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Abstract

This article rests on the distinction between the legal and political meanings of a judicial decision. Cases that are resolved in legal terms may have unpredictable political consequences. Bliss v. Attorney General of Canada (1978) demonstrates this brilliantly: Stella Bliss's argument that Canadian Unemployment Insurance maternity benefits violated the equality provisions of the Bill of Rights was soundly defeated in the court& Ultimately, however, a loose coalition of feminist and civil liberties groups took Bliss into the political process and succeeded in forcing a revision of Unemployment Insurance along with a dramatic expansion of the scope of section 15 of the Canadian Charter of Rights and Freedoms. The article traces the complex transition from personal case to political cause, demonstrating that Supreme Court decisions have a specious finality: disputes may only be conclusively resolved by a broader political process wherein organizational strength, not legal principle, prevails.

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BLISS v. *ATTORNEY GENERAL OF CANADA*: FROM LEGAL DEFEAT TO POLITICAL VICTORY

BY LESLIE A. PAL* AND F.L. MORTON**

This article rests on the distinction between the legal and political meanings of a judicial decision. Cases that are resolved in legal terms may have unpredictable political consequences. Bliss *v.* Attorney General of Canada *(1978) demonstrates this brilliantly: Stella Bliss's argument that Canadian Unemployment Insurance maternity benefits violated the equality provisions of the* Bill of Rights *was soundly defeated in the courts. Ultimately, however, a loose coalition of feminist and civil liberties groups took* Bliss *into the political process and succeeded in forcing a revision of Unemployment Insurance along with a dramatic expansion of the scope of section 15 of the* Canadian Charter of Rights and Freedoms. *The article traces the complex transition from personal case to political cause, demonstrating that Supreme Court decisions have a specious finality: disputes may only be conclusively resolved by a broader political process wherein organizational strength, not legal principle, prevails.*

I. INTRODUCTION

On October 31, 1978, the Supreme Court of Canada rejected Stella Bliss's application for Unemployment Insurance benefits.[1] The Court held that maternity benefit provisions under the 1971 *Unemployment Insurance (UI) Act*[2] did not contravene the equality provisions of the *Canadian Bill of Rights*.[3] The denial of Unemployment Insurance benefits because of pregnancy did not, the Court ruled, discriminate on the basis of sex or deny women equality before the law. This decision was the end of the road for Stella Bliss, who had spent two years fighting a denial of Unemployment Insurance benefits. But it was just the beginning of a series of events that would ultimately lead to a complete overhaul of Unemployment Insurance maternity benefit conditions and to far-reaching changes in the *Canadian Charter of Rights and Freedoms*.[4] The *Bliss* case

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[1] *Bliss* v. *Attorney-General of Canada* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

[2] *Unemployment Insurance Act, 1971*, R.S.C. 1971, c. 48.

[3] *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

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

led women's groups to demand stronger equality rights in section 15 of the *Charter*, in particular the inclusion of the phrase "equal benefit" of the law. Bliss's obscure dispute ten years ago has compelled dramatic changes in Canada's constitutional and social policy landscape.

What is significant about *Bliss* is not the decision itself, but the way that the decision has been processed within the broader political system. To date, the Canadian literature on judicial process and policy making has focused on the content of decisions, or the way in which legal principles are applied to the facts of a case to produce a decision. Yet there is a distinction, as Peter Russell notes, between the legal and political effects of a judicial decision.[5] Though Russell's analysis confined itself to the field of intergovernmental relations, it clearly has broader application. While Supreme Court of Canada decisions are the end of the legal process, they are often only the beginning of a political process that amends or overturns them. The *Bliss* case demonstrates this brilliantly: Bliss's 1978 legal defeat was completely neutralized through spectacular victories in the political arena by groups that took up her cause. *Bliss* really has three aspects: the legal battle, the pressure to change Unemployment Insurance, and ultimately the fight to entrench stronger guarantees of social equality in the *Constitution.*[6]

A close examination of *Bliss* also helps overcome another weakness in the Canadian literature on judicial process: the absence of analyses of the political and social context of judicial decisions.[7] An adequate explanation of the political meaning of a court decision requires more than a description of legal principles and their application to a case, or even those aspects of the socio-economic background of judges that lead them to make certain kinds of decisions. Why do cases come forward at all? Who champions them? What social forces do they reflect and animate?

This study of *Bliss* addresses these larger dimensions of the judicial process. It places the legal dispute into its personal, social, and political contexts, and shows how the Court decision fit into a broader political process that ultimately went well beyond what either Bliss or the judges could have intended or even imagined.

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[5] P.H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources" (1985) XI:2 Can. Pub. Pol'y 161.

[6] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[7] C. Barr, "Using Process Theory to Explain Judicial Decision Making". 1 Can. J. Law & Soc. (1986) 57.

II. ORIGINS OF THE DISPUTE[8]

Stella Bliss was born and educated in Britain. She lived in Canada from 1965 to 1969, working in Vancouver, and then returned to England where she was employed as an office manager. In 1975 she decided to return to Vancouver to start an antique business. Bliss planned to enter Canada through New Orleans, the home of her American common law spouse. Although they had been assured in Britain that their application was approved, officials in New Orleans had no record of the couple. The delays lasted weeks, and Bliss finally received her immigration papers in June, in part on the strength of a job offer from the Vancouver company that had employed her earlier. Her companion was granted a three-month work permit. Because of the delays, the job she had been promised fell through. Concerned that her common law spouse would be deported after his work permit expired, Bliss married him in August, 1975, unaware that she was two months pregnant at this time.

