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# Blissed Out: Section 15 at Twenty

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## I. INTRODUCTION

This paper was written for the 20th anniversary of the coming into force of section 15(1) of the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> This was a celebrated anniversary; generally, it is felt to be a good thing that we have an equality rights provisions in our Charter, and it is certainly a good thing that it came into force. But, anniversaries are important critical tools because they remind us to look backwards. Has our Charter, specifically section 15(1), been transformative of our society? Has it moved us in the direction of our best and highest aspirations of equality and justice for women? Or has it been merely preservative of the pre-existing societal status quo? While I leave these questions to another time, I do want to use this occasion to reflect upon one of the stories those of us in the legal community tell ourselves: that at least we have left *Bliss*<sup>2</sup> behind.

So, I begin by stating that one thing worth noting is the surprising (perhaps), depressing (certainly) continuation of the same themes that defeated Stella Bliss when, in 1979, she launched her *Canadian Bill of Rights*<sup>3</sup> challenge to the Canadian *Unemployment Insurance Act*.<sup>4</sup> While equality law has moved on from the specific facts of *Bliss*, and from some of the discrete judicial conclusions in that case, it is still true that the series of critical ways of understanding the relationship between equality rights, individuals and the state that mark *Bliss* persist. This

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<sup>1</sup> Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>2</sup> *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183 [hereinafter "*Bliss*"].

<sup>3</sup> S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III [hereinafter "*Bill of Rights*"].

<sup>4</sup> 1970-71-72 (Can.), c. 48.

essay is an exploration of how current constitutional equality law has never really left the *Bliss* analysis behind. I am not arguing that all cases subsequent to *Bliss* are necessarily as bad as *Bliss*, although I would argue that a few are, but rather, my argument is that, taken as a whole, section 15(1) jurisprudence suffers from the same flaws as those did Stella Bliss's claim.<sup>5</sup>

This chapter begins with a quick recap of *Bliss* that includes identification of three conceptual errors central to that case. My argument then recasts these errors into more general inadequacies in equality law thinking, in order to show how the equality thinking of *Bliss* remains a strong thread in recent argument, even though the factual issues in that case may be things of the past.<sup>6</sup> Indeed, my contention is that current equality jurisprudence replicates and reinforces the failings that are so pointedly obvious in *Bliss*.

## II. THE *BLISS* DECISION

*Bliss v. Canada (Attorney General)* is a 1979 decision of the Supreme Court of Canada that dealt with a challenge to the *Unemployment Insurance Act, 1971* under the *Bill of Rights*. The case has been discussed, dissected and dismissed extensively.<sup>7</sup> If section 15(1) of the Charter and its espoused course of substantive equality constitute our "after" picture, *Bliss* and section 1(b) of the *Bill of Rights* are clearly the "before" picture. *Bliss* now stands as the emblem of equality analysis gone wrong. Indeed, dissatisfaction with the Court's

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<sup>5</sup> This argument is both more and less than saying simply that Canadian equality law remains wedged within a formal equality analysis, despite constant judicial denials to the contrary. It is less because I do not deal with the full range of formalism equality law might ape. It is more because I use *Bliss* to make the more detailed point that this failure to move into a truly substantive equality framework takes place through a number of conceptual failures, many of which are encountered in *Bliss*.

<sup>6</sup> The current employment insurance scheme, of course, remains plagued by gender inequality issues. Reduced benefit levels and toughened qualification criteria continue to render this plan inaccessible either formally or practically for a majority of Canadian female workers. For a discussion of this, see Gillian Calder, "Recent Changes to the Maternity and Parental Leave Benefits Regime as a Case Study: The Impact of Globalization on Social Programs in Canada" (2003) 15(2) C.J.W.L. 342; Gillian Calder, "A Pregnant Pause: Federalism, Equality and the Maternity and Parental Leave Debate in Canada" Fem. Legal Stud. [forthcoming in 2006].

<sup>7</sup> See, e.g., Sheilah L. Martin, "Persisting Equality Implications of the 'Bliss' Case" in Sheilah L. Martin & Kathleen E. Mahoney, eds., *Judicial Neutrality and Equality* (Toronto: Carswell, 1987), at 198.

analysis in *Bliss* fed directly and influentially into the struggle for a full and effective text for section 15(1) in the new Charter.<sup>8</sup>

While the facts of the case are well known, they bear repeating for the purposes of this text. The 1971 *Unemployment Insurance Act* at the heart of the case provided two sorts of benefits related to work interruptions: regular benefits and special benefits such as maternity benefits. Workers were eligible for regular benefits once they had worked eight weeks and as long as they remained ready and willing to work throughout benefit receipt. Maternity benefits, on the other hand, required a 10-week work history with no necessity of remaining ready and willing to work during the benefit period. Stella Bliss, the complainant in the case, had an “interruption of employment” due to the birth of her child. Wishing to receive unemployment benefits during this work interruption, but having worked for only nine weeks prior to the start of the interruption, she applied for regular unemployment benefits two days after giving birth. Her application was accompanied by a doctor’s certificate attesting that she was ready, willing and able to work at that time. Seemingly, the conditions for regular benefit relief were met, albeit in the context of a work stoppage clearly linked, at least initially, to her impending and consequent childbirth.

However, section 46 of the 1971 *Unemployment Insurance Act* stated that pregnant women were eligible for pregnancy benefits alone during the period beginning eight weeks before confinement and finishing six weeks after confinement. The clear assumption of the legislation, confirmed by the Supreme Court in *Bliss*, was that for this period pregnant and post-pregnant women were neither available nor able to work.<sup>9</sup> And, if such women did not qualify for pregnancy benefits, they were ineligible for any benefits at all. Thus, the Court in

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<sup>8</sup> Only once did the Supreme Court of Canada find that s. 1(b) of the *Bill of Rights* required striking down a federal statutory provision. In the case of *R. v. Drybones*, [1970] S.C.R. 282, the Court nullified a provision of the *Indian Act*, R.S.C. 1952, c. 149, that made it an offence for “an Indian” to be intoxicated off a reserve. This provision was found by Ritchie J., for a majority of the Court, to breach the equality clause of the *Bill of Rights*. This pattern of ineffectiveness in *Bill of Rights* jurisprudence, and, importantly, *Bliss* in particular, were instrumental in forging the consensus among women’s equality-seeking groups that a more forceful prohibition on discrimination was needed. Thus, in the negotiations around the text of s. 15(1), representatives of women’s groups were clear in their advocacy for a text that was more extensive in its articulation of equality rights than that of the *Bill of Rights*.

<sup>9</sup> The Court stated that s. 46 was based on the assumption that “women eight weeks before giving birth and for six weeks after, were, generally speaking, not capable of nor available for work.” *Bliss*, *supra*, note 2, at 716.

explicating this provision of the Act concluded, “the governing condition of entitlement in respect of ‘unemployment caused by pregnancy’ is the fulfillment of the condition ... [of] ‘ten weeks of insurable employment’”.<sup>10</sup> On this ground, Stella Bliss had been denied coverage in relation to her initial claim to the Unemployment Insurance Commission, and the denial was upheld by the Supreme Court.

