

PART I - INTRODUCTION

1. The CCLA supports the position of the Respondents in Appeal. The expanded spouse-in-the-house rule, stemming from the definition of "spouse" in s. 1(1)(d) of O. Reg. 366 (the "Regulation"), violates ss. 7 and 15 of the *Charter* and cannot be saved by section 1.
2. The CCLA will focus on 2 points: (1) The impugned definition is not "functional" in nature; and (2) The impugned definition has the effect of violating the rights of social assistance applicants and recipients to liberty and security of the person under s. 7 of the *Charter*.

PART II - SUBMISSIONS

First Submission

the impugned definition is not "functional" in nature, read in the context of its legislative scheme.

3. The Government's use of a presumption, or "deeming provision" in s. 1(3) of the Regulation discredits its claim of functionality for the impugned definition. Section 1(3) provides:

"For the purposes of clause (d) of the definition of "spouse" in subsection (1), unless the applicant or recipient provides evidence to satisfy the Director to the contrary, it is presumed that if a person of the opposite sex to the applicant or recipient is residing in the same dwelling place as the applicant or recipient, the person is the spouse of the applicant or recipient."

4. In order for a definition to be functional, it must seek to ascertain the true nature of the definition's subject. Deeming provisions like s. 1(3) of the Regulation, however, are designed to do the opposite — to establish a fact without evidence. The Supreme Court of Canada has said:

"The purpose of any 'deeming' clause is to impose a meaning, to cause something to be taken to be different from that which it might have been in the absence of the clause."¹

5. Similarly, the Supreme Court of Canada said in *Verrette*:

"A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing

¹ *R. v. Sutherland* (1980), 113 D.L.R. (3d) 374 (S.C.C.) at 379.

although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used ..."²

6. The use of such a deeming provision in conjunction with the definition in s. 1(d) is even more insidious when examined in its operational context. It places an evidentiary burden on an already disadvantaged group to prove to an intimidating and complex bureaucracy that a legal presumption is wrong. The record in this case is replete with evidence concerning the problems faced by the poor generally, and impoverished single mothers, in particular, simply in coping with life's daily exigencies. To compound the burden, individuals must expose to scrutiny matters of fundamental personal privacy in order to disprove the presumption. As a whole, this legislative construct is sublimely Kafkaesque. It imposes an artificial premise, and then stacks the deck against refuting it, all the while proclaiming its virtuous search for the simple truth.

Second Submission

The spouse-in-the-house rule violates the rights of social assistance applicants and recipients to liberty and security of the person under s. 7 of the charter in 3 ways:

- (1) it deprives them of their privacy;**
- (2)it violates their personal autonomy by inhibiting the formation and maintenance of intimate relationships; and**
- (3)it imposes on them serious psychological stress.**

(1) Deprivation of Privacy.

7. The liberty interest in s. 7 strongly protects the right to privacy.³ Respect for individual privacy is tied "inextricably to the concept of human dignity".⁴ It is an "essential component of what it means to be 'free'"⁵ and thus is central to the maintenance of a "free and democratic society".

"[S]ociety has come to realize that privacy is at the heart of liberty in a modern state. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has

² *R. v. Verrette* (1978), 85 D.L.R. (3d) 1 (S.C.C.) at 15.

³ *R. v. O'Connor* (1995), 130 D.L.R. (4th) 235 (S.C.C.).

⁴ *Ibid.*, paras. 110 and 111.

⁵ *Ibid.*, para. 113.

⁶ *R. v. Dymont* (1988), 45 C.C.C. (3d) 244 (S.C.C.) at 254; also *R. v. Mills*, [1999] 3 S.C.R. 668 at para.

a profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."⁶

8. In order to foster the values of dignity, integrity and autonomy, the scope of privacy under s. 7 extends to "protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This includes information which tends to reveal intimate details of the lifestyle and personal choices of the individual."⁷ "The interest in being left alone by the state includes the ability to control the dissemination of confidential information."⁸ Privacy is "the right of the individual to determine for himself when, how and to what extent he will release information about himself."⁹

9. The CCLA acknowledges of course that, as under s. 8, the right to privacy under s. 7 of the *Charter* is not absolute: it protects a "reasonable expectation of privacy."¹⁰ It can readily be seen, though, that social assistance applicants and recipients do have a reasonable expectation of privacy concerning the kind of information put at risk by the spouse-in-the-house rule.