Thus, by summer's end, Bliss and her husband found themselves in Vancouver without work, and because of the recession, without prospects of starting a business. Bliss joined Brown Bros. Ford on September 24, 1975 as a leasing secretary, and discovered shortly afterwards that she was pregnant. Since she did not intend to request more than one week's leave of absence, she did not inform her employer. However, when her condition was discovered in January, Bliss was fired. Bliss applied for Unemployment Insurance benefits in February, 1976, but was denied. She then appealed her dismissal to the B.C. Human Rights Commission, and was reinstated since pregnancy was an illegal ground for firing. She worked until March 12, when she was fired again. Bliss had a son on March 16 and reapplied for regular Unemployment Insurance benefits on March 22. While the Commission agreed that she was capable of and available for work, it treated her claim as one for maternity benefits. On April 5 the Commission again denied the claim because Bliss failed to meet the 'magic ten' requirement, which stipulated that a woman had to have been working before she became pregnant.[9]

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[8] The following is based on interviews with Stella Bliss, her lawyers Allan MacLean and Lynn Smith, newspaper reports, Supreme Court depositions, and material from MacLean's case file. The interviews were conducted in Vancouver and Victoria, B.C., in July, 1985.

[9] Section 30(1), *UI Act, supra*, note 2. This and other technical features of Unemployment Insurance maternity benefits are explained in text accompanying note 40, *infra*. Bliss was actually informed of the denial on March 31, 1976, but the April 5 letter confused the issue by erroneously stating that she had twenty-eight weeks of insured employment in the 'magic ten' benefit period. Bliss was informed of the error in an interview on June 11, 1976. Submission to Board of Referees, June 15, 1976.

Bliss appealed this decision to the Board of Referees (the first tier of the Unemployment Insurance appeal system). She argued that her claim was for regular rather than maternity benefits, and that if section 46 of the *Act* denied her these regular benefits,[10] it violated the *Bill of Rights* guarantee of "equality before the law."[11] As well, Bliss had consistently maintained that she was not responsible for her unemployment before September, 1975. She blamed immigration officials for having delayed her entry into Canada, and thus costing her the original job offer from the Vancouver company.[12] In a unanimous decision in July, 1976, the Board of Referees denied her appeal. Bliss had anticipated a denial: "All is as expected," she wrote upon hearing of the decision.[13]

The *Bill of Rights* argument was largely Bliss's own invention (it had been suggested by a law student at a legal aid centre Bliss visited), but to appeal further she needed legal and organizational help. At that time appeals to the Umpire from a unanimous Board decision could only be filed by an appellant's trade union or association, or with the consent of the Chair of the Board. The Chair initially denied Bliss's appeal to the Umpire on the ground that "there was no principle of importance involved in the case."[14] The Service, Office, & Retail Workers Union of Canada (SORWUC) then agreed to sponsor her case, enabling the appeal to proceed. (Bliss only joined the union after it agreed to be her sponsor.) Unable to afford a lawyer, Bliss was directed to Allan MacLean of the Vancouver Community Legal Assistance Society. MacLean met with Bliss in July and was initially reluctant to accept her case: the courts had not been receptive to equality arguments under the *Bill of Rights*, and his time was already overbooked. Bliss persisted however, and eventually persuaded MacLean to submit an appeal on her behalf.[15]

SORWUC forwarded its submission on November 30, 1976. It argued that the maternity benefits section of the *UI Act* was discriminatory because

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[10] Under *UI Act*, *ibid.* s. 46, a pregnant claimant can receive benefits only under s. 30.

[11] Section 1(b) of the *Canadian Bill of Rights*, *supra*, note 3, reads:
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;

[12] Letter from S. Bliss to Unemployment Insurance Commission (11 January 1976), *Vancouver*. Also see letter from S. Bliss to A. MacLean (3 December 1976), *Vancouver*.

[13] Letter from S. Bliss to J. Rands (24 June 1976), *Vancouver*.

[14] Letter from Unemployment Insurance Commission to S. Bliss (28 July 1976), *Vancouver*.

[15] Letter from A. MacLean to Unemployment Insurance Commission (28 August 1976), *Vancouver*. SORWUC had officially decided to support Bliss at its 22 July meeting. Service, Office and Retail Workers Union of Canada, Local 1, Minutes of 22 July 1976.

it "discriminates between pregnant working women and all other working women, and . . . against all women by creating a special section of the Act which ignores the biological role of childbearing which is as much a part of any woman's life as is working itself."[16]

By this time the appeal had acquired some notoriety in Vancouver. The Vancouver *Province* carried news reports and editorials on the issue, and five days prior to the Umpire's hearing, SORWUC announced that if the decision rendered was unfavourable, it would be challenged.[17] The union also promised to lobby Parliament to have the legislation changed.

Justice Collier sat as Umpire and on February 18 decided in favour of Bliss. His examination of the *UI Act* suggested that its availability provisions were "the source of a basic concept in the legislation: provided a claimant is capable of and available for work, entitlement is the rule."[18] In his view, section 46 was a departure from the general statutory scheme because denial of benefits was predicated on sexual differences.

When the Commission decided to appeal the Umpire's ruling, MacLean enlisted the help of Lynn Smith, Chair of the Vancouver Community Legal Assistance Society and a prominent feminist lawyer. The Federal Court of Appeal heard the case in Vancouver, and in June, 1977 decided that section 46 of the *UI Act* did not violate the right to "equality before the law." Justice Pratte, in delivering the Court's judgment, noted that the *Bill of Rights* did not expressly prohibit discrimination, but rather granted "equality before the law" irrespective of race, national origin, colour, religion, or sex. He further ruled:

> Assuming the respondent to have been "discriminated against", it would not have been by reason of her sex. Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If s. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[19]

"Equality before the law" did not mean that all statutes need apply to all individuals in the same manner; only that different treatment be based on relevant distinctions and that individuals within distinct classes be treated similarly.

