Court File No. 35623

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

British Columbia Teachers' Federation
And
Surrey Teachers' Association

APPELLANTS
(RESPONDENTS)

and

British Columbia Public School Employers' Association
And
Board of Education of School District No. 36 (Surrey)

RESPONDENT
(APPELLANT)

West Coast Women's Legal Education and Action Fund

INTERVENERS

FACTUM OF THE INTERVENER WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

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PART I OVERVIEW AND STATEMENT OF FACTS

1. This case is about the ongoing struggle to have women's reproductive work fully recognized, and to ensure that all benefit schemes for parents and pregnant women, particularly government benefit schemes, are consistent with the requirements of substantive equality. Substantive equality requires that the benefit schemes take the real work of reproduction and parenting, and the different experiences of parents and pregnant women, fully into account.

2. The provision of benefits to pregnant women and new parents is of significant import for women's equality in Canadian society. Women have historically borne the burden of both the physical and social aspects of reproduction [together "social reproduction"], which has circumscribed their roles within the labour and public spheres. An essential aspect of substantive gender equality, then, is the equalizing of this burden. As Deschamps J. for this Court noted, "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."[1]

3. The central legal issue in this case is whether a government employer who provides benefits to women who give birth and to other parents must do so in a substantively equal manner. The Appellant, the British Columbia Teachers' Federation, filed a grievance on behalf of its membership as a whole against the Surrey School Board. Under the Surrey School Board benefits plan, birth mothers are given 15 weeks of Supplemental Employment Benefits (SEB) to cover pregnancy, birth, post-partum recovery and care-giving, and must choose how to allocate that benefit before and after the baby is born. Other parents who qualify under the SEB plan are given 15 weeks of SEB plan benefits for care-giving alone.

4. Arbitrator Hall concluded that the exclusion of birth mothers from parental leave SEB benefits breaches the substantive equality rights of birth mothers under s. 15(1) of the *Charter* and s. 13(1) of the BC *Human Rights Code,* and cannot be justified under s. 1 of the *Charter* or s. 13(4) of the *Human Rights Code*.[2] On appeal, the Court of Appeal for British Columbia

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[1] *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 [*Reference*] at para.66.

[2] *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Supplemental Employment Benefits Grievance)*, [2012] B.C.C.A.A.A. No. 138 [Hall Arbitration] at paras.68(b)-(c).

overturned the Arbitrator's finding of discrimination. The Court of Appeal did not see any material distinction between pregnancy leave and parental leave (and associated benefits) because it found the purpose of both is "to further the interests of the child who is newly arrived in the family unit" and to foster the "health of parents and children to serve an important societal interest". The Court concluded that there was nothing discriminatory about providing the same 15 weeks of SEB plan benefits to birth mothers, birth fathers and adoptive parents.[3]

5. West Coast LEAF submits that where an employer offers a benefit scheme for pregnant women and new parents, that scheme must recognize the significance of both child bearing and child rearing to the important work of social reproduction. Women who give birth need time and resources to recover from the physiological impacts of birth. In addition, all parents, including birth mothers, need time and resources to bond with and meet the needs of their new children. To deny additional time and resources to pregnant women means that birth mothers will disproportionately bear the burden of social reproduction. Any scheme that perpetuates this historical burden on women is discriminatory and thus contrary to the substantive equality guarantees in the *Human Rights Code* and the *Charter*.

PART II ISSUES

6. West Coast LEAF submits that this case raises the following issues:

a. Did the Court of Appeal err in finding that pregnancy leave and benefits and parental leave and benefits serve the same purpose?

b. Did the Court of Appeal err in finding that Article G.21.4.i of the Collective Agreement was not discriminatory contrary to section 13 of the *Code* or s.15(1) of the *Charter*?

c. If the Court of Appeal erred in reaching that determination, what is the appropriate remedy?

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[3] *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2013 BCCA 405 at paras.24 and 26.