However, Stella Bliss not only challenged this refusal of benefits based on a reading of the legislation, but also claimed that if the legislation was to be so understood, these provisions denied her the right of equal protection of the law guaranteed by the *Bill of Rights*.<sup>11</sup> In response to this aspect of her case, the Court, after confirming the exclusionary meaning of the legislation with respect to pregnant women, also then denied the claim of sex discrimination.

In defeating the charge of sex discrimination, Ritchie J. for the Court relied upon three, somewhat entangled, factors. To begin, Ritchie J. found that no distinction at law lay between women and men. There were two elements to this conclusion. First, he argued, the statute distinguished between non-pregnant and pregnant persons. After all, not all women have been, are or ever will be pregnant. The group of non-pregnant persons therefore includes both women and men and thus the group untouched by the exclusory provisions includes both sexes. The second element of this conclusion was that, consequently, any different treatment cannot be based on sex, but rather relies on the biological fact of pregnancy. As Ritchie J. wrote: “Any inequality between the sexes in this area is not created by legislation but by nature.”<sup>12</sup> According to this judgment, then, pregnancy and gender were not relevantly related, and differential treatment based on being or not being pregnant rested upon a pre-existing natural inequality. Correspondingly, the consequence of such inequality or the obligation to remedy such inequality was not the

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<sup>10</sup> *Id.*, at 189.

<sup>11</sup> The provision at issue states that:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

...

(b) the right of the individual to equality before the law and the protection of the law....

*Bill of Rights, supra*, note 3.

<sup>12</sup> *Bliss, supra*, note 2, at 190.

responsibility of the state under the *Bill of Rights*. Capping this line of argument, of course, was the classic division between the public and the private, this time cast in terms of what is or is not “natural”.

The second factor instrumental to Ritchie J.’s conclusion was that Stella Bliss’s case involved an entitlement to a benefit. It did not involve the imposition of a penalty or a burden, or the treatment “of one section of the population more harshly than all others”.<sup>13</sup> Rather, what was under challenge was “a definition of the qualifications required for entitlement to benefits”.<sup>14</sup> Consequently, the Court held that Stella Bliss’s complaint had nothing to do with equality in the administration of the law or the law’s enforcement, as guaranteed by the *Bill of Rights*. Quite simply, then, the type of state action involved lay beyond that document’s scope.

The third factor was marked by Ritchie J.’s early observation of the “heavy financial burden”<sup>15</sup> placed on the federal government by its jurisdiction over unemployment insurance under s. 91(2A) of the *Constitution Act, 1867*.<sup>16</sup> While this factor makes no explicit reoccurrence in the remainder of the judgment, one strongly suspects that this initial acknowledgment prefigured the Court’s consequent concern about preservation of the statutory “conditions of entitlement to the benefits”<sup>17</sup> set up by the Act. Certainly, it is apiece with Ritchie J.’s later discussion of the high threshold appropriate for judicial censure of “a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government”.<sup>18</sup>

The result — rejection of the claim by Stella Bliss — was overdetermined by the Court’s disconnection of pregnancy from gender, the Court’s refusal to extend the protections of the *Bill of Rights*’ equality provisions to a benefits scheme, and the Court’s underlying recognition of and caution about the government’s financial burden. Critique of these features of the constitutional argument of the Court has not been lacking. Indeed, many an exposition of Canadian equality law begins its odyssey with dismissal of the Court’s judgment in *Bliss*.

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<sup>13</sup> *Id.*, at 191.

<sup>14</sup> *Id.*, at 191–92.

<sup>15</sup> *Id.*, at 185.

<sup>16</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>17</sup> *Bliss*, *supra*, note 2, at 186.

<sup>18</sup> *Id.*, at 193, quoting Dickson J. in *Curr v. The Queen*, [1972] S.C.R. 889, at 899.

Ten years later, the Supreme Court had the opportunity to revisit its reasons in *Bliss*. In the 1989 case of *Brooks v. Canada Safeway Ltd.*,<sup>19</sup> similar facts arose, this time in the context of an employer's group insurance plan and the Manitoba *Human Rights Act*.<sup>20</sup> In *Brooks*, a challenge was made to Safeway's exemption of pregnant women from accident and sickness benefits during a 17-week period coincident with childbirth, regardless of the source of work disruption. The Supreme Court, in a unanimous decision written by Dickson C.J., found that exclusion from the benefit plan by reason of pregnancy was indeed sex discrimination. To find otherwise, Dickson C.J. continued, would be to "sanction imposing a disproportionate amount of the costs of pregnancy upon women."<sup>21</sup> *Bliss*, if not explicitly overruled, was bracketed as, at least, out of date.<sup>22</sup>

So, *Bliss* remains tagged as an artifact of equality days gone by, of an earlier overly formal and thin equality *zeitgeist*. If only this were indeed the case. Regretfully, the three features of the *Bliss* decision identified above — unwillingness to recognize the full range of forms that patterns of sex discrimination take, a restrictive picture of government obligation under rights provisions, and concern about government budgets and judicial legitimacy — live on. Despite *Brooks* and the early and earnest words of McIntyre J. in *Law Society of British Columbia v. Andrews*<sup>23</sup> that "s. 15 of the *Charter* was an attempt to remedy some of the shortcomings of the right to equality in the *Canadian Bill of Rights*,"<sup>24</sup> section 15(1) jurisprudence largely suffers from the same flaws. Some decisions at the Supreme Court level have managed to stay relatively clear of the pitfalls of *Bliss*, but many, particularly a spate of recent cases, do not. Thus, the deference and formalism of the *Bliss* Court are with us still. Only now, these three problems find continued, albeit more general, expression as the mainstays of the liberal legalism that haunts equality doctrine.

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<sup>19</sup> [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219 [hereinafter "*Brooks*"].

<sup>20</sup> S.M. 1974, c. 65.

<sup>21</sup> *Brooks*, *supra*, note 19, at para. 29.

<sup>22</sup> *Id.*, at para. 40.

<sup>23</sup> [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 [hereinafter "*Andrews*"].

