

## The Dilemmas of Feminist Activism in Law

*A recent Supreme Court of Canada decision about the constitutionality of maternity and parental benefits made some important statements about the role of the state and our collective responsibility for the work of bearing and raising children. The challenge for feminists is how to build on the court's recognition of substantive equality when the very system that was affirmed by their judgment is one that many agree is the wrong system for delivering maternity and parental benefits. This article reviews the history of maternity and parental benefits as well as the problems associated with the current model and outlines the highlights of the Supreme Court decision. It concludes with a reflection on where such progress leaves us if it is a positive step in the wrong direction.*

Twenty years after the coming into force of the Charter equality guarantee the Supreme Court of Canada has recently breathed new life into the concept of substantive equality as it pertains to bearing and caring for children.<sup>1</sup> We could even look at this decision as coming full circle, back to the place where the Court first pronounced in 1989 that “those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged....”<sup>2</sup> Now, in 2005, the Court unanimously recognized the economic costs of motherwork and stepped away from the current tendency to reprivatize women’s social reproductive labour and upheld the power of the federal government to provide maternity and parental benefits as part of the Employment Insurance scheme. In this short note I will briefly outline the history and current functioning of the federal maternity/parental benefit scheme, describe the Quebec Court of Appeal decision and provide a few highlights from the Supreme Court reasons. I will close by looking at the question of whether and how activists concerned with equality for mothers can advance a maternity and

parental benefits scheme that truly meets the needs of all.

Initial attempts by the federal government to enact a national unemployment insurance scheme in the 1930s were challenged by the provinces as an encroachment on the provincial jurisdiction over property and civil rights. As a result a constitutional amendment was negotiated that allowed the introduction of a federal unemployment program in 1940. Maternity benefits were added in 1971 and were expanded to include 10 weeks of parental benefits in 1990. In 2001 parental benefits were extended to 35 weeks. It is section 22 that provides for the payment of maternity benefits to an eligible woman for a period of fifteen weeks surrounding the birth of her child. Section 23 provides for the payment of parental benefits for a total of 35 weeks to qualifying parents of a newborn or child placed for adoption. In order to qualify for either of these benefits the parent claiming them must have worked at least 600 hours in the preceding 52-week period. Under the scheme the benefit payable is 55 percent of the recipient's weekly wage to a maximum of \$413/week. With benefit levels this low many women cannot afford to take a maternity or parental leave. In families that can afford a 45 percent cut in income it is the lower income earning parent who will take the leave and in a heterosexual relationship this is predominantly the mother. In fact as recently as 2000, 98 percent of all recipients of maternity/parental benefits under the scheme were women.<sup>3</sup>

Only claimants with sufficient workforce attachment are eligible for maternity or parental benefits, thus workers who are self-employed, working part-time or on contract, or other contingent workers are excluded from the benefit. As a result, more than one third of new mothers do not have access to maternity or parental benefits. Half of these are women who did not engage in paid work, or did not have sufficient hours of paid work, in the qualifying period because of the nature of their employment or because they were caring for their other children.<sup>4</sup> These inequalities are at the root of the many criticisms that have been leveled at the scheme over the years. Various challenges to the scheme for its failure to meet women's equality rights have failed at the level of the Federal Court of Appeal. For example, in *Lesiuk v. Canada*<sup>5</sup> a mother of one child challenged the denial of maternity benefits for the birth of her second child on the basis that the qualifying requirement discriminated against her because her caregiving responsibilities for her first child affected the number of hours she was available to work preceding the birth of her second child. Her equality arguments were successful before the Umpire who found that the eligibility requirements had a disproportionate impact on individuals with childcare responsibilities, predominantly women. The Federal Court of Appeal struck down that decision on the basis that women's human dignity was not demeaned by a denial of benefits. The Federal Court of Appeal employed similar logic in *Miller v. Canada*,<sup>6</sup> a challenge to the claw-back of regular benefits where a claimant has received maternity/parental benefits.

The essence of women's claims relating to the maternity/parental benefit scheme is that it was designed to meet the needs of the ideal male worker, one

who worked full-time, year round, and who had a partner at home taking care of all domestic labour. Because women's working patterns do not mirror those of this ideal worker, maternity and parental benefits have fitted poorly into this model with the most significant impact on marginalized women who already experience the greatest inequalities in the labour force. As Nitya Iyer has argued, the existing model reinforces the motherwork of the predominantly middle and upper class women who can access maternity benefits while "the maternal work of other women workers remains privatized and invisible."<sup>7</sup>

In Quebec, the story has unfolded somewhat differently. Throughout the 1990s women's groups and organized labour in the province worked with the government to develop a broader and richer maternity and parental benefits scheme under the opt-out provisions of the federal *Employment Insurance Act*. This new Quebec model suffered from fewer of the discriminatory problems that plague the federal scheme but negotiations between the province and the federal government on the cost sharing dragged on for years. Finally, in March of 2002 the Quebec government asked the Court of Appeal for Quebec to rule on the constitutionality of ss. 22 and 23 of the *Employment Insurance Act*.<sup>8</sup> The Court of Appeal held that the federal government did not have the power to provide maternity and parental benefits under the unemployment insurance constitutional amendment. The Court held that this amendment was to be narrowly construed as relating only to loss of employment for economic reasons. Maternity or parental benefits are more properly seen as part of a social program aimed at a situation that is personal in nature and therefore properly belong within provincial jurisdiction. The Court, echoing the formal equality notions of voluntariness that were rejected in *Brooks*,<sup>9</sup> stated that matters of personal choice could not be covered by an insurance scheme that is intended to protect against unforeseeable risk.

The decision of the Court of Appeal provoked a great deal of anxiety because of the mixed message it sent. On the one hand, the more progressive Quebec plan that had been hard won by a broad coalition of community activists had been upheld. On the other, a finding that the scheme was outside of federal jurisdiction raised serious concerns for the continued availability of any maternity/parental benefits elsewhere in Canada. Moreover the regressive language of voluntariness and choice was contrary to feminist theorizing about gender equality and women's social reproductive work. These tensions created an untenable situation for women's groups who might have considered intervening before the Supreme Court of Canada, as none wanted to be seen to be arguing against the accomplishments of our Quebec sisters and yet none wanted to lose the national program or leave the formal equality construction of women's childbearing work unchallenged. This ambivalence perhaps explains the absence of any feminist interveners before the Supreme Court.

In October 2005, in a decision where a majority of the judges were women, the Supreme Court upheld the constitutionality of the maternity/parental benefits on two grounds. On the division of powers aspect of the case the court

held that the maternity/parental benefits were in pith and substance a “mechanism for providing replacement income during an interruption of work. This is consistent with the essence of the federal jurisdiction ... namely the establishment of a public insurance program the purpose of which is to preserve workers’ economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment.”<sup>10</sup> It did not accept the dichotomy between “economic” and “personal” reasons that had been relied upon by the Court of Appeal. The Court also rejected the narrow original intent approach of the Court of Appeal although it did acknowledge the political elements at play in defining the features of federalism and affirmed that the “task of maintaining the balance between federal and provincial powers falls primarily to governments.”<sup>11</sup>

Although it is not explicitly set out, the Court also brought a substantive equality approach to this case. Madam Justice Deschamps recognizes that “in our times, having a child is often the result of a deliberate act decided on by one or both parents. There are many facets to pregnancy however. Despite all the technological progress that has been made, conception does not result from a mathematical calculation that can be used to determine when or even if it will occur. In addition, 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 is not incompatible with the concept of risk in the realm of insurance, and that can moreover be harmoniously incorporated into a public unemployment insurance plan.”<sup>12</sup> 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 represents a move away from the privatizing approach that is seen in many recent decisions that touch upon social reproduction. The decision 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. Women’s connection to the labour market is well established, and their inclusion in the expression “unemployed persons” is as natural an extension as the extension involving other classes of insured persons who lose their employment income.... The social nature of unemployment insurance requires that Parliament be able to adapt the plan to the new realities of the workplace. Some eligibility requirements derive from the essence of the unemployment concept, while other requirements are, rather mechanisms that reflect a social policy choice linked to the implementation of the plan.”<sup>13</sup>

The power of this decision is that it represents the strongest statement of

the public, collective responsibility for the work of raising future generations since *Brooks* and it affirms an existing mechanism for providing at least some level of that public support. The challenge it presents is that many feminists and other activists in this area are agreed that maternity and parental benefits are best provided outside of the unemployment scheme where they could be expanded to cover the many marginalized women who are currently excluded from the benefits. The current scheme is still far from meeting the needs of the most vulnerable women in Canadian society and has significant regressive implications even for the more privileged among us. Because women still do the bulk of the work of caring for children even when they are employed in paid work inequalities in the maternity/parental benefits scheme disadvantage them disproportionately compared to men. A full realization of women's equality rights requires an adequate maternity/parental benefits scheme.

The strategic question facing activists now is how to continue to promote a broad social program with minimum national standards while advocating additions and enhancements to the program that are antithetical to its continued existence within the *Employment Insurance Act*. This is an especially pressing concern when the Supreme Court has taken a significant step in the direction of equality in a case that reinforces the position of maternity/parental benefits within the *Act*. Should we build on this momentum and lobby for a richer, more extensive benefit program along the lines of the Quebec program? Or should we be seeking a universal program that would include all mothers regardless of their connection with the work force in a way that recognizes the inherent value of each one's motherwork. There are numerous proposals for reform to the *Employment Insurance Act* that have been circulated recently, and practically speaking, such an incremental approach is probably the correct one. It is important to keep our larger, transformative, ideal visions of full equality in sight, but as we grapple with this challenge we should not forget to celebrate the victory this case represents for women who are struggling to reconcile their roles as mothers and workers in contemporary Canadian society.

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<sup>1</sup>Reference re *Employment Insurance Act (Can.)* ss. 22 and 23, 2005 SCC 56.

<sup>2</sup>*Brooks v. Canada Safeway Ltd* [1989] 1 S.C.R. 1219.

<sup>3</sup>See generally Turnbull, Lorna A., *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).

<sup>4</sup>Shillington, Richard. 2003. Access to Maternity Benefits, [http://www.shillington.ca/publications/maternity\\_benefits.pfd](http://www.shillington.ca/publications/maternity_benefits.pfd).

<sup>5</sup>[2003] 2 F.C. 697 (C.A.). For more on this case see Turnbull, Lorna A. "How does the Law Recognize Work?" (2004) 6 *Journal of the Association for Research on Mothering* 58.

<sup>6</sup>2002 FCA 370. For more on this case see Turnbull, *ibid*.

<sup>7</sup>Iyer, Nitya, "Some Mothers are Better than Others: A Re-examination of Maternity Benefits" in Susan Boyd, ed. *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 177. There is a voluminous academic commentary on the limits of the current maternity/parental benefits scheme that cannot reasonably be summarized here although reference to the Iyer article and to Turnbull, *supra* note 3 will give a reader some sense of the literature.

<sup>8</sup>[2004] R.J.Q. 399 (C.A.).

<sup>9</sup>*Supra* note 1.

<sup>10</sup>*Supra* note 2 at para 68.

<sup>11</sup>*Ibid* at para 10.

<sup>12</sup>*Ibid* at para 54 & 56.

<sup>13</sup>*Ibid* at para 66.