

Sheila Greckol

SG: My name is Sheila Greckol. I was counsel for United Nurses of Alberta at the time of the Parcels case. United Nurses of Alberta was named as a respondent in the complaint. But it was nominal to be a respondent, because of course we supported the complaint completely and took a very active part in the litigation. That case ended in the spring of 1991 and 10 years later I was appointed to the Court of Queens Bench, and I've been here for almost 10 years. It's a propitious time for me to be talking about this – it's almost 20 years since the decision was rendered. As it happened, several of us in those proceedings were pregnant. I was pregnant; my daughter's 20. So I will never forget that Parcels case for many reasons, but that's one of them.

Q: Why was the case important and why was it happening then?

SG: In those years it was very much, if we think back 20 years, we were really at the forefront of fighting for women's equality in the workplace on every front – fighting against sexual harassment, fighting for equal opportunity, fighting for women to be in traditionally male dominated workplaces where all the benefits were, and fighting for women to be treated as permanent features of modern work life. To that point really, women had been treated in a fashion where I think one of the cases says they were like transients in the workplace, and they would be accorded a position and paid until such time as they got pregnant. Then it was a question, would they be kept on, would they not be kept on, would they be required to leave, would they have to change their terms and conditions of employment? So it was a very important case from that perspective because of course women were seeking full equality in the workplace. At the same time women have the procreative imperative – they bear the burden, and the benefits, and the blessings of childbearing for the entirety of society. It seemed only right and fair that there be accommodation for the needs of childbearing and no economic detriment to be borne by women as a result of that procreative role which women have. It was a time of

convergence of many different issues, with women in the workplace perhaps the most important of the issues that women faced.

Q: What was the situation in *Brooks*?

SG: *Brooks* of course went to the Supreme Court of Canada from Manitoba, and it involved the Safeway workers, specific complainants in the province of Manitoba. Because human rights law is created complaint by complaint, the law may be very clear as to what the obligations of the employer are with respect to human rights in the workplace. But until a particular employer is called to task, there's no legal requirement that he or she abide by the human rights context or the human rights imperatives. So what happened after *Brooks* was decided was that very little changed except in the Safeway organization and perhaps only in Manitoba. It was necessary for someone to bring a complaint forward in Alberta and in other jurisdictions. This was a perfect opportunity because the union of course being a female-dominated union and amongst the most progressive if not the most progressive on all of these issues amongst unions in Canada, it was a propitious circumstance. UNA decided they would take on this case and participate with the Commission in launching the case. The result would be that Susan Parcels would have a remedy but it also would apply with respect to all of the women and others who are bound by the collective agreement for the United Nurses in the province of Alberta. Beyond that point, however, nothing was going to change in Alberta until other people started to assert those rights in other workplaces, and indeed that's what we found. The complaint was largely successful for Susan Parcels. It established the concept that health related absences from work as a result of or contiguous with or associated with pregnancy were to be treated as valid health-related reasons for the purposes of insurance, so that women would be paid throughout the usual period of what used to be called confinement – six weeks prior to delivery, six weeks after delivery. Women would be paid by the insurance plan for the period that they could be viewed as having a valid health-related reason for absence from work. The answer would be for Susan Parcels and for other nurses under the collective agreement that yes, the insurance company would pay for that period of time. But all the other women working under collective agreements or under

individual contracts in the province of Alberta, life would go on as normal for them. The employment standards at the time did provide for a certain period of time away from work but didn't speak to this issue of whether or not they would be paid in that time period. So the consequence was after the decision by Chair de Villars was largely in favour of the complaint, so after that we found ourselves – and Jo-Ann you were involved in those cases too, I think you were the resident expert in the succeeding decades – we found that complaints came from every corner of the workplace life in Alberta and it was necessary to write letters to the employer and advise them what the law was, what their obligation was. It was in some cases necessary to file grievances, necessary to bring complaints to the Human Rights Commission, to enforce what *Parcels* decided. Interesting, as I was noting before we commenced the interview, when I first started work here I had a student a couple of years into my appointment here and she became pregnant and was pregnant during her articling year. The provincial government said to her, well go and find another articling position when you're finished with your pregnancy. I was shocked by that because there it was, somewhere in the mid-'90s, long after the decision had been made, cases had been dealt with with the provincial government, but still completely inappropriate response to a female employee right here in the heart of where laws are made. So really it's been great to have those changes. They're very important changes, but it was a long, long process. I suppose that's my point. Any meaningful change usually takes a long time.

