

# ***From Bliss to Brooks and Beyond: A Contemporary Analysis of Pregnancy Discrimination in Canada***

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*The 1989 Brooks v Canada Safeway Ltd ruling by the Supreme Court of Canada marked a watershed moment in Canadian jurisprudence, firmly establishing pregnancy discrimination as a form of sex discrimination under human rights legislation. Since then, the legal landscape has evolved significantly, with both legislative and judicial advancements aimed at combatting pregnancy discrimination. However, recent data reveals a persistent problem, especially in the workforce, where over forty cases of pregnancy discrimination have been litigated in the past five years alone. Given that women hold half of all jobs in the country and many will experience pregnancy during their careers, addressing this issue is paramount for contemporary human rights. This article reviews the historical context of pregnancy discrimination in Canada, examines the current legislative framework and identifies qualitative trends in recent tribunal cases. In doing so, this article underscores ongoing challenges and highlights the urgent need for continued vigilance in safeguarding the rights of pregnant individuals in the Canadian workforce.*

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*L'arrêt Brooks c. Canada Safeway Ltd rendu en 1989 par la Cour suprême du Canada a marqué un jalon important dans la jurisprudence canadienne en établissant fermement la discrimination fondée sur la grossesse comme une forme de discrimination fondée sur le sexe au sens de la législation sur les droits de la personne. Depuis lors, le paysage juridique a considérablement évolué, ce qui a donné lieu à des avancées sur les plans législatif et judiciaire visant à lutter contre la discrimination fondée sur la grossesse. Toutefois, des données récentes révèlent un problème persistant, en particulier dans le monde du travail, où plus de quarante cas de discrimination fondée sur la grossesse ont fait l'objet de poursuites au cours des cinq dernières années seulement. Étant donné que les femmes occupent la moitié des emplois dans le pays et que beaucoup d'entre elles seront enceintes au cours de leur carrière, il est primordial de s'attaquer à ce problème capital dans la perspective des droits de la personne. Le présent article passe en revue le contexte historique de la discrimination fondée sur la grossesse au Canada, en examine le cadre législatif actuel et identifie les tendances qualitatives dans les affaires judiciaires récentes. Ce faisant, il souligne les défis actuels et met en évidence la nécessité urgente de faire preuve de vigilance pour protéger les droits des personnes enceintes dans le monde du travail au Canada.*

## I. Introduction

In the 1989 decision of *Brooks v Canada Safeway Ltd*, the Supreme Court of Canada (the “SCC”) delivered a historic judgment which unequivocally established that discriminating against an individual based on their pregnancy is a form of sex discrimination under Canadian human rights legislation.<sup>1</sup> This landmark decision marked a significant victory for women’s rights across the country, given that the SCC had refused to recognize pregnancy discrimination as a form of sex discrimination less than a decade earlier in *Bliss v Canada (Attorney General)*.<sup>2</sup> Since *Bliss*, significant strides have been made in Canadian legislation and jurisprudence to acknowledge the issue of pregnancy discrimination and provide legal mechanisms to combat it.

Unfortunately, pregnancy discrimination continues to be a problem in Canada, especially for women in the workforce.<sup>3</sup> In the past five years alone, over forty cases of pregnancy discrimination in the employment context have been litigated before human rights boards and tribunals.<sup>4</sup> This is a fundamental concern for contemporary human rights in Canada, given that half of all jobs are held by women<sup>5</sup> and a significant number of them will experience pregnancy during their careers.<sup>6</sup> Consequently, it is crucial to address the legal rights and obligations surrounding pregnancy to combat the impact of pregnancy discrimination on a substantial portion of the Canadian workforce.

This article is divided into two sections. The first section provides an overview of the history of pregnancy discrimination litigation in Canada

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<sup>1</sup> *Brooks v Canada Safeway Ltd*, 1989 CanLII 96 (SCC) [*Brooks*].

<sup>2</sup> *Bliss v Attorney General of Canada*, 1978 CanLII 25 (SCC) [*Bliss*].

<sup>3</sup> Any reference to “women” in this article means reference to individuals who are capable of bearing children. This is not meant to exclude any individuals who can biologically have children but do not identify with the term “women”. While this article focuses on the treatment of pregnancy discrimination as a form of sex discrimination, it is important to acknowledge that evolving understandings of gender and pregnancy, including the use of terms like “pregnant persons”, may influence how human rights tribunals define and address pregnancy discrimination in the future. At the time of writing this article, there is no significant evidence in tribunal decisions to suggest a shift in this approach, but this remains an area for potential development.

<sup>4</sup> Westlaw and CanLII searches using a combination of search terms (including “pregnancy”, “discrimination” and “pregnant”) revealed over forty Board and Tribunal decisions within the timeframe December 2018–October 2023.

<sup>5</sup> Statistics Canada, “Proportion of women and men employed in occupations, annual, inactive, Table 14-10-0335-02” (Ottawa: Statistics Canada, 6 February 2025), online: <statcan.gc.ca> [perma.cc/YM28-958A].

<sup>6</sup> Statistics Canada, “Fewer babies born as Canada’s fertility rate hits a record low in 2020” (Ottawa: Statistics Canada, last modified 6 October 2022), online: <statcan.gc.ca> [perma.cc/5ZA5-GC6E].

through an examination of the SCC's pivotal judgments in *Bliss* and *Brooks*. This background provides the necessary context for understanding the contemporary manifestations of pregnancy discrimination. The second section delves into pregnancy discrimination in the present day, encompassing both human rights legislation and jurisprudence. This article demonstrates that protections against pregnancy discrimination have been explicitly incorporated into Canadian human rights legislation. In addition to statutory coverage, this article offers an analysis of recent human rights board and tribunal cases from across the country that address pregnancy discrimination claims. Based on this examination, this article argues that three key principles emerge: first, the "subtle scent of discrimination" enables tribunals to draw inferences of discrimination regardless of an employer's intentions or the absence of direct evidence; second, the length of service is important because tribunals differentiate between long-term and short-term employees; and third, the timing of termination is crucial in establishing the temporal connection to pregnancy disclosure necessary to succeed in a pregnancy discrimination claim.

The article concludes by acknowledging the inherent limits of studying pregnancy discrimination through the lens of human rights tribunal decisions. While human rights jurisprudence provides valuable insights into trends in pregnancy discrimination, it represents only a partial picture of the broader issue. As with any area of case law, it often highlights only the cases that are adjudicated, leaving many instances of discrimination unrecorded or unresolved – a mere glimpse of the iceberg compared to the scope of the problem.

Much of the available literature on this topic discusses the shift from *Bliss* to *Brooks* and provides commentary on the SCC's reasoning.<sup>7</sup> This article contributes to existing literature by moving beyond early discourse surrounding pregnancy discrimination following the SCC's initial landmark judgments. It provides an updated framework of pregnancy discrimination in Canada and highlights how this form of discrimination continues to put women at a disadvantage in the workforce.

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<sup>7</sup> See Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990) 4:2 CJWL 407; Lorna A Turnbull, "The Promise of *Brooks v. Canada Safeway Ltd*: Those Who Bear Children Should Not Be Disadvantaged" (2005) 17:1 CJWL 151 [Turnbull, "The Promise of *Brooks*"]; Lorna A Turnbull, "*Brooks, Allen & Dixon v. Canada Safeway Ltd* - A Comment (*Bliss* Revisited)" (1989) 34:1 McGill LJ 172; Gwen Brodsky, "The Right to Employment without Discrimination on the Basis of Pregnancy" (1988) 46:4 Advocate 571.

## A. Method of Analysis

This article examines human rights tribunal cases from across Canada that have addressed pregnancy discrimination issues over the span of five years, from December 2018 to October 2023.<sup>8</sup> This timeline was used to ensure that the case sample reflects current trends and patterns related to pregnancy discrimination in Canada. Furthermore, this article focuses almost exclusively on the work of human rights tribunals addressing pregnancy discrimination claims arising from the employment context, rather than cases decided by labour arbitrators in unionized settings. The rationale behind this choice is that collective agreements negotiated by unions often offer protection against pregnancy discrimination that differs, and occasionally surpasses, what is provided to non-unionized employees through legislation.<sup>9</sup> The focus of this article is on cases addressing the rights and obligations of both employees and employers concerning pregnancy discrimination. A similar analysis focusing on pregnancy discrimination claims adjudicated by labour arbitrators under collective agreements in the labour context is planned for a future article.

A combination of search terms – including “pregnancy”, “discrimination” and “pregnant” – was used to locate relevant cases within the time frame of October 2018 to December 2023. This search resulted in over forty cases where pregnancy discrimination was discussed by human rights boards and tribunals. To develop a comprehensive understanding of the legal trends in this area, all these cases were reviewed. From this analysis, the most substantive and noteworthy cases were selected to highlight ongoing challenges and trends in pregnancy discrimination jurisprudence.<sup>10</sup>

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<sup>8</sup> This includes decisions by bodies named as “Tribunals” as well as other forms of human rights adjudication bodies or independent adjudicators, as not every province has a dedicated human rights tribunal. In some provinces, such as Manitoba, human rights commissions refer complaints to a human rights adjudication panel or an individual adjudicator. In Saskatchewan, the Court of King’s Bench conducts hearings that are referred to it by the Saskatchewan Human Rights Commission.

<sup>9</sup> P Andiappan, M Reavley & S Silver, “Discrimination Against Pregnant Employees: An Analysis of Arbitration and Human Rights Tribunal Decisions in Canada” (1990) 9:2 J Bus Ethics 143 at 144.

<sup>10</sup> While this article focuses on a qualitative study of trends in pregnancy discrimination jurisprudence over the identified timeframe, a complementary quantitative analysis would be a fruitful area for future research to provide additional insights into the scope and prevalence of these issues.

## II. Origins of Pregnancy Discrimination Discussions in Canadian Law

To gain a comprehensive understanding of pregnancy discrimination in Canada today, it is necessary to examine its historical origins in the legal landscape.

### A. It Starts with *Bliss*

The SCC's judgment in *Bliss* was the first significant case to address the issue of pregnancy discrimination. This case was concerned with the entitlement of women to unemployment insurance benefits during pregnancy and childbirth.<sup>11</sup> The central issue was whether a section of the *Unemployment Insurance Act, 1971* (the "UIA"), which limited the eligibility of pregnant women for unemployment insurance benefits, constituted sex discrimination and consequently contravened the *Canadian Bill of Rights* (the "Bill of Rights").<sup>12</sup> In sum, the UIA entitled women to "special" benefits during a specific period of pregnancy and childbirth if they could meet certain entitlement conditions, including having "ten weeks of insurable employment".<sup>13</sup> However, the problem was that the provision of these "special" benefits came with a "concomitant limitation of entitlement" which excluded these women from claiming ordinary benefits under the UIA solely because their unemployment was due to pregnancy.<sup>14</sup> As a result, if a pregnant woman could not meet the "magic ten" rule for entitlement to these "special" benefits, they risked receiving no benefits at all during the period specified in the UIA.<sup>15</sup> This left Stella Bliss, and others in her position, trapped — she was refused pregnancy benefits because she did not qualify, yet she was also ineligible for regular benefits simply because she was pregnant.<sup>16</sup>

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<sup>11</sup> In *Bliss*, the SCC specifies "during a specified part of the period of pregnancy and childbirth". However, this period includes postpartum, beginning eight weeks "before the confinement" and ending six weeks after. See *Bliss*, *supra* note 2 at 183 ("during a specified part of the period of pregnancy and childbirth").

<sup>12</sup> *Bliss*, *supra* note 2 at 185.

<sup>13</sup> *Ibid* at 189.

<sup>14</sup> *Ibid* at 188.

<sup>15</sup> *Ibid* at 189.

<sup>16</sup> Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 CJWL 185 at 209.