The Court's decision was, of course, disappointing to MacLean and Smith and to Vancouver women's groups. Representatives of the Vancouver Status of Women had attended the hearing on May 19, as had

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[16] Letter from P. Barter (SORWUC) to A. MacLean (30 November 1976), *Vancouver.*

[17] "UIC Faces Maternity Challenge", *The* [*Vancouver*] *Province* (5 January 1977) 23.

[18] CUB-4510 at 17.

[19] *Re Attorney General of Canada and Bliss* (1977), 77 D.L.R. (3d) 609 at 613 (F.C.A.).

members of Bliss's union, SORWUC. Interestingly, by this point, Bliss had become less involved with the case. She almost missed the Federal Court of Appeal hearing, and claims not to have shared what she perceived as the hard-line feminism of her supporters. The case had also taken a personal toll: her marriage had dissolved under the stress of the appeal, and her husband and son eventually left for the United States. While she continued to be advised by MacLean on developments and remained convinced of the justice of her case, Bliss felt that she had become more a symbol than an actor.[20]

MacLean and Bliss decided to appeal the decision to the Supreme Court of Canada, but estimated that this would cost at least $2,500. With Bliss's permission, MacLean enlisted the Vancouver Status of Women in establishing a Stella Bliss Appeal Fund. The Fund was quickly endorsed by SORWUC, the British Columbia Federation of Women, and the B.C. Government Employees' Union. The National Action Committee on the Status of Women, based in Ottawa, also took an interest in the case, and groups across the country held functions to raise money for the Fund.[21]

MacLean served notice of appeal on August 10, 1977. The Federal Court of Appeal heard the application in September, and granted leave to appeal. Lynn Smith had contacted Andrew Roman of the Public Interest Advocacy Centre requesting funds in support of the appeal. The Centre, through Roman's personal contacts, had become a nodal point for a loose national network of political activist lawyers interested in what they deemed to be progressive causes. Roman was unable to provide funding but offered to act as agent in Ottawa and to provide counsel. He suggested John Nelligan, Q.C., a recent past-President of the Canadian Civil Liberties Association, who agreed to serve on a *pro bono* basis.[22] Cost was an important consideration because, even by November, the Vancouver Status of Women had collected under $400. The Vancouver group had notified others across Canada, so that Quebec, Ottawa, and Manitoba women's organizations were sending money.[23] With the help

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[20] For example, once the Supreme Court appeal was underway, MacLean wrote to Bliss:
> I am also assuming that you have no objections to the use of your name in such things as interviews, newspaper stories, letters, etc. in an attempt to raise funds to cover disbursements in this matter. Please let me know if you do have any objections. Keep up the good work.

(7 October 1977), *Vancouver.*

[21] For example, the Ottawa Coalition for Full Employment contacted MacLean on 1 September 1977 to say it wanted to help raise funds for Bliss.

[22] Letter from A. Roman to L. Smith (28 September 1977), *Ottawa.*

[23] Letter from Vancouver Status of Women to A. MacLean (22 November 1977), *Vancouver.*

of SORWUC and the B.C. Federation of Labour, the Fund started to receive more money from union locals early in 1978.[24]

With these funds, MacLean and Smith were able to travel to Ottawa to 'junior' Nelligan, who argued before the Supreme Court. Because Chief Justice Laskin was ill, Justice Spence was removed from the bench for the appeal. This was unfortunate for the appellants, as these two Justices were more favourably disposed to *Bill of Rights* arguments than their colleagues.[25] While Nelligan argued the case ably, both MacLean and Smith sensed that the Court would not be persuaded. MacLean later concluded that the judges feared that a favourable decision on *Bliss* would encourage a rash of equality-based litigation.[26]

The Supreme Court announced its decision on October 31, 1978. Justice Ritchie, writing for an unanimous court, supported the lower court's definition of "equality before the law" as "equality of treatment in the administration and enforcement of law. . . ."[27] This largely procedural definition meant that as long as Bliss was treated like all other pregnant Unemployment Insurance claimants, the *Bill of Rights* had not been violated.

Of course, Bliss had never claimed that the problem lay in the way that section 46 had been administered. Rather, she contended that it was section 46 itself that violated her right to "equality before the law," because of its harsher treatment of pregnant applicants in particular, and, by extension, of women in general. While the procedural definition adopted by the Court avoided this issue, Ritchie J. went on to address it. He noted that the classification scheme represented by sections 30 and 46 was in pursuit of a "valid federal purpose," that of distinguishing between eligible and ineligible applicants for Unemployment Insurance benefits.[28] While he conceded that section 46 had an unequal impact on women and men, he said that this was due to "nature," not the legislation.[29]

Justice Ritchie attempted to distinguish *Bliss* from *R.* v. *Drybones*,[30] in which the Court struck down a statute for apparently substantive

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[24] Letter from Vancouver Status of Women to A. MacLean (22 March 1978), *Vancouver.*

[25] Letter from A. MacLean to S. Bliss (20 June 1978), *Vancouver.* See W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53 Can. B. Rev. 649 for the pre-*Bliss* record of the Supreme Court.

[26] MacLean, personal memorandum on Supreme Court procedure, 12 June 1978, at 2.

[27] *Bliss, supra,* note 1 at S.C.R. 192, D.L.R. 423.

[28] *Ibid.* at S.C.R. 186, D.L.R. 418-19.

[29] *Ibid.* at S.C.R. 190, D.L.R. 422.