<sup>24</sup> *Id.*, at 170. Justice McIntyre goes on to add that: "The shortcomings of the *Canadian Bill of Rights* as far as the right to equality is concerned are well known." *Id.*

To be sure, these three features are not exactly replicated. In *Bliss*, they had a fact-specific formulation. Their continued presence in recent jurisprudence is equally configured specifically by the details of the cases in which they are deployed. But what is true is that the underlying ideological presuppositions that generated the reasons of *Bliss* and that constituted the barrier to the acknowledgment of the equality harms of Stella Bliss's situation still predominate. So, while no judge today would say that pregnancy discrimination is not sex discrimination or that different treatment on the basis of pregnancy by definition has roots in nature and is thus unassailable, equally formalistic and objectionable assessments of what counts or does not count as discrimination continue to pepper case law. The form these ideas took in *Bliss* was, perhaps, cruder and, certainly, more directly mistaken on the issues of pregnancy and equality than what one might expect from a court today. However, similar misconceptions about equality analysis figure in current judicial reasoning, albeit perhaps in more sophisticated or subtle ideological elaboration. Or, at least, they appear in articulations that remain equally opaque to contemporary political sensibilities but nonetheless problematic for the same conceptual reasons. At root, much judicial equality thinking remains lodged within the *Bliss* formulation.

### III. CURRENT EQUALITY JURISPRUDENCE

What are the forms and the instances of this replication? This question will be answered by way of a quick survey of a range of recent and not so recent Supreme Court of Canada decisions under section 15(1) of the Charter. The discussion is organized by reference to the features of the *Bliss* case identified in the first part of this paper, which, for the purposes of this next exposition, are developed into a pair of more general and less fact-specific conceptualizations. To that task, then, this paper next turns.

#### 1. Pregnancy Discrimination is Not Sex Discrimination

##### (a) *The Relevance of Gender*

The now most memorable, because it is to our modern minds the most comic, feature of *Bliss* is the Court's refusal to equate being pregnant with being female. Indeed, reviews of Canadian equality jurisprudence often highlight this conclusion as reassurance of how far



we have come.<sup>25</sup> And, to some extent, it is true we are a long way from the absurdity of thinking pregnancy to be gender-neutral. Certainly, our Supreme Court has moved beyond its early concerns, most stark in *Bliss*, about under- and over-inclusive grouping. That is, the Court no longer rejects a distinction as sex-based simply because it catches some men within its definition or leaves some women out. But it is not the case that the Court will always appreciate sex characteristics when they are in play.

In *Gosselin v. Quebec (Attorney General)*<sup>26</sup> (a decision discussed at some length in the next section of this paper), an equality challenge came from Louise Gossein, who, when under 30 years of age, had received significantly reduced social assistance benefits because of her age. Chief Justice McLachlin wrote the majority judgment and in it dealt only with the age characteristics of the differential benefits Gosselin experienced. Chief Justice McLachlin discussed Gosselin's status as a social assistant recipient as a basis for her adverse treatment, but rejected even that redefinition.<sup>27</sup> What she failed even to consider was the contextual shaping of Gosselin's situation by sex, as an additional feature of the harm Gosselin suffered. In its intervenor factum, the National Association of Women and the Law ("NAWL") argued that a substantive equality analysis in this case mandated a focus not merely on "the facially explicit distinction based on age, but on the combination and intersectionality of age, poverty, and gender".<sup>28</sup> The factum goes on: "In keeping with the contextual approach adopted by this Court, all of the affected group's traits, history and circumstances are relevant to determining whether the impugned regulation has the effect of demeaning human dignity".<sup>29</sup> In the statement of facts with which the factum begins, NAWL detailed the gender specific impact on young women generally of the lowered benefit and how these adversely

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<sup>25</sup> See e.g., Beverley McLachlin C.J., *A Canadian Judgment*, in Andrew Stodkley & David Rowe, eds. (Christchurch: The Centre for Commercial and Corporate Law Inc., 2004), at 52–53.

<sup>26</sup> [2002] S.C.J. No. 85, 2002 SCC 84. Discussion of the case begins at text surrounding note 53.

<sup>27</sup> *Id.*, at para. 35.

<sup>28</sup> *Gosselin v. Quebec (Attorney General)* (29 May 2001), Quebec 27418 (Que. C.A.) (Factum of the Intervenor at para. 26), online: PovNet <<http://www.povnet.org/gosselin/genl.PDF>> (date accessed: March 22, 2006).

<sup>29</sup> *Id.*

affected Louise Gosselin herself.<sup>30</sup> To ignore the gendered dimensions of poverty belies the lesson *Bliss* taught us: that sex manifests itself in complex and varied ways. Indeed, it would be odd if sex — so central an organizing feature of our identity — were not to configure and be relevant to much of our collective and individual attitudes, habits and traditions. Indeed, equality advances often come through the recognition that traits not traditionally thought of as gendered are, in fact, expressions of gender. The majority dissent in *Gosselin* ignored this insight.

Another case that illustrates this formal equality framework and its elision of the gendered dimensions of personhood, here of parenthood, is the Supreme Court of Canada's decision in *Trociuk v. British Columbia (Attorney General)*.<sup>31</sup> In this case, a “messy and intractable dispute ... [between] a mother and father over the surnames of their infant children”,<sup>32</sup> the Court dealt with a biological father's right to be acknowledged on his children's birth registration forms. The facts involved a single mother whose refusal to give her newly born triplets their father's name was permissible under the then British Columbia *Vital Statistics Act*.<sup>33</sup> Ultimate authority over a newborn child's surname, according to the statute, was the mother's.

In a unanimous decision penned by Deschamps J., the Court upheld the father's claim as establishing an unjustifiable infringement of section 15(1). The decision is a brief one, indicating, as Hester Lessard notes,<sup>34</sup> that the Court thought the issues relatively straightforward. The decision began by way of a quick conclusion that the impugned statutory provisions explicitly drew a distinction on the enumerated ground of sex by distinguishing between mothers and fathers, and that such a distinction gave rise to differential disadvantage for fathers unable to have their names on the birth registration and a role in determining the children's surnames.<sup>35</sup> There was no judicial defence of what was in fact a complex assumption that mothers and fathers are relevant comparator groups in this section 15(1) analysis; that is, that

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<sup>30</sup> *Id.*, at paras. 6–9.

<sup>31</sup> [2003] S.C.J. No. 32, [2003] 1 S.C.R. 835.

<sup>32</sup> Hester Lessard, “Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*” (2004) 16(2) C.J.W.L. 164, at 166.

<sup>33</sup> R.S.B.C. 1996, c. 479.

<sup>34</sup> Lessard, *supra*, note 32, at 168.

<sup>35</sup> *Supra*, note 31.

fathers as a group stand in the same relation to the issue at stake as do mothers. Instead, the Court's assessment rested on a number of unarticulated premises about the primacy of biological connection to issues of birth registry and surname determination, and the formal equality of mothers and fathers at this stage of their children's lives. Simply put, the mother and father stand to their children, and to each other, as simply the source of the genetic material that went into the generation of the children. Erased from the picture is the complex social (most obviously here, gendered) context in which that simple biological picture is configured, played out and experienced. So what framed the issues for the judicial analysis was a simplistic story about formal familial relations and equality rights,<sup>36</sup> a story that assumed unquestioned patriarchal norms and traditional ideas about the privacy of family relations and, therefore, the undesirability of state re-orchestration of those traditional patriarchal orderings. Here, as in *Bliss*, deployment of formal equality language promotes conservation of traditional notions of biology and gender norms. And, the gendered division of labour that occupied the centre of this case and of *Bliss* — quite literally — was ignored and denied.

