APPROACHES TO GENDER EQUALITY IN THE WORKPLACE: *DUMONT-FERLATTE* V. *CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION)*

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TABLE OF CONTENTS

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I. INTRODUCTION

After decades of human rights cases, and now *Charter*[1] cases, women are still struggling to achieve the important goals of equality and freedom from discrimination in the workplace. In July of 1996, a human rights tribunal decision was released in a case brought by one hundred and three women in the public service who were denied annual and sick leave credits and their bilingual bonus while on maternity leave.[2] In denying these women's claim of sex discrimination, the Canadian Human Rights Tribunal based its decision on the legally outdated formal equality approach.[3] Consequently, the Tribunal incorrectly considered whether the rules applied to pregnant women in the workplace were discriminatory based on the inappropriate criteria of how much pregnant women were "like" another category of employees. This recent disappointing human rights decision dealing with sex discrimination in the workplace suggests that feminists should reconsider the question of whether a human rights litigation strategy is an effective tool in the struggle for equality for women.

A. *Objectives and Outline of the Comment*

In this case comment I will evaluate *Dumont-Ferlatte* v. *Canada (Employment and Immigration Commission),*[4] a recent Canadian Human Rights Tribunal decision involving a claim of discrimination in the workplace based on sex. I will evaluate the decision, considering both its legal validity on its own merits and its implications for using human rights law to advance the cause of women's equality in the workplace.

In the introduction I will outline my methodology, introduce the problem of gender inequality in the workplace and introduce the issue of using human right litigation as a strategy to achieve gender equality.

In the first section I will review the recent treatment of discrimination and equality issues by the courts and Parliament. I will also provide some background on the treatment of pregnant women in the workplace through examples in the case law and from the federal public service.

In the second section I will explain the facts and the decision in *Dumont-Ferlatte* decided by the Canadian Human Rights Tribunal on July 16, 1996. This case involved a sex discrimination claim, brought by one hundred and three women in federal public service, and concerned a rule that prevented female employees on maternity leave from accumulating annual and sick leave credits and credits towards a bilingual bonus.

In the third section I will evaluate the Tribunal's approach to women's equality, its underlying assumptions, its chosen method of analysis and its decision. Then I will offer models of equality proposed by feminists that the Tribunal members could have used and that would have had more validity for women.

At a broader level, in the fourth section, I will consider how this case illustrates the progress

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

[2] *Dumont-Ferlatte* v. *Canada (Employment and Immigration Commission),* [1996] C.H.R.D. No.9 (Canadian Human Rights Tribunal) (QL) [hereinafter *Dumont-Ferlatte*]. The tribunal's decision was upheld on judicial review by the federal court in a decision released on December 11, 1997 by Tremblay-Lamer J. ((11 December 1997), T-1802-96, (F.C.T.D.)) [hereinafter *Dumont-Ferlatte 2*].

[3] A formal equality approach considers that people who are "similarly situated" or "alike" one another must be treated equally to the extent that they are the same. People who are not similarly situated need not to be treated similarily.

[4] *Supra* note 2.

we have made (or not made) towards acceptance by courts and Tribunals of an approach to equality and discrimination in human rights law that is truly useful or meaningful for women's struggle for equality. In light of this evaluation, I will consider the usefulness of a strategy of human rights challenges to the project of women's equality generally and specifically to pregnant women in the workplace. In the final section, I will present my conclusions.

Subsequent to this case comment being written in December of 1996, this case was brought to the Federal Court Trial Division for judicial review. The Federal Court decided, in December 1997, to uphold the Tribunal's decision and thus the new judgment does not affect the analysis in this paper. I have added a brief postscript about this judicial review at the end of the paper.

B. *Methodology*

My paper will reflect a feminist approach and analysis. Given that there are many perspectives and approaches within feminism, I will endeavor to place my approach within the spectrum of feminist doctrine. I agree with Lynn Smith's description in her paper about feminist research, that a feminist analysis is informed "by an understanding that our legal system is patriarchal in origin and spirit" and focuses on "changing the legal system in ways which will improve the position of women in society."[5] Further, a feminist analysis does not accept the answers that standard legal research provides as final ones.[6]

While I accept the radical feminist idea that patriarchy is at the foundation of our society, my approach is tempered by a willingness to consider alternatives within the present legal system. I also place a heavy emphasis on the socialist feminist idea that women's economic equality is an essential building block to any meaningful overall equality. We must also remember that women are not a homogeneous group but are differently situated. A "sex equality-enhancing measure" must also be "respectful of and attentive to differences among women" and must not "exacerbate existing avenues of oppression" that some women face.[7]

C. *Defining the Problem: Gender Inequality in the Workplace*

Women cannot be equal members of our society until they achieve some form of economic equality. This in turn requires that women have the ability to participate fully in the paid labour force. In order to achieve this goal, a vital step will be to eradicate historic and ongoing discrimination faced by so many women during their employment. A workplace that is open to women's participation will be free from harassment and discrimination, will provide equal pay for the work women perform, will give women equal opportunities for advancement, and will provide flexibility that reflects the realities of women's lives.

The significance of workplace issues in the struggle for women's equality is demonstrated by the sharp increase in the participation of women in the paid labour force, and by the large proportion of women for whom paid work is a necessity. Women's participation in the paid labour force has increased dramatically since the 1950's and in many cases a woman's income is vital to the household or possibly even the only household income. As of 1987, over 56% of Canadian

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[5] L. Smith, "What is Feminist Legal Research?" in Winnie Tomm, ed., *The Effects of Feminist Approaches on Research Methodologies* (Waterloo: Wilfred Laurier Press, 1989) 71 at 71 [hereinafter *Smith*].

[6] *Ibid.* at 95.

[7] N. Iyer, "Some Mothers are Better than Others: A Re-examination of Maternity Benefits," in S.B. Boyd ed., *Challenging the Public/Private: Feminism and Socio-Legal Policy* (Toronto: University of Toronto Press, 1997) 168 at 170. [hereinafter *Iyer*].

women were participating in the paid labour force, up from 23% in 1951. In Ontario in 1990, of women in prime childbearing ages of 25-44, 82% were working full-time. As of 1988, 50% of mothers with children under three were working full time and for single mothers the numbers increased to 63%. More and more women are part of the paid labour force, and for many of these women paid work is essential. Clearly, workplace equality is more important than ever to the struggle for women's equality.