PART III STATEMENT OF ARGUMENT

A. Parental and pregnancy benefits are necessary for gender equality

7. Employment leave and financial benefits that allow pregnant women to recover from the physiological impacts of pregnancy and childbirth, and allow all parents the time and resources necessary to adjust to a child's arrival within a family, are essential to the project of gender equality in Canada.[4] Dickson C.J. for this Court in *Brooks v. Canada Safeway* in 1989 noted:

> It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women.[5]

8. Although the point does not arise directly in this appeal, West Coast LEAF notes that Canada's current system of providing pregnancy and maternity benefits is problematic. It conceptualizes pregnancy and parental benefits as a replacement for employment income, and provides such benefits through the employment insurance scheme rather than through some other form of state-led social welfare scheme. It thus perpetuates inequality in a variety of ways because many birth mothers and other parents do not qualify for employment insurance benefits.[6] This includes a disproportionate number of parents who are historically disadvantaged by ethnicity, gender and other correlates of low income subsistence and part-time employment.[7]

9. However, the conceptual distinction between child-bearing and child-rearing remains critical to substantive equality for all women, regardless of whether benefits are provided

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[4] Calder, Gillian. "The personal is economic: unearthing the rhetoric of choice in the Canadian maternity and parental leave benefit debates" in Rosemary Hunter and Sharon Cowan, eds. Choice and Consent: Feminist Engagements with Law and Subjectivity (New York: Routledge-Cavendish, 2007), pp.125-141 at p.128.

[5] *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 ["Brooks"] at para.29.

[6] Iyer, Nitya. "Some Mothers are Better than Others: A Re-examination of Maternity Benefits" in S. Boyd., ed. Challenging the Public/Private Divide: Feminism, Law and Public Policy (Toronto: University of Toronto Press, 1997) pp.168-194 [Iyer] at 171.

[7] *Ibid.* at 176.

through the recipient's relationship with employment, or are disseminated through some other form of state-led social welfare scheme. The distinct burden of pregnancy, child-birth and post-partum recovery must be fully accounted for and recognized in any benefit plan, or the plan will widen the gap between birthing mothers – a group that has historically disproportionately borne the burden of reproduction – and others, including other benefit recipients. Once an employer offers a benefit plan, it must be designed and delivered in a non-discriminatory manner.[8]

10. Taking account of the ways in which pregnancy impacts the lives of women who give birth is essential for ensuring women's equality. Similarly, taking account of the many ways in which families form and thrive is essential to promoting the goals of substantive equality for all parents. A supplemental benefits scheme that forces birth mothers to choose between accessing benefits for pregnancy and childbirth or accessing benefits for childcare and bonding devalues both the important societal work of care-giving and the important societal work of pregnancy and birth, and inequitably places the burden of child-rearing on women who give birth. Benefits provided for care-giving must not be eroded by requiring pregnant and birthing mothers to use those benefits to recover from the physiological processes of pregnancy and birth while other qualifying parents may use them for care-giving alone.

B. The failure to provide adequate pregnancy benefits is discriminatory

11. The tests for discrimination under the legislative human rights scheme and s.15 of the *Charter of Rights and Freedoms* are doctrinally distinct in both function and law,[9] and must remain that way in order to facilitate the promotion of substantive equality and access to justice. However, whether this case is considered from a human rights or a *Charter* perspective, a pregnancy and parental leave benefits plan that does not account for the distinction between child-bearing and child-rearing, such as the SEB plan here, is discriminatory. These submissions will focus on the *Charter* violation.

12. The substantive equality analysis under s. 15(1) of the *Charter*, most recently articulated by Abella J. in *Quebec v. A.*, rejects the notion that equality necessitates identical treatment, and

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[8] *Brooks, supra* note 5 at para.34; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*] at para.73.

[9] *Human Rights Code*, RSBC, 1996, c. 20, s.3; *R.* v. *Oakes,* [1986] 1 S.C.R. 103 at para.64.

holds instead that equality requires that the state take into account disadvantage flowing from the underlying differences between individuals in society.[10] Justice Abella, for the majority of the Court on this issue, notes:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.[11]

