman suffers from an ailment totally unrelated to pregnancy, she is ineligible for benefits simply because she is pregnant. The plan singles out pregnancy for disadvantageous treatment, in comparison with any other health reason which may prevent an employee from reporting to work. With the sole exception of pregnancy, eligibility for compensation under the plan is available on broad and general terms. It is indeed generous, save in respect of pregnant women. For any single continuous period during which an employee is incapable of performing at work for health reasons, 26 weeks of benefits are available. Employees may recover under the plan without being house confined. No restrictions are placed on disability, with the solitary exception of pregnancy. It is difficult to conclude otherwise than

that, as a result of the unfavourable treatment accorded to pregnancy *vis-à-vis* all other medical conditions, the Safeway plan discriminates on the basis of pregnancy.

Counsel for Safeway advanced a number of arguments in support of the proposition that the disability plan does not discriminate by reason of pregnancy. The submissions can be grouped into five main headings. First, it was argued that pregnancy is neither "a sickness or an accident" and therefore, it need not be covered by a sickness and accident plan; second, that pregnancy is a voluntary state and, like other forms of voluntary leave, it should not be compensated; third, the plan could not be discriminatory because there was no intention to discriminate; fourth, the plan was not discriminatory but was underinclusive in that it exempted certain disabilities from coverage; finally, on the basis of a rather novel interpretation of the relationship between regulations under the *Unemployment Insurance Act, 1971,* and the Manitoba *Human Rights Act* it was claimed that *The Human Rights Act* implicitly permits employee benefit plans to exclude compensation for pregnancy. In my view, none of these arguments can assist Safeway in escaping the conclusion that its sickness and accident plan discriminates on the basis of pregnancy.

The first two claims, that pregnancy is neither an accident nor an illness and that it is voluntary, are closely related. I agree entirely that pregnancy is not characterized properly as a sickness or an accident. It is, however, a valid health-related reason for absence from the workplace and as such should not have been excluded from the Safeway plan. That the exclusion is discriminatory is evident when the true character, or underlying rationale, of the Safeway benefits plan is appreciated. The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. 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. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery -- which sort of comparison the respondent's argument implicitly makes -- is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. 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. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the

costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose.

In sum, if an employer such as Safeway enters into the field of compensation for health conditions and then excludes pregnancy as a valid reason for compensation, the employer has acted in a discriminatory fashion. In view of this finding, it should be noted that the Safeway plan would be considered discriminatory even if it did not exclude coverage for non-pregnancy-related illness and accidents. It is enough that the plan excludes compensation for pregnancy. That it makes a further exclusion for non-pregnancy-related conditions compounds the discrimination and highlights how the plan's designers viewed pregnancy.

It is also noteworthy that the plan by its own terms, does not exclude pregnancy-related absence from compensation for the major part of the nine months of pregnancy. Although a normal pregnancy is somewhat less than forty weeks in duration, pregnant women, under the plan, are not disentitled until ten weeks before the anticipated week of child birth. During the first twenty-nine weeks of pregnancy, Safeway does not refuse to compensate pregnant employees on the ground that pregnancy is neither an accident nor an illness. It is not compelling to argue that pregnancy is not compensated after twenty-nine weeks because it is a voluntary condition, when, to that point, pregnancy has been compensated under the sickness and disability plan.

The third argument, that the plan cannot be discriminatory because the respondent had no intention to discriminate, has little or no force in light of the decision of this Court in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536. In that case, the Court held that the effect of an impugned practice, not the

underlying intent, was the governing factor in determining whether the practice gave rise to discrimination. Intent to discriminate is not a necessary element of discrimination.

