

CEDAW as a Tool to Ensure Economic Equality for Mothers in Canada

This piece looks at the question of how the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) provides a roadmap for the economic equality of mothers in Canada. The paper outlines the provisions of CEDAW that would support mothers' claims to income supports that are intended to address the specific needs of women in the workforce created by their roles as child bearers and carers. While the Supreme Court of Canada has provided a progressive vision of gender equality as it affects mothers, lower courts have failed to follow that court's leadership. The article concludes that we must continue to hold governments to account in implementing, interpreting and supporting policies that may bring Canada closer to the ideal of equality for women that is envisioned in CEDAW.

In 1981, Canada ratified the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In doing so Canada undertook to take all appropriate measures to ensure women's full and equal rights by constitutional guarantee and by legislative and other means (Articles 2 and 3). Thirty years and several reviews by the CEDAW Committee (set up to review countries' compliance with the Convention, now under the auspices of the Office of the High Commissioner for Human Rights) have passed since then and yet women, and especially mothers, in Canada still struggle for equality.

This article reviews some of the provisions of CEDAW that are relevant to Canadian mothers' equality, with a particular focus on the economic aspects of equality. For many women, the greatest impacts of inequality are felt when they become mothers and the mismatch between market work and mother work results in economic setbacks. In particular, the paper looks at several

court cases that clearly proclaim a vision of equality for mothers, and other cases that seem to belie our commitment. As others authors have noted before, progress towards equality for women follows a pattern: One step forward and two steps back (see Brodsky and Day).

The United Nations recognized this pattern at the time the Convention was being negotiated and drafted, and in the Preamble it was noted that despite the Universal Declaration of Human Rights which proclaimed that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, and despite the responsibility of States Parties to the International Covenants on Human Rights to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights, women continued to experience extensive discrimination. In the preamble, the Convention documents the following concerns:

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist.

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

...

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

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,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women...

These are concerns and aspirations that Canada remains committed to even as, a decade into the twenty-first century, inequalities between men and women continue to exist. While in a country like Canada men and women may be equal on paper, various measures show that equality is elusive in reality.¹

The Reality for Women in Canada

It is no secret that there is a growing gap between the richest 10 percent and the poorest ten percent of the population in Canada. The richest receive more than ten times the average income of the poorest citizens and Canada does a poorer job of redistribution through taxes and benefits than it has done in the past, or than is the case in most OECD countries (OECD 2011).² The OECD previously reported that income inequality grew in Canada much more rapidly than in other OECD countries in the period from 1995 to 2005 attributing this to significantly reduced spending on unemployment and various family benefits (OECD 2008). For women this matters because women are more frequently represented among the poor and experience greater depths of poverty than men. Women also rely more on social programs than men (Statistics Canada 2006b: 144; Finnie; Morris; Townsend 2-3, 6).

We also know that women in Canada still earn less than men, a lot less than men. The average annual pre-tax income in 2003 of women aged 16 years and older from all sources is \$24,400, a mere 62 percent of the figure for men. Even full-time, full-year employed women with average earnings of \$36,500 made only 71 percent of what comparably situated men earned (Statistics Canada 2006b: 134, 149, 140). International studies of wage gaps have established that there remains a residual difference between men's and women's earnings that cannot be explained away by differentials in education, skills, experience or location in the labour market and which reflects gender-based inequality (Kabeer 4). Compounding this are other disadvantages experienced by many women in Canada. Aboriginal women, women with disabilities, immigrant women and women of colour all experience deeper poverty still, a fact that was noted and roundly condemned by the CEDAW Committee in 2003 and again in 2008 (Statistics Canada 2006b).³

The most recent Global Gender Gap Report of the World Economic Forum, which considers the economic participation and opportunities, educational attainment, political empowerment and health and survival of women in countries around the globe ranked Canada back at 18th after placing 20th

in 2010, 25th in 2009, 31st in 2008, 18th in 2007 and 13th in 2006 and still behind countries such as the Philippines, Lesotho, the United Kingdom and the United States (see Haussmann et al.). According to the measures of the World Economic Forum, Canada has closed less than three quarters of the gap between women and men. By contrast, Iceland, which is ranked at the top, has closed more than 85 percent of the gap.