While there has been some public recognition of the need to eradicate workplace discrimination, real progress has been slow and women often find themselves fighting the same battles over and over again. Discriminatory attitudes continue to prevail. The 1990 report of the federal Task Force on Barriers to Women in the Public Service described the ongoing discrimination against women employed in the public service:[8]

> The barriers faced by women in today's public service are for the most part less obvious than those of the past. The regulation requiring women to resign upon marriage (which was revoked ... in 1955) was an easily identifiable barrier, with a readily apparent solution. Today's barriers are generally more subtle and integrated, forming an intricate pattern of confinement and limitation, rather than opportunity.[9]

While surveying attitudes to women in the workplace, Task Force commissioners were told that despite "the growing number of female heads of households...there is a persistent belief that men do serious work to support their families, while women undertake trivial tasks for pin money.[10] The stereotypes that "women lack ambition and incentive to seek promotion" can create serious obstacles in the workplace.[11] Women often find it hard to acquire developmental training or must contend with feelings that women want to be coddled or protected. "Patronizing attitudes, paternalism and resentment" are commonly faced by women in non-traditional trades.[12] Women also face stereotypes surrounding their role as wives and daughters, but particularly as mothers. This is often reflected in the selection process where women are asked questions that men would never be asked about their intention to have children and about their priority of work versus family. Typically, it is assumed that women will not be adequately committed to their work. Women also face discrimination in relation to their attempts to balance work and family, as "efforts to accommodate the demands faced by working mothers have been seen as 'concessions' - extra privileges given to women... Support [for working mothers] is still not regarded as a reflection of society's needs, but as 'special favours' for women in the work force."[13]

The Task Force concluded that the most significant barriers faced by women in the public service were attitudes towards women, the difficulty of balancing work and family responsibilities and the corporate culture. All of these barriers have an impact on women's childbearing function and thus issues surrounding working women and pregnancy will be among the issues that are crucial to resolve in the struggle for equality in the workplace. It will be important to recognize women's important social role as the bearers of children, while not allowing assumptions about this role to constrain their full and equal participation in the work force. Women have a right to

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[8] Task Force on Barriers to Women in the Public Service, *Beneath the Veneer: the Report of the Task Force on Barriers to Women in the Public Service: Volume 1 Report and Recommendations*. (Ottawa: Minister of Supply and Services Canada, 1990) [hereinafter *Beneath the Veneer*].

[9] *Ibid.* at 60.

[10] *Ibid.* at 62.

[11] *Ibid.* at 63.

[12] *Ibid.* at 66.

[13] *Ibid.* at 79.

participate in the waged economy without bearing the full cost of procreation economically, professionally or socially. While it is clear that biologically only women can bear children, the consequences of this fact have little to do with nature as suggested in the 1979 *Bliss* case, and everything to do with laws, rules and attitudes created by patriarchal society and reflected in the workplace.[14]

Discrimination in the workplace based on pregnancy (and therefore based on sex) also undermines the progress of all women towards true full participation in the wage-labour economy. While it affects individual women directly by inhibiting them from becoming pregnant, or by hurting their chances of advancement, it also sends a message to all women that "our participation in the paid labour force is seen as less valuable and as warranting less protection than men's participation."[15]

> This is not just an issue of significance for women's equality. It has an impact on all of society, as society derives a social benefit from continuing human reproduction. Society is already being impacted by these trends as the hostility of the workplace to reproduction has led to a significant drop in the birth rate and to postponement of childbirth for many women.[16]

D. *Fighting Inequality with Human Rights Litigation*

Are protections under human rights law the answer for working women? Women have been bringing human rights cases for decades and the results have been mixed. While incremental changes have been made, and decisions have occasionally pushed the legislative agenda,[17] bringing human rights cases only addresses individual women's situations and usually deals with only one issue at a time. This limitation tends to mask the systemic nature of the problem. As Sheila Greckol writes, "at the heart of gender issues at the workplace lies systemic discrimination, and ... systemic discrimination involves discriminatory practices so permanent, so pervasive, so deeply rooted that they are embedded in the totality of the system and are coextensive with it, has proved an elusive evil."[18] Cases do not always turn out favourably for women and the resulting assumptions that can become entrenched serve to further subordinate women.

The approach to equality chosen by human rights tribunals is one crucial factor in considering whether bringing these cases will help achieve women's economic equality. While there is no consensus among feminists on a definitive equality theory, it is clear that, as Kathleen Lahey describes, they are all making a statement about "the realities of patriarchal hegemony and the uselessness of legal equality guarantees that are defined only by male power holders who are

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[14] *Bliss* v. *A.G. Canada,* [1979] 1 S.C.R. 183 at 190, [1978] W.W.R. 711 [hereinafter *Bliss* cited to S.C.R.] a Supreme court case dealing with maternity leave benefits, where Mr. Justice Ritchie stated, "[a]ny inequality between the sexes in this area is not created by legislation but by nature." See also S. Martin, "Persisting Equality Implications of the "Bliss" case" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 195 at 198.[hereinafter *Martin*].

[15] D. Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1991) 4:2 C.J.W.L. 407 at 430 [hereinafter *Majury*].

[16] Iyer, *supra* note 7 at 168. Postponing childbirth also has serious health implications for both women and children.

[17] Changes to the unemployment insurance legislation around maternity leave often came after court cases revealing discrimination. Although these cases were not always brought by women! See for example *Schachter* v. *Canada,* [1992] 2 S.C.R. 679, (1992) 93 D.L.R. (4th) 1 [hereinafter *Schachter*].

[18] S.J. Greckol, "Gender Issues in Arbitration: The Employee's Perspective" (1991) 1 Labour Arbitration Yearbook 143 at 143 [hereinafter *Greckol*].

speaking out of masculist experience."[19] If the tribunals continue to apply a narrow formal equality approach to sex discrimination, rather than accepting a substantive or feminist approach, it is unlikely that much progress is possible. These important issues will be explored in this paper.

