Date: 20070809

Docket: A-346-05

Citation: 2007 FCA 265

CORAM: **NADON J.A.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

PATTI TOMASSON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 27, 2007.

Judgment delivered at Ottawa, Ontario, on August 9, 2007.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an application for judicial review of the decision of an Umpire, Krindle J., dated June 9, 2005, which dismissed the applicant's appeal from a decision of the Board of Referees (the "Board"). More particularly, the Umpire concluded that the Board had made no error in dismissing the applicant's claim for maternity benefits pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"). In so concluding, the Umpire dismissed the applicant's constitutional challenge that the maternity provisions of the Act contravened section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter").

[2] The main issue in this application is whether those provisions of the Act which grant maternity benefits only to biological mothers ("biological mothers or birth mothers") discriminate against adoptive mothers and hence violate their rights under subsection 15(1) of the Charter.

[3] For the reasons that follow, I conclude that the provisions at issue do not infringe subsection 15(1) of the Charter. In my view, in granting maternity benefits to birth mothers, Parliament rightly recognized that pregnancy and childbirth justified the granting of particular benefits by reason of the physical and psychological consequences of pregnancy.

THE FACTS

[4] The applicant and her husband adopted two children, namely, Sara, born on March 12, 1999 and Hannah, born on November 8, 2003. Both children were placed with the applicant shortly after their births.

[5] With respect to each child, the applicant applied to the Employment Insurance Commission (the "Commission") for maternity and parental benefits and on both occasions, she was granted parental benefits but was denied maternity benefits. By the time of Hannah's birth, the number of weeks in respect of which parental benefits could be paid for the care of a newborn or adopted child was 35 weeks, up from the 10 weeks which had previously been available. In all other respects, the requirements to obtain parental benefits as well as maternity benefits remained unchanged. Consequently, a biological mother can now combine 15 weeks of maternity benefits with 35 weeks

of parental benefits, allowing her to spend a total 50 weeks with her newborn child while adoptive parents, including the applicant, are limited to 35 weeks of parental benefits.

[6] At the end of each of her parental leave periods, the applicant decided to take additional unpaid time off from work, which she claims was influenced by the maternity benefits period, so as to continue the bonding process with her children.

[7] The applicant appealed the Commission's decisions denying her maternity benefits to the Board which upheld the Commission's decisions that she was not entitled to those benefits because she was not the biological mother of the children in respect of whom she claimed benefits.

[8] In the case of her first child, the applicant appealed the Board's decision to the Umpire, challenging the constitutionality of the Act on the ground that it was discriminatory against adoptive mothers. Rouleau J., the Chief Umpire designate, refused to address the Charter challenge because, in his view, the issue had already been decided by the Ontario Court of Appeal in *Schafer v. Canada (Attorney General)* (1997), 149 DLR (4^{th}) 705, (leave to appeal to the Supreme Court of Canada denied on January 29, 1998). Accordingly, the applicant was granted a hearing before Umpire W.J. Haddad, Q.C., but was not allowed by him to put forward her constitutionality argument.

[9] As a result, the applicant commenced a judicial review application of Rouleau J.'s decision before this Court. On June 27, 2002, her application was allowed, the decision of Rouleau J. was set aside and the matter was remitted back to the Chief Umpire designate for him to designate an

Umpire, other than himself and Umpire Haddad, to rehear the applicant's appeal, including the constitutionality issue.

[10] With respect to her second child, the applicant also appealed the Commission's decision to the Board which, once again, dismissed her appeal. The applicant appealed the Board's decision and both of her appeals were heard by Krindle J., whose decision of June 9, 2005 disposed of the two appeals.

THE ISSUE

[11] The issue in this application is whether the Umpire committed a reviewable error in dismissing the applicant's challenge under section 15 of the Charter.

THE RELEVANT LEGISLATION

[12] I reproduce the relevant parts of the impugned provisions of the Act.

12. (1) If a benefit period has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximums established by this section.	**12.** (1) Une fois la période de prestations établie, des prestations peuvent, à concurrence des maximums prévus au présent article, être versées au prestataire pour chaque semaine de chômage comprise dans cette période.
(2) The maximum number of weeks for which benefits may be paid in a benefit period because of a reason other than those mentioned in subsection (3) shall be determined in accordance with the table in Schedule I by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.	(2) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations — à l'exception de celles qui peuvent être versées pour l'une des raisons prévues au paragraphe (3) — est déterminé selon le tableau de l'annexe I en fonction du taux régional de chômage applicable au prestataire et du nombre d'heures pendant lesquelles il a occupé un emploi assurable au cours de sa période de référence. Maximum : prestations spéciales

(3) The maximum number of weeks for which benefits may be paid in a benefit period
(a) **because of pregnancy is 15**;
(b**) because the claimant is caring for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption is 35**;
(c) because of a prescribed illness, injury or quarantine is 15; and
(d) because the claimant is providing care or support to one or more family members described in subsection 23.1(2), is six.

(3) Le nombre maximal de semaines pendant lesquelles des prestations peuvent être versées au cours d'une période de prestations est :
a) **dans le cas d'une grossesse, quinze semaines**;
b) **dans le cas de soins à donner à un ou plusieurs nouveau-nés du prestataire ou à un ou plusieurs enfants placés chez le prestataire en vue de leur adoption, 35 semaines;**
c) dans le cas d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement, quinze semaines;
d) dans le cas de soins ou de soutien à donner à un ou plusieurs membres de la famille visés au paragraphe 23.1(2), six semaines.

(4) **The maximum number of weeks for which benefits may be paid**
(a) for a single pregnancy is 15; and
(b) for the care of one or more new-born or adopted children as a result of a single pregnancy or placement is 35.

(4) **Les prestations ne peuvent être versées pendant plus de 15 semaines, dans le cas d'une seule et même grossesse, ou plus de 35, dans le cas de soins à donner à un ou plusieurs nouveau-nés d'une même grossesse ou du placement de un ou plusieurs enfants chez le prestataire en vue de leur adoption.**

[…]

…

22. (1) Notwithstanding section 18, but subject to this section, **benefits are payable to a major attachment claimant who proves her pregnancy**

22. (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, **des prestations sont payables à la prestataire de la première catégorie qui fait la preuve de sa grossesse.**

(2) Subject to section 12, benefits are payable to a major attachment claimant under this section for each week of unemployment in the period.
(a) that begins the earlier of
(i) eight weeks before the week in which her confinement is expected, and
(ii) the week in which her confinement occurs; and
(b) that ends 17 weeks after the later of
(i) the week in which her confinement is expected, and
(ii) the week in which her confinement

(2) Sous réserve de l'article 12, les prestations prévues au présent article sont payables à une prestataire de la première catégorie pour chaque semaine de chômage comprise dans la période qui :
(a) commence :
(i) soit huit semaines avant la semaine présumée de son accouchement,
(ii) soit, si elle est antérieure, la semaine de son accouchement;
(b) se termine dix-sept semaines après
(i) soit la semaine présumée de son

occurs	accouchement,
[…]	(ii) soit, si elle est postérieure, la semaine de son accouchement
	…
(6) **If a child who is born of the claimant's pregnancy is hospitalized, the period during which benefits are payable under subsection (2) shall be extended by the number of weeks during which the child is hospitalized.**	(6) **La période durant laquelle des prestations sont payables en vertu du paragraphe (2) est prolongée du nombre de semaines d'hospitalisation de l'enfant dont la naissance est à l'origine du versement des prestations.**
23. (1) Notwithstanding section 18, but subject to this section**, benefits are payable to a major attachment claimant to care for one or more new-born children of the claimant or one or more children placed with the claimant for the purpose of adoption** under the laws governing adoption in the province in which the claimant resides.	**23.** (1) Malgré l'article 18 mais sous réserve des autres dispositions du présent article, **des prestations sont payables à un prestataire de la première catégorie qui veut prendre soin de son ou de ses nouveau-nés ou d'un ou plusieurs enfants placés chez lui en vue de leur adoption** en conformité avec les lois régissant l'adoption dans la province où il réside.
[Emphasis added]	[Je souligne]

I also reproduce subsection 15(1) of the Charter.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15. (1)** La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques

[13] By reasons of the impugned provisions of the Act, biological mothers are entitled to a total of 50 weeks of paid leave, i.e. 15 weeks as a result of the pregnancy and 35 weeks for the care of the newborn child. The maternity benefits can be taken by the biological mother, at any time, 8 weeks

before the birth of the child and 17 weeks after the birth. With respect to the 35 additional weeks, they can be used either by the biological mother or the biological father. I should point out that the maternity benefits of 15 weeks are available to the biological mother even in those instances where the child is given up for adoption or is stillborn. With respect to adopted children, the adoptive family, either the mother or the father, is entitled to 35 weeks of paid leave.