10. The impugned definition serves as a platform for an intrusive and degrading investigative regime which, in many situations, eviscerates the most intimate aspects of the personal privacy of social assistance applicants and recipients. The definition induces substantial invasions of privacy, as well as the constant threat of privacy invasions, without adequate justification.

11. In September 29, 1995, a Directive issued by the Ministry of Community and Social Services outlined the assessment requirements for the determination of spousal status pursuant to the new expanded definition of spouse, when reviewing cases where co-residents of the opposite sex reside in the same dwelling place as the applicant or recipient. According to the Directive, to determine if an applicant or recipient is a "spouse", the following information becomes subject to exploration: • use of common phone number; • statement from landlord that person lives there or is on lease; • driver's license history and car registration; • employment records; • credit checks; •

⁶ *R. v. Dyment* (1988), 45 C.C.C. (3d) 244 (S.C.C.) at 254; also *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 79.

⁷ *O'Connor*, *supra*, p. 290, para. 118, quoting with approval *R. v. Plant*, [1993] 3 S.C.R. 281 at 293.

⁸ *Mills*, *supra*, at para. 80.

⁹ *R. v. Duarte* (1990), 65 D.L.R. (4th) 240 (S.C.C.) at 252.

¹⁰ The scope of privacy protection under s. 7 take its cue from s. 8 of the *Charter*, which marks one aspect of the larger group of protections afforded by s. 7. As such, the scope of s. 7's privacy protection is at least as broad as that afforded under s. 8: see *Mills*, *supra*, at para. 87.

self-declared common residency; • voters' lists; • telephone listings; • bank accounts; • previous accommodation; • property and investments; • use or benefit of assets such as a car, entertainment equipment, telephone, appliances, furniture, etc. owned by either person; • use of or access to drug, dental and other benefit programs; • contributions toward costs of shelter, entertainment and services; • gifts and payments for items; • invitations to social gatherings; • attendance at church or benevolent organizations; • how time is spent during evenings, weekends and vacations; • how they are known and recognized in neighbourhood or community; • how meals are conducted and with whom they are spent; • how they are known by public authorities; • advice to children about homework and other things; • attendance at birthday parties; • methods of laundromat attendance; • how they are known by professional practitioners as a couple; and • wills and insurance designations.¹¹

12. Many of the criteria used to assess the factors in the definition are inherently subjective. The Government's guidelines and corresponding questionnaire¹² contain inquiries about other people's perceptions of the relationship of the applicant or recipient, including the opinions of neighbours, friends, family and children. Although the information disclosed is theoretically protected under confidentiality legislation, applicants and recipients must sign a blanket "consent to release information" form as a condition of obtaining assistance. This consent renders the supposed privacy protection meaningless. Social assistance workers may and do use the consent to talk to a wide range of people who have had contact with assistance recipients including: landlords, employers, teachers, neighbours, utilities suppliers and children. Among other things, this usually reveals directly or indirectly the subject person's social assistance status, and aspects of the relationship or friendship with the co-resident, as well as a great deal of other personal information.¹³

13. The affidavits of Ms. Nye and Ms. Houston illustrate how the impugned definition results in a broader scope of investigation by making a wide array of third parties subject to inquiries. Family, social, community and religious circles can all become involved in investigations. Ms. Houston stated that she was advised that the Family Benefits workers would "ask around the community" to determine whether her co-resident had truly terminated his residency in her home. Ms. Houston had not told her neighbours that

¹¹ Ex. 15 to Affidavit of K. Costante, *Respondents' Record*, Vol. I, Tab 1-15.

¹² Questionnaire for Determination of Spousal Status, Ex. "F" to Affidavit of G. Gibson, *Appellants' Record*, Vol. IV, Tab 19-F.