[30] *R.* v. *Drybones* (1969), [1970] S.C.R. 282, 9 D.L.R. (3d) 473.

equality reasons (racial discrimination) rather than procedural reasons. He held that the "equality before the law" requirement was concerned primarily, if not exclusively, with the imposition of penalties and sanctions, and not the distribution of benefits in social welfare legislation. Ritchie J. emphasized the "wide difference between legislation which treats one section of the population more harshly than all others by reason of race as in the case of *Regina* v. *Drybones* . . . and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits."[31]

Personally, Bliss was exhausted: her marriage had collapsed, and she was tired of her notoriety in Vancouver. In addition, her case had encouraged women having similar problems with the Commission to appeal, and much of Bliss's time in the previous year had been spent providing help and advice. She only occasionally responded to journalists researching the maternity benefits question, and eventually left the country temporarily.[32] MacLean continued to work at the Vancouver Community Legal Assistance Society, and wrote several letters over the next two years to the Ministers of Employment and Immigration and opposition critics, suggesting changes in Unemployment Insurance benefits. In personal terms, however, the Stella Bliss maternity appeal was over: its protagonists had retired from the field.

The *Bliss* case set other, larger, forces in motion; forces that would eventually triumph in the political arena. While the Supreme Court of Canada may have been concerned with the political implications of a decision favouring Bliss, it failed to gauge the outcry that followed its denial of the appeal. Bliss was now a national symbol for the women's movement and, to a lesser extent, the trade union movement. The Vancouver Status of Women described the Supreme Court's decision as a "kick in the stomach" for all working women.[33] Reacting to this and similar criticism, Bud Cullen, Minister of Employment and Immigration, issued a statement after the decision announcing that maternity benefit provisions were under review.[34] Women's groups were stunned by what they perceived as a highly unfair legal decision, and were determined that it would never happen again.

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[31] *Bliss, supra,* note 1 at S.C.R. 191, D.L.R. 423.

[32] Bliss is currently a partner in a consulting firm, in addition to managing several business enterprises of her own.

[33] "Cabinet to re-examine UIC maternity benefits", *The [Toronto] Globe and Mail* (1 November 1978) 14.

[34] *Ibid.*

III. MATERNITY BENEFITS AND UNEMPLOYMENT INSURANCE

> Preliminary analysis of the case tends to point to a "Pyrrhic victory" for the Commission. . . . In other words, while it is not likely that the section will be struck down, it is possible that the Court will seek to exert some pressure on the Commission to render the section more equitable. In this vein it can be assumed that the political ramifications of the court decision will be operationally more important than the decision itself.[35]

Bliss's larger ramifications can only be understood with reference to the traditional place of maternity benefits within the *Unemployment Insurance Act.* Canada's first *UI Act* was passed in 1940, with subsequent *Acts* in 1955 and 1971.[36] However, the central principles have remained consistent despite substantial legislative change. Unemployment Insurance operates as a social insurance scheme in which a large group of persons is compelled to contribute to a fund from which they may subsequently draw if they incur stipulated risks. In Unemployment Insurance, the risk is loss of income due to involuntary unemployment. While specific definitions have changed from statute to statute, Canadian Unemployment Insurance has always demanded the following of potential claimants: (i) some minimum level of contributions based on wages or salaries from lawful employment, (ii) evidence that loss of income is in large degree involuntary, (iii) that the claimant is capable of work, and (iv) that the claimant is available for work. These provisions ensure that the claimant has been in the labour force, has an insurable risk, and is involuntarily unemployed.

Before 1971, unemployment due to pregnancy was not indemnified under Unemployment Insurance. Unemployment due to pregnancy was treated as voluntary, as the predictable consequence of presumably voluntary sexual activity. As well, pregnant women leaving employment did so because of physical incapacity to work and because of impending child-care responsibilities: the requirements of capability and availability were therefore violated. There were no explicit clauses under the 1955 *UI Act* denying benefits to pregnant or recently pregnant claimants, but a rule of thumb developed that women were considered incapable of and unavailable for work six weeks before and after confinement. A

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[35] *Internal Report of the Canada Employment and Immigration Commission, Benefit Policy Branch: Discussion Paper Concerning the Aftermath of the Supreme Court Decision* (1978) at 10-11.

[36] *Unemployment Insurance Act, 1940*, S.C. 1940, c. 44; *Unemployment Insurance Act*, S.C. 1955, c. 50; *supra*, note 2. A legislative history is available in G. Dingledine, *A Chronology of Response: The Evolution of Unemployment Insurance from 1940 to 1980* (Ottawa: Supply and Services Canada, 1981).

1958 Umpire decision stated: "my predecessors established the principle that every claimant is presumed not to be able to work nor available for work during the six weeks preceding the confinement and for the six following weeks and also that the request of proof for rebutting such presumption must be strong and convincing."[37] The decision also held:

> First, even if there is no more presumption of non-availability when the six weeks subsequent to the confinement have elapsed, the claimant is obviously compelled, as any other claimant, to prove her availability for work. However, as the progressive domestic responsibilities of the claimant may from now on prevent her from working outside her home, the insurance officer is quite in order to request that the claimant inform him of the steps taken or about to be taken, among other things, to insure without delay the care of her child or children and so remain in a position to accept at once all suitable employment opportunities. . . . This is a question of fact.[38]

In 1962, the Committee of Inquiry into Unemployment Insurance (the Gill Committee) noted that exceptions to the rule of thumb were rare and, as the Umpire's decision suggests, proving availability even six weeks after confinement required evidence of child care arrangements. Nonetheless, the Gill Committee recommended increasing the disqualification from six to eight weeks on both sides of the confinement date: "Regulations of this type would not be intended to discriminate against pregnant women or the mothers of young children but they would be intended to preserve the insurance character of the unemployment insurance plan by preventing payment of benefit to persons who are in fact unavailable for employment."[39]

The 1971 *UI Act* completely overhauled the plan, generally liberalizing its provisions and extending its benefits.[40] Along with regular benefits, the new *Act* introduced "special benefits" for sickness and maternity. Only "major attached" claimants, those with at least twenty weeks of insurable employment in the previous fifty-two, were eligible; "minor attached" workers, with between eight and twenty weeks of insurable employment, might be more tempted to abuse these benefits. The outstanding feature of the new maternity benefits offered under section 30 of the *Act* was that the recipient did not have to demonstrate capability and availability. Indeed, the payments were made precisely because the claimant was presumed unavailable for work.