The fourth argument is that the plan is not discriminatory but merely underinclusive of the potential risks it could conceivably insure. Safeway alleges that the decision to exclude pregnancy from the scope of its plan is not a question of discrimination, but a question of deciding to compensate some risks and to exclude others. It seeks support for this argument from two American cases in which the Supreme Court of the United States held that the exclusion of pregnancy from compensation schemes did not constitute discrimination on the basis of sex. In *Geduldig v. Aiello*, *supra*, the Court held that a disability insurance system which did not provide compensation for pregnancy did not violate the equal protection clause of the Fourteenth Amendment. Two years later, in *General Electric Co. v. Gilbert*, *supra*, the Court affirmed this conclusion in the context of Title VII of the *Civil Rights Act of 1964*. In both cases the Court held the group insurance plans to be underinclusive of the risks they chose to insure but held that underinclusiveness did not necessarily amount to discrimination.

In my view, the reasoning in those two cases does not fit well within the Canadian approach to issues of discrimination. In both *General Electric* and *Geduldig* the United States Supreme Court held that distinctions involving pregnancy were constitutionally permissible if made on a reasonable basis, unless the distinctions were designed to effect invidious discrimination against members of one sex or another. In Canada, as I have noted, discrimination does not depend on a finding of invidious intent. A further consideration militating against the application of the concept of underinclusiveness in this context, stems, in my view, from the effects of so-called "underinclusion". Underinclusion may be simply a backhanded way of permitting discrimination. Increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to

provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory fashion. Selective compensation of this nature would clearly amount to sex discrimination. Benefits available through employment must be disbursed in a non-discriminatory manner.

Safeway's fifth argument derives from a creative interpretation of s. 7(2) of the Manitoba *Human Rights Act*. Section 7(2)(a) provides for exceptions to the general prohibition of discrimination embodied in s. 6 of the Act. The section explicitly permits employee benefits plans to draw distinctions on the basis of age, sex, marital status, physical or mental handicap, or family status where "the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted . . .". No regulations were ever prescribed pursuant to this section. Safeway attempts to "read in" regulations by pointing to regulations passed under the *Unemployment Insurance Act, 1971* dealing with employer-provided wage loss plans. Section 19(*h*)(vii) of the*Unemployment Insurance Act, 1971* regulations specifically discusses employer plans which do not compensate pregnant women during the seventeen-week "10-1-6" period. The presence of this regulation, the respondent asserts, indicates that exceptions of this nature must have been envisioned by the drafters of *The Human Rights Act* as constituting a permissible distinction pursuant to s. 7(2).

I cannot agree with the respondent's interpretation. The Manitoba legislature clearly considered the issue of discrimination in benefits plans. Distinction along sex lines might have been permissible in employee benefit plans, had regulations been passed pursuant to s. 7(2). The only conclusion to be reached from the absence of regulations under that provision is that discrimination in employee benefit packages is not permissible. It is not

correct to attribute regulations to the *Human Rights Act* where no regulations have been passed under that Act.

For the foregoing reasons, I am of the view that the respondent's accident and sickness plan discriminates on the basis of pregnancy.

VIII

Is Discrimination on the Basis of Pregnancy Sex Discrimination?

Having found that the Safeway plan discriminates by reason of pregnancy, it is necessary to consider whether pregnancy-based discrimination is discrimination on the basis of sex. I venture to think that the response to that question by a non-legal person would be immediate and affirmative. In retrospect, one can only ask -- how could pregnancy discrimination be anything other than sex discrimination? The disfavoured treatment accorded Mrs. Brooks, Mrs. Allen and Mrs. Dixon flowed entirely from their state of pregnancy, a condition unique to woman. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.

