

Court File No.: 810/95

**ONTARIO COURT OF JUSTICE  
GENERAL DIVISION  
(DIVISIONAL COURT)**

IN THE MATTER OF *The Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

AND IN THE MATTER OF *Ontario Regulations 409/95 and 410/95*

AND IN THE MATTER OF the *Canadian Charter of Rights and Freedoms*, s.24,  
*Constitution Act*, R.S.C. 1985 Appendix II, No. 44, as amended

**B E T W E E N:**

**SANDRA ELIZABETH FALKINER, CLAUDE MARIE CADIEUX,  
CYNTHIA PAULINE JOHNSTON and DEBORAH ANN SEARS**

Applicants

- and -

**THE ATTORNEY GENERAL OF ONTARIO  
and THE LIEUTENANT GOVERNOR IN COUNCIL**

Respondents

**FACTUM OF THE APPLICANTS**

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**PART I - THE NATURE OF THE APPLICATION**

1. This Application is for:
  - (i) An order declaring that Regulation 366 of R.R.O. 1990, subsections 1(1)(d), 1(3) and 2(7)(b) as amended by *Ontario Regulations 409/95* and Regulation 537 of R.R.O. 1990, subsections 1(1)(d), 1(3) and 7(8) as amended by *Ontario Regulation 410/95* are *ultra vires* the *Family Benefits Act* and the *General Welfare Assistance Act*;

- (ii) An order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* declaring that these same regulations are contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;
- (iii) In the alternative, an order declaring that these regulations are of no force and effect with respect to the applicants;
- (iv) Such further and other relief as counsel may advise and this Honourable Court may permit.

## PART II - THE FACTS

### A THE APPLICANTS

2. The four applicants in this case are women who lost their eligibility to receive Family Benefits (FB) as sole support parents after the Ontario government changed the definition of "spouse" in the Family Benefits and General Welfare legislation in October, 1995.

3. Specifically, the four applicants have been deemed to be "spouses" under the *Family Benefits Act* and have thereby lost their entitlement to receive FB for themselves and their children in their own right, that is, apart from the person of the opposite sex with whom they co-reside. They are no longer receiving FB allowances, and are unable to receive benefits under the GWAA as "sole support parents" because the identical definition of "spouse" disentitles them to assistance under that *Act*.

4. Each of the applicants has dependent children and is living with a person of the opposite sex. They are in similar positions in the following respects. In each case:

- (i) The recipient and co-resident have lived together for less than one year.
- (ii) The recipient relied on the knowledge (provided by their FB caseworker) that they could live with someone for a period of time without being deemed spouses and thereby losing FB eligibility in making the decision to live together.
- (iii) The co-resident is not the father of the applicant's child(ren) and has no legal support obligation toward the applicant or her child(ren).

- (iv) Prior to October, 1995, the applicants' actual FB entitlement was being reduced to reflect the fact that there was a co-resident contributing to household expenses, in accordance with the FB regulations.
- (v) The applicant and co-resident do not consider themselves to be spouses, as the term is commonly understood.
- (vi) The applicant and co-resident have consciously strived to maintain financial independence and they consider themselves to be financially independent of one another.
- (vii) The applicant and the co-resident wish to remain financially independent until they are prepared to make a more permanent commitment to one another.

Affidavit of Sandra Elizabeth Falkiner, paras. 16, 17, 24, 30  
Application Record, vol. 1, Tab 5, pp.41-42, 45, 49-50

Affidavit of Claude Marie Cadieux, paras. 1, 3, 30  
Application Record, vol. 1, Tab 6, pp. 79, 88-89

Affidavit of Cynthia Pauline Johnston, paras. 1, 17, 18, 23  
Application Record, vol. 1, Tab 7, pp.114, 116, 118

Affidavit of Deborah Ann Sears, paras. 17, 28, 33, 34, 40  
Application Record, vol. 1, Tab 8, pp. 140-142

5. Three of the Applicants are not eligible to receive general welfare assistance as a couple with their co-resident. Ms. Cadieux and Ms. Falkiner are not eligible as couples with their co-residents because they all receive student loans (the amounts of which do not provide for basic needs). A two-adult family in which both adults receive student loans is categorically ineligible for general welfare. Ms. Johnston and her co-resident are not eligible as a couple because he is self-employed in a business, even though this business does not provide sufficient income to support the entire household. A self-employed person is categorically ineligible for general welfare.

*O.Reg.537 ss.1(9), 7.*

Affidavit of Sandra Elizabeth Falkiner, paras. 10, 15  
Application Record, vol. 1, Tab 5, pp. 38-51.

Affidavit of Claude-Marie Cadieux, paras. 25-26, 32  
Application Record, vol. 1, Tab 7, pp. 86, 89.

6. One of the applicants, Ms. Falkiner, has a child with severe asthma. Until the change to the definition of spouse, she relied on the drug prescription coverage provided with her social assistance to pay for the drugs which must be administered daily in order to prevent life-threatening asthma attacks.

Affidavit of Sandra Elizabeth Falkiner, para. 7  
Application Record, vol. 1, Tab 5, p. 36.

7. All of the applicants have suffered serious abuse from men in their pasts, either from former spouses or within their families, and are therefore particularly anxious to maintain stable environments for themselves and their children:

- (i) Ms Falkiner experienced an abusive relationship with a violent man who, when she left him, followed her to another province, and twice broke into her apartment, and once threatened her with a knife at her throat. This experience has made Ms Falkiner reluctant to trust men. In addition, she does not wish to jeopardize her son's welfare and security.
- (ii) Ms. Cadieux and her children experienced severe physical and emotional abuse from her alcoholic ex-husband, who frequently threatened to kill her and who prevented her from having any social contact. Her children have required professional counselling for the resulting psychological problems. Ms. Cadieux is reluctant to make a commitment or to become financially dependent on another man because of these experiences. This does not mean however, that she does not wish to live with her boyfriend. On the contrary, she wishes to live with him on a trial basis in order to determine whether it will be safe for her to make a long-term commitment to the relationship. She believes that, like all other Ontario residents, she should have the opportunity to live together for three years without financial obligations between herself and her boyfriend.
- (iii) The end of Deborah Sears' 12-year marriage to an alcoholic husband left her children emotionally upset and insecure, to the point that their school work deteriorated and they required professional counselling. Ms. Sears' co-resident has made good progress in recovery from alcohol and drug addiction, and has a relationship with her children which is beneficial to them. However, Ms. Sears is

anxious that her co-resident have the opportunity to stabilize his recovery and that both return to work before committing to a relationship involving financial interdependence.

- (iv) Cynthia Johnston became self-supporting at the end of Grade 10 to escape an alcoholic and abusive father. The breakdown of her three-year marriage left her with three children to support. Ms. Johnston's co-resident has developed a relationship with her children which is beneficial to them. The withdrawal of her only source of income, and the prospect that her co-resident may have to move away has seriously undermined her efforts to maintain stability for her children.

Affidavit of Claude-Marie Cadieux, paras. 4 - 15  
Application Record, vol. 1, Tab 6, pp. 79-83.

Cross-examination of Claude-Marie Cadieux, p. 32 question 180, p. 48  
question 274  
Respondents' Application Record

Affidavit of Sandra Elizabeth Falkiner, paras. 16, 27 - 29  
Application Record, vol. 1, Tab 5, pp. 41-42, 47-49.

Affidavit of Deborah Sears: paras 4-16, 36-49, 55-57, 60-61.  
Application Record, vol. 1, Tab 8, pp. 139-143.

Affidavit of Cynthia P. Johnston: paras 3, 26.  
Application Record, vol. 1, Tab 7, p. 114, 118.

## **B THE LEGISLATIVE BACKGROUND**

### **(a) Definitions of "spouse" in social assistance legislation**

8. In the past decade, four versions of the definition of spouse have been used in determining whether an applicant is eligible for social assistance in their own right.
9. Prior to 1986, a "spouse" for the purposes of social assistance legislation was defined as a person to whom an applicant or recipient was married or with whom she or he was living "as husband or wife". This was commonly called the "spouse in the house" rule. This rule was widely criticised prior to 1986 both for its content, which was discriminatory against women, and for how it was administered both at the delivery level and by the Social Assistance Review

Board. This administration was frequently arbitrary and capricious, and was accompanied by extreme invasions of privacy. It was also frequently the basis for charges of criminal fraud.

Affidavit of Nancy Vander Plaats, para. 31  
Application Record, Tab 10

Margaret Leighton, "Handmaid's Tales: Family Benefits Assistance and the Single-Mother-Led Family" (1987) *University of Toronto Faculty of Law Review* 324

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

*R.R.O. 1980*, Regulation 318, (Family Benefits) s. 1(1)(d)

*R.R.O. 1980*, Regulation 441, (General Welfare) s. 1(1)(p)

10. In 1985 this definition was challenged as a violation of sections 7 and 15 of the *Charter of Rights*. These cases were never heard. The government publicly admitted the intrusiveness and arbitrariness of the rule, and decided to settle the challenges by promising to amend the definition of "spouse".

Affidavit of Nancy Vander Plaats, para. 33, Exhibit "G".  
Application Record, vol. 1, Tab 10, pp. 161, 238-239

Cross-examination of Nancy Vander Plaats, Exhibit A p. 4  
Respondents' Application Record

11. Minor changes were made to the definition of spouse in 1986. Then, in 1987, the government promulgated new regulations under the *General Welfare Assistance Act* and *Family Benefits Act*. It was intentionally decided that the new regulations would provide a definition of spouse in line with the *Family Law Act*, which provides that a couple may cohabit for three years before financial obligations are imposed. The new social assistance definition of "spouse" was:

- (i) a person of the opposite sex to an applicant or recipient who together with the applicant or recipient have declared to a welfare administrator or the Director that they are spouses;

- (ii) a person who is required under the provisions of a court order or domestic contract to support the applicant or recipient or any of his or her dependants,
- (iii) a person who has an obligation to support the applicant or recipient or any of his or her dependants under s.30 or 31 of the *Family Law Act* despite a domestic contract or other agreement between the person and the applicant or recipient whereby they purport to waive or release such obligation to support, or
- (iv) a person of the opposite sex to the applicant or recipient *who has resided continuously with the applicant or recipient for a period of not less than three years.*(emphasis added)

*O. Reg. 589/87* (superseding *O. Reg. 638/86*) (Family Benefits)

*O. Reg. 590/87* (superseding *O. Reg. 639/86*) (General Welfare)

12. The 1987 regulations provided further that:

Clause (d) of the definition of "spouse" ... does not apply to a person who has resided continuously for a period of not less than three years with the applicant or recipient and the applicant or recipient provides evidence to the Director that the economic, social and familial aspects of the relationship between the person and the applicant or recipient were such that the continuous residing does not amount to cohabitation.

*O. Reg. 589/87* (Family Benefits) s. 1(d)

*O. Reg. 590/87* (General Welfare) s. 1(b)

Cross-examination of Kevin Costante, question 388  
Application Record, Tab 23, Tab I

13. The 1987 regulations also provided that sexual factors are not to be taken into account in determining whether persons are spouses.

*O. Reg. 589/87* (Family Benefits) s. 1(1a)

*O. Reg. 590/87* (General Welfare) s. 1(1a)

14. In developing the 1987 rule the Social Assistance Review Committee and ultimately the government specifically rejected a rule which would deem relationships to be spousal where there was economic contribution from one person to another prior to the three years which give

rise to support obligations pursuant to the *Family Law Act*. The Social Assistance Review Committee stated:

The Committee believes that the government should not implement this criterion...[I]t seems unenforceable, at least without the kinds of investigations that raised concerns about the spouse in the house rule [prior to 1986]. Most of all, we think that it would discourage a substitute parent in the home from being even modestly supportive of the sole-support parent's efforts to raise his or her children, because of a fear that this would render that parent ineligible for social assistance.