(b) *Nature, Choice and Merit*

In *Bliss*, the Court disqualified Stella Bliss's claim through characterizing her disadvantage as the consequence of a natural condition. The Court thus found that the state bore no responsibility for this biological fact and its fallout. *Brooks* quickly cut through this logic by recognizing that the state is properly held responsible for "the social and legal consequences which attach to [pregnancy]".<sup>37</sup>

What *Brooks* did *not* note was that the concept of "nature" — and, I argue, its compatriots "choice" and "merit" — have long stood for those aspects of individual circumstances or fate that lie outside the purview of the redistributive potential of classical liberal concern or, more relevantly, of individual rights. Inequality meted out along these lines, a

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<sup>36</sup> Lessard, *supra*, note 32, at 171.

<sup>37</sup> Sheilah L. Martin, "Persisting Equality Implications of the 'Bliss' Case" Sheilah L. Martin & Kathleen E. Mahoney, eds., in *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), at 198.

classical liberal might argue, is thereby “necessary, and legitimate”.<sup>38</sup> After all, who could dispute what is natural, deserved or self-selected? But this closure of critical examination by way of characterization of the inequality of which an individual complains as “natural”, “chosen” or “merited” is deeply problematic. Indeed, many of the major steps in the progression towards women’s equality have come precisely from the revelation of the “natural” as “social”,<sup>39</sup> the “chosen” as “coerced”<sup>40</sup> and the “merited” as “undeserved”.<sup>41</sup> And, as critical readers of equality cases, we are wisely suspicious of these notions.

These three notions have much in common, both in the use to which they have traditionally and historically been put to categorically mark unequal circumstances off-limits for collective rejigging and in the importance these notions bear for the political underpinnings of classical liberalism’s reverence for the individual. (It is this reverence, ironically, that gives birth to the centrality of equality in our political and legal culture.) The *Bliss* Court might have easily, through the same logic and type of argument, dismissed the adverse consequences of pregnancy as the result of individual choice for which the individual — here Stella Bliss — bears sole responsibility.

This ideological certainty (or confusion, depending on one’s perspective) about the import of the notions of nature, choice and merit has deep roots in Canadian equality jurisprudence. In the primogenial section 15 case at the Supreme Court (the jurisprudential equivalent of

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<sup>38</sup> Marlee Kline, “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” 30 *Osgoode Hall L.J.* 375.

<sup>39</sup> For example, the idea of natural gender traits and abilities had to be overcome to open up many professions to women. See, for illustration, *Bradwell v. Illinois*, 83 U.S. 130 (1873), where the Supreme Court of the United States stated: “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life...”. The Canadian counterpart to this decision is *Re French* (1905), 37 N.B.R. 359 (S.C.).

<sup>40</sup> Insistence on “choice”, coined in terms of “consent”, to defeat women’s charges of sexual assault is a significant part of the history of criminal law. Modern sexual assault law has responded to women’s charges of sex discrimination in these cases by recognizing more complex and subtle ways in which choice is constrained, coerced and denied. See, for illustration of at least the notion that consent is less than straightforwardly understood, *R. v. S.(D.G.)* (2004), 72 O.R. (3d) 233 (C.A.), appeal dismissed by the Supreme Court of Canada in *R. v. Stender*, [2005] S.C.J. No. 36, [2005] 1 S.C.R. 914. For the larger political argument that consent functions within the liberal social contract as the basis of patriarchy, and that consent alone is inadequate evidence of a just outcome, see Carole Pateman, *Sexual Contract* (Cambridge: Polity, 1988).

<sup>41</sup> Pay equity law and its increasing sophistication owes much to the recognition that men’s greater wages, relative to women’s, are frequently the result of false and sexist characterization of the work some men do as of greater value or more merit than comparable, or even identical, work done by women.

the *Mayflower* in American history), *Andrews*, the Court rejected formal equality as a test adequate to the equality analysis required by section 15.<sup>42</sup> However, McIntyre J.'s judgment, the majority opinion on this topic, was somewhat confused about what a substantive analysis of equality would look like. Clearly, it would be a contextual inquiry, but beyond that it is not clear. And, in illustration of other points, McIntyre J. cited "merit" as one of the unassailable metrics along which disadvantage can be meted out without constituting discrimination. Thus, in McIntyre J.'s mind, we can assume, "natural" traits and abilities, to at least some extent, lay outside the equality calculus. Justice McIntyre thus failed to steer clear of formalistic analysis, missing how systemic and historic patterns of exclusion track and rely upon notions like merit and nature. Claims of merit, nature and choice are difficult to critically unpack; they so often are the roots of discrimination. This makes these notions deeply functional in the perpetuation and obfuscation of inequality. And, a truly radical equality analysis cannot sidestep their challenge.

Several cases illustrate the Court's failure to grasp the socially constructed nature of these terms. The first I will mention is *Weatherall v. Canada (Attorney General)*,<sup>43</sup> a case that represents for subsequent case law the exemplary instance when equality did not demand equal treatment. In this case, a male prisoner complained of being subject to frisk searching and patrolling of cell ranges by female guards. Female prisoners were not subject to cross-sex surveillance. The prisoner's challenge was made in terms of sections 7, 8, and 15(1) of the Charter and focused on both the inappropriateness of guards of the opposite sex and the inequality of male prisoners' exposure to such guards, when female prisoners had surveillance by women guards only.

The Supreme Court issued such a short decision in this case (under two pages) that any effort to write about the decision is almost doomed to be lengthier than the case itself. The challenges based on sections 7 and 8 were quickly dismissed, as the Court held that there was no reasonable expectation of privacy. On the equality issue, the Court began with the reminder that "equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in

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<sup>42</sup> To be exact, the Court rejects the "similarly situated test", understood as the Aristotelian expression of formal equality. *Andrews, supra*, note 23, at 166.

<sup>43</sup> [1993] S.C.J. No. 81, [1993] 2 S.C.R. 872 [hereinafter "*Weatherall*"].

certain cases to promote equality”.<sup>44</sup> This is the lesson from the substantive equality critique of formal equality learned well by the Court in *Andrews*,<sup>45</sup> and, as much as it says anything, it is certainly true. We know this at least from feminists’ sameness/differences debates. But the Court, in its practical invocation of this truism, incompletely appreciated the role of history and society. That is, the Court noted that historical and sociological differences between men and women can mean that practices prohibited when done to female prisoners by male guards need not be banned when it is female officers doing similar things to male inmates. The Court cited the historical trend of violence by men against women as an illustration of gender-specific implications of the cross-gender exposure. The Court recognized and credited the historically and socially contingent nature of gender norms and sensitivities. But the Court, in the same breath, spoke determinatively of “nature”: “Biologically, a frisk search or surveillance of a man’s chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate”.<sup>46</sup> Lost is the lesson implicit in the Court’s early words of the roles history and sociology play in constructing a lived experience. Biology, ironically in a discourse that is in fact all about historical and social specificity and a lack of formalism, becomes a “given” or necessary reality that assigns unarguable significance to different body parts across different genders. This part of the judgment is a confounding few paragraphs, because, apart from the deterministic and naturalistic caste lent to “biology”, the judgment *is* nuanced to the social, historical and patriarchal context of women. But it is the power dynamics between men and women *per se* — patriarchy and its manifestations, actually — that render male guards uniquely problematic for female prisoners along all constructed lines: history, society and biology. It is not simply that women have lactating breasts and men do not that renders the treatment different. It is that patriarchy has marked female breasts differently than it has the chest areas of men. The Court read the social meaning of breasts as a neutral fact of biology, just as the pregnancy of Stella Bliss

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<sup>44</sup> *Id.*, at 877.