¹³ Affidavit of Nancy Vander Plaats, *Appellants' Record*, Vol. I, Tab 10.

she received social assistance and was humiliated by the idea of their involvement in her private life through the Government's inquiries.¹⁴

14. Ms. Nye was required to prove that Mr. Martineau, her co-resident, was not her spouse, by providing a letter from her incarcerated boyfriend confirming that she was his girlfriend, and a letter from the woman Mr. Martineau was dating saying that she was Mr. Martineau's girlfriend, not Ms. Nye's. The Declaration against Ms. Nye, based largely on hearsay, included information that Ms. Nye and Mr. Martineau played cards together as a team.¹⁵

15. Sexual information is also exposed to scrutiny in order to meet the onus of demonstrating entitlement. The Assistant Deputy Minister, Mr. Costante, admitted in cross-examination that the expanded definition of spouse empowers the Government to investigate such matters as: (a) whether or not clothes were left at the residence by an overnight visitor of the opposite sex; (b) whether and at what times a car is left at the residence; and (c) whether a toothbrush was left at the residence.¹⁶

16. Social assistance workers may go to great lengths to investigate the behaviour of social assistance applicants and recipients. Workers have been encouraged to conduct bathroom visits to find such evidence as shaving cream and extra toothbrushes that might reveal the presence of a male visitor. Workers have been provided with lists of household items considered proof of male visitors, such as hunting magazines, a large dog, expensive stereo equipment, and "masculine" clothing. A worker in one Ontario city was known to stake out the parking lot of a subsidized housing complex at night, to see who visited sole support mothers. Another worker in the same city was known to throw sand upon doorsteps in an attempt to track the footprints of male visitors. A worker in another city demanded that a sole support mother try on unisex boots found in her home to prove that they belonged to her, an experience she understandably found humiliating.¹⁷

17. Such conduct cannot be explained away as aberrant administrative behaviour, or irrelevant historical conduct. It is the systemic product of the spouse-in-the-house rule which mandates that the most intimate details of the lives of social assistance applicants and recipients be exposed in order to determine spousal status.

18. Social assistance applicants and recipients do not, by virtue of their impoverishment and consequent need of temporary assistance for themselves and their

¹⁴ Affidavit of Myrna Houston, *Appellants' Record*, Vol. II, Tab 12, para 15.

¹⁵ Affidavit of Bonnie Nye, *Appellants' Record*, Vol. IV, Tab 20, paras. 19, 27.

¹⁶ Cross-examination of Kevin Costante, *Appellants' Record*, Vol. VII, Tab 23, pp. 150-152.

¹⁷ Affidavit of Margaret Hillyard Little, *Appellants' Record*, Vol. III, Tab 15, paras. 35-7.

children, forfeit their expectation of privacy in that "biographical core of personal information" which "tends to reveal intimate details of the lifestyle and personal choices of the individual". They do not relinquish their dignity in order to survive. The kind of intimate personal information that is exposed in the determination of spousal status is considered to afford the highest level of privacy expectations.¹⁸

19. Where the privacy interest in question is of fundamental importance to the self-esteem and psychological well-being of an emotionally fragile party alleging a constitutional infringement of privacy rights, it should be found that the party has a reasonable expectation of privacy in the circumstances.¹⁹

20. As the Respondents' own personal situations amply demonstrate, many single mothers eligible for social assistance have suffered serious abuse from men, and are therefore anxious to maintain stable environments for themselves and their children. Their emotional well-being is fragile. Intrusive and degrading investigations can have a devastating effect on them.²⁰

21. In sum, social assistance applicants and recipients have a reasonable expectation of privacy with respect to their intimate, personal information.

22. SARB misconstrued this particular constitutional challenge, at first instance. SARB was under the mistaken impression that it was the Director's investigations and the methodology of these investigations *per se* that were being challenged. In fact, this challenge focuses on the legislative platform for the investigations, namely the definition of spouse in s. 1(1)(d) of the Regulation. Absent the particular definition of spouse, the offensive intrusiveness of the Director's investigations would be eliminated. The CCLA does not contest the need to assess and monitor categorical eligibility *per se*. Rather, it challenges the particular form or content of the category — the impugned definition of spouse — because the content of the category generates an extraordinary level of invasion of privacy, without adequate justification.