II. BACKGROUND

Women have been working towards equality using many strategies including human rights cases and proposals for legislative reform. As this brief background section will explain, we have made significant progress since the days when women were fired from the public service for getting married. However, in the area of discrimination and equality law, the courts have taken a long time to officially recognize the simple notions that discrimination based on pregnancy is sex discrimination and that equality does not merely mean treating "likes alike." What seem like extremely obvious conclusions to many women have taken the courts and tribunals many years to accept, and even today it appears that these conclusions have not been completely integrated into their approach. In this section I will review the recent treatment of discrimination and equality issues by the courts and Parliament. I will also provide some background on the treatment, both in the case law and in the federal public service, of pregnant women in the workplace.

A. *Equality and Discrimination Cases*

For many years the reigning precedent on discrimination based on pregnancy was the 1979 Supreme Court decision in *Bliss*. Mr. Justice Ritchie claimed that differentiation based on pregnancy was not sex discrimination and was in fact merely a differentiation between "pregnant and non-pregnant persons" as to who could qualify for Unemployment Insurance benefits (as if any one other than women could ever be pregnant). This case is also famous for the judicial declaration that "any inequality between the sexes is created not by legislation but by nature." While Mr. Justice Ritchie used a formal equality model[20] in parts of his analysis, which evaluated pregnant women on whether they were treated equally to other pregnant persons, his "nature" comment seems to take us back to an even more antiquated era where women were seen to have naturally a separate role within a separate sphere (the home). Both his choice of equality theories, and his classification of the issue as merely a question of "who qualifies for benefits" meant that it was impossible to find discrimination in this case. While this decision has since been overruled, the judicial attitudes and assumptions behind it persist.

In 1985, the court finally rejected the formal equality model. In *Andrews* v *Law Society of British Columbia*[21] Mr. Justice McIntyre rejected the formal equality approach, in favour of a substantive approach, in words if not in application when he said, "the mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights ... consideration must be given to the content of the law, to its purpose, and its impact upon those to whom is applies, and also upon those whom it excludes from its application."[22] Despite McIntyre's words, authors like Diana Majury have commented that the reasoning and the results

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[19] K. Lahey, "Feminist Theories of (In)Equality" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 71 at 85 [hereinafter *Lahey*].

[20] A formal equality approach considers that people who are "similarly situated" or "alike" one another must be treated equally to the extent that they are the same. People who are not similarly situated do not need to be treated equally.

[21] [1989] 1 S.C.R. 143, [1989] 2 W.W.R. 289 [hereinafter *Andrews*].

[22] *Ibid.* at 167-168.

in *Andrews* still look like formal equality.[23] Although *Andrews* is still held out as setting a substantive definition of equality, what the judges are often doing when they apply it actually looks more like formal equality.[24] In any event, the words from *Andrews* still stand and we must insist that they are followed in spirit, not just in theory.

Some progress was made in the 1989 Supreme Court decision in *Brooks* v. *Canada Safeway Ltd*[25] Chief Justice Dickson in *Brooks* adopted the *Andrews* definition of discrimination[26] and brought some consideration of context into his analysis. The Chief Justice considered context by examining both the underlying rationale for the health plan that was at issue, and "the social context of pregnancy as an activity that benefits all society, but the costs of which have been disproportionately borne by women."[27] He also adopted substantive equality language when he stated that the purpose of anti-discrimination law "is the removal of unfair disadvantages which have been imposed on individuals and groups in society."[28] However, he also applied *Andrews* so as to treat likes alike.[29]

Brooks also gave support to the conclusion that discrimination against a subset of the relevant group, such as pregnant women, may be considered discrimination against the relevant group generally (women) for the purposes of human rights cases. There was also finally a recognition by the Court that discrimination based on pregnancy is discrimination based on sex. Majury suggests that this recognition may be "more a function of the gains that women have made in the paid labour force than of a more far reaching understanding of discrimination. ... [A] 'pregnant employee' looks more like 'people' in the paid labour force than she did ten years ago."[30] The *Brooks* case still stands and was followed and extensively quoted in a 1996 Supreme Court case *Battlefords and District Cooperative Ltd.* v. *Gibbs,*[31] dealing with mental disability.

This recognition of pregnancy as a form of sex discrimination has been formally adopted in the Human Rights Codes of several provinces and was added to the *Canadian Human Rights Act*[32]

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[23] Majury, *supra* note 15 at 425.

[24] For recent examples see *Native Women's Association of Canada* v. *Canada,* [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224 [hereinafter *NWAC*], where Justice Sopinka applies formal equality by assuming that everyone is equal and searching for proof of inequality. See also *Thibaudeau* v. *Canada,* [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449[hereinafter *Thibaudeau*] whereas the women judges contextualize their judgments and look to see if there is equality substantively, the male judges for the majority still apply formal equality.

[25] [1989] 1 S.C.R. 1219 [hereinafter *Brooks*].

[26] Definition of discrimination from *Andrews, supra* note 21 at 174, "...discrimination may be described as a distinction, whether intentional or not but 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. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

[27] Majury, *supra* note 15 at 429. In *Brooks*, *supra* note 25, Dickson C.J. stated at 1243 "[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. It is only women who bear children; no man can become pregnant...it is unfair to impose all of the costs of pregnancy upon one half of the population."

[28] *Brooks*, *supra* note 25 at 1238.

[29] Majury, *supra* note 15 at 431-437.

[30] *Ibid.* at 431.

[31] [1996] 3 S.C.R. 566. *Brooks* was also followed in *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1 W.W.R. 1 [hereinafter *Janzen*], *Miron* v *Trudel,* [1995] 2 S.C.R. 418, [1989] 4 W.W.R. 39 and *Schachter, supra* note 17.

[32] R.S.C. 1985, c. H-6, s. 3(2) [hereinafter CHRA].

in July 1983. At the same time, the federal public service has been developing its own approach to pregnant women in the workplace.