Cross-examination of Kevin Costante, question 388  
Application Record, Tab 23, Tab I

15. The 1987 definition was in effect until October 1, 1995. As of that date, clause (d) was amended to define as a spouse:

- (d) a person of the opposite sex to the applicant or recipient who is residing in the same dwelling place as the applicant or recipient if,
  - (i) the person is providing financial support to the applicant or recipient,
  - (ii) the applicant or recipient is providing support to the person, or
  - (iii) the person and the applicant or recipient have a mutual agreement regarding their financial affairs, and

the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation.

RRO 1990, *O. Reg. 366 (Family Benefits Regulation)*, s.1(3), as amended by O.Reg. 410/95

RRO 1990, *O. Reg. 537 (General Welfare Regulation)*, s.1(3), as amended by O.Reg.409/95

16. The regulations were also amended in October 1995 to impose a presumption that two persons of the opposite sex are spouses whenever they live in the same dwelling place, now providing that:

...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.

Reg. 366, s.1(3), as amended by O.Reg.410/95

Reg. 537, s.1(3), as amended by O.Reg.409/95

17. Effective October 1, 1995, the government also amended the regulations under the *General Welfare Assistance Act* and the *Family Benefits Act* to provide that no one could be eligible for social assistance as a sole support parent unless the applicant or recipient was living apart from his or her "spouse" "by reason of separation with no reasonable prospect of reconciliation".

*Reg. 366, s. 2(7)(b), as amended by O.Reg.410/95*

*Reg. 537, s. 7(8), as amended by O.Reg. 409/95*

**(b) Meaning of the new definition of spouse**

18. The term "spouse" has been historically interpreted in light of its common law meaning as referring to a person in a marriage like relationship. This involved consideration of four distinct factors: sexual or conjugal, economic support, social and familial relations. Under the definition as it now stands, both sexual and economic factors have been effectively removed as relevant factors in the determination of spousal status.

**(i) Sexual factors**

19. Sexual factors were removed from the consideration of spousal status in the 1987 amendments, when questions of spousal status did not arise until people who were otherwise deemed to be spouses had lived together for three years. In the context of the current definition, the removal of sexual factors from consideration in determining spousal status means that opposite sex co-residents cannot adduce the fact that they have no sexual relationship in order

to rebut the presumption that they are spouses, which arises immediately upon sharing a residence.

Cross-examination of Nancy Vander Plaats, Exhibit A p. 6  
Respondents' Application Record

**(ii) Economic factors**

20. The new definition of spouse also means that any two co-residents who are considered to have a social and familial relationship will be deemed to be spouses regardless of their economic relationship. Subparagraphs (i), (ii) and (iii) of the definition of spouse in paragraph (d) clearly encompass all possible financial arrangements between two people who live in one dwelling place. This is supported by the directions to caseworkers in policy documents promulgated by the Ministry of Community and Social Services ("the Ministry").

21. The first two financial scenarios contemplated by the new spouse definition (ss. (d)(i) and (ii)) involve support of the woman by the man, and vice versa. The third scenario (ss. (d)(iii)), involving any "mutual agreement regarding their financial affairs", includes on its face all arrangements regarding living expenses, including those in which the parties agree to pay their own expenses, to share expenses equally, to share according to actual or estimated consumption, or to share according to any other sort of formula. Both of the witnesses put forward by the Ministry acknowledged that this was the case.

Cross-examination of Kevin Costante, pp. 40-46; questions 195-229  
Application Record, Tab 23

Cross-examination of Susannah Wilson, pp. 30-34; questions 119-139  
Application Record, Tab 24

22. The directives and training materials distributed to family benefits and welfare workers also reveal that all arrangements in which common expenses are shared will necessarily be captured by the new rule. Caseworkers are explicitly directed to ignore their common sense expectation that a 50-50 sharing of expenses indicates economic independence. They are directed,

rather, to look also at whether such items as televisions, cars, furniture or telephones are used jointly by co-residents, and to take such sharing as evidence of financial interdependence.

Affidavit of Kevin Costante, Exhibit 15 pp. 6-7; Exhibit 23 pp. 35-36  
Respondents' Application Record, vol 1, Tab 1.

Cross-examination of Kevin Costante, Exhibit B, question 563  
Application Record, Tab 23, Tabs B, L, M, N, R

23. Despite the Respondents' assertion that the Ministry requires financial interdependence which is "more than trivial", this alleged qualification is not mentioned in any policies or training materials promulgated by the Ministry.

Affidavit of Kevin Costante, para. 67  
Respondents' Application Record, vol 1, Tab 1, p.19.

Cross-examination of Kevin Costante, Exhibit B, question 563  
Application Record, Tab 23, Tabs B, L, M, N, R

24. The experience of social assistance recipients also demonstrates that the new definition is sufficiently broad to encompass relationships which do not constitute "cohabitation" as that word is ordinarily understood. Persons of opposite sex who share accommodation for purely financial reasons or for reasons of friendship are having their benefits eliminated or reduced merely because they enjoy some degree of companionship with their co-resident. This is consistent with the experience of recipients under the spouse in the house rule prior to 1986.

Affidavit of Donald McKinney, paras. 1 - 23  
Application Record, vol. 4, Tab 18, pp.117-1173

Affidavit of Gary Gibson, para. 13 - 27  
Application Record, vol. 4, Tab 19, pp. 1179-1182

Affidavit of Bonnie Nye, paras. 19, 20-21  
Application Record, vol. 4, Tab 20, pp. 1219-1220

Affidavit of Myrna Houston, paras.4-15  
Application Record, vol. 2, Tab 12, pp. 536-539

(c) **Effects of the new rule**

25. For categories other than single persons and sole support parents, the effect of the new spouse definition is to require that the benefit level be assessed (or re-assessed) taking into account the resources and income of the deemed "spouse". For single persons and sole support parents, the effect of the rule is that they are rendered categorically ineligible for social assistance in their own right, resulting thereby in the termination or refusal of assistance to persons who are otherwise eligible for social assistance as persons in need.

*Reg. 366, as amended by O.Reg. 410/95*

*Reg. 537, as amended by O.Reg. 409/95*

26. Under the new rule, these effects are permissible on the mere suspicion of a "spousal" relationship, with the onus being on the recipient to demonstrate otherwise. Assessment of the 'evidence' is in the discretion of individual caseworkers. Where there is any doubt or question, the recipient may be cut off or denied assistance and then forced to appeal to the Social Assistance Review Board.

Affidavit of Margaret Hillyard Little, para. 43  
Application Record, vol. 3, Tab 15, p. 634

Affidavit of Nancy Vander Plaats, para. 31  
Application Record, vol. 1, Tab 10, p. 160

Affidavit of Gary Gibson, Exhibit K  
Application Record, vol. 4, Tab 19, p. 1212

Affidavit of Myrna Houston, paras 3-12  
Application Record, vol. 2, Tab 12, pp. 534-538

Affidavit of Bonnie Nye, paras 13-40  
Application Record, vol. 4, Tab 20, pp. 1217-1227

Affidavit of Kevin Costante, para. 66  
Respondents' Application Record, vol. 1, Tab 1, p. 18.

27. Persons who are disentitled pursuant to the new rule have three options.

- (i) First, the recipient may end the co-residency situation. This is often undesirable for several reasons, such as: the inability to finance a move where two or three months' notice is required as well as last month's rent at a new location; the inability to find suitable affordable accommodation; disruption of relationships which are emotionally beneficial for the recipient and her children.
- (ii) Alternatively, if the recipient's deemed "spouse" has income and assets such that they are not eligible for welfare, the applicant or recipient may be forced to become dependent on the generosity of that person, regardless of the fact that they do not consider themselves to be spouses and regardless of the fact that the co-resident has no obligation to support the recipient pursuant to family law legislation. This is undesirable because it creates a situation of dependency (which has particularly significant consequences for female dependents) and it puts a severe and damaging strain on a developing relationship.
- (iii) If the recipient's deemed "spouse" has not got sufficient income to support the deemed family unit, and if that person is *willing* to do so, the two may apply for general welfare assistance as a couple. In such a case the welfare cheque is generally made out to the man as head of household and the woman is thereby dependent. Although the legislation does not technically require the man to be the head of household, this is in fact the normal practice of welfare workers. Because both "spouses" must sign an application for assistance, a woman who wishes to maintain financial control cannot compel the welfare authorities to treat her as head of household in the face of resistance from her co-resident. This option requires the couple to form a "family" against their will and in the absence of any obligations under family law. The family unit is thus *forced* upon two adults who have no chosen or legal family responsibilities toward one another.

Even where this may be an apparent option, the couple may not be eligible for general welfare in any event. This is the case, for example, (1) if the 'spouse' has asset or income levels which disqualify him from welfare; (2) if the 'spouse' is considered to be self-employed under the *General Welfare Assistance Act*; or (3) if both receive OSAP student loans.

Affidavit of Ian Morrison, para. 19  
Supplementary Application Record, Tab 1, pp. 6-8

Affidavit of Marshall Fine,  
Supplementary Application Record, Tab 2, pp. 2-4

Affidavit of Donald McKinney, paras. 21-22  
Application Record, vol. 4, Tab 18, p. 1172

Affidavit of Kevin Costante, paras. 85-90  
Respondents' Application Record, vol. 1, Tab 1, pp. 23-24.

Cross-examination of Marshall Fine, pp. 55-57, question 276-284; p. 59, question 290; pp 78-79, questions 383-386; p. 97 question 457  
Respondents' Application Record

Cross-examination of Nancy Vander Plaats, pp. 101-102, question 468-470;  
p.104, question 483  
Respondents' Application Record

28. In addition, some investigations and terminations of benefits will be accompanied by criminal charges. In the past, this threat has been used by social assistance workers to coerce "admissions" of "spousal" arrangements. Actual criminal charges are traumatic in themselves, and particularly so when the result is incarceration, as it often was under the former "spouse in the house" regime. This may destroy an already fragile developing family unit and jeopardizes custody arrangements. Publicity engenders increased public hostility, regardless of the outcome of the case. In the past, women have stated that they entered guilty pleas only to avoid the trauma of a trial.

Affidavit of Nancy Vander Plaats, paras. 48, 49, 50, 51  
Application Record, vol. 1, Tab 10, pp. 166-167

Affidavit of Margaret Hillyard Little, paras. 49, 50, 51  
Application Record, vol. 3, Tab 15, pp. 636-637

Affidavit of Cheryl Bailey, para. 6  
Application Record, vol. 4, Tab 22, p. 1279

Dianne Martin, "Passing the Buck: Prosecution of Welfare Fraud;  
Preservation of Stereotypes" (1992) 12 *Windsor Yearbook of Access to  
Justice* 52, at p. 55

29. Termination of benefits, will also, in some cases be accompanied by an assessment of overpayment, creating debt obligations that recipients are never able to pay and which therefore keep them in long term financial dependence.

Affidavit of Nancy Vander Plaats, para 47, 48  
Application Record, vol. 1, Tab 10, p. 166

30. Decisions of the Social Assistance Review Board reveal numerous instances in which overzealous or careless workers have forced people to apply for assistance as couples or to declare that they are couples inappropriately, by the use of various threats including threats of fraud charges. These kinds of problems are particularly likely to occur where recipients have psychological or psychiatric problems, are illiterate or are developmentally delayed. In one recent decision of the Social Assistance Review Board, Decision No. M-12-25-25, an Eligibility Review Officer admitted before the Board that she cut recipients off without any evidence at all that they were living with a spouse on the grounds that, sometimes when people are told there is proof of an allegation, they will admit it.

SARB No. M-12-25-25 (1996)  
And see: SARB No. L-04-29-05 (1993); SARB M-12-09-25 (1995); SARB  
No. G-09-02-14 (1989); SARB J-05-15-10 (1991); SARB No. K-10-17-08  
(1994); SARB L-04-07-18 (1993).