[14] The applicant challenges, under subsection 15(1) of the *Charter*, the constitutionality of those provisions on the ground that they treat biological and adoptive mothers differently. She submits that the purpose and effect of the differential treatment is to give biological mothers more time for bonding and childcare than is afforded to adoptive mothers.

THE UMPIRE'S DECISION

[15] Because of her view that she was bound by the decision of the Ontario Court of Appeal in *Schafer, supra*, which held that the provisions of the Act granting maternity benefits to biological mothers did not discriminate against adoptive mothers, Krindle J. dismissed the applicant's appeals. However, it can safely be said that had Krindle J. not been of the view that she was bound by *Schafer, supra*, she likely would have decided the issue in favour of the applicant.

[16] I should point out here that, by consent, the respondent filed, as part of the record before the Umpire, affidavit evidence originally filed in the *Schafer* case. In particular, the respondent filed the affidavits of Dr. Murray Enkin, sworn July 14, 1994 and May 21, 1995. At that time, Dr. Enkin was professor emeritus with the Department of Obstetrics and Gynecology at the Faculty of Health

Sciences, McMaster University, with an associate appointment with the Department of Clinical Epidemiology and Biostatistics.

[17] In addition to the documentary evidence adduced by the parties, the Umpire heard, *inter alia*, the oral evidence of the applicant and of Dr. Lucy Jane LeMare, a developmental psychologist.

THE APPLICANT'S SUBMISSIONS

[18] The applicant makes a number of submissions as to why this Court ought to overturn the Umpire's decision.

[19] First, the applicant submits that as the Umpire was not bound by *Schafer, supra*, she ought to have decided the case before her on the basis of the section 15 test enunciated by the Supreme Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. As a corollary to that submission, the applicant says that, in any event, *Schafer, supra*, was wrongly decided and that it contains numerous errors.

[20] To begin with, the applicant submits that in concluding that the sole purpose of the maternity benefits was to allow women to recover from pregnancy, the Ontario Court of Appeal ignored subsection 22(6) of the Act, which allows a biological mother to extend the period of maternity benefits by the length of time her child is hospitalized. Hence, according to the applicant, subsection 22(6) is inconsistent with the point of view adopted by the Ontario Court of Appeal in *Schafer, supra*, that there is a sole purpose to the maternity provisions.

[21] In that light, the applicant says, relying on the Supreme Court's decision in *Reference Re. Unemployment Insurance Act (Canada), ss. 22 and 23)*, [2005] 2 S.C.R. 669, and on subsection 22(6) of the Act, that it is clear that the maternity provisions have a dual purpose, namely, recovery and bonding/attachment, which purposes Umpire Krindle was prepared to find had she had not been of the view that she was bound by *Schafer, supra*. Specifically, the applicant refers to paragraphs 67 and 68 of the Umpire's decision, where she says:

> [67] Recovering from the effects and stresses of pregnancy and giving birth does not require the physical presence of the child with the mother. The mother's recovery from the effects of pregnancy and giving birth will continue whether or not the child is hospitalized. In all probability a mother's physical recovery would be faster if she had only her own needs to consider. What is fostered by the forgoing subsection is the ability of the mother and child to be together, the ability of the mother to be with the child and the child to be with the mother. What is fostered by the forgoing subsection is the crucial process of bonding/attaching.
>
> [67] [*sic*] Subsection 22(6) has always been part of the maternity/pregnancy benefit provisions of the Act. It was part of the benefits provisions at the time of the decision in Schafer and cannot constitute new law enacted after *Schafer*.
>
> [68] I would find, if the decision were mine to make, that the pregnancy/ maternity provisions have a two-fold purpose:
> (a) to permit a birth mother to heal from a pregnancy; and
> (b) where there is a birth mother and baby, to permit the birth-mother and baby to spend time together following the birth of the baby.

[22] As a second error in *Schafer, supra*, the applicant submits that the Ontario Court of Appeal failed to consider the effect of the maternity provisions and whether that effect was discriminatory on adoptive mothers and their children.

[23] As a third error, the applicant says that, contrary to the Supreme Court's decision in *Law, supra*, the Ontario Court of Appeal failed to consider the needs of adoptive mothers in interpreting the maternity provisions.

[24] The applicant then submits that on the basis of the test enunciated by the Supreme Court in *Law, supra*, the inevitable conclusion is that the provisions at issue discriminate against adoptive mothers and that such discrimination is not justified under section 1 of the Charter.

[25] More particularly, the applicant makes the following submissions based on the test set out in *Law, supra*:

1. The proper comparator group to adoptive mothers and their children is that of biological mothers and their children.
2. The legislation at issue imposes differential treatment between adoptive mothers and biological mothers in that the latter receive an additional benefit of 15 weeks of maternity leave in the first year of their child's life, but adoptive mothers do not.
3. Adoptive mothers are subject to differential treatment based on an analogous ground.
4. The applicant, as an adoptive mother, has faced pre-existing disadvantage. In support of this proposition, the applicant relies on the judgment of this Court in *Canada (Attorney General) v. McKenna*, [1999] 1 F.C.R. 402. The maternity benefits provisions have a purpose or effect that is discriminatory within the meaning of the Charter. At paragraph 81 of her Memorandum of Fact and Law, the applicant makes the point in the following terms:

> 81. However, having set out to provide for both birth mothers and their children, and adoptive mothers and their children, the Act does so in a manner that is discriminatory because:
> (a) The bonding and attachment process is critical to the longterm development of an infant.
> (b) The most important time for the bonding and attachment process is in the first 12 months of life.
> (c) Infants are attaching with their mothers and mothers are bonding with their infants during the maternity benefit provision and they are doing so regardless of whether the mother is healing from pregnancy.
> (d) Adopted infants and birth infants require the same amount of time for attachment forming.

> (e) but, "the legislated denial of maternity benefits to adoptive mothers in a significant percentage of cases lessens the time available in the first critical year of a child's life for an infant to attach to his or her adoptive mother and lessens the time available to an adoptive mother to bond with her adopted child" [Reasons of the Umpire, para. 39]

5. The discrimination which results from the impugned provisions impacts upon her dignity interests as a mother. At paragraph 85 of her Memorandum of Fact and Law, she makes that point as follows:

> The dignity interest at issue in this proceeding is that of motherhood. It relates to the ability of the Claimant to place herself within that designation with the same force and effect as birth mothers caring for their newborns. It relates to the ability of the Claimant to care for, nurture and bond with her daughters. It is difficult to conceive of a fundamental social institution more important than motherhood. It is equal access to that institution which the Act deprives the Claimant and her children and it cannot be reasonably argued that such a result is not contrary to the dignity interests involved.

6. The discrimination against adoptive mothers is not saved by section 1 of the Charter.

[26] For her submissions regarding the bonding and attachment process, the applicant relies on the evidence of Dr. LeMare. In particular, the applicant relies on the following passages from Dr. LeMare's affidavit of July 6, 2004:

> 7. **Bonding refers to the feelings of affection and protectiveness that parents have towards their babies**. …
>
> 8. Some mothers feel an immediate bond with their children and for others it takes longer. The same is true for adoptive mothers. In some rare instances, which apply to birth mothers and adoptive mothers, a mother never feels a strong bond to her child. Birth mothers often begin preparing to bond before their child is born when they experience fetal movement, see ultrasound images, anticipate the birth, and go through the birthing process. These experiences can engender feelings of "knowing" one's child and affection for the child. In most instances, adoptive mothers do not have the opportunity to participate in these experiences with their unborn child. The preparation to bond can begin when adoptive parents hear that they will be receiving a child, which is typically very shortly before the child actually comes home. Hence, the start of the bonding process typically occurs closer to the time of actual contact with the infant in adoptive families than in birth families.
>
> 9. Bonding is extremely important as the affectional ties a mother feels for her baby prime her to behave in a way that will promote the likelihood of the infant forming a secure attachment. Specifically, when a mother experiences strong

feelings of affection and protectiveness towards her infant, she takes pleasure in her baby and is motivated to attend to and become proficient at reading and reacting appropriately to her baby's signals. These caregiving behaviours support the development of a secure attachment on the part of the infant. In most instances, bonding occurs and intensifies during the early days, weeks and months of the infant's life during which time mothers and infants are typically in close and continuous proximity to one another. Hence, bonding and recovery from childbirth most often happen contemporaneously.

10. **Attachment refers to a very specific kind of relationship that infants form with their caregivers. The attachment process derives from the infant's inate need for safety and security.**

11. An infant's disposition to form an attachment is based in her biology and is of evolutionary significance because it maximizes the child's likelihood of survival. All babies are born ready to form attachments.

12. Early attachment behaviours include crying and smiling; both of these are behaviours whose fundamental function is to keep caregivers engaged with and in close proximity to the infant.

…

18. While selective attachment does not occur until an infant is approximately six months of age, all the caregiving that an infant has received in the first six months of life informs the quality of attachment that forms. The early months of the infant's life are a critical time for caregivers to learn about and become proficient at reading and reacting appropriately to the baby's signals. Their success at this contributes to the expectations that the infant develops regarding the availability of care and security. …

21. **If a child is adopted early in infancy there is no difference in the attachment process between adopted and biological children.**

22. A secure attachment is the ideal for all children. That is because a secure attachment helps children navigate through the developmental tasks they will encounter as they age. … In that sense, I am of the opinion that the quality of the attachments adopted children form with their parents as infants can be more important for adopted children as they enter adolescence.

23. **Research indicates that 18 months with a particular emphasis on the first 12 months, is the most important time for the formation of the attachment bond. This time frame is not generally different for adopted children if they are adopted early in infancy.**

[Emphasis added]

[27] During the course of her oral testimony, Dr. LeMare indicated that there was no difference in the bonding process between father and child and mother and child. At pages 53 and 54 of the transcript of her testimony of March 15, 2005, she gave the following evidence:

> Q. … And did I understand you to say that there is a difference between father and child and mother and child?
>
> A. I don't think I said that. There often is a difference. In our society typically it is mothers who care for infants; and because of that, typically mothers get to know their infants more quickly and possibly better than fathers do.
>
> Q. But theoretically there should be no difference.
>
> A. Theoretically if it was the father who was caring for the infant in the same way that mothers typically care for infants, we may not expect a difference.
>
> Q. Okay, and that can happen?
>
> A. That can happen, yes.

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[28] Although it goes without saying that we are not bound by *Schafer, supra*, I have concluded, after careful consideration of the reasons given by the Ontario Court of Appeal in that decision, that the conclusion reached by that Court is clearly the right one. Because I agree entirely with the Reasons given in *Schafer, supra*, I will first carefully review them, as well as those given by the British Columbia Court of Appeal in *B.C. Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Committee)* (2002), 216 D.L.R. (4th) 322, which fully endorsed *Schafer, supra*. Following that review, I will address the applicant's overall submissions, including her submission that *Schafer* is not good law by reason of the Supreme Court of Canada's decisions in *Law, supra*, and *Reference re Insurance Employment Act (Canada),supra*.

[29] I should point out that at the time that *Schafer, supra*, was heard by the Ontario Court of Appeal, the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1 (the "U.I. Act"), provided for 15 weeks of maternity benefits to biological mothers and 10 weeks of parental benefits to either biological or adoptive parents. In addition, five weeks of benefits were provided if the child suffered from a physical, psychological or emotional condition. The U.I. Act also provided for 15 weeks of sickness benefits.

[30] Commencing December 31, 2000, the parental benefits under the Act (the Act came into force on June 20, 1996) were increased from 10 weeks to 35 weeks. Both parents can share these benefits but are limited to one 35 week period.

[31] In *Schafer, supra* , the respondents, two adoptive mothers and their adopted sons, challenged, pursuant to section 15 of the Charter, those provisions of the Act which treat biological and adoptive mothers differently, namely: paragraph 11(3)*(a)* (now 12(3)*(a)*), which provided maternity benefits to biological mothers for a period of up to 15 weeks; and paragraph 11(3)*(b)* (now 12(3)*(b)*), which provided for childcare benefits to all parents, whether biological or adoptive, for a period of up to 10 weeks (now 35 weeks).

[32] The respondents argued that these provisions, by allowing a biological family 25 weeks (15 weeks + 10 weeks) of paid leave and 10 weeks only to an adoptive family, were discriminatory and in violation of section 15 of the Charter.

[33] Cameron J., the Trial Judge, in a decision reported at (1996) 29 O.R. (3d) 496 (Gen. Div.), declared that those parts of the U.I. Act which provided pregnancy and childbirth benefits were discriminatory against adoptive parents and adopted children contrary to subsection 15(1) of the Charter, and that the provisions were not saved by section 1 of the Charter.

[34] The Ontario Court of Appeal began its analysis by a review of the legislative history of the U.I. Act which came into force in 1940, the purpose of which was to provide benefits to an unemployed person, capable of work and in search of work. Hence, the case law established a presumption that because a pregnant woman was not physically capable of working for a period of six weeks prior to the expected birth and for six weeks after the birth, she was not entitled to benefits unless she could rebut the presumption.

[35] In 1971, because of the increasing role of women in the workforce, the U.I. Act was amended to provide maternity benefits of 15 weeks, which had to commence eight weeks prior to the expected birth and which had to end six weeks after the birth.

[36] In 1976, the U.I. Act was again amended to make the 15 weeks of benefits payable at any time during a 26-week period, beginning eight weeks before the expected birth and terminating 17 weeks after birth.

[37] In 1984, a further amendment came into force so as to provide 15 weeks of parental benefits for the use of either adoptive mothers or fathers. By reason of the coming into force of section 15 of the Charter in April 1985, these provisions were successfully challenged in *Schachter v. Canada*,

[1988] 3 F.C. 515. In that case, Mr. Schachter sought a declaration that the parental benefits of 15 weeks were discriminatory in that he, as a biological father, was not entitled to them.

[38] Strayer J. (as he then was) concluded that the legislation discriminated against Mr. Schachter on the basis of his sex. He accordingly "read into" the U.I. Act a provision giving biological parents the same childcare benefits that adoptive parents were entitled to under the legislation. Strayer J.'s decision was appealed to the Supreme Court of Canada but, before the case was heard, the U.I. Act was amended so as to provide for ten weeks (the benefit was reduced by Parliament from 15 weeks to ten weeks) of parental benefits available to either biological or adoptive parents.

[39] After carefully reviewing the reasons given by Cameron J. in concluding that the provisions of the U.I. Act which provided for pregnancy and childbirth benefits discriminated against adoptive parents and adopted children, the Court of Appeal turned to the issues before it.

[40] First, the Court of Appeal enquired into the purpose of the maternity and childcare benefits. It had no difficulty concluding that the purpose of these benefits was to protect women who work from the economic costs of pregnancy and childbirth. In the Court's opinion, the first judge had erred in concluding that the purpose of the maternity benefits was that of supporting family formation. In the Court's view, the focus of the U.I. Act was not the formation of families, but the circumstances surrounding employment and unemployment. In that light, Austin J.A., writing for the Court in *Schafer, supra*, said at para. 37:

> 37. The original maternity benefit in the 1971 legislation was Parliament's response to what it was as the special needs of birth mothers, including those who give up their children for adoption**. Parliament provided a comprehensive arrangement to protect the income, job security and promotion of women in the workplace who become pregnant.** The purpose of the 1984 amendment was to do the same for women who adopt children. The specific purpose of both the 1971 and 1984 legislation was to provide partial replacement of income while out of the workplace, either by reason of pregnancy and childbirth or by reason of child care.
>
> [Emphasis added]

[41] Following this conclusion, the Court of Appeal turned to the second issue before it, namely, whether the existing scheme of maternity benefits and childcare benefits violated subsection 15(1) of the Charter.

[42] The Ontario Court of Appeal proceeded on the basis of the test enunciated by the Supreme Court of Canada in *Miron v. Trudel*, [1995] 2 S.C.R. 418. That test was summarized by the Court of Appeal at para. 39 of its Reasons as follows:

> (a) Does the Act distinguish between the claimant and others so as to deny the claimant one or more of the equality rights protected by s. 15(1)?
> (b) Is this denial of equality discriminatory? This requires the court to consider whether the distinction is:
> i. based upon an enumerated or analogous ground; and
> ii. contrary to the purpose of s. 15(1).

[43] After indicating its agreement with Cameron J. that the discrimination analysis could not be focused on the adoptive family but rather on a comparison between biological and adoptive mothers, the Court then addressed the first leg of the test, i.e. whether a distinction existed between the claimant and others resulting in a denial of equality before or under the law, or equal protection or benefit of the law.

[44] In answer to that question, the Court stated in unequivocal terms that the legislation made a distinction between biological and adoptive mothers and that as a result of that distinction, adoptive mothers were denied the same benefits as those available to biological mothers. Consequently, the claimants had established that they were denied equal benefit of the law.

[45] The Court then turned to the question of whether the distinction was discriminatory. It first asked itself whether the distinction was based upon an enumerated or analogous ground. Although he was not convinced that women who adopted children did so by reason of a personal characteristic that was immutable or changeable only at an unacceptable personal cost, or that adoptive women constituted a minority that was discrete in the sense of separate or discernible, or that adoptive parents had suffered historical and legal disadvantages as a result of their status, Austin J. nonetheless assumed, without deciding the question, that the status of adoptive mothers constituted an analogous ground.

[46] The Court of Appeal then dealt with the question of whether the distinction between biological and adoptive mothers violated subsection 15(1) of the Charter. It began its analysis of that question by quoting with approval that part of Cameron J.'s Reasons, found at page 528, where he stated:

> … does the impugned legislative provision violate the purpose of s. (15(1), namely, to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens based on the stereotypical application of group characteristics?

[47] The Court noted that Cameron J.'s words correctly reflected what had been said by McIntyre J. at pages 168-169 and 174-175 of his Reasons in *Andrews v. Law Society of British Columbia*, [1989]1 S.C.R. 143,

> It is, of course, obvious that legislatures may – and to govern effectively – must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society**. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.** (pp. 168-169)
>
> …
>
> **Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.** (pp. 174-175).
>
> [Emphasis added]

and by McLachlin J. (as she then was) at page 429 of her Reasons in *Miron, supra*,

> … **exceptionally** it may be concluded that the denial of equality on the enumerated or analogous ground does not violate the purpose of sec. 15(1) – to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics, **rather than on the basis of merit, capacity or circumstances.**
>
> [Emphasis added]

[48] As an example of the kind of exceptions envisioned in *Miron, supra*, the Court of Appeal referred to the Supreme Court's decisions in *R. v. Hess, R. v. Nguyen*, [1990] 2 S.C.R. 906, and *Weatherall v. Canada (Attorney General of Canada)*, [1993] 2 S.C.R. 872, where the Supreme Court, notwithstanding a legislative distinction based upon an enumerated ground, held that there was no discrimination contrary to subsection 15(1) of the Charter because the distinction was based

on capacity or circumstances rather than upon the stereotypical application of presumed group characteristics.

[49] The Court of Appeal made the point that what these cases showed was that "a biological reality removed the distinction drawn from the ambit of section 15(1)" (para. 59 of the Court of Appeal's Reasons). The Court then went on to say that a similar analysis applied in the case before it in that pregnancy and childbirth, which only biological mothers experience, constituted an inescapable biological reality. Thus, in the Court's view, compensating biological mothers for loss of work by reason of their pregnancy and childbirth could not constitute discrimination.

[50] The Court then turned to an argument put forward by the respondents (Mr. and Mrs. Schafer) and the intervener, the Adoption Council for Ontario, that a maternity benefit period of 15 weeks exceeded the physiological needs of most biological mothers and that an average of 4 to 6 weeks was sufficient for biological mothers to cope with the physical consequences of pregnancy and childbirth and that, as a result, paragraph 11(3) [now 12(3)] of the Act went beyond the specific circumstances of biological mothers. Hence, in that light, paragraph 11(3) did not fall within the exceptions alluded to by McLachlin J. in *Miron*, *supra*. On the basis of that submission, the respondents and the Adoption Council for Ontario argued that the purpose and/or effect of those weeks which were not required to meet the physical demands of pregnancy and childbirth gave biological mothers additional time to bond with their children, which time was not afforded to adoptive mothers.

[51] The Court of Appeal dealt with these submissions as follows. First, the Court opined that although pregnancy was not an illness, it had many of its physical characteristics, i.e. nausea, fatigue, vomiting, backache, fluid retention, vaginal discharge, varicose veins and nerve entrapment syndromes. It further said that not only was anxiety concerning the forthcoming labour a source of distress for the biological mother, she faced additional problems in the case of either an abnormal or difficult pregnancy, i.e. multiple pregnancy, diabetes, pre-eclampsia and bleeding. The Court also alluded to the fact that approximately one-fifth of deliveries in Canada were carried out by caesarian section which requires anesthesia and major abdominal surgery. It also pointed out that vaginal birth often requires an episiotomy or perineal laceration, the pain and discomfort of which often lasts for weeks and months.

[52] For these findings, it can safely be said that the Court of Appeal relied in great part on the evidence of Dr. Murray Enkin, whose affidavits of July 14, 1994 and May 21, 1995 were before Umpire Krindle. In particular, the following passages from Dr. Enkin's affidavit of July 14, 1994 appear highly relevant:

> **LABOUR AND CHILDBIRTH**
>
> 29. Labour and childbirth exact their toll to a different degree in different women. Some labours are short and relatively easy. Others are prolonged and exhausting. Approximately one fifth of deliveries in Canada today are carried out by Caesarian section, which adds the additional strain of an anaesthetic and a major abdominal surgical operation. Vaginal birth is often accompanied by an episiotomy or perineal laceration, with subsequent pain and discomfort, which persist for weeks or months. Almost 50% of Ontario births involve an episiotomy, with the rate for different hospitals varying from 1% to 99%. Less than 10% of women giving birth in hospitals escape with an intact perineum.
>
> **POST-DELIVERY**
>
> 30. The time after birth is marked by profound physical, hormonal, and psychological changes. The enormous metabolic changes that took place over the months of pregnancy must be reversed in a matter of days or weeks. The uterus

> must involute, shrink back to its prepregnant size, and all that tissue must be absorbed. The placental site must heal.
>
> 31. The traditional six weeks time for a post-partum examination is an arbitrary one, and it cannot be assumed that the woman's body has resumed its non-pregnant state or is fully functional by that time. Many women are still suffering the effects of pregnancy and the trauma of delivery at that time, and for some time after. Prospective studies have shown that breast symptoms, vaginal discomfort, fatigue, haemorrhoids, poor appetite, constipation, dizziness, depression and sexual difficulties may persist for long periods after giving birth.
>
> 32. Sleep deprivation and the acceptance of new responsibilities for infant care are among the burdens of new parenting, and are shared by all new parents. It is for this reason that parental leave from employment responsibilities is required in addition to maternity leave. It is reasonable to assume that for biological mothers the burdens of new parenthood may be all the more difficult to cope with when they are added to the already present burdens of recovery from pregnancy and childbirth.
>
> 33. In addition, biological mothers require a period following childbirth to establish and maintain breastfeeding for their newborn child. I have reviewed the affidavit of Karyn Kaufman, and I agree with her assessment with respect to this aspect of post-natal recovery.

[53] These findings led the Court to the view that it was far from obvious that the 15 weeks of maternity benefits were not justified. In the Court's opinion, choosing an appropriate period of recovery was clearly arbitrary and that in fixing the maternity benefits at 15 weeks, it was clearly open to Parliament to include within the scheme the greatest number of women in the workforce. Consequently, in the Court's opinion, the fact that not every single pregnant woman required 15 weeks away from work was not sufficient to render the legislation unconstitutional. In support of this view, the following paragraphs from Dr. Enkin's affidavit of May 23, 1995 are apposite:

> **Post-partum period**
>
> 10. I agree with Dr. Hannah that recovery from pregnancy is a poorly defined concept, and that the 6 week accepted period for follow-up examination of the mother is arbitrary. I also agree that the 6 week definition is not to be interpreted as an indication of when a woman may resume full activities.
>
> 11. I disagree however with Dr. Hannah's interpretation of this as meaning that most women are in physical condition to full activities in less than 6 weeks. On the contrary, even a so-called normal delivery (experienced by very few women today) results in a major metabolic stress, which requires a variable but usually lengthy period of time to fully recover. The extent to which this metabolic stress manifests

> itself in biologically measurable outcomes will depend on the intensity with which these outcomes are searched for. In any case, I would suggest these pathophysiological manifestations are not important in and of themselves. The important consideration is how the woman feels. Some women recover quickly, others will take much longer.
>
> …
>
> 14. I agree with Dr. Hannah that it has always been difficult to differentiate, in the case of a woman who has given birth, the role played by the demands of her newborn and the normal recovery process itself. It will always be difficult to do so, because comparisons among women in different situations are biased by the number of confounding factors which render such comparisons invalid. More importantly, however, it would be a futile exercise to even attempt to make such a differentiation. The difficulties experienced by new biologic mothers result from the combinations and interactions of physiological recovery and the demands of caregiving to the new infant.
>
> 15. The fact that some women can and do return to outside employment early tells us nothing about what most women can, or should do. The purpose of maternity leave is for the benefit of the mother, to allow her time to recover in accord with her own needs. To be effective, it must be adequate and flexible, because mothers' needs differ. That the baby will also benefit from this is inevitable, but incidental. Dr. Hannah does not advocate the reduction of maternity benefits.
>
> …
>
> 17. Dr. Hannah's affidavit in summary shows that it is possible for some women to work right up to labour, and to return to work right after delivery. I do not dispute this. But for the majority of women, who would not describe their pregnancy as "uneventful", who either have symptoms or complications during the pregnancy, or undergo various forms of birth trauma, a period of maternity leave provides major health benefits to the mother, with collateral benefits for the baby. Parental leave, which is the same for biological and adoptive parents, primarily provides benefits for the baby, with collateral benefits to the parents.

[54] At paragraphs 68, 69 and 70, the Court summarized its rationale for concluding as it did in the following terms:

> ¶ 68 To summarize, **it is not necessarily discriminatory for governments to treat biological mothers differently from other parents, including adoptive parents. In order to cope with the physiological changes that occur during childbearing, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period.** Indeed, such leave provisions may be necessary in order to ensure the equality of women generally, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination: *see Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

> ¶ 69 **None of this is to deny the respondents' submission that adoptive mothers also face profound challenges in adopting and caring for their children.** The decision to adopt often follows unsuccessful and difficult attempts to conceive a child biologically. The adoption process itself is rife with anxiety and stress as prospective parents are subjected to an invasive background check. An agonizing wait follows. The adoptive parents can have as little as 48 hours' notice of their child's arrival. The anxiety does not end with the child's placement. In addition to the universal demands of parenting a new child, adoptive parents may have to endure a 21-day waiting period during which the birth mother may change her mind about placing her child for adoption. Finally, with many placements of adopted children, there is a six-month probationary period during which the adoptive parents are under close scrutiny. International adoptions are at least equally complicated, often involving extended and multiple periods away from home.
>
> ¶ 70 **However, as severe and distressing as these problems may be, they are not the same problems facing biological mothers.** No doubt adoptive parents would put the extra 15 weeks of paid leave to excellent use in preparing and caring for their newly arrived child, but the purpose of the pregnancy leave benefit is not to provide income support to parents who care for their children. It is to provide a flexible system of income support to women who need time away from work because of pregnancy and childbirth. [Emphasis added]

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

[55] I now turn to the British Columbia Court of Appeal's decision in *B.C. Government and Service Employees' Union, supra.*

[56] Before the Court of Appeal was the question of whether the granting of leave benefits to an adoptive mother for a period that was less than the period she would have been entitled to, had she been a biological mother, infringed an employee's rights under a collective agreement. More particularly, under the collective agreement, as integrated under its terms with the *Employment Insurance Act*, both biological and adoptive mothers were entitled to 29 weeks of leave without pay, but the biological mother received employment insurance benefits and a collective agreement supplement for 27 weeks, while the adoptive mother received such benefits only for ten weeks.

[57] By the time the matter was heard by the British Columbia Court of Appeal, the Supreme Court of Canada had rendered its decision in *Law v. Canada, supra*. As a result, that decision's analytical framework was the one which the Court of Appeal adopted.

[58] In *B.C. Government and Service Employees, Union, supra,* the employee and her union argued that the differential treatment between biological and adoptive mothers amounted to discrimination. Specifically, a grievance was brought by the Union on behalf of the employee on the ground that the failure to provide her with an allowance equivalent to the maternity leave allowance constituted discrimination on the basis of family status, contrary to subsection 13(1) of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 270.

[59] Although he found the Union's argument attractive, the arbitrator decided to follow the Ontario Court of Appeal's decision in *Schafer, supra,* and, as a result, he dismissed the grievance. That decision was appealed by the Union.

[60] Before the Court of Appeal, the Union argued that the arbitrator had erred in not concluding that the distinction made between biological and adoptive mothers was discriminatory and that the arbitrator ought not to have followed *Schafer, supra*, because recent Supreme Court of Canada decisions clearly demonstrated that the *Schafer, supra*, analysis was incomplete. The Union also argued that in any event, the arbitrator, not bound by *Schafer, supra*, ought not to have followed it.

[61] The Court of Appeal dismissed the appeal and its Reasons for so concluding can be summarized as follows.

[62] First, the Court of Appeal agreed with the view expressed by Mr. Justice Laskin of the Ontario Court of Appeal in *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* (2002), 212 D.L.R. (4th) 633, that the analytical framework for determining whether a violation of section 15 of the Charter had occurred was the framework enunciated by the Supreme Court in *Law, supra*. In the Court's view, the test enunciated in *Law, supra*, also governed whether a violation of section 13 of the British Columbia *Human Rights Code* had occurred.

[63] In expressing that view, the Court of Appeal referred to the reasons given by Mr. Justice Iacobucci at page 547 of his Reasons in *Law, supra*, and pointed out that the analytical framework enunciated in that case did not "consist of a series of strict tests but rather a cluster of points of reference" (paragraph 12 of the Court of Appeal's Reasons).

[64] The Court of Appeal then pointed out that on the basis of that cluster of points, counsel for the parties had made different and conflicting submissions. At paragraphs 14 and 15 of his Reasons for the Court of Appeal, Lambert J.A. sets out their respective submissions:

> 14 Counsel for the Union and Ms. Reaney said that the purpose of the Maternity Leave, the Adoption Leave, the Parenting Leave, the Maternity Allowance, and the Parenting Allowance, was one single purpose, namely, to aid in family formation. He said that if we accepted that purpose for the provisions, then the differential treatment under the Leave and Allowance provisions between biological mothers and adopting mothers amounts to discrimination against adopting mothers in relation to family status affecting family formation.
>
> 15 Counsel for the Crown said that the purpose of the Maternity Leave, Maternity Allowance, Parenting Leave and Parenting Allowance was to protect the health and well being of biological mothers while they are undergoing the specific processes involved in giving birth and in recovering from giving birth, so that they can leave the work place smoothly and return smoothly. He said that the purpose of

> the Adoption Leave, Parenting Leave and Parenting Allowance was to protect the health and well being of adopting parents (not only mothers) as well as birth parents, while undergoing the specific but different processes involved in adopting a child so that the adopting parent may introduce the adopted child to his or her new home and circumstances with a minimum of stress, and to provide for a smooth re-entry by the adopting parent into the work force.

[65] A reading of these paragraphs makes it quite clear that the submissions before the B.C. Court of Appeal were very similar to the ones made before the Court of Appeal in *Schafer, supra*, and to those made by the applicant in the present matter.

[66] The Court of Appeal then went on to state the question at issue in the appeal, namely, what was the purpose of the maternity leave and maternity allowance provisions found in the collective agreement. At paragraph 17 of his Reasons, Lambert J.A. provided the following answer:

> 17 In my opinion the purpose of the Maternity Leave and Maternity Allowance provisions, when seen in their context**, is not the encouragement of family formation** but, rather, protecting the health and well being of pregnant women and new biological mothers, (not simply new parents), while undergoing the health and other stresses of giving birth and recovering from giving birth, so that they can reasonably effectively return to the work force.
>
> [Emphasis added]

[67] Lambert J.A. gave a number of reasons in support of his conclusion. First, he made it clear that he agreed entirely with the Reasons in *Schafer, supra*, that there was a significant difference between the health and stress problems suffered by biological mothers and those suffered by adoptive mothers. In making that point, he specifically referred to paragraph 61 of the Reasons given by Austin J.A. in *Schafer, supra*, which I have summarized at paragraph 51 of these Reasons.

[68] Second, he referred to the legislative history of the Act set out in *Schafer, supra*, at paragraphs 9 to 23 thereof, which show that the maternity provisions of the Act were enacted to compensate biological mothers "for the incapacity of pregnancy and childbirth in relation to leaving the workforce and returning again after the process of biological childbirth" (paragraph 18 of the Reasons).

[69] Third, as only pregnant women can benefit from the maternity leave provisions, the provisions clearly relate to pregnancy and childbirth. Consequently, if the purpose of the provisions was to encourage or bolster family formation, not only would there be discrimination against adoptive mothers, but also against biological and adoptive fathers.

[70] Fourth, the fact that the maternity leave provisions are also available to mothers who, following the birth of their child, give it up for adoption also supports the view that it is the effect on employment of the pregnancy and the birthing process, and not the effect on employment of the family formation process, which is the purpose of the provisions.

[71] Lastly, the Court points out that children may be adopted at any age, and therefore adoption is distinguishable from the pregnancy and birthing process relating to biological childbirth.

[72] After setting out the reasons for his conclusion, Lambert J.A. again made it clear that he was in full agreement with *Schafer, supra*. He then emphasized that it was important for purposes of judicial comity that the law should be consistent throughout the country and that, as a result, he would not depart from *Schafer, supra*, unless satisfied that it was wrongly decided or that there had

been a change in the law following that decision. He concluded that *Schafer, supra,* had not been wrongly decided and that no change in the law had occurred since that decision had been rendered.

ANALYSIS

[73] In my view, the Reasons given by both Courts of Appeal in *Schafer, supra,* and *B.C. Government and Service Employees' Union, supra*, provide, for the most part, a complete answer to the applicant's submissions. In my opinion, these Reasons satisfactorily demonstrate that the provisions at issue do not substantially discriminate against adoptive mothers and that, as a result, the provisions do not infringe section 15 of the Charter.

[74] Notwithstanding this conclusion, I will nonetheless apply the test set out in *Law, supra,* and deal with the applicant's submissions.

[75] Relying on the Supreme Court's decision in *Reference re Insurance Employment Act, supra,* and on subsection 22(6) of the Act, the applicant urges us to conclude that while the primary purpose of the maternity benefits is to provide women with income replacement as they recover from pregnancy and childbirth, the benefits have the further purpose or effect of allowing biological mothers and their children attachment and bonding time. The applicant then says that with those purposes in mind, the application of the section 15 test enunciated by the Supreme Court in *Law, supra*, leads to the conclusion that the impugned provisions clearly discriminate against adoptive mothers, i.e. in that their dignity as mothers is demeaned.

[76] I therefore now turn to the test enunciated by the Supreme Court in *Law, supra,* and whether the application of that test leads to the conclusion that the applicant's Charter rights have been violated. Under that test, the applicant must satisfy the Court that:

(a) the impugned law imposes differential treatment between her and others in purpose or effect;

(b) the differential treatment is based on an enumerated or analogous ground of discrimination;

(c) the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

[77] In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, at paragraphs 22 to 25, the Supreme Court explained the test set out in *Law, supra*, in the following terms:

> 22 The dual requirements of *Andrews, supra,* and *Eldridge, supra,* were broken into three requirements *in Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 88: (1) differential treatment under the law; (2) on the basis of an enumerated or analogous ground; (3) which constitutes discrimination.
>
> 23 **There is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1). It is the words of the provision that must guide. Different cases will raise different issues.** In this case, as will be discussed, an issue arises as to whether the benefit claimed is one provided by the law. The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met.
>
> 24 **A complicating factor is that however one states the requirements for s. 15(1), they inevitably overlap.** For example, the nature of the benefit, the enumerated or analogous ground at issue, and the choice of a correct comparator play a role in all three steps: see *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65. Frameworks thus do not describe discreet linear steps; rather, they serve as a guide to ensure that the language and purpose of s. 15(1) are respected.
>
> 25 **Whatever framework is used, an overly technical approach to s. 15(1) is to be avoided.** In *Andrews, supra,* at pp. 168-69, McIntyre J. warned against adopting a narrow, formalistic analytical approach, and stressed the need to look at equality issues substantively and contextually. **The Court must look at the reality**

> **of the situation and assess whether there has been discriminatory treatment having regard to the purpose of s. 15(1), which is to prevent the perpetuation of pre-existing disadvantage through unequal treatment.**
>
> [Emphasis added]

[78] The first leg of the test is to determine whether the legislation imposes a differential treatment between the claimant and others, in purpose or effect.

The Comparator Group:

[79] The Court of Appeal in *Schafer, supra*, concluded that the proper comparator groups were those of biological mothers and adoptive mothers. The respondent urges us to conclude that these groups are not proper comparators and that, as a result, "the applicant cannot bring herself within the universe of beneficiaries and her claim must fail from the outset" (para. 53 of the respondent's Memorandum of Fact and Law). In the alternative, the respondent submits that the appropriate group to be compared with biological mothers is the group consisting of "all parents who choose to care for newborn children or children placed for adoption" (para. 55 of the Respondent's Memorandum). Notwithstanding these submissions, I am prepared to assume for the present purposes that the proper comparison is that between biological mothers and adoptive mothers.

Differential Treatment:

[80] It is undeniable that the impugned provisions do make a distinction between biological and adoptive mothers. Thus, the Act clearly denies equal treatment to both groups. Because the distinction made between these two groups is apparent on the face of the legislation, I agree entirely

with the respondent that an inquiry into the "effects" of the legislation at this stage of the test is not necessary.

Enumerated or Analogous Ground:

[81] The second leg of the test calls for a determination of whether the status of adoptive mother constitutes an analogous ground to those enumerated in subsection 15(1) of the Charter. Because I conclude, on other grounds, that the applicant's Charter rights have not been violated, I need not come to a conclusion on this point.

Purpose and Effect:

[82] The object of the third leg of the test is to determine whether the differential treatment which results from the impugned provisions has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The question is thus whether a reasonable person, in circumstances similar to those of the applicant and taking into account all of the contextual factors relevant to the matter, would conclude that the impugned provisions, either in purpose or effect, demean the applicant's human dignity.

[83] I begin by examining the legislation. In this regard, the parties are in agreement that while the maternity benefits provide income replacement to birth mothers while they are recovering from pregnancy and childbirth, the parental benefits provide for income replacement to all parents in the initial stages of child rearing.

[84] However, to repeat myself, the applicant submits that the maternity benefits scheme is discriminatory of her section 15 rights because it serves a second distinct purpose or effect in allowing birth mothers and baby to spend time together after the birth. For this proposition, the applicant relies on the Supreme Court's decision in *Reference re. Employment Insurance Act, supra,* and on subsection 22(6) of the Act, which extends the maternity benefits in those cases where the child born of the mother's pregnancy is hospitalized.

[85] I will address firstly the respondent's submissions based on the Supreme Court's decision in *Reference re Employment Insurance Act, supra*.

[86] Before the Supreme Court in that case was the constitutional validity of sections 22 and 23 of the Act. The Quebec Court of Appeal, in answer to an application by the Government of Quebec for an opinion under the *Court of Appeal Reference Act*, R.S.Q., CR-23, section 1, found sections 22 and 23 to be unconstitutional because the matters to which those provisions applied were under provincial jurisdiction.

[87] On appeal to the Supreme Court of Canada, the Quebec Court of Appeal's decision was overturned. First, the Supreme Court found that the primary purpose of the impugned provisions was to provide women who lost their employment income because of pregnancy with income replacement benefits. This, in the Court's view, was clearly ascertainable from the text of the provisions.

[88] The Supreme Court then turned to the effect of the provisions, which it explained at paragraphs 28 and 29 of its Reasons in the following terms:

> 28 In the instant case, the effect of the provision is to enable insured pregnant women to have access to financial resources at a time when they are not receiving their employment income.
>
> 29 However, these resources also make it possible for them to take time off work for physiological reasons associated with their pregnancies, and to take care of their families for longer periods than if they were compelled to return to work early because they were impecunious. **The primary effect is therefore to replace, in part, these women's employment income, but the secondary effect is to enable them to prepare for childbirth, to recover physiologically and to have a period of time to take care of their families.**
>
> [Emphasis added]

[89] Thus, in the Court's view, Parliament clearly intended to replace earnings interrupted by pregnancy which, no doubt, was the prime effect of the provisions. This led the Court to reject the argument put forward by the Attorney General of Quebec that the purpose of the maternity benefits was to support families and to enable women to care for their children at the time of their birth. Not only did the Act not grant any leave period, but maternity leave was governed by legislation other than the Act and by private arrangements made between employers and employees. Hence, even though support for families and the ability to care for children may well be one of the effects of the provisions at issue, that was clearly not the pith and substance of the legislation. In the Court's opinion:

> [35] … The fundamental objective of the maternity benefits plan is to protect the workers' incomes from the time when they lose or cease to hold their employment to the time when they return to the labour market.

[90] This led the Court to ultimately conclude, at paragraph 68 of its Reasons, that the maternity benefits were a mechanism for providing replacement income during a period of interrupted work.

This, in the Court's view, was clearly within the pith and substance of Parliament's jurisdiction over employment insurance, the purpose of which was to protect workers' economic security and to ensure their return to the labour market. Consequently, the impugned provisions were not invalid.

[91] Finally, the Court came to a similar conclusion with respect to the parental benefits provided under the Act. At paragraphs 74 and 75, the Court stated:

> 74 As in the case of maternity benefits, the right of claimants to take time off work is governed not by the EIA, but by provincial legislation*: Act respecting labour standards*, s. 81.10.
>
> 75 I therefore find that parental benefits, like maternity benefits, are in pith and substance a mechanism for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child, and that it can be concluded from their pith and substance that Parliament may rely on the jurisdiction assigned to it under s. 91(2A) of the *Constitution Act, 1867*.

[92] I agree entirely with the respondent's submission that the Supreme Court's decision in *Reference re Employment Insurance Act, supra*, is of no help to the applicant in respect of her section 15 arguments. The primary and secondary effects which are discussed by the Supreme Court in that case are obviously of significance with respect to the issue of whether the legislation was "in pith and substance" within Parliament's jurisdiction over employment insurance. However, the same cannot be said with regard to the issue before us, i.e. the distinction made by the legislation between biological and adoptive mothers and, for that matter, adoptive fathers.

[93] The "effects" which Deschamps, J. discusses in her Reasons in *Reference re Employment Insurance Act, supra*, are unrelated to the section 15 equality analysis, the purpose of which is to determine whether the impugned provisions, in making a distinction on an enumerated or analogous ground, violate in purpose or effect the dignity of a claimant. The fact that the provisions at issue

have “effects” that fall outside the legislation’s “pith and substance” is, in my respectful view, of no relevance to the section 15 issue.

[94] With respect to subsection 22(6), the applicant contends that the biological mother’s recovery from pregnancy and childbirth will continue, regardless of whether the child is hospitalized, and that recovery would be faster if she only had to take care of herself. This was the view put forward by Umpire Krindle in her decision.

[95] It is far from obvious to me what Parliament’s intention was in enacting subsection 22(6). However, one possible interpretation and, in my view, probably the better one, is that Parliament wished to recognize the fact that the recovery process of birth mothers was affected when their newborn children were hospitalized, possibly because of the stress and anxiety which the hospitalization might cause. That interpretation is the one which flows from reading subsection 22(6) in the context of the Act as a whole.

[96] In a *Special Report to Parliament on Income Replacement Benefits for New Parents* (Ottawa: Canadian Human Rights Commission, 1987), the Canadian Human Rights Commission described the purpose of the maternity benefits under the Act as a way to “provide income replacement for the period surrounding childbirth when, because of her [the mother] physiological condition, she must stay away from her [the mother] job” (p. 3 of the Special Report). The Human Rights Commission, which dealt specifically with concerns with regard to the nature of unemployment insurance maternity and adoption benefits (as they were then named), further stated at pages 6 and 7:

> Maternity benefits are payable exclusively to the biological mother as they represent income replacement for her unique physiological needs resulting from pregnancy and childbirth.
>
> (…)
>
> Clearly, adoptive parents do not require income support for circumstances relating to pregnancy or childbirth. They do share with biological parents, however, an undeniable need for income replacement for the period during which intensive case and nurturing must be provided to a new child.

[97] The legislative history of the Act also points to the fact that the maternity benefits were intended for birth mothers, while the parental benefits were intended for mothers or fathers, either natural or adoptive. In fact, before the enactment of the adoption benefits in 1983, maternity benefits had been introduced exclusively to protect birth mothers from an earning interruption due to their physical incapacity to work after childbirth. In 1983, with the enactment of the adoption benefits, Parliament recognized the need for adoptive parents to care for their newly arrived child. In 1988, those benefits were extended to all biological parents and were renamed parental benefits (see *Schachter, supra*).

[98] This, in my view, clearly shows Parliament's intention to distinguish between two distinct purposes, namely, recovery and childcare, by creating two distinct sets of benefits. Had the maternity benefits been intended for caring and bonding, there would have been no need to include birth mothers in the scope of parental benefits.

[99] Another persuasive indication that the purpose of the maternity benefits provisions is to support the mother's recovery from pregnancy and childbirth is the fact that the benefits are also available to birth mothers who give up their children for adoption. Consistent with the view that

maternity benefits are intended to alleviate the physiological and psychological limitations resulting from pregnancy and childbirth is the fact that birth mothers may claim up to eight weeks prior to the expected date of birth.

[100] I conclude on this point that the purpose of the maternity benefits provisions of the Act is to replace the income of insured pregnant women and biological mothers while they undergo the health and other stress of giving and recovering from birth. As a result, these women suffer no disadvantage when they return to the workforce. Hence, the purpose of the provisions is clearly not the encouragement of bonding or attachment. The focus of the legislation, taken as a whole, concerns the circumstances surrounding employment and unemployment.

[101] Having identified the specific and exclusive purpose of the maternity benefits, namely, the protection of women from the economic costs of pregnancy and childbirth, the next issue is to determine whether the distinction between birth and adoptive mothers amounts to a violation of the latter's human dignity by imposing restrictions or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on merit or circumstances (See: *Miron, supra*, at 492).

[102] In *Law, supra*, the Supreme Court sets out four factors which should be examined in order to determine whether legislation is discriminatory, namely: (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (ii) correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; (iii) ameliorative purpose or

effects of the impugned law upon a more disadvantaged person or group in society; and (iv) nature and scope of the interest affected by the impugned law.

[103] At paragraph 29 of its Reasons in *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, the Supreme Court made the following comments regarding these factors:

> 29. To answer this question, we must consider the four factors set out in *Law*. None of these factors is a prerequisite for finding discrimination, and not all factors will apply in every case. The list of factors is neither absolute nor exhaustive. In addition, the factors may overlap, since they are designed to illuminate the relevant, contextual considerations surrounding a challenged distinction. Nonetheless, the four factors provide a useful guide to evaluating an allegation of discrimination, …

[104] I now turn to the first factor.

1. Pre-existing Disadvantage:

[105] This factor involves a consideration of whether the claimant group has experienced pre-existing disadvantage, stereotyping, prejudice or vulnerability.

[106] The evidence before us has not convinced me that adoptive mothers have historically suffered disadvantage, stereotyping, prejudice or vulnerability in the past. In fact, no evidence has been put forward to support that point of view. Further, the applicant has not shown that the legislation at issue is itself functioning by device of stereotypes (see: *Lovelace v. Ontario*, [2001] 1 S.C.R. 950, at para. 73).

[107] To the contrary, the legislative amendments of 1983, pursuant to which the then adoptive benefits were enacted, gave adoptive mothers (or adoptive fathers) 15 weeks of benefits, i.e. the

equivalent of those weeks of paid leave which, until then, had only been available to biological mothers. While it is true that in 1988, as a result of Mr. Justice Strayer's decision in *Schachter*, *supra*, and by reason of the concerns submitted to Parliament by the Canadian Human Rights Commission, biological mothers (or fathers) were given benefits equivalent to those given to adoptive mothers, it cannot be said that the situation of adoptive mothers and their important role in caring for their adopted children has not been an important concern on the part of Parliament.

[108] In that regard, it is worth emphasizing what the Human Rights Commission said in its 1987 Special Report to Parliament at pages 6-7:

> Unemployment Insurance Benefits (as they were then called) have always been paid only to the biological mother, and were clearly introduced to respond to her special needs. Had they been intended, even in part, for the childcare purposes they would have been available, at least in part, to either parents.
>
> Lately, the government itself continues to support this interpretation. After close scrutiny to ensure compliance with the Charter, the government affirmed that maternity benefits are exclusively for the mother.

[109] In light of this Report and the legislative history of the UI Act, there can be no doubt that consideration was given by Parliament to the particular situation of adoptive mothers in order to ensure that their human dignity was preserved.

[110] Consequently, I conclude that there is no evidence of stereotypes or pre-existing disadvantages as concerns adoptive mothers.

2. Correspondence Between the Ground on Which the Claim is Based and the Actual Needs, Capacity or Circumstances of the Applicant or Others:

[111] With respect to this factor, the Court must consider the needs, capacity and circumstances of the applicant's group, but also the needs, capacity and circumstances of the comparator group, i.e. biological mothers. On this count, legislation which considers the actual needs, capacity or circumstances of the applicant and her group in a manner that respects their value as human beings and members of Canadian society will not likely have a demeaning effect on their human dignity.

[112] The applicant does not and, in my view, cannot deny that biological mothers are recovering from their pregnancy and childbirth during the maternity benefits period. However, she argues that they are also using that time to bond with their newborn children, and thus, denying adoptive mothers that bonding time affects their human dignity and amounts to discrimination.

[113] Inevitably, the attachment and bonding process will occur by reason of close contact between the mother and her child from the moment of birth. I am also prepared to accept that biological mothers will wish to devote the little energy they have to care for their newborn child immediately after birth. However, should adoptive mothers be entitled to a maternity benefits period, they will employ all of their time, efforts and energy to care for their child, while birth mothers will not have the same energy and time to care for their children by reason of low energy levels and specific health and stress problems (see: Affidavit of Dr. Murray Enkin, sworn July 14, 1994, paras. 31 and 32).

[114] This reinforces my view that the distinction made by the legislation between birth and adoptive mothers is based on the actual needs, capacity and circumstances affecting biological mothers, that is, pregnancy, childbirth and recovery. The biological reality is such that the bonding process between mother and child cannot be the same in respect of birth and adoptive mothers. As Dr. LeMare states in her affidavit, birth mothers often begin to bond before their child is born. They react to the fetus, signals and movements, watch ultrasounds and go through the birthing process. Although some adoptive parents may have the opportunity to closely participate in these experiences with the unborn child, most of them will only begin bonding when the child is actually adopted.

[115] This does not mean that adoptive mothers and fathers do not undergo considerable stress and difficulties in the adoption process and in caring for their newly arrived child. This is not a situation comparable to that experienced by biological mothers. The particular needs of all parents who do not give birth have been provided for in the form of parental benefits. Nevertheless, the adoption of a child does not render adoptive parents, or biological fathers for that matter, physiologically unable to work for a certain period of time before or after the arrival of a child. As the Ontario Court of Appeal said in *Schafer, supra,* at page 25:

> However, as severe and distressing as these problems may be, they are not the same problems facing biological mothers. No doubt adoptive parents would put the extra 15 weeks of paid leave to excellent use in preparing and caring for their newly arrived child, but the purpose of the pregnancy leave benefit is not to provide income support to parents who care for their children. It is to provide a flexible system of income support to women who need time away from work because of pregnancy and childbirth.

[116] Although the applicant concedes that birth mothers have physical needs which differ from those of adoptive mothers, she nonetheless argues implicitly, as was argued in *Schafer, supra,* that

the 15 weeks of maternity benefits exceed the actual time required for biological mothers to recover. On that premise, the applicant argues that the effect of section 12 of the Act is to allow biological mothers to take advantage of maternity benefits to bond with their children.

[117] In my opinion, this submission fails to consider the unpredictable and unique circumstances surrounding pregnancy and childbirth. The fact that some women recover fully in less than 15 weeks does not counter the fact that other women require much longer time to recover because of conditions such as diabetes or postpartum depression. Abnormal or multiple pregnancies, for instance, may result in complications before and after birth. Thus, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period.

[118] Even in the best of circumstances, i.e. healthy pregnancies and deliveries, it seems clear to me that it is more difficult for biological mothers to cope with motherhood than for adoptive mothers who do not have to recuperate from pregnancy and childbirth. In fact, " no woman (…) was at full functional status at 6 weeks postpartum and several had not yet resumed all usual activities by 6 months after the birth of their infants". (see the Affidavit of Cassandra Kirewskie, para. 39).

[119] In my view, the maternity benefits period must be considered as establishing a range so as to include the situation of women who recover faster and of those who must take the full 15 weeks to recover (See: *Brooks v. Canada Safeway Ltd*; *Allen v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 45 C.R.R. 115; *Schafer, supra*).

[120] As the Supreme Court stated in both *Law, supra,* at para. 106, and in *Gosselin, supra,*at para. 55, there is no necessity for legislation to always correspond perfectly with social reality in order to comply with subsection 15(1) of the Charter:

> ***Law, supra:***
>
> 106. Under these circumstances, the fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all survival spouses does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, under these limited circumstances at least, to premise remedial legislation upon informed generalizations without running afoul of s. 15(1) of the *Charter* and being required to justify its position under s. 1. I emphasize, though, that under other circumstances a more precise correspondence will likely be important where the individual or group which is excluded by the legislation is already disadvantaged or vulnerable within Canadian society.
>
> ***Gosselin, supra:***
>
> 55. I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

[121] Further, as my colleague Evans J.A. stated in *Krock v. Canada (Attorney General),* [2001] F.C.J. No. 896 (C.A.), at para. 11, it is for Parliament and not for the courts to establish and fine-tune statutory benefits schemes:

> 11. When presented with an argument that a complex statutory benefits scheme, such as unemployment insurance, has a differential adverse effect on some claimants contrary to section 15, the Court is not concerned with the desirability of extending the benefits in the manner sought. In the design of social benefit programs, priorities must be set, a task for which is better suited than the courts, and the Constitution should not be regarded as requiring judicial fine-tuning of the legislative scheme.

[122] There can be no doubt, in my view, that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period. Thus, there are distinct purposes for each of the two income-replacement benefits: one is to provide income while a woman is incapacitated from work due to pregnancy or recuperation; the other is to provide income while parents are caring for and bonding with their children.

[123] In my view, it is impossible to set a length of maternity leave that will universally meet the physiological needs of all pregnant women. As the evidence of Dr. Enkin eminently demonstrates, 15 weeks of maternity leave is in no way unreasonable so as to accommodate the needs of most women.

3. Ameliorative Purpose or Effects of the Benefits Program Upon a More Disadvantaged Person or Group:

[124] In *Law, supra*, the Supreme Court, at paragraph 72 of its Reasons, opined that an ameliorative purpose or effect which accords with the goals of sub-section 15(1) of the Charter, i.e. the granting of benefits to biological mothers so as to allow them to recover from pregnancy and childbirth, will be unlikely to violate the human dignity of more advantaged individuals "where the exclusion of these more advantaged individuals largely corresponds to the greater needs or the different circumstances experienced by the disadvantaged group being targeted by the legislation".

[125] In the present matter, there can be no doubt that pregnant women have been a disadvantaged group. In fact, the maternity benefits were created in favour of this group in order to ensure that biological mothers were accommodated in the workplace. In this regard, the words of Dickson C.J. in *Brooks v. Canada Safeway Limited, supra*, at pages 1237 and 1238, are entirely apposite:

> **The first two claims, that pregnancy is neither an accident nor an illness and that it is voluntary, are closely related. I agree entirely that pregnancy is not characterized properly as a sickness or an accident. It is, however, a valid health-related reason for absence from the workplace and as such should not have been excluded from the Safeway plan.** That the exclusion is discriminatory is evident when the true character, or underlying rationale, of the Safeway benefits plan is appreciated. The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. **It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society.** Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to undergo medical treatment for cosmetic surgery -- which sort of comparison the respondent's argument implicitly makes -- is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. **Viewed in its social context pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence from the workplace.**
>
> **Furthermore, to not view pregnancy in this way goes against one of the purposes of anti-discrimination legislation. This purpose, which was noted earlier in the quotation from *Andrews, supra*, is the removal of unfair disadvantages which have been imposed on individuals or groups in society.** Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose.
>
> [Emphasis added]

[126] I also note that the Canadian Human Rights Commission has given its wholehearted support to the co-existence of maternity and parental benefits. I therefore have no hesitation in concluding that the maternity benefits have an ameliorative purpose which is entirely consistent with subsection 15(1) of the Charter and that the exclusion of adoptive mothers from those benefits does not, in any way, undermine the equality guarantee of the section.

4. Nature of the Interest Affected:

[127] As the Supreme Court said at paragraph 88 of its Reasons in *Law, supra*, "[T]he more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1)". In other words, the greater the severity of the consequences of the impugned legislation on the affected group, the likelier the differential treatment will amount to discrimination.

[128] Thus, in the present matter, does the fact that the maternity benefits are not available to adoptive mothers promote the view that adoptive mothers are less capable or less worthy of recognition or value as human beings or members of Canadian society? (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, at para. 58)

[129] In my view, when the legislation is considered in its entire context, it becomes impossible to argue that in enacting the maternity benefits provisions, Parliament has demeaned adoptive mothers or cast any doubt on their worthiness as human beings. Not only have adoptive mothers not been

excluded from a fundamental social institution, i.e. motherhood, but their interests were considered and accommodated by Parliament when it enacted the parental benefits provisions.

CONCLUSION AND DISPOSITION

[130] Exact parity between biological and adoptive mother would result, in my view, in discrimination against biological mothers. In fact, maternity leave provisions are indispensable to ensure the equality of women in general, who suffer disadvantage in the workplace due to pregnancy-related matters. The distinction created in favour of pregnant women is legitimate because it seeks to accommodate their needs in the workforce as a disadvantaged group. (See: *Brooks v. Canada Safeway Ltd*., (1989) 1 S.C.R. 1219 at p. 1238; Canadian Human Rights Commission, *Special Report to Parliament on Income Replacement Benefits for New Parents, supra*). As the Supreme Court held in *Lovelace v. Ontario, supra*, at paras. 85-86, the exclusion from a targeted program does not militate in favour of discrimination against the excluded group:

> 85. … Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society. In other words, we are dealing here with a targeted ameliorative program which is alleged to be underinclusive, rather than a more comprehensive ameliorative program alleged to be underinclusive.
>
> 86. Having said this, one must recognize that exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.

[131] If this Court was to conclude that adoptive mothers are entitled to maternity benefits, this would implicitly constitute a finding that birth mothers deserve no more time off from work than adoptive mothers, even if they must go through the burden of pregnancy and childbirth. This would

take us back to the situation which the 1984 amendment to the U.I. Act sought to solve, i.e. compensation for birth mothers who were incapable of working because they were recovering, by extending the adoption benefits (now the parental benefits) to biological parents.

[132] I also wish to emphasize the fact that if maternity benefits are made available to adoptive mothers, I see no reason why adoptive fathers or, for that matter, biological fathers, should not be entitled to claim those benefits as well. In fact, as the evidence of Dr. LeMare shows, there is, in principle, no difference between mothers and fathers insofar as the bonding process is concerned. This view is supported by the legislation, which makes the parental benefits available to both fathers and mothers. Should maternity benefits be available to adoptive mothers only, fathers, both biological and adoptive, would be denied the benefit.

[133] As the Ontario Court of Appeal said in *Schafer, supra*, at para. 59 of its Reasons, singling out biological mothers for unique benefits arising from the fact of pregnancy and childbirth cannot constitute discrimination:

> [59] … Here, the inescapable biological reality is the fact of pregnancy and childbirth, which only biological mothers experience. Compensating only biological mothers for work lost because of pregnancy and childbirth cannot constitute discrimination because only biological mothers undergo the physiological demands of pregnancy and childbirth.

[134] I therefore conclude, as the Ontario Court of Appeal concluded in *Schafer, supra*, that the applicant's rights under subsection 15(1) of the Charter have not been violated. The reasonable adoptive mother would no doubt recognize that by reason of the physiological and psychological experience resulting from pregnancy and childbirth, biological mothers are deserving of special

benefits so as to accommodate their particular needs. The reasonable adoptive mother would also no doubt recognize that the maternity benefits are essential to protecting the wellbeing of these mothers so that they can, in due course, effectively return to their employment. The reasonable adoptive mother would also recognize that Parliament has considered and recognized her own needs by the enactment of the parental benefits provisions and that she has in no way been excluded from Canadian society. Hence, the reasonable adoptive mother would not feel demeaned by the granting of the maternity benefits to biological mothers.

[135] For these reasons, I would dismiss this application with costs.

"M. Nadon"
J.A.

"I agree.
K. Sharlow J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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