NO. A870414
VANCOUVER REGISTRY

# THE SUPREME COURT OF BRITISH COLUMBIA

RE: Century Oils (Canada) Inc. and Production Supply Company Ltd. and Christine Marie Davies

BETWEEN:

CENTURY OILS (CANADA) INC. AND
PRODUCTION SUPPLY COMPANY LTD.

PETITIONERS

AND:

CHRISTINE MARIE DAVIES
BRITISH COLUMBIA COUNCIL OF HUMAN RIGHTS

RESPONDENTS

---

## MEMORANDUM OF LAW

## OF CHRISTINE DAVIES, RESPONDENT

---


Gayle Gavin and Gwen Brodsky
904 Helmcken Street
Vancouver, B.C.
V6Z 1B3

Solicitors for the Respondent, Christine Davies

No. A870414
Vancouver Registry

THE SUPREME COURT OF BRITISH COLUMBIA

RE: Century Oils (Canada) Inc. and Production Supply Company Ltd. and Christine Marie Davies

BETWEEN:

Century Oils (Canada) Inc. and
Production Supply Company Ltd.

Petitioners

AND:

Christine Marie Davies
British Columbia Council of Human Rights

Respondents

MEMORANDUM OF LAW

OF CHRISTINE DAVIES, RESPONDENT

Point To Be Argued

The respondent Christine Davies submits that the respondent Council correctly interpreted discrimination on the basis of pregnancy to be discrimination on the basis of sex as prohibited by the Human Rights Act, S.B.C. 1984, c.22, s.8.

Summary of Argument

1. The Respondent Christine Davies submits that the Council correctly interpreted discrimination on the basis of pregnancy to be discrimination on the basis of sex as prohibited by the Human Rights Act, S.B.C. 1984, c.22, s.8. The question is one of fact, and not of law, and, therefore, for the Council to determine. Only if the Council's interpretation of sex discrimination is patently unreasonable could the Council's decision be set aside by the Court. The Council's interpretation of sex discrimination to include discrimination based on pregnancy is a common sense interpretation, which is neither patently unreasonable nor otherwise wrong. It is an interpretation which has been adopted in cases arising under the Canadian Human Rights Act, under provincial human rights legislation in other jurisdictions, under the Human Rights Code, R.S.B.C. 1979 c.186, and in one other case under the Human Rights Act, S.B.C. 1984 c.22. Further, the Council's interpretation of sex discrimination comports with recognized principles for the interpretation of human rights legislation; Canada's international human rights commitments; contemporary understandings of discrimination, sex discrimination in particular; and the equality guarantees of the Canadian Charter of Rights and Freedoms.

Canadian Charter of Rights and Freedoms, 1982, Sections 15 and 28

Appendix "A"

Convention on the Elimination of all Forms of Discrimination Against Women, Article 11, ratified 10 December 1981, in force for Canada 10 January 1982, Report of Canada, Department of the Secretary of State, May 1983, p.VII

Appendix "B"

2. Although some learned adjudicators, basing their decisions on Bliss v Attorney General for Canada , have declined to interpret sex discrimination to include discrimination based on pregnancy, the respondent respectfully submits that Bliss is not dispositive of the issue before this Court. The ruling in Bliss that pregnancy discrimination is not discrimination on the basis of sex is an obiter dictum in relation to a different statute involving different considerations and consequences. In the alternative, the respondent submits that Bliss is no longer applicable to discrimination in the human rights context because the Supreme Court of Canada has subsequently expanded the meaning of discrimination in human rights legislation, and, further, the

section 1(b) equality clause of the Canadian Bill of Rights has been specifically overtaken by section 15 of the Canadian Charter of Rights and Freedoms.

Bliss v Attorney General for Canada (1978), 92 D.L.R. (3d) 417; [1978] 6 WWR 711 (SCC)

3. In view of the strong criticism that Bliss has elicited, the all encompassing wording of section 15 of the Canadian Charter of Rights and Freedoms, and recent pronouncements of the Supreme Court of Canada concerning the purposive and liberal approach to be taken in Charter cases, it is respectfully submitted that if Bliss were to be heard by the Supreme Court of Canada now, and the Unemployment Insurance Act still read as it did in 1978, the Court would find a violation of equality rights.