<sup>45</sup> Justice McIntyre wrote: “It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.” *Andrews*, *supra*, note 23, at 164.

<sup>46</sup> *Weatherall*, *supra*, note 43, at 877.

and its burdens were simply biological details. This, at least partial, elision of gendered power as configuring the contrast between male and female prisoners and their guards led the Court to miss, as well, any appreciation of the ways in which male prisoners might also be usefully and contextually figured along different lines of power as, say, race, colonialism, disability and class. This last omission is the most telling and disturbing of the judgment.<sup>47</sup>

*Eaton v. Brant County Board of Education*<sup>48</sup> is a case where different treatment was again found to be equal treatment through similar mechanisms of failing to question what counts as “natural”. In this case, the Court, in an opinion written by Sopinka J., asserted relatively early on that distinctions based on actual characteristics can be consistent with equality.<sup>49</sup> And, it appears, such real characteristics are ideally those we associate with the disabled: “It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability”.<sup>50</sup> Here, “true” stands in for the designation “natural” and, in its face, the Court soft-pedaled social exclusion and back-pedaled away from equality. The Court ignored a wide literature about the social construction of disability and the unnaturalness of its marginalization.<sup>51</sup> Thus, the Court here, by assuming the exceptionalization of disability, naturalized the able-bodied norms of a school classroom into which Emily Eaton fit uneasily. The individual — the 12-year-old Emily Eaton assigned to a separate classroom — just like the Stella Bliss denied pregnancy benefits, is assumed to occupy a margin, a place apart from the mainstream and its benefits, that exists prior to society or social contexts. And in *Eaton*, insult is added to seclusion when the Court refused even to find that the initial differentiation was disadvantageous

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<sup>47</sup> It is worth noting in passing, as well, that the Court was not loathe to use gender stereotypes in aid of justifying selective favourable treatment of women in this case. The judgment’s cursory s. 1 discussion describes the “humanizing effect of having women in [guard] positions” as one of the government’s justificatory objectives. *Id.*, at 878.

<sup>48</sup> [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 [hereinafter “*Eaton*”].

<sup>49</sup> *Id.*, at para. 66.

<sup>50</sup> *Id.*, at para. 67.

<sup>51</sup> A. Asch & M. Fine, “Introduction: Beyond Pedestals” in M. Fine & A. Asch, eds., *Women with Disabilities: Essays in Psychology, Culture, and Politics* (Philadelphia: Temple University Press, 1988), at 1; R.C. Lewontin *et al.*, *Not In Our Genes: Biology, Ideology, and Human Nature* (New York: Pantheon Books, 1984).

to Emily Eaton. For disabled individuals, it seems, separate is not only equal but humane.

As we have already seen with *Bliss*, and again with *Eaton*, discrimination can and does often rest powerfully on real differences, not merely stereotypical and falsely attributed differences. That is, Stella Bliss was pregnant; Emily Eaton was disabled. Gwen Brodsky has written that a notion of discrimination as prohibited stereotyping is “not sufficient”, given that not only is difference often very real, but that stereotypes can be so “submerged” that they are unreliably unearthenable.<sup>52</sup> So *Bliss* should (but has yet to) teach us that the “real” is an unreliable indicator of the nondiscriminatory. And we should learn from *Eaton* that not only is the “real” often and/or usually socially configured, but that the consequences of it are far from fixed and inevitable.

*Gosselin v. Quebec (Attorney General)*<sup>53</sup> is a relatively recent case in which notions of individual responsibility — of merit or choice — can be seen to continue to structure the Court’s resolution of the issues. The case dealt with a challenge to the *Regulation Respecting Social Aid*,<sup>54</sup> a Quebec law that set the base amount of welfare for adults under the age of 30 years of age at \$170 per month. The rate for those over the age of 30 was \$466 per month, an amount the Quebec legislature itself had “deemed to be the bare minimum for the sustainment of life”.<sup>55</sup> Young adults able to access employability programs set up by the government could, for at least a temporary period, raise their benefit rates to the higher regular rate. However, it was not clear, at least to the dissenting judges in this case, that this was a particularly realistic option.<sup>56</sup> The result, the appellant Gosselin’s class action claimed, was dire deprivation on a regular basis for approximately 75,000 young people between 1985 and 1988 in violation of sections 7 and 15(1) of the Charter and section 45 of the Quebec *Charter of human rights and freedoms*.<sup>57</sup>

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<sup>52</sup> Gwen Brodsky, “*Gosselin v. Quebec (Attorney General)*: Autonomy with a Vengeance” (2003) 15(2) C.J.W.L. 194, at 212.

<sup>53</sup> [2002] S.C.J. No. 85, 2002 SCC 84 [hereinafter “*Gosselin*”].

<sup>54</sup> R.R.Q. 1981. c. A-16, r. 1, s. 29(a).

<sup>55</sup> *Gosselin*, *supra*, note 53, at para. 251.

<sup>56</sup> Madame Justices L’Heureux-Dubé and Arbour note that 88.8 per cent of young adults were not able to raise their monthly benefits through this method for any significant period of time. *Id.*, at para. 130, *per* L’Heureux-Dubé J. and para. 371, *per* Arbour J.

<sup>57</sup> R.S.Q. 1977, c. C-12, s. 45.



Chief Justice McLachlin wrote the majority opinion in this case and moved immediately in her judgment to a characterization of Louise Gosselin that clearly predicted her ultimate rejection of Gosselin's claims:

Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work ... But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance.<sup>58</sup>

By contrast, Gosselin was described in the following way in the factum of the National Association of Women and the Law intervenor:

Despite Ms. Gosselin's efforts to improve her situation through participation in various employability programmes, she was greatly affected throughout the period at issue by the severely constrained choices with which the reduced rate left her. Undisputed expert testimony indicated that without professional help, the psychological consequences engendered by the reduced rate could have lasting repercussions and possibly compromise Ms. Gosselin's ability to live her life fully.<sup>59</sup>

The contrast between these two accounts of Louise Gosselin's existence is arresting. Chief Justice McLachlin's account of Gosselin's misfortune placed emphasis, explicit or not, on features about the individual herself: her mental health, her work ethic, her stamina, her range of poor personal choices. NAWL's account was more situational, still individual, but reflective of a broader context of destitution and misfortune.