As I have noted, the respondent relies primarily on the decision of this Court in *Bliss v. Attorney General ofCanada*, *supra*, to argue that discrimination by reason of pregnancy is not discrimination on the basis of sex. In *Bliss*, the Court was asked to decide whether s. 46 of the *Unemployment Insurance Act, 1971*, which restricted the eligibility of pregnant women to unemployment benefits, constituted sex discrimination contrary to s. 1(*b*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. Section 1(*b*) provides that each individual is entitled to "equality before the law" without discrimination due to, amongst

other things, sex. The Court held that the complainant had not been deprived of the right to equality before the law. Section 30 of the *Unemployment Insurance Act, 1971* provided pregnancy benefits for the fifteen- week period commencing eight weeks before the anticipated date of childbirth. Section 46 limited the eligibility of pregnant women who were unable to work during this fifteen-week period to benefits under s. 30. The qualifying conditions for benefits under s. 30 were more onerous than those for other types of unemployment benefits. To receive benefits under s. 30, a woman had to have accumulated ten or more weeks of insurable earnings in the twenty weeks immediately preceding the expected date of birth. Basic employment insurance benefits merely required eight weeks of insurable employment in the relevant qualifying period. Ritchie J., speaking for the Court, acknowledged that the effect of ss. 30 and 46 of the Act was to impose conditions on women from which men were excluded, but stated that "[a]ny inequality between the sexes in this area is not created by legislation but by nature". He continued by quoting with approval the following *obiter* passage from the reasons of Pratte J. in the Federal Court of Appeal (at pp. 190-91):

> The question to be determined in this case is therefore, not whether the respondent had been the victim of discrimination by reason of sex but whether she has been deprived of "the right to equality before the law" declared by s. 1(*b*) of the *Canadian Bill of Rights*. Having said this, I wish to add that I cannot share the view held by the Umpire that the application of section 46 to the respondent constituted discrimination against her by reason of sex. 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 section 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.

On this reasoning, pregnancy discrimination was held not to be discrimination on the basis of sex.

Over ten years have elapsed since the decision in *Bliss*. During that time there have been profound changes in women's labour force participation. With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom, I am prepared to say that *Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then. Combining paid work with motherhood and accommodating the childbearing needs of working 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. It is only women who bear children; no man can become pregnant. As I argued earlier, it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women. 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 legislation, more particularly, the *Unemployment Insurance Act, 1971*. The capacity to become pregnant is unique to the female gender. As the appellants state in their factum: "The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not". Distinctions based on pregnancy can be nothing other than distinctions based on sex or, at least, strongly, "sex related". The Safeway plan was no doubt developed, as Brennan J. noted in the *General Electric* case, at pp. 149-50, "in an earlier era when women openly were presumed to play a minor and temporary role in the labor force".

The decision of this Court in *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, augured the demise of *Bliss*. Writing for the Court, Beetz J. said, at p. 301:

> For present purposes I note simply that the improbable distinction in *Bliss* between discrimination based on sex and discrimination based on pregnancy has been called into question and, even if it were to stand, the case might not be decided in the same manner today given this Court's recent recognition of adverse effect discrimination in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

The approach to interpreting human rights legislation taken in *Bliss* is inconsistent with that enunciated by this Court in a number of decisions since *Bliss*. I refer, for example, to *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, *supra*; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, and *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145. La Forest J. summed up the thrust of these more recent cases in *Robichaud v. Canada(Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90:

> The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also *Insurance Corporation of British Columbia v.*

> *Heerspink*, [1982] 2 S.C.R. 145, *per* Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J., in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* (*the Action Travail des Femmes* case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

In the case mentioned earlier, *Andrews v. Law Society of British Columbia,* McIntyre J. rejected a "similarly situated" test in an equality rights challenge under the *Canadian Charter of Rights and Freedoms*. *Bliss* was not a *Charter* case, nor is the case at bar, but the comment of McIntyre J. respecting *Bliss* is of surpassing interest. He stated (at pp. 167-68):

> Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.
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> A similarly situated test focussing on the equal application of the law to those to whom it has application could lead to results akin to those in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. In *Bliss*, a pregnant woman was denied unemployment benefits to which she would have been entitled had she not been pregnant. She claimed that the *Unemployment Insurance Act, 1971* violated the equality guarantees of the *Canadian Bill of Rights* because it discriminated against her on the basis of her sex. Her claim was dismissed by this Court on the grounds that there was no discrimination on the basis of sex, since the class into which she fell under the Act was that of pregnant persons, and within that class, all persons are treated equally.

