IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

BETWEEN:

SUSAN BROOKS,
(Complainant-Appellant)
APPELLANT

AND

CANADA SAFEWAY LIMITED
(Respondant)
RESPONDENT

AND BETWEEN

PATRICIA ALLEN and PATRICIA DIXON, and
THE MANITOBA HUMAN RIGHTS COMMISSION.
(Complainants-Appellants)
APPELLANT

AND

CANADA SAFEWAY LIMITED,
(Respondent)
RESPONDENT

AND

WOMEN'S LEGAL EDUCATION AND ACTION FUND (L.E.A.F.)

INTERVENER

INTERVENER'S FACTUM

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INDEX

PART I
STATEMENT OF FACTS

1. The Intervener concurs with the Statement of Facts of the Appellant.

PART II
POINTS IN ISSUE

A. Did the Court of Appeal for Manitoba err in interpreting the Manitoba Human Rights Act in that it concluded that the prohibition against sex discrimination in employment did not encompass a prohibition against discrimination based on pregnancy?

B. Did the Court of Appeal for Manitoba err in interpreting the Manitoba Human Rights Act in that it concluded that the prohibition against family status discrimination in employment did not encompass a prohibition against discrimination based on pregnancy?

C. Did the Court of Appeal for Manitoba err in concluding that a disability plan, such as the one offered by the Respondent Canada Safeway Limited, which offers less generous benefits to women employees who are pregnant, is not discriminatory within the meaning of the Manitoba Human Rights Act?

PART III
BRIEF OF ARGUMENT

A. DID THE COURT OF APPEAL FOR MANITOBA ERR IN INTERPRETING THE MANITOBA HUMAN RIGHTS ACT IN THAT IT CONCLUDED THAT THE PROHIBITION AGAINST SEX DISCRIMINATION IN EMPLOYMENT DID NOT ENCOMPASS A PROHIBITION AGAINST DISCRIMINATION BASED ON PREGNANCY?

(1) That pregnancy discrimination is sex discrimination is the only conclusion consistent with the present-day understanding of equality and the right to be free from discrimination.

(a) in the context of human rights jurisprudence

1. Recent decisions of this honourable Court under human rights legislation show an approach to equality which goes beyond the formal principle of treating similarly situated persons similarly and recognizes the purpose of human rights legislation as connected with both equal opportunity and equal concern and respect. The Intervener agrees with the Appellant's submissions in paragraphs 17 and 18 of its Factum that human rights legislation has the status of public "fundamental law" which should be interpreted in a manner which gives effect to its purpose.

> Re Ontario Human Rights Commission et al. and Simpsons-Sears Limited [1985] 2 S.C.R. 536, (1985), 23 D.L.R. (4th) 321 at 329
> I.C.B.C. v. Heerspink [1982] 2 S.C.R. 145 at 158
> Winnipeg School Division No. I v. Craton [1985] 2 S.C.R. 150 at 156
> Action Travail des Femmes v. Canadian National Railway Company et al. [1987] I S.C.R. 1114, (1987) 8 C.H.R.R. D/4210 at D/4223
> Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84, (1987) 8 C.H.R.R. D/4326 at D/4329.

2. A similar view of the meaning of equality is widely found in academic writing and in governmental studies.

> Judge Rosalie Abella, Equality in Employment: Royal Commission Report (1984) at 1-18, 254
> Walter Tarnopolsky and William Pentney, Discrimination and the Law (1985) at Chapter XVI
> Beatrice Vizkelety, Proving Discrimination in Canada (1987) at 238-240

3. In two recent decisions, this honourable Court has found that human rights legislation provides remedies to assist women in overcoming particular sex-specific barriers against their entry into the paid work force.

> Robichaud v. A.G. Canada (Treasury Board), **supra**, para. I at C.H.R.R. D/4330-4333
> Action Travail des Femmes v. C.N.R. Co. et al. **supra**, para. I at C.H.R.R. D/4232.