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[37] CUB-1505 at 3.

[38] *Ibid.* at 3-4.

[39] Canada, *Report of the Committee of Inquiry into the Unemployment Insurance Act* (Ottawa: Queen's Printer, 1962) (Chair: E.C. Gill) at 135. It should be noted that the Report did not object to maternity benefits *per se*, only to their inclusion in Unemployment Insurance.

[40] See L.A. Pal, "Revision and Retreat: Canadian Unemployment Insurance, 1971-1981" in J.S. Ismael, ed., *Canadian Social Welfare Policy: Federal and Provincial Dimensions* (Montreal: McGill-Queen's University Press and the Institute of Public Administration of Canada, 1985) 75.

This anomaly was accepted because the federal government had promised, but until 1970 had failed to produce, significant social policy reforms.[41] The revisions to the *UI Act* became a vehicle for 'filling the gaps' in the Canadian welfare state. Maternity benefits, a routine feature of most comparable social security systems was one of the gaps. Because of the relative generosity of these benefits and a fear that they might be abused, the *Act* made their qualifying conditions more stringent. In addition to having at least twenty weeks of insurable employment in the last year, a pregnant woman had to meet the so-called 'magic ten' rule. Section 30(1) required a claimant to work "ten or more weeks of insurable employment in the twenty weeks that immediately precede the thirtieth week before her expected date of confinement." Since a normal pregnancy is forty weeks long, this rule ensured that claimants were employed at or before the time of conception and had not entered the work force while pregnant simply to collect the benefits. As well, since these were special benefits reserved for claimants who could meet the special requirements, it seemed illogical to permit women to collect regular benefits (for which capability and availability had to be proved) around the date of confinement. Therefore, section 46 of the *Act* stated that, subject to section 30, claimants who did not qualify for maternity benefits were not entitled to receive regular benefits for a period commencing eight weeks before the week of confinement and ending six weeks after that week.

In spite of what may have been generous motives, legislators placed a ticking bomb inside the *UI Act*, and it exploded with the *Bliss* case. Inevitably, someone would challenge one of the *Act*'s anomalies. First, maternity benefits with the 'magic ten' rule had the most difficult entrance requirement of any Unemployment Insurance benefit. Only women faced this higher hurdle. Second, section 46 turned what had been a rebuttable presumption under the 1955 program to an irrebuttable one. Women who were pregnant or who had recently given birth, were denied benefits that they would normally have had no trouble getting, simply because their unemployment happened to coincide with pregnancy. No factual demonstration of capability and availability had force with respect to section 46. Finally, pregnant "major attached" claimants without the 'magic ten' qualified for neither maternity nor regular benefits. The government had an opportunity to address these anomalies in 1975, International Women's Year, but it chose to make only a cosmetic change

[41] G.A.F. Johnson, "A Minister as an Agent of Policy Change: The Case of Unemployment Insurance in the Seventies" (1981) 24 Can. Pub. Admin. 612 at 619.

to increase the flexibility of the fifteen week benefit period.[42] *Bliss* addressed all three of these central anomalies directly, but they were upheld.

Despite the *Bliss* ruling, complaints about discrimination under section 46 continued to be heard, now before the recently created Canadian Human Rights Commission. Between March, 1978 and February, 1979, the Human Rights Commission submitted six complaints on maternity provisions to Unemployment Insurance authorities.[43] These were not unexpected, since the Canadian Employment and Immigration Commission had been advised in early 1978 that a Supreme Court decision upholding section 46 would intensify pressure from women's lobbies to change the legislation.[44] In fact, women's groups across the country reacted strongly against the Supreme Court's decision, and by 1979 the Commission was promising revisions to the *Act*, which would make maternity benefits more flexible. These changes were postponed with the 1980 federal election, and upon re-election the Liberals decided to establish a Task Force on Unemployment Insurance rather than move directly to revision.

The Task Force's 1981 Report supported the criticisms of maternity benefits that had been made over the last few years. It suggested the elimination of the 'magic ten' rule and section 46, and the extension of maternity benefits to adoptive parents.[45] Although the Task Force made numerous other suggestions, only the ones relating to maternity benefits were successfully implemented.[46] The Unemployment Insurance benefits denied to Bliss seven years earlier were now available to all Canadian women.

IV. THE IMPACT OF *BLISS* ON THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

> One of the minor consolations in this business is even the ones you lose sometimes refuse to die and have their effect for future litigants even though your client goes away dissatisfied. In my conversations with Doris Anderson, one time President of the Women's Advisory Council, I was convinced that part of their fervour in obtaining a special place for women's rights arose out of the shock they received on reading the *Bliss* case.[47]

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[42] *UI Act, supra*, note 2, as am. S.C. 1974-75-76, c. 80.

[43] Dingledine, *supra*, note 36 at 95.

[44] F.L. Morton & L.A. Pal, "The Impact of the Charter of Rights on Public Administration" (1985) 28 Can. Pub. Admin. 221 at 226.

[45] Employment and Immigration Canada, *Unemployment Insurance in the 1980s* (Ottawa: Supply & Services, 1981) at 67-71.

[46] *UI Act, supra*, note 2, as am. S.C. 1980-81-82-83, c. 150, s. 4.