23. The fact that it is the content of the category itself that causes the deprivations of rights in question in this case was recognized by the Ontario Government in 1986, when it announced an end to the spouse-in-the-house rule. At that time, the Government publicly conceded the unjustifiably intrusive nature of investigations caused by an expansive spouse-in-the-house rule:

"Changes to Ontario's welfare system, announced today by

¹⁸ *Dyment, supra*, at 257.

¹⁹ *R. v. J.W.* (March 25, 1994) Newmarket Doc. No. 2235/93 (Ont. G.D.) at para. 6.

²⁰ *Re Pitts and Director, Family Benefits Branch* (1985) 51 O.R. (2d) 302 (Div. Ct.) at 314.

Community and Social Services Minister John Sweeney and Attorney General Ian Scott, will put an end to the controversial "spouse in the house" rule by April 1, 1987.

Under the revised system, a sole support parent will not lose eligibility for public assistance, simply for sharing living quarters with a person of the opposite sex.

'It's time to move away from intrusive investigations into private conduct, towards a system which looks to the objective needs of sole support parents', said Mr. Sweeney. . . . Now our government is committed to establishing new eligibility criteria for sole support parents in need of public assistance."²¹

(2) Violation of Personal Autonomy and Imposition of Serious Psychological Stress.

24. SARB held in the present case that the impugned definition violated the Respondents' personal autonomy rights to form conjugal and non-conjugal relationships, and their right to be free from serious, state-imposed psychological stress.²² The Government appealed these findings. The Divisional Court majority did not overturn them, but instead held that it was unnecessary for them to consider whether the impugned definition contravened s. 7 of the *Charter*, because they had already held that it contravened s. 15 and could not be saved by s. 1.²³ The Divisional Court majority did specifically uphold, however, SARB's factual finding that the impugned definition would have the effect of preventing or discouraging the formation of new family relationships, as this was also one of the findings upon which the s. 15 claim was based.²⁴

25. The CCLA submits that this Court should confirm SARB's holdings that the impugned definition violates the rights of social assistance recipients to personal autonomy and to be free from state-imposed psychological stress. (These issues are addressed together below, because they are intertwined. It is, in part, the state-imposed psychological stress that interferes with the personal autonomy to form and maintain intimate relationships.

²¹ Affidavit of Nancy Vander Plaats, *Appellants' Record*, Vol. 1, Tab 10, para. 35 and Ex. G thereto.

²² SARB Charter Decision, *Appeal Book*, Tab 4, pp. 144-154.

²³ Reasons of the Divisional Court Majority, *Appeal Book*, Tab 3, p. 59.

²⁴ This finding is located at SARB Charter Decision, *Appeal Book*, Tab 4, pp. 126-27. The Divisional Court's holding is located at Reasons of the Divisional Court Majority, *Appeal Book*, Tab 3, pp. 26-27.

26. It is now recognized that s. 7 affords protections that extend well beyond physical liberty and security, and threats posed only by the criminal justice system, to include fundamental aspects of personhood threatened in any manner by government action.

27. The right to liberty in s. 7 "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." La Forest J. said in *B. (R) v. Children's Aid Society*, that "liberty does not mean mere unconstrained freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."²⁵ And in most recently in *Blencoe*, the Supreme Court stated that "the liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. ... '[L]iberty' is engaged where state compulsions or prohibitions affect important and fundamental life choices."²⁶

