Sex Equality and Biological Difference: Some Preliminary Observations

Sheilah L. MARTIN*

* Associate Professor, Faculty of Law, University of Calgary, Calgary, Alberta.

I. INTRODUCTION

We are at an interesting stage in the development of a Canadian approach to equality rights under the *Charter of Rights and Freedoms*.[1] Important advances have been made in formulating a legal theory of equality which is responsive to existing realities. A growing understanding of the extent of discrimination and the effects of societal inequities has led courts to retire worn or limited legal concepts and embrace a more expansive notion of equality. For example, an intention to discriminate was no longer required once the disparate and deleterious impact of unequal treatment was uncovered and fully appreciated.[2] In addition, the Supreme Court has recognized that discrimination may be systemic and has approached and applied *Charter* rights according to the interests they were intended to protect.[3] The Court used this purposive approach to the expanded and entrenched *Charter* equality guarantees when it rejected the straight jacket of an identical treatment equality paradigm and stated that true equality may require differential treatment if the burdens of the unfairly disadvantaged are to be alleviated.[4] The Court took another step in what the Abella Commission called the ongoing process of equality in *Law Society of British Columbia v. Andrews*.[5] It resolved some of the interpretative controversies concerning ss. 15 and 1 and rejected the similarly situated test as being seriously deficient for equality determinations.

Even with these advances, we are nevertheless in the earliest stages of equality litigation in Canada and many fundamental issues remain. One such issue, which is of immense practical significance and some doctrinal difficulty, is how to accommodate the reality of biological difference between men and women in a sex equality analysis. Courts and commentators have traditionally had difficulty integrating women's unique childbearing capabilities into a legal theory of rights. In the *Morgentaler* decision Madame Justice Wilson quoted the following passage with approval[6]:

> *the history of human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has not been a struggle to define the rights of*

---

1. Part 1 of the *Constitution Act,* 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11.

2. *Ontario Human Rights Commission and O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, *Robichaud* v. *Canada*, [1987] (Treasury Board).

3. *Hunter* v. *Southam Inc.* [1984] 2 S.C.R. 145; *Law Society of Upper Canada* v. *Shapinkei*, [1984] 1 S.C.R. 357.

4. *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 347.

5. *Andrews* v. *Law Society of British Columbia,* [1989] 1 S.C.R. 143, 91 N.R. 255. It is unrealistic to expect courts or commentators to articulate an all encompassing coherent equality theory which will allow primarily deductive responses in all cases, especially at this early stage in the development of our Charter jurisprudence. One must therefore seek a general approach to equality which may evolve over time and be adapted according to need.

6. *R.* v. *Morgantaler*, [1988] 1 S.C.R. 30, 82 N.R. 1 at 125-126.

> *women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus women's needs and aspirations are only now being translated into protected rights.*

Although equality has long been recognized as an organizing principle of democracy, the ideal was not formulated to remedy inequality between men and women.[7] Equality was often the way one group of men demanded rights other men already had. And even when women began to demand equal "rights" their claims initially focused on acquiring the same advantages already enjoyed by men (like the right to vote or own property).

Profound societal changes and the introduction of constitutionally entrenched equality rights therefore require a re-examination of equality theory. These equality questions will be approached largely as matters of first instance and we can therefore expect courts to seek guidance from existing principles. Traditional anti-discrimination norms will provide only limited assistance because they are often based on the existence of false distinctions, erroneous imputed characteristics, and incorrect sterotypes. Where real biological differences exist, physiological fact makes certain distinctions true. But even to the extent to which biological sex *is* an appropriate proxy for childbearing capacities, it does not provide any guidance on defining constitutional norms which include and respect the rights of women. Translating women's needs and aspirations into protected legal rights will therefore challenge the courts to interpret legal protections in a gender inclusive manner, to acknowledge and incorporate women's sex specific reproductive capacities, while regarding their life experience and their struggles to eliminate inequality.

II. WHAT DIFFERENCE DOES DIFFERENCE MAKE

To state the obvious, women and men have been assigned different, immutable and complementary roles in relation to human reproduction. Only women have the physical capacity to gestate, bear and breastfeed babies. One must be careful to distinguish between biological functions concerning child-bearing and social roles concerning child-rearing. Only the former is physiologically unique to women, with the result that only variances concerning childbearing capacities should qualify as a "real" biological difference. Social attitudes, expectations, assumptions or stereotypes are culturally defined and must be carefully scrutinized to differentiate them from the truly biological. It is easy to fall within the trap of biological determinism and confuse nature and nurture. (For example, such a confusion occurs when the social skills of parenting are transformed into the skills of "mothering" assigned and ascribed solely or chiefly to women.) But such a trap must be avoided.

Some theories of sex equality focus on the relevance of real biological difference. Their underpinnings tend to reflect an acceptance of the similarly situate equality standard because the issue is often framed in terms of whether or not men and women are sufficiently

---

7. Kathleen Layey, "Feminist Theories of (In)Equality" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 71. Andrew Petter, "Legitimizing Sexual Inequality: Three Early Charter Cases" (1989) Chronique de Jurisprudence 358.

alike to qualify for like treatment.[8] Although there are variations and nuances, four basic models accept this emphasis. First, under what is called "liberal equality", the sole function of legal equality guarantees is to eliminate barriers that impede equal opportunity between men and women; this approach does not recognize the child-bearing capacity of women or "the historical features of the subjection of women as a group".[9] Second, under the "assimilationist" view, sex is considered to be irrelevant in a legally androgynous system. This theory equates reproductive differences with the functional equivalent of such things as eye colour or height. The assimilationist approach calls for identical legal treatment.[10] Third, in contrast to these two variants which require a strict or absolute equality, the bivalent approach recognizes a dual system of rights — sometimes characterized as "equal rights" versus "special rights". Under this approach, consideration of sex-based characteristics such as sex or pregnancy will constitute discrimination when reference to these characteristics disadvantages the individual, but not when the sex-based difference is taken into account affirmatively.[11] The fourth approach — the incorporationalist equality approach — takes sex differences into account but only in a defined and limited way: women are entitled to have different rights only in respect to pregnancy and breastfeeding.[12] To the extent a legal provision provides indentical treatment but fails to account for these sex-related differences, it would therefore violate sex equality guarantees.[13]

---

8. For a general review of equality theories, see Anne Scales, "Towards a Feminist Jurisprudence" (1980) 56 Ind. L.J. 375; Herma Hill Kay, "Models of Equality" (1985) Ill. L. Rev. 39; Mary Jane Mossman, "Gender, Equality and the Charter" in *Equality in Employment* (Research Studies for the Abella Royal Commission Report) at 297.

9. See Anne Scales, *Ibid.* See also Mary E. Becker, "Prince Charming: Abstract Equality" (1987) Sup. Ct. L. Rev. 201.

10. The most noteworthy proponent of this theory is Wendy Wiliams. See Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate" (1984) Rev. L. & Soc. Change 325; "Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure" (1986) 37 Rutgers L. Rev. 823. Katherine T. Bartlett, "Pregnancy and the Constitution: The Uniqueness Trap" (1974) 62 Calif. L. Rev. 1532.

11. Anne Scales, *supra* note 8. For a general discussion, see also Mary Ellen Gale, "Unfinished Women: The Supreme Court and the Incomplete Transformation of Women's Rights in the United States" (1987) 9 Whittier L. Rev. 445.

12. Herma Hill Kay, *supra,* note 8 at 81. Dianne Zimmerman, "Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex" (1975) 75 Colum. L. Rev. 441. See Christine A. Littleton, "Reconstructing Sexual Equality" (1987) 75 Calif. L. Rev. 1279.

13. Many women are reluctant to argue that pregnancy is "unique" because biology-based arguments have always been used against women to forge and maintain an inferior social status. Women's equality claims were initially advanced on the basis that women share the same aspirations and abilities as men and that women should be treated as indidivudals, not as a group, and certainly not as a group in need of protection. To now emphasize different and special characteristics in relation to pregnancy is sometimes feared because judges and legislators might be tempted to extend the different legal treatment on the basis of secondary biological characteristics, cultural stereotypes or mythical inabilities. The major argument for identical treatment therefore appears to be a strategic one: that if judges are allowed to take the unique biological aspects of pregnancy into account they will get it wrong and further perpetuate traditional stereotypes of women. The answer proposed under the "same treatment" approach is to give them no room to get it wrong.

    See Sylvia Law, "Rethinking Sex and the Constitution" (1984) 132 U. Pa. L. Rev. 955.

Any approach which emphasizes biological difference when comparing women to men to determine whether they are similarly situated runs the serious risk of incorporating gender bias.[14] Under a similarly situated standard the choice of the norm or referant is especially important because it serves as a baseline for comparison. As selection is an integral part of the equality analysis it should be critically examined, rather than remain unstated or assumed.[15] It will be exceptionally difficult to justify the norm in matters concerning sex equality and real biological difference between men and women. Should men be compared to women or should women be compared to men? After all, men and women are equally as different from each other and there is no meaningful statistical measure or recognized "natural" state to determine whether men or women are gender typical. Because women will often be seeking the advantages men have already secured for themselves the male position will tend to be the assumed referant. A male norm can only operate to the prejudice of women, especially pregnant women.

If men's bodies and men's experience are the chosen baseline then it can come as little surprise that pregnancy and maternity leave are often labelled "special treatment". One must seriously question the assumptions of any approach which calls giving women what they need "special" and where withholding from men something they will never need is seen as "reverse discrimination". Like other decision makers engaged in a critical process, judges must learn to recognize such examples of androcentric thought: that is, when the male experience is accepted as the universal experience and our thinking is constructed around men rather than around men and women.[16] From the perspective of the woman, who should be equally free to indulge in the human foible of taking herself as the starting point, the capacity to become pregnant is the norm and her reality. If one recognizes that biologically there are two types of persons, female and male, there is no logical or *a priori* starting point for equality determinations involving real biological differences.

A legal theory of equality which focuses on the reality of biological difference may also fail to take into account that in our society biological difference does not exist in an atmosphere of mutual acceptance and accommodation. We live within a hierarchy of values where being different generally means having less than those who establish the standard. The social context of biological difference must be acknowledged and incorporated into any comparative equality analysis. Perhaps the time has come to recognize women as biological persons in the same way the Privy Council accepted that Canadian women were legal "persons" in 1929.[17] Today, issues of sex equality should start from the premise of biological

---

14. For a discussion see Sheilah L. Martin, "The Continuing Equality Implications of the Bliss Case" in Martin & Mahoney, *supra* note 7 at 195; Mary Ann Boling, "Pregnancy Benefits, Benign Sex Discrimination and Justice: Why Does it Matter How We Ask the Questions" (1981) 11 Golden Gate U.L. Rev. 981.

15. The absence of a purely principled manner in which to decide who to compare has led some to argue that equality, especially equality based on similar situation, is an "empty" concept. See P. Westen, "The Empty Idea of Equality" (1982) 95 Marr. L.R. 537; D. Harris, "Equality, Equality Rights and Discrimination Under the Charter of Rights and Freedoms" (1987) 21 U.B.C. L. Rev. 389.

16. Margrit Eichler, "Foundations of Bias: Sexist Language and Sexist Thought" in Martin & Mahoney, *supra* note 7 at 22.

17. *Edwards* v. *A.G. Canada*; Re "Persons" in s. 24, B.N.A. Act, [1930] A.C. 124 (P.C.).

duality and incorporate an ethic of acceptance so that we can stop the fruitless and often-times insulting search for an analogy to pregnancy.[18]

III. FURTHER PROBLEMS WITH A SIMILAR SITUATED TEST

Even if the problems of selecting a referant can be overcome, these four basic models provide only limited assistance to Canadian courts because the Supreme Court has recently rejected the similarly situated test on which they are premised and has explicitly recognized that pregnancy discrimination is sex discrimination.[19] Before *Andrews* the similarly situated test found favor with numerous Canadian courts.[20] This test, based on the Aristotelian principle of formal equality, requires that persons who are equal should be treated equally and that unequals should be treated unequally in proportion to their inequality[21]. The similar situated test is usually intuitively appealing because it resembles the grade school admonition against comparing apples and oranges. But without knowing who is similarly situated, and in what relevant respects, constructing the categories for comparison is a necessary part of the exercise and it can be a highly selective matter of characterization. The appropriate width of the categories is within the discretion of the decision maker and often-times the major issue dividing parties is precisely how the comparison should be formulated and how the issue should be framed.

The pre-Charter decision in *Bliss v. A.G. Canada*[22] illustrates the centrality of category selection to this type of equality analysis. Stella Bliss was prevented from receiving the regular unemployment benefits she qualified for because a section in the *Act* stipulated

---

18. In *Brooks* v. *Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219, Chief Justice Dickson stated at 1249-50:

    > It is contended that there is an analogy between that case and the present situation; beards are peculiar to men as pregnancy is peculiar to women; however, not all men grow beards and not all women become pregnant. I do not find these cases helpful; I cannot find any useful analogy between a company rule denying the right to wear beards and an accident and sickness insurance plan which discriminates against female employees who become pregnant. The attempt to draw an analogy at best trivializes the procreative and socially vital function of women and seeks to elevate the growing of facial hair to a constitutional right.
    >
    > The American Supreme Court recently overruled a case similar to *Bliss*. In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) the Court held that pregnancy discrimination was not sex discrimination. It changed its mind in *Cal. Fed. Savings and Loan Assn.* v. *Guerra,* 758 F. 2d 390 (9th Circ., 1985).

19. For a general critique of the similar situate test see M. D. Lepofsky & H. Schwartz, note (1988) 67 Can. Bar Rev. 115.

20. See, for example, *Reference Re Family Benefits Act* (1986), 75 N.S.R. (2d) 338; 186 A.P.R. 338, (N.S.S.C.A.D.); *Reference Re Use of French in Criminal Proceedings in Saskatchewan* (1987), 58 Sask. R. 161; 44 D.L.R. (4th) 16 (Sask. C.A.); *Smith, Klein and French Laboratories* v. *Canada (Attorney General)*, [1978] 78 N.R. 30 (F.C.A.); *R.* v. *Ertel* (1987), 20 O.A.C. 257; 35 C.C.C. (3d) 398 (Ont. C.A.).

21. See Anne Bayefsky, "Defining Equality Rights" in Anne Bayefsky & Mary Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985) at 1.

22. [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711.

that a pregnant woman either qualified for maternity benefits or received nothing.[23] Ms. Bliss claimed that this section infringed her right to the equal protection of the law contained in the *Canadian Bill of Rights*. The Supreme Court dismissed her claim and held that the protections under the *Bill of Rights* did not apply to legislated benefits, that pregnancy discrimination was not sex discrimination, and that equality required a review of similarly situated individuals. Even though the judges recognized that only women could become pregnant they chose to compare how the Act treated "pregnant people" and "non-pregnant people". As the "non-pregnant" category included both male and female persons they reasoned that any resulting discrimination against persons in the pregnant category was not on the basis of sex, but resulted from the inherent biological differences between men and women.[24]

The conclusion that pregnancy discrimination was not sex discrimination, although much criticized[25] and since reversed by the Supreme Court,[26] was nevertheless a logical deduction considering how the court constructed the categories for comparison under its similarly situate equality standard. By comparing pregnant women with non-pregnant persons, rather than necessarily non-pregnant men the Court could separate pregnancy and gender and attribute the impugned differentiation to nature's law and not parliamentary enactment. In addition, the absence of an analogous physical condition or equivalent life experience for men meant that no two similarly situated groups could be compared to determine whether there was equal or unequal treatment. Maleness was the standard against which pregnant women were compared and because the court saw a real biological difference special burdens could be imposed on pregnant women without there being any inequality.

This approach to sex equality only operates to benefit women when they are most like men because men and women must be sufficiently close before they can even be compared to see if they merit equal treatment. Childless professional women, who are best able to compete with men on men's terms, would be the principal beneficiaries of this approach. But such a legal test devalues women's biological capacities and fails to address the vast social and material disparities between men and women. It also fails to appreciate that men and women are most unequal when they are the most different.

---

23. *Unemployment Insurance Act*, S.C. 1970-71-72, c. 48, s. 46.

24. Two quotes from Mr. Justice Ritchie summarize this view. [1978] 6 W.W.R. 711 at 717:

    If s. 46 treats unemployed pregnant women differently from unemployed persons, be they male or female, it is it seems to me, because they are pregnant, and not because they are women.

    ... any inequality between the sexes in this area is not created by legislation but by nature.

25. See, for example, M. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 Osgoode Hall L.J. 332.

26. *Brooks* v. *Canada Safeway*, *supra* note 18.

In the recent case of *Brooks v. Canada Safeway*[27] the Supreme Court redefined the categories for comparison where the rights of pregnant women were involved. The question before the Court was the proper interpretation of "sex discrimination" in the *Manitoba Human Rights Act*.[28] In *Brooks* the complainant challenged her employer's accident and sickness insurance plan because it excluded coverage for pregnancy and maternity leave. The Court concluded that the plan's complete disentitlement of pregnant women during a 17-week period discriminated against pregnant employees because they received significantly less favourable treatment than other employees. There was discrimination because the plan singled out pregnancy for disadvantageous treatment in comparison with other health reasons which may prevent women from reporting to work. The court recognized that pregnancy was a valid health-related reason for absence from work and that to exclude it imposed unfair disadvantages on pregnant women.

The Court accepted that discrimination on the basis of pregnancy was discrimination on the basis of sex:

> *The capacity for pregnancy is an immutable characteristic, or incident of gender and a central distinguishing feature between men and women. A distinction based on pregnancy is not merely a distinction between those who are and are not pregnant, but also between the gender that has the capacity for pregnancy and the gender which does not.*[29]

It also rejected the argument that pregnancy-related discrimination could not be sex discrimination because not all women become pregnant.[30] The Court reasoned that while pregnancy-related discrimination only affects part of an indentifiable group, it does not affect anyone who is not a member of the group. The fact, therefore, that the plan did not discriminate against all women, but only against pregnant women, did not make the impugned distinction any less offensive. The fact that partial discrimination remains discrimination was reinforced by the Supreme Court's decision in *Janzen v. Platy Enterprises Ltd.*[31] where it held that the sexual harassment of only some female employees was nevertheless sex discrimination.

Thus, the categories have been reformulated on gender lines and the *Bliss* case has been overruled. By replacing the categories of non-pregnant and pregnant with those of men and women the Supreme Court in *Brooks* has recognized biological reality — that women's reproductive capacity does not justify unequal treatment by law, and that no amount of

---

27. *Ibid.* As a group or individual is said to be equal *to* another group or individual. In most cases the complainant alleges that he/she is being treated unfairly in relation to someone or some group. Because equality is primarily concerned with relative disadvantage, the search for a starting point — choosing what is to be compared and what will serve as the referent — is as important as the formulation and application of the chosen equality principles.

28. The *Human Rights Act,* S.M. 1974, c. 65, s. 6(1). Manitoba did not amend its Act after the *Bliss* decision to expressly include pregnancy discrimination within the ambit of sex discrimination.

29. *Ibid.* at 28.

30. *Ibid.* at 32ff.

31. [1989] 1 S.C.R. 1252.

biological difference warrants discriminatory treatment. Recognizing that pregnancy discrimination is sex discrimination increases the possibility that meaningful comparisons will now be made. The Supreme Court has, however, recently gone much further than rejecting the conclusion in *Bliss* that women and men are not similarly situated in matters concerning reproduction.

IV. THE *ANDREWS* CASE

In *Law Society of British Columbia v. Andrews*,[32] the Court expressly rejected the similarly situated test as being "seriously deficient" for equality comparisons under the *Charter*. Mr. Justice McIntyre criticized the similarly situated test because it could be used to support the reasoning and the result in *Bliss v. Attorney General of Canada*.[33] The *Andrews* case dealt with a section of provincial legislation which denied admission to the practice of law to non-citizens. In this decision, its first dealing with s. 15, the Court outlined an approach to equality which resolved some of the issues concerning the role of s. 15(1), the meaning of the term "discrimination" and the relationship between 15(1) and s. 1.[34]

The Supreme Court said the purpose of s. 15 is to ensure equality in the formulation and application of the law. Section 15 required that "consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies and also upon those whom it excludes from its application".[35] This means that even a gender neutral provision affecting reproduction, like a law prohibiting all sterilizations, would raise sex equality issues because, by definition and application, legal controls on human reproduction either directly or disparately affect women as the group which physically reproduces the species.

---

32. *Supra* note 5.

33. *Ibid.* at 293 and the criticism that the similarly situate test is seriously deficient does not, however, mean the test is destined to become irrelevant. It can be expected that it may continue to be used either under certain circumstances or as a starting point.

34. One view of the interrelationship between ss. 15 and 1 proposed that any distinction is sufficient to establish discrimination and a breach of s. 15 such that the court should immediately turn to s. 1 of the *Charter* to determine its constitutional validity. A second view, formulated by the British Columbia Court of Appeal, involved a consideration of reasonableness and fairness of the impugned legislation under s. 15(1); but building such wide controls into the concept of equality under the rights granting section left a circumscribed role for s. 1. The approach accepted by the Supreme Court is described as the "enumerated" or analogous grounds approach. Under it, "discrimination" under s. 15(1) must be invidious or pejorative in nature. It must result from an unreasonable classification or unjustifiable differentiation. Under this approach the principles of justification and reasonableness are incorporated into s. 15(1) independently of s. 1. Possible duplication with s. 1 raises the issue of what type of and level of evaluation is appropriate under each section, especially considering the Supreme Court's previous decisions which hold that the right guaranteeing sections of the *Charter* must be kept analytically distinct from s. 1. See also P. Hogg, *Constitutional Law of Canada*, 2d. ed. (Toronto: Carswell, 1985) at 800. Principally see *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *R.* v. *Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713.

35. *Andrews, supra* note 5.

The Court required discrimination before there could be a breach of s. 15. Discrimination is defined as

> *a distinction, whether intentional or not, based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*[36]

This definition was selected on the basis of its similarity with provincial, national and international human rights enactments, its consistency with the purpose of s. 15 and the established role of s. 1 as the appropriate section under which the infringement of *Charter* rights are justified. A differentiation is discriminatory when it undermines our fundamental values.

Under this approach discrimination occurs when women, and not men, are made to suffer legal burdens on their rights because of their reproductive capacities. The Court said "the promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".[37] To ensure equal concern, respect, and consideration, burdens must be measured from the complainant's perspective because whether something constitutes a benefit or burden depends largely on perspective, upon whether the focus is on the person supposedly benefitted or allegedly burdened. If a male reference point is used it is easier to characterize, for example, the maternity leave provisions of the *Unemployment Insurance Act* in the *Bliss* case as conferring a benefit on women which is unavailable to men. If, however, the focus shifts and women are used as the reference point, the exclusiveness of

---

36. *Ibid.* at 302. See also 290 where he clearly states that the main consideration in an equality analysis is the impact of the impugned law on the individual or group concerned:

    Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.

37. *Ibid.* at 297. Normally if a *Charter* section is breached the burden shifts to the government to establish that the infringement is reasonably justified in a free and democratic society under s. 1. Under the test established in *Oakes, supra* note 34, the first inquiry is whether the government has a "pressing and substantial interest". In *Andrews, supra* note 5, Mr. Justice McIntyre suggested that this aspect of the *Oakes* test is too stringent when applied to breaches of the equality guarantees because legislatures need to differentiate among individuals and groups to govern effectively. He replaced the *Oakes* standard with the less stringent one of whether the government can establish a desirable social objective.

    While many commentators predicted a lower level of scrutiny for unenumerated groups (like citizenship) his comments are wide enough to embrace enumerated and unenumerated grounds of distinction. The majority of the court did not, however, endorse this lower level of judicial scrutiny in the case of a breach of s. 15. The majority and minority therefore split on both the interpretation and application of s. 1. In the majority opinion of Madame Justice Wilson, the government will still be required to demonstrate a pressing and substantial state interest when there is a breach of s. 15. This is an important point because a lower level of judicial scrutiny for equality infringements may have impaired the evolution of equality theories and discouraged the use of equality arguments.

different and more onerous requirements for maternity coverage are burdens imposed solely on pregnant women.

The combination of *Andrews* and *Brooks* can be used as a basis for an approach to sex equality grounded in the reality of biological duality, under which women are not penalized for the ways in which they are not like men. Biological realities are ackowledged but not emphasized. Under the Court's approach to equality, social conditions of disadvantage are more important than biological difference. In *Andrews*, Mr. Justice McIntyre remarked that equality:

> *is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.*[38]

The Court's recognition of the centrality of the social and political context of equality determinations bodes well for those who believe the *Charter* can be used to improve the life conditions of women.

The social and political context was important to the decision in *Brooks*. The Court commented upon the profound changes in women's workforce participation where "combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives".[39] The Court also explained how everyone in society benefits from procreation but that under the employer's plan the costs were unfairly placed on pregnant women. The removal of unfair disadvantages imposed on groups in society was seen as a key purpose of anti-discrimination legislation. A finding that the respondent's plan was discriminatory was justified on the basis that it furthered this purpose and recognized that the rights of pregnant women were burdened in a way that men's were not.[40] After the judicial acceptance of biological duality in *Brooks* and the purposive approach to equality rights outlined in *Andrews*, Canadian courts presented with equality arguments will be required to direct their attention beyond biological difference, criteria of relevance and the fit between legislative goals and legislative means.

V. FURTHER REFINEMENTS AND FUTURE TRENDS

The approach of the Supreme Court opens the door to the type of equality arguments proposed by Professor MacKinnon and the Women's Legal Education and Action Fund (LEAF). Neither approach requires similarly situated groups. Professor MacKinnon seeks to address the core issue of inequality by asking whether the challenged policy or practice contributes to the oppression of women. The disadvantageous and prejudicial treatment of women because they are women would be unequal even if there was no one or nothing to

38. *Supra* note 5 at 289.

39. *Supra* note 18 at 27.

40. *Ibid.* at 20, 21.

compare them with.[41] LEAF has also presented a detailed sex equality argument on matters relating to women's reproductive capacities which focuses more widely on women's social and political position in society, rather than emphasizing the real biological differences between the sexes.[42] Within the relevant social context of sex inequality it is important to recognize that women have been denied control over the reproductive uses of their bodies in ways that men have not. Women have been socially disadvantaged in controlling sexual access to their bodies because of social learning, lack of information, inadequate or unsafe contraceptive technology, social pressure, custom, poverty and enforced economic dependence, sexual force, and ineffective enforcement of laws against sexual assault. As a result, they often do not control the conditions under which they become pregnant.[43]

Under conditions of social inequality on the basis of sex, women have also been allocated primary responsibility for the intimate care of children. Social custom, social and cultural pressure, economic circumstances and lack of adequate daycare (public or private) have meant that women often do not control the circumstances under which they rear children. Men as a group are not comparably disempowered by their reproductive capacities and are not generally required by society to spend their lives caring for children to the comparative preclusion of other life pursuits.[44]

Women's reproductive capacity is therefore seen as an integral part of women's "equality problem", along a spectrum of situations. Whether or not they actually have children, all women are disadvantaged by societal norms that limit their options in the public domain because of childbearing and childrearing.[45] Women who become pregnant and have children face additional burdens because of their roles inside the family, because of custom and because society's resources are not usually allocated in ways that would assist women's childbearing and childrearing activities. These circumscriptions affect even those women whose pregnancies and childrearing are voluntary. This social and political inequality has important implications for the interpretation of the *Charter*'s equality guarantees.

LEAF has argued that for women of reproductive age, the guarantee of sex equality should be interpreted so as to reduce or minimize state-sanctioned interference with women's full development as human beings, socially, economically and politically.[46] For women who are pregnant, and carrying the foetus to term, regard for sex equality should prohibit state-sanctioned interference with their physical being and their authority to make prenatal caretaking decisions. In the context of abortion in the *Borowski* case, LEAF also argued that women's equality rights should preclude the kind of state coercion into motherhood which results when the state bars women's access to abortion. Access to reproductive health care, including abortion, is seen as a necessary means for women to survive in their unequal life

---

41. Catherine Mackinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979) at 101ff; *Feminism Unmodified* (Cambridge: Harvard University Press, 1987).

42. See, for example, LEAF's factum as intervenor in *Andrews, supra* note 5.

43. LEAF Factum, *Borowski* v. *A.G. Canada* as Intervenor, Par. 49 *et seq.*

44. *Ibid.* par. 51

45. *Ibid.* par. 52.

46. *Ibid.* par. 53.

circumstances. Women's access to legal abortion was viewed as an attempt to ensure that women and men have more equal control of their reproductive capacities, more equal opportunity to plan their lives and more equal ability to participate fully in society than if legal abortion did not exist. In short, the guarantees in ss. 15 and 28 require that the *Charter* must provide women faced with unwanted pregnancies a secure right to control the number, timing and spacing of their children.[47]

Existing Supreme Court jurisprudence lays the foundation for a sex equality analysis for different types of legal regulation which involve women's biological role in human reproduction. Government action will now be open for scrutiny when its controls further entrench women's historical relegation to social subordination and second class citizenship, where all direct victims of the deprivation of reproductive control would be female or where women's self-determination and autonomy would be burdened by law in a way that men's are not.

VI. CONCLUSION

The equality implications of legal controls on women's reproduction must be recognized because where pregnancy is part of the issue some people are unable to see that sexual equality is still possible, or indeed even relevant. Controls on women's reproductive capacities have tended to be discussed solely in terms of individual rights and freedoms. In the United States, for example, the abortion right is supported on the basis of one woman's privacy, not all women's equality.[48] In Canada the Supreme Court in *Morgentaler*[49] was content to strike down s. 251 of the *Criminal Code* on the basis that it infringed a woman's security of the person or liberty interest under s. 7. The Court did not need to comment on the equality arguments made against s. 251 and refrained from doing so. But the Supreme Court decisions in *Andrews*, *Brooks*, and *Janzen and Govereau* give support to an equality analysis of the many issues where women's social position and reproductive differences are involved.

An equality analysis will require that attention be paid to the actual life circumstances of women and an emphasis on collectively based equality argument reinforces that what happens to one woman is often a representative sample and not an isolated case.[50] An equality analysis may also help break down the public/private distinction in relation to constitutional rights, force us to question the impact of social constraints on women's choice, and undermine the idea that pregnancy is a universally and freely chosen state. The facial neutrality of a provision will become less important than the realization that everyone will not

---

47. *Ibid.* par. 56.

48. The privacy analysis began in *Roe* v. *Wade*, 410 U.S. 113 (1973) (U.S.S.C.) and was recently used in *Webster* v. *Reproductive Health Services* (3 July 1989) (U.S.S.C.).

49. *Morgentaler, supra* note 6.

50. For an overview, see N. Colleen Sheppard, "Equality, Ideology and Oppession: Women and the Canadian Charter of Rights and Freedoms", in Christine Boyle, ed., *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 195.

be benefitted or burdened by it in an equivalent manner. An equality analysis of biological capacity reproductive rights can also be seen as a first phase of the rethinking of rights which Madame Justice Wilson suggested was necessary in *Morgentaler, Smoling et al.*