The SCC concluded that the unemployment insurance scheme under the *UIA* did not violate the *Bill of Rights* because any inequality between the sexes was “not created by legislation but by nature.”<sup>17</sup> By stating that any disadvantages experienced by pregnant women were attributable to nature, the SCC was able to shift blame away from the legislative scheme.<sup>18</sup> This assertion narrowed the legal issue and defined the social and legal constructions of pregnancy, as well as its biological reality, as a “natural” difference between men and women.<sup>19</sup>

Another maneuver used by the SCC to defeat the equality rights challenge was by “sever[ing] the link between the harmful effects complained of and the legal ground of discrimination claimed, thereby disaggregating the affected group.”<sup>20</sup> Relying on the following paragraph written by Justice Pratte in the Federal Court of Appeal, the SCC refused to interpret differential treatment based on pregnancy as differential treatment based on sex:

Assuming the respondent to have been “discriminated against”, it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. *If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.*<sup>21</sup>

In other words, instead of comparing treatment between men and women, the *UIA* created a distinction between pregnant (women) workers and non-pregnant (men and women) workers, escaping scrutiny under the sex equality guarantee in the *Bill of Rights*.<sup>22</sup> Under this argument, discrimination based on pregnancy was not considered discrimination based on sex because not all women were affected and all non-pregnant individuals, male or female, were treated the same.<sup>23</sup> This reasoning overlooked the fact that only women could become pregnant and thus *only* women were adversely affected by the impugned legislation.<sup>24</sup> According to

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<sup>17</sup> *Bliss*, *supra* note 2 at 190.

<sup>18</sup> Brodsky & Day, *supra* note 16.

<sup>19</sup> Mary Jane Mossman, “Feminism and the Law: Challenges and Choices” (1998) 10:1 *CJWL* 1 at 6.

<sup>20</sup> Brodsky & Day, *supra* note 16.

<sup>21</sup> *Bliss*, *supra* note 2 at 190–91 [emphasis added].

<sup>22</sup> Mossman, *supra* note 19 at 7.

<sup>23</sup> Brodsky & Day, *supra* note 16.

<sup>24</sup> Mossman, *supra* note 19 at 7.

the SCC, the harsher treatment of pregnant women did not extend to treating women in general unfairly.<sup>25</sup>

Furthermore, the SCC interpreted “equality before the law” under the *Bill of Rights* as “equality of treatment in the administration and enforcement of law”.<sup>26</sup> This procedural definition meant that as long as the applicant was treated like all other pregnant individuals seeking benefits, there was no violation.<sup>27</sup> In summary, *Bliss* implicitly endorsed a definition of discrimination that was too narrow – one that required treating *all* women differently from men, directly and intentionally.<sup>28</sup> This early understanding of human rights protection failed to recognize that sex discrimination often consists of practices that are not directly or intentionally aimed at disadvantaging women but nonetheless result in systemic inequalities.<sup>29</sup> Consequently, the fact that the impugned provision disproportionately disadvantaged pregnant women applying for unemployment insurance benefits was not considered sex discrimination under this narrow framework.

## B. Brooks: A Long-Awaited Victory

The SCC’s verdict in *Bliss* prompted a strong reaction from women’s groups, who were “stunned by what they perceived as a highly unfair legal decision and were determined that it would never happen again.”<sup>30</sup> *Brooks* provided an opportunity for the SCC to re-evaluate a benefits plan that excluded pregnant women. In a groundbreaking decision, the SCC brought

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<sup>25</sup> *Bliss*, *supra* note 2 at 192.

<sup>26</sup> *Ibid.*

<sup>27</sup> Leslie A Pal & FL Morton, “*Bliss v Attorney General of Canada: From Legal Defeat to Political Victory*” (1986) 24:1 Osgoode Hall LJ 141 at 145.

<sup>28</sup> Brodsky, *supra* note 7 at 574.

<sup>29</sup> *Ibid.* The Supreme Court of Canada has significantly expanded the concept of systemic discrimination, which refers to patterns of behavior, policies or practices embedded in organizational structures that create or perpetuate disadvantage. Key cases such as *Fraser v Canada (Attorney General)*, 2020 SCC 28, *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 1999 CanLII 652 (SCC) [*Meiorin*] and *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) [*Andrews*], have been instrumental in shaping this understanding. While these cases are highly significant and present a compelling area for further study, a comprehensive review of these cases is beyond the scope of this article, which focuses on contemporary trends in pregnancy discrimination.

<sup>30</sup> Pal & Morton, *supra* note 27 at 148.

pregnancy discrimination within the purview of human rights protection by defining pregnancy discrimination as a form of sex discrimination.<sup>31</sup>

In the *Brooks* case, Safeway's complex sickness and accident plan (the "Plan") provided disability benefits to employees who had worked for Safeway for three months and needed time off from work due to health-related reasons.<sup>32</sup> However, the Plan excluded pregnant employees from obtaining these benefits during a seventeen-week period before and after the anticipated date of childbirth.<sup>33</sup> Instead of being eligible for benefits under the Plan, pregnant employees who were unable to work due to either pregnancy-related or non-pregnancy-related issues could receive separate maternity benefits.<sup>34</sup> These maternity benefits were an inadequate substitute as they required a longer work history for eligibility and provided less financial support for a shorter duration.<sup>35</sup> The complainant filed a complaint with the Manitoba Human Rights Commission, asserting that the differential treatment of pregnancy in the Plan constituted sex-based discrimination contrary to *The Human Rights Act* of Manitoba.<sup>36</sup>

The SCC identified two key issues: first, whether the Plan itself was discriminatory; and second, whether discrimination based on pregnancy amounts to sex discrimination. In a unanimous decision, the SCC ruled that the Plan did discriminate against pregnant employees and that this constituted discrimination based on sex. On the first issue, the SCC found that pregnant employees received considerably less favourable treatment under the Plan compared to other employees, as they were denied regular compensation, regardless of the reason they were unable to work.<sup>37</sup> Furthermore, even if pregnant employees qualified for maternity benefits, they would receive a lesser amount than a non-pregnant employee who was absent from work due to some other physical disability.<sup>38</sup> In summary, the Plan "single[d] out pregnancy for disadvantageous treatment, in

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<sup>31</sup> New Brunswick Human Rights Commission, "Guideline on Pregnancy Discrimination" (December 2019) at 5, online: <gnb.ca> [perma.cc/HVB8-WT3R] [New Brunswick Guideline].

<sup>32</sup> *Brooks*, *supra* note 1 at 1224–25.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* at 1225–26.

<sup>36</sup> *Ibid* at 1223.

<sup>37</sup> *Ibid* at 1236.

<sup>38</sup> *Ibid* at 1235.

comparison with any other health reason which may prevent an employee from reporting to work.”<sup>39</sup>

In its reasoning, the SCC acknowledged the fundamental importance of pregnancy in our society.<sup>40</sup> Pregnancy is not an illness or disability but a valid health-related reason for being absent from work and should be treated as such in terms of the economic consequences to employees unable to work.<sup>41</sup> Furthermore, failing to compensate pregnant employees for health-related issues requiring absences from work contradicts the purpose of human rights legislation, which aims to eliminate disadvantages suffered by specific groups.<sup>42</sup> Since only women can bear children, “it is unfair to impose all the costs of pregnancy upon one half of the population.”<sup>43</sup>

The SCC then addressed the second issue of whether pregnancy discrimination is discrimination based on sex. In explicit terms, the Court stated:

“How could pregnancy discrimination be *anything other than* sex discrimination? The disfavoured treatment accorded [to the complainants] flowed entirely from their state of pregnancy, a condition unique to woman [*sic*]. They were pregnant because of their sex. Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.”<sup>44</sup>

The SCC rejected the notion that discrimination against pregnant women could not be considered sex discrimination because not all women are, or will be, pregnant.<sup>45</sup> Less favourable treatment that exclusively affects an identifiable group is still discrimination if it affects only part of that group.<sup>46</sup> Since all pregnant women are women, discrimination against pregnant women arises from their membership in the larger group.<sup>47</sup> As Diana Majury explains, “pregnancy discrimination does not affect only women who are pregnant.”<sup>48</sup> Pregnancy discrimination has “negative reverberations for all members of the oppressed group”, such as discouraging some women from becoming pregnant and conveying that women’s participation in the

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<sup>39</sup> *Ibid* at 1236.

<sup>40</sup> *Ibid* at 1237.

<sup>41</sup> *Ibid* at 1237–38.

<sup>42</sup> *Ibid* at 1238.

<sup>43</sup> *Ibid* at 1243.

<sup>44</sup> *Ibid* at 1242.

<sup>45</sup> Majury, *supra* note 7 at 430.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid*.

workforce is less valuable than the participation of men.<sup>49</sup> Clearly, “pregnancy discrimination is discrimination against women, individually and collectively.”<sup>50</sup>

As for *Bliss*, the SCC in *Brooks* made its position clear:

*Bliss* was wrongly decided or, in any event, that *Bliss* would not be decided now as it was decided then ... It is difficult to accept that the inequality to which Stella Bliss was subject was created by nature and therefore there was no discrimination; the better view, I now venture to think, is that the inequality was created by legislation, more particularly, the *Unemployment Insurance Act*, 1971.<sup>51</sup>

### C. Understanding the Transition from *Bliss* to *Brooks*

The significant change in the SCC’s stance on pregnancy discrimination from *Bliss*, in 1978, to *Brooks*, in 1989, raises questions about the underlying reasons for this shift. Lorna Turnbull suggests that this dramatic turnaround could have been “indicative of a new approach to equality generally and to women’s claims in particular.”<sup>52</sup> The SCC itself cited profound changes in women’s participation in the labour force and ten years of experience with jurisprudence arising from human rights discrimination claims as reasons for reversing *Bliss*.<sup>53</sup> The practical absurdity of distinguishing between “pregnant” and “non-pregnant persons” to avoid recognizing pregnancy-based discrimination as sex discrimination could no longer be sustained a decade later.<sup>54</sup> As mentioned earlier, the period following *Bliss* marked “a defining moment of feminist engagement with the law”, driven by the “tremendous involvement of the feminist community” in advocating for better outcomes for working women.<sup>55</sup>

Feminist and civil liberties groups played a crucial role in the legal reform following *Bliss*, becoming critical allies in the Canadian government’s creation of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).<sup>56</sup> Representatives from these groups criticized the original interpretation of “equality before the law”, which had been interpreted as equal application of the law rather than ensuring that laws themselves did

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Brooks*, *supra* note 1 at 1243–44.

<sup>52</sup> Turnbull, “The Promise of *Brooks*”, *supra* note 7 at 152.

<sup>53</sup> *Brooks*, *supra* note 1 at 1245.

<sup>54</sup> Pal & Morton, *supra* note 27 at 159.

<sup>55</sup> Turnbull, “The Promise of *Brooks*”, *supra* note 7 at 153.

<sup>56</sup> Pal & Morton, *supra* note 27 at 153.

not discriminate against women.<sup>57</sup> In her testimony before the Special Joint Committee on the Constitution, Lynn McDonald, president of the National Action Committee on the Status of Women, specifically cited *Bliss* as an example of how “unacceptable women in the labour force are if they are pregnant or if they have very young children” and called for a more just interpretation of equality.<sup>58</sup>

An examination of the statutory context in which these judgments were made also sheds light on how the SCC could have arrived at different conclusions. In *Bliss*, the SCC interpreted the right to equality under provisions of the *Bill of Rights*.<sup>59</sup> Conversely, *Brooks* required the SCC to consider provisions that prohibited sex discrimination in provincial human rights legislation.<sup>60</sup> Additionally, *Brooks* was one of the earliest equality decisions of the SCC following the introduction of section 15, the equality rights provision of the *Charter*, whereas *Bliss* was decided in the pre-*Charter* era.<sup>61</sup>

The presence of the *Charter* at the time *Brooks* was decided may have allowed the SCC to adopt a more generous approach to combatting sex discrimination, instead of relying on legislative tools with a narrower scope, such as the *Bill of Rights*.<sup>62</sup> The *Bill of Rights* has faced widespread criticism for being largely ineffective in guaranteeing protection against legislative discrimination.<sup>63</sup> Nearly simultaneously with the *Brooks* ruling, the SCC in *Andrews v Law Society of British Columbia* acknowledged that the language of the *Charter* was intended to address the shortcomings of the *Bill of Rights*.<sup>64</sup> In *Brooks*, the SCC explicitly referenced the approach to equality under the *Charter* and emphasized that it is of “surpassing interest”, even though neither *Bliss* nor *Brooks* were technically *Charter* cases.<sup>65</sup>

One could also highlight the composition of the SCC as a factor influencing the direction of both judgments. In *Bliss*, the bench consisted of

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<sup>57</sup> *Ibid* at 155.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Bliss*, *supra* note 2 at 184.