Argument

4. The question of whether discrimination based on pregnancy is discrimination based on sex is not a question of law, but of fact, for the B.C. Human Rights Council to determine.

Re CIP Paper Products Ltd. and Sask. Human Rights Commission (1978), 87 D.L.R. (3d) 609 (Sask. C.A.)

5. Accordingly, the finding of the B.C. Human Rights Council, in the case at bar, that discrimination on the basis of pregnancy is discrimination on the basis of sex, cannot be set aside by the Court unless the Council's finding is based on a patently unreasonable interpretation of section 8 of the Human Rights Act, S.B.C. 1984, c.22.

- Re Lorne v Camozzi et al and local 115 (1986), 24 D.L.R. (4th) 266 (B.C.C.A.)

6. A common sense approach to the interpretation of sex discrimination dictates that it would include discrimination based on pregnancy. "Sex" according to its plain meaning includes pregnancy. The capacity for pregnancy is an immutable characteristic, an incident of gender and a central distinguishing feature between men and women.

7. It is is submitted that the distinction created by pregnancy discrimination is between the gender that has the capacity for pregnancy and the gender that does not.

8. Pregnancy has been recognized as an incident of gender and discrimination against pregnant women held to be sex

discrimination, in a case arising under the _Canadian Human Rights Act_.

_Treasury Board_ v. _Tellier-Cohen_ (1982), 4 C.H.R.R. D/1169

9. Pregnancy discrimination has also been held to be sex discrimination in cases arising under provincial human rights legislation in other jurisdictions.

_Giouvandoudis_ v. _Golden Fleece Restaurant and Carras_ (1984), 5 C.H.R.R. D/1967

_Winterburn_ v. _Lou's Place and Lou Nadlin and Larry Sheppard_ (1984), 5 C.H.R.R. D/2052

_Canada Safeway Limited_ v. _Manitoba Food and Commercial Workers Union and Manitoba Human Rights Commission_ (1984), 5 C.H.R.R. D/2133 (Man Q.B.)

10. In another British Columbia case besides the one at bar, the Human Rights Council interpreted sex discrimination to include discrimination based on pregnancy.

_Stafanyshyn_ v. _Four Seasons Management_, unreported November 10, 1986 (B.C. Human Rights Council)

11. B.C. Boards deciding cases under the "reasonable cause" provision of the Human Rights Code, R.S.B.C. 1979 c.186, also expressed the view that pregnancy discrimination is sex discrimination.

Holloway v MacDonald and Clairco Foods Ltd. (1983), 4 C.H.R.R. D/1454

Paton v Brouwer and Co. (1984) 5 C.H.R.R. D/1946

12. In all of the cases listed above, pregnancy discrimination was considered to be sex discrimination notwithstanding that not all women are pregnant all of the time. Pregnancy discrimination is still sex discrimination even though not all women become pregnant and not all women are pregnant all of the time. Only women have the capacity for pregnancy. Restrictions or exclusions in employment based on pregnancy affect women exclusively. Analagously, restrictions in employment applying to sperm donors would constitute sex discrimination.

13. It is not and never has been the law that all members of the class against which discrimination is alleged must be equally affected. As Professor William Black sitting as a Board of Inquiry in Holloway, supra, said, "Surely, it would be discrimination on the basis of political belief to dismiss all employees who had voted for a particular political party even though not everyone holding that belief had voted. Comparable reasoning suggests that an exclusion based on pregnancy constitutes sex discrimination".

Holloway v Macdonald and Clairco, supra,
at D/1458

14. Similarly, in the case of Rand v. Sealy Eastern Ltd., discrimination against an Orthodox Jew by an employer company owned and managed by others of the Jewish faith, was held to be discrimination on the basis of creed. A training program had been arranged for the employees, to be held on Saturday. The complainant could not comply because of his creed. Although only the complainant, who observed Saturday Sabbath, was discriminated against, it was still discrimination on the basis of creed.