[47] Letter from J. Nelligan to A. MacLean (2 June 1981), *Ottawa.*

The third dimension of the *Bliss* saga is its impact on the *Canadian Charter of Rights and Freedoms.* The Supreme Court's 1978 decision culminated a judicial trend toward a minimalist interpretation of the *Bill of Rights* in general and the "equality before the law" provision in particular.[48] *Bliss* was the second Supreme Court decision to give a purely procedural interpretation to the equality clause and to reject claims by female plaintiffs that they were victims of illegal sex discrimination.[49] Both decisions were widely criticized by feminist and civil liberties groups.

In the aftermath of *Bliss* and other failed legal battles, feminist and civil liberties groups began to argue that the existing *Bill of Rights* had proven ineffective in protecting equality rights. They petitioned for a constitutionally entrenched charter of rights with more explicit and stronger guarantees.[50] These objectives coincided fortuitously with the nation-building agenda of then Prime Minister Trudeau and the Liberal Party. With an eye toward the growing regional conflict in Canadian politics, Trudeau embarked on a major campaign of constitutional reform in 1980, with a new charter of rights and freedoms as its centerpiece.[51]

Feminist groups proved to be crucial allies in Trudeau's constitutional quest. They effectively bargained their support for a rewording of the equality rights clause that would preclude any future decisions like *Bliss.* What the Canadian people got was section 15 of the *Charter* — the most sweeping constitutional guarantee of equality to be found in any liberal democracy in the world. The key clause of section 15, "the equal benefit of the law," comes directly from *Bliss.*

After a summer of inconclusive negotiations culminating in the disastrous First Ministers' Conference in September, Trudeau announced his intention to proceed unilaterally with patriation and reform of the *Constitution.*[52] In October, 1980 the government introduced a *Constitution Act* that contained a *Charter of Rights* applicable to both orders of government:

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[48] Tarnopolsky, *supra,* note 25.

[49] The first was *Attorney-General of Canada* v. *Lavell; Isaac* v. *Bédard* (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481.

[50] See C. Housek, "Women and the Constitutional Process" in K. Banting & R. Simeon, eds., *And No One Cheered* (Toronto: Methuen, 1983) 280 at 283.

[51] See R. Knopff & F.L. Morton, "Nation Building and the Canadian Charter of Rights and Freedoms" in Royal Commission on the Economic Union and Development Prospects for Canada, *Constitutionalism, Citizenship and Society in Canada* (vol. 33) by A. Cairns & C. Williams (Toronto: University of Toronto Press, 1985) 133.

[52] R. Romanow, J. Whyte & H. Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell-Methuen, 1984) at 61.

> Section 15: Non-Discrimination Rights
>
> (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
>
> (2) This section does not preclude any law program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.[53]

This phrasing of "non-discrimination rights" essentially duplicated the wording of the similar provision in section 1(b) of the *Bill of Rights.* The continuity in phrasing was part of the Trudeau government's strategy to minimize provincial opposition to the *Charter* by emphasizing its continuity with existing legal precedent and policy. This strategy was acknowledged several months later by Jean Chrétien, who said that the October, 1980 version "was the result of compromises achieved . . . in negotiations between the federal government and the provinces. [These have created] the type of compromise which weakens the effectiveness of constitutional protection of human rights and freedoms."[54]

The government's 'minimalist' approach to section 15 (and to the *Charter* in general) immediately antagonized interest groups who wanted a broadly worded *Charter* that would effect a clean break with the 'failed' *Bill of Rights.* This antagonism dominated much of the testimony given in hearings before the Special Committee on the Constitution in November and December of 1980. Even the past president of Canada's leading civil libertarian association told the Special Committee that if this charter was the best the government could offer, then his organization's response was, "Thanks, but no thanks."[55]

Feminist groups quickly organized to attack the phrasing of section 15.[56] In testimony given to the Special Committee on the Constitution, the Canadian Advisory Council on the Status of Women (CACSW), the National Action Committee on the Status of Women (NAC), and the National Association of Women and the Law (NAWL) all stressed the need for "new and strong standards of equality" and for wording that "will provide such clear directions to judges that they cannot possibly misinterpret the intended content and meaning."[57]

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53 As cited by P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 52.

54 "Will make 'major changes', Chretien says in BNA statement", *The [Toronto]* Globe and Mail (13 January 1981) 10.

55 W. Midanik, quoted in "Canadian Civil Liberties Association News Notes on the Constitution" (February, 1981).

56 See P. Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: The Women's Press, 1983) at 34-37.

57 Canadian Advisory Council on the Status of Women, "Women, Human Rights and the Constitution: Submission to the Special Joint Committee on the Constitution" (18 November 1980) at 4.

The representatives of these groups explicitly condemned the "equality before the law" clause as an inadequate guarantee against the repetition of cases like *Lavell*[58] and *Bliss*. In her testimony before the Special Joint Committee, Lynn McDonald, president of the NAC, explicitly referred to *Bliss* to make this point: "In view of the Stella Bliss case especially, it is clear that more specific directions need to be given to the courts for the interpretation of equality."[59] *Bliss*, McDonald continued, illustrated how "unacceptable women in the labour force are if they are pregnant or if they have very young children."[60] She concluded by declaring that "equality before the law is an inadequate wording, because it has been interpreted only to mean equality in the application of the law and has not been interpreted to mean that the laws themselves must not discriminate against women."[61]

The CACSW presentation to the Committee continued this theme. Supplementary language was necessary to emphasize that what was required was not just equal application of laws, but equal laws. To this end, the CACSW brief recommended that the new concept of the "equal benefit of the law" be added to section 15, and that its title be changed from "Non-Discrimination Rights" to "Equality Rights" in order to stress that equality meant more than non-discrimination.[62]

By the end of 1980, it was clear that the government's minimalist strategy had failed. The federal Tories and provincial 'Gang of Eight' were still adamantly opposed to the entire package of constitutional reform, and the government had been criticized by feminist and civil liberties groups for proposing an anemic charter. Casting about for a way to rescue its constitutional initiative, the Liberal government reversed its original strategy and sought to bring on side its feminist and civil libertarian critics. By accommodating their demands to strengthen the wording of key *Charter* sections, the government hoped to gain a new and highly visible constituency for its total reform package.

