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How Does the Law Recognize Work?

When a parent goes on maternity or parental leave from regular employment to give birth to, breastfeed or care for and nurture an infant, is that parent working? What do we understand to be work? When women are engaged in both market work and motherwork, what messages do we as a society send about their work? Over the past quarter century courts in Canada have had occasion to consider some of these questions and their pronouncements have been indicative of the position of mothers in Canadian society. This paper will consider a number of recent cases that have dealt with women's dual roles as mothers and workers, cases that show that despite some signs of progress, there is much that has not changed in 25 years.

In 1978 the Supreme Court of Canada decided the case of *Bliss v. A.G. Canada* which held that a woman who had been refused Unemployment Insurance¹ benefits because of her pregnancy was not discriminated against on the basis of sex.² For a decade thereafter a formalistic model of gender equality restricted women's ability to challenge discrimination on the basis of pregnancy. Remarkably, just a decade later in *Brooks v. Canada Safeway Ltd*, the Supreme Court had the opportunity to revisit the issue and recognized that a woman who was discriminated against because of pregnancy was discriminated against on the basis of sex and that such discrimination was contrary to both human rights legislation and the equality guarantee of the *Canadian Charter of Rights and Freedoms*.³ Broad language noting the weight of the burden of childbearing borne by women proclaimed that it was "unfair to impose all of the costs of pregnancy upon one half of the population." The court noted "[t]hat those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious."⁴ Despite such broad language (which might have suggested that discrimination against

mothering was a thing of the past) a number of recent cases seem to be taking us back to the dark days of *Bliss*.⁵ Kelly Lesiuk and Joanne Miller are just two of the women whose attempts to shape or extend our understandings of what gender equality means for mothers have been rejected on the basis of formalistic *Bliss*-type reasoning.

Kelly Lesiuk is a registered nurse. Already the mother of a three year old child, she was employed on a part time basis when she became pregnant with her second child. On her doctor's advice in April 1998 she stopped working and applied for EI maternity benefits. She was turned down because she had worked only 667 hours in the qualifying period instead of the 700 hours required to demonstrate work force attachment. Ms. Lesiuk unsuccessfully appealed this denial to a Board of Referees. On a further appeal to the Umpire she argued that the 700-hour eligibility requirement violated her equality rights. The Umpire agreed, finding that the requirement discriminated against those whose childcare responsibilities made it more difficult to meet the requirement, predominantly women who are employed an average of 30 hours/week compared to men's average of 39 hours/week. The Umpire also found that the eligibility requirements undermined the human dignity of women by promoting the view that women are less capable or valuable as members of Canadian society because they must work longer to demonstrate their attachment to the workforce. The Attorney General sought a review of the Umpire's decision by the Federal Court of Appeal, and in January 2003 that court held that Kelly Lesiuk was not discriminated against by the eligibility requirements of the Employment Insurance scheme because her human dignity was not demeaned.⁶

Just months earlier, in October, 2002, Joanne Miller was told by the Federal Court of Appeal that she was not entitled to full employment insurance benefits when she lost her job because she had previously received maternity and parental benefits in the same benefit period. The court held that the *Unemployment Insurance Act* which limits receipt of regular benefits when claimants have already received special benefits was not contrary to the equality provisions of s. 15 of the *Charter of Rights and Freedoms*. Ms. Miller had been employed at the Native Canadian Centre of Toronto since 1992. In 1995 she became pregnant with her second child. She went on maternity leave from her employment in March of 1996 and applied for and received 15 weeks of maternity benefits and ten weeks of parental benefits. Four days before she was due to return to her job, Ms. Miller was informed by her employer that her position was no longer available. Finding herself jobless, she applied for regular unemployment insurance benefits to replace her income while she sought new employment. On the basis of the weeks of insurable employment, a claimant in Ms. Miller's situation who became unemployed would ordinarily be entitled to 40 weeks of regular benefits. However, since Ms. Miller had already received 25 weeks of maternity and parental benefits, she was only entitled to 15 weeks of regular benefits because the operation of the Act has the effect of deducting

from the maximum number of weeks of entitlement for regular benefits any weeks of special benefits received during the same benefit period.⁷