Rand v Sealy Eastern Ltd., (1982) 3 C.H.R.R. D/938

15. The argument that not all members of the class are equally affected was also dealt with in connection with sexual harassment. In Zarankin v Johnstone, Professor Lynn Smith, a B.C. Board of Inquiry, rejected a suggestion that acts of sexual harassment were the result of personal sexual attractiveness, rather than based upon female gender. Disposing of this argument the Board said,

> "Although it might be thought that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally recipients of it, that is fallacious. So long as gender provides a basis for differentiation, it matters not that further differentiation on another basis is made. An analogy would be a complaint of sex discrimination against an employer who decided to dismiss all of his married female employees but none of his male employees and none of his unmarried female employees. The decision would affect one group adversely - female employees - even though it would not affect every member of that group. Similarly, 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." (emphasis added)

Zarankin v Johnstone (1984), 5 CHRR D/2274 at D/2276, affirmed on appeal to the B.C.S.C.

16. In the United States the argument that sex combined with another factor is not sex discrimination has also been

rejected. In the case of Sprogis v United Airlines Inc. the court decided the hypothetical situation posed in Zarankin, supra, and held that a "spouse" rule for stewardesses discriminated on the basis of sex. The airline fired any of its stewardesses who got married and refused to hire women as stewardesses unless they were single. No male employees were subject to such a rule. The court rejected the defendant's argument that its rule was directed not toward all females, but only toward married females. It also rejected the argument that as there were no male stewardesses, the distinction was not based on sex but rather on marital status of the female employees, a non-prohibited ground under Title VII. The court said,

> The scope of Section 703(a)(1) is not confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and employment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy. (emphasis added)

Sprogis v United Airlines Inc. 444 F. 2d 1194 (1971) at p.1198

17. The scope of discrimination against women based on their capacity for pregnancy is very broad. It goes beyond discrimination aginst women who are actually pregnant, and includes, for example, employer questions about the birth control methods and child bearing intentions of prospective, female employees.

> Discrimination on the Basis of Pregnancy, 1977, Hearings on S. 995 before the Subcommittee on Labour of the Senate Committee on Human Resources. 95th Cong., 1st Sess., 31-33 (1977) (Statement of Vice Chairman, Equal Employment Opportunity Commission, Ethel Bent Walsh); at 113-117 (Statement of Wendy W. Williams); at 117-119 (Statement of Susan Deller Ross); at 307-309 (Statement of Bella S. Abzug).
>
> Appendix "C"

18. The effects on women of pregnancy discrimination are extremely serious, making the public policy arguments in favour of its prohibition very compelling. In the case of H.W. v Kroff, Sholto Hebeton sitting as Board of Inquiry on a case under the Human Rights Code, R.S.B.C. 1979 c.186, said:

> Pregnant women are a class of people who have been subject to a very significant disadvantage by classification processes which have denied them employment, either entirely or at specific times of their pregnancy.
>
> H.W. v Kroff and Riviera Reservations, unreported July 22, 1976 (B.C. Board) p.8

19. In another case decided under the Human Rights Code,

R.S.B.C. 1979, c.186, Gibbs, the serious effects on women of pregnancy discrimination were powerfully argued by the solicitor for the complainant and quoted by the Board in its decision:

> ...Women should not be granted equal treatment in the work force only on the condition of and at the price of denying their role as mothers. If only the woman who never becomes pregnant is treated equally, then women as a class have been denied their full humanity, their right to choose to fill their biological role of growing the next generation. It is the same as saying to women - if you want to be equal, then you must be the same as men and not have babies. That is not equal treatment and equal respect for every person regardless of sex.
>
> If women who are pregnant are not to be treated as full and equal human beings, women as a class are not equal and are on an inferior footing in the work force.
>
> Historically, discrimination on the basis of pregnancy has been a common feature in the work force. Women who were pregnant were required to cease teaching once their condition "showed". Refusal to hire women on the basis that they might become pregnant has been and continues to be a not uncommon experience for women. Women have been and continue to be fired from their jobs once their employer learns that they are pregnant. Discrimination against women because they may become or because they are pregnant is an ongoing fear and burden for women. The effects of pregnancy discrimination on women is not an abstract, theoretical, hypothetical concept; it is real-life experience. The purpose of the Human Rights Code is to deal with problems of discrimination in a real-life, practical manner and not in an abstract, theoretical, conceptual manner. The latter would be a hollow achievement for working women...