13. According to Abella J., assessment of harms to dignity, identification of mirror comparator groups, deference to the good intentions of the legislature and inquiry about the presence of stereotyping or prejudice no longer form part of a "rigid template" for analyzing equality. The majority of the Court recognizes that these requirements unduly hampered the attainment of substantive equality. Instead, assessment of discrimination requires a contextual analysis that asks whether the impugned state conduct perpetuates discrimination or widens the gap between a historically disadvantaged group and the rest of society on the basis of enumerated or analogous grounds.[12] The examination of motivations for discriminatory conduct belongs within the s.1 justificatory stage and is conceptually distinct from the equality analysis.[13]

14. Applying this approach, the SEB plan perpetuates the disadvantage flowing from the different ways in which birthing mothers and other parents arrive at parenting. Pregnancy and child-birth place physiological demands on women's bodies, and women experience disadvantage while recovering from both. Without supplementary benefits during *both* parental leave and pregnancy leave, birth mothers continue to disproportionately bear the costs of bearing children in Canada. If a woman accesses SEB benefits prior to giving birth, then she has fewer resources to support her taking time following the child's birth to bond with and parent the child. Similarly, as a woman recovers from birth, she uses the benefits for her recovery and therefore has fewer benefits to cover parenting time. As a consequence, the SEB plan violates the substantive equality guarantee in s. 15(1) of the *Charter*.

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[10] *Quebec (Attorney General) v. A*, 2013 SCC 5 [*Quebec v. A.*] at paras.318-333.
[11] *Ibid* at para.332.
[12] Smith, Lynn and William Black, "The Equality Rights" in E. Mendes and S. Beaulac (eds.), Canadian Charter of Rights and Freedoms (5th ed.) (Toronto: LexisNexis, 2013), pp.951-1028 at 971-2.
[13] *Quebec v. A.*, *supra* note 10 at para.333; and *Miron v. Trudel*, [1995] S.C.J. No. 44 at para.129.

15. The basic benefits provided through the EI system do not offer a full replacement wage. Thus, the reality of the SEB plan benefits is that as a top-up they assist employees who qualify to stay at home and care for their children for a longer period of time than might otherwise be possible. Without SEB plan benefits, employees face the economic hardship of lost wages, which may in some cases restrain them from taking their full leave. By not permitting birth mothers to access the 15 weeks of SEB plan benefits available to adoptive parents, birth fathers, and other social parents, birth mothers may have to return to work earlier than other parents. While the evidence in this case does not show whether women who gave birth cut their leave short due to the SEB plan benefit structure, this Court's observation that employment insurance maternity benefits make it possible for women to take time off work for reasons associated both with their pregnancies and with childcare applies equally in the context of top up benefits.[14]

16. To prevent the perpetuation of disadvantage, benefit schemes for pregnancy, birth, post-partum recovery, family formation and care-giving must take into account underlying differences that give rise to disadvantage. The fact of being pregnant, giving birth and recovering from birth is one such critical difference. Once an employer offers a benefit, it is obliged to do so in a non-discriminatory manner.[15] In *Eldridge*, "a failure to ensure that [deaf persons] benefit equally from a service offered to everyone" was found to violate s.15(1).[16] Here, pregnant and birthing women do not benefit equally from the SEB plan because they face greater lost wages than other parents.

17. This Court has explicitly recognized that the law's role is to remedy disadvantage flowing from preexisting difference.[17] This recognition represents a critical advance over this Court's reasoning in *Bliss*, where Ritchie J. for the Court refused to apply a rights based analysis to remedy disadvantage that he said flowed from biology rather than from the operation of law.

18. The reasoning of the Court of Appeal in this case, however, threatens to return us to the state of the law in *Bliss*. In *Bliss,* the Court placed the burden of lost income due to childbearing squarely on women since, "[a]ny inequality between the sexes in this area is not created by

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[14] *Reference, supra* note 1 at para.29; Hall Arbitration, *supra* note 2 at paras.5(31)-(40).
[15] *Brooks, supra* note 5 at para.34; *Eldridge, supra* note 8 at para.73.
[16] *Eldridge, supra* note 8 at para.66.
[17] *Eldridge, supra* note 8 at para.66; and *Quebec v. A, supra* note 10 at para.332.