28. In a similarly expansive manner, security of the person under s. 7 of the *Charter* extends beyond the physical to the psychological dimension. The five Supreme Court majority judges in *Morgentaler* all held that "serious psychological tension caused by the State" infringes security of the person under s. 7.²⁷ Likewise, in *O'Connor*, the majority of the Supreme Court emphasized that "the right to security of the person encompasses the right to be protected against psychological trauma."²⁸ Most recently, in *New Brunswick (Minister Health and Community Services v G.(J.)*, the Supreme Court of Canada settled any lingering issue concerning whether the ambit of protection afforded under s. 7 extends to threats posed by the civil justice system.²⁹ That case raised the issue of whether a provincial government was obliged to furnish legal aid to an indigent mother to enable her to contest the granting of custody of her children to the provincial Minister of Health and Community Services. The Court unanimously held that the provincial government was so obliged on the basis that the custody order in favour of the Minister restricted the mother's right to security of the person under s. 7 of the *Charter*, without fundamental justice. The Court held that the right of security of the person under s. 7 protects both the physical and psychological integrity of the individual and that this protection extends beyond the criminal law.³⁰

29. In *G.(J.)*, the Supreme Court discussed in detail the nature of the protection of "psychological integrity" included in the right to security of the person. Lamer C.J. said:

²⁵ [1995] 1 S.C.R. 315, at para. 80. Iacobucci and Major J. took a similar view of the ambit of s. 7 in their joint reasons, stating at para. 212 that "the scope of 'liberty' as understood by s. 7 is expansive."

²⁶ *Blencoe v. B.C. (Human Rights Commission)* (2000), 190 D.L.R. (4th) 513 (S.C.C.) at para. 49.

²⁷ *R. v. Morgentaler* [1988], 1 S.C.R. 30 per Dickson C.J. at 45; Beetz J. at 80; Wilson J. at 161.

²⁸ *O'Connor*, *supra*, at para. 112.

²⁹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

³⁰ *Ibid.* at paras. 58 and 65 per Lamer C.J.; also para. 117 per L'Heureux-Dubé J.

"Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in *Morgentaler* . . . suggested that security of the person would be restricted through "serious state-imposed psychological stress". Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action... For a restriction of the security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent... Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, ***through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere.***³¹ [emphasis added].

30. As noted above in the discussion of privacy, the impugned definition of spouse creates a platform for the same kind of "procedure in which the relationship is subject to state inspection and review" that the Supreme Court of Canada held in *G.(J.)* constituted "a gross intrusion into a private and intimate sphere" and therefore violates the right of security of the person under s. 7.

31. In addition, security of the person is infringed by the spouse-in-the-house rule pursuant to the threat of provincial or criminal fraud proceedings.

32. Section 19 of the *Family Benefits Act* defines the provincial fraud offence as follows:

"(1) No person shall knowingly obtain or receive a benefit that he

³¹ *G.(J.)*, *supra*, at paras. 59-61.

or she is not entitled to obtain or receive under this Act and the regulations.

(2) No person shall knowingly aid or abet another person to obtain or receive a benefit that such other person is not entitled to obtain or receive under this Act and the regulations.

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence and on conviction is liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both fine and imprisonment."

33. Section 380 of the *Criminal Code* is the criminal fraud provision. It provides, in part, that "every one who by deceit, falsehood or other fraudulent means, whether or not it is a false pretense within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any . . . money" is liable, depending on the value of the fraud, to imprisonment for a term up to six months, two years or ten years."

34. The nature of this threat is described in the Ministry's Guidelines regarding fraud.³² These Guidelines stipulate that it is the responsibility of the municipality and local Welfare Administrator to "identify fraud and to determine what action to take." In this regard, the local Welfare Administrator is given the discretion to decide whether to "treat the unjustified assistance as an overpayment" or to "lay charges, either under the provincial legislation or under the *Criminal Code*. Importantly, the Guidelines go on to stipulate that because of the time limit of six months for commencing provincial offence proceedings,³³ "it has been deemed appropriate to pursue actions of alleged fraud under the Criminal Code of Canada."

35. As SARB found, this psychological stress imposed on sole support parents by the impugned definition's regime is compounded by their fear of losing their means of subsistence should they have relations with members of the opposite sex. This compromises their freedom to form and maintain intimate relationships. SARB's reasoning is compelling:

"The Appellants' evidence shows that the formation of a new family through the introduction of a step-parent figure is a complicated and emotionally difficult process. This attempt to integrate a new father can take considerable time. The sole support mother must cope with developing a personal relationship with the man she hopes will become her partner, how that man relates to her children, how the children's relationship with her will change and

³² Ex. 24. to the Affidavit of K. Constante, *Respondents' Record*, Vol. I, Tab 1-24.