And see: Cross-examination of Claude-Marie Cadieux, pp. 42; question 254  
Respondents' Application Record

31. A further effect of the legislation is the significant invasion of recipients' privacy necessitated by determinations of co-residency and cohabitation.

Affidavit of Margaret Hillyard Little, para. 32  
Application Record, vol. 3, Tab 15, p. 631

Affidavit of Nancy Vander Plaats, para. 41  
Application Record, vol. 1, Tab 10, p. 164

32. In the past, caseworkers have often gone to extreme lengths to determine whether a person of the opposite sex is present in a recipient's home. They have conducted surveillance to watch for the coming or going of male visitors. They have been encouraged to conduct bathroom visits to identify toiletry items which might reveal the presence of a male visitor. In one case a worker believed that hunting magazines, a large stereo and 'masculine' clothing revealed the presence of a man in the house, a conclusion clearly based on stereotype. In another case a woman was forced to try on a pair of unisex boots to prove that they belonged to her.

Affidavit of Margaret Hillyard Little, para. 34  
Application Record, vol. 3, Tab 15, p. 623

33. In addition, third parties are encouraged to report the presence of another adult at the home of a single social assistance recipient. Investigations may therefore be commenced as a result of malicious reporting by neighbours, landlords or disgruntled ex-partners. The new 1995 "Welfare Fraud Hotline" protects the identity of informers. At the same time, caseworkers are specifically directed to collect "all" available evidence by talking with neighbours, landlords, schools and anyone else who might be thought to have information.

Affidavit of Margaret Hillyard Little, paras. 35, 38, 39  
Application Record, vol. 3, Tab 15, pp. 632-633

Affidavit of Bonnie Nye, paras. 29, 35  
Application Record, vol. 4, Tab 20, pp. 1223, 1225

Cross-examination of Kevin Costante, Exhibit B, question 142  
Application Record, Tab 23, Tabs B, G

Affidavit of Myrna Houston, para. 15  
Application Record, vol. 2, Tab 12, p. 539

34. Once co-residency is established, evidence of "spousal" status is gathered by way of a nine page questionnaire which requires details of virtually every aspect of daily life. The questions require that co-residents provide financial information, which they are often reluctant to do given that they do not perceive themselves to be spouses of the applicant or recipient. Social assistance recipients experience this questionnaire as arbitrary and highly intrusive. The applicants' experts who were cross-examined generally agreed that while the questionnaire is capable of demonstrating that persons share aspects of their lives, it does not assist in demonstrating whether those persons are spouses or merely friends.

Affidavit of Nancy Vander Plaats, para. 39 Exhibit H  
Application Record, vol. 1, Tab 10, pp. 164, 240-264

Affidavit of Margaret Hillyard Little, para. 41  
Application Record, vol. 3, Tab 15, p. 364

Affidavit of Gary Gibson, paras. 32-36  
Application Record, vol. 4, Tab 19, pp. 1183-1184

Affidavit of Bonnie Nye, para. 19  
Application Record, vol. 4, Tab 20, p. 1219

Cross-examination of Marshall Fine, pp. 24, question 118; p. 93 question  
444  
Respondents' Application Record

Cross-examination of Margaret Hillyard Little, pp. 87-89; questions 375-  
383  
Respondents' Application Record

Cross-examination of Nancy Vander Plaats, pp.17-19, questions 70-74; p.  
73, question 346  
Respondents' Application Record

35. Caseworkers are specifically directed to take as incriminating evidence facts which are necessary strategies by which women attempt to cope with severe poverty. For example, a male

friend or former partner may be the only person available to co-sign a lease where low income makes it otherwise impossible to meet the minimum income requirements of many landlords. Similarly, the requirements of a landlord may force a people to pretend that they are couples by presenting themselves together to the landlord or by joining bank accounts.

Affidavit of Margaret Hillyard Little, para. 44  
Application Record, vol. 3, Tab 15, pp. 634-635

Cross-examination of Bruce Porter, pp. 38-39, question 135  
Respondents' Application Record

36. The rule has a "chilling effect" on one of the only ways for a single mother to escape poverty, which is to form a new relationship with a male earner. This possibility is jeopardized by the new spouse in the house rule in two ways:

- (i) The rule removes the three year period for living together, a period which many people (including many social assistance recipients) believe is important to develop a more permanent commitment with a potential partner. The formation of a new family unit takes considerable time, particularly when there has been abuse in a past relationship (at least 48 percent of women have been abused in a past intimate relationship) and particularly when there are children involved (evidence indicates at least two years are required for successful integration of a family where step-parents are involved). The sole support parent must manage the development of her personal relationship with the person she hopes will become her partner, the relationship of that adult with her children, and the related changes in her children's relationships. Co-residency is often perceived to be necessary to determine the feasibility of a successful relationship. The possibility of success is significantly threatened by the imposition of financial obligations at an early stage, since women often wish to avoid the power imbalance created by dependency and men are often reluctant at first to commit financially to a new "family".

- (ii) Women on social assistance are afraid to become involved with men because of the fear that their spousal status will be investigated. This "chilling effect" on the formation of opposite sex relationships inhibits the commencement or development of relationships which may have a long term potential of assisting women to escape poverty.

Affidavit of Brigitte Kitchen, paras. 8, 33  
Application Record, vol. 2, Tab 11, pp. 280, 287

Affidavit of Usha Gici George, paras 10, 21  
Application Record, vol. 2, Tab 13, pp. 543-544, 546

Affidavit of Nancy Vander Plaats, para. 56  
Application Record, vol. 1, Tab 10, p. 169

Cross-examination of Robert Fulton, pp. 39-41; questions 143-150  
Respondents' Application Record

Affidavit of Marshall Fine, paras. 3-5  
Supplementary Application Record, Tab 2, p. 3

Cross-examination of Marshall Fine, pp. 25-30, questions 127-153; p. 61, question 302; p.92, question 441  
Respondents' Application Record

Affidavit of Margaret Hillyard Little, para. 34, 36, 37, 52 - 54  
Application Record, vol. 3, Tab 15, pp. 632-633, 637-638

Cross-examination of Margaret Hillyard Little, pp. 185-187; questions 830-834  
Respondents' Application Record

**(d) The new "reconciliation" rule**

37. The new "no reasonable prospect of reconciliation" rule applies only to sole support parents. Although the respondents have asserted in evidence that the rule only applies to a small subset of sole support parents, those who are eligible pursuant to s.2(7)(b) of the FB Regulation, it is clear that the rule does not in fact operate in this way. First, there is only one category of sole support parent under the GW program and the rule applies to that category. As almost all

FB sole support parents first enter the social assistance system through the GW program, the rule applies to them at the point of entry. Second, the respondents' evidence itself shows that its claim about the rule's limited application is not pointed out in any of the materials provided to FB caseworkers, including the directive dealing specifically with this aspect of the new rule. There is nothing in the FB files or computer database to distinguish sole support parents based on the section pursuant to which they are eligible, and thus there is nothing in the administration system directing caseworkers to either apply the rule differently, or to distinguish recipients in a way that would make a differential application possible.

Affidavit of Kevin Costante, paras. 69-72  
Respondents' Application Record, vol. 1, Tab 1, 19-20.

Cross-examination of Kevin Costante, pp. 26-28, questions 124-133,  
question 456.  
Application Record, Tab 23, Tabs E, F

38. The scope of the "no reasonable prospect of reconciliation rule" is not defined by the regulation. Caseworkers have already told recipients that it applies to people who separate in order to avoid the consequences of the new spouse in the house regulations. Although a recent Ministry directive indicates that the regulation should only be applied in circumstances of temporary separation due to work or education requirements, the applicants' experts universally state that policy directives without the force of law are often not applied by caseworkers in practice. Decisions of the Social Assistance Review Board also demonstrate that this is an endemic problem. Further, the Ministry has not provided evidence as to the number of persons who were affected by the regulation prior to the promulgation of its directive in March, 1996, after this application was well under way.

Cross-examination of Nancy Vander Plaats, pp. 71, question 331; p. 107  
question 494  
Respondents' Application Record

Cross-examination of Margaret Hillyard Little, p. 151; question 665  
Respondents' Application Record

Affidavit of Myrna Houston, para.15  
Application Record, vol. 2, Tab 12, p. 539

Cross-examination of Kevin Costante, p. 94, question 471  
Application Record, Tab 23, Tab E

**C SOCIAL CONTEXT**

**(a) Who is affected by the new rule**

39. All social assistance recipients are subject to the new spouse definition.

Affidavit of Kevin Costante, para. 20  
Respondents' Application Record, vol. 1, Tab 1, p.6.

40. As a direct consequence of the amendment to the definition of spouse, 10,103 recipients of FB and GWA have been found to be ineligible as single persons or sole support parents.

Affidavit of Kevin Costante, para 85.  
Respondents' Application Record, vol. 1, Tab 1, p. 23.

41. The vast majority (89 percent) of those who have been terminated from social assistance since the new rule came into effect are women. This includes persons in all categories of social assistance eligibility including single employable, persons with disabilities and sole support parents.

Affidavit of Kevin Costante, para 86  
Respondents' Application Record, vol, Tab 1, p. 23.

42. The large majority (79 percent) of all persons terminated from eligibility as a result of these changes are single parents; 76 percent of all persons terminated are single mothers. The children of these sole support parents are disentitled because of their parents' disentitlement.

Cross-examination of Kevin Costante, p.119, questions 594-595  
Application Record, Tab 23, Tab Q

43. The government has no follow-up studies or other information as to the circumstances of the 6947 persons who have been cut off social assistance because of the new rule and have not returned to social assistance.

Cross-examination of Kevin Costante, pp. 139-141, questions 692-702  
Application Record, Tab 23, Tab E

**(b) Single mothers**

44. Single mothers are one of the most disadvantaged groups in Canada. Single parent families headed by women have the highest poverty rate of all family types. Canada's poverty rate for single mothers is higher than most other countries in the industrialized world. In Ontario, about two thirds of all single mothers are on social assistance.

Affidavit of Brigitte Kitchen, paras. 14-17, 32  
Application Record, vol. 2, Tab 11, 282, 286-287

45. The likelihood of poverty is even greater for young single mothers, who are those most likely to have young children at home. Moreover, the depth of poverty (the amount by which they fall below the poverty line) is likely to be higher for single mothers than for other poor families.

Affidavit of Brigitte Kitchen, paras. 14, 15, 16  
Application Record, vol. 2, Tab 11, p. 282

46. Children are therefore most likely to be poor when they live in households headed by a female lone parent. The poverty they experience will have adverse long term effects including: higher rates of physical and mental health problems; higher risk of death from disease and accident; higher incidence of poor performance in school; and greater likelihood of dropping out of school. These disadvantages have long term effects on economic achievement throughout life.

Affidavit of Brigitte Kitchen, para. 19  
Application Record, vol. 2, Tab 11, p.283

47. Although many single mothers on social assistance work part time and want to find work, the labour force is generally not a ready answer to single mothers' poverty. In Ontario, a full time job at minimum wage still leaves the worker well below the poverty line, meaning that employment often does not provide economic self-sufficiency. Job opportunities are increasingly scarce and insecure, particularly for younger workers, especially young single mothers with child care responsibilities, since affordable child care is very scarce and employers are often not responsive to childcare demands.

Affidavit of Brigitte Kitchen, paras. 26 - 28  
Application Record, vol. 2, Tab 11, pp. 285-286

Affidavit of Margaret Hillyard Little, para. 30  
Application Record, vol. 3, Tab 15, pp. 630-631

Affidavit of Nancy Vander Plaats, paras. 20, 27  
Application Record, vol. 1, Tab 10, pp. 158, 159

**(c) The Social Assistance System**

48. Ontario social assistance rates were lowered by 21.6 percent in October 1995 and are generally recognized to be far below all measurements of poverty used by the social policy community across Canada.