On January 12, 1981, Minister of Justice Chrétien unveiled the government's new strategy at the opening session of the Special Committee. Chrétien declared that the testimony heard by the Committee demonstrated that Canadians were not satisfied with the compromise

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58 *Lavell*, *supra*, note 49.

59 Canada, Special Joint Committee of the Senate of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, vol. 9 at 59 (20 November 1980).

60 *Ibid.* at 64.

61 *Ibid.* at 65.

62 The section 15 wording recommended by the CACSW brief was: "(1) Every person shall have equal rights in law including the right to equality before the laws and to the equal protection and benefit of the law." *Supra*, note 57 at 32.

Charter language urged by the provincial premiers, and that they wanted a "strong Charter of Rights and Freedoms."[63] He set out a sweeping list of changes to the *Charter*, taking care to note the beneficiaries of each alteration. The strategy had the intended effect. "It's incredible," exulted Walter Tarnopolsky, then president of the Canadian Civil Liberties Association. "[I]t appears that they have given us just about exactly what we asked for."[64]

No lobby fared better than the feminists. Section 15 was rewritten almost completely in accordance with the CACSW recommendations. Chrétien introduced the revised section 15 with the observation that he agreed with the CACSW and NAWL proposals to rename the section "Equality Rights" in order to "stress [its] positive nature." He went on to recommend that the "equality before the law" clause be reinforced with the two additional guarantees of "equality under the law" and "equal benefit of the law."[65] The first of these was designed to protect women "against laws that treat men and women differently, such as the *Indian Act*."[66] This was a clear reference to the *Lavell* and *Bédard* cases.[67] The phrase "equal benefit of the law" was intended, among other things, "to protect against discrimination in payment of unemployment benefits. . . ."[68] The reference to the *Bliss* case could not have been clearer. Subsequent legal commentary on section 15 has confirmed that the intention behind the rewording was to reverse the restrictive interpretation of equality given in *Lavell* and *Bliss* under the *Bill of Rights*.[69]

Feminists fought and won one more constitutional battle before the *Charter* was adopted. On November 5, 1981, the political deadlock on constitutional reform was broken by a compromise measure agreed to by all parties except Quebec. One concession made by the federal government was the addition of a "notwithstanding" clause, allowing either level of government to exempt legislation from certain *Charter* provisions, including section 15.[70] Provincial leaders had demanded this concession as a protection against 'judicial supremacy' and the centralizing potential of the *Charter*.[71]

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[63] *The [Toronto] Globe and Mail*, *supra*, note 54.

[64] *Ibid.* at 11.

[65] *Ibid.* at 10.

[66] R.S.C. 1970, c. I-6, s. 94(b). "More rights for women in changes to charter", *The [Toronto]* Globe and Mail (12 January 1981) 1.

[67] *Lavell*, *supra*, note 49.

[68] *The [Toronto] Globe and Mail*, *supra*, note 66.

[69] See Hogg, *supra*, note 53 at 50-51.

[70] *Charter*, *supra*, note 4, s. 33. See Kome, *supra*, note 56 at 83-84.

[71] Knopff & Morton, *supra*, note 51.

Prime Minister Trudeau publicly stated his reluctance to 'weaken' the *Charter*, but argued that without this concession the *Charter* would have been lost. He failed to gauge the negative reaction of feminists, who suddenly saw their hard-fought victory on section 15 sacrificed on the altar of federal-provincial relations. Invoking memories of *Bliss*, *Lavell*, and other defeats, feminists quickly mounted a coast-to-coast campaign to re-establish the 'unconditional' status of the principle of sexual equality. Within a week, they won over the federal and all ten provincial governments. Section 28 was added to the *Charter* guaranteeing that its rights were to be enjoyed equally by both men and women, notwithstanding any other *Charter* provisions. While the practical implications of this new provision are ambiguous, symbolically it was an important assertion of the principle of sexual equality. The 'taking of twenty-eight' represents another ripple effect of *Bliss*.

While the influence of *Bliss* on the wording of section 15 is clear, the impact of the new right to "equal benefit of the law" on public policy has yet to be determined. Section 15 did not take effect for three years, to allow governments time to audit their statute books for potential violations and correct them.[72] This moratorium precluded any litigation under section 15 until April, 1985. There has been considerable activity, however, in the area of 'legislative audits' and these studies foreshadow an aggressive use of the "equal benefit" wording by feminist groups.

The 'legislative audits' undertaken by provincial governments have tended to adopt a minimalist methodology that limits the scope of equality rights to statutes employing sex as a basis of legislative classification.[73] This approach has been sharply criticized by feminists as too narrow. They stress that the real source of sexual inequality is now 'systemic' rather than intentional discrimination, resulting from laws that are neutral on their face but have a 'disparate impact' on women. Therefore, section 15, and especially the "equal benefit" language, should be interpreted to require 'equality of result'. Feminists have undertaken their own 'legislative audit' using this result-oriented approach and have produced a much longer and more sweeping list of required legislative reforms.[74]

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[72] This three year waiting period is mandated by section 32(2) of the *Charter*, *supra*, note 4.

[73] See Saskatchewan, Department of Justice, *Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms* (Discussion Paper) released by J.G. Lane (1984); Government of Alberta News Release, "Bill 95: The Charter Omnibus Act" (Attorney-General's Office, 9 November 1984).