Chief Justice McLachlin's opening paragraph very much framed what followed in the judgment. While this is not the place to dissect in detail the *Gosselin* judgments,<sup>60</sup> it is the place to tag the notion of "choice" that so strongly prefigured McLachlin C.J.'s analysis, just as it

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<sup>58</sup> *Gosselin*, *supra*, note 53, at para. 1, *per* McLachlin C.J.

<sup>59</sup> *Gosselin v. Quebec (Attorney General)* (29 May 2001), Quebec 27418 (Que. C.A.) (Factum of the Intervenor at para. 12), online: PovNet <<http://www.povnet.org/gosselin/genl.PDF>> (date accessed: March 22, 2006).

<sup>60</sup> For a discussion of this sort, see the forthcoming collection of essays in Margot Young *et al.*, *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: University of British Columbia Press, 2007).

did her introductory paragraph. Midway through her judgment, McLachlin C.J. returns to Gosselin's circumstances by noting that Gosselin suffered from "personal problems, which included psychological and substance abuse components".<sup>61</sup> This comment comes in the context of assessing Gosselin's ability to increase her benefits through program participation, with the clear message that any failure at issue was Gosselin's own. Yet the observation coexists with the fact that only two of the three available programs raised rates to the over-30 rate. In addition, the number of program openings was vastly outnumbered by the number of under-30 individuals on benefits.

The outcome of McLachlin C.J.'s analysis appeared to rest on uncritical adoption and deployment of the very discriminatory stereotypes that informed the provincial regulation in the first place: that young people are on welfare because they are lazy and unwilling to work; that young people choose not to work; and that too comfortable and continued an existence on welfare breeds habitual choice to remain absent from the labour market.<sup>62</sup> Only with such a set of unstated assumptions could McLachlin C.J. conclude that the punitive welfare rate was "an affirmation of [young peoples'] potential",<sup>63</sup> that "the Regulation was aimed at ameliorating the situation of welfare recipients under 30",<sup>64</sup> and that the state's purpose was to discourage young people from a path of "dependence and unemployment"<sup>65</sup> and to "enhance their dignity and capacity for long-term self-reliance."<sup>66</sup>

In a review article written nine years ago, a number of constitutional scholars, myself included, wrote that the Court's 1994–95 term was marked by a "political imagery of the individual . . . in which abstract individualism combine[d] with, and often mask[ed], traditional, conservative images of social order and moral choice".<sup>67</sup> This is what we see in spades in the *Gosselin* case. Louise Gosselin fails as the neo-

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<sup>61</sup> *Gosselin*, *supra*, note 53, at para. 48.

<sup>62</sup> Justice LeBel, in his dissenting judgment, notes that the distinction between those over and under 30 in terms of benefit levels "perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation." *Id.*, at para. 407, *per* LeBel J.

<sup>63</sup> *Id.*, at para. 42.

<sup>64</sup> *Id.*, at para. 62.

<sup>65</sup> *Id.*, at para. 65.

<sup>66</sup> *Id.*, at para. 66.

<sup>67</sup> Hester Lessard *et al.* "Developments in Constitutional Law: The 1994–95 Term" (1996) 7 S.C.L.R. 81, at 82.

liberal “market citizen” and it lies not with the state to compensate for this. It is Gosselin’s private business, just as it is her own private moral fault to fail to support herself. Indeed, the state is correct in treating her in a childlike way. It is justifiably paternalistic in its tough love program. Ignored is the damage such tough love will do to Gosselin and to her ability to participate as a full member of society. And lost, as already discussed, are the gendered dynamics of that damage. *Gosselin* joins the ranks of the now not very rare cases where the Court has found that adverse distinction on the basis of an enumerated or analogous ground does not constitute discrimination.

In *Nova Scotia (Attorney General) v. Walsh*<sup>68</sup> we again find that the autonomous, rational, freely choosing individual stalks the rhetoric of the majority decision. Susan Walsh challenged under section 15 that the provincial failure to extend to common-law heterosexual couples the presumption that matrimonial property was to be divided upon relationship dissolution. An almost unanimous Court, with L’Heureux-Dubé J. alone dissenting, found no violation of section 15.

Justice Bastarache wrote the majority decision. He did acknowledge that unmarried, cohabiting couples have suffered historical disadvantage, and that, for at least some cohabiting heterosexual couples, failure to divide matrimonial property equitably upon relationship breakdown may be unfair to one partner, typically the woman, and that unmarried status may be something forced on one partner by the other.<sup>69</sup> However, such contextual observations were overridden by Bastarache J.’s conclusion that the presence of consent and choice were more crucial: “A decision not to marry should be respected because it also stems from a conscious choice of the parties.”<sup>70</sup> Therefore, the distinction drawn by the matrimonial property exclusion respects that decision not to marry. To find otherwise would be to use the Charter’s guarantees of equality and respect for individual dignity to undermine autonomous exercise of individual choice.<sup>71</sup> Justice Bastarache heralded the primacy of choice: “choice must be

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<sup>68</sup> [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 [hereinafter “*Walsh*”].

<sup>69</sup> Justice Bastarache cited L’Heureux-Dubé J.’s concurring judgment in *Miron v. Trudel* [1995] S.C.J. No. 44, at para. 102: “For a significant number of persons in so-called ‘non-traditional’ relationships, however, I dare say that notions of ‘choice’ may be illusory.” *Walsh id.*, at para. 42.

<sup>70</sup> *Id.*, at para. 55.

<sup>71</sup> *Id.*, at para. 43.

paramount.”<sup>72</sup> Preservation of the liberty of couples to make this choice is an underlying value of the Charter, and as such informs the inquiry into discrimination.<sup>73</sup> Limitations that restrict the choice of couples not to marry would be contrary to this liberty.

These cases together, then, document the harm reverence for “nature”, “choice” and “merit” wreaks on equality analysis.

(c) *The Truly Different and Equality*

The claim by Stella Bliss for benefits falls afoul, to an important extent, of the fact that no man experiences a pregnancy. Pregnancy is a rather unique, although common, condition; that is, it is a purely female condition. And this feature of the case presents a good reminder of one of the risks of an analysis that is understood as definitionally comparative.

Equality law has difficulty dealing with the inequality of those most marginalized and most neglected in our society. It has this difficulty because the further an individual or group sits from what counts as the “norm”, the more it looks like the inequality complained of is simply idiosyncratic, not apiece with larger patterns of social exclusion. And, therefore, there is no comparator with which to anchor the equality analysis. As Patricia Williams writes, equality analyses risk recasting “the general group experience [of the marginal] as a fragmented series of specific, isolated events rather than a pervasive social phenomenon....”<sup>74</sup> If there is no counterpart in the experience or profile of those closer to the centre, the marginalization and dispossession of our most unequal will be missed. These cases will seem simple individual instances of personal failure, oddity or happenstance. Overlooked will be the “collective position or social positioning”<sup>75</sup> that gives coherence to the claim of inequality.

So the further away from the mainstream — the privileged norm — a claimant is, the more difficult it has been for the Court to see that it is

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<sup>72</sup> *Id.*, at para. 43.

<sup>73</sup> Justice Bastarache wrote: “[I]t is important to note that the discriminatory aspect of the legislative distinction must be determined in light of *Charter* values. One of those essential values is liberty ... Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty.” *Id.*, at para. 63.

<sup>74</sup> Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard: Harvard University Press, 1991), at 13.

<sup>75</sup> *Id.*

the norm, not the different individual, in which the fault for inequality lies.<sup>76</sup> The most marginalized, the most “different”, will be least likely to easily find a comparator group against whom their equality harms will show up. Formal equality is at its most powerful and liberatory when it deals with the different treatment of the (mostly) same.<sup>77</sup> In *Bliss*, the normly was, of course, the reproductively male worker.

*Hodge v. Canada (Minister of Human Resources Development)*<sup>78</sup> slips into equality jurisprudence in a seemingly mild and innocuous way. The case deals with the challenge by Betty Hodge to the denial of her eligibility to collect a survivor pension in relation to a former common-law spouse under the Canada Pension Plan. Hodge had ended her relationship with the CPP contributor after an 11-month separation and a final attempt at reconciliation. Evidence was that the relationship had been a destructive one for Hodge; her common-law partner was verbally and physically abusive.

Justice Binnie writes the decision for the Court and holds that the denial does not offend section 15 of the Charter. Two points about this decision are apposite. First, Binnie J.’s last paragraph on same-sex relationships — that in the absence of the availability of same-sex marriage these relationships need a separate analysis — folds this case into a case about choice, similar to *Walsh*. Pointedly ignored are the power dynamics clearly at play in Hodge’s abusive common-law relationship, which may or may not have influenced the “choice” not to marry, and the timing of the separation. Second, this case illustrates the failure of the Court to understand just what difference and marginalization can mean. Betty Hodge and other ex-common-law spouses in her situation, have no comparator among married folk. The Court matches Hodge up with a group — former married spouses — that from within the dominant or insider position looks formally comparable, but really isn’t. This, of course, erases the legal specificity of Hodge’s situation and thus the inequality Hodge experienced faded away.

The Supreme Court’s decision in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*,<sup>79</sup> also illustrates the problem of

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<sup>76</sup> Margot Young, “Sameness/Difference: A Tale of Two Girls” (1997) 4 Rev. Const. Stud. 150, at 165.

<sup>77</sup> *Id.*, at 165.

<sup>78</sup> [2004] S.C.J. No. 60, [2004] 3 S.C.R. 357.

<sup>79</sup> [2004] S.C.J. No. 71, [2004] 3 S.C.R. 657.

difference, this time from another angle. This case dealt with the equality implications of the British Columbia government's refusal to fund treatment for preschool-aged autistic children. The Court unanimously rejected the claim that such a refusal infringed both section 15(1) and section 7. Here, the choice of comparator group — individuals who are non-disabled and suffering a disability other than a mental disability, who seek or receive funding for an emergent, non-core therapy that is important for his or her present and future health and has only recently begun to be recognized as medically required<sup>80</sup> — determined the outcome. The categorization of comparator group marginalized and exceptionalized the autistic children at the centre of the case so that their inequality disappeared. No one got funding for such a unique health need. There was no discriminatory different treatment. All were equally denied.

Through comparator group selection, the Court in both these cases elided the inequality of which the applicants complained. In one case, *Hodge*, the complainant group lost its distinctiveness and was thus re-situated within the norm of no benefit receipt. In the other case, *Auton*, the claimants' distinctiveness as redoubled with the result that the group was placed so far out of the norm that no state benefit was obligatory. Either way, the complex relationship or tension between the complainant group and the norm was denied and difference manipulated in the task of setting up the comparative analysis.

## 2. State Budget and Judicial Legitimacy: The Economics of Equality

These last two features of the *Bliss* decision — a restrictive picture of government obligation under the *Bill of Rights* and concern about government budget and judicial legitimacy in militating spending — are best presented together. The Court in *Bliss* clearly shared the common liberal hesitancy toward judicial activism, but, more specifically, toward engaging the judicial/legislative divide in the area of social spending. This concern was all the more pronounced given the ordinary legislative stature of the *Bill of Rights*.

The recent case most representative of these concerns and of judicial default in their face is the decision of the Supreme Court in

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<sup>80</sup> *Id.*, at para. 55.

*Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*.<sup>81</sup> This case stands out as the first to allow a cost-based justification alone of a claim of sex discrimination. The case dealt with the agreement by the Newfoundland and Labrador provincial government to pay equity obligations with respect to public health workers. The government had signed a pay equity agreement with the workers' union in which a process and methodology for implementation of pay equity was laid out. In April 1991, before any payments under the agreement had been made, the House of Assembly passed the *Public Sector Restraint Act*,<sup>82</sup> eliminating the government's retroactive obligation to pay approximately \$24 million in pay equity benefits for the years 1988–91. In assessing the legislation, the Supreme Court issued a fairly straightforward finding that section 15(1) had been breached and that the constitutional challenge it was “an uphill battle” for the government.<sup>83</sup>

However, this was far from the tone of the section 1 discussion; here, the government justification swept the day. Two features of the Court's section 1 analysis stand out. First, the Court demonstrated surprising deference to the government's invocation of budgetary processes and characterization. In Binnie J.'s words: “Ordinarily such a casually introduced s. 1 record would be a matter of serious concern.”<sup>84</sup> In this case, the Court was willing to take judicial notice of a broader set of material facts (public accounts and other parts of *Hansard*), finding such material sufficient to avoid “triggering a confrontation between the courts and government”.<sup>85</sup>

The Court was equally deferent to the government's characterization of its budgetary deficit as a severe financial crisis. Indeed, extreme characterizations abounded: a “fiscal crisis”,<sup>86</sup> a “financial emergenc[y]”,<sup>87</sup> a “serious financial situation”,<sup>88</sup> “drastic circumstances”,<sup>89</sup> “not a normal

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<sup>81</sup> [2004] S.C.J. No. 61, [2004] 3 S.C.R. 381 [hereinafter “*NAPE*”].

<sup>82</sup> S.N. 1991, c. 3, as am. by S.N.L. 1992, c. P-41.1.

<sup>83</sup> *NAPE*, *supra*, note 81, at para. 39.

<sup>84</sup> *Id.*, at para. 56.

<sup>85</sup> *Id.*, at para. 58.

<sup>86</sup> *Id.*, at para. 62.