Professor Peter Hogg in *Constitutional Law of Canada* (2nd ed. 1985), speaking of the *Bliss* case, commented at p. 791:

> Ritchie J., who wrote the unanimous opinion of the Court, denied that the discrimination in the Act was based on sex. He quoted with approval a dictum in the lower court to the effect that the disadvantaged class was defined by pregnancy rather than

> by sex, and Ritchie J. concluded that "any inequality between the sexes in this area is not created by legislation but by nature." This part of the reasoning is open to criticism. Bliss was not claiming the special maternity benefits, for which a longer period of qualification might well have been justifiable. She was claiming the regular benefits, to which she would have been entitled if her employment had been interrupted by layoff, illness or any cause other than pregnancy. The denial of benefits was the result of her pregnancy. Since pregnancy is a condition to which only women are vulnerable, the denial should have been characterized as sexual discrimination. It is true that the Act did not discriminate against all women, only pregnant women, but discrimination against some women should not be treated any differently than discrimination against all women.

I am not persuaded by the argument that discrimination on the basis of pregnancy cannot amount to sex discrimination because not all women are pregnant at any one time. While pregnancy-based discrimination only affects part of an identifiable group, it does not affect anyone who is not a member of the group. Many, if not most, claims of partial discrimination fit this pattern. As numerous decisions and authors have made clear, this fact does not make the impugned distinction any less discriminating.

David Pannick, Barrister and Fellow of All Souls College, Oxford, observed in his work *Sex Discrimination Law* (1985), at pp. 147-48, that:

> The EAT [Employment Appeals Tribunal] was, however, correct to assume that the less favourable treatment (if any) of the pregnant woman was on the ground of her sex. Because only women can become pregnant, the complainant who is dismissed because she is pregnant can argue that she would not have been less favourably treated but for her sex. It requires a very narrow construction of the statute to exclude less favourable treatment on the ground of a characteristic unique to one sex. It is quite true that not all women are (or become) pregnant. But it is important to note that direct discrimination exists not merely where the defendant applies a criterion that less favourably treats all women. It also exists where special, less favourable, treatment is accorded to a class consisting only of women, albeit not all women. Suppose an employer announces that it will employ any man with stated qualifications but only a woman who has those qualifications and who is over six feet tall. Albeit not all women are excluded, the employer has directly discriminated against women

> because it has imposed a criterion which less favourably treats a class composed entirely of women.

I would make note also of the article "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. c/7, at c/11, by Professor James MacPherson:

> In *Bliss v. Attorney-General (Canada)* provisions of the federal Unemployment Insurance Act which treated pregnant women more harshly than all other applicants for unemployment insurance were held not to constitute sex discrimination. "Any inequality between the sexes in this area", wrote Mr. Justice Ritchie for a unanimous Court, "is not created by legislation but by nature".
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> The argument that can be advanced in support of this conclusion is that the unemployment insurance legislation treats all women, except pregnant women, on an equal footing with men with respect to eligibility for benefits, and that the differentiation based on pregnancy works against women not qua women, but rather on the basis of a physical condition. It follows, the argument runs, that the differentiation in the legislation is between two classes of women, not between women and men.
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> In my view, this argument is not valid. The fact that discrimination is only partial does not convert it into non-discrimination. For example, federal legislation that treated some, but not all, Indians more harshly than whites would be discriminatory. Equally, an employer's decision not to hire a particular black solely because of his blackness would run afoul of provincial human rights legislation even though the employer hired other blacks. Legislation or the practice of individuals cannot be saved because they work only a partial discrimination. The legislation in *Bliss* works such a partial discrimination. Although most women are treated equally with men, a certain class, namely those women who are pregnant, are treated more harshly because they are pregnant. Since pregnancy is a condition unique to women, the legislation denies these women their equality before the law. By not recognizing this, and by concluding that differentiation on the basis of pregnancy is not sex-related, the Supreme Court of Canada has decided not to strike against one of the most long-standing and serious obstacles facing women in Canada, namely legislation and employer practices directed against pregnant women.