For women with children the gap between them and men is even greater. A 1995 Statistics Canada study found that the major factor contributing to the wage gap is the presence of children, not age, marital status or education (Statistics Canada 1995:22). More recent Statistics Canada research has studied the “motherhood earnings gap” finding that average hourly earnings of mothers were about 12 percent lower than those of women who do not have children (Statistics Canada 2009; Turnbull 2001). Seventy three percent of all women with children under 16 years living at home participated in the paid labour force while 87 percent of men did so according to the 2001 census (Statistics Canada 2001). Three quarters of the women with children who participate in the paid labour force are employed full time regardless of the age of their children (Statistics Canada 2006b: 105). Licensed, affordable childcare is only available for 17 percent of children under 12 in Canada, so even in the 21st century women still perform the lion’s share of domestic tasks on top of their paid hours in the workforce, resulting in a gendered division of paid and unpaid work. Women spent on average 4.3 hours on domestic labour including childcare in 2005 compared with 2.5 hours/day for men. Ninety percent of women engage in such unpaid work whereas the percentage of men participating is 69 percent (Statistics Canada 2006a; Pupo; Bakht et al. 543-4, 546; Calder 352). The effects of such inequities during their working years follow women into their senior years. More than sixty percent of women do not have private workplace pensions, and their earnings from the Canada Pension Plan are much lower than are men’s (see, generally, Statistics Canada 2006b: 279; Wiggins; Doe and Kimpson).

Leadership at the Supreme Court of Canada

As a nation, we find ourselves in this place in spite of the fact that, after ratifying CEDAW, we did entrench a broad commitment to gender equality into our constitution in the form of the equality guarantees in sections 15 and 28 of the Canadian Charter of Rights and Freedoms.⁴ Our highest court has interpreted the equality guarantee to include substantive equality, a concept of equality that extends beyond formal equality’s promise of treating likes alike, to ensure that protected groups are not subject to disadvantages or burdens not imposed on others, or excluded from access to advantages or benefits available to others

(*Andrews v. Law Society of British Columbia*). While the jurisprudence since that 1989 decision has deviated significantly from the broad and remedial approach first laid out, recent decisions have begun the slow journey back to surveying the impact on disadvantaged groups to ensure that the challenged laws or actions are not reinforcing systemic disadvantages or stereotypes (*R. v. Kapp*).

In 1989, just months after that first equality case, the Supreme Court of Canada decided the case of *Brooks v. Canada Safeway Ltd.* Chief Justice Dickson wrote that that discrimination against a woman because of pregnancy was discrimination on the basis of sex, and noted the burden of childbearing borne by women, saying it was “unfair to impose all of the costs of pregnancy upon one half of the population . . . and that it seems to bespeak the obvious that those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged.” Reading words like these one could imagine that the Chief Justice had read the preamble to CEDAW and had clearly grasped the systemic discrimination it was intended to address, even though there is no reference to CEDAW in his decision.⁵ The decision was remarkable because barely a decade before, in 1978, the Supreme Court had decided in the case of *Bliss v. A.G. Canada* that a woman who had been refused Unemployment Insurance benefits because of her pregnancy was not discriminated against on the basis of sex. The court reasoned that Stella Bliss had not experienced sex discrimination since the Act treated pregnant women differently from other unemployed persons, both male and female, “because they are pregnant and not because they are women.” The *Bliss* case is a classic example of the failure of formal equality and the *Brooks* case an example of how looking at the broader context of an equality claim to examine the law’s impact can promote substantive equality.

In 2005, the Supreme Court, in a case about the respective constitutional powers of the federal and Quebec governments, reviewed Quebec’s maternity/parental benefit scheme.⁶ A majority of the judges on the panel were women, and they upheld the constitutionality of the federal Employment Insurance maternity/parental benefits. They also brought a substantive equality approach to this case, and again, a broad view of the social context of women who are mothering that reflects the aspirations of CEDAW. Madam Justice Deschamps recognized that “the benefit derived from procreation extends beyond the benefit to the parents. Children are one of society’s most important assets, and the contribution made by parents cannot be overstated. . . . The decision to offer women the possibility of receiving income replacement benefits when they are off work due to pregnancy is therefore a social policy decision . . . that can . . . be harmoniously incorporated into a public unemployment insurance plan.”⁷ This language underlines the benefit society derives from women’s reproductive labour and the collective responsibility to support women in their roles as workers and mothers. It also expresses a departure from the privatizing approach

that is seen in many other decisions that touch upon social reproduction. The decision, in line with a substantive equality approach, also seems to recognize that maternity/parental benefits are different from regular unemployment benefits because they are designed to meet the particular needs of women: “a growing portion of the labour force is made up of women, and women have particular needs that are of concern to society as a whole. An interruption of employment due to maternity can no longer be regarded as a matter of individual responsibility.”⁸

These two decisions represent strong statements of the collective social responsibility for the work of raising future generations and affirm the need to provide at least some level of that public support as a necessary element of women’s full inclusion in Canadian society. While neither decision referenced Canada’s obligations under CEDAW, both of them represent an expression of equality that would give effect to those obligations. Unfortunately, during the same time periods at lower level courts and in the hands of government administrators, these progressive approaches to ensuring economic equality and inclusion for mothers are not being upheld.