<sup>87</sup> *Id.*, at para. 72.

<sup>88</sup> *Id.*, at para. 73.

<sup>89</sup> *Id.*, at para. 86.

time”,<sup>90</sup> “an exceptional financial crisis”.<sup>91</sup> Somewhat circularly, the Court accepted the severity of the cut to pay equity as corroboration of the government’s claim to crisis.<sup>92</sup> It seems the more economically drastic the discrimination, the more believable — and justifiable — the government’s financial reason for doing so is.

The second feature of this section 1 analysis is that by allowing a fiscal crisis to provide a pressing and substantial objective, Binnie J. took on and significantly reshaped the “dollars for rights” controversy.<sup>93</sup> Justice Binnie’s careful dismissal or reconstruction of past section 1 cases allowed the distillation of something he called the “sole purpose” test: “budgetary considerations *in and of themselves* cannot *normally* be invoked as a *free-standing* pressing and substantial objection for the purposes of s. 1.”<sup>94</sup> From this case, the principle emerges that courts must be open to “the periodic occurrence of financial emergencies when measures must be taken ... to see a government through the crisis.”<sup>95</sup>

This case thus stands out as a significant development in section 1 jurisprudence, but also as an ironic “development” in that it harks back to the early sensitivity to the government budgets in *Bliss*. While the budgetary concern was understated in *Bliss*, and not the primary mechanism for denying Stella Bliss’s claim, in *NAPE* the financial angle is key. Women’s equality rights — recognized by the government in its pay equity agreement promises — are cast as threats to the attainment of other public goods such as hospital beds and schoolrooms.<sup>96</sup> And the effect of the judgment is to uphold discriminatory budget balancing: the levying of a targeted tax on an already vulnerable and economically disadvantaged group of female workers in the name of the greater economic good. Male workers faced no similar shouldering of the burden of the public debt. The result is a deeply unfortunate moment in Canadian human rights law.

The ideological force of the claim of budgetary disaster through deficit is highlighted by reference to the very public records the Court claimed to have noted. These records show that the budgetary deficit

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<sup>90</sup> *Id.*, at para. 97.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at para. 62.

<sup>93</sup> *Id.*, at para. 65.

<sup>94</sup> *Id.*, at para. 71, quoting from *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (emphasis added by Binnie J).

<sup>95</sup> *Id.*, at para. 72.

<sup>96</sup> *Id.*, at para. 95.



claimed in this case was hardly, in Binnie J.'s words, a "temporary but serious financial crisis."<sup>97</sup> In each of the five previous years, the government ran a deficit budget, and in some of those years the deficit was significantly higher.<sup>98</sup> The deficit so critical to Binnie J.'s analysis appears to be neither unusual nor exceptionally high. We come full circle with these observations, to the earlier concern in *Bliss* for the heavy load the budgetary costs of social programs: the costs of unemployment insurance or of pay equity, specifically, or of women's equality, possibly.

#### IV. CONCLUSION

The pillars of Ritchie J.'s decision in *Bliss* continue to plague Charter cases. The density and variance of sex in our lived experiences too often lies unexplored and unacknowledged. The most marginalized and denied have yet to be recognized as central to what ought to count as "normal". And we are left with a catalogue of concepts and norms — choice, consent, liberty, the private, the natural, agency, merit — that, although critically challenged by equality aspirations, too often define and foreclose equality analysis. This is a bleak, not a blissful, place to end up. And it brings to mind some advice from a fellow equality traveller: we must be aware of "the unemancipatory relations of power [a right] conceals in its sunny formulations of freedom and equality".<sup>99</sup>

On a more positive note, two points are salient. Not all of the liberal concepts courts use against equality claims are necessarily a bad thing, if you really have them. Choice, agency, privacy, freedom: these are what Louise Gosselin, Betty Hodge and the Newfoundland Labrador workers wanted, but did not get. This liberal set of goods, is also, in the words of Gayatri Spivak relayed through Wendy Brown, "that which we cannot not want".<sup>100</sup> Nor is our challenge to get the Court to use the right

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<sup>97</sup> *Id.*, at para. 98.

<sup>98</sup> The deficits of the previous five years were: 1985–86, \$253 million; 1986–87, \$231 million; 1987–88, \$197 million; 1988–89, \$226 million; 1989–90, \$175 million. Department of Finance Canada, Fiscal Reference Tables (October 2004), online: <[http://www.fin.gc.ca/frt/2004/frt\\_e.pdf](http://www.fin.gc.ca/frt/2004/frt_e.pdf)>, at Table 17 (date accessed: March 23, 2006).

<sup>99</sup> Wendy Brown, "Suffering the Paradoxes of Rights" in Wendy Brown & Janet Halley, eds., *Left Legalism/Left Critique* (Durham: Duke University Press, 2002), at 421.

<sup>100</sup> *Id.*, at 420, quoting Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993), at 45–46.

words of formal or substantive equality; after all, the similarly situated test can get you anywhere you are politically willing to go. Our struggle is to politicize women's realities inside the courtroom.

We have made progress since *Bliss*. Section 15 does mean more than section 2(b) of the *Bill of Rights* did in *Bliss*. And section 15 has made some differences in some individuals' lives. But recognizing the economic and social rights that form the text of most recent equality claims will take a kind of judicial political courage and insight, as United Nations High Commissioner of Human Rights and a former Supreme Court of Canada justice, Louise Arbour, urged upon our courts in the 2005 LaFontaine-Baldwin Lecture.<sup>101</sup> Also, naming and addressing sex inequality — recognizing its complex systemic structuring, its multiple articulations and forms — takes a more critical brand of politics. Courts in other jurisdictions, not only ours (and here I am thinking of a recent South African decision about prostitution and stigmatization in *S. v. Jordan*),<sup>102</sup> have defaulted on this as well. Courts must learn to use section 15 to push and to destabilize what passes as common sense. We need also to recognize the difficulty inherent in asking equality rights, bred of liberal thought and encased in a document equally liberal, to be more than guarantees of a formal, albeit sometimes quite powerful, equality.<sup>103</sup> And we must engage critically and with greater ferocity with these same issues outside of the court, as an essential component in setting in place the conditions necessary for more subtle, complex and transformative jurisprudence.

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<sup>101</sup> Louise Arbour, 2005 Lecture (Lecture presented at the LaFontaine-Baldwin Symposium, Quebec City, 4 March 2005), online: <<http://www.lafontaine-baldwin.com/speeches/2005/>> (date accessed: March 23, 2006).

<sup>102</sup> [2002] S.A.J. No. 87 (Const. Ct.).

<sup>103</sup> Hester Lessard writes: "Equality, then, placed in the historical and material context of liberal political economies is formal equality. Substantive equality, formulated as a legal right, is oxymoronic." Hester Lessard, "Mothers, Fathers, and Naming: Reflections on the Law Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16 C.J.W.L. 164, at 177 (emphasis in original).