B. *History of Maternity benefits in the Public Service* [33]

Up until World War II, the public service did not hire married women and if a woman became married she would have to resign. The government introduced its first version of a maternity policy in 1942. This policy required that women resign two months before their due date. In 1962, a pregnant woman had to take a mandatory unpaid maternity leave, however, she would no longer lose her job. This unpaid leave was supplemented by Unemployment Insurance benefits after 1971, if she had been working long enough to qualify. In 1981, the federal public service began contributing to their employees' maternity leave by providing a "bridging benefit" for the two week waiting period until their Unemployment Insurance benefits started. That year the employer began paying its first form of maternity allowance, as a result of negotiations with one union. This allowance was paid during the U.I. "bridge" period and the benefit period and added to the U.I. benefits received to bring the employee up to 93% of their salary. In 1984, the *Unemployment Insurance Act* was amended to give the same benefits that natural mothers received to adoptive parents. Since natural fathers were excluded from these benefits, a man named Schachter brought a human rights complaint based on sex discrimination. After he successfully brought his case to the Supreme Court level, the government changed the *Unemployment Insurance Act* to provide for a 10 week parental leave that could be taken by mothers, fathers or adoptive parents. Same sex parents are still excluded from this benefit. Women could add this benefit onto their existing 17 weeks period without any additional waiting period.

The current rules for pregnant employees in the federal public service, according to the Tribunal, are as follows:

> In short, a pregnant employee may use a maternity leave without pay beginning before, on or after her delivery date, as she sees fit. During her pregnancy, she may also use her paid sick leave credits or her annual leave credits. Thus, a pregnant employee could choose to take her paid sick leave credits or her annual leave credits without taking an unpaid maternity leave.
> During her maternity leave without pay, the employee is guaranteed that she will still have her job when she returns to work, and will receive any wage increases and advancements that came into effect while she was absent.
> With regard to pension, life insurance and disability insurance plans, she may maintain the benefits she is entitled to under the collective agreement. The employer pays into the various plans the portion payable by the employee, who must reimburse the employer after returning to work in accordance with the agreed-upon terms. With regard to health insurance, however, the employee must pay her share during her absence.[34]

iii) *The Current Situation*

Feminists and women's groups have been advocating legal changes involving pregnant women and the workplace, especially since the *Bliss* case.[35] While some of these objectives have been achieved there is still more to do. We have achieved (1) recognition of pregnancy as a form of sex

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[33] The history of the public service maternity leave policy was described in the decision in *Dumont-Ferlatte, supra* note 2 at paragraphs 43-68.

[34] *Ibid.* at para 70-72.

[35] See in particular Martin, *supra* note 14 at 206.

discrimination (*Brooks*, CHRA) and; (2) separate parental leave and maternity leave, recognizing the split between child rearing (which both parents ought to be involved in) and childbearing (which only women can do).[36]

We may not have, however, achieved, as Martin advocated in 1987, recognition by the judiciary of a "concept of equality which recognizes that women cannot be treated unequally because they are pregnant and to recognize the worthwhile, social function pregnant women perform."[37] While the courts claim to have recognized both these concepts in words (*Andrews*, *Brooks*), judicial (and tribunal) analysis and decision-making still reflect a formal equality way of thinking. Even the substantive conceptions of equality that have been accepted by the courts do not go far enough towards a conception of equality that reflects women's realities. I will explore these more reflective conceptions of equality in Part IV of this paper. In the next sections I will present a very recent human rights case and consider its implication for the development of women's economic equality.

III. THE FACTS AND THE DECISION: *DUMONT-FERLATTE*[38]

In 1990, Suzanne Gauthier, and later Jo-Ann Dumont-Ferlatte filed complaints with the Canadian Human Rights Commission against their employer, the Federal government. They maintained that the refusal to credit them with annual and sick leave during the time they were on maternity leave violated the CHRA. One hundred and three other women joined their case, and some of them added an allegation that this discrimination also deprived them of their right to a bilingual bonus.

The complainants were denied their rights to annual and sick leave credits and bilingual bonuses because, under the collective agreement, to earn them they had to receive at least ten days pay per month. The employer did not consider the women to be receiving pay while on maternity leave.

The complainants claimed that this refusal to allow them to accumulate credits during maternity leave was discrimination on the basis of sex and therefore in violation of their human rights. The CHRA states in section 3(2) that discrimination based on pregnancy shall be deemed to be discrimination based on sex. Under section 3(1) of CHRA, sex is a prohibited ground of discrimination. The complainants also referred to section 7 of the CHRA but the Tribunal said it had no bearing since the practices in question "although admittedly discriminatory were unlikely to destroy the complainants' employment opportunities."[39] Section 7 of the CHRA states: "it is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."[40] Section 7 should have been applied to this case because the employer in the course of employment "differentiated adversely" in relation to an employee, however, the Tribunal chose not address this fact at all.

All the parties agreed that if there was discrimination, it was adverse effect discrimination. As

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[36] See *Iyer*, *supra* note 7 for criticism of this split and the lack of change in the gendered-division of labour in the private sphere despite this public measure. See also Evans & Pupo, "Parental Leave: Assessing Women's Interests" (1993) 6:2 C.J.W.L. 402. Note that lesbian and gay partners are still excluded from parental leave under the new Employment Insurance Act.

[37] Martin, *supra* note 14 at 206.

[38] *Dumont-Ferlatte*, *supra* note 2.

[39] *Ibid.* at paragraph 9.

[40] *Supra* note 32 at s.7.

discrimination is not defined in the CHRA, the Tribunal considered definitions from the case law. The definition of "discrimination" was taken from *Andrews*[41] and the definition of "adverse effect" was taken from *O'Malley v. Simpson Sears Ltd.*[42]

The complainants were claiming adverse effect discrimination because they considered the rule neutral on its face. They claimed, however, that women were prevented from earning these benefits while they were on unpaid maternity leave whereas men could never find themselves in this situation, therefore women were adversely affected by the rule.

The Tribunal said it was not sufficient to compare pregnant women with men. They considered this comparison invalid and suggested a different one. They justified this claim using an inapplicable quote from *Thibaudeau* that doesn't seem to indicate that this comparison is invalid: "...it cannot be the case that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous...if legislation which adversely affects women has the same adverse effect upon men...it cannot logically be said that the ground of discrimination is sex."[43] In this case the tribunal was not faced with a case where there were more women affected than men, because no men were affected. They were not dealing with a rule than had the same adverse affect on men, because men would never be on maternity leave.