Reference might also be made to the judgment of Oppal J. of the Supreme Court of British Columbia in*Century Oils (Canada) Inc. v. Davies* (1988), 22 B.C.L.R. (2d) 358, delivered January 28, 1988, in which the following appears, at pp. 364-65:

> It may be unduly restrictive and somewhat artificial to argue that a distinction based on a characteristic such as pregnancy, which is shared only by some members of a group, is not discrimination against the whole group. It is no answer to say that, since pregnancy discrimination is not usually applicable to all women, it is not discrimination on the basis of sex, for discrimination which is aimed at or has its effect upon some people in a particular group as opposed to the whole of that group is not any the less discriminatory. This point was made by a board of inquiry under the former Human Rights Code, R.S.B.C. 1979, c. 186, in the case of *Zarankin v. Johnstone* (1984), 5 C.H.R.R. D/2274, at p. D/2276, . . . wherein the board stated:
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> . . . an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely.
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> It cannot be said that discrimination is not proven unless all members of a particular class are equally affected. The interpretation of sex discrimination which is suggested by the petitioner is unduly restrictive and probably runs contrary to contemporary societal expectations.

Finally, on this point, the respondent referred to *Canada Safeway Ltd. v. Manitoba Food and Commercial Workers Union, Local 832*, [1981] 2 S.C.R. 180, in which this Court restored an arbitration award which found Safeway's "no beards" rule to be a "reasonable" rule. Safeway argues that, by analogy, this Court has already found that discrimination because of pregnancy is not discrimination because of sex. Reference was also made to *Manitoba Human Rights Commission v. Canada Safeway Ltd.*, [1985] 1 S.C.R. x, in which a panel of this Court dismissed the Human Rights Commission's application for leave to appeal the decision thatSafeway's "no beards" rule was not discrimination because of sex. The Manitoba Court of Appeal in a unanimous decision stated that the "no beards" rule was "definitely not a matter of sexual discrimination" ([1985] 1 W.W.R. 479, at p. 480). It

is contended that there is an analogy between that case and the present situation; beards are peculiar to men as pregnancy is peculiar to women; however, not all men grow beards and not all women become pregnant. I do not find these cases helpful; I cannot find any useful analogy between a company rule denying men the right to wear beards and an accident and sickness insurance plan which discriminates against female employees who become pregnant. The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right.

I am also unpersuaded by the respondent's argument that legislative amendments to preclude pregnancy-based discrimination in the aftermath of *Bliss* indicate that the term sex discrimination does not include pregnancy. One cannot conclude from the fact that some provinces have added pregnancy as an express prohibited ground of discrimination in light of a restrictive definition of sex, that discrimination on the basis of sex does not encompass pregnancy-based discrimination.

IX

Discrimination on the Basis of Family Status

In addition to arguing that discrimination based on pregnancy is sex discrimination, the appellants allege that it is discrimination by reason of family status. As I have already found pregnancy discrimination to violate the prohibition on sex discrimination in the Manitoba *Human Rights Act*, it is not necessary to consider this issue and I refrain from doing so at this time.

X

Disposition

I am of the view that the respondent's accident and sickness plan discriminates on the basis of sex by excluding compensation for pregnant women during a seventeen-week period. I would therefore allow these appeals, and set aside the judgment of the Court of Appeal for Manitoba, with costs of the proceedings before the Manitoba courts and this Court. I would remit the complaints of the appellants to the adjudicator for determination of the appropriate remedy pursuant to the Manitoba *Human Rights Act*.

Appeals allowed with costs.

Solicitor for the appellants: Tanner Elton, Winnipeg.

Solicitors for the respondent: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitor for the intervener: C. Lynn Smith, Vancouver.

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* Le Dain J. took no part in the judgment.