³³ *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 76.

how this will affect the children's relationship with their father. These concerns were apparent in the affidavits and testimony of the Appellants. . . .

The Board has already found that the uncertainty in the definition of spouse would have a chilling effect on the freedom of the Appellants, as sole support parents on social assistance, to form relationships with opposite sex co-residents. This is discussed in more detail at pp. 24-26 of this decision under the s. 15 analysis. The Board finds that once a sole support parent begins co-residing with a person of the opposite sex, she must constantly worry that some interaction between herself or her children or her relatives and the co-resident could trigger a finding by the Director that the relationship had "crossed over" into a spousal relationship. If this happens, the basic means of subsistence for herself and her children would be terminated.

The Board has no difficulty finding that a constant sense of not knowing whether sharing a meal with the co-resident or meeting his family will be the act that tips the balance and put one's means of subsistence in jeopardy, is psychologically stressful and would affect the immediate relationship as well as the possibility of entering new relationships in the future. ..."³⁴

(3) The deprivations of liberty and security of the person do not accord with the principles of fundamental justice.

36. The principles of fundamental justice must be interpreted within the legal context in issue.³⁵

37. The Supreme Court of Canada has held repeatedly since the *Motor Vehicle Reference*³⁶ that principles of fundamental justice extend beyond mere procedural protections. La Forest J. said in *Godbout*:

"[I]f deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be 'fundamentally just' not only in terms of the process by which they are carried out

³⁴ SARB Charter Decision, *Appeal Book*, Tab 4, p. 145.

³⁵ *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.

³⁶ *Ref. re Motor Vehicle Act*, [1985] 2 S.C.R. 486.

but also the ends they seek to achieve, as measured against basic tenets of both our judicial system and legal system more generally".³⁷

38. The determination of fundamental justice under s. 7 often involves "the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state".³⁸

39. For example, Sopinka J. stated in *Rodriguez*:

"Where the deprivation does little or nothing to enhance the state's interest . . . a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose . . . It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered."³⁹

40. In *O'Connor*, L'Heureux-Dube J. explained this balancing analysis in respect of privacy interests:

"It [the right to privacy] must be balanced against legitimate societal needs. This court has recognized that the essence of such a balancing process lies in assessing *reasonable expectation of privacy*, and balancing that expectation against the necessity of interference from the state . . . Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right . . ."⁴⁰

41. The significant privacy, autonomy and security interests at stake in this case are not overridden by the limited, perhaps even non-existent, "salutary effects" of the Government's purported pecuniary and law enforcement interest of ensuring that only people "truly in need" receive social assistance.

42. La Forest J. has said that "[t]he needs of law enforcement are important, even

³⁷ *Godbout, supra*, at para. 74.

³⁸ *Godbout, supra*, at para. 76; see also *Mills, supra*, at para. 86.

³⁹ *Supra*, at 151-52.

⁴⁰ *O'Connor, supra*, pp. 289-90, para. 117.

⁴¹ *Dyment, supra*, at 261.

beneficent, but there is a danger when this goal is pursued with too much zeal."⁴¹

43. The Government's expansion of spousal status in the impugned definition is overzealous in the sense that La Forest J. suggests. The Government has adduced no substantial evidence that prior to the 1995 amendment and the introduction of the impugned definition of spouse, single mothers receiving assistance under the *FBA* were receiving benefits based on an unreasonable assessment of their "true" need because of contacts they maintained with members of the opposite sex.

44. The Ontario Government concluded in 1986 that the spouse-in-the-house rule gives rise to "**unjustifiable**" intrusions into the private lives of social assistance applicants and recipients.