Affidavit of Margaret Hillyard Little, para. 20-21  
Application Record, vol. 3, Tab 15, p. 627

Affidavit of Kevin Costante, para. 29  
Respondents' Application Record, vol. 1, Tab 1, p.8

49. To make ends meet, it is essential that persons on social assistance utilize all possible cost-saving measures, such as relying on food banks and sharing the costs of accommodation. Living

with another person was in fact one recommendation made by the representatives of the Ontario government in 1995 as a means of coping with the massive rate cuts. Careful planning of all expenses is a necessity since social assistance recipients live close to the edge and are unable to save for contingencies.

Affidavit of Nancy Vander Plaats, paras. 7, 9, 66  
Application Record, vol. 1, Tab 10, pp. 153-154, 172

Affidavit of Linda E. Law, para. 14, Exhibit B  
Application Record, vol. 4, Tab 16, p. 940

Cross-examination of Susannah Wilson, pp. 34-35; questions 143-147  
Application Record, Tab 24

50. Although there is an appeal process in the social assistance system (the Social Assistance Review Board or "SARB"), where a person deemed to be a spouse by the Director appeals that decision, it will usually be at least several months before the appeal is heard. Interim assistance in cases of emergency is available on a discretionary basis only, and at least half of the time are refused. In any event, it is often many weeks before a request for interim assistance is processed. Social assistance recipients virtually never have any savings to draw upon for survival during the waiting period. In April 1996, it took an *average* of 32.8 working days to process a request for interim assistance. The Respondents cannot provide information as to whether this is an accurate reflection of the time to process requests relating to the spouse rules specifically. Even after SARB issues an order for interim assistance, it can be at least a week before a recipient receives a cheque.

Affidavit of Nancy Vander Plaats, para. 69  
Application Record, vol. 1, Tab 10, p. 172

Affidavit of Ian Morrison, paras. 10 - 15  
Supplementary Application Record, Tab 1, pp. 4-6

Affidavit of Margaret Hillyard Little, para. 45  
Application Record, vol. 3, Tab 15, p. 635

Affidavit of Cheryl Bailey, para. 13  
Application Record, vol. 4, Tab 22, pp. 1281-1282

Affidavit of Melissa Flinders, para. 29  
Application Record, vol. 4, Tab 21, p. 1272

Affidavit of Bonnie Nye, para. 42, Exhibit P  
Application Record, Tab 20, pp. 1228, 1265-1267

Cross-examination of Kevin Costante, p.157, questions 786-787, p. 161,  
question 808.  
Application Record, Tab 23,

51. In addition, although all recipients are supposed to be made aware of their right to appeal to SARB, many people report that they have no knowledge of its existence. This may be because the information is only provided in English, and therefore requires literacy in the English language. Even where recipients are aware that SARB exists, they report not understanding how it operates, not understanding that it is independent from the FB office, and not believing that it is a meaningful process.

Cross-examination of Nancy Vander Plaats, p. 92; question 431  
Respondents' Application Record

52. Further, according to public statements, the continued existence of SARB is very much in question. This appeal mechanism can be dismantled since as of April 1st, 1996 the appeal process is no longer required by the *Canada Assistance Plan*. Members of this government have stated in official government proceedings that the future of the Social Assistance Appeals Board is in question.

Cross-examination of Nancy Vander Plaats, p. 108; question 499  
Respondents' Application Record

Cross-examination of Margaret Little. p. 154; question 677  
Respondents' Application Record

Hansard, Wednesday, 7 February 1996, Standing Committee on  
Government Agencies

**(d) Prejudice against social assistance recipients**

53. It is widely known that recipients of social assistance are stigmatized because of their dependence on the state. Many report feelings of shame, knowing that they are viewed as

"inferior" or "parasites" by the public, by social assistance workers, and by their own families. These hostile attitudes, which have increased in recent years, are rooted in stereotypes which attribute poverty to personal inadequacy and laziness.

Affidavit of Margaret Hillyard Little, para. 23  
Application Record, vol. 3, Tab 15, p. 638

Affidavit of Nancy Vander Plaats, paras. 24, 25, 29, 30  
Application Record, vol. 1, Tab 10, pp. 158-159, 160

Affidavit of Bruce Porter, paras. 11 - 38  
Application Record, vol. 3, Tab 14, pp. 584-594

54. Stereotypes about social assistance recipients are generally unfounded. For example, contrary to popular myth, social assistance recipients do not have more children than other families, most people do not stay on social assistance for a long period of time, and persons on social assistance do not spend money on extravagant personal items. Similarly, there is no evidence to support the common stereotype that single mothers on social assistance are particularly promiscuous, immoral or unfit. Further, many single mothers try to work even where the amount they receive is less than welfare, because they wish to avoid the stigma of dependence on the state.

Affidavit of Margaret Hillyard Little, para. 23  
Application Record, vol. 3, Tab 15, p. 628

Affidavit of Nancy Vander Plaats, paras. 24, 25, 29, 30  
Application Record, vol. 1, Tab 10, pp. 158-159, 160

Affidavit of Bruce Porter, paras. 11 - 15, 28 - 31  
Application Record, vol. 3, Tab 14, pp. 584-586, 590-592

Cross-examination of Kevin Costante, question 541  
Application Record, Tab 23, Tab AA

55. One consequence of the stigma attached to receipt of social assistance is that many recipients and their children try to hide the fact that they are on social assistance from others, including teachers, employers, landlords and neighbours. This confidentiality is destroyed by

investigations of "spouse in the house" allegations, leading to further feelings of humiliation and isolation.

Affidavit of Margaret Hillyard Little, paras. 47 - 48  
Application Record, vol. 3, Tab 15, pp. 635-638

Cross-examination of Margaret Hillyard Little, pp. 59-60, question 255  
Respondents' Application Record

56. Many recipients report that even their social assistance workers are condescending and arrogant to them, robbing them of their self-respect and reinforcing feelings of inadequacy. The workers also perpetuate sexist attitudes by behaving in an authoritarian or paternalistic manner. They exert control by creating an atmosphere of mistrust and fear. Paternalistic attitudes toward women are also evidenced by the fact that, where men are present in the household, the benefits cheque is usually directed to them as the heads of household.

Affidavit of Margaret Hillyard Little, paras. 23, 27 Exhibit D  
Application Record, vol. 3, Tab 15, pp. 628, 629-630, 834-835

Affidavit of Bruce Porter, para. 22  
Application Record, vol. 3, Tab 14, p. 588

57. The arrogance of some social assistance workers evidences an imbalance of power which is also present in other relationships between persons on social assistance and persons in authority. Landlords, for example, often refuse to rent to persons who receive social assistance.

Affidavit of Bruce Porter, paras. 16-21  
Application Record, vol. 3, Tab 14, pp. 586-588

58. Prejudice against persons in receipt of social assistance is recognized in the Ontario *Human Rights Code* which protects against discrimination in housing on the basis of "receipt of social assistance". Several other Canadian jurisdictions have similar provisions.

Affidavit of Bruce Porter. paras. 11 - 12,  
Application Record, vol. 3, Tab 14, pp. 584-585

59. The stresses of subsistence living, combined with the prejudices experienced by persons in receipt of social assistance are severe. One major Ontario study has concluded that receipt of social assistance has a significant negative impact on quality of life. In 1995, prior to the introduction of the "spouse in the house" rule, 36 percent of lone parents on social assistance reported being depressed or very unhappy, compared to 4 percent of the general population. The isolation created by the "spouse in the house" rule will only aggravate this situation.

Affidavit of Margaret Hillyard Little, para. 19  
Application Record, vol. 3, Tab 15, pp. 626-627

**(e) Women who have experienced abuse**

60. The widespread phenomenon of violence against women (about 50 percent of the female social assistance population has experienced abuse) makes the spouse in the house rule troubling in five ways.

Cross-examination of Margaret Little, pp. 120; questions 524-525  
Respondents' Application Record

61. First, by increasing women's dependence on men, it increases women's vulnerability to abuse and impedes their ability to leave already abusive relationships. This impediment is particularly great for immigrant women, for whom family breakdown may be strongly disapproved.

Affidavit of Usha Gici George. para 26-32  
Application Record, vol. 2, Tab 13, pp. 547-649

62. Second, while the rule impedes all women's ability to develop healthy relationships with new partners, this is particularly true of women who have been abused in the past. For these women the process of developing trust is a particularly lengthy one which involves, in fact, a fear

of dependence. The time which may be necessary for this process to occur is removed by the new spouse in the house rule.

Affidavit of Usha Gici George, para. 13  
Application Record, vol. 2, Tab 13, p. 544

Affidavit of Nancy Vander Plaats, para. 56  
Application Record, vol. 1, Tab 10, p. 169

Affidavit of Robert Fulton, para. 6  
Application Record, vol. 4, Tab 17, p. 944

Cross-examination of Robert Fulton, pp. 39-41; questions 143-150  
Respondents' Application Record

63. Third, women experience the dynamics of the spouse in the house rule as being similar to the dynamics of abusive relationships. This is a dynamic of victimization which includes: excessive supervision; demeaning treatment through control of financial resources; unwarranted and demeaning invasion of privacy; unpredictable and disorienting oscillation between benevolence and cruelty by those with power over them; and persistent devaluing of their role. The caseworker is experienced as being analogous to the abuser in that he or she controls access to basic necessities and has a determinative effect on the ability to have control over what happens to the children.

Affidavit of Bruce Porter, para. 23  
Application Record, vol. 3, Tab 14, pp. 588-589

Cross-examination of Bruce Porter, pp. 30-31; questions 111-113  
Respondents' Application Record

Cross-examination of Margaret Hillyard Little, p. 188; question 837  
Respondents' Application Record

64. Fourth, the new "spouse in the house" rule also allows an abusive ex-partner to retain control over a woman by threatening to make a false report to the welfare authorities or even insisting on moving in with her.

Affidavit of Margaret Hillyard Little, paras. 57 - 58  
Application Record, vol. 3, Tab 15, pp. 638-639

Affidavit of Nancy Vander Plaats, paras. 43, 52  
Application Record, vol. 1, Tab 10, pp. 164-165, 167-168

65. Finally, the rule prevents a woman from living with a man for protection or for the provision of a positive male role model for her children.

Affidavit of Margaret Hillyard Little, paras. 57 - 58  
Application Record, vol. 3, Tab 15, pp. 638-639

Affidavit of Nancy Vander Plaats, paras. 43, 52  
Application Record, vol. 1, Tab 10, pp. 164-165, 167-168

### PART III - ISSUES AND THE LAW

66. The issues for determination in this application are:
- a. Are subparagraphs (ii) and (iii) of paragraph (d) and s.2(7) of Ontario Regulations 409/95 and 410/95 ultra vires the *Family Benefits Act* and the *General Welfare Act*?
  - b. Do these same regulations violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*?

### PART IV - THE VIRES OF THE REGULATIONS

#### A THE APPLICANTS' POSITION

67. It is submitted that

- (i) subparagraphs (ii) and (iii) of paragraph (d) of the definition of "spouse" enacted by O.Reg.s 409/95 and 410/95 are *ultra vires* the *General Welfare Assistance Act* and the *Family Benefits Act*; and that
- (ii) the words "with no reasonable prospect of reconciliation" in s.2(7)(b) of O.Reg.366 as amended by O.Reg.410/95 and s.7(8) are *ultra vires* the *General Welfare Assistance Act* and the *Family Benefits Act* respectively.