legislation but by nature".[18] It was thus not the role of rights doctrine to remedy such disadvantage. Similarly, the Court of Appeal's decision here leaves the cost of childbearing to women by failing to account for their different needs and forcing them to give up either benefits for physical recovery time or benefits for child care time for their new child. In both *Bliss* and the Court of Appeal's decision in the case at bar, the reasoning adopted rendered the burden of pregnancy invisible to the law. The reasoning in *Bliss* was soundly rejected in *Brooks,* and *Brooks* is further supported by Abella J's reasoning in *Quebec v. A.*

19. Regardless of whether the collective agreement provides one benefit or two benefits, the Court of Appeal in the case at bar erred in applying a formal equality analysis to find that there is no discrimination in SEB provisions which provide all parents with the same length of benefits. In making this finding, the Court of Appeal appears to have ignored salient differences between the needs of birthing women and those of other parents. The Court also erred in finding that the purpose of the SEB provisions was the same for both pregnancy and parental leaves and associated benefits, and West Coast LEAF adopts the Appellant's submissions in that regard.[19]

20. The Respondents argue that since the provisions were bargained in good faith, they must be presumed to be non-discriminatory.[20] This argument relies on the erroneous notion that lack of intent to discriminate can negate a claim of discrimination. In fact, discrimination can be founded upon discriminatory intent *or* discriminatory impact,[21] and therefore a good faith intention on the part of the employer is irrelevant to this Court's determination of whether the SEB provisions within this agreement are discriminatory in effect. As this Court stated in *Withler*: "The focus of the inquiry is on the *actual impact* of the impugned law, taking full account of social, political, economic and historical factors concerning the group."[22] [emphasis added]. In this case, the actual impact of the impugned provision is to perpetuate disadvantage, and the bargaining history of the parties is not germane to this conclusion. It is noteworthy that where the Respondents have suggested that stereotyping and prejudice are still essential to the

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[18] *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183 at 190.
[19] Appellant's factum at paras.57-77.
[20] Respondents' factum at para.79.
[21] *Quebec v. A.*, *supra* note 10 at paras.328 and 333.
[22] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para.39.

equality analysis, they are quoting from the minority decision on s.15(1) in *Quebec v. A.*[23] The majority reasons of Abella J. on this issue directly contradict this assertion.

21. West Coast LEAF agrees with the Appellant that this violation of s.15(1) cannot be justified under s.1 of the *Charter*.

C. The discrimination cannot be remedied by 'equality with a vengeance'

22. The Respondents say that if the current SEB plan is found to be discriminatory, this Court should either impose a requirement that any renegotiation of the SEB plan benefits be cost neutral, or read down the SEB plan to remove pregnancy benefits and provide only parental benefits to all new parents. We say that both of these approaches would amount to removing benefits to achieve substantive equality and, in the case of removing pregnancy benefits, would leave a SEB plan that remains discriminatory.

23. Even if this Court upholds Arbitrator Hall's decision, Arbitrator Hall may have to make a further decision regarding remedy because he retained jurisdiction to provide a substantive award if the parties are unable to remedy the discrimination he found through bargaining. It is appropriate for this Court to provide some guidance on any such substantive award, as doing so now supports the important objective of ensuring that SEB benefits are provided in a non-discriminatory manner with a minimum of further delay.

24. Moreover, it is appropriate for this Court to provide guidance more broadly to employers in ensuring that their benefit plans are in compliance with human rights and *Charter* requirements. Employers are ultimately responsible for ensuring that the workplaces they manage and direct are free of discrimination,[24] including ensuring that any collective agreements in place are not discriminatory[25] and do not breach the *Charter*. The obligation to fulfill human rights and *Charter* requirements is a basic obligation that cannot be trumped by other interests in the workplace, contracted out of, or traded away.[26]

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[23] Respondent's factum at para.137.
[24] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at paras. 15 and 17.
[25] *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at paras. 29 and 30.
[26] *Ibid*.

25. This court has identified respect for the purposes of the *Charter* as an important principle which must guide a court or arbitrator in fashioning a remedy.[27] The purpose of section 15 of the *Charter* is to promote equality and to ameliorate and rectify disadvantage.[28] Where a benefit provision is meant to remedy or ameliorate disadvantage but is found to be under-inclusive, it is inconsistent with this deeper social purpose of the *Charter* to penalize existing benefit recipients to remedy that under-inclusiveness. It would be particularly contrary to the deeper purposes of the *Charter* to remove benefits from recipients who themselves are disadvantaged.[29] This has been described as "equality with a vengeance".[30]

26. As long as the wage support benefits provided to pregnant women and other parents do not equal the wages they lose through pregnancy, child-birth, post-partum recovery and caring for a new child, pregnant women and other parents remain disadvantaged by the contribution that they are making to the important societal work of having and raising children, and producing the next generation. The parties' SEB plan benefits exist to replace lost wages and therefore to partially remedy this ongoing disadvantage for those who qualify. Disadvantage remains for all benefit recipients because the SEB plan does not fully replace the lost wages of any recipient.[31] However, it is the position of West Coast LEAF that the SEB plan less fully rectifies this ongoing disadvantage for pregnant women, because (all else being equal) the loss of wages is greater for women who parent as well as give birth and as such is entitled to greater benefits.

27. While the employer was not required to provide any SEB plan, removing any aspect of the SEB plan benefits currently provided to remedy the plan's lack of substantive equality would be contrary to the deeper social purpose of the *Charter*. The Respondents have suggested that the pregnancy benefit should be removed to achieve substantive equality. We submit that removing either the pregnancy or the parental benefit would result in removing ameliorative benefits from disadvantaged beneficiaries, and would therefore be contrary to the objectives of

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[27] *Schachter v. Canada,* [1992] 2 S.C.R. 679 [*Schachter*] at paras. 37 to 39; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*] at paras. 24 and 25.
[28] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras.42-51.
[29] *Schachter*, *supra* note 27 at para. 41; Doucet-Boudreau, *supra* note 27 at para. 55.
[30] *Schachter, supra* note 27 at para.41
[31] Hall Arbitration, *supra* note 2 at para. 5(13).

the *Charter*.[32] It would also be inconsistent with the requirement of substantive equality to remedy the discrimination in the present SEB plan by eliminating just the pregnancy benefits, leaving a plan that included parental benefits but not pregnancy benefits. Because of the central role of women's pregnancy in bringing new children into families, any plan providing parental benefits must also provide pregnancy benefits. Otherwise, a benefit plan would leave women's particular contributions of pregnancy, child-birth, and post-partum recovery, and the disadvantages that arise from those particular contributions, unrecognized and unameliorated.

28. The Respondents have also asked this Court to order that any alteration to the benefits provided under the SEB plan be done on a cost-neutral basis within the benefits clause. Any such order would entail taking funds from other parents, who are also disadvantaged, to remedy the greater disadvantage of pregnant women. That would be contrary to the deeper social and ameliorative purposes of the *Charter*. We note that even in *Ontario Power*, the order was that the alteration should be cost-neutral over the "freely negotiated or arbitrated constraints of the overall cost of the wage and benefit package of their collective agreements".[33]

PART IV COSTS

29. West Coast LEAF is not seeking costs, and requests that no costs be awarded against it.

PART V ORDERS SOUGHT

30. West Coast LEAF respectfully requests a declaration that the appeal be granted.

All of which is respectfully submitted.

Dated at Vancouver this 29th day of October, 2014

for Clea Parfitt
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[32] For example, in *Newfoundland (Treasury Board) v. N.A.P.E*, [2004] 3 S.C.R. 381 at para. 46, this Court held that removing a pay equity agreement designed to address sex-based pay inequity amounted to reinforcing an inferior status and perpetuating disadvantage, and was thus a breach of s. 15(1) of the Charter.

[33] *Ontario Power Generation Inc. v. Society of Energy Professionals (Maternity/Paternity Leave Grievance)*, [2000] O.L.A.A. No. 697 (Picher) at para. 34.

PART VI LIST OF AUTHORITIES

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Smith, Lynn and William Black, "The Equality Rights" in E. Mendes and S. Beaulac (eds.), Canadian Charter of Rights and Freedoms (5th ed.) (Toronto: LexisNexis, 2013), pp.951.	13

PART VII LEGISLATION

***Human Rights Code*, R.S.B.C. 1996, c.210, s.3, s.13(1) and 13(4).**