The Tribunal determined the correct issue was "whether a pregnant woman, prevented from earning her annual leave and sick leave credits and from receiving her monthly bilingual bonus because she is absent on maternity leave, is treated *any differently than others to whom the same rule applies when they take similar kinds of leave.*"[44] [emphasis mine] The Tribunal proceeded to search for an appropriate group to compare with the pregnant women. Their statement of the issue indicated the group would be people who it determined were "similarly situated" to the women.

The Tribunal then determined that maternity leave was neither a form of sick leave, based on 1987 CHRC policy, nor a form of paid leave; it was instead a form of unpaid leave. The analysis they employed to come to that conclusion will be examined in critical detail in the next section. This conclusion resulted in comparing women who took maternity leave to other employees who took unpaid leave periods, such as educational leave, personal leave or union leave, for the purposes of determining if the effect was discriminatory. The Tribunal determined that since other people on unpaid leave were also subject to the rule - that sick leave and annual leave credits would not accumulate during a month where less than ten days were paid - the rule affected all employees on unpaid leave equally, including pregnant women on maternity leave. The Tribunal therefore dismissed the claim that pregnant employees on maternity leave were facing discrimination on the basis of sex.

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[41] *Andrews, supra* note 21 at 174. See the definition of discrimination from *Andrews* at note 27.

[42] [1985] 2 S.C.R. 536 at 551 [hereinafter *O'Malley*]. "Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground [...] On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force [...] An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply."

[43] *Dumont-Ferlatte, supra* note 2 at paragraph 37 quoting from *Thibaudeau* v. Canada (M.N.R.), [1994] 2 F.C. 189 at 204 (F.C.A.).

[44] *Ibid.* at paragraph 38.

IV. CRITIQUES OF THE LEGAL ANALYSIS AND THE APPROACH TO EQUALITY

While there are several angles from which to criticize this case, I will focus my critique on the choice of equality theory and the resulting application of that theory to defining the issue and to defining the relevant type of comparison.

I will show that the Tribunal applied a formal equality approach. Even if one were to fully accept that the formal equality approach were the correct one, I will contend that they failed to justify their choice of employees on "other forms of unpaid leave" as the appropriate group for comparison. Other types of comparison were possible, and preferable. Further, the Tribunal failed to adequately demonstrate that these women employees on maternity leave were in fact "unpaid" given the definitions of remuneration and benefits adopted in the case. I do not accept, however, that the formal equality approach should have been used at all. Rather, a substantive equality analysis is required by precedent and should have been followed.[45] The Tribunal could have chosen to expand equality even further by considering approaches put forward by various feminist authors that are more suitable to reaching the goal of anti-discrimination legislation - the removal of unfair disadvantages which have been imposed on individuals or groups in society.[46]

The Canadian Human Rights Tribunal, in deciding this case, clearly applied the reasoning of a formal equality approach to discrimination. The language of "similarly situated" is not often used in human rights case which have focused more on the language of discrimination, Diana Majury explains, but "the absence of the language of "treat likes alike" does not necessarily mean that the similarly situated test is not being applied in terms of effect."[47] We can see the Tribunal applying the "treat likes alike" methodology to their analysis. They decided that pregnant women were not like men. Instead they found a group that, in their estimation, pregnant employees were "like" - employees on some form of unpaid leave. After this determination, it took only few paragraphs to determine that all employees on unpaid leave were treated alike, and therefore there was no discrimination.

Even if one were to fully accept that the formal equality approach was the correct one, it is difficult to accept the Tribunal's choice of employees on "other forms of unpaid leave" as the appropriate group for comparison. Other types of comparison were possible, even preferable. The Tribunal could have chosen to compare these women with pregnant women in other workplaces to see if they were treated alike. They could have chosen to compare pregnant women on maternity leave with other people they resemble, such as people on other non-chosen leaves, like sick leave. Both of these choices might have led the Tribunal to different conclusions.

In the alternative, even if you accept that within the formal equality approach, a comparison with "other unpaid leave" was appropriate, you could still come to a more fitting conclusion. When comparing maternity leave to the types of unpaid leave,[48] the evidence shows that maternity leave does not have the same impact as other unpaid leave. It has a greater impact on women because,

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[45] A substantive approach was outlined in *Andrews, supra* note 21. "[C]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom is applies, and also upon those whom it excludes from its application."

[46] According to McIntyre, J. in *Andrews, ibid.* and affirmed in *Brooks, supra* note 25.

[47] Majury, *supra* note 15 at 410, footnote 13.

[48] Leaves without pay recognized by the collective agreements include paternity leave without pay, adoption leave without pay, leave without pay for the care and upbringing of pre-school children, leave without pay for spousal relocation, and leave without pay for family responsibilities, leave without pay for personal reasons, sick leave without pay, educational leave without pay, leave without pay to seek election, or to participate in activities of an international organization, military leave without pay, and union leave without pay (described in *Dumont-Ferlatte, supra* note 2 at para 82).

as we discussed in the introduction, women who take maternity leave are far more vulnerable to repercussions in the workplace because of attitudes towards a mother's place in the workplace or questions about their commitment to it. Maternity leave is the only type of "unpaid" leave that can only ever affect women and it is the only leave that is not chosen.[49] Also, considering maternity leave the same as other types of paid leave indicates a failure to recognize this leave as involving a special contribution to society by women rather than a chosen leave which is usually profitable to an individual. This is a difficult legal argument to make because the constraints of formal equality make it difficult to consider the real historical, contextualized, and substantive issues for women. As Sheilah Martin says, "a judicial decision may appear internally consistent, logical and in accordance with legal precedent but nevertheless be based on erroneous gender-based assumption."[50]

The Tribunal explained, at paragraph 70, that pregnant employees have the "choice" to use up their paid sick leave or paid annual leave and thus have the "choice" to avoid a period of unpaid maternity leave and the resulting loss of credit accumulation. The Tribunal appeared to be suggesting that this "choice" would eliminate the adverse impact of the rule. It can hardly be said to be more fair and less discriminatory to force *only* female employees to use up their other time off for childbearing. This attitude represents a step backwards in the attempt to mitigate the effects childbearing on women's role in the workplace.