## **B THE VIRES OF THE REGULATIONS**

### **(a) The regulation making power under the FBA and GWAA**

68. The *Family Benefits Act* provides that an allowance shall be paid to any "person in need" within the classes of recipients set out in s.7 of the *Act*. Section 20 of the *Act* provides that the Lieutenant Governor in Council may make regulations "defining person in need", "prescribing standards of eligibility for benefits in addition to those mentioned in this *Act*", and "prescribing classes of persons, in addition to those mentioned in this *Act*, to whom benefits may be provided".

*Family Benefits Act*, R.S.O. 1990, c. F.2, s. 7(1),s.20(a), (m), (n)

69. The *General Welfare Assistance Act* requires a municipality to provide assistance to any "person in need" within the municipality "in accordance with the regulations". Section 14 of the *General Welfare Assistance Act* provides that the Lieutenant Governor in Council may make regulations "prescribing classes of assistance and the items to be included in any such class", "prescribing classes of persons who are eligible for assistance and fixing standards of eligibility", "defining persons in need or prescribing classes of such persons", "adding to the classes of persons who are recipients of governmental benefits", "defining expressions for the purposes of the regulations", and "respecting any matter considered necessary or advisable to carry out the intent and purpose of the *Act*".

*General Welfare Assistance Act*, R.S.O. 1990, c. G.6, s. 14 (a), (b), (i), (s)

70. Neither the GWAA nor the FBA specifically confer a power to define "spouse" or any related terms. In determining whether the definition of "spouse" is intra vires the legislative scheme, reference must therefore be made to the purpose and intent of the legislative scheme, to determine the parameters and proper interpretation of the regulation making power.

**(b) Applicable principles of statutory interpretation**

**(i) Large and liberal interpretation**

71. It is submitted that the *General Welfare Assistance Act* and the *Family Benefits Act* should be interpreted largely and liberally to attain their remedial objectives and suppress the mischief against which they aim. Any ambiguities should be resolved in favour of the applicant or recipient.

*Kerr v. Metropolitan Toronto* (1995), 22 O.R. (2d) 588; rev'd without reference to this point.

*Dennhardt v. Ontario (Ministry of Community and Social Services)* (1987), 45 D.L.R. (4th) 149 at p. 153 (Ont. Div. Ct.) per Austin J. quoting from Wilson J. in *Re Abrahms and A.G. Canada* (1983), 142 D.L.R. (3d) 1 at pp. 7-8.

*Driedger on the Construction of Statutes* 3d ed. R. Sullivan (ed) (Toronto: Butterworths) at pp. 376-379.

**(ii) Interpretation consistent with the *Canada Assistance Plan***

72. Both *Acts* should also be interpreted consistently with the terms and conditions of the Canada Assistance Plan. Ontario's social assistance legislation was specifically designed to fulfil Ontario's undertakings pursuant to an agreement entered into under the Canada Assistance Plan. It should be presumed that the Legislature did not intend to grant to the Lieutenant Governor in Council authority to pass subordinate legislation inconsistent with the Canada Assistance Plan and Ontario's undertaking in the absence of the clearest possible statutory authority.

73. The *Canada Assistance Plan* is federal legislation enacted in 1967 in order to facilitate the development of national welfare standards by the provision of cost-sharing from the federal

government for provincial social assistance programs and welfare services. The Canada Assistance Plan provides for the making of agreements between the federal government and the provinces, pursuant to which the federal government provides funds to the province respecting the cost of social assistance provided in the province under a provincial law which is consistent with the Canada Assistance Plan. The provincial laws are set out in a schedule to the agreement between the federal government and the province.

*Canada Assistance Plan*, R.S. c. C-1, s.2, 4, 6(1)(2).

74. Ontario entered into an agreement with the federal government under the Canada Assistance Plan in 1968. The *General Welfare Assistance Act* and the *Family Benefits Act* are listed in the Schedule to that agreement as provincial laws consistent with the Canada Assistance Plan.

*Canada Assistance Plan*.

*Ministry of Community and Social Services Act*, R.S.O. 1990, c.M-20, s.3.

75. In 1967, the government of Ontario amended the *General Welfare Assistance Act* to bring it into compliance with the requirements of the forthcoming *Canada Assistance Plan*. On March 20, 1967, the Hon. J.Yaremko, then Minister of Public Welfare, rose in the Legislature to state:

"The purpose of [Bill 55, An act to amend the *General Welfare Assistance Act*] is to bring the *General Welfare Assistance Act* into line with the requirements of the Canada Assistance Plan."

*Hansard*, 27th Leg. 5th Sess., March 20, 1967, Hon. Yaremko, p.1538.

76. The *Family Benefits Act* was enacted in 1966 specifically in contemplation of the pending Canada Assistance Plan. On June 16, 1966, the Hon. L. P. Cecile, then Minister of Public Welfare, introduced Bill 179, An act to provide benefits to persons and families in need for first reading as follows:

"The *Family Benefits Act* is introduced in anticipation of the Canada Assistance Plan, which will have its greatest influence upon the legislation involved here. This legislation will be implemented subsequent to agreements under the Canada Assistance Plan through which the Ottawa government will undertake to share financially in the total program....The *Family Benefits Act* will permit the province to design new programs that

will meet the maintenance needs and other requirements of families and individuals. We are looking forward toward more flexibility of treatment and comprehensive services."

77. It has been held by this Court that the *General Welfare Assistance Act* should be interpreted together with the Ministry of Community and Social Services Act and the Canada Assistance Plan and regulations.

*Our House Ottawa Inc. v. Ottawa-Carleton (Regional Municipality)* (1992), 92 D.L.R. (4th) 337, at p.348 (Ont. Div. Ct.).

78. At the time it was enacted and at all relevant times for this litigation, the payment of benefits pursuant to the *Family Benefits Act* was expressly made conditional on the existence of Ontario's cost-sharing agreement with the government of Canada pursuant to the Canada Assistance Plan.

*Family Benefits Act*, s.2.

79. The Canada Assistance Plan requires that in determining whether a person is in need, the social assistance authority must take into account the income and resources available to that person to meet her needs and those of her dependants. This obligation is stated as part of the definition of person in need in s.2 of the *Canada Assistance Plan* and again as a specific condition that must be contained in a cost-sharing agreement with a province.

*Canada Assistance Plan*, s.2(a), s.6.

80. The usual and ordinary or common meaning of the term "available" includes the requirement that the thing be "ready or free for use" "capable of being used" "obtainable". All these definitions entail an understanding that the income is within the grasp of the person. The common meaning of the term does not permit an interpretation that something is "available" when it is not legally available and not available in fact.

*The New Lexicon Webster's Dictionary of the English Language*, (New York: Lexicon Publications, 1987).

(iii) Interpretation consistent with *The Charter of Rights and Freedoms*

81. It is submitted that where there is any ambiguity as to the meaning or scope of legislation, the values and principles of the Charter of Rights may be looked to as an aid to interpretation and an interpretation consistent with those values and principles should be preferred over one which is not.

*Hills v. Canada*, [1988] 1 S.C.R. 513, per L'Heureux-Dubé, J. at p. 558.

*Canada (Attorney General) v. Mossop* (1993), 149 N.R. 1 (SCC) per Lamer C.J.C. at p. 27.

82. In *Schachter v. Canada*, the Chief Justice stated, "while s.15 may not absolutely require that benefits be made available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances."

*Schachter v. Canada* (1989), 93 D.L.R.(4th) 1, per Lamer C.J.C. at p. 15.

(c) **The objects and purpose of the legislation**

83. Social assistance is the income maintenance program of last resort for persons in need in Ontario. The purpose of the GWAA is to provide basic income support to people who are in short-term or emergency need in order to ease the impact of unemployment, family breakdown, or temporary illness or disability. The purpose of the FBA is to provide assistance to those who are likely to be in need for a prolonged period of time, specifically disabled adults and their dependants, disabled children, single-parent families with little or no wage income, older adults under age 65, and children in foster care.

84. Pursuant to s. 7 of the FBA an allowance shall be provided in accordance with the regulations to a person in need who is a mother with a dependant child whose husband has deserted her for three months or more, who is divorced from the father of her dependant child

and has not remarried, or whose dependant child was born out of wedlock. All of the applicants in this case fall within these circumstances.

*Family Benefits Act*, ss. 7(1)(d)(ii), (vi), (vii).

85. It is submitted that both Acts must be interpreted consistently with the Canada Assistance Plan, as requiring that the rules for determining who is need and providing assistance in accordance with that need must take into account whether resources are actually available to meet those needs.

86. Judicial decisions in other contexts also support the proposition that social assistance legislation which is intended to provide basic assistance for persons in need should not be interpreted as permitting resources to be deemed available to a recipient unless the legislation is clear and unequivocal.

*Re Gach and Director of Welfare* (Brandon) (1973), 35 D.L.R.(3D) 152 (Man. C.A.).

*Re De Lima and Minister of Community and Social Services*, (1973) 35 D.L.R.(3d) 481 (Ont.Div.Ct.).

**(d) The vires of the new spousal definition**

**(i) Deeming unavailable resources to be available**

87. It is submitted that the regulation making authority under the GWAA and *FBA* does not authorize the Lieutenant Governor in Council to enact regulations which have the effect of deeming resources available to an applicant or recipient which are not in fact available to that person to meet her basic needs.

88. Under the General Welfare Assistance and the Family Benefits regulatory schemes, once a person who is living with an applicant or recipient is determined to be the applicant's or

recipient's "spouse", that spouse's income and assets are irrefutably deemed to be available to support the applicant or recipient and any dependent children.

*Reg. 537 (GWAA), ss. 4(1)(a), 15(1)(b).*

*Reg. 366 (FBA), ss. 3(1)(c), 3(2)(c), 13(1)(b).*

89. Pursuant to paragraphs (ii) and (iii) of the new definition of "spouse", the necessary economic nexus to establish spousehood is deemed to be present even where there is no legal obligation to provide support or economic contribution, no support is actually being provided and there has been no voluntary assumption of an obligation to support. Thus the regulations irrefutably deem support to be available from a "spouse" even in circumstances in which the same regulations expressly make the actual provision of support irrelevant to the determination of whether that same person is a "spouse".

**(ii) Restricting eligibility established by the legislature**

90. A regulation making power may not be used to enact a regulation which has the effect of changing the rules laid down by statute. In particular, where a statute confers benefits upon a class of people, it is submitted that the Lieutenant Governor in Council may not make regulations which conflict with the obligation to provide benefits.

*Canada (Attorney General) v. Silk* (1983), 145 D.L.R. (3d) 221.

*Canada (Attorney General) v. Paulsen et al* (1973), 38 D.L.R. (3d) 225 at p. 232.

*Re Metropolitan Toronto Police Association and Inflation Restraint Board* (1984), 9 D.L.R. (4th) 634 (Ont. Div. Ct.).

*Trans Canada Pipelines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.).

91. Pursuant to s. 7 of the FBA an allowance shall be provided in accordance with the regulations to a person in need who is a mother with a dependant child whose husband has deserted her for three months or more, who is divorced from the father of her dependant child

and has not remarried, or whose dependant child was born out of wedlock. All of the applicants fall within these circumstances and were in receipt of social assistance prior to the change in regulations. All of the applicants continue to be entitled by statute to receive benefits, it being the regulatory change alone which has restricted their entitlement.

*Family Benefits Act*, ss. 7(1)(d)(ii), (vi), (vii).

92. The regulatory changes have the effect of amending the parent statute to exclude sole support parents who reside with an adult person of the opposite sex. It is submitted that by restricting entitlement beyond that provided in the FBA, the regulations are *ultra vires*.