Q: How did the case unfold?

SG: I think we could all see that it was an emerging issue. It first came to me because I was counsel for United Nurses of Alberta. Susan Parcels was a member of the union. United Nurses wanted to get onboard and fight for this very issue, which was the treatment of women who are unable to work during some or all of their period of maternity. So it came to me through the nurses and of course they very generously said, whatever it takes we're going to fight this. Because the relationships with counsel for the Commission and counsel for the Alberta Hospital Association were well known amongst all of us and because we could all see this as an emerging issue and an important issue,

there was a consensus amongst us that we should put all of the important issues to the tribunal even though the complaint perhaps was narrowly laid. If it wasn't going to be this case it was going to be other cases, so judicial hearing economy and efficient use of the resources would dictate that we would try to deal with it as comprehensively as we could. I think we all shared to some extent in preparing witnesses and calling witnesses. It was really quite a collaborative effort. My recollection is that we were responsible for bringing the economic or actuarial evidence forward, dealing with the interrelationship between paying maternity benefits and unemployment insurance; that was a very important issue, how the two are necessarily intertwined and what would be the result. – costs for the employer, how those costs could best be shared with the Unemployment Insurance Plan. So we dealt with those issues to some extent. Then there were experts, I remember Dr. Uretsky, who was then perhaps one of the leading specialists in the province in Alberta in obstetrics and gynecology, and he still is, I might add. He came and described at length the fundamental and very profound [effect] on a woman's body of conceiving and carrying a child to term and giving birth, and the recovery period thereafter. He linked the evidence on that subject – and it was really quite an eye-opening experience, particularly to the women in the room – that we would've ever been required to simply soldier on without any broader support from our workplace or from our employer. So all of that evidence was there. It was an important contributor to the final result, a recognition of the enormity of the contribution that women make by having children for society. What a health process it is, and yet how it is a health-related issue that should be technically and legally indistinguishable from any of the other health-related reasons [for absence] from work. So all of that evidence was there, the evidence on the economic side and on the unemployment insurance side and how that would work into the calculations for benefits for women.

Q: What basic principles did it accept?

SG: That's a hard question to answer in retrospect. The decision was that for the period of time that a woman is required to be away from work for valid health-related reasons associated with pregnancy, she is entitled to access the sick benefits plan just as she

would for any other valid health-related reason. Let's compare it to an appendectomy or a broken arm. So that period could kick in as early as, some women must be on bed rest from the second week of their maternity all the way through delivery – it could extend that period of time. For most women the evidence was it's a period of six weeks before and six weeks after. We were arguing that for that period it should be a presumptive period so that people would not have to go through the expenditure of resources, both personal and financial, and healthcare resources, in order to have a doctor's note certifying that yes you are within the regular range and you do require 12 weeks off around date of delivery for health related reasons, and therefore should be paid insurance. So we thought it advisable that, unless there was evidence to the contrary, that most women should be presumed to require the 12 week period around date of delivery. Chair de Villars decided against that point. She said that cases should be decided on an individual basis. As we discussed earlier, as it did turn out and materialize, people did eventually come to accept that there was such a presumptive period, because it seems wasteful to have to fight over whether it was a week here or week there and that for most women that are healthy and not suffering complications, that period pertains. When it went to appeal my recollection is that the employers were taking issue with the entire decision, the decision of whether or not this was indeed discrimination not to treat women the same as any other person in the workplace with this kind of health-related reason, and pay them benefits. They were unsuccessful in changing the decision to any material extent. There was one issue Madame Justice Trussler decided the case at the Court of Queens Bench, and it related to whether or not employers would be able to take advantage of the benefits of SUB plans through Unemployment Insurance, or whether they must fund this. We argued on that that point that there really hadn't been a full exploration of that issue at the tribunal hearing and that it should be referred back to them for a complete consideration of the evidence that might pertain to that. These cases really go forward on the record before they court and there wasn't enough information. She did accept that ground of appeal and she did decide that employers could avail themselves of SUB plans. There was no appeal from that. In terms of the individual woman accessing these benefits, as long as she was receiving what a male or anybody else with access to those benefits might receive, I think the union was content.

Q: Is there anything else you'd like to add?