Gibbs et al v Board of School Trustees, School District No. 36 (Surrey) et al, unreported 1978 (B.C. Board) at p.6

20. Most women of working age face the possibility of pregnancy. Any rule that discriminates against pregnant women potentially discriminates against most women. Statistics on pregnancy gathered from the United States show that more than 80 percent of working women are in their prime child-bearing years, ages 15 through 45, and 93 percent of the women in this age group are expected to have at least one child during these years. An estimated 85% of women in the work force will become pregnant at least once during their work life.

> S. Kamerman, Maternity and Parental Benefits and Leaves, An International Review, Columbia University, Center for Social Services 8 (1980).
>
> Dowd, Maternity Leave: Taking Sex Differences Into Account, 54 Fordham L. Rev. 1101, 1103 (1986).

21. In construing the parameters of human rights legislation there is considerable guidance from the Supreme Court of Canada. In Craton, the Court was faced with a conflict between Manitoba's Public Schools Act and its Human Rights Act. Mr. Justice McIntyre described the latter as a "public and fundamental law of general application" and said further:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern.

Craiton v Winnipeg School Division No.1 (1985), 61 N.R. 241 (S.C.C); (1985), 6 C.H.R.R. D/3014 at D/3016

22. In the case of O'Malley v Simpsons-Sears Ltd., the Supreme Court of Canada, referring to its earlier decision in Heerspink, summarized the approach to be taken to the interpretation of human rights legislation and in so doing made the following points:

    (a) human rights legislation is of a special nature, not quite constitutional but more than ordinary,

    (b) the accepted rules of construction are flexible enough to permit the court to recognize in the construction of human rights legislation the special nature and purpose of the enactment,

    (c) it is for the courts to seek out its purpose and give it effect,

(d) the aim of human rights legislation is the removal of discrimination.

O'Malley v Simpsons-Sears Ltd. (1985), 23 D.L.R. 321, at 329 (S.C.C.); [1985] 2 S.C.R 536 7 CHRR D/3102;

Insurance Corp of B.C. v Heerspink et al (1982), 137 D.L.R. (3d) 219 at pp. 228-9; [1982] 2 S.C.R. 145 S.C.C. at pp.157-8

23. A narrow restrictive approach which would defeat the purpose of human rights legislation should be avoided.

Huck v Canadian Odeon Theatres Limited (1985) 6 CHRR D/2682 at D/2686, (Sask. C.A.) (L.A. to S.C.C. denied)

24. A narrow restrictive approach to the meaning of sex discrimination which excluded pregnancy discrimination would be

the Human Rights Act S.B.C. 1984, c.22 would suggest that the legislature intended sex discrimination to include discrimination based on pregnancy. It is a principle of statutory interpretation that given two possible interpretations of a statute, the one respecting a state's international obligations is to be preferred.

Pierre A. Cote, The Interpretation of Legislation in Canada, Les Editions Yvon Blais Inc., Cowansville, 1984, p.290

International Convention on the Elimination of All Forces of Discrimination against Women, supra Appendix "B"

27. The case law on the question of whether pregnancy discrimination is sex discrimination is not unanimous. In some cases it has been held that pregnancy is excluded from sex discrimination, on the basis of statements made by the Supreme Court of Canada in Bliss. It is submitted, however, that Bliss is not conclusive on the issue of pregnancy discrimination, and that the point must be taken to be open.

Bliss v Attorney General for Canada, supra, (1978), 92 D.L.R. (3d) 417; [1978] 6 W.W.R. 711 (S.C.C.)

Pentney and Tarnopolsky, Discrimination and the Law Richard De Boo, (1985) at pp.8-15

Stefanyshyn v Four Seasons Management, supra

Giouvanoudis v Golden Fleece Restaurant, supra

Tellier-Cohen v Treasury Board, supra

Holloway v MacDonald and Clairco Foods Ltd., supra

Canada Safeway Limited v Manitoba Food and Commercial Workers Union, supra

28. Bliss does not purport to be an authoritative interpretation of human rights legislation. The ruling in Bliss that pregnancy discrimination is not discrimination on the basis of sex is an obiter dictum in relation to a different statute involving different considerations and consequences.

Stefanyshyn v Four Seasons, supra, at p.4

29. The question in Bliss was not whether there had been sex discrimination per se, but whether there had been discrimination on account of sex of such a nature as to deprive the plaintiff of her "equality before the law" under section

1(b) of the Canadian Bill of Rights. Mr. Justice Ritchie acknowledged that Bliss was not about discrimination per se when he said he was "in accord" with Mr. Justice Pratte's reasoning in the Federal Court of Appeal to the effect that:

> "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 had been deprived of equality before the law..."

Bliss v Attorney General for Canada, supra, [1978] 6 W.W.R. 711 at 717

30. It is further respectfully submitted that even if the pregnancy/sex distinction drawn in Bliss was intended to apply to human rights legislation, that distinction is no longer applicable because (a) the Supreme Court of Canada has subsequently expanded the meaning of discrimination in human rights legislation and (b) the Section 1(b) equality clause of the Canadian Bill of Rights has been specifically overtaken by section 15 of the Canadian Charter of Rights and Freedoms.

Bliss v Attorney General for Canada, supra

31. The Supreme Court of Canada has expanded the meaning of discrimination beyond the narrow one suggested in Bliss. In Bliss the Court seemed to confine itself to an examination

of the legislation for a facial distinction between women and men. Finding no facial distinction based on gender, the Court concluded that the rule did not discriminate on the basis of sex. On December 17, 1985, the Supreme Court of Canada ruled in O'Malley that discrimination may result from the adverse impact of a facially neutral rule. If the Court had applied the O'Malley reasoning in Bliss, the impugned rule would have been found to be discriminatory by virtue of its adverse impact on women.

O'Malley v Simpsons-Sears et al, supra

Bliss v Attorney General for Canada, supra

32. In O'Malley, Mr. Justice McIntyre said, "If it does, in fact, cause discrimination; if its effect is to impose on one group of persons obligations, penalties, or restrictive conditions not imposed on the members of the community, it is discriminatory". Similarly, in Bhinder the Supreme Court of Canada held that discrimination includes unintentional or adverse effects discrimination. It would be anomalous if human rights jurisprudence recognized adverse effects discrimination in general but not in relation to pregnancy in particular.

O'Malley et al v Simpsons-Sears, supra, (1985) 23

D.L.R. (4th) 321 at p.329

Bhinder and the Canadian Human Rights Commission v C.N.R. (1985) 2 S.C.R. 561 7 C.H.R.R. D/3093

33. The concept of sex discrimination in particular has evolved and expanded since the Supreme Court of Canada decided Bliss. For example it is now widely accepted that sexual harassment is discrimination on the basis of sex. This is so even though sexual harassment could not be said to be a defining sex characteristic.

Brennan v Robichaud et al (1985), 57 N.R. 116 (F.C.A.); 85 CLLC 16,038 (F.C.A) (L.A. to S.C.C. granted and appeal pending)

Commodore Business Machines Limited v Minister of Labour for Ontario, 14 D.L.R. (4th) 118; (1984) 49 O.R. (2d) 17; [1984] 10 Admin L.R. 130 (Ont. D.C.)

Foisey v Bell Canada 18 D.L.R. (4th) 222; 85 C.L.L.C. 17,008 (Que S.C.); (1984) 6 CHRR D/2817

Mehta v MacKinnon (1985), 19 D.L.R. (4th) 148 (N.S.C.A.); (1985) 67 NSR (2d) 112; 155 APR 112; 6 CHRR D/2634
(L.A. to S.C.C. denied November 21, 1985)

Bliss v Attorney General for Canada, supra

34. The equality guarantee of Section 1(b) the Canadian Bill of Rights has been specifically overtaken by section 15 of the Charter. The guarantee of sex equality in section 15 is reinforced by section 28 of the Charter, making it absolutely clear that sex equality is an important constitutional value. Section 15 provides fresh impetus for judicial interpretations of sex discrimination that will give effect to sex equality. It is submitted that an interpretation of sex discrimination that excluded discrimination based on pregnancy would deny women the sex equality that is guaranteed by section 15 of the Charter.

35. The wording of section 15, combined with the inclusion of section 28 of the Charter, repudiates the reasoning of the Supreme Court of Canada in Bliss. As Mr. Justice Tarnopolsky said in a scholarly article:

> In order to understand the motivation behind the addition of the fourth equality clause, namely 'equal

> benefit of the law', it is necessary to review the Bliss case....This very brief survey of how majority decisions on the Supreme Court of Canada limited the 'equality before the law' clause in the Canadian Bill of Rights, and how these limitations led directly to the incorporation of four equality clauses in section 15(1), also explains, partly, why various women's groups lobbied so hard, both before and after the November 1981 Accord, for the inclusion of section 28.

W. S. Tarnopolsky "The Equality Rights in the Canadian Charter of Rights and Freedoms [1983] No. 1, Vol. 61, Canadian Bar Review 242

Bliss v Attorney General for Canada, supra

36. Prior to the constitutional debates in 1981, it had become clear that Bliss had failed to withstand the test of time. The reasoning in Bliss had elicited a flood of criticism. Professor James McPherson, in "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980), had analyzed the contention that "any inequality between the sexes in this area is not created by legislation but by nature", and said,

> 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 legisla-

tion is between two classes of women, not between women and men.

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 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.

1 CHRR C/7 at C/11

Bliss v Attorney General for Canada, supra

37. In a similar vein are the criticisms of Bliss made by Marc Gold in an article entitled "Equality Before the Law in the Supreme Court of Canada: A Case Study", (1980) 18 Osgoode Hall L.J. 336.

38. The Bliss decision was also criticized by the Commission in Leier, a Saskatchewan human rights case. Though the Commission felt bound to follow Bliss, it expressed dis-

satisfaction with Bliss, saying,

> To establish a dichotomy between 'pregnant women and non-pregnant persons', is, surely, to beg the question. As Mr. Justice Stevens [U.S. S.C.] said, 'The classification is between persons who face a risk of pregnancy and those who do not'.
>
> Leier v C.I.P. Paper Products Ltd., unreported, December 1, 1978 (Sask Bd)
>
> Bliss v Attorney General for Canada, supra

39. Quite apart from the question of whether Bliss applies to the case at bar, it is submitted that the equality guarantees of the Charter apply to the interpretation of the Human Rights Act S.B.C. 1984, c.22.

    Justine Blainey v Ontario Hockey Association (1986), 54 O.R. (2d) 513 (Ont. C.A.)

40. Section 15 of the Charter guarantees equality before and under the law as well as equal protection and benefit of the law. This is a broad egalitarian statement designed to give the Courts the power to eliminate inequality. Section 8 of the Human Rights Act S.B.C. 1984, c.22 provides protection against sex discrimination. Pursuant to the sex equality guarantees of the Charter women have a right to the

equal protection and benefit of the sex discrimination provision of the Act.

41. "Equality under the law", in particular, goes beyond the procedural equality that concerned the Court in Bliss. Equality under the law is intended to reach the substance of legislation and deal with unequal effects.

> Eberts, "Sex and Equality Rights", Equality Rights and the Canadian Charter of Rights and Freedoms, Bayevsky and Eberts eds; (1985) pp.183-218, at pp. 200, 207.
>
> Bayevsky, "Defining Equality Rights" Equality Rights and the Canadian Charter of Rights and Freedoms, Bayevsky and Eberts eds. (1985) pp.1-78 at p.12.
>
> Bliss v Attorney General for Canada, supra

42. The section 15 equality rights are designed to create a new model for equality rights in Canada. With respect to the differences between section 1(b) of the Canadian Bill of Rights and section 15 of the Charter, Professor Lynn Smith has said,

> ...The language chosen to articulate the equality rights was clearly intended to eliminate the pitfalls of section 1(b) of the Canadian Bill of Rights. (27) Those pitfalls, whose description in the literature on the Bill of Rights needs not be repeated, were the

> "frozen concepts" approach, the limitation of "equality before the law" to the Diceyan sense of that term, the use of an extremely defferential "valid federal objective" test, and the restriction of the right to equality before the law to situations involving penalties rather than entitlement to benefits. (28) Section 15 makes an egalitarian statement of the sort which the Canadian Bill of Rights did not, in language understandable as a direct response to the Supreme Court decisions.(29)

Lynn Smith, "A New Paradigm for Equality Rights" in Righting the Balance: Canada's New Equality Rights, 1986 ed Lynn Smith 353 at p.357.

43. The Supreme Court of Canada has stated that the approach taken to rights guaranteed in the Charter should be a purposive one, a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing the full benefit of the Charter's protection.

R v Big M Drug Mart Ltd. [1985], 3 W.W.R. 481 (S.C.C.)

44. The Supreme Court of Canada has confirmed that the reasoning underlying Bill of Rights decisions is not determinative of the approach to be taken to rights guaranteed under the Charter. For example, in Singh Madame Justice Wilson said,

> It seems to me that the recent adoption of the Charter by Parliament and nine out of the ten provinces as

part of the Canadian constitutional framework has sent a clear message to the Courts that the restrictive attitude which at times characterized their approach to the Canadian Bill of Rights ought to be re-examined.

Re Singh and Minister of Employment and Immigration

(1985), 17 D.L.R. (4th) 422 at 461; 1 S.C.R. 177;

58 N.R. 1; 14 C.R.R. 13

45. Similarly, in R v Therens, Mr. Justice LeDain said that because of the Charter's constitutional character it must be regarded as a "new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection". He acknowledged that the Courts felt some ambivalence in the application of the Canadian Bill of Rights because it does not reflect a clear constitutional mandate.

R v Therens (1985) 59 N.R. 122 S.C.C.

46. The question of how pregnancy relates to sex equality has been considered recently by the Supreme Court of the United States. It was held that a statute requiring employers to provide unpaid maternity leave is consistent with the

equality goals of Title VII because it ensures that women as well as men can be employed and have families.

> California Federal Savings and Loan Assn, et al v Guerra, Director, Department of Fair Employment and Housing et al U.S. Law Week No. 85-494; 107 S.C. 683 (1987)

47. In view of the strong criticism that Bliss has elicited, the all encompassing wording of section 15 of the Charter, and recent pronouncements of the Supreme Court of Canada concerning the purposive and liberal approach to be taken in Charter cases, it is respectfully submitted that if the Unemployment Insurance Act still read as it in 1978 and Bliss were to be heard by the Supreme Court of Canada now, the Court would find a violation of equality rights.

> Bliss v Attorney General for Canada, supra

## List of Authorities

Bayevsky and Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms; The Carswell Company Limited, Toronto, 1985

Beaudoin and Tarnopolsky, The Canadian Charter of Rights and Freedoms: Commentary; Human Rights Research and Education Centre, University of Ottawa, 1982

Bhinder and the Canadian Human Rights Commission v CNR (1985) 2 S.C.R. 56; 7 CHRR D/3093

R v Big M Drug Mart [1985], 3 W.W.R. 481 (S.C.C.)

Blainey v Ontario Hockey Association (1986), 54 O.R. (2d) 513 (Ont C.A.)

Bliss v Attorney General of Canada, (1978), 92 D.L.R. (3rd) 417; [1978] 6 W.W.R. 711 (S.C.C)

Brennan v Robichaud et al (1985), 57 N.R. 116 (F.C.A.); 85 C.L.L.C. 16,038 (F.C.A.) (L.A. to S.C.C. granted and appeal pending)

Re CIP Paper Products Ltd. and Saskatchewan Human Rights Commission (1978), 87 D.L.R. (3d) 609 (Sask. C.A.)

California Federal Savings & Loan Assn. et al v Guerra, Director, Department of Fair Employment and Housing, et al U.S. Law Week No. 85-494; 107 S.C. 683 (1987)

Canada Safeway Limited v Manitoba Food and Commercial Workers Union and Manitoba Human Rights Commission (1984), 5 CHRR D/2133 (Man. Q.B.)

Commodore Business Machines Limited v Minister of Labour for Ontario, 14 D.L.R. (4th) 118; (1984) 49 O.R. (2d) 17; 10 Admin. L.R. 130 (Ont. Div. Ct.)

Cote, The Interpretation of Legislation in Canada; Les Editions Yvon Blais Inc., Cowansville, Quebec, 1984

Cra·ton v Winnipeg School Division No.1 (1985), 61 N.R. 241 (S.C.C.); (1985), 6 C.H.R.R. D/3014

Dowd, Maternity Leave: Taking Sex Differences Into Account, 54 Fordham L. Rev. 1101 (1986)

Foisey v Bell Canada, 18 D.L.R. (4th) 222; 85 C.L.L.C. 17,008 (Que. S.C.); (1984) 6 CHRR D/2817

Gibbs et al v Board of School Trustees, School District No. 36 (Surrey) et al, unreported 1978 (B.C. Board)

Giouvanoudis v Golden Fleece Restaurant and Carras (1984), 5 CHRR D/1967

Gold, "Equality Before the Law in the Supreme Court of Canada: A ase Study", (1980) 18 Osgoode Hall L.J. 336

H.W. v Kroft and Riviera Reservations, unreported July 22, 1976 (B.C. Board)

Holloway v MacDonald and Clairco Foods Ltd. (1983), 4 C.H.R.R. D/1454 (Sask C.A.)

Huck v Canadian Odeon Theatres Limited (1985), 6 CHRR D/2682 at D/2686 (Sask. C.A.) (L.A. to S.C.C. denied)

Insurance Corp. of B.C. v Heerspink et al (1982), 137 D.L.R. (3d) 219; [1982] 2 S.C.R. 145 (S.C.C.)

Kamerman, Maternity and Parental Benefits and Leaves, An International Review, Columbia University, Center for Social Services, 8

Leier v CIP Paper Products Ltd. unreported December 1, 1978 (Sask Bd)

Re Lorne v Camozzi et al and local 115 (1986) 24 D.L.R. (4th) 266 (B.C.C.A.)

McPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" 1980

Mehta v MacKinnon (1985) 19 D.L.R. (4th) 148 (N.S.C.A.); (1985) 67 N.S.R. (2d) 112; 155 A.P.R. 112; 6 C.H.R.R. D/2634 (L.A. to S.C.C. denied November 21, 1985)

O'Malley v Simpsons-Sears Ltd. (1985) 23 D.L.R. (4th) 321 (S.C.C.); [1985] 2 S.C.R. 536; 7 C.H.R.R. D/3102

Paton v Brouwer and Co. (1984), 5 C.H.R.R. D/1946

Pentney and Tarnopolsky, Discrimination and the Law, Richard De Boo, 1985

Rand v Sealy Eastern Ltd., (1982) 3 C.H.R.R. D/938

Regina v Big M Drug Mart (1985), 18 D.L.R. 4th 321

Re Singh and Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422; 1 S.C.R. 177; 58 N.R. 1; 14 C.R.R. 13

Smith, Righting the Balance: Canada's New Equality Rights, Canadian Human Rights Reporter, Inc., Vancouver, B.C., 1986

Sprogis v United Airlines Inc. 444 F. 2d 1194 (1971)

Stefanyshyn v Four Seasons Management, unreported November 10, 1986 (B.C. Human Rights Council)

Tarnopolsky "The Equality Rights in the Canadian Charter of Rights and Freedoms" [1983] No. 1, vol. 61, Canadian Bar Review, 242

R v Therens (1985) 59 N.R. 122 S.C.C.

Treasury Board v Tellier-Cohen (1982), 4 C.H.R.R. D/1169

Winterburn v Lou's Place and Nadlin and Sheppard (1984), 5 C.H.R.R. D/2052

Zarankin v Johnstone (1984) 5 C.H.R.R. D/2274