45. Disentitling social assistance benefits on the basis of spousal status as defined in the impugned definition violates the principles of fundamental justice because the spousal standard is arbitrary, and unrelated to any legitimate and substantial legislative purpose.⁴²

46. Applicants for social assistance must initially satisfy the test of need to qualify for benefits. However, the definition of spouse uses criteria that are unrelated to the financial resources or needs of applicants and recipients. To disentitle benefits solely because applicants or recipients, mostly single mothers, choose to have a relationship or even cohabit with a man where the man makes some or no financial contribution is to invoke a standard unrelated to any legitimate legislative purpose, and one that is therefore arbitrary and contrary to fundamental justice. The legislative purpose would be served by simply requiring the applicant or recipient to report whatever income or financial assistance she receives, and factoring that into the calculation of the amount of social assistance benefit, not by conditioning *eligibility* on the relationship.⁴³

47. Not only is the impugned definition unrelated to any legitimate and substantial legislative purpose, it also contradicts the broader legislative goals of meeting the subsistence needs of single mothers and their children, and protecting the public from unnecessary expense. Prior to the amendment, applicants and recipients would report rental income from members of the opposite sex living with them. Under the current

⁴¹ *Dyment, supra*, at 261.

⁴² *R. v. Jones*, [1986] 2 S.C.R. 284 at 303.

⁴³ *Rodriguez, supra*, at 594.

Regulation, in particular the operation of the reverse onus provision in tandem with the impugned definition, such reports will trigger an investigation of potential spousal relationships and the possibility of termination of benefits. In the absurd result, social assistance applicants and recipients will choose not to take on roommates who could help to reduce the amount of benefits for which they are eligible.

48. Similarly, by inhibiting the formation or maintenance of intimate relationships, the Government is limiting the ability of sole support parents to leave the social assistance system. A co-residence relationship is one of the main "exit strategies" employed by single parents to leave social assistance.⁴⁴

49. In somewhat overlapping fashion with the balancing test, the impugned definition can also be seen to breach the principles of fundamental justice because of overbreadth and vagueness.

50. Overbreadth is to be distinguished from vagueness. The two are separate requirements of fundamental justice. In the case of overbreadth, the means are too sweeping in relation to the objective. If the government uses means which are broader than necessary to pursue a legitimate objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason.⁴⁵

51. The impugned definition of spouse is overbroad because it captures relationships where the parties do not intend to engage in a spousal-type relationship. SARB offered convincing reasoning in holding that the impugned definition is overbroad:

"Having considered the evidence and arguments in these appeals, the Board is persuaded that the definition is overly broad as it can capture relationships and arrangements which ordinarily would not be considered spousal and it is therefore disproportionate in application. The Board makes this finding for the following reasons.

In the Board's view, the threshold for the test of economic interdependence is extremely low, even in light of the majority of the Board's interpretation of the economic test in the decisions on the merits in these appeals. The test requires financial interdependence that is not "trivial" but the Board finds that not all non-trivial interdependence amounts to actual financial support for a single parent and children.

⁴⁴ Affidavit of Brigitte Kitchen, *Appellants' Record*, Vol. II, Tab 11, para. 33; Cross-examination of Robert Fulton, Respondents' Record, Vol. IV, Tab 6, pp. 41-44, 46; Affidavit of Margaret Little, *Appellants' Record*, Vol. III, Tab 15, paras. 52-56.

⁴⁵ *R. v. Heywood*, [1994] 3 S.C.R. 761 at 791-3.

The Board is satisfied that some of the Appellants intended to remain financially independent of their co-resident and that the intent of the parties should not be an irrelevant consideration. Nevertheless the Board found there was "non-trivial" interdependence in practice and this was enough to pass the threshold economic test according to the definition. The definition does not allow the expressed intent of the parties to be taken into account.

In the Board's view, the economic portion of the definition sets such a low threshold that a consideration of the social and familial factors may become determinative of the spousal relationship. Yet these factors are not exhaustively spelled out, are not given individual weighting (i.e. is the fact meals are shared occasionally more significant than if the co-resident helps the single parent's child with homework?) and can be present in other types of relationships than spousal ones (see also the discussion at pp. 25-26 of the decision).