Further, the Tribunal failed to adequately demonstrate that these women employees on maternity leave were in fact "unpaid" given the definitions they rely on. The Tribunal accepted, at paragraph 76, that women on maternity leave cannot receive remuneration because they do not perform work - and they say that such remuneration for work performed is the very essence of an employment contract. This conclusion can be contradicted by two statements the Tribunal made earlier in the decision. At paragraph 30, they said that if you were paid a salary, and were absent from work on paid leave, such as annual vacation, you were *deemed* to be at work and received all the relevant credits. Why then, could a pregnant woman employee, receiving a maternity allowance,[51] bringing her to 93% of her regular salary, not also be *deemed* to be at work when on maternity leave? The Tribunal then tried to discount the "maternity allowance" as a benefit rather than as remuneration. However, the definition of remuneration relied on by the Tribunal at paragraph 29 of the case explicitly *included* benefits as a form of remuneration[52].

Moreover, the Tribunal relied on the testimony of Mr. Swayze, for the government side, as proof that the employer and unions have always acknowledged that maternity leave was a form of leave without pay. However, the contrary assumption could easily have been read into the payment of the maternity allowance. The fact that the employer tops up the E.I. benefits to 93% of wages

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[49] Greckol, *supra* note 18 at 153. Greckol takes on the issue of choice versus necessity at page 153, "[t]o deny benefits to women on the basis that the procreative needs of women are matters of choice rather than necessity... is an exercise in result-oriented reasoning." See also L.A. Turnbull, "Brooks, Allen & Dixon v. Canada Safeway Ltd - A comment (Bliss Revisited)" (1989) 34 McGill L. J. 172 at 184, explains that not all pregnancies are voluntary and that "[m]any factors which influence whether a woman becomes [or stays] pregnant are beyond her control."

[50] Martin, *supra* at note 14 at 197.

[51] For a maternity allowance, the employer tops up the Employment Insurance benefits to 93% of wages and pays for the bridge period (the two week waiting period before beneftis begin)

[52] The definition the Tribunal relies on for remuneration, from labour relations lawyer Robert P. Gagnon, in *Dumont-Ferlatte, supra* note 2 at paragraph 29, includes the following passage: "[t]herefore, besides the wage or salary, in the narrowest sense, that is paid on the basis of performance or hours worked, *remuneration also includes benefits such as* vacation allowances, *pay for non-working days*, or the employer's share of certain insurance or retirement plan premiums, as the case may be." [emphasis added].

and pays for the bridge period (two week waiting period) indicates an understanding that women should still receive their *pay* while they are on maternity leave and makes them look more "like" people on *paid* leave than people on other *unpaid* leave. The federal public service might well have had a fully *paid* maternity leave program were it not able to rely on the E.I. program to pay half the employees salary. Thus, the distinction is more about who pays the employee while on maternity leave, rather than whether they are paid or not.

The Tribunal itself acknowledged in its decision that maternity leave is not quite the same as other leaves: "Not only was maternity leave without pay given the same treatment as the other forms of leave without pay, it had better benefits. For example, ...an employee on maternity leave without pay receives ninety-three per cent (93%) of her wages."[53] The Tribunal did not consider the possibility that maternity leave had better benefits because it is in a class all by itself.

Clearly then, the Tribunal's application of the formal equality approach in this case is problematic. I have shown that, even within the narrow analytical terms of the formal equality approach, the Tribunal's analysis is by no means self evident: it is internally inconsistent at times.

However, even if the Tribunal had correctly applied the formal equality approach, I question the appropriateness of using it at all in this case. In *Andrews*, Mr. Justice McIntyre clearly indicated that the out-dated "similarly situated" test was no longer appropriate, and adopted a substantive equality approach instead. Moving beyond the formal equality test is important because it provides very limited grounds for recognizing discrimination against women based on sex. The "similarly situated" test only acknowledges discrimination in situations where a woman is already "like" the people (men) with whom she is compared. Unfortunately, *Dumont-Ferlatte* illustrates that courts and tribunals do not always adopt a substantive equality approach, and, as discussed above, recent case law shows that where courts and tribunals have claimed to employ a substantive equality approach, their decisions have still tended to reflect formal rather than substantive equality analysis.[54]

In addition, the Tribunal could have chosen to expand equality even further by considering approaches put forward by various feminist authors. These alternative approaches are more suited to the objective of anti-discrimination legislation - the removal of unfair disadvantages which have been imposed on individuals or groups in society. The semantic gymnastics of a formal equality analysis described in the previous section provide additional evidence that a new equality approach is needed in discrimination law. The formal approach to equality is so narrow and abstract that it obscures reality and makes inequality almost impossible to see. We need a theory that allows us to look at women's circumstances and context, and that takes historical disadvantage into account.

The transformation from the strictly formal reasoning in *Bliss* to the progressive language used in *Brooks* shows how fluid the legal definitions of equality and discrimination can be. As Rosalie Abella states, "[i]t is the very dynamism of equality that makes it so elusive an objective. In examining the theories of equality promulgated through history, one is struck by the obvious - the extent to which its cogency and implementation are affected by the social environment from which it draws oxygen."[55] There is room for a new equality theory to be accepted, but this will probably not occur until the "social environment" is ready to accept it. The "gap between the theoretical and what is argued (or arguable) in courtrooms is obviously very wide, but not unbridgeable."[56]

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[53] *Ibid.* at paragraph 89-91.

[54] Cases like *Thibaudeau, supra* note 24 and *NWAC, supra* note 24 still employed a formal equality analysis even if they do not admit it explicitly.

[55] R. Abella, "The Dynamic Nature of Equality" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 3 at 4.

[56] Smith, *supra* note 5 at 96.

Let us then consider a few approaches proposed by feminist authors. Kathleen Lahey would "require judges to ask whether the rule or practice that is being challenged contributes to the actual inequality of women, and whether changing the rule or practice will actually produce an improvement in the specific material conditions of the specific woman or women before them." Will judges know how to do this? Lahey says for judges to do this they would have to change their method of analysis to listen and validate women's voices and would have to "contextualize the issues they are analyzing."[57]

In 1979, Catherine MacKinnon proposed that we ask the question, "does the gender based law contribute to the subordination of women or to their empowerment"[58] to determine if there is equality or discrimination. By 1984, her new "dominance approach" still posed this question, but she emphasized that this "dissident" approach did not make an abstract standard or rule that would allow us to trace and interpret reality by applying a straightforward formula: "[i]ts project is more substantive, more jurisprudential than formulaic, which is why it is difficult for the mainstream discourse to dignify it... . It proposes to expose that which women have had little choice but to be confined to, in order to change it."[59] She says that gender is inequality first and that sex inequality questions are questions of male supremacy and systemic dominance.[60] "Gender... is a detriment that is presumptively suspect."[61] Perhaps the way to apply this approach is to assume that all laws created under patriarchy are unequal and that the onus to show that a law is not discriminatory should be placed on those who would defend that law.

Diana Majury suggests evaluating decisions using two criteria. The first is contextualization: to be able to recognize a practice as discriminatory one must consider history and current context. The second criterion is found in her inequality approach. This approach presumes that inequality is historically and systematically entrenched, unlike the approach that assumes equality and requires equality advocates to prove that there has been an exceptional aberration from that assumed equality.[62]

Another more detailed set of criteria is offered by Margrit Eichler in her equality model.[63] She essentially asks if the rule in question will decrease inequality. She is working from the assumption that inequality is the presumed state of affairs. To implement her question she describes 12 dimensions of inequality that must be considered. She looks at differences in (1) likelihood of survival; (2) assigned human worth; (3) control over property; (4) control over valued goods and services; (5) control over working conditions; (6) control over knowledge and information; (7) control over political processes; (8) control over symbolic representations; (9) control over one's body; (10) control over daily lifestyles; (11) control over reproductive processes and (12) symmetry or asymmetry in affective relationships. This test is concrete and would allow one to lay the full picture of women's inequality before the court. However, its focus on difference may reinforce a male standard, just as MacKinnon feared.[64]

Although there are differences between these theories, some common themes emerge. The basis for a feminist analysis of equality seems to be working from the assumption of presumed

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[57] Lahey, *supra* note 19 at 83.

[58] C. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale Univeristy Press, 1979)

[59] C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 40 [hereinafter *Feminism Unmodified*].

[60] *Ibid.* at 42.

[61] *Ibid.* at 44.

[62] Majury, *supra* note 15 at 416-420.

[63] M. Eichler, "The Elusive Ideal - Defining Equality" (1988) 5 C.H.R.Y.B. 167.

[64] *Feminism Unmodified, supra* note 60.

inequality, rather than equality as the starting point. Consideration of the historical and current context will be crucial to allow women's reality to be seen. Rather than making an abstract comparison against which women can be measured, feminists would ask whether the rule in question will decrease inequality or increase women's subordination.

These approaches would have allowed the Tribunal in *Dumont-Ferlatte* to consider the effect of the public service rules for maternity leave on women and to see if they contributed to the empowerment of women or to their subordination. The fact that women are passed over for promotion or assumed to be uncommitted to the work force would have been a relevant fact. These theories would have allowed the Tribunal to consider that not accumulating credits for future leave can be linked to the stereotype that women are not just leaving temporarily for childbearing, but that they are not really committed to the paid labour force. In *Bliss*, judges using the formal equality approach determined that the fact that women had to fulfill different conditions than other people to receive U.I. was not discrimination, but they did not consider that the "conditions" themselves have an effect on who can fulfill them. Using a feminist approach to inequality, the Tribunal in the *Dumont-Ferlatte* case could have examined the rule which required employees to be paid 10 days a month to accumulate credits, and asked if the rule itself was discriminatory and not just whether who it applies to was discriminatory. These types of analyses would be much more likely to move us towards equality for women.

While I do not wish to focus on this element in this paper, if the Tribunal had used a different approach and had found adverse effect discrimination, then the women involved might be entitled to demand accommodation from their employer up to the point of undue hardship.[65] The concept of duty to accommodate has not been established specifically in a sex discrimination case, but it is certainly arguable that this duty applies to women as well.

Analysis of the *Dumont-Ferlatte* decision shows that despite cases like *Andrews*, which appeared to move us away from formal equality, this type of reasoning continues to be pervasive. While a feminist approach to equality would bring us closer to an understanding of the discrimination women face in the workplace, it seems unlikely that these approaches will be adopted by courts and tribunals in the foreseeable future.

V. BROADER CRITIQUES OF A HUMAN RIGHTS LITIGATION STRATEGY

When viewed in the context of discrimination and equality case law, the 1996 *Dumont-Ferlatte* decision provides yet more evidence for the conclusion that courts and tribunals are unwilling or unable to shake the formal equality approach. This conclusion makes it difficult to be optimistic about the efficacy of using human rights cases to advance women's equality, and specifically women's economic equality, through challenges to workplace discrimination based on pregnancy. As MacKinnon has written,

> [t]he mainstream doctrine of the law of sex discrimination that results [sameness / difference theory] is, in my view, largely responsible for the fact that sex equality law has been so utterly ineffective at getting women what we need and are socially prevented from having on the basis of a condition of birth: a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity.[66]

As suggested in my analysis of the *Dumont-Ferlatte* decision, the inability of courts and tribunals

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[65] *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

[66] *Feminism Unmodified, supra* note 60 at 32.

to move beyond mainstream doctrines such as the formal equality approach makes it very unlikely that human rights cases will actually recognize most forms of gender discrimination. Moreover, even where precedents like *Andrews* have embraced more progressive theories such as the substantive equality approach, the case law suggests that courts and tribunals apply them poorly. Thus, the potential for advancing women's equality through human rights litigation seems small, and the potential for the more progressive theories of equality developed by feminists to become part of a more progressive human rights jurisprudence seems even smaller still.

A further limitation of a human rights litigation strategy arises from the fact that it attempts to deal with a systemic problem, gender inequality, on a case-by-case, and micro-issue-by-micro-issue basis. Although there were one hundred and three complainants in the *Dumont-Ferlatte* case, the courts did not look at them as a systemically oppressed group, but rather as an isolated collection of individuals undifferentiated from all other individuals. Admittedly, bringing cases with multiple complainants may have greater potential to highlight the broad effects of discrimination and may "[run] counter to the complaint-based model...which individualizes and depoliticizes complainants and the discrimination on which they are based."[67] However, these possibilities did not materialize in *Dumont-Ferlatte*, and even if they had, the result would have only been a very incremental change that would not have challenged the systemic gender inequalities in public service workplaces. Thus, although a handful of cases (like the *Brooks* case) have brought about significant advances for women's equality, the overwhelmingly incremental and individualist tendencies of human rights litigation mean that it is an unlikely avenue for visionary, systemic transformation of workplace gender relations.

One might acknowledge the incremental nature of change resulting from human rights litigation, and still view it as an important and effective component of a broader strategy for advancing women's equality. However, this view suggests that discrimination and equality case law involves a linear, progressive track towards equality. The case law is inconsistent and often regressive. In fact, some cases may do more harm than good if they entrench stereotypes or set precedents that reinforce discrimination against oppressed groups.

Human rights litigation is also used by non-oppressed groups, including men, to challenge equality enhancing practices. As Diana Majury has suggested, some decisions may themselves be viewed as an extension of social discrimination: "...[experience] raises some very fundamental questions about using legal forums to try and address problems of discrimination. Can a court decision itself be discriminatory because of the assumptions it brings to bear and perpetuates and because of the tremendous impact it can have on the disadvantaged group whose issue is before it?"[68] Viewed in this light, human rights litigation does not involve a consistently progressive process of change that will necessarily enhance a broader strategy for advancing equality.

The progressive transformative potential of human rights litigation is further limited by the continuing reluctance of courts and tribunals to interfere with government spending powers. Judicial restraint has meant that human rights decisions tend to require only relatively minor remedial actions from governments. Even in cases involving private parties, the courts and tribunals have not, in general, been very creative or forceful with their remedial powers.

A further limitation of human rights litigation arises from the significant costs imposed on parties engaging in litigation of any kind. These costs are both personal and financial. At a personal level, litigation often takes a very heavy emotional and social toll on the complainant(s). In the case of workplace issues, litigation may lead to stifled career advancement and strained interpersonal relations, possibly even ostracism in the workplace or community. Financially, legal fees are almost

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[67] Majury, *supra* note 15 at 439.

[68] *Ibid.* at 434, note 79.

always substantial. The significance of the financial barriers to human rights litigation are revealed by the fact that the volume of CHRA cases is significantly greater than the volume of major *Charter* challenges, which are much more costly. It is difficult to disagree with Shelagh Day's contention that "[t]he limited application of the *Charter* and the cost of court actions mean that statutory human rights laws will remain the most practical, important and accessible equality protections for most Canadians."[69]

In sum, there are many significant reasons to reconsider the efficacy of human rights litigation as an avenue for advancing women's equality. However, it is important to acknowledge the gains for women that have resulted from human rights litigation. Some of these are described above in the review of the case law concerning discrimination and equality. Other gains have been made when human rights cases served as catalysts for public debate and legislative change, as in the *Schachter* and the Unemployment Insurance changes for adoptive parents. Moreover, if feminists chose to ignore human rights litigation, it would continue without any further progressive cases or legal arguments. Thus, I must conclude that human rights litigation can be one of many tools in the struggle for women's equality, but that it should be used strategically, in full knowledge of the limitations described here.

VI. CONCLUSION

An important component of achieving equality for women in society will be the achievement of economic and workplace equality. A vital step towards equality in the workplace for women will be the eradication of discrimination based on pregnancy and therefore sex. The Task Force on Barriers to Women in the Public Service illustrated how pervasive discriminatory attitudes and stereotypes about women are in the federal public service.[70] Faced with this discrimination, women must decide if bringing human rights challenges will be the best way to address the problem. For Jo-Ann Dumont-Ferlatte and one hundred and three women working in the public service who recently brought their case to the Canadian Human Rights Tribunal, there was no satisfaction. The application of formal equality reasoning by the Tribunal members made it easy for them to reject these women's claims. The application of this approach by the Tribunal demonstrates that despite a formal rejection of this outdated test for equality in *Andrews*, it is still being applied by our courts and tribunals to the detriment of complainants. This raises serious questions about the effectiveness of using human rights complaints to advance the struggle for women's equality in the workplace. As I have discussed, while there are very strong critiques of using human rights law to try and end discrimination, to abandon it altogether also poses risks, thus, it should be used strategically, in full knowledge of its possible limitations.

Post-Script

This case was heard by the Federal Court Trial Division on judicial review in 1997. The court's decision by Justice Tremblay-Lamer was released on December 11, 1997 upholding the Canadian Human Rights Tribunal's decision. This decision was based on a similar analysis to the one critiqued in this paper and thus has similar weaknesses and does not detract from my argument above.

The court once again mistakenly began from an interpretation of equality through a formal

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[69] S. Day, "Impediments to Achieving Equality" in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1996) 402 at 409.

[70] *Beneath the Veneer, supra* note 8.

equality lens. As such, the court continued to grapple with the constraints of the formal equality analysis. As the court found that pregnant women were the only people affected by the rule, the trick became who to compare them to or who is "alike." The court refused to compare them to people on paid sick leave, because pregnant women are not performing work. This refusal is based on false assumptions, as was analyzed earlier in this paper,[71] as many people are paid when not performing work and then are deemed to be at work (such as while on annual vacation leave, time off in-lieu of overtime, or other paid leaves). The court again chose to compare pregnant women to people on other unpaid leave, and this choice has already been extensively critiqued above. In a case like this, where there is really no comparable group, it becomes clear that a new approach to equality analysis is needed. A substantive equality or feminist analysis of equality would not have forced the court to make a false comparison but would have allowed the court to consider context, history and factors such as whether the rule further subordinates or empowers women.

[71] See *supra* note 52, 53, and 54 and accompanying text.