In the cases of *Lesiuk* and *Miller* as well as the other related cases, the courts and tribunals appeared to have been unaware of the context within which women engage in market work and motherwork. This was so in spite of the ample evidence of women's lived experiences that was presented by the intervenors in these cases.⁸ Women in Canada continue to experience economic disadvantages relative to men as evidenced by the continuing wage gap. Women on average earn anywhere from \$0.76 to \$0.52 for every dollar earned by men, depending upon the way in which the figures are calculated. Only unmarried women aged 25 to 44 who are employed fulltime approach men's earnings. These women earn \$0.97 for every dollar fulltime employed men earn. Women also tend to work in traditionally female occupations with correspondingly lower "female" rates of pay. In 1992, 70 percent of all employed women worked in teaching, nursing and related health professions, clerical, or sales and service. Women are also disproportionately among the members of the part time workforce.⁹ Structural characteristics of the workplace also serve to marginalize mothers as workers. Inflexible work hours and increased employer demands for overtime and shift work act as barriers to people with childcare responsibilities. Economic changes and globalization have also led to increased contract and part-time work, particularly in sectors of the economy where women have traditionally found employment.¹⁰ The result is increasing instability and vulnerability for workers, especially women.

Even in today's society where 71.4 percent of mothers with children under the age of 16 are working fulltime in the paid workforce, women continue to shoulder the bulk of the domestic labour associated with caring for children and running a household.¹¹ When childcare arrangements fail, it is mothers who take time away from work to meet the family's childcare responsibilities.¹² After a child is born, it is almost always the mother who takes leave from her employment to care for the newborn or adopted child. In 1998, women represented 98.4 percent of the recipients of maternity and parental benefits under the employment insurance scheme.¹³ Finally, adequate access to employment requires adequate access to quality affordable childcare, a goal we have yet to realize in Canada where a mere third of all children with both parents or a lone parent being employed have access to licensed space.¹⁴ All of these factors heighten women's vulnerability in the labour market, especially at a time of job loss.

Related to women's disadvantaged position in the workforce is the fact that women are also generally at a greater risk of poverty than men and, when in poverty, experience a greater depth of poverty. Women who are already disadvantaged as racialized women, aboriginal women, lone parents, immigrants or disabled women are even more likely to face these risks.¹⁵

Recent work by authors in Canada, the United States and Europe now reveals that some of the economic disadvantage women experience is attribut-

able to the responsibilities many women bear as mothers. Mothers may experience a reduction in expected lifetime earnings of as much as 57 percent relative to women who do not have children. The value of this loss could exceed \$US one million. Laws and policies which do not take account of the impact of care giving responsibilities on earnings and workforce participation compound the disadvantage women already experience.¹⁶

Discriminatory attitudes about women as secondary earners also continue to operate. An employed woman is assumed to be supported by her husband who is the “real” wage earner. In reality however there are many single mothers who don’t have husbands or whose former husbands are not paying adequate support, many lesbian mothers whose female partners also experience discrimination in earnings, many women whose earnings are as vital to their families’ survival as are their male partners’.¹⁷

Such discriminatory attitudes were also prevalent in the early 1970s, at a time when child care was also less available, and when the time away from paid employment after the birth of a child averaged 6.6 years.¹⁸ This was the time when Stella Bliss had her child. When Stella Bliss became pregnant she was fired from her job. Because of very high eligibility requirements she was unable to qualify for maternity benefits under the Unemployment Insurance program, so she applied for regular benefits for the period of time that she was available for work before and after the birth of her child. Even though she met the eligibility requirements for the regular benefits she was turned down because a provision of the *Act* denied regular benefits to pregnant women for a period of 15 weeks surrounding the expected date of birth. It was this provision that Stella Bliss challenged as violating her equality rights under the old Bill of Rights. The courts relied on the logic of pregnant persons to find that she 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.”¹⁹

Such an approach to a question of gender equality is no longer correct in law or in policy and was clearly rejected by the Supreme Court of Canada in *Brooks*. The same year it decided *Brooks* the Supreme Court handed down its first decision on the equality provision of the *Charter* and set a course towards substantive equality that has evolved in fits and starts over the intervening decade.²⁰ The proper approach to equality claims is now accepted as being the one set out by the Supreme Court in 1999 in *Law v. Canada (Minister of Employment and Immigration)*.²¹ The court set out an approach to equality that focuses upon three central issues:

- (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
- (C) whether the law in question has a purpose or effect that is

discriminatory within the meaning of the equality guarantee.²²

A proper application of this analysis should have supported a finding that the EI provisions challenged by both Lesiuk and Miller do violate the equality rights of women who are mothers. When Joanne Miller lost her job she, unlike other workers who found themselves unemployed, was unable to rely on regular benefits solely because she had received maternity and parental benefits. The Federal Court of Appeal was unable to see this as differential treatment, noting that Miller was treated just like any other recipient of maternity, parental or disability benefits and so her claim failed. For Kelly Lesiuk, the differential treatment was recognized but the Federal Court of Appeal found that such treatment would not offend her human dignity and so her claim failed on the basis that her treatment was not discriminatory. In certain respects the reasoning of the Federal Court of Appeal in both of these cases echoes the reasoning of the Supreme Court in *Bliss* itself 25 years ago. First, in *Bliss* the court employed a formal approach to equality where likes were expected to be treated alike. Second, the court showed great deference to parliament to enact laws as it saw fit. Both of these lines of reasoning are also apparent in the *Lesiuk* and *Miller* cases.

In *Bliss*, the Supreme Court noted that men and women who were not pregnant were treated alike for purposes of the unemployment insurance scheme, and only pregnant persons, who were differently situated, were treated differently. Consequently, the denial of benefits to Stella Bliss because she was pregnant did not amount to gender discrimination. In *Miller* and the related cases the Federal Court of Appeal noted that men and women are treated exactly the same by the impugned provisions, that only people who had received maternity or parental benefits were treated differently and thus they are gender neutral and not contrary to the claimants' *Charter* rights.²³ What the Court did not advert to is that while men too may have their benefits limited, it is in fact almost exclusively women who are actually affected. In *Lesiuk*, the formal approach is not so patently obvious, but is present nonetheless. While the court accepted that Lesiuk and other part-time workers were treated differently and that that differential treatment may have been due to her gender and parental status, it held that it was not discriminatory because ultimately very few women in parental status were affected and the differential treatment was really "between those who work at or above the threshold requirement for hours and those who fall short of this threshold."²⁴ In both of these cases, as in *Bliss*, the laws had a disproportionately negative effect on mothers but the courts refused to recognize that effect as a violation of the claimants' equality rights.

The deference to parliament evident in *Bliss* also played out in *Miller* and *Lesiuk*. In *Miller*, the court by adopting its reasoning in the earlier related decisions, noted that a court should not "engage in constitutional tinkering" even when the adverse effects of the impugned provision are not undifferentiated in their impact.²⁵ In *Lesiuk*, it was in the analysis under section one of the

Charter that the court emphasized that the complexity of the EI scheme meant that the courts ought not to superimpose additional requirements even if they may be desirable to address differential impacts of the legislation.²⁶ Yet surely the Constitution does require courts to tinker or superimpose additional requirements when the laws enacted fail to meet the standard of equality set out in the *Charter*. Parliament may be best suited to set priorities and determine eligibility for social benefits, but when it does so in violation of a constitutional right, and cannot justify the violation under section one, then it is the role and duty of the court to “tinker” with the legislative scheme. Deference is contrary to the text and spirit of the *Charter* as well as the early *Charter* jurisprudence.²⁷

Miller and Lesiuk have brought important and difficult cases before the courts to try to address the very questions that were raised in the opening of this piece. What does gender equality look like for mothers? Can a woman belong fully to Canadian society as both a mother and a worker? So far, despite the courageous challenges of women like Lesiuk and Miller, the Federal Court of Appeal has been unable to answer these questions in any meaningful way.

Perhaps some of the difficulty for the court in reaching a nuanced understanding of what equality might entail for mothers lies in the limits of an analysis that requires a claimant to demonstrate a violation of her human dignity. Much in the *Law* approach to equality turns on the concept of human dignity. Mr. Justice Iacobucci defined it this way:

Human dignity means that an individual or group feels self respect and self worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?²⁸

This definition of human dignity sounds fair and in keeping with the spirit of the *Charter*'s substantive equality guarantee. But it has been criticized by a number of commentators who have pointed out that notions of human dignity pervade many sections of the *Charter* and that equality comprises something more. There is also a fear that human dignity is too loose and malleable a

concept to protect the particular kinds of interests that are to be protected by section 15.²⁹ Certainly the focus of the Federal Court of Appeal on human dignity in both *Miller* and *Lesiuk* has been an impediment to their success. In both cases the court affirmed that a denial of EI benefits “could hardly be said violat[e] one’s essential human dignity,”³⁰ since they did not reinforce the stereotype that women should stay home and care for children or suggest that women’s work is any less worthy of recognition.

If human dignity has been a stumbling block for equality seeking mothers and has been challenged on a theoretical basis as well, then perhaps we should ask what is the particular essence of equality that section 15 should be used to protect and foster? Denise Reaume has surveyed a range of feminist positions to conclude that, despite their differing understandings of women’s experiences and of strategies to achieve equality, all feminist approaches are concerned with the harm of exclusion.³¹ She has specifically focused on implicit exclusion which occurs when rules or laws are drafted using men as the norm. Such gender neutral rules do not encompass the lived experiences of women in their design and in their operation they exclude women from full participation in the larger society.³² Reaume offers *Bliss* as the classic example of such implicit exclusion. The *Miller* and *Lesiuk* cases provide 21st century examples of the same kind of implicit exclusion.³³

In a recent and important article Donna Greschner has argued that the primary purpose of the equality guarantee is to protect each person’s interest in belonging, simultaneously, to several communities. The communities that everyone may belong to are the universal human community, the Canadian political communities and the particular identity communities that may be demarcated by sex, race, religion or other enumerated or analogous attributes.³⁴ As Greschner notes, the concept of human dignity may protect an individual’s interest in belonging to the universal human family, but does not go far enough to protect his or her other interests in belonging.³⁵ She maintains that the historical, philosophical and linguistic underpinnings of section 15 all support the conclusion that it is intended to protect belonging.³⁶ The complex sense of community that characterizes Canadian society is evidence of the rejection of assimilation as the only way to belong.³⁷

Belonging is particularly relevant in the situation where what is at stake is a mother’s interest in belonging to the “public” sphere of employment, even while she also continues to belong in the “private” sphere of child nurture. The sense of connection, of a non-autonomous identity that the word “belonging” implies, captures the encumbered reality of a mother’s experience.³⁸ This concept of belonging, as it applies in the context of *Lesiuk*, *Miller* and the related cases, crystallizes the sense of injustice that has pushed at least five women in the past three years to challenge provisions of the Unemployment Insurance Act before the Federal Court of Appeal. These women are asking the court to recognize that they are members of the human family, the Canadian political communities and are women and mothers. They should not have to choose

between being mothers and being workers. They should not be treated as “less than full members, and not permitted to participate fully in the opportunities and riches of society.”³⁹

Although both Miller and Lesiuk sought leave to appeal the Federal Court of Appeal decisions to the Supreme Court of Canada, they were both turned down. This is especially unfortunate because it is vital that the Supreme Court provide some guidance and demonstrate what gender equality looks like as it applies to women who have responsibilities for bearing and raising children. This area of women’s gendered lives is one that poses challenges for theorists⁴⁰ and courts alike, and the need to address it properly is vital in promoting women’s equality. For the reality now is that however integrated women may have become into the public spheres of life, most still continue to have children. How we as a society allow for a “fit” between the worker and the mother roles of women determines how real equality will be for us. The Supreme Court may soon be considering an appeal from a Quebec Court of Appeal decision that determined that maternity and parental leave benefits paid out under the *Employment Insurance Act* are social welfare payments paid out not for economic reasons but because of a personal interruption in employment.⁴¹ The practical result of this is that the federal government does not have the legislative authority to establish maternity and parental leave programs but the provinces would be free to implement their own schemes.⁴² This case may provide some opportunity to the Supreme Court to speak to the question of “fit” in women’s motherwork and market work. Perhaps then it will be possible to breathe life into the words of Chief Justice Dickson in *Brooks*: “Combining paid work with motherhood and accommodating the childbearing needs of women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.”

¹*Unemployment Insurance Act*, R.S.C. 1985, c. U-1 reenacted as the *Employment Insurance Act*, S.C. 1996, c. 23.

²[1979] 1 S.C.R. 183 [Bliss].

³*Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁴*Brooks v. Canada Safeway Ltd*, [1989] 1 S.C.R. 1219 [Brooks].

⁵*Canada (Attorney General) v. Lesiuk*, 2003 FCA 3; *Miller v. Canada (Attorney General)*, 2002 FCA 370 [Miller]; *Sollbach v. Canada (Attorney General)* (1999) 252 N.R. 137, 16 C.C.L.I. (3d) 161, 71 C.R.R. (2d) 109 (F.C.A.) [Sollbach]; *Krock v. Canada (Attorney General)* (2001), 273 N.R. 228, 2001 FCA 188 [Krock]; *Canada (Attorney General) v. Brown* (2001), 286 N.R. 395, 2001 FCA 385 [Brown].

⁶*Lesiuk*, *ibid.*

⁷*Miller*, *supra* note 5.

⁸Women's Legal Education and Action Fund in particular presented such evidence.

⁹Lorna A. Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001) at 23.

¹⁰Statistics Canada, *Women in Canada 2000* (Ottawa: Statistics Canada, 89-503-XPE, 2000) at 103.

¹¹Norene Pupo, "Always Working Never Done: The Expansion of the Double Work Day" in Pupo, Duffy & Glenday, eds. *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the 21st Century* (Toronto: Harcourt Brace & Company, 1997) at 545-46; *Women in Canada 2000*, *ibid.* at 100.

¹²Turnbull, *Double Jeopardy*, *supra* note 9 at 22.

¹³*Women in Canada 2000*, *supra* note 10 at 109, 133.

¹⁴*Women in Canada 2000*, *supra* note 10 at 101.

¹⁵Marika Morris, "Women and Poverty: A Fact Sheet" (CRIAOW: March 2002) <http://www.criaw-icref.ca/povertyfactsheet.htm>; *Women in Canada 2000*, *supra* note 10.

¹⁶See generally Turnbull, *Double Jeopardy*, *supra* note 9.

¹⁷*Ibid.*

¹⁸Janet Fast and Moreno Da Pont, "Changes in Women's Work Continuity" (Autumn 1997) 46 *Canadian Social Trends* 2.

¹⁹Bliss, *supra* note 2.

²⁰*Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143.

²¹[1999] 1 S.C.R. 497. The *Law* approach has been critiqued by a number of authors who note that it risks allowing the courts to slip back into the old relevancy test from the earlier cases, and placing the burden of proof upon the claimants rather than upon the state. See generally Beverley Baines, *ALaw v. Canada: Formatting equality*" (Spring 2000) 11 *Constit. Forum* 65; June Ross, *AA Flawed Synthesis of the Law*" (Spring 2000) 11 *Constit. Forum* 74; Craig B. Davis, *AVriend v. Canada, Law v. Canada, Ontario v. Mand H.: The Latest Steps on the Winding Path to Substantive Equality*" (1999) 37 *Alta. L. Rev.* 683; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002) 6 *Rev. Constit. Studies* 291; Donna Greschner, "Does *Law* Advance the Cause of Equality" (2001) 27 *Queen's L. J.* 299.

²²*Law*, *supra* note 21 at para. 88.

²³See *Miller, Nishri and Sollbach*, *supra* note 5.

²⁴*Lesiuk*, *supra* note 5 at para 50.

²⁵*Nishri*, *supra* note 5 at para. 43, emphasis added. In *Krock*, *supra* note 5 at para. 11, the court held that when it is "presented with an argument that a complex statutory benefits scheme, such as unemployment insurance, has a differential adverse effect on some claimants contrary to section 15, the court is not concerned with the desirability of extending the benefits in the manner sought. In the design of social benefits programs, priorities must be set, a task for which parliament is better suited than the courts, and the Constitution should not be regarded as requiring judicial fine tuning of the legislative scheme."

²⁶Lesiuk, *supra* note 5 at para 66.

²⁷Lorraine Wienrib, "Canada's Charter of Rights: Paradigm Lost?" (2002) 6 *Rev. Constit. Studies* 119.

²⁸*Law, supra* note 21 at para. 53.

²⁹*Supra* note 21.

³⁰Sollbach, *supra* note 5 at para. 14.

³¹Denise Reaume, "What's Distinctive About Feminist Analysis of Law?" (1996) 2 *Legal Theory* 265.

³²*Ibid.* at 273.

³³*Ibid.* at 281.

³⁴Greschner, *supra* note 21.

³⁵*Ibid.* at 293-94.

³⁶*Ibid.* at 315.

³⁷*Ibid.* at 304.

³⁸See the discussion in *Double Jeopardy*, *supra* note at 9, 45-46 of the theoretical challenges posed by mothers to liberalism because they are not autonomous individuals, but rather encumbered ones.

³⁹Greschner, *supra* note 21 at 306.

⁴⁰Patrice di Quinzio, *The Impossibility of Motherhood: Feminism, Liberalism and the Problem of Motherhood* (New York: Routledge, 1999) at vii-xx.

⁴¹*Procureur general du Quebec c. Procureur general du Canada*, [2004] J.Q. no. 277 (C.A.).

⁴²In fact Quebec has already proposed a family leave program that provides more generous benefits than the current federal scheme under the Employment Insurance Act. Other provinces may decide to provide less generous benefits.