Lower Courts Still Struggle with Equality for Mothers

Starting in 1999, a series of cases were decided by the Federal Court of Appeal that related to women’s access to Employment Insurance benefits in situations where they had recently claimed maternity benefits, or were attempting to qualify for maternity or parental benefits. In several of the cases the court held that the rules which limited the mother’s access to regular benefits after receiving maternity/parental benefits were not contrary to the equality provisions of the *Charter* because they did not result in differential treatment since both men and women experienced the same limitations on benefits (even though at the time 98 percent of maternity benefit claimants were women) (*Sollbach v. Canada (Attorney General)*; *Krock v. Canada (Attorney General)*; *Canada (Attorney General) v. Brown*; *Miller v. Canada (Attorney General)*).⁹ In another case where the court recognized that the eligibility requirements impacted women differently than men because women’s work patterns were affected by their responsibilities for childcare, the court still found that there was no discrimination, because a denial of benefits “could hardly be said to violate one’s essential human dignity” (*Canada (Attorney General) v. Lesiuk*). Since the Supreme Court’s decision in *Kapp* in 2008, “dignity” is no longer being considered as the primary indicator for a finding of discrimination. The Court noted that the focus on human dignity (as set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497) was “abstract and subjective,” “confusing and difficult to apply,”

“formalistic,” and “an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.”¹⁰

These are cases where the rules that the court was being asked to consider were rules that appeared to treat women the same as men, but where the impact of applying them to women, who still bear the greatest burden of child rearing, and certainly of childbearing, is disadvantageous. The application of these rules in this way makes it difficult and burdensome for women to participate fully in marketwork while still having responsibility for motherwork. Laws, policies and practices which do not take account of the impact of care giving responsibilities on earnings and workforce participation compound the disadvantages women already experience. In these cases, the women were asking courts to recognize that they are workers *and* mothers. Recognition of a woman’s identity as a worker should not be limited to the situations where she suppresses her mothering role in order to appear more like an ideal—typically male—worker. The law should support the recognition of workers who have other important social commitments such as raising children.

CEDAW has provisions that require Canada to pass laws and implement policies and practices that will remove these disadvantages. Under CEDAW Canada must take measures to modify social and cultural patterns in a way that promotes an understanding of social reproduction as the collective responsibility of society and parents of both genders (Article 5); to eliminate discrimination against women in employment through measures such as maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances; safe working conditions; prohibitions on discrimination on the grounds of pregnancy or of maternity leave; and the provision of social services that enable parents to combine family obligations with work responsibilities (for example, child-care facilities) (Article 11). CEDAW also requires that Canada take into account the particular challenges faced by rural women, especially their unpaid work and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy (Article 14).

With such clear statements of Canada’s commitments, it is difficult to understand why women, and especially mothers, still have such a gap to close until they achieve equality with men as it is envisioned in CEDAW. Part of the reason for slow progress towards this goal may be that courts are not often reminded of our country’s commitments under international laws like CEDAW. They also lack a full understanding of the realities of women’s lived experiences, especially in caring for children and working in paid employment (see Turnbull 2006). Another part of the problem is that when an individual woman brings a challenge to the unequal effect of some law (like the Employment Insurance rules about eligibility for maternity benefits

discussed above) the government is quick to defend the law and to argue against the substantive equality approach the claimant puts forward. A recent case relating to access to disability benefits under the Canada Pension Plan (CPP) provides a distressing example (*Harris v. Minister of Human Resources and Skills Development*).

A young mother with Multiple Sclerosis was unable to claim disability benefits under the Canada Pension Plan scheme because she failed to meet the “recency requirement” under the Act. One of her children was profoundly disabled which affected her ability to return to paid work until the child was nine years old, but the rules only provide for absence from paid work until the child reaches seven years of age. She claimed that she was discriminated against on the basis of her child’s disability, not on the basis of gender. The court was willing to consider her child’s disability as a ground of discrimination under section 15, but ultimately decided that there was no discrimination because “the provisions apply equally to all ... [since] ... all children take the same length of time to reach the age of seven.” One judge even went on to say that the claimant “chose to care for her child rather than return to work in 1998 and so it is a result of her own actions that she was unable to meet the recency requirement.” This decision was not appealed to the Supreme Court of Canada. It is difficult, in light of Canada’s commitments made under CEDAW, to understand why the government is defending such a narrow application of a law that was intended to address women’s unique situation as workers who have children.

Conclusion

When faced with decision-making like this it is easy to get discouraged and to wonder if we will ever achieve the kind of substantive equality that Canada has committed to through CEDAW and through our own constitutional provisions. In Article 7, CEDAW provides that governments shall “ensure to women, on equal terms with men, the right ... [t]o participate in non-governmental organizations and associations concerned with the public and political life of the country.” Yet, the federal government has cut funding to Status of Women Canada significantly since 2006 and as a consequence to a broad range of women’s organizations.¹¹ The Court Challenges Program, an innovative funding program that allowed disadvantaged groups to apply for support to bring “test cases” to ensure proper application of the Charter equality guarantees was also cancelled in 2006, with the suggestion that spending government funds to challenge Canada’s laws was an inappropriate use of public funds.¹² It is contrary to the commitments that Canada made under CEDAW to cut these important programs that enable women to advocate for gender equality.

We must continue to push our governments and the judiciary to live up to the

commitment we have made to the women of this country. Despite cuts to our organizations, despite the difficulty of getting equality cases before the courts, we must demand that Canada take “all appropriate measures to ensure women’s full and equal rights.”¹³ The Convention on the Elimination of all forms of Discrimination Against Women is a tool that women must put forward more vigorously when making claims for equality.

¹See for example the statements on the website of Foreign Affairs and International Trade Canada to the effect that “Canada is a world leader in the promotion and protection of women’s rights and gender equality” (<<http://www.international.gc.ca/rights-droits/women-femmes/equality-egalite.aspx?view=d>>).

²The citation to statistics from the OECD, the World Economic Forum and Statistics Canada are the same or similar to statistics that I regularly cite in my work to lay the context for the legal analysis that follows. See, generally, also Turnbull (2001) and continuing through to Turnbull (2010).

³See UN CEDAW (2003), at para. 357-8, 361-2, 373-82, esp. 373-4; see also UN CEDAW (2008).

⁴Part I of the *Constitution Act*, 1982. While the Charter does not provide explicit reception of CEDAW and there is debate about its status in Canada, the history of the Charter and the approach taken by courts confirm it is relevant to equality law in Canada. See, generally, Freeman and Van Ert (88, 187, 540).

⁵In *Slaight Communications v. Davidson* (at 1056), decided the same year as the *Brooks* case, C. J. C. Dickson does provide the most compelling theory for the application of international human rights law to Charter decision-making.

⁶Reference re *Employment Insurance Act* (Can.) ss. 22 and 23, 2005 SCC 56.

⁷Ibid at para 54 and 56.

⁸Ibid at para 66.

⁹These cases may simply be evidence of the challenges created by the “dignity” approach to equality analysis (see also note 10) or they may be indicative of the difficulty the courts still experience in grasping the imperative of substantive equality as it applies to mothers.

¹⁰At para. 22, where the Court cites a range of critical literature that has interrogated the application of the “dignity” concept.

¹¹A \$5 million cut resulted in the closure of three quarters of the organization’s offices across the country and was accompanied by restrictions on the “advocacy” work of the community organizations funded by Status of Women (see the *Tenth Report* of the Standing Committee on the Status of Women. See, also, “Tories to cut off funding for women’s lobby groups.”) The new “model” has resulted in the closure of countless women’s organizations in the country as the restrictions on the nature of work they do and on the dollars available has

closed them down (see Mullins; and the webpage of the Ad Hoc Coalition for Women's Equality and Human Rights).

¹²Although the cut took place within a range of other program cuts, specific reasons were not provided. Then Treasury Board president, John Baird, did however remark that it didn't make sense for the federal government to "subsidize lawyers to challenge the government's own laws in court" (see Walkom. See also "Court Challenges Program").

¹³Many organizations across the country continue to work hard to promote gender equality in the face of these obstacles. In Manitoba, UNPAC is doing important work in the community and with the government to achieve the CEDAW promise (see DeGroot and Turnbull; Turnbull 2010).

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