The Board finds that this definition can capture relationships other than those which would normally be considered "spousal" or "marriage-like" relationships. No other legislation in the province was brought to the Board's attention which would consider someone to have a "common law" spouse from the moment that co-residence begins."⁴⁶

52. The impugned definition of spouse is also unconstitutionally vague. It is an essential attribute of fundamental justice that legal rules be framed and applied consistently and even-handedly. The means used to accomplish a legislative objective must be clearly defined, for two reasons. First, persons should be given fair warning of proscribed conduct so that they can act accordingly. Secondly, unclear standards lead to arbitrary enforcement.

"A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.

[T]he standard . . . applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen

⁴⁶ SARB Charter Decision, *Appeal Book*, Tab 4, pp. 152-53.

Factum of the CCLA Page 16

is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions."⁴⁷

53. The impugned definition, in particular the standard "social and familial aspects of relationships amounting to cohabitation", is, in the context, so vague and uncertain that it cannot be applied in a consistent, even-handed way. It fails to provide fair notice to social assistance applicants and recipients about where the spousal line is drawn. Nowhere are they properly advised of the entire range of factors to be considered in making the spousal assessment, or of the relative weighting of applicable factors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Martin J. Doane *Jan. 2, 2001*

⁴⁷ *R. v. N.S. Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639-40, 642. See also, *Heywood, supra*, *R. v. Morales*, [1992] 3 S.C.R. 711 and *Motor Vehicle Reference, supra*, at 1157-61.

Schedule "A" - List of Authorities Cited

1. *R. v. O'Connor* (1995), 130 D.L.R. (4th) 235 (S.C.C.).
2. *R. v. Dymont* (1988), 45 C.C.C. (3d) 244 (S.C.C.).
3. *R. v. Duarte* (1990), 65 D.L.R. (4th) 240 (S.C.C.).
4. *R. v. J.W.* (March 25, 1994) Newmarket Doc. No. 2235/93 (Ont. G.D.).
5. *Re Pitts and Director, Family Benefits Branch* (1985) 51 O.R. (2d) 302 (Div. Ct.).
6. *B. (R) v. Children's Aid Society*, [1995] 1 S.C.R. 315.
7. *Blencoe v. B.C. (Human Rights Comm.)* (2000), 190 D.L.R. (4th) 513 (S.C.C.).
8. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
9. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.
10. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.
11. *Godbout v. Longueuil* (1997), 152 D.L.R. (4th) 577 (S.C.C.).
12. *Ref re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
13. *Rodriguez v. B.C. (A.G.)*, [1996] 3 S.C.R. 519.
14. *R. v. Jones*, [1986] 2 S.C.R. 284.
15. *R. v. Heywood*, [1994] 3 S.C.R. 761.
16. *R. v. N.S. Pharmaceutical Society*, [1992] 2 S.C.R. 606.
17. *R. v. Morales*, [1992] 3 S.C.R. 711

Schedule "B" - Statutes Cited

1. *R. v. O'Connor* (1995), 130 D.L.R. (4th) 235 (S.C.C.).
2. *R. v. Dymont* (1988), 45 C.C.C. (3d) 244 (S.C.C.).
3. *R. v. Duarte* (1990), 65 D.L.R. (4th) 240 (S.C.C.).
4. *R. v. J.W.* (March 25, 1994) Newmarket Doc. No. 2235/93 (Ont. G.D.).
5. *Re Pitts and Director, Family Benefits Branch* (1985) 51 O.R. (2d) 302 (Div. Ct.).
6. *B. (R) v. Children's Aid Society*, [1995] 1 S.C.R. 315.
7. *Blencoe v. B.C. (Human Rights Comm.)* (2000), 190 D.L.R. (4th) 513 (S.C.C.).
8. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
9. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.
10. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.
11. *Godbout v. Longueuil* (1997), 152 D.L.R. (4th) 577 (S.C.C.).
12. *Ref re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
13. *Rodriguez v. B.C. (A.G.)*, [1996] 3 S.C.R. 519.
14. *R. v. Jones*, [1986] 2 S.C.R. 284.
15. *R. v. Heywood*, [1994] 3 S.C.R. 761.
16. *R. v. N.S. Pharmaceutical Society*, [1992] 2 S.C.R. 606.
17. *R. v. Morales*, [1992] 3 S.C.R. 711