<sup>60</sup> *Brooks*, *supra* note 1 at 1227.

<sup>61</sup> Turnbull, “The Promise of *Brooks*”, *supra* note 7 at 152.

<sup>62</sup> *Ibid*.

<sup>63</sup> Lynn Smith, “The Equality Rights” (1991) 20:2 Man LJ 377 at 380.

<sup>64</sup> In *Andrews*, *supra* note 29, the SCC stated that “the language of s 15 was deliberately chosen in order to remedy some of the perceived defects under the *Canadian Bill of Rights*”.

<sup>65</sup> *Brooks*, *supra* note 1 at 1245.

only male justices.<sup>66</sup> By the time *Brooks* was decided, the SCC had welcomed its first two female justices: Justice Wilson and Justice L'Heureux-Dubé.<sup>67</sup> While there is no explicit indication that the presence of two female justices influenced the SCC's decision in *Brooks*, the composition of the SCC may have contributed to more inclusive and gender-diverse perspectives during the decision-making process.<sup>68</sup>

### III. Pregnancy Discrimination in the Present Day

*Brooks* marked a momentous shift in Canada's approach to sex-based discrimination by affirming that discrimination on the grounds of pregnancy constitutes a human rights violation.<sup>69</sup> Since the *Brooks* decision, the recognition of pregnancy discrimination as a human rights issue in Canada has been further defined and developed within various realms of Canadian governance, including legislation and the work of human rights commissions and tribunals.

#### A. Legislation

In the employment context, human rights in Canada are protected primarily through federal, provincial and territorial human rights statutes. Federally, the *Canadian Human Rights Act* ("CHRA") protects individuals in Canada from discrimination when they are employed by or receive services from the federal government, First Nations governments or private companies regulated by the federal government (such as banks, trucking companies, broadcasters and telecommunications companies).<sup>70</sup> The CHRA prohibits discrimination based on various grounds, including sex.<sup>71</sup> Building upon the SCC's clarification in *Brooks* that "discrimination on the basis of pregnancy is a form of sex discrimination",<sup>72</sup> the CHRA explicitly states that "[w]here the ground of discrimination is pregnancy or child-birth, the

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<sup>66</sup> *Bliss*, *supra* note 2, Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

<sup>67</sup> Supreme Court of Canada, "List of current and former judges" (last modified 12 August 2025) at 1, online: <scs-csc.ca> [perma.cc/X4UE-KJS3].

<sup>68</sup> Brodsky, *supra* note 7 at 575.

<sup>69</sup> *Brooks*, *supra* note 1 at 1247, 1250.

<sup>70</sup> Canadian Human Rights Commission, "Human Rights in Canada" (last visited 4 February 2025), online: <chrc-ccdp.gc.ca> [perma.cc/9TRF-2CEJ].

<sup>71</sup> Canadian Human Rights Commission, "Policy on Pregnancy & Human Rights in the Workplace – Page 1" (last visited 4 February 2025), online: <chrc-ccdp.gc.ca> [perma.cc/W3H2-E96P].

<sup>72</sup> *Brooks*, *supra* note 1 at 1242.

discrimination shall be deemed to be on the ground of sex.”<sup>73</sup> The Canadian Human Rights Commission (the “Commission”) administers the *CHRA* and handles complaints under it.<sup>74</sup> If a complaint cannot be settled or if the Commission decides that further examination is warranted, the Commission may refer complaints to the Canadian Human Rights Tribunal (the “Tribunal”) for a decision.<sup>75</sup> The Tribunal operates similarly to a court of law, as it has the authority to order remedies and award damages, but is less formal and focuses exclusively on cases related to discrimination.<sup>76</sup> Decisions of the Tribunal can be judicially reviewed by the Federal Court of Canada.<sup>77</sup>

Provincial and territorial human rights laws share many similarities with the *CHRA* and apply many of the same principles. Each province and territory provides legislative protection against pregnancy discrimination in the employment context through their own human rights statutes.<sup>78</sup> Generally, this legislation applies to provincial and municipal governments, businesses, non-profit organizations and individuals within their respective jurisdictions.<sup>79</sup> Most provincial and territorial human rights legislation explicitly includes pregnancy as a protected ground under the category of sex.<sup>80</sup> Only two human rights statutes fail to explicitly mention pregnancy: the *Human Rights Code* of British Columbia (“*BCHRC*”)<sup>81</sup> and the *Human Rights Act* of Prince Edward Island (“*PEIHRC*”)<sup>82</sup>. However, even where pregnancy is not explicitly mentioned, case law has evolved to include pregnancy discrimination within the scope of human rights protection. For

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<sup>73</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(2). This language was added to the *Canadian Human Rights Act* in 1986 to explicitly recognize pregnancy-related discrimination as a form of discrimination under Canadian human rights law.

<sup>74</sup> Canadian Human Rights Commission, “Our Work” (last visited 4 February 2025), online: <chrcreport.ca> [perma.cc/MNZ9-X68].

<sup>75</sup> *Ibid.*

<sup>76</sup> Canadian Human Rights Tribunal, “Welcome to the Canadian Human Rights Tribunal” (last modified 23 January 2024), online: <chrt-tcdp.gc.ca> [perma.cc/3HPW-BC3B].

<sup>77</sup> Canadian Human Rights Tribunal, “A Guide To Understanding The Canadian Human Rights Tribunal” (last modified 22 January 2024), online <chrt-tcdp.gc.ca> [perma.cc/53MH-SXYZ].

<sup>78</sup> For example, see *The Human Rights Code*, SM 1987-88, c 45, CCSM c H175; *Human Rights Code*, RSO 1990, c H19; *Alberta Human Rights Act*, RSA 2000, c A-25.5.

<sup>79</sup> Canadian Centre for Diversity and Inclusion, “Overview of Human Rights Codes by Province and Territory in Canada” (January 2018) at 4, online (pdf): <ccdi.ca> [perma.cc/2ET5-D8CZ].

<sup>80</sup> For example, see the *Human Rights Code*, RSO 1990, c H19, s 10(2); the *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 44(2); or *The Human Rights Code*, SM 1987-88, C 45, CCSM c H175, s 9(2)(f).

<sup>81</sup> *Human Rights Code*, RSBC 1996, c 210.

<sup>82</sup> *Human Rights Act*, RSPEI 1988, c H-12.

instance, the British Columbia Human Rights Tribunal has cited *Brooks* as the authority for establishing that pregnancy discrimination falls within the realm of the protected characteristic of sex.<sup>83</sup> Similarly, Prince Edward Island’s Human Rights Commission has explicitly stated that the protected ground of “sex” covers discrimination complaints related to pregnancy, despite the absence of any decisions addressing this issue directly.<sup>84</sup>

## B. Jurisprudence of Human Rights Tribunals

Human rights tribunals work to promote and protect human rights by investigating discrimination complaints and representing the public interest in mediating and litigating these complaints. A critical role of human rights commissions is the development of policy documents and guidelines, which reflect the commissions’ interpretation of the rights set out in their respective human rights legislation and offer guidance on various human rights issues.<sup>85</sup> While these documents are not binding on human rights tribunals or courts, they are often given great deference in decision-making.<sup>86</sup>

According to the Canadian Human Rights Commission, pregnancy discrimination refers to “any action, decision, or policy that negatively affects a woman as a result of her pregnant status.”<sup>87</sup> The Commission lists the following actions that might result in pregnancy discrimination:

- i. Terminating a person’s employment due to pregnancy-related conditions or circumstances;
- ii. Refusing to hire or promote a person because she is pregnant, plans to become pregnant or recently gave birth;
- iii. Adverse differential treatment in employment because of pregnancy-related circumstances or conditions;
- iv. Creating or following policies or practices that negatively affect an employee because of pregnancy-related conditions or circumstances; and

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<sup>83</sup> *Godfrey v BHD Instrumentation and others*, 2019 BCHRT 276 at para 32.

<sup>84</sup> PEI Human Rights Commission, “Areas and Grounds of Discrimination”, online: <peihumanrights.ca> [perma.cc/M3FT-AVJW].

<sup>85</sup> Ontario Human Rights Commission, “Guide to your rights and responsibilities under the Human Rights Code” (15 January 2009), online (pdf): <ohrc.on.ca> [perma.cc/P9HH-M76A].

<sup>86</sup> *Ibid.*

<sup>87</sup> Canadian Human Rights Commission, “Pregnancy & Human Rights in the Workplace: Policy and Best Practices” (Ottawa, Canadian Human Rights Commission National Office, last visited 4 February 2025) at 5, online: <chrc-ccdp.gc.ca> [perma.cc/4S75-DWRJ] [CHRC Policy and Best Practices].

- v. Failing to provide reasonable accommodation for an employee who is pregnant, trying to become pregnant or recently gave birth.<sup>88</sup>

An analysis of current jurisprudence reveals that case law on pregnancy discrimination tends to fall under one of the above categories. Thus, using these categories of discrimination as guideposts, the following section provides a current summary of pregnancy discrimination jurisprudence.<sup>89</sup> This analysis aims to identify present-day trends in pregnancy discrimination case law and highlight the actions that constitute pregnancy discrimination in the workplace.

However, before delving into an analysis of case law, it is necessary to explain how pregnancy discrimination claims are proven. First, the individual bringing the case forward (the “complainant”) must demonstrate *prima facie* discrimination based on their pregnancy on a balance of probabilities.<sup>90</sup> To establish *prima facie* discrimination in pregnancy discrimination cases, the “complainant must show that she was pregnant, that she suffered [an] adverse impact or effect, and that her pregnancy was a factor in the adverse impact.”<sup>91</sup> Complainants do not have to prove that pregnancy was the sole factor, or even the primary factor, of the discriminatory treatment; it is sufficient to demonstrate that pregnancy was *a* factor in the discriminatory conduct.<sup>92</sup> Once a *prima facie* case of pregnancy discrimination is established, the burden shifts to the respondent, typically the employer, to demonstrate that there was no discrimination or to provide a credible, non-discriminatory justification for their actions.<sup>93</sup> This often

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<sup>88</sup> *Ibid.* This understanding of pregnancy discrimination is echoed by other human rights commissions across the country. For example, see New Brunswick Guideline, *supra* note 31 at 7–8; Alberta Human Rights Commission, “Human Rights, Pregnancy, and Parental Rights and Responsibilities” (November 2022) at 4–5, online (pdf): <albertahumanrights.ab.ca> [perma.cc/956B-HJ35]; Saskatchewan Human Rights Commission, “Pregnancy, Parenting & the Workplace” (2006) at 10, online (pdf): <saskatchewanhumanrights.ca> [perma.cc/SF5A-SCPF]; Ontario Human Rights Commission, “Pregnancy” (last visited 4 February 2025), online: <ohrc.on.ca> [perma.cc/LFC6-SUDL].

<sup>89</sup> Note that while both *Bliss* and *Brooks* discuss pregnancy discrimination in the context of benefit suspension for pregnant individuals, there has been no case in the last five years where this kind of pregnancy discrimination is found. Therefore, benefit suspension for pregnant individuals is not included as one of the categories.

<sup>90</sup> *Bauknecht v 1055791 Alberta Ltd o/a Elkwater Lake Lodge & Resort*, 2020 AHRC 16 at para 28 [Bauknecht]; New Brunswick Guideline, *supra* note 31.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

takes the form of a claim that they reasonably accommodated the employee to the point of undue hardship, a point that will be further discussed below.

*i. Terminating a Person's Employment Due to Pregnancy-Related Conditions or Circumstances*

Terminating an employee for being pregnant is the most blatant form of pregnancy discrimination and a clear violation of Canadian human rights legislation. Termination is a grave matter with profound consequences for an individual's livelihood, self-esteem and the core right to be free from sex-based discrimination in the workplace.<sup>94</sup>

These cases typically involve situations where employers dismiss employees upon learning of their pregnancy, either because the employee voluntarily disclosed the pregnancy or the employer became aware of it independently, such as through a third party.<sup>95</sup> Employers often cite concerns about the employee's ability to perform job duties or maintain productivity as the reason for termination, without providing clear evidence of performance issues. While employers have a right to terminate employees for various reasons, including poor performance, they cannot use this as an excuse to dismiss an employee solely because of their pregnancy. If pregnancy is a contributing factor in the termination, it constitutes a violation of human rights law.<sup>96</sup> Jurisprudence emphasizes that as long as a pregnant employee can perform her duties, she should be allowed to continue working until she goes on maternity leave.<sup>97</sup>

An example of this form of pregnancy discrimination can be found in the 2023 case of *Lall v Apidel Staffing Inc operating as Apidel Technologies and another*.<sup>98</sup> This case, heard by the British Columbia Human Rights Tribunal, involved a complainant who alleged that her employer discriminated against her based on sex when they terminated her three weeks after she disclosed her pregnancy. The employer refuted the discrimination claim, arguing that they terminated the complainant due to poor job performance and her failure to obtain a work-related visa to the United States.<sup>99</sup>

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<sup>94</sup> Andiappan, Reavley & Silver, *supra* note 9 at 147.

<sup>95</sup> Newfoundland and Labrador, Human Rights Commission, "Guidelines for Accommodation of Pregnancy in the Workplace" (last visited 4 February 2025), online: <thinkhumanrights.ca> [perma.cc/JD2F-PVQE] [Newfoundland and Labrador Guidelines].

<sup>96</sup> Andiappan, Reavley & Silver, *supra* note 9 at 148.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Lall v Apidel Staffing Inc operating as Apidel Technologies and another*, 2023 BCHRT 45 [*Lall*].

<sup>99</sup> *Ibid* at para 2.

The Tribunal concluded that the complainant had indeed experienced discrimination due to her pregnancy.<sup>100</sup> The Tribunal made the important observation that “[e]mployers rarely announce that they are dismissing an employee because she is pregnant. Rather, such a connection is often established by reasonable inferences drawn from surrounding circumstance[s].”<sup>101</sup> Decision-makers can consider the timing between termination and knowledge of pregnancy to infer that pregnancy discrimination has occurred.<sup>102</sup> The fact that termination occurred only three weeks after the complainant revealed her pregnancy supported the inference that pregnancy played a role in the termination.<sup>103</sup> Furthermore, the employer failed to rebut the available inference of discrimination with any credible evidence of legitimate job performance concerns<sup>104</sup> or urgency in obtaining a visa.<sup>105</sup> In light of these circumstances, the complainant’s pregnancy was deemed to be an operative factor in her termination, constituting discrimination.<sup>106</sup>

*Weihls v Great Clips and others (No 2)*<sup>107</sup> serves as another example of termination due to pregnancy. In this case, the British Columbia Human Rights Tribunal addressed a complaint from an employee who alleged that her employer terminated her only eight days after she disclosed her pregnancy. There was no dispute that the employer terminated the complainant following her pregnancy disclosure.<sup>108</sup> The central question revolved around whether pregnancy played a role in her termination.<sup>109</sup> The

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<sup>100</sup> *Ibid* at para 72.

<sup>101</sup> *Ibid* at para 20.

<sup>102</sup> *Ibid* at para 22.

<sup>103</sup> *Ibid* at paras 22, 23.

<sup>104</sup> *Ibid* at paras 32, 36–37. The parties gave conflicting testimony and neither party submitted documentary evidence to support their positions. If Ms. Lall’s sales volume was inadequate as alleged, it would be reasonable to expect there to be some documentary material showing this. Moreover, the respondents claimed that Ms. Lall was consistently a poor employee for over a year, but they gave no evidence of any corrective or disciplinary action taken earlier.

<sup>105</sup> *Ibid* at paras 30, 37. The respondents did not provide Ms. Lall with a specific date within which the visa needed to be obtained, and Ms. Lall worked for nearly a year without a visa before the respondents decided to terminate her. Other than one email sent to Ms. Lall asking about the status of her visa application, there was no documentary evidence that getting a visa was so important to the respondents that it put Ms. Lall’s employment in jeopardy.

<sup>106</sup> *Lall, supra* note 98 at para 38.

<sup>107</sup> *Weihls v Great Clips and others (No 2)*, 2019 BCHRT 125 [*Weihls*]; see also *Parker v Vapex Electronics Ltd*, 2020 AHRC 32.

<sup>108</sup> *Weihls, supra* note 107 at para 2.

<sup>109</sup> *Ibid*.

employer argued that pregnancy had “no role whatsoever in their decision” and that the complainant’s termination resulted from a lack of basic hairstyling skills.<sup>110</sup> Contrary to the employer’s argument, the Tribunal found that the complainant was terminated because she was pregnant.<sup>111</sup>

The Tribunal accepted that lack of skill was *a* reason for the salon’s termination of Ms. Weihs.<sup>112</sup> She was a junior stylist early in her career, with a significantly lower customer return rate than other stylists and a negative Facebook review.<sup>113</sup> However, the key issue was whether pregnancy was also a factor. The most compelling evidence on this point was a comment made by the employer at the time of the pregnancy announcement, in which they stated, “I hope Lizzie [another stylist at the salon] and the other girls aren’t pregnant. Whatever you did, keep it with you” or words to that effect.<sup>114</sup> This comment strengthened the inference of discrimination found in the eight days between Ms. Weihs’ pregnancy announcement and her termination.<sup>115</sup> Although the employer may have had genuine concerns about performance, it was only after the pregnancy disclosure that they decided not to invest more time and energy into improving Ms. Weihs’ skills because she would require “too much help and her maternity leave would interrupt any progress.”<sup>116</sup> In summary, the temporal connection between the pregnancy announcement and the termination, along with the employer’s negative comment at the time of the pregnancy announcement, led to a reasonable inference that the complainant’s pregnancy was a factor in her termination.<sup>117</sup>

*Kestle v Pacific Coast Marine Windshields*, another case heard by the British Columbia Human Rights Tribunal, illustrates how tribunals can draw inferences of pregnancy discrimination even when an employee does not directly disclose her pregnancy to her employer.<sup>118</sup> In this case, the complainant was terminated one week after informing a first-aid attendant

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<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at para 4.

<sup>112</sup> *Ibid* at para 82.

<sup>113</sup> *Ibid* at para 81.

<sup>114</sup> *Ibid* at paras 83–84.

<sup>115</sup> *Ibid* at para 86.

<sup>116</sup> *Ibid* at paras 86, 88.

<sup>117</sup> *Ibid* at para 91.

<sup>118</sup> *Kestle v Pacific Coast Marine Windshields*, 2019 BCHRT 252 [*Kestle*].

at work that she was pregnant.<sup>119</sup> A few days after this disclosure, her boss returned from vacation and terminated her employment.<sup>120</sup>

The employer presented two arguments, both of which the Tribunal addressed. First, the employer argued that the first-aid attendant did not inform anyone else at the company about the complainant's pregnancy.<sup>121</sup> Therefore, her pregnancy could not have played a role in her termination.<sup>122</sup> Second, the employer contended that the complainant was terminated solely based on her work performance, giving them a reasonable non-discriminatory reason for her termination.<sup>123</sup>

In response to the employer's first argument, the Tribunal acknowledged that there was no clear evidence anyone at the company had informed the employer about the complainant's pregnancy.<sup>124</sup> However, Tribunals are permitted to draw inferences from the timing of termination in pregnancy discrimination cases, particularly inferences based on the sequence of events.<sup>125</sup> Such cases "often stand to be proven on the basis of changes in employer behaviour or adverse employment-related decisions made after the employer is informed of the employee's pregnancy".<sup>126</sup> Based on this reasoning, the Tribunal reasonably inferred from the timing of the complainant's termination that her pregnancy was a factor in the adverse decision, as less than a week had passed between her pregnancy disclosure and her termination.<sup>127</sup>

Regarding the employer's second argument concerning poor performance, the Tribunal explained that it "has had many chances to consider complaints like this one, where a complainant alleges an employer terminated her after learning she was pregnant, and the employer responded to the complaint that she was terminated solely due to poor work performance".<sup>128</sup> In this case, there was no evidence of performance concerns before the complainant's termination. All evidence supporting the claim of poor job performance was generated after the complainant disclosed her

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<sup>119</sup> *Ibid* at para 1.

<sup>120</sup> *Ibid* at para 13.

<sup>121</sup> *Ibid* at para 27.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid* at para 28.

<sup>124</sup> *Ibid* at para 31.

<sup>125</sup> *Chang v ILSC (Vancouver) and others*, 2006 BCHRT 144 at para 7 [*Chang*].

<sup>126</sup> *Ibid*.

<sup>127</sup> *Kestle*, *supra* note 118 at para 33.

<sup>128</sup> *Ibid* at para 29.

pregnancy and, in some instances, after she had filed the complaint.<sup>129</sup> This further emphasized that concerns about the complainant's job performance were fabricated to justify her termination because she was pregnant.<sup>130</sup>

While the foregoing cases clearly illustrate that terminating an employee due to her pregnancy constitutes a violation of human rights, it is essential to note that pregnancy does not grant an employee immunity from termination. The case law establishes that "pregnancy itself does not prevent an employer from terminating an employee where there are demonstrated and ongoing work performance issues."<sup>131</sup> For example, in *Sicat v 1779785 Alberta Inc o/a Tim Horton's*, a case heard by the Alberta Human Rights Tribunal, the complainant was terminated within seven days of the respondent taking over management of the company and after learning about her pregnancy. The employer argued that her termination resulted from poor work performance and complaints from coworkers and customers about her demeanour. The Director of the Alberta Human Rights Commission dismissed the complaint, ruling that the complainant's pregnancy was not a factor in her termination.<sup>132</sup> Past and ongoing complaints and discipline for rudeness towards customers and fellow employees, as well as her subpar work performance, supported the employee's termination.<sup>133</sup>

Upon review of the Director's decision, the Tribunal upheld the Director's decision to dismiss the complaint.<sup>134</sup> The Tribunal agreed that the evidence demonstrated that the complainant had a documented history of concerns regarding her interactions with colleagues and customers, along with subpar work performance.<sup>135</sup> These concerns persisted under the new ownership and were immediately identified by the new owner.<sup>136</sup> In fact, there was evidence that the new owner had intended to terminate the complainant as early as the first day he took over management, before he

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<sup>129</sup> *Ibid* at para 20.

<sup>130</sup> *Ibid* at para 36.

<sup>131</sup> *Sicat v 1779785 Alberta Inc o/a Tim Horton's*, 2021 AHRC 101 at para 25.

<sup>132</sup> *Ibid* at para 12.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid* at para 26.

<sup>135</sup> *Ibid* at para 19.

<sup>136</sup> *Ibid* at para 20.

had any awareness of the complainant's pregnancy.<sup>137</sup> However, the previous manager advised him to give the complainant another chance.<sup>138</sup>

On balance, the evidence indicated that the reason for the complainant's termination was her ongoing poor work record and history of complaints from customers and employees, not her pregnancy.<sup>139</sup> This distinguishes *Sicat* from other cases that lack any evidence of credible performance issues. Moreover, the Tribunal heavily relied on its finding that the employer's intention to terminate the complainant arose before its awareness of the complainant's pregnancy.<sup>140</sup> This was crucial in supporting the conclusion that pregnancy was not a factor in the complainant's termination. Rather, the complainant was a long-term problematic employee who happened to be pregnant when new management took over and decided to make some changes.

Similarly, in *Bauknecht v 1055791 Alberta Ltd o/a Elkwater Lake Lodge & Resort*, another case of the Alberta Human Rights Tribunal, the complainant provided her employer with a doctor's note about three months into her employment.<sup>141</sup> The note indicated that she required modified duties due to her pregnancy.<sup>142</sup> Nine days later, the employer terminated her and provided no reasons in the termination letter.<sup>143</sup> In response to the human rights complaint, the employer argued that the complainant was terminated at the end of her probationary period due to performance reasons.<sup>144</sup> The complainant argued that the temporal proximity of the medical note and the fact that she had never been spoken to about performance issues supported the argument that she was terminated due to her pregnancy.<sup>145</sup>

The Tribunal concluded that the employer had legitimate concerns about the complainant's performance and that her termination resulted from these concerns, not her pregnancy.<sup>146</sup> The employer was reasonably concerned that the complainant did not provide advance notice of her absences from

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<sup>137</sup> *Ibid* at para 6.

<sup>138</sup> *Ibid* at para 22.

<sup>139</sup> *Ibid* at para 25.

<sup>140</sup> *Ibid* at para 21.

<sup>141</sup> *Bauknecht, supra* note 90 at para 3.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid* at para 3.

<sup>144</sup> *Ibid* at para 5.

<sup>145</sup> *Ibid* at para 4.

<sup>146</sup> *Ibid* at para 51.

work and that she spent excessive time chatting while at work.<sup>147</sup> Testimonies from other employees supported these concerns and there was evidence of multiple verbal warnings issued to the complainant before her termination.<sup>148</sup> Additionally, although some of the complainant's absences were related to medical appointments concerning her pregnancy, her termination was linked to her failure to provide advance notice rather than the appointments themselves.<sup>149</sup> Regarding the timing of the termination, the Tribunal accepted the employer's argument that the timing of the decision to terminate the complainant's employment was related to the end of her probationary period, not her pregnancy.<sup>150</sup> In employment law, employers are free to terminate employees during (and after) their probationary periods, as long as the same protection against discrimination is provided to both non-probationary and probationary employees.<sup>151</sup>

In summary, a comprehensive review of recent case law in this area highlights that terminating an employee solely because she is pregnant is a violation of human rights. Tribunals do not tolerate employee dismissals based on false claims of "poor job performance" when the actual reason behind termination is the employee's pregnancy. In the absence of direct evidence of discrimination, which is often scarce in these cases, tribunals are entitled to draw inferences of discrimination from the timing of termination and the employer's actions leading up to termination. Nevertheless, if genuine performance issues exist, an employee may be terminated even if she is pregnant.

ii. *Refusing to Hire or Promote a Person Because She Is Pregnant, Plans to Become Pregnant or Recently Gave Birth*

Employers have the right to select the most qualified candidates for job positions.<sup>152</sup> However, they do not possess the right to reject an equally qualified candidate due to pregnancy.<sup>153</sup> This manifests itself in various ways: an employer cannot decline a candidate because of their pregnancy,

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<sup>147</sup> *Ibid* at para 32.

<sup>148</sup> *Ibid* at para 33.

<sup>149</sup> *Ibid* at para 38.

<sup>150</sup> *Ibid* at para 52.

<sup>151</sup> See *Korthe v Hillstrom Oil Co*, 1997 CanLII 24841 at para 37 (BCHRT); *Kovacs v John's Bedrooms Barn and Foam Warehouse and others*, 2013 BCHRT 31 at para 26; or *Horton v Niagara (Regional Municipality)*, 1987 CanLII 8548 at para 47 (ONHRT).

<sup>152</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>153</sup> *Ibid*.

post a job advertisement that excludes or implies excluding pregnant individuals or inquire if an applicant is pregnant or plans to become pregnant.<sup>154</sup> Human rights legislation protects job applicants just as it protects existing employees.<sup>155</sup>

It is also considered discriminatory to withhold promotions or demote an employee based solely on their pregnancy or pregnancy-related leave.<sup>156</sup> The presumption that a candidate will take time off for maternity leave or that their pregnancy will hinder job performance constitutes a violation of Canadian human rights law.<sup>157</sup> Over the past five years, only two cases have dealt with this kind of discrimination and both were dismissed.<sup>158</sup>

In *Douglas v Ducharme Motors Ltd*, the complainant alleged that the respondent discriminated against her by withdrawing an offer of full-time employment after discovering she was pregnant.<sup>159</sup> The complainant initially held a part-time position for the respondent.<sup>160</sup> During a meeting with her manager, full-time employment was discussed and allegedly offered.<sup>161</sup> However, after informing the employer of her pregnancy, the complainant claimed that the manager made negative comments about her work and appearance and told her she was no longer being considered for the full-time position.<sup>162</sup> The employer denied the existence of a full-time offer and argued that performance issues had emerged before they were aware of the pregnancy.<sup>163</sup>

In a brief decision, the Alberta Human Rights Tribunal dismissed the complaint because the complainant failed to provide evidence of the alleged full-time offer of employment.<sup>164</sup> There was no correspondence or documentation confirming the contents of the meeting where the offer was purportedly made.<sup>165</sup> Furthermore, the employer presented evidence of the

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<sup>154</sup> New Brunswick Guideline, *supra* note 31 at 7.

<sup>155</sup> Ontario Human Rights Commission, "Human rights issues at all stages in employment" (last visited 4 February 2025), online: <ohrc.on.ca> [perma.cc/T3X7-NRP7].

<sup>156</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>157</sup> New Brunswick Guideline, *supra* note 31 at 10–11.

<sup>158</sup> See *Douglas v Ducharme Motors Ltd*, 2020 AHRC 87 [Douglas]; and *Peckford v Corner Brook Stream Development Corporation*, 2020 CanLII 29324 (NLHRC) [Peckford].

<sup>159</sup> *Douglas*, *supra* note 158.

<sup>160</sup> *Ibid* at para 3.

<sup>161</sup> *Ibid* at para 4.

<sup>162</sup> *Ibid* at para 6.

<sup>163</sup> *Ibid* at para 7.

<sup>164</sup> *Ibid* at para 18.

<sup>165</sup> *Ibid*.

complainant's performance issues early on in her employment and prior to her disclosing the pregnancy.<sup>166</sup> Therefore, the Tribunal concluded that there was no indication the termination was related to the complainant's pregnancy.<sup>167</sup>

*Peckford v Corner Brook Stream Development Corporation*, a case from Newfoundland and Labrador, involved a seasonal employment contract where the employer was successful in demonstrating that their refusal to hire the complainant back was non-discriminatory.<sup>168</sup> The complainant had been employed by the respondent for two summers.<sup>169</sup> However, after disclosing her pregnancy to the respondent's executive assistant, she was not offered the position again, as the respondent claimed it had found someone else with "considerable experience".<sup>170</sup> The complainant alleged that when she informed the executive assistant of her pregnancy, she was told that her pregnancy was not a concern at that point "but might be later as the pregnancy progressed."<sup>171</sup> The respondent denied this and argued that the decision not to hire the complainant was made on a merit-based assessment of her qualifications.<sup>172</sup>

The adjudicator acknowledged that the complainant established a *prima facie* case of discrimination, given that her pregnancy was the only apparent difference in her candidacy. However, turning the onus to the employer, the adjudicator was satisfied that the employer had valid, non-discriminatory reasons for not selecting her for the position.<sup>173</sup> The respondent presented evidence that the chosen candidate possessed superior skills and experience.<sup>174</sup> Moreover, the adjudicator emphasized that "[t]here is no expectation, in respect of term contracts for seasonal work, that they will continue to be awarded year after year."<sup>175</sup> Therefore, despite the complainant's expectations based on her prior experience, the employer was not obligated to rehire her. The adjudicator concluded that the decision not

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<sup>166</sup> *Ibid* at para 19.

<sup>167</sup> *Ibid* at para 20.

<sup>168</sup> *Peckford*, *supra* note 158 Newfoundland and Labrador does not have a human rights tribunal, so the Newfoundland and Labrador Human Rights Commission refers complaints to an independent Human Rights Adjudicator to decide if discrimination occurred.

<sup>169</sup> *Peckford*, *supra* note 158 at para 11.

<sup>170</sup> *Ibid* at para 22.

<sup>171</sup> *Ibid* at para 19.

<sup>172</sup> *Ibid* at para 2.

<sup>173</sup> *Ibid* at para 72.

<sup>174</sup> *Ibid* at para 76.

<sup>175</sup> *Ibid* at para 77.

to hire the complainant was unrelated to her pregnancy and did not infringe on her human rights.<sup>176</sup>

*iii. Adverse Differential Treatment in Employment Because of Pregnancy-Related Circumstances or Conditions*

Canadian human rights legislation unequivocally protects employees from adverse treatment linked to their pregnancy status. Just as it is prohibited to terminate an employee due to pregnancy, other forms of employer retaliation due to pregnancy also qualify as discrimination.<sup>177</sup> An obvious example of this kind of discrimination can be found in *McPherson v 557466 Alberta Ltd o/a LDV Pizza Bar*, a case heard by the Alberta Human Rights Tribunal.<sup>178</sup> In this case, the complainant alleged that the respondent discriminated against her based on the protected ground of pregnancy when she experienced adverse treatment in the form of reduced hours, changes in shift schedules and ultimately termination of employment following her pregnancy disclosure.<sup>179</sup>

The Tribunal held that all three allegations of adverse impact were substantiated.<sup>180</sup> First, termination of employment is inherently adverse treatment.<sup>181</sup> Second, payroll records supported the claim of reduced working hours and that the complainant was being sent home earlier after informing the respondent of her pregnancy.<sup>182</sup> The reduction in hours had an adverse impact, as the complainant depended on adequate hours to sustain her livelihood.<sup>183</sup> Finally, the significant schedule change, from the “lucrative” evening shifts that yielded increased hours and tips (which she had always worked) to lunch shifts, represented another form of adverse impact.<sup>184</sup>

The Tribunal concluded that the pregnancy played a role in the adverse impacts of the complainant’s termination and reduced hours but not in the

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<sup>176</sup> *Ibid* at para 78.

<sup>177</sup> Kathryn Meehan, “Falling through the Cracks: The Law Governing Pregnancy and Parental Leave” (2023) 35:2 Ottawa L Rev 211 at 218.

<sup>178</sup> *McPherson v 557466 Alberta Ltd o/a LDV Pizza Bar*, 2023 AHRC 36 [*McPherson*].

<sup>179</sup> *Ibid* at para 2.

<sup>180</sup> *Ibid* at para 11.

<sup>181</sup> *Ibid* at para 12.

<sup>182</sup> *Ibid* at paras 14–16.

<sup>183</sup> *Ibid* at para 16.

<sup>184</sup> *Ibid* at para 17.

schedule change.<sup>185</sup> The complainant testified that she directly asked the respondent if her pregnancy was the reason for her termination and the respondent answered that he could not have the complainant in the restaurant because she was eight months pregnant.<sup>186</sup> At that point, the complainant was only five months into her pregnancy but was visibly pregnant.<sup>187</sup> Additionally, the evidence showed that the respondent told the Employment Standards Officer that pregnancy was a factor in the complainant's termination.<sup>188</sup> Regarding reduced hours, the Tribunal found that the complainant's pregnancy was a factor in the adverse treatment, "[g]iven the connection between the reduced hours and the timing of when the complainant disclosed her pregnancy".<sup>189</sup>

Unlike the previous two issues, the Tribunal did not find a connection between the complainant's pregnancy and the change in her schedule. Contrary to the issue of reduced hours, which was connected in time to when the complainant disclosed her pregnancy, with a clear demarcation at the time of pregnancy disclosure, there was no temporal connection between the shift change and the pregnancy disclosure.<sup>190</sup> The change from evening shifts to lunch shifts came later and appeared to be made at the last minute, with little regard for the complainant or her personal schedule.<sup>191</sup> However, general arbitrary or unfair employment practices are not protected by human rights legislation.<sup>192</sup> Moreover, the evidence did not establish that the lunch schedule impacted the complainant's ability to fully participate in the workplace, as she was able to reschedule medical appointments to work the scheduled lunch shifts.<sup>193</sup> Additionally, there were no negative comments or other evidence linking pregnancy to the schedule change.<sup>194</sup> For all these reasons, the complainant failed to satisfy her burden of establishing that

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<sup>185</sup> *Ibid* at para 27.

<sup>186</sup> *Ibid* at para 36.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid* at para 42. Employment Standards Officers may conduct inspections to see if employment standards are being met, either proactively or as a result of a complaint. In this case, the Employment Standards Officer investigated and resolved the complainant's Employment Standards complaint about her termination. After receiving information from the complainant and speaking to her, the Employment Standards Officer testified before the Tribunal.

<sup>189</sup> *McPherson, supra* note 178 at para 61.

<sup>190</sup> *Ibid* at para 63.

<sup>191</sup> *Ibid* at para 23.

<sup>192</sup> *Ibid*. The court pointed out that going forward, she may have required accommodation, but the parties did not get to that point because of her termination.

<sup>193</sup> *Ibid* at para 65.

<sup>194</sup> *Ibid* at para 64.

pregnancy was a factor in the adverse treatment, as there was no evidentiary connection between her pregnancy and the schedule change.<sup>195</sup>

A common example of adverse impact arises when an employee chooses to take maternity leave. All jurisdictions have employment standards legislation requiring that an employee return from maternity leave to the same or equivalent position with equal wages and benefits.<sup>196</sup> Employers can make changes to an employee's position during maternity leave, but "these changes should be necessary and justified, and the employee should be kept informed about them."<sup>197</sup> Employers should involve employees on maternity leave in decisions or policy changes directly affecting their employment.<sup>198</sup>

An example where the employer failed to comply with this requirement is found in *LaFleche v NLFD Auto dba Prince George Ford (No 2)*, a case heard by the British Columbia Human Rights Tribunal.<sup>199</sup> In this case, the complainant was terminated from her job during her maternity leave.<sup>200</sup> The evidence demonstrated that the employer hired a temporary replacement for her while she was on leave.<sup>201</sup> However, nine months into her maternity leave, the employer informed the complainant that the temporary employee would remain in the complainant's position when she returned from maternity leave.<sup>202</sup> Although she was not explicitly terminated, she was informed that her job duties would significantly change from her managerial position to an unknown position and she was left in limbo about what position or duties she would be undertaking.<sup>203</sup> Furthermore, the employer told the complainant that they would provide possible return-to-work scenarios but failed to do so before her scheduled return date.<sup>204</sup>

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<sup>195</sup> *Ibid.*

<sup>196</sup> Meehan, *supra* note 177. For example, see *Employment Standards Act, 2000*, SO 2000, c 41, s 53(1); *The Employment Standards Code*, SM 1998, c 29, CCSM c E110, s 60(2); *Employment Standards Act*, SNB 1982, c E-7.2, s 44(1).

<sup>197</sup> New Brunswick Guideline, *supra* note 31 at 17.

<sup>198</sup> *Ibid* at 15.

<sup>199</sup> *LaFleche v NLFD Auto dba Prince George Ford (No 2)*, 2022 BCHRT 88 [*LaFleche*].

<sup>200</sup> *Ibid* at para 2.

<sup>201</sup> *Ibid* at paras 17–20.

<sup>202</sup> *Ibid* at paras 21, 26.

<sup>203</sup> *Ibid* at para 57. There was no discussion about changes to Ms. LaFleche's pay, title or who would be reporting to whom.

<sup>204</sup> *Ibid.*

The Tribunal ruled that the employer was entitled to make legitimate business decisions while the complainant was on leave.<sup>205</sup> However, it could not make changes that left her at a disadvantage compared to other employees who were not on maternity leave.<sup>206</sup> The Tribunal explained, “[b]ut for Ms. LaFleche's maternity leave, she would have continued as the marketing manager”, a position she had held successfully for over two years.<sup>207</sup> The Tribunal also criticized the fact that the complainant was not consulted or informed about changes in the workplace, particularly those affecting her position.<sup>208</sup> It emphasized that being on maternity leave does not disentitle a person from being involved in discussions and decisions in the workplace, especially those that directly affect them.<sup>209</sup> Again the Tribunal explained, “[b]ut for her maternity leave, Ms. LaFleche would not have been excluded from such conversations and decisions. She would have been an active participant, especially since she acted in a managerial capacity.”<sup>210</sup>

In its reasoning, the Tribunal in *LaFleche* referred to the case of *Bateman v Prime Time Sports*, which found that discrimination can be established if an employer terminates an employee while on a *Code*-protected leave in favour of their replacement.<sup>211</sup> This is because if the employee had not taken a *Code*-protected leave, “the employer would have no opportunity to prefer a replacement employee”.<sup>212</sup> In *LaFleche*, the employer made changes because it preferred the complainant's maternity leave replacement, even though there was no evidence to suggest that the complainant had been anything but successful in her position. Had she not taken maternity leave, she would have continued as the marketing manager.<sup>213</sup>

In contrast to the cases mentioned above, there are legitimate reasons for making changes to an employee's position during maternity leave, even if those changes result in termination.<sup>214</sup> For example, mass layoffs due to financial constraints may be justifiable if they are carried out in a way that

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<sup>205</sup> *Ibid* at para 61.

<sup>206</sup> *Ibid*.

<sup>207</sup> *Ibid*.

<sup>208</sup> *Ibid* at para 62.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid*.

<sup>211</sup> *Bateman v Prime Time Sports*, 2012 BCHRT 230 at paras 70–80 [*Bateman*].

<sup>212</sup> *LaFleche*, *supra* note 199 at 63.

<sup>213</sup> *Ibid* at para 61.

<sup>214</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

is procedurally fair to all employees.<sup>215</sup> The case of *Falchetti v Bensen Manufacturing* illustrates this concept.<sup>216</sup> In this case, the British Columbia Human Rights Tribunal found no evidence establishing a connection, or “nexus”, linking the complainant’s sex to her termination during maternity leave.<sup>217</sup> The employer argued that even if the complainant had not been on maternity leave, they would have terminated her because they had to close a branch of their manufacturing operations, resulting in the elimination of her position and the termination of eight other employees.<sup>218</sup> Furthermore, there was no evidence suggesting that those who were retained had been spared due to their not taking maternity leave.<sup>219</sup>

These cases demonstrate that adverse treatment in employment violates human rights legislation when it is directly linked to an employee’s pregnancy or pregnancy-related leave. Negative differential treatment based on pregnancy-related status, such as reduced hours, termination or exclusion from workplace decisions, constitutes discrimination if a clear connection to pregnancy can be established. However, the critical factor in these cases is whether the adverse differential treatment is directly linked to the individual’s pregnancy. If there is no connection between the adverse treatment and the employee’s pregnancy or pregnancy-related leave, such treatment does not constitute a violation of human rights. As stated earlier, pregnancy does not shield employees from all situations that are common in the workplace, including changes in schedules or layoffs due to economic constraints, provided these decisions do not disproportionately or unfairly target pregnant employees. Ultimately, these rulings underscore the importance of identifying a clear connection between pregnancy and adverse treatment to determine whether a human rights violation has occurred.

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<sup>215</sup> *Ibid.*

<sup>216</sup> *Falchetti v Bensen Manufacturing*, 2019 BCHRT 40.

<sup>217</sup> *Ibid* at paras 45, 50.

<sup>218</sup> *Ibid* at para 39.

<sup>219</sup> *Ibid* at para 45.

iv. *Creating or Following Policies or Practices That Negatively Affect an Employee Because of Pregnancy-Related Conditions or Circumstances*

Employment policies and practices should not have the effect of discriminating against employees, either directly or indirectly. For instance, pregnant employees should not face disadvantages for being absent from work due to their pregnancy, such as for pregnancy-related illness or medical appointments.<sup>220</sup> A prime example of this is *Abreu v Transport Fortuna*, a case of the Canadian Human Rights Tribunal, where a complaint of discrimination based on pregnancy was upheld.<sup>221</sup> The complainant was terminated when she became unable to work due to pregnancy-related illness.<sup>222</sup> The employment agreement allowed the employer to terminate employees who were on sick leave for an unspecified number of days.<sup>223</sup> The complainant had informed her employer about her high-risk pregnancy and had been absent from work for six days as a result.<sup>224</sup> When she subsequently informed her employer that she needed an additional day off due to medical reasons, the employer dismissed her on the same day.<sup>225</sup>

The Tribunal found that the complainant's pregnancy-related sick leave was a contributing factor in her dismissal, constituting discrimination based on pregnancy.<sup>226</sup> The complainant had received a troubling text message from her employer justifying her termination on the basis that he would have "to do everything by himself" and complaining about her pregnancy-related absences.<sup>227</sup> Furthermore, the short interval between the complainant informing the employer of her absences and her subsequent dismissal suggested a causal relationship between the two.<sup>228</sup> The Tribunal ruled that allowing the employer to terminate employment based on an unspecified amount of sick leave constituted a "discriminatory practice".<sup>229</sup> If not for this vague provision in the employment agreement, the complainant would have continued working as usual until her maternity leave, as her second and

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<sup>220</sup> New Brunswick Guideline, *supra* note 31 at 14.

<sup>221</sup> *Abreu v Transport Fortuna*, 2020 CHRT 35 [*Fortuna*]; see also *Youmbi Eken c Réseaux Netrium Inc*, 2019 TCDP 44.

<sup>222</sup> *Fortuna*, *supra* note 221 at para 4.

<sup>223</sup> *Ibid* at para 3.

<sup>224</sup> *Ibid* at paras 4–5.

<sup>225</sup> *Ibid* at para 4.

<sup>226</sup> *Ibid* at paras 69, 83.

<sup>227</sup> *Ibid* at para 72.

<sup>228</sup> *Ibid* at para 73.

<sup>229</sup> *Ibid* at para 79.

third trimesters progressed smoothly.<sup>230</sup> While this poorly worded policy applied to all employees, it had a disproportionate impact on the complainant due to her pregnancy.

A unique aspect of this case is that the complainant sought “systemic remedies” from the respondent. The complainant requested that the Tribunal order the respondent to cease its discriminatory practices, including implementing a non-discrimination and support policy for pregnant employees in the workplace, along with mandatory training to enforce non-discrimination policies.<sup>231</sup> At the time, the respondent did not have a human resources policy concerning sick and pregnancy leave.<sup>232</sup> The Tribunal agreed that systemic measures were appropriate and ordered the respondent to “immediately stop discriminating against its pregnant employees or employees taking pregnancy-related sick leave” and to establish measures to “prevent future incidents of discrimination based on pregnancy or disability within six months”.<sup>233</sup> The respondent was also ordered to consult with the Canadian Human Rights Commission to develop and implement these measures.<sup>234</sup>

v. *Failing to Provide Reasonable Accommodation for an Employee Who Is Pregnant, Trying to Become Pregnant or Recently Gave Birth*

The duty to accommodate is one of the most fundamental principles in employment law. This article will address it to the extent that it is relevant to pregnancy discrimination. Employers have obligations that extend beyond merely avoiding discriminatory actions.<sup>235</sup> They must implement sound workplace policies and make genuine efforts to adapt the workplace and job duties so that pregnant employees can continue their employment without hindrance.<sup>236</sup> For example, a pregnant employee may require additional bathroom breaks, a modified shift schedule or the assignment of alternative duties. Employers should take the necessary steps to ensure their

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<sup>230</sup> *Ibid* at para 98.

<sup>231</sup> *Ibid* at para 124.

<sup>232</sup> *Ibid* at para 125.

<sup>233</sup> *Ibid*.

<sup>234</sup> *Ibid* at para 126.

<sup>235</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>236</sup> *Ibid*.

employees can work to the best of their abilities and free from discrimination, which is the essence of the duty to accommodate.<sup>237</sup>

However, it is important to note that the duty to accommodate should not result in “undue hardship” to the employer and must also be “reasonable”. Undue hardship arises when factors like safety, health or cost impose an excessive burden on the employer, rendering their business unfeasible.<sup>238</sup> When accommodation reaches the point of undue hardship, the employer may no longer be obligated to provide further accommodation.<sup>239</sup> The duty to reasonably accommodate, short of undue hardship, forces employers to accommodate an employee’s disadvantage but recognizes that there is a limit to the steps an employer is reasonably expected to take.

A straightforward case where the employer failed to fulfill their duty to accommodate is *Turnbull v Edmonton Pipe Trades Educational Fund o/a Alberta Pipe Trade College*.<sup>240</sup> In this case, the complainant, who was employed as an instructor for approximately two years, informed her employer of a medical condition requiring accommodation.<sup>241</sup> Without inquiring into the nature of the medical condition or the extent of the accommodations needed, the employer terminated the complainant the following day.<sup>242</sup> The medical condition that required accommodation was her pregnancy.<sup>243</sup>

The Alberta Human Rights Tribunal concluded that the complainant’s request for accommodation resulted in her termination.<sup>244</sup> Since the medical condition requiring accommodation was pregnancy, this constituted pregnancy discrimination. The respondent failed to explore or consider any potential accommodation options, even though the complainant had suggested various solutions.<sup>245</sup> Moreover, the employer explicitly stated that the decision to terminate the complainant was due to her request for accommodation.<sup>246</sup>

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<sup>237</sup> CHRC Policy and Best Practices, *supra* note 87.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> *Turnbull v Edmonton Pipe Trades Educational Fund o/a Alberta Pipe Trade College*, 2021 AHRC 172.

<sup>241</sup> *Ibid* at para 2.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*

<sup>244</sup> *Ibid* at para 8.

<sup>245</sup> *Ibid* at para 22.

<sup>246</sup> *Ibid* at para 19.

The Tribunal emphasized that it did not matter whether the complainant explicitly mentioned her pregnancy to her employer because discrimination was “established either way”.<sup>247</sup> The employer chose not to make further inquiries about the nature of the medical condition or possible accommodation.<sup>248</sup> The Tribunal rightly noted that “[t]he fact that the respondent did not know exactly what protected ground the medical condition related to does not insulate it from liability for discrimination when it knew that a protected ground was involved and decided to terminate her because she asked for accommodation”.<sup>249</sup>

While the duty to accommodate is robust, it is not intended to impose an obligation on employers to accommodate every request or preference made by employees. This is particularly relevant when there is a legitimate reason for treating an employee differently due to her pregnancy. For example, if a job involves working with dangerous chemicals, it may be justified to treat a pregnant employee differently to accommodate her pregnancy and accommodation may not precisely align with the employee’s preferences. An example of this concept is found in the case of *Ajax (Town) v Ajax Professional Fire Fighters’ Association, Local 1092*.<sup>250</sup> This case was not decided by a human rights tribunal but by a labour arbitrator in Ontario.<sup>251</sup> Nonetheless, it is noteworthy as it has been cited in various cases and secondary sources and is the only case within the past five years that discusses the duty to accommodate pregnant individuals.<sup>252</sup>

In *Ajax*, the grievor worked as a suppression firefighter on 24-hour shifts.<sup>253</sup> Her doctor recommended that she should no longer respond to emergency calls while on duty due to pregnancy-related medical conditions

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<sup>247</sup> *Ibid* at para 10.

<sup>248</sup> *Ibid* at para 12.

<sup>249</sup> *Ibid*.

<sup>250</sup> *Ajax (Town) v Ajax Professional Fire Fighters’ Association, Local 1092*, 2019 CanLII 69278 (ONLA) (Arbitrator: Jasbir Parmar).

<sup>251</sup> *Ibid*.

<sup>252</sup> See *Hydro Ottawa Limited and IBEW, Local 636 (2020-06), Re*, 2021 CarswellOnt 3483, 148 CLAS 49 (Ontario Arbitration) (Arbitrator: Judith Allen); *MAHCP and Shared Health, Re*, 2024 CanLII 122938 (Manitoba Arbitration) (Arbitrator: Kristin L Gibson); Russel W Zinn, “Law of Human Rights in Canada: Practice and Procedure” (last visited 15 December 2020) at ch 11 online: (WL Can) Thomson Reuters Canada Limited; and Donald JM Brown, QC & David M Beatty with the assistance of Adam J Beatty, “Canadian Labour Arbitration, 5th Edition” (last visited 15 December 2020) at ch 7, online: (WL Can) Thomson Reuters Canada Limited.

<sup>253</sup> *Ibid* at para 4.

that prevented her from wearing heavy personal protective equipment.<sup>254</sup> Responding to emergency calls was a critical aspect of the 24-hour shifts she had worked before her pregnancy.<sup>255</sup> To accommodate her, the town decided to assign her to the day shift for non-emergency work.<sup>256</sup> However, the grievor suggested that she continue to work the 24-hour shifts without responding to emergency calls because it was more convenient for her childcare obligations.<sup>257</sup> When the Town declined, the grievor alleged that the town discriminated against her and that she should have been assigned duties on her regular 24-hour shift as an accommodation for her pregnancy.<sup>258</sup>

For various reasons, the arbitrator determined that the town did not discriminate against the grievor based on her pregnancy.<sup>259</sup> First, the employer personally met with the grievor shortly after she informed them of her pregnancy to explore their options and consider her views regarding the work she could perform during the 24-hour shift.<sup>260</sup> The arbitrator noted that “this indicates the Chief made a serious effort to obtain relevant information, consider the Grievor's views about the work she felt she could perform, and considered that information by way of discussions with both Human Resources and the deputy chiefs.”<sup>261</sup>

Additionally, the nature of the accommodation the employee suggested played a role in the decision. If the grievor continued the 24-hour shift without responding to emergency calls, an additional staff member would need to be added to the 24-hour shift to perform the emergency work that she could not do. Employers are not required, as a form of accommodation, to assign an extra staff person to perform the duties an employee seeking accommodation cannot do.<sup>262</sup> Since emergency fire suppression work was a key component of the 24-hour shift and the grievor could not perform this work due to her pregnancy, the Town met its duty to accommodate by

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<sup>254</sup> *Ibid* at para 9.

<sup>255</sup> *Ibid* at para 7.

<sup>256</sup> *Ibid* at para 19.

<sup>257</sup> *Ibid* at para 10–12.

<sup>258</sup> *Ibid* at paras 56–57.

<sup>259</sup> *Ibid* at paras 93–102.

<sup>260</sup> *Ibid* at paras 10–11.

<sup>261</sup> *Ibid* at para 91.

<sup>262</sup> *Ibid* at para 113.

assigning her to day shifts while she was pregnant.<sup>263</sup> Importantly, this shift change did not result in any wage, seniority or benefit loss.<sup>264</sup>

As demonstrated by these cases, accommodating pregnant employees is crucial to avoid discrimination claims. Pregnant employees must receive reasonable accommodations to enable them to continue doing their job in the workplace. However, reasonable accommodation is context-specific and employees should remain flexible and collaborative throughout the accommodation process.

### C. Three Principles Emerging in Present-Day Pregnancy Discrimination Jurisprudence

After a thorough review of current pregnancy discrimination case law, three key principles emerge:

- i. The “subtle scent of discrimination” has implications for evidence and intent;
- ii. Length of service is a key factor; and
- iii. Timing is crucial.

#### i. *The “Subtle Scent of Discrimination” Has Implications for Evidence and Intent*

Tribunals recognize that “employers seldom advertise their breaches of the *Code* before or after the fact”.<sup>265</sup> This “subtle scent of discrimination” is referred to in various cases, as the Tribunal in *Fortuna* explained:<sup>266</sup>

“The case law recognizes the difficulty of proving allegations of discrimination by direct evidence given that discrimination is not a practice which one would expect to see displayed directly or overtly. The Tribunal’s role, therefore, is to consider all the circumstances and to determine on a balance of probabilities whether there is discrimination or whether there is, as described in *Basi*, the “subtle scent of

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<sup>263</sup> *Ibid* at para 102.

<sup>264</sup> *Ibid* at paras 147–148. The Tribunal also considered whether the town discriminated against the grievor on the grounds of family status and concluded that the grievor failed to establish she suffered a disadvantage in respect of her childcare obligations because of the change in her schedule. The evidence demonstrated that the grievor had access to full-time childcare. The fact that she wanted childcare in a different structure to address the specific way she wished to raise her son was not a disadvantage based on her family status.

<sup>265</sup> *Kestle*, *supra* note 118 at para 34.

<sup>266</sup> *Fortuna*, *supra* note 221 at para 13 [emphasis added].

discrimination". In short, the Tribunal can draw an inference of *prima facie* discrimination when the evidence before it renders such an inference more probable than the other possible inferences or hypotheses." [citations omitted]

Since providing direct evidence of discrimination is not always feasible because "there is rarely direct evidence of discrimination",<sup>267</sup> discrimination can be established on grounds of credibility or circumstantial evidence.<sup>268</sup> Moreover, as the Tribunal in *Fortuna* explained, inferences of discrimination can be drawn when an employer's behaviour clearly has an adverse impact on their pregnant employee.<sup>269</sup> Timing is an important consideration for tribunals in making inferences of pregnancy discrimination.

Additionally, discrimination does not hinge on intent; what matters is the impact of an employer's actions, not their intentions.<sup>270</sup> This principle is evident as early as *Brooks*, where the SCC decisively rejected the respondent's argument that their sickness and accident plan could not be discriminatory because they had no intention to discriminate.<sup>271</sup> The SCC emphasized that intent was of "little or no force" given that previous jurisprudence made clear that it is the effect of a discriminatory practice, rather than the underlying intent, that determines whether it gives rise to discrimination.<sup>272</sup>

In *McPherson*, the Tribunal expressed disappointment that the respondent "did not appear to have even a basic understanding of an employer's obligations to a pregnant employee."<sup>273</sup> For example, the respondent did not believe that maternity leave was job-protected and had never heard of reasonable notice termination pay.<sup>274</sup> Tribunals expect employers to educate themselves about their obligations regarding pregnancy discrimination. Deliberate ignorance and lack of intent do not

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<sup>267</sup> *Bauknecht*, *supra* note 90 at para 30.

<sup>268</sup> *Ibid.*

<sup>269</sup> *Chang*, *supra* note 125.

<sup>270</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>271</sup> Even after *Brooks*, the SCC has consistently held that "unintentional" discrimination is equally deserving of legal censure as intentional discrimination. For example, in *Meiorin* (paras 29 and 49), the Court recognized that employers with discriminatory intent rarely craft rules that are explicitly discriminatory. Instead, they often implement seemingly neutral standards that produce discriminatory effects. This phenomenon, known as "adverse effect discrimination", arises when a policy or practice appears neutral but disproportionately impacts a protected group. In *Meiorin*, the SCC ruled that a fitness standard unjustifiably excluded women from firefighting jobs, exemplifying adverse effect discrimination.

<sup>272</sup> *Brooks*, *supra* note 1 at 1239.

<sup>273</sup> *McPherson*, *supra* note 178 at para 55.

<sup>274</sup> *Ibid* at para 55.

serve as a defence for employers who discriminate against pregnant employees.<sup>275</sup>

Related to intent is the principle that pregnancy does not have to be a “significant, material, causal, sole, or main factor” in the differential adverse treatment of a pregnant employee to establish discrimination.<sup>276</sup> Discrimination arises when an employer treats an employee differently “at least in part because of her pregnancy”.<sup>277</sup> Case law indicates that tribunals will assess whether it is more likely than not that the complainant’s pregnancy was at least one factor in the differential treatment.<sup>278</sup>

For example, in *Fortuna*, the Tribunal concluded that whether pregnancy was the only reason for dismissal was irrelevant.<sup>279</sup> Even if “[t]here may certainly have been other reasons in the Employer’s mind at the time of dismissal,” the Tribunal did not have to consider whether these reasons justified the employee’s termination.<sup>280</sup> In cases involving pregnancy discrimination, it is sufficient that pregnancy was one factor in the employer’s decision to treat the employee differently.

## ii. Length of Service Is a Key Factor

Various provincial legislation regarding employment standards establishes probationary periods during which employment can be terminated without notice or termination pay.<sup>281</sup> This does not imply that pregnancy discrimination is permitted during the probationary period, but case law tends to apply a more lenient standard when determining whether pregnancy played a role in termination that occurred within the probationary period. This differentiation makes sense, as seniority in the workplace carries weight and legislation prescribes specific standards of conduct based on an employee’s length of service.

For instance, in the *Douglas* case, the Tribunal noted that the complainant’s termination occurred within her probationary period when

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<sup>275</sup> *Ibid* at paras 55, 68.

<sup>276</sup> *Ibid* at para 24.

<sup>277</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>278</sup> *Ibid*.

<sup>279</sup> *Fortuna*, *supra* note 221 at para 70.

<sup>280</sup> *Ibid*.

<sup>281</sup> For example, see *Employment Standards Act*, *supra* note 196, s 54(a); *The Employment Standards Code*, *supra* note 196, s 62(1)(a)(i).

the employer decided that “continued employment was not feasible”.<sup>282</sup> Similarly, in *Bauknecht*, the Tribunal accepted the employer’s argument that the decision to terminate employment was related to the end of the employee’s probationary period, not her pregnancy.<sup>283</sup> This explanation played a significant role in dismissing the complainant’s discrimination claims.

Additionally, in *Peckford*, the Tribunal firmly rejected the employee’s expectation that her seasonal work contract would be renewed year after year when she was overlooked for the position she had held for the previous two summers.<sup>284</sup> This highlights that it is more challenging for short-term, seasonal employees – with less connection to the workplace by virtue of their length of service – to succeed in pregnancy discrimination claims compared to long-term, permanent employees.

### iii. *Timing is Crucial*

The significance of timing in these cases cannot be overstated, as it is a recurring theme in virtually every pregnancy discrimination case. Decision-makers are entitled to rely on suspicious timing to support findings that pregnancy played a role in adverse treatment, whether it pertains to termination, refusal to hire or other forms of workplace discrimination.<sup>285</sup> In the absence of contradictory evidence, decision-makers can reasonably infer pregnancy discrimination based on the timing of an adverse action.<sup>286</sup> This is explicitly demonstrated in *Kestle*, where the employee was terminated less than a week after disclosing her pregnancy.<sup>287</sup> Based on the timing of the termination, the Tribunal was allowed to draw the inference that pregnancy was at least one factor in her termination, rather than the alleged poor performance issues the employer cited.<sup>288</sup> The same situation occurred in *Lall*, where the employee was terminated approximately three weeks after revealing her pregnancy, and in *Weihs*, where the employee was terminated only eight days after disclosing her pregnancy.<sup>289</sup> In each case, the temporal

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<sup>282</sup> *Douglas*, *supra* note 158 at para 20.

<sup>283</sup> *Bauknecht*, *supra* note 90 at para 52.

<sup>284</sup> *Peckford*, *supra* note 158 at para 77.

<sup>285</sup> Newfoundland and Labrador Guidelines, *supra* note 95.

<sup>286</sup> *Lall*, *supra* note 98 at para 20.

<sup>287</sup> *Kestle*, *supra* note 118 at para 1.

<sup>288</sup> *Ibid* at para 33.

<sup>289</sup> *Weihs*, *supra* note 107 at para 2.

connection between the pregnancy announcement and the termination was a central consideration in the pregnancy discrimination ruling.

This ability to draw inferences based on timing is crucial, as it distinguishes a discrimination claim from general arbitrary or unfair employment practices that do not constitute discrimination. For example, in *McPherson*, only two of the three adverse treatment claims made by the employee were successful. While her termination and reduced hours were “connected in time” to when she disclosed her pregnancy, there was no temporal connection to her pregnancy disclosure when her evening shifts were changed to lunch shifts, as this change “came later”.<sup>290</sup> Since there was no evidentiary link between the schedule change and the complainant’s pregnancy, the Tribunal could not infer that pregnancy played a role in the schedule change.<sup>291</sup> Human rights legislation requires a protected ground to be a factor in adverse treatment.<sup>292</sup> Therefore, if a tribunal cannot make an inference of discrimination based on timing, it is challenging for employees to succeed in their discrimination claims.

#### **D. Limits of Human Rights Tribunal Adjudication and Recommendations**

An examination of pregnancy discrimination case law from the past five years reveals that pregnancy discrimination remains a significant issue in Canada, despite clear indications from human rights commissions, tribunals and legislatures that pregnancy discrimination violates human rights. Many women face adverse workplace consequences due to their pregnancies, such as reduced hours, denial of post-maternity leave return opportunities or even outright termination shortly after announcing their pregnancies.

However, analyzing recorded pregnancy discrimination cases provides only a partial view of the problem. These cases do not account for reported complaints of pregnancy discrimination that human rights tribunals and commissions have not yet addressed. For example, in February 2023, a 24-year-old woman from Manitoba filed a human rights complaint with the Manitoba Human Rights Commission after being denied a job because she

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<sup>290</sup> *McPherson*, *supra* note 178 at paras 63–64.

<sup>291</sup> *Ibid* at para 64.

<sup>292</sup> *Ibid*.

was three months pregnant.<sup>293</sup> The outcome of this complaint is still not published by the Commission. Additionally, some cases of pregnancy discrimination likely go unreported due to employees' fears of employer retaliation, lack of awareness of their rights or companies quietly settling cases to avoid addressing human rights violations.<sup>294</sup> Finally, factors including cost, delay and effectiveness of human rights litigation diminish the success of legal redress.<sup>295</sup> While acknowledging these limitations is important, an examination of human rights jurisprudence is nonetheless helpful in identifying trends and highlighting examples of pregnancy discrimination in the Canadian workforce.

Recognizing the limitations of relying solely on jurisprudence for insights into pregnancy discrimination, a 2021 survey conducted by "Moms at Work", a leading community for working mothers in Canada, revealed that 33% of employees on maternity leave experienced workplace discrimination due to their status as mothers.<sup>296</sup> According to the report, common discriminatory experiences included poor treatment, derogatory comments and the denial of professional opportunities such as promotions or raises.<sup>297</sup> Some women were even laid off or demoted.<sup>298</sup>

Human rights commissions also provide insights into the issue by releasing their annual reports about the grounds and areas of complaints they receive. For example, in 2022, the Canadian Human Rights Commission accepted 763 complaints, of which 19% were related to sex discrimination and 61% pertained to employment.<sup>299</sup> While the exact number of sex discrimination cases related to pregnancy discrimination is not specified, the prevalence of pregnancy discrimination in recent case law suggests a substantial portion of these complaints may be pregnancy related.

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<sup>293</sup> Chelsea Kemp, "Woman says she was denied job at southwestern Manitoba grocery store because of pregnancy", *CBC News* (last modified 18 September 2023), online: <cbc.ca> [perma.cc/RLJ3-U8W5].

<sup>294</sup> Linda McKay-Panos, "Pregnancy Discrimination Remains an Issue", *LawNow* (8 March 2017), online (blog): <aclrc.com> [perma.cc/M2CU-HSGQ].

<sup>295</sup> Dominique Clément, "Renewing Human Rights Law in Canada" (2017) 54:4 *Osgoode Hall LJ* 1311 at 1328–31.

<sup>296</sup> Moms at Work, "2021 Maternity Leave Experience Report" (2021) at 3 online: <thisismomsatwork.com> [perma.cc/C5RV-2B62].

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*

<sup>299</sup> *Calling for Inclusion: The Canadian Human Rights Commission's 2022 Annual Report to Parliament*, Catalogue No HR1-4E-PDF (Ottawa: Canadian Human Rights Commission, 2023) (Charlotte-Anne Malischewski) online: <chrcreport.ca> [perma.cc/NWE7-VJMT].

These findings emphasize the persistent challenges of addressing pregnancy discrimination and the limitations of human rights adjudication as the sole remedy. Consequently, it is vital to adopt proactive and preventative measures to combat pregnancy discrimination before it escalates to adjudication. In the workplace, employers should create equitable environments for pregnant employees. Key actions include establishing clear policies for accommodating pregnancy, assessing employees based on their qualifications and performance rather than assumptions about their ability to work due to pregnancy and providing education and training for all staff on human rights obligations and pregnancy discrimination.<sup>300</sup>

Beyond the workplace, public education plays a critical role in fostering awareness of rights and responsibilities related to pregnancy discrimination. Empowering individuals to recognize and report discriminatory practices is an essential step in preventing violations and ensuring accountability. By addressing the root causes of pregnancy discrimination and promoting a culture of respect and equity, the need for adjudication can be minimized and progress toward eliminating pregnancy discrimination can be achieved.

#### IV. Conclusion

Pregnancy discrimination is a form of sex discrimination that violates Canadian human rights legislation at the federal, provincial and territorial levels. As the Canadian Human Rights Commission explicitly emphasizes, “[p]regnancy in the workplace is a fundamental human rights issue of equality of opportunity between men and women. Women should not suffer negative consequences in the workplace simply because they are pregnant.”<sup>301</sup> Yet, despite the clear legal stance against pregnancy discrimination, Canadian human rights jurisprudence reveals that this is an

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<sup>300</sup> Charlie Herrera Vacaflor, “Pregnancy Discrimination in Canada: What Employers Need to Know” (last modified 8 July 2024), online: <peninsulagrouplimited.com> [perma.cc/3GLW-2W69]. The author attempted to locate examples of workplaces that have successfully implemented the foregoing best practices to serve as examples but was unsuccessful. It is likely that many such policies are internal and not accessible to the public.

<sup>301</sup> CHRC Policy and Best Practices, *supra* note 87 at 4.

ongoing problem.<sup>302</sup> An examination of recent trends in pregnancy discrimination case law suggests that, more than two decades after the SCC's landmark decision in *Brooks* condemning pregnancy discrimination, working women continue to face significant challenges and inequities tied to pregnancy in the workplace.

This article began with an analysis of two influential cases delivered by the SCC, *Bliss* and *Brooks*. These cases laid the historical foundations from which many fundamental principles related to pregnancy discrimination stem. The article then examined numerous human rights cases from across the country and identified recurring patterns to offer a contemporary perspective on the state of pregnancy discrimination in Canada. Based on this examination, the article argued that three key principles emerge: first, the "subtle scent of discrimination" enables tribunals to draw inferences of discrimination regardless of an employer's intentions or the absence of direct evidence; second, length of service is important, with decision-makers distinguishing between long-term and short-term employees; and third, the timing of termination plays a vital role in establishing the temporal connection required to succeed in a pregnancy discrimination claim. While these cases shed light on part of the problem, the prevalence of pregnancy discrimination persists due to fears of reporting and factors such as cost, delay and effectiveness of human rights litigation. Employers and the general public must take proactive measures to combat this phenomenon.

The dramatic increase in the proportion of mothers in employment means that a large segment of the Canadian population is vulnerable to experiencing pregnancy discrimination.<sup>303</sup> The impact of pregnancy discrimination can be severe, as it "manifests itself in subtle ways, and works to marginalize and disempower" pregnant women, women on maternity leave and women seen as likely to become pregnant.<sup>304</sup> Discrimination can deprive these women of training, projects, promotions or job advancement opportunities, violating the fundamental human rights principle of equality

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<sup>302</sup> Specific statistics or data on pregnancy discrimination trends are currently not published by any official body. This is particularly significant given the dramatic rise in the proportion of mothers in the workforce since the *Bliss* and *Brooks* decisions. Quantitative trends in pregnancy discrimination represent a promising area for future research.

<sup>303</sup> Statistics Canada, "Employment rate of mothers and fathers, 1976 to 2021", Catalogue No 14280001 (Ottawa: Statistics Canada, 30 May 2022) online: <statcan.gc.ca> [perma.cc/QZ3L-QKVS]. A significant trend in Canada's labour market is the dramatic increase in the proportion of mothers in employment, reaching 76.5% in 2021, up from 40.5% in 1976.

<sup>304</sup> New Brunswick Guideline, *supra* note 31 at 4.

of opportunity for all without discrimination.<sup>305</sup> Moreover, society benefits from women's ability to manage both the procreative and employment-related aspects of life, the importance of which has been recognized by courts and governments.<sup>306</sup> As stated by the SCC in *Brooks*, "[c]ombining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives."<sup>307</sup> The common thread running through cases of pregnancy discrimination is that finding ways to successfully manage the dual demands of motherhood and employment is a critical step towards true equality. Denying opportunities or imposing restrictions on pregnant women is a form of discrimination.

While there is more work to be done, some legal progress has been made in combatting pregnancy discrimination. Just three decades ago, the SCC refused to acknowledge pregnancy discrimination as a human rights violation. Today, pregnancy is a protected ground under human rights legislation and numerous cases demonstrate that decision-makers take pregnancy discrimination seriously. By understanding the manifestations and risks of pregnancy discrimination, we can continue working to protect pregnant women.

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<sup>305</sup> *Ibid.*

<sup>306</sup> Meehan, *supra* note 177 at 234.

<sup>307</sup> *Brooks*, *supra* note 1 at 1243.