[74] See Charter of Rights Educational Fund, *Report on the Statute Audit Project* (Toronto: 1985).

The recently released 'legislative audit' of the federal government also adopts a result-oriented approach to section 15, and recommends sweeping changes in a broad range of federal programs and policies.[75]

If the reforms outlined in these various 'statutory audits' are not achieved by legislative action, feminists are prepared to try to force them through court challenges. In October, 1984, CACSW released an extensive study of Canadian and American interest groups' use of constitutional litigation as a tactic to achieve policy objectives. It recommends a similar strategy of "systematic litigation" as a "vehicle for social change."[76] An important aspect of this plan of action, a legal defence fund to pay for test case litigation, was launched in April, 1985.[77] In addition, the federal government has established a five year, eleven million dollar "Court Challenges Program," specifically designed to assist litigants mounting section 15 challenges to government policies.[78] Last but not least, feminist lawyers will go to court well armed with sophisticated legal arguments drawn from the impressive amount of legal periodical literature that has been produced by lawyer-activists since 1982.[79]

Thus, a new chapter in Canadian constitutional development is about to be written. Section 15 is now in effect. Wide-sweeping, egalitarian constitutional doctrines have been finely honed by well-prepared interest groups. Both public and private financing are in place. In the excitement and controversy that is certain to accompany these events, the origin of this new chapter should not be forgotten — Stella Bliss's determined but unsuccessful battle to claim the Unemployment Insurance benefits she thought she deserved.

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[75] See *Report of the Parliamentary Committee on Equality Rights: Equality for All* (Ottawa: Supply and Services Canada, 1985) (Chair: J.P. Boyer).

[76] See M.E. Atcheson, M. Eberts & B. Symes, *Women and Legal Action: Precedents, Resources and Strategies for the Future* (Ottawa: Canadian Advisory Council on the Status of Women, 1984) esp. at 163-72.

[77] Known as the Legal Education and Action Fund (LEAF) this organization has already raised $250,000 from private sources and been involved in five *Charter*-based cases.

[78] The 'new' Court Challenges Program is actually an expansion of a program established in February, 1978 to fund language rights cases arising under ss 93 and 133 of the *Constitution Act, 1867, supra,* note 6 and the *Manitoba Act,* (U.K.) 13 Vict., c. 3. In 1982 the Program was expanded to include litigation involving the language rights provisions of the *Charter* (*supra,* note 4, ss 16-23). On September 25, 1985, Minister of Justice John Crosbie announced that the Court Challenges Program would be further expanded to include *Charter* litigation involving s. 15 equality rights, and also ss 27 and 28 dealing with multiculturalism and sexual equality respectively. Administration of the Program has been transferred from the Secretary of State's office to the Canadian Council on Social Development to ensure independence and impartiality.

[79] For the most recent and probably most influential of the s. 15 legal commentaries, see A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

V. CONCLUSION

Supreme Court decisions, aloof from the unseemly clash of vested interests and insulated from the pressures that drive the rest of the political process, invite exegetical analysis. *Bliss*, for instance, can be understood and explained in terms of the interpretive tradition of the Supreme Court *vis-à-vis* the *Bill of Rights*. Allan MacLean, Stella Bliss's lawyer, correctly anticipated the Court's negative decision. But even this type of explanation focuses on the decision itself, ignoring its antecedents and consequences.

Our analysis of the *Bliss* case clearly shows that the insulation of the judicial process is not absolute. Stella Bliss, her lawyers, and especially her supporters from the feminist and union movements saw the court appeals as only one stage of a broader political strategy to change Unemployment Insurance. More fundamentally, they sought to roll back what they perceived as widespread sexual bias in federal legislation. In the heat of legal battle they became optimistic, and after their initial upset in 1978, set about using other means to achieve the same end. From the perspective of these groups, the judicial system is only one route, one strategy, in a broader political offensive. Indeed, as *Bliss* shows, legal defeat can sometimes become a political advantage. From an exegetial point of view, the Supreme Court's decision may have had some logical basis, but this was lost in the apparent practical absurdity of distinguishing between "pregnant and non-pregnant persons." In this case, precise legal language became easily and quickly transformed into political slogans.

This transformation was not performed by Stella Bliss or her lawyers, but by a nexus of groups prepared to support her cause. The origins of the legal dispute were entirely personal: in the Unemployment Insurance internal appeal system, Bliss even argued her own case. She lacked the resources to go further, and at this point needed to couple her personal fight with a larger political agenda. Feminist groups and trade unions saw in Bliss a symbol and an opportunity, and came to her assistance, thereby transforming a personal case into a political cause. In addition to these groups, Bliss received help from a network of civil libertarian lawyers. Singly, none of these groups and organizations was especially powerful; together they formed a substantial support structure for an assault on Unemployment Insurance.

Our analysis of the *Bliss* case compels a modest assessment of the power of the courts. If the judicial process is indeed conceived by various activist networks as only one strategic locus of political pressure, judicial decisions have no intrinsic finality. A Supreme Court decision may appear on its own merits to favour one or another side of a dispute, but the final political resolution of that dispute depends on the determination,

organization, resources, and wit of the combatants. The 1978 *Bliss* decision could not have supported the government's arguments more firmly, but Unemployment Insurance was under official review within days of the decision's release, and feminist organizations turned the decision into their trump card two years later in arguing for "equal benefit of the law." The *Canadian Charter of Rights and Freedoms* will doubtless encourage more judicial activism but it would be a mistake to assume that such activism will in itself create a regime of judicial supremacy over the legislature or executive. Court decisions will continue to be only one tributary in the broader stream of policy making.