SG: It just was, like I said earlier, a wonderful convergence of many different things at a moment in time. We had a wonderful complainant, an articulate complainant, a feisty complainant, who wanted to assert her rights. We had a fabulous union representing her interests and those of other women in the union. We had an excellent lawyer in Mr. Wallace for the Commission. We had an excellent lawyer in Mr. Armstrong representing the employers and hospital associations. There was a just a zeal for finding the answers in the best possible way. It was really a time where there was a tremendous desire to work for women's rights. Even people that were opposing this and doing what lawyers are required to do in the adversarial process, there was a recognition that really it was time to accord women their full human rights in the workplace. I think everybody felt good about it. I think in the end even some parts of the employer's organization felt good about it, because if women cannot go into the workplace and reconcile what they want to do, which is be mothers, with what they also want to do, which is have careers, then it is an eternally frustrating problem. I will just add that to this day I think the single most often asked question to me in my current job, from young women, is how do you manage having a career and having children? I think financial support is crucial to that as well as the seamless transition through maternity and return to work, the fact that your job is guaranteed, the fact that you take minimal economic loss; the fact that if you choose to, you return to exactly the same job, same terms and conditions of employment, and hopefully the economic impact upon you has been minimized and borne as it should be by our larger society, which of course is grateful that women carry out this role on behalf of society as well as themselves, their families and their communities. I just have to say I'm not sure we got all the stuff on the SUB plans right, but it's pretty vague.

Q: What's the precedential value of the case?

SG: One of the important things that came out of this tribunal hearing was that it was a very comprehensive treatment of the issues. Chair de Villars really did a tremendous job

writing all of the evidence and writing all of the issues. It really did become a guiding light. When other employers would be recalcitrant about implementing what were by the end their obligations under the human rights legislation, we could use that decision. We could send a letter to the employer counsel, the employer, and say look, this is the law of the land, you really don't have anything left to fight about here, it's all in this decision. But if you won't agree to extend these benefits to women at your workplace, we simply will have to bring a complaint and go through this all over again. It'll cost a lot of money and it'll be embarrassing for you, because in the community's eye, you should be observing human rights, not defying human rights. But to have that decision in your back pocket really did smooth the road towards finding that level of equality in a particular workplace.

Q: What role do unions play in setting precedents on social issues?

SG: I practiced labor law for almost 25 years in Alberta. Absolutely without any doubt whatsoever, the union movement took the lead on bringing equality to the workplace for people in the province of Alberta. The union movement, first of all, was much stronger than our human rights process has ever been in Alberta. We as lawyers helped with this but certainly the unions were at the forefront of incorporating many human rights codes in each collective agreement. Certainly all our clients did that. So the result would be that grievances would be brought under the collective agreement to fight for these same equality issues that you could at the same time or could have opted to go to the Human Rights Commission for. In those years after 1991 I would say slowly human rights process in Alberta has diminished and diminished. It has never returned to the kind of force that it was in those years. We used to have real vibrant human rights tribunal hearings in those years, setting important precedents. But over time it was whittled away and we were not having that kind of vigorous assertion of human rights through the complaint process at the Commission. So it became very important that there be a robust grievance procedure and a culture of bringing human rights cases under collective agreements by trade unions. Trade unions in Alberta took up that challenge with alacrity, with vigor. They fought many important cases, if you want to look at the jurisprudence

across the country, advancing the cause of human rights in the workplace – important sexual harassment cases, mandatory retirement cases, equality of access to jobs, accommodation issues in the workplace – many important cases. The trade union movement, without any shadow of a doubt, led that movement for human rights in the workplace in Alberta. There's just no doubt about it. There must've been hundreds of grievances on human rights issues filed in the province of Alberta in those halcyon days of human rights for every complaint that was brought and processed through the Human Rights Commission. Absolutely no doubt about that. And they would not [?] from the fight, if it was unsuccessful. In fact, we had to take some of these pregnancy leave cases to court and were successful in the wake of *Parcels*. I can think of at least two that went to court. So the unions put forward really blank chequebooks, in my experience, in these human rights issues, and fought for them vigorously and really created to the extent we have equality in the workplace in Alberta. I would lay it at the door and give the credit to the labour movement, absolutely without a doubt. I think that the facts and the jurisprudence speaks for itself. If it wasn't obtained through litigation it was obtained through collective bargaining. And of course the union movement had the resources and the motivation to go out there and find out what was cutting edge in the country. They found cutting edge decisions on things like drug and alcohol testing, on addictions issues in the workplace, on mental health. We took one of the important cases through the courts in Alberta on mental disability at the workplace; it was actually a Canada Safeway case. On every conceivable issue that could arise on a human rights basis in the workplace, the unions were right where you would ideally want an advocate to be. It's true. Who else is doing it besides the unions? Nobody else is doing it.

Q: What's the difference between equality and the same?

SG: I think that this whole issue about what does equality mean, it's a really crucial issue. It depends on the level of disadvantage. If there's more disadvantage, more accommodation is required in order to bring someone to a place of equality. For example, if you have a person who's a paraplegic who wishes to be a receptionist at a big downtown law firm, well if she becomes disabled in that fashion while she's an employee

we really need to look at what is required to accommodate her to bring her to a place of equality so that she can continue to work. This issue or this idea of what is required in order to achieve equality plays out in many different ways. Certainly it played out in the '90s in the area of women getting into male-dominated workplaces. There was a famous case that came out of the firefighting sector. They were firefighters that were working in the forest firefighting industry. Firefighting, as we know, has been a profession that's historically barred to women. The issue became in that case whether there were legitimate workplace qualifications that were required and that they were being applied in a fashion that they would be exclusive of women. For example, is it fundamental to the job or is it a central requirement for a job that a woman be of a certain height or a person be of a certain height and a certain weight? Must she be able to bench press a certain amount of weight? It began to be an inquiry into whether or not there were core requirements for the job that were fundamentally related to carrying out the job, or were they simply irrational bases that could as a result deprive women of employment? That began to be the issue. That's only part of the issue of to what extent should there be accommodation, to what extent are standards and criteria fairly imposed and fairly implied. All of these tangential issues around equality began to be explored. Ultimately, through that case from British Columbia that went to the Supreme Court of Canada, the idea emerged that employers were obliged by human rights law to achieve equality to accommodate unless it was not possible to do so.

Q: How do you balance your own emotional connection with the needs of the legal system?

SG: It's an interesting question that you raise. It brings to mind this whole idea about how really it is very important to have women involved in all aspects of work life. I think Madam Justice Bertha Wilson wrote an important piece on this, about how women bring to the table of, for example, decision making, but to the law and I'm sure every other profession, a more holistic view of life. Whether that's true or not as society evolves, I can't say. But certainly in those years there were very clear gender roles. Women were primarily responsible for children and the domestic side of life, and men for bringing

home the bacon and doing other sorts of things to contribute to family life. So it began to be apparent in the development of the jurisprudence and the writing by the academics that in order for law to fully develop and take into account all of the contextual circumstances of people's lives and fairly represent and fairly respond to individual needs and community needs, we needed to be looking at things in a more holistic fashion. Let me stereotype for just a moment. Decision making will necessarily be flawed if it is simply the repose of, for example, white middle aged men who go golfing at the Mayfair on Friday afternoon. They have one perspective on life and it's an important perspective and we need to hear from them too, but we also need to hear from people who have broader and deeper understanding of different issues. When you exclude from the workplace, and let's talk about law or any other calling, one half of the population's voice, necessarily those decisions are not going to be holistic or broad or as deep or meaningful as they could be when all those voices are heard, when all those voices are blended. When we talk about work on the Bench, it's important to have balance of different perspectives, different voices, different cultural backgrounds, different genders and so on. I think we are moving in that direction, similarly so in every walk of life. We used to find in some of these male-dominated workplaces, for example I remember being retained by the union and the employer at the Weldwood plant along with my female counterpart, the employer lawyer, to go out there and speak on the subject of sexual harassment in the workplace and gender equality in the workplace. We realized that unless workplace culture changed and women were... my view was until we just started hiring women in equal numbers, we weren't going to change workplace culture. But in every walk of life, in order to have balanced healthy relationships at work, we needed to have a balance in numbers and a balance... It needs to be open to people from all communities regardless of colour, age, gender and so on, of course subject to safety considerations when we talk about things like mandatory retirement. So really what equality is about is freedom, and what freedom is about is absence of restraint. When we have artificial barriers at the workplace to full participation, we don't have freedom, even in a civilized country such as we live in here.

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