4. To generalize from the human rights jurisprudence, there are four possible ways to discriminate against members of particular groups:
(a) through a rule or practice which applies to all members of the group, such as the former prohibitions against women voting or entering the professions (total, direct discrimination);
(b) through a rule or practice which applies to all members of a group who also possess a particular characteristic, such as the rule at issue in the Drybones case, which affected all Indians who were intoxicated off a reservation (partial, direct discrimination);
(c) through a rule or practice which, although neutral on its face, disadvantages only or primarily members of one group compared with another, such as the Sunday closing rule at issue in Edwards Books & Art Ltd. v. The Queen or the requirement to work on a Saturday at issue in Re Ontario Human Rights Commission et al. and Simpsons-Sears Ltd. (indirect or systemic discrimination, which may be total or partial, depending upon the circumstances);
(d) through a pattern of treatment which singles persons out for abuse on the basis of a condition of birth, i.e. gender (sex harassment is an example.)

> R. v. Drybones [19701 S.C.R. 282 at 297
> Edwards Books & Art Ltd. v. the Queen, [1986] 2 S.C.R. 713 at 766, 808
> Re Ontario Human Rights Commission and Simpsons-Sears Limited, **supra**, para. I at 332
> Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case Study of Sex Discrimination (1979) at 208ff.

5. The Intervener submits that discrimination based on pregnancy falls into the second category in paragraph 4 above when there is a straightforward pregnancy-based rule or practice, as in the instant case.

6. Discrimination against a subset of a group identified by a prohibited classification is nonetheless discrimination. For example, refusal to hire Roman Catholics who go to Mass while hiring those who do not go to Mass would still be discrimination because of religion. Failing to provide access to a building for persons in wheelchairs while providing access to those with other disabilities would still be discrimination because of disability. To say that pregnancy discrimination is not sex discrimination because there are, at any given time, non-pregnant women, is as illogical as it is to say that discrimination against observant Roman Catholics is not religious discrimination because there are non-observant Roman Catholics, or that inaccessibility for those in wheelchairs is not discrimination based on disability because there are those on crutches who can enter.

> Saskatchewan Human Rights Commission and Huck v. Canadian Odeon Theatres (1985), 18 D.L.R (4th) 93 (Sask. C.A.), leave to appeal refused June 6, 1985
> Rand v. Sealy Eastern Ltd., (1982) 3 C.H.R.R. D/938
> Wiens v. Inco Metals Company, April 6, 1988, Ont. B.I. (Cumming), unreported, at 33.

7. On the other hand, if a subset is defined by a factor which applies widely, so that the subset is not identified by a prohibited classification, it is not necessarily discriminatory. Thus, refusal to serve disorderly women in a public facility is not discriminatory if the management equally refuses to serve disorderly men.

8. Cases where the discrimination is "colourable" or where the effect of discriminating against the subset has an adverse impact on a group defined by a prohibited classification are exceptions to the principle stated in paragraph 7. An example of a "colourable" provision would be a rule disentitling from a benefit all those who live on an Indian reserve (in all likelihood this would be designed to disentitle Indians, although it may also catch others). An example of adverse impact discrimination would be height and weight requirements for employees where they are not bona fide occupational qualifications and have the effect of disproportionately excluding women or members of some racial groups from employment.

> R. v. Hayden [1983] 6 W.W.R. 655, 3 D.L.R. (4th) 361 (Man. C.A.) at D.L.R. 364, leave to appeal refused 3 D.L.R. (4th) 361; compare R. v. Lefthand (1985), 37 Alta. L.R. (2d) 223 (Alta. C.A.) at 231

Chapdelaine and Gravel v. Air Canada et al. (1988) 9 C.H.R.R. D/4449 (Can. H. Rts. Trib.) at D/4454
Action Travail des Femmes v. C.N.R., **supra**, para. 1 at C.H.R.R. D/4216.

9. The instant case is comparable with R. v. Drybones, although not exactly analogous because it is possible to be intoxicated off a reserve and not Indian; it is not possible to be pregnant and not female. However, singling out a subset of a prohibited classification does not render the provision nondiscriminatory. There can be no doubt that pregnant women are a subset of the group defined by a prohibited classification (sex), just as Indians intoxicated off a reserve were a subset of the group defined by a prohibited classification (Indians). Just as the only persons affected by the legislation struck down in Drybones were Indian, the only persons affected by the exclusion in the insurance plan in the instant case are women. The fact that all women are not caught by the distinction does not mean that the class of women is not affected.

R. v. Drybones, **supra**, para. 4 at 297.

(b) in the context of modern equality theory

10, Historically, most sex discrimination litigation arose in cases where the only issue was whether the law should treat women the same as men when they met the very requirements which were set out for men in the law.

In re Mabel Penery French (1905), 37 N.B.R. 359 at 363
A.G. Canada v. Lavell [1974] S.C.R. 1349 at 1353
Edwards v. A.G. Canada [1930] A.C. 124 at 126-7.

11. This understanding of equality between the sexes is incomplete; it allows women to be equal to men only so long as and to the extent that they are the same as men.

Angela Miles, "Feminism, Equality and Liberation" (1985) 1 Can. Jo. Women and the Law 42 at 64-68
Catharine A. MacKinnon, "Difference and Dominance: On Sex Discrimination" in Feminism Unmodified: Discourses on Life and Law (1987) 32 and "Making Sex Equality Real" in L. Smith, G. Cote-Harper, R. Elliot and M. Seydegart (eds.)
Righting the Balance: Canada's New Equality Rights (1986) 37
Martha Minow, "Foreword: Justice Engendered" (1987) 101 Harv. L. Rev. 10 at 32-33, 38-45

Laurence H. Tribe, Reorienting the Mirror of Justice: Gender, Economics, and the Illusion of the 'Natural"', in Constitutional Choices (1985) 238.

12. This understanding of equality fails to deal with biological and social realities such as the different roles played by women and men in reproduction. Thus, rules governing behaviour in the workplace which assume that the "worker's" role in reproduction and childcare consists, after conception, in the provision of some assistance with childrearing (typically, not requiring any time off work) are inadequate to deal with female workers.

13. This understanding of equality fails to deal with socio-economic realities such as the common pattern of income-earning within marriage. Thus, separation of property in which the spouses are treated as theoretically equal economic units each acquiring and holding property has proved inadequate.

Rathwell v. Rathwell [1978] 2 S.C.R. 436
Freda Steel, "The Ideal Marital Property Regime — What Would it Be?" in Elizabeth Sloss (ed.), Family Law in Canada: New Directions (1985) 127 at 128-131.

14. Finally, this understanding of equality fails when confronted with the cultural reality that women have been expressly and effectively excluded from playing an equal role in public life and in the private business sector of the economy for most of our history, and that many of our institutions still reflect that history. Thus, an expectation that the political process or private institutions will readily respond to women's needs and concerns is unrealistic.

Action Travail des Femmes v. C.N.R. Co. et al., **supra**, para. 1 at C.H.R.R. D/4229-4232
Royal Commission Report: Status of Women in Canada (1970) Chap. 7, 333-356.

15. Legal reasoning often depends upon reasoning by analogy. However, there can be no reasoning by analogy where none exists. Pregnancy provides the paradigm case for women's situation having no analogy in men's lives.

16. The Intervener submits that a theory or model of equality which fails to deal with the social, economic, biological and cultural realities of women's lives is simply an inadequate theory, that a method of legal reasoning which requires analogies in order to identify inequalities is an inadequate method, and that an understanding of women's inequality entails recognition of the social subordination of women to men.

> N. Colleen Shephard, "Equality, Ideology and Suppression: Women and the Canadian Charter of Rights and Freedoms" in Christine Boyle, A. Wayne MacKay, Edward J. McBride and John A. Yogis (eds.), Charterwatch: Reflections on Equality (1986) 195 at 216-218
> also see generally Catharine A. MacKinnon and other references **supra**, para. 11.

17. Terms and conditions of employment set as standard in Canada have been (and still tend to be) those which contemplate a male worker, that is, a worker who may become a parent without childbearing, lactation (or, typically, subsequent nurturing) responsibilities, and who may in general count on the support of a wife in the domestic sphere.

> See, for example, Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 30; Workers' Compensation Act, R.S.B.C. 1979, c. 437, s. 17 am. 1985, c. 68, s. 12.

18. Thus, only to the extent that women's career patterns fit within institutions and structures created by and for men, can they compete on an equal basis in the paid work force. The presumption of a male "norm" may mean that women in the paid workforce must forego childbearing (and perhaps marriage) or operate under a distinct disadvantage if they undertake it.

> Katherine Swinton, "Regulating Reproductive Hazards in the Workplace: Balancing Equality and Health" (1983) 33 U. of T. L.J. 44 at 71-73.

19. The problem of combining paid work with motherhood affects a great many women. This is not because there is a high incidence of maternity among women workers at any given time (the existing evidence suggests that it would be around 2%) but because many if not most women do become pregnant at some point in their lives. In 1983, the percentage of women who participated in the paid labour force was 52.6%. It is estimated that in 1984 this participation rate rose to 56%. Among women of childbearing age, the participation rate is highest. For example, it is estimated in 1987 that 74.4% of women between the ages of 25 and 44 partic-

ipated in the paid labour force. Overall, women comprised 41.7% of the paid labour force in 1983 and 42.6% in 1985.

> Statistics Canada, Women in Canada - A Statistical Report, 1985, 89-503E
> Statistics Canada, The Labour Force, November 1987, 71-001 (monthly)
> Statistics Canada, Women in the Workplace, 1987, 71-534.
> Monica Townson, "Economic Consequences of Maternity Leave", in Sheilah L. Martin and Kathleen E. Mahoney (eds.), Equality and Judicial Neutrality (1987) 218 at 223.

20. The Intervener submits that if human rights legislation does not protect women in the paid work force against discrimination based on pregnancy, pregnant women will be vulnerable to many forms of invidious differential treatment, including lower wages, loss of benefits and even dismissal, in the absence of specific legislation.

(c) in the context of the advent of the Charter

21. The Canadian Charter of Rights and Freedoms is the "supreme law of Canada" by virtue of section 52 of the Constitution Act, 1982 and its provisions should be considered when interpreting human rights legislation. The Charter applies to the terms of provincial human rights legislation. Section 15 of the Charter gives individuals the right to equal protection and equal benefit of the law, including human rights laws. Since April 17, 1985, it has required that a term such as "sex discrimination" in a human rights statute be interpreted in a manner consistent with sections 15 and 28 of the Canadian Charter of Rights and Freedoms.

> Re Blainey and Ontario Hockey Association et al. (1986), 26 D.L.R. (4th) 728 at 736 (Ont. C.A.), leave to appeal refused June 26, 1986, S.C.C.; approved in Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 et al. [1986] 2 S.C.R. 573 at 595-6 Connell v. University of British Columbia; Harrison v. University of British Columbia (1988), 21 B.C.L.R. (2d) 145 (C.A.) at 149.

22. Although section 15 of the Charter was not in effect at the time at which the human rights complaint in this case arose, it is submitted that section 15 reflects our deep and ongoing values with respect to the meaning of equality and the importance of our legal system as a factor in the attainment of equality.

23. It is submitted that terms which are common to human rights legislation and the Charter. such as "sex", "religion", and "race" should, wherever possible, be interpreted in a manner which is consistent.

24. The legislative history of section 15 of the Charter, culminating in the inclusion of the wording "equal benefit of the law" and "equality under the law" suggests an intention to depart from the reasoning and the outcome of the Bliss case.

> Walter S. Tarnopolsky, "The Equality Rights", in Walter Tarnopolsky and Gerald A. Beaudoin (eds.), Canadian Charter of Rights and Freedoms: Commentary (1982) 395 at 421-22
> Anne F. Bayefsky, "Defining Equality Rights", in Anne F. Bayefsky and Mary Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (1985) 1 at 3-25.

25. Under other sections of the Charter, this honourable Court has approached equality-related issues in a manner consistent with the Intervener's argument. In Edwards Books & Art Ltd. v. the Queen the Court recognized that a system which is designed to meet the needs of the majority may have the effect of infringing the rights of particular groups whose needs are different. The three sets of Reasons of the majority in the Morgentaler case reflect an appreciation of the necessity for life alternatives to be reasonably available to women, consistent with the view of equality argued by this Intervener.

> Edwards Books & Art Ltd. v. the Queen **supra**, para. 4 at 765, 781
> Morgentaler v. The Queen, [1988] I S.C.R. 30 per Dickson C.J. at 56-60, 70-73, per Beetz J. at 89-91, 101-106, 121-122, per Wilson J. at 164 180.

26. This Court has said that Charter rights are to be given a purposive interpretation. The Women's Legal Education and Action Fund submits (as it did in its intervention in Andrews v. Law Society of British Columbia, argued in this honourable Court in October, 1987, decision reserved) that the primary purpose of the equality rights guaranteed in sections 15 and 28 of the Charter is to alleviate the disadvantage of historically disadvantaged, powerless or excluded groups, such as women, through permitting review of governmental action or laws which, in their purpose or effect, perpetuate disadvantage. It submits that human rights legislation should also be interpreted purposively and that the primary purpose of anti-discrimination legislation such as the Manitoba Human Rights Act is similarly to alleviate the disadvantage of historically disadvantaged, powerless or excluded groups, such as women, through providing remedies in particular

instances of discrimination to individuals (or groups, where the legislation permits.)

> R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at 331; see also references in para. 1, **supra**.

27. The Intervener submits that the disadvantage of women in the paid workforce stems in considerable measure from the perpetuation of norms which are implicitly male, in that they do not take cognizance of workers as mothers or mothers as workers. If the definition of "sex discrimination" does not extend to discrimination against pregnant women or mothers, the purpose of human rights legislation in this respect cannot be fulfilled.

(2) The arguments for finding pregnancy discrimination not to be included within the meaning of sex discrimination are insupportable.

28. There are two concerns which may underlie reluctance to find that pregnancy discrimination is sex discrimination. First, there may be a belief that pregnancy is a voluntary condition and that women who choose to become pregnant should be responsible for the consequences. Second, there may be a related belief that employers or society as a whole should not be expected to subsidize women who choose to become pregnant.

> Reasons of Adjudicator, Case on Appeal, Vol. I, p. 234; Respondent's Factum, para. 6.

29. There are serious problems with the argument that pregnancy is a voluntary condition and therefore one which should not properly be seen in the same light as sickness or disability. (At the same time, normal pregnancy is not the same as sickness or disability: it is a unique condition.)

30. While pregnancy may sometimes be a voluntary condition in the case of individual women, for women as a group pregnancy is not voluntary. The social imperatives for women to bear children are clear and obvious. It should not be socially disadvantageous for women to perform a function (reproduction) which benefits society as a whole. As recognized by this Court in cases under human rights legislation and under the Charter it is sometimes necessary to view people as members of groups in order to understand the nature of the discrimination against them and create the appropriate remedies for it.

> Action Travail des Femmes v. C.N.R., **supra**, para. I at D/4226
> Edwards Books & Art Ltd. v. The Queen, **supra**, para. 4 at 781.

31. Further, many pregnancies are not voluntary in the ordinary sense of the word. Some pregnancies are not the result of voluntary sexual activity but rather of coerced sex. Some other pregnancies are the result of voluntary sexual activity but are not desired or intended; rather, they are the consequence of unavailable, inadequate or failed birth control.

32, Notably, other medical conditions arising unintentionally from voluntary activity (such as automobile accidents or sports injuries) are not excluded from the Respondent's insurance plan. Nor are any male-specific conditions excluded from the Respondent's insurance plan.

> Case on Appeal, Vol. II, p. 276
> General Electric Co. v. Gilbert 429 U.S. (1976) 124 at 151-3, per Brennan J., dissenting.

33. Disadvantaging women who have children is inconsistent with viewing women as fully human. Wilson J. stated in the Morgentaler decision (and the Intervener submits that this statement is consistent with the Reasons of other members of the majority):

> The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. (Morgentaler v. The Queen, **supra**, para. 25, per Wilson J. at p. 172.)

34. With respect to the second concern, that it is inappropriate to subsidize women who become pregnant, in part this may rest upon the premise that pregnancy is a voluntary condition. For the reasons given above, the Intervener submits that that is a mistaken premise: the voluntariness of individual pregnancies, even where it exists, is irrelevant to the issue whether it is discriminatory to disadvantage pregnant women.

35. As well, this concern may arise from the fundamental distinction which has been made between the nature of productive activity in the private and the public spheres. Recently, some political and economic theorists have argued that the line between work done in the "private" sphere (unpaid and in general unrecognized) and in the "public" sphere (paid and recognized as work, for example by inclusion in the Gross National Product) is arbitrary and works gravely to women's detriment.

> Lorenne Clark and Lynda Lange, "Introduction", Lorenne Clark and Lynda Lange (eds.), The Sexism of Social and Political Theory (1979) vii
> Margrit Eichler, "The Connection Between Paid and Unpaid Labour and its Implication for Creating Equality for Women in Employment", in Judge Rosalie Abella (Commissioner), Research Studies of the Commission on Equality in Employment (1985) 537.

36. Although the bearing and rearing of children has traditionally been done by women in the private sphere (meaning that it is unpaid labour), undeniably bearing and rearing of children is work which is vital to our society. Notably, in many industrialized countries fully-paid (or close to fully-paid) maternity leave has been the norm.

> Monica Townson, "Economic Consequences of Maternity Leave" in Sheilah L. Martin and Kathleen E. Mahoney (eds.), Equality and Judicial Neutrality (1987) 218 at 221
> Monica Townson, "Introduction", Paid Parental Leave Policies: An International Comparison with Options for Canada, Task Force on Child Care, Background Papers Series 4, Status of Women Canada (1985) at 4-10.

37. If women are to enjoy an equal opportunity to participate in the life of our society, the social value of child bearing ought to be given full currency in the law.

Marc Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study", (1980) 18 Osgoode Hall Law Journal 336 at 426.

38. The Intervener submits, therefore, that there is no principled basis for concerns based on perceptions of pregnancy as voluntary, or on perceptions of some unfairness in making benefits, including insurance benefits, available to pregnant women and new mothers. On the contrary, to act on those perceptions would be to perpetuate inequality, as reflected in the Preamble to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1980:

> Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole....

39. The decision of this honourable Court in Bliss v. A.G. Canada was followed by the courts below and is relied upon by the Respondent. The Intervener submits that the Bliss case is distinguishable and, in the alternative, with respect, that it was wrongly decided.

> Reasons of the Adjudicator, Case on Appeal, Vol. I, 223-6
> Reasons of Simonsen J., Case on Appeal, Vol. I, 253-5
> Bliss v. A.G. Canada [1979] 1 S.C.R. 183, (1978), 92 D.L.R. (3d) 417.

40. It is submitted that the Bliss case is distinguishable because:
(a) The Court was dealing with an application to strike down federal legislation pursuant to the Canadian Bill of Rights, a federal statute which the courts were reluctant to see as permitting any departure from the principles of Parliamentary sovereignty.
(b) In Bliss, human rights legislation duly enacted by an elected legislature, aimed at promoting equality and preventing harmful discrimination, was not at issue.
(c) This Court's comments in Bliss on the meaning of sex discrimination were obiter dicta in that the basis for the decision was that section 1(b) of the Canadian Bill of Rights failed to extend to benefits rather than penalties, or to equality in the substance rather than the administration of the law, and that in any event there had

been established a valid federal objective for the Unemployment Insurance Act.

Bliss v. A.-G. Canada, **supra**, para. 39, at D.L.R. 421-425.

41. It is submitted in the alternative, and with respect, that the Bliss case was wrongly decided because:

(a) The Court and the parties were operating on the understanding of equality which was then prevalent — that (at least in the workplace) what was required was to treat women the same where they were "the same" as men. Thus, the Court had been led into error when it stated that any inequality was not created by the legislation, but by nature and that therefore there was no discrimination. Parliament, not "nature", enacted the Unemployment Insurance Act.

(b) The Court erred when it found that the legislation in Bliss was not discriminatory, even under the test for inequality which was then applied. The appellant, Stella Bliss, was disentitled to unemployment insurance benefits because of her condition even though she would have qualified for them otherwise. In other words, she was similarly situated to men who had paid premiums for the same period of time and who were unemployed, but ready and available for work. Despite being similarly situated in those respects, she was disentitled by the statute.

(c) The Court erred in logic in holding that pregnancy discrimination is not sex discrimination, for reasons given in paragraphs 6-9 above.

Bliss v. A.G. Canada, **supra**, para. 39, D.L.R. at 421-422.

42. After the ruling in Bliss, Parliament moved to amend the Unemployment Insurance Act (to remove the disentitlement which Bliss had challenged) and the Canadian Human Rights Act (to add "pregnancy" to the definition of sex discrimination). In other jurisdictions, including Manitoba, subsequent legislation has also consistently taken the form of adding pregnancy to the definition of "sex". This is an expression of public policy in the area. It does not follow from the fact that a legislature has amended a human rights statute specifically to cover an area, that it was not previously covered; amendments may be made in order to clarify, out of an abundance of caution.

Canadian Human Rights Act, S.C. 1976-77, c. 33, am. S.C. 1980-81-82-83, e. 143, s. 3
Human Rights Code, S.M. 1987, c. 44, s. 9(2)(f)
Saskatchewan Human Rights Code, S.S. 1979, c. 524.1, s. 2(o)
Individual's Rights Protection Act, R.S.A. 1980, c. 1-2, s. 7(1.1)
Human Rights Act, S.Y. 1987, c. 3, s. 6(f)
Pregnancy Discrimination Act, 42 USCS, s. 2000 e(k)
Re Ontario Human Rights Commission et al. v. Simpsons-Sears, **supra**, para. 1, overruling (1982), 138 D.L.R. (3d) 133 (Ont. C.A.) at 136
Wiens v. Inco Metals Company, **supra**, para. 6 at 73-4 and 59
Interpretation Act, R.S.M. 1954, cap. 128, s. 27(2).

43. The Respondent also relies upon decisions of this Court relating to whether it is sex discrimination to have a "no beards" rule for male employees.

Canada Safeway Ltd. v. Retail Store Employees Union Local 832 (1981), 37 N.R. 394
Manitoba Human Rights Commission v. Canada Safeway Limited (1985), 58 N.R. 311.

44. It is fallacious to analogize between pregnancy and growing a beard. Facial hair serves no particular social function. On the other hand, reproduction is a central human concern. It is imperative to the survival of our species that women give birth. To compare the ability to grow facial hair with the ability to give birth is to trivialize the social role women play in giving birth. Further, men grow facial hair as fashion dictates. Whether women have babies is not a matter of fashion.

45. Whether or not discrimination based on possession of a beard is sex discrimination (that is not at issue here), discrimination based on pregnancy is. In any event, this honourable Court did not discuss whether the "no beards" policy was sex discrimination in either of the cases cited by the Respondent. The decision of the Manitoba Court of Appeal in the 1985 human rights case has been persuasively criticized by academic commentators.

Tarnopolsky and Pentney, Discrimination and the Law (1985) at 8-51 to 8-54.

(3) Recent authority supports the inclusion of pregnancy discrimination is sex discrimination.

46. In a recent British Columbia Supreme Court decision, the issue was whether the British Columbia Human Rights Act prohibition against sex discrimination in employment prevented an employer from firing a woman whom it had just hired, upon learning that she was pregnant. Oppal J. said:

> 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...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.
>
> Century Oils (Canada) Inc. and Production Supply v. Christine Marie Davies and British Columbia Council of Human Rights, as yet unreported, British Columbia Supreme Court, January 28, 1988, at p. 10. See also the decisions cited by the Appellants at para. 7 of their Factum, and Riggio v. Sheppard Coiffures Ltd. (1988) 9 C.H.R.R. D/4520 (Ont. Hum. Rts. B.I.) at D/4525 and Wiens v. Inco Metals Company, supra, para. 6 at 59.

47. In the United Kingdom, since the Turley case cited by the Respondent there have been decisions limiting its effect. For example, in one case the tribunal said:

> Finally Mr. Symons submitted that the equality clause did not operate in this case because there was a material difference between the applicant and male employees, other than the difference of sex. Putting his argument succinctly, he said that the different treatment afforded to the applicant when she was sick was not merely because she was a woman (which would be a difference of sex alone) but because she was a woman who had just become a mother (which, he said, is an additional difference). In our view this argument propounds a distinction without a difference, and we reject it for a number of reasons. First we consider that the difference between being a man, who only has to produce a sick certificate to qualify for benefit, and being a mother, who has to go further, is in our view clearly no more than a difference of sex within the meaning of s. 1(3). The section is not designed for such narrow distinctions as the difference between being a woman and being a mother.

Coyne v. Exports Credits Guarantee Department [1981] I.R.L.R. 51 at 54; see also Hayes v. Malleable Working Men's Club and Institute [1985] I.C.R. 703 (E.A.T.) at 708-9.

48. An American appellate court considered a case under Title VII of the Civil Rights Act against an airline which as a rule fired any of its female flight attendants who married and refused to hire women as flight attendants unless they were single. No male employees were subject to such a rule, although there were no male flight attendants. The Court said:

> 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.

Sprogis v. United Airlines Inc. 444 F. 2d 1194 (7th Cir. 1971) 1194 at 1198 (cert. denied).

49. In a 1987 decision the United States Supreme Court considered whether a California statute requiring employers to provide unpaid pregnancy leave of up to 4 months, and to reinstate returning employees to their same or similar jobs, violated federal legislation (the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act) mandating the same treatment for pregnant women as other employees. The Court rejected the argument that the California statute violated the federal legislation, holding that both statutes were passed to promote equal opportunity in employment, and were not in conflict. The Court clearly believed that equality for women is promoted by accommodating the childbearing needs of working women, and noted that the California statute's approach was consistent with the dissenting opinion of Brennan J. in General Electric Co. v. Gilbert. **supra**, para. 32, adopted by Congress in enacting the Pregnancy Discrimination Act. The majority Reasons in California Federal Savings state:

> By "taking pregnancy into account" California's pregnancy disability leave statute allows women, as well as men, to have families without losing their jobs.

California Federal Savings & Loan Association et al. v. Guerra, Director, Department of Fair Employment & Housing et al. 93 L Ed 2d 613 (1987) at 629; Pregnancy Discrimination Act, **supra**, para. 42.

50. In summary, the Intervener submits that the Manitoba Court of Appeal erred in concluding that the prohibition against sex discrimination in employment in section 6(1) of the Manitoba Human Rights Act did not encompass discrimination based on pregnancy because such a conclusion is inconsistent with a purposive approach to the interpretation of human rights legislation, is inconsistent with a present-day understanding of the meaning of equality as reflected in judicial decisions, academic writing and the Charter, is inconsistent with a logical approach to sex-specific distinctions, and is inconsistent with recent authority and public policy in the area.

B. DID THE COURT OF APPEAL FOR MANITOBA ERR IN INTERPRETING THE MANITOBA HUMAN RIGHTS ACT IN THAT IT CONCLUDED THAT THE PROHIBITION AGAINST FAMILY STATUS DISCRIMINATION IN EMPLOYMENT DID NOT ENCOMPASS A PROHIBITION AGAINST DISCRIMINATION BASED ON PREGNANCY?

51. The Intervener agrees with the submissions of the Appellants and submits that family status discrimination must encompass a prohibition against discrimination based on pregnancy. A woman who is pregnant is about to become a mother, and discrimination against her because she is pregnant is based upon that future family status.

C. DID THE COURT OF APPEAL FOR MANITOBA ERR IN CONCLUDING THAT A DISABILITY PLAN, SUCH AS THE ONE OFFERED BY THE RESPONDENT CANADA SAFEWAY LIMITED, WHICH OFFERS LESS GENEROUS BENEFITS TO WOMEN EMPLOYEES WHO ARE PREGNANT, IS NOT DISCRIMINATORY WITHIN THE MEANING OF THE MANITOBA HUMAN RIGHTS ACT?

52. The Intervener submits that a plan such as the one at issue in this case, which cuts off benefits to women because they are pregnant, is discriminatory within the meaning of section 6(1) of the Manitoba Human Rights Act, either on the basis of sex or, alternatively, family status. The point of an insurance program is to spread risks; if the goal were to ensure an even allocation of benefits to all participants regardless of need, the program would not be an insurance program but something else (such as a forced savings program).

53. Further, the Intervener takes issue with the Respondent's suggestion that, because women may stand to gain more from the insurance program than men, it is proper to disentitle them from benefits. It is submitted that it is just as improper to disentitle women from benefits for that reason as it would be to disentitle from insurance benefits members of a particular racial or religious group who appear, statistically, to require a higher level of benefits in particular contexts. The fact that statistical differences may be established between groups does not immunize policies or practices distinguishing between those groups from the effect of human rights legislation.

> City of Los Angeles, Department of Water and Power, et al. v. Manhart et al. 55 L.Ed 2d 657 (1978) at 664-6.

PART IV
NATURE OF THE ORDER SOUGHT

54. The Intervener respectfully requests that this appeal be allowed, that an order be made that the Respondent has discriminated against the Appellants, contrary to the provisions of s. 6(1) of the Manitoba Human Rights Act, and that the Adjudicator be asked to determine an appropriate remedy pursuant to s. 28 of the said Act. The Intervener further requests that there be no costs against the Intervener.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Of Counsel for the Intervener Women's Legal Education and Action Fund

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Appendix B Canada Human Rights Act, S.C. 1976-77, c. 33	15
Appendix C Human Rights Act, S.B.C. 1984, c.22	16
Appendix D Human Rights Act, S.M. 1974, c. 65	1, 10, 18
Appendix E Human Rights Act, S.Y. 1987, c. 3	15

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