93. In 1977 the Ontario Court of Appeal held that the definition of "spouse" as it read at that time was *intra vires* the *Family Benefits Act*. The Court held that there was nothing in the *Act* to preclude an assumption of support to a woman living with a man as if she was his wife. In so doing, the Court defined "spouse" in this context as referring to a "marriage like" relationship which would include sexual and economic interrelationship. The Courts consistently held under that definition that economic support was an essential although not an exclusive factor in determining spousal status. It was open to an applicant/recipient under this definition to show that there was no sexual relationship, voluntary assumption of support or actual economic support to show that she was not living with a man as "husband and wife".

*Re Warwick and Minister of Community and Social Services* (1978), 21 O.R.(2d) 528 (C.A.).

*Willis v. Ministry of Community and Social Services* (1983), 40 O.R.(2d) 287 (Div.Ct.).

94. The Ontario Divisional Court recently held in *Szmulowicz* that the authority given to a delegate to define a particular term is limited by the common meaning of that term. The issue in *Szmulowicz* was whether regulations passed pursuant to the Medical Act could prohibit the "block-fee" method of billing, by defining it as professional misconduct.

The purpose for which executive legislative authority is conferred affects its valid scope...a statutory power given to a delegate to "define" a particular term is an authority to "settle the limits of" or to "make clear" that particular term. It is not a *carte blanche*. The authority given to the delegate to define a term is limited by the common meaning.

*Re Szmuilowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204 (Div. Ct.) at pp. 219-20.

See also *Canada (Attorney General) v. Paulsen* (1973), 38 D.L.R. (3d) 225 (F.C.A.) at p. 233.

95. While there is no universal understanding of what a spouse is, or is not, the one common indicia of a spousal relationship continues to be financial interdependence between adults. This is particularly relevant when definitions of spouse are considered in the context of legislation the object and purpose of which is the provision of assistance to people in need.

96. The regulation has in effect defined "spouse" in such a manner so as to create a spousal relationship, under circumstances where the sole support parent would be recognized as "single" for all other social and legal purposes. As such, the definition of spouse does not conform to the common meaning of the term and is *ultra vires*. In the *Trans-Canada Pipe Lines Ltd. v. Saskatchewan (Treasurer)* case, where a statutory exemption was removed pursuant to a regulatory change, the court stated:

I am of the opinion that if the Lieutenant-Governor in Council had by Regulation defined a "single woman" to mean a "married woman" such a Regulation would have been *ultra vires* the Lieutenant-Governor in Council, for he would by such a Regulation in effect be amending the statute.

*Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan*. (1968), 67 D.L.R. (2d) 694 at p.703.

(e) **Vires of the "No Reasonable Prospect of Reconciliation" rule**

97. It is further submitted that the words "by reason of separation with no reasonable prospect of reconciliation" in O.Reg.336 s.2(7)(b) (as amended) and O.Reg. 537 s.7(8) (as amended) are *ultra vires* the *Family Benefits Act* and *General Welfare Assistance Act*.

98. It is submitted that the theoretical prospect of reconciliation upon separation is entirely irrelevant to any issue that may properly be considered by the Lieutenant Governor in Council in passing regulations to further the purposes of the legislative scheme. It has no bearing on whether there is an obligation to support between the separated parties, whether support is being pursued or whether support is being provided, all of which issues may be addressed pursuant to other sections of the regulations.

99. Pursuant to this regulation, two people of the opposite sex who cohabit are deemed to be spouses. Should they separate, the "reasonable prospect of reconciliation rule" acts as a continuing bar to entitlement, despite the fact that neither the definition of "spouse", nor the reconciliation rule itself consider the availability of income and resources to the sole support parent.

100. It is further submitted that subordinate legislation may be reviewed on the grounds that it improperly discriminates in its application. Discrimination on grounds that have been recognized as improper in such sources as human rights legislation requires particularly clear enabling authority.

J.M. Keyes, *Executive Legislation* (Toronto: Butterworths, 1992) at pp.225-229.

*Forget v. Quebec* (1988), 52 D.L.R.(4th) 432 (S.C.C.) at p. 443.

101. The "reconciliation rule" applies only to sole support parents (the vast majority of whom are single mothers) and their children. It does not apply to any other category of recipient. The restriction of the "reconciliation rule" is clearly perverse and discriminatory on its face. Pursuant to this rule, if a "couple" separated with the woman retaining custody of the children, and it was determined that there was a reasonable prospect of reconciliation, she would be deemed ineligible for assistance, whereas if her spouse applied for social assistance as a single person without dependants, he would remain eligible.

## PART V - THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

### A THE REGULATIONS VIOLATE SECTION 15 OF THE *CHARTER*

#### (a) The Applicants' position

102. It is submitted that the definitions of "spouse" in O.Reg.537 and O.Reg.s.366, as amended by O.Reg.409/95 and O.Reg.410/95 respectively are contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. The new definition denies equal access to basic subsistence benefits to applicants or recipients who share a residence with a person of the opposite sex where the co-resident has no legal obligation of support and has not voluntarily assumed such obligations. In its application the definition results in gross invasions of privacy and exposure to criminal liability on vague and ill-defined grounds. The regulations thereby discriminate against social assistance recipients, sole support parents and their children. The new definition, in the regulatory regime within which it operates, discriminates on its face on the grounds of receipt of public assistance and marital status, and in its impact on the grounds of sex, age, marital and family status.

103. It is submitted that the addition of the words "by reason of separation with no reasonable prospect of reconciliation" in O.Reg.537 s.7(8) and O.Reg. 366 s.2(7)(b), as amended by O.Reg.409/95 and O.Reg.410/95 respectively are contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. This rule denies equal access to basic subsistence needs to sole support parents and their children. The rule, in the regulatory context in which it operates, discriminates on its face on the grounds of marital and family status and age, and in its impact on grounds of sex.

### B THE SECTION 15 TEST

104. Section 15 of the Charter provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and,

in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

105. The Supreme Court of Canada has outlined a number of steps which the applicants in this case must address in demonstrating that a law breaches s. 15 of the *Charter*:

- (i) First, the applicants must establish that the law creates an inequality. Inequality is created if the law distinguishes on the basis of certain personal characteristics (differentiation). Inequality is also created by a provision which, although it does not on its face distinguish on the basis of personal characteristics, has an effect on a group identified by certain personal characteristics that is not felt by others (disproportionate impact).
- (ii) Second, the applicants must establish that the distinction is discriminatory. The court must determine whether the inequality is discriminatory, i.e. whether the provision imposes on an individual or group a disadvantage or burden, or deprives them of an advantage or benefit. In examining the nature of the burden placed on the applicants, the court must have regard to the historical disadvantage suffered by the group affected and the broader social, political and legal context.
- (iii) Finally, the applicants must establish that they are members of a group which is protected by the *Charter* on either enumerated or analogous grounds.

*R. v. Swain* [1991] 1 S.C.R. 933, per Lamer C.J.C. at p. 992.

*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, (1989), D.L.R. (4th) 1 (S.C.C.) per McIntyre J. at pp. 18, 22-24 D.L.R.

*Symes v. Canada* (1993), 110 D.L.R. (4th) 470 (S.C.C.), per Iacobucci J. at pp. 552- 553, 556.

*Egan v. Canada*, [1995] 2 S.C. R. 513, per Cory J. at p. 584-586.

*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 549.

(a) **Interpretation and application of section fifteen test**

(i) **Adverse effect discrimination within the s.15 guarantee of equality**

106. It is clearly established that laws may discriminate in their effects as well as the direct distinctions which they make. It is submitted that an adverse effect experienced by some, but not all members of a group, can constitute discrimination within the meaning of s. 15.

*Symes, supra*, per Iacobucci J. at p. 562.

*Rodriguez v. British Columbia (Attorney General)*, *supra*, per Lamer, C.J.C., at p.556-557.

*Brooks, Allen and Dixon et al. v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; 94 N.R. 373; 58 Man.R.(2d) 161; 59 D.L.R.(4th) 321, at p. 1247 S.C.R.

*Janzen and Govereau v. Pharos Restaurant and Grammas et al.*, [1989] 1 S.C.R. 1252; 95 N.R. 81; 58 Man.R.(2d) 1. at pp. 1288-1289 S.C.R.

(ii) **Interpretation of s.15 to avoid further entrenchment of disadvantage**

107. Governments have a positive duty to ensure that legislative distinctions do not have an adverse impact on disadvantaged groups. In *Rodriguez v. British Columbia (Attorney General)*, the Chief Justice stated that, "to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons".

*Rodriguez v. British Columbia (Attorney General)*, *supra*, at p. 549.

(iii) **Discrimination on enumerated grounds**

108. Once it has been determined that a law discriminates either on its face or in its application on the basis of characteristics enumerated in s.15(1), the issue of whether the discrimination can be justified moves to s.1 of the *Charter*.

*Miron v Trudel*, [1995] 124 D.L.R. (4th) 693, per McLachlin J. p. 739.

(iv) The correct approach to interpreting "analogous grounds"

109. Where it is determined that a law discriminates on the basis of characteristics not specifically stated in s.15(1), the Court must decide whether the characteristic is one that should nevertheless be afforded protection against discrimination. In determining whether a particular personal characteristic is analogous to those enumerated in s. 15, a broad, generous and purposive approach must be adopted. The purpose of s. 15 is to prevent or remedy discrimination against groups suffering social, political and legal disadvantage in our society.

*R. v. Turpin*, [1989] 1 S.C.R. 1296 at p. 1329.

*Haig v. Canada (Chief Electoral Officer)* (1993), 105 D.L.R. (4th) 577 (S.C.C.), per L'Heureux-Dubé J. for the majority at p. 610.

*Miron v. Trudel*, *supra*, at p. 739-746, 747, per McLachlin J. (for Sopinka, Cory, Iacobucci JJ.).

110. One indicator of an analogous ground is that the targeted group has suffered historical disadvantage, independent of the challenged distinction. Another may be the fact that the group constitutes a "discrete and insular minority". Another indicator is a distinction made on the basis of a personal characteristic. By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1). Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory. All of these may be valid indicators in the inclusionary sense that their presence may signal an analogous ground. But the converse proposition -- that any or all of them must be present to find an analogous ground -- is invalid.

*Miron v. Trudel*, *supra*, at pp. 746-748, per McLachlin J. (for Sopinka, Cory, Iacobucci JJ.) para 27-31.

111. A person who suffers discrimination may be identifiable by more than one "personal characteristic" that attracts the protection of s.15. It is important to focus on the fact of discrimination rather than an excessive concern with precise categorization.

112. Categories of discrimination cannot be reduced to watertight compartments, but rather will often overlap in significant measure. Awareness of, and sensitivity to, the realities of those experiencing the distinction is an important task that judges must undertake when evaluating the impact of the distinction on members of the affected group.

*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, per L'Heureux-Dubé J. (dissenting) at p. 645-646, 149 NR 1 at p.108-109, para 151-153.

## C THE AMENDED DEFINITION OF SPOUSE VIOLATES SECTION 15

### (a) Creation of distinctions on the basis of personal characteristics

113. The new definition of spouse differentiates between *social assistance recipients* and all other citizens of Ontario. Social assistance recipients are assigned to the status of "single" or "couple" on the basis of a definition not used for any other legal purpose. The new definition does not accord either with the definition used in the *Family Law Act* to impose support obligations between unmarried cohabitants, or with any of the common law interpretations developed over the years, which take into account the whole range of common indicia of spousehood. Nevertheless, the attribution of spousal status is based on stereotypical assumptions of what a "spouse" is and is imposed for the same purpose that spouse is defined in other contexts: that is, to treat individuals as attachments to "family units" based on assumptions about sexual, economic and social behaviour.

114. The new definition has clearly had a disproportionate impact on *women*. Of those who were terminated after October 1 on the grounds that they were living with a person of the opposite sex who was deemed to be a "spouse", approximately 90% are women.

115. The definition of spouse in the context of the regulatory scheme differentiates between *sole support parents* and all other social assistance applicants or recipients. The legal consequences of a finding that a co-resident is a "spouse" are different for sole support parents

than for any other category of eligibility. Only sole support parents are rendered categorically ineligible as a result of such a finding.

116. The differential treatment of sole support parents is also a distinction on grounds of sex. By far the largest group of recipients affected by the change were sole support parents, approximately 95% of whom are women. The percentage of sole support parents affected is greatly disproportionate to their representation within the categorical divisions of the social assistance system.

117. The new definition of spouse differentiates between the *children of poor sole support parents* and all other children. Because the parent of a child in this situation ceases to be eligible for social assistance in her own right and is either disentitled altogether or must apply for assistance as a "couple", the child is forced into a situation of dependency on an adult who is not her or his biological parent. In short, the definition deems certain adults, almost invariably men, to be the fathers of children of poor sole support parents and imposes a dependency relationship regardless of whether the man has shown an intention to treat the child as his dependant, the test for parenthood under the *Family Law Act*.

*Family Law Act*, R.S.O. 1990, c. F.3, s.1.(1), 29, 30, 31.(1).

(b) **The imposition of a disadvantage or burden on those affected by the distinctions**

118. The new definition of spouse clearly discriminates against all the groups identified above. It imposes both direct and indirect disadvantages and burdens on the people with these characteristics who are affected by the definition.

119. A person residing in the same dwelling place as a person deemed to be her "spouse" is not entitled to social assistance in her own right. Large numbers of recipients have been terminated from social assistance, the social program of last resort, because of real or imputed co-residence with a person whom she may not consider a spouse, who has not voluntarily undertaken to support her and who is under no legal obligation to do so.

120. The regulations discriminate further against poor women and specifically against poor sole support mothers. The application of the definition of spouse in the context of the social assistance regulations forces women to depend on the charity of men who have no legal obligation to support them, have not voluntarily undertaken to do so and who may not be able to do so. This enforced stereotypical dependency reinforces and supports the real economic disadvantages of women in society and reinforces and supports the stereotypical assumptions about "women's roles" which have contributed historically to this disadvantage.

121. The administrative practices required to police the definition of spouse involve intrusive and humiliating deprivations of privacy and confidentiality. Investigations of allegations of co-residence necessarily involve the threat and usually the reality that the person being investigated will be revealed publicly to neighbours, landlords, employers and potentially many more people as a social assistance recipient. Investigation of the nature and quality of the relationship involves a process of intrusive and invasive questioning. Even where it is determined that an opposite sex co-resident is not a spouse, a recipient will be subject to ongoing questioning.

122. Because an opposite sex co-resident is deemed to be a spouse until proven otherwise, the new definition imposes difficult and often impossible burdens on poor individuals to disprove this assumption. It therefore further burdens poor individuals and particularly poor mothers in that it will tend to inhibit them from entering into living arrangements with persons of the opposite sex for reasons of economy, psychological or physical security, thus further restricting their already limited options for obtaining adequate accommodation for themselves and their children.

123. The new definition will also have a chilling effect on a poor single mother's freedom to live with a man in a potentially conjugal relationship prior to making a decision whether or not commitment to a relationship as a couple is desirable for herself and her children.

124. The amended definition increases the likelihood of exposure to criminal investigation, prosecution and conviction on the basis of a vague and ill-defined standard. This burden falls almost exclusively on poor women and specifically on poor mothers. Furthermore, the fear of

prosecution, which is not fanciful or far-fetched, is added to the other burdens and anxieties faced by poor single mothers.

Affidavit of Margaret Little, para. 32,34  
Application Record, vol. 2, Tab 15, at pp. 631-632.

Affidavit of Nancy Vander Plaats, para. 45-53  
Application Record, vol. 1, Tab 10, at pp. 165-168.

125. These consequences of the definition affect not only those who are not on assistance now, but also those who may need social assistance in the future. A woman who anticipates the need to apply or reapply for social assistance and who is aware of the rule will have to consider whether there is a risk to her in entering into a co-residential relationship with a man, as friends alone or in anticipation of a possible commitment to a spousal relationship.

126. Children of sole support parents affected by the definition are forced into a premature and artificial relationship with "fathers" who have no legal obligation or ability to provide support for them. The "chilling effect" of the regulations will be such that children whose custodial parent is on social assistance will be deprived of the possibility of sharing a residence and developing a supportive relationship with a man. Depending on the situation, the result of the "chilling effect" can result in the loss of needed adult protection and emotional support, a friendly relationship, or the inability to develop a new parental relationship.

**(c) Discrimination on prohibited grounds**

**(i) Discrimination against social assistance recipients**

127. It is submitted that discrimination against social assistance recipients is prohibited by s.15(1). The status of being a social assistance recipient is an analogous characteristic to those enumerated in s.15(1).

128. Social assistance recipients fit all the indicia of a disadvantaged group. Social assistance recipients are by definition extremely poor, reflecting the fact that the individuals who need social

assistance are disproportionately members of groups facing other major systemic disadvantages in society, including people with disabilities, sole support mothers, people with limited education and literacy, and so on.

129. There is widespread prejudice and hostility towards social assistance recipients, both historically and currently; and this is commonly based on distorted or simply erroneous stereotypical views about the characteristics of social assistance recipients. Social assistance recipients (especially longer term recipients such as the disabled and mothers with responsibility for young children) are particularly vulnerable as they depend on social assistance programs for their very means of subsistence. They have little political power and governments have little interest or motivation in protecting their interests.

Affidavit of Nancy Vander Plaats, paras. 24, 25  
Application Record, vol. 1, Tab 10, at pp. 158-159.

Martha Jackman, "Constitutional contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law." *Review of Constitutional Studies*, Vol. II, No. 1, p. 76.

130. Legislative recognition of the vulnerability of social assistance recipients is reflected both in anti-discrimination legislation and in legislation protecting the confidentiality of identity as social assistance recipients. This is another factor that the Supreme Court has identified as relevant in determining whether a group is protected by s.15.

*Egan v. Canada*, *supra*, per Cory J. at p. 602.

*Miron v. Trudel*, *supra*, per McLachlin J. at p. 748.

*Human Rights Code*, R.S.O. 1990, c. H19, s. 2(1) ("Receipt of Social Assistance").

*Human Rights Code*, S. Nfld. 1988, c. 62, s. 7(1) ("social origin").

*Human Rights Act*, R.S.N.S. 1989, c. 214 as amended by S.N.S. 1991, c. 12, s. 5(1)(f) ("Source of Income").

*Human Rights Code*, C.C.S.M., c. H175, s. 9(2)(j) ("Source of Income")  
D/312 21.

*Freedom of Information and Protection of Privacy Act* R.S.O. 1990 C.F-  
31, ss. 2 ("personal information"), 21(3)(c).

*Municipal Freedom of Information and Protection of Privacy Act* R.S.O.  
1990 C.M-55 ss. 2 ("personal information"), 14(3)(2).

131. Social assistance receipt alone, or in conjunction with other indicia of disadvantage, such as being a sole support parent, has been recognized by other Canadian courts as qualifying for protection under s.15.

*R. v. Rehberg* (1993), 127 N.S.R. (2d) and 355 A.P.R. 330 at p. 355.

*Schaff v. Canada*, [1993] 18 C.R.R. (2d) 143, at pp. 147-151.

*Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993),  
101 D.L.R. (4th) 224 (N.S.C.A.), at pp. 233-234.

*Federated Anti-Poverty Groups of British Columbia v. British Columbia  
(Attorney General)* (1991), 70 BCLR (2d) 325 (BCSC), at p. 344.

**(ii) Women**

132. The new definition of spouse has a disproportionate adverse affect on women. Sex is an enumerated head of prohibited discrimination in s.15(1). Once it is determined that discrimination on an enumerated grounds exists, the constitutional inquiry moves to s.1.

**(iii) Sole support parents**

133. It is submitted that insofar as the application of the definition of spouse in the larger context of the regulatory scheme discriminates against sole support parents, it also constitutes discrimination on grounds of sex. The sole support parents affected by this regulation are overwhelmingly women. It is therefore submitted that the impact on sole support parents is in reality discrimination on an enumerated ground of prohibited discrimination under s.15(1).

134. In the alternative, it is submitted that the condition of being a poor sole support parent is clearly analogous to the prohibited grounds of discrimination in s.15(1). Sole support parents show all the indicia of disadvantage that call for constitutional protection against discrimination:

- (i) Sole support parents and their children, as a group are economically disadvantaged in relation to other families with children.
- (ii) The great majority of sole support parent families are headed by mothers. Sole support mothers are one of the most disadvantaged groups in Canadian society. Approximately 60% of all mother-led families live in poverty.
- (iii) The likelihood of sole support mothers having to rely on social assistance is very high generally, and is particularly high for young sole support mothers and mothers of young children.
- (iv) Living in poverty is very harmful to the mental and physical health of poor women and their children. The economic and social disadvantages of single motherhood follow women throughout their lives, and child poverty causes serious and permanent harm to children's life prospects.
- (v) As social assistance recipients, single mothers are subject to stigma, hostility and inaccurate and harmful stereotyping of "welfare mothers".
- (vi) The disadvantages which cause sole support mothers to experience such extraordinarily high risks of poverty and need for social assistance are derived directly from deeply rooted historical disadvantages based on gender inequalities.  
Patricia Evans, "The Sexual Division of Poverty: The Consequences of Gendered Caring" in C. Baines et al (eds.), *Women's Caring: Feminist Perspectives on Social Welfare* (Toronto: McClelland and Stewart, 1991)

Craig McKie, "An Overview of Lone Parenthood in Canada", in Hudson & Galaway, eds., *Single Parent Families: Perspectives on Research and Policy* (1993, Thompson Educational Publishing)

Martin Dooley, "Recent Changes in the Economic Welfare of Lone Mother Families in Canada: The Roles Of Market Work, Earnings and Transfers", in *Single Parent Families, supra*

Affidavit of Margaret Hillyard Little, paras. 20 - 23  
Application Record, vol. 3, Tab 15, at pp. 627-628.

Affidavit of Nancy Vander Plaats, paras. 10 - 13, 20, 24  
Application Record, vol. 1, Tab 10, at pp. 154-155, 158-159.

**(iv) Discrimination against children**

135. It is submitted that discrimination against children on social assistance is discrimination on grounds of age, which is a prohibited ground of discrimination under s.15(1). Any justification of this discrimination must be made under s.1 of the Charter.

136. It is further submitted that insofar as the children affected by the operation of the rule are the children of sole support parents, this is a particularly disadvantaged group and should be afforded protection under s.15 of the Charter. Children of sole support parents face a far higher likelihood of poverty than all other children in Canadian families, and children of sole support mothers face the highest likelihood of severe financial disadvantage and all the consequent problems associated with this.

**D THE "NO REASONABLE PROSPECT OF RECONCILIATION" RULE VIOLATES S.15(1)**

137. It is further submitted that insofar as the regulations deny eligibility to a sole support parent where a caseworker believes that such a person is separated from her "spouse" "with no reasonable prospect of reconciliation", these words in O.Reg. 366 s.2(7)(b) and O.Reg.537 s.7(8) as amended, violate s.15(1) of the Charter.

**(a) Distinctions created by the regulation**

138. The "no reasonable prospect of reconciliation" rule applies only to sole support parents and thus creates an inequality on its face between sole support parents and all other persons in

need who apply for social assistance. It also thereby creates a distinction between all children of sole support parents who apply for social assistance and all other children in need.

139. Furthermore, the person with whom a recipient's "prospects of reconciliation" are to be assessed may not be a spouse as recognized by any other legal regime, may owe no obligation of support and may not in fact be providing any assistance. The reconciliation rule refers only to a "spouse". The term spouse is defined in the regulations and stated to be for the purposes of the regulations. Thus, a sole support parent could be deemed ineligible under this rule after separating from a man to whom she was not married, who is not the father of her children, and with whom she had cohabited (or is believed to have cohabited) for even a brief period of time.

140. The facial distinction between sole support parents and all other categories of recipients affects women almost exclusively, because the vast majority of sole support parents receiving social assistance are mothers. The effect of the rule can be seen clearly from the scenario of a couple on social assistance with children who decide to separate and apply separately for assistance and a caseworker chooses to believe that there is a "reasonable prospect of reconciliation". If, for example, the mother retains custody of the children, she and the children would be rendered categorically ineligible for assistance, while the man would remain eligible for assistance as a single person.

**(b) Burdens imposed by the rule**

141. As a result of this rule single parents, almost always mothers, and their children will be denied assistance even where they are in need on every other criterion of the social assistance scheme and regardless of whether their needs are actually being met by the former spouse.

142. This rule may also inhibit the ability of children to maintain contact with the non-custodial birth parent. The undefined provision "reasonable prospect of reconciliation" has been and is likely to be applied over-broadly, such that access visits by a non-custodial parent, or the maintenance of any degree of social activity between persons of opposite sexes who once shared a home, may trigger cessation or denial of benefits to a sole-support parent.

(c) **Discrimination on enumerated and analogous grounds**

143. The reconciliation rule discriminates against children of sole support parents and therefore discriminates on grounds of age and family status. The rule discriminates against sole support parents and therefore on the grounds of family status and sex, for the reasons given above.

**PART VI - THE REGULATIONS VIOLATE SECTION 7 OF THE CHARTER**

**A PROPER INTERPRETATION OF SECTION 7**

144. Section 7 of the Charter provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

145. The analysis of section 7 of the Charter involves two steps. First there must be a finding that there has been a deprivation of the right to "life, liberty and security of the person and, secondly that the deprivation is contrary to the principles of fundamental justice."

*R. v. Beare; R. v. Higgins* (1988), 55 D.L.R. (4th) 481, at p. 492.

146. Life, liberty and security of the person are independent interests, which must be given independent significance by the Court. The three concepts are capable of a wide range of meaning and their interpretation should be "a generous rather than a legalistic one."

*R. v. Big M. Drug Mart* (1985), 18 D.L.R. (4th) 321, at p. 360.

*R. v. Morgentaler* (1988), 1 S.C.R. 30 at p. 52.

*Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422, at pp. 458-459.

147. It is submitted that life, liberty and security of the person are essential aspects of a democratic society and that as such they must be animated by the values embodied in the common law and in the *Charter*.

*R. v. O'Connor* (Dec. 14, 1995) S.C.C. File No. 24114, per L'Heureux-Dubé J. at para. 113.

148. In particular, it is submitted that section 7 must be interpreted in light of the section 15 equality guarantee. The Supreme Court of Canada has stated that "the section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*." In the context of section 7 this means that threats to life, liberty and security of the person must be particularly scrutinized when they are imposed in a manner which disadvantages members of already disadvantaged groups.

*Andrews, supra*, at p. 26.

149. Further, it is submitted that section 7 of the *Charter* should be interpreted in conformity with Canada's international obligations. So far as possible, the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

*Re Public Service Employees Relations Act* [1987], 1 S.C.R. 313, per Dickson C.J.C. at pp. 348-349.

*Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 at pp. 427-428.

P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1993), at pp. 30-33.

150. In particular, Canada has ratified both the *Universal Declaration of Human Rights* and the *Covenant on Economic, Social and Cultural Rights*, which provide, respectively:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services,

and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article, 25(1) *Universal Declaration of Human Rights*.

The states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Article 11(1) of the *Covenant on Economic, Social and Cultural Rights*.

151. Further, Canada is a signatory to the *Convention on the Rights of the Child*, which was expressly supported by the provinces, including Ontario. Under this Convention, parties are required to take measures to assist parents and others responsible for children to provide adequate nutrition, clothing and housing. The right of a child to sustained nurture in his or her home is specifically protected and adopted.

Article 27(3) *Convention of the Rights of the Child*, U.N. Doc. A/RES/44/25. adopted by the General Assembly of the United Nations November 20, 1989; signed by Canada May 28, 1990; in force September 2, 1990.

152. It is submitted that section 7 should not be interpreted as excluding all claims with an economic component. On the contrary, the Supreme Court of Canada has specifically stated that section 7 may include "economic rights fundamental to human life or survival", which rights are distinct from economic interests of a corporate-commercial nature or rights relating to standard of living.

*Irwin Toy v. Quebec* (1989), 58 D.L.R. (4th) 577 (S.C.C.) at p. 633.

*Schaff v. The Queen*, *supra*, at p. 165.

*Brown v. British Columbia (Ministry of Health)* (1990), 66 D.L.R. (4th) 444 at p. 467.

*Fernandes v. Director of Social Services* (1992) 7 Admin. L. R. (2d) 153 at p. 166.

**(a) Deprivations of Life, Liberty and Security of the Person**

153. It is submitted that the "spouse in the house" regulations will lead to deprivations of life, liberty and security of the person in the following ways:

- (i) The regulations are a threat to liberty and security of the person because of the increased exposure to criminal charges on vague and ill-defined grounds, for social assistance recipients.
- (ii) The regulations will deprive social assistance recipients of their privacy and therefore of liberty and security of the person.
- (iii) The regulations will restrict the liberty and freedom of social assistance recipients to form conjugal and non-conjugal co-residency relationships even though these relationships may be in the best interests of recipients and their children.
- (iv) Social assistance recipients and their children may be deprived of life and security of the person by being deprived of the basic means of subsistence when attempting to form relationships with people of the opposite sex, even though they may receive no financial support from those people and even though their needs remain unchanged.

**(i) Deprivations of liberty through the criminal process**

154. The spouse in the house regulations may lead to imprisonment by way of prosecutions under social assistance legislation or under the Criminal Code. By virtue of this possible penalty, the regulations threaten a deprivation of liberty and must therefore conform with the principles of fundamental justice.

P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at pp. 44-6 to 44-7.

155. Social assistance recipients, specifically women, have been charged with fraud and sent to jail in Ontario because of the operation of the "spouse in the house" rule. It is submitted that this experience, combined with the current government's expressed concern about perceived fraud by social assistance recipients, suggest a significant threat to the liberty of sole support parents subject to the new regulations.

Dianne Martin, "Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes" (1992), 12 *Windsor Yearbook of Access to Justice* 52, at p. 55.

**(ii) Deprivations of privacy**

156. The investigative practices used to monitor the spouse in the house rules are extremely intrusive and humiliating in two principal respects. Applicants or recipients are subject to intrusive investigations to determine if someone is living with them, and then must answer questions and provide information about the most minute details of their lives to rebut a sweeping presumption of spousal relations. Women live in constant fear because of welfare workers who scrutinize the contents of their homes and conduct undercover surveillance of their personal lives.

157. It is submitted that this degree of scrutiny and surveillance violates Canadians' reasonable expectation of privacy and thereby engages the "liberty" and "security of the person" interests protected by section 7 of the *Charter*. Accordingly, both the regulations and the investigatory practices used to enforce them must conform with the principles of fundamental justice.

*R. v. O'Connor, supra*, at para. 118.

158. In the recent decision of *R. v. O'Connor*, L'Heureux-Dubé J., speaking for the majority of the Supreme Court on the issue of protection of privacy, reviewed in detail that Court's jurisprudence and affirmed that the rights to "liberty" and "security of the person" include the fundamental value of privacy. Although there were several judgments rendered in that case, at least five other Justices indicated their agreement with this analysis of the nature of the right to privacy.

*R. v. O'Connor, supra*, at paras. 110-113.

159. The Supreme Court has expressly stated that the privacy interests protected by the *Charter* include,

... 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 would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293.

160. The Supreme Court's concern in protecting privacy relates to the *Charter*'s overall purposes of, *inter alia*, safeguarding human dignity and protecting against state-imposed psychological trauma. While it is true that privacy can never be absolute, it is submitted that both of these purposes require close scrutiny of the spouse in the house regulations to ensure that they conform with the principles of fundamental justice.

*R. v. O'Connor*, *supra*, at paras. 111, 112, 117.

161. Legislatures have recognized the special importance of confidentiality with respect to the status of being a social assistance recipient.

*Egan v. Canada*, *supra*, per Cory J. at p. 602.

*Miron v. Trudel*, *supra*, per McLachlin J. at p. 747.

*Freedom of Information and Protection of Privacy Act* R.S.O. 1990 C.F-31, ss. 2 ("personal information"), 21(3)(c).

*Municipal Freedom of Information and Protection of Privacy Act* R.S.O. 1990 C.M-55 ss. 2 ("personal information"), 14(3)(2).

**(iii) Deprivations of rights of association and personal autonomy**

162. It is submitted that the new regulations will seriously restrict the freedom of social assistance recipients to enter into both spousal and non-spousal relationships with persons of the opposite sex.

163. The new regulations and their administration have a "chilling" effect which prevents the formation or continuation of opposite sex relationships. This impedes the creation of relationships which may be of emotional benefit to recipients and to their children and which may, over time, assist in ending recipients' dependence on social assistance.

164. In *R. v. O'Connor*, L'Heureux-Dubé J. strongly affirmed a broad and liberal interpretation of s.7, with particular reference to Wilson J.'s statement in *R. v. Morgentaler* that s.7 should be read to "guarantee to every individual a degree of personal autonomy over important decisions intimately affecting their private lives."

*R. v. O'Connor, supra*, per L'Heureux Dubé J. at para. 111.

165. It is submitted that "liberty" and "security of the person" include the right of all persons to form relationships which meet the psychological and emotional needs of themselves and their children. The decision to enter such relationship is one of fundamental importance which all persons should be allowed to make free from government constraint (such constraint being either intended or resulting from impugned legislation).

*Miron v. Trudel, supra*, per McLachlin J. at p. 748 .

*B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1995), 122 D.L.R.(4th) 1 (S.C.C.), per La Forest J. at pp. 39-40.

*Rodriguez v. British Columbia (Attorney General), supra*, per Sopinka J. at p. 584, per McLachlin J. at p. 618.

*R. v. Morgentaler, supra*, per Wilson J. at pp.166-171.

(iv) Deprivation of basic means of subsistence

166. Some recipients whose allowances are cancelled because they are, or are alleged to be living with a "spouse" will lose the means of obtaining the basic necessities of life. It is submitted that this amounts to a deprivation of "security of the person" for both the recipients and their children within the meaning of s.7.

167. While the courts have generally agreed that section 7 does not protect purely economic interests, the Supreme Court of Canada has specifically left open the question of whether "certain economic rights fundamental to human life or survival" are protected.

*Irwin Toy Ltd. v. Quebec, supra*, at pp. 632-633.

168. Lower courts have generally rejected the view that security of the person is relevant to the circumstances of people in poverty. However, this position has been widely criticized by legal commentators and by the United Nations Committee on Economic, Social and Cultural Rights, which recommended that a purposive approach to the *Charter* should be taken so as to provide remedies against governmental failure to respect internationally protected social and economic rights.

Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims", (1993) 19 *Queen's Law Journal* 65.

Ian Morrison, "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare", (1988) 4 *Journal of Law and Social Policy* 1.

John D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter"; 13 *Manitoba Law Journal* 455.

United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, "Consideration of Reports Submitted by States Parties Under Articles 16 and 18 of the Covenant: Concluding Observations of the Committee on Social, Economic and Cultural Rights (Canada)", Geneva, 10 June 1993, E/C. 12/1993/5, (1993) 20 *Canadian Human Rights Reporter*.

169. Further, in lower court cases rejecting the application of section 7 to the economic circumstances of persons in poverty, courts have reasoned that "life" and "security of the person" are not engaged by a diminished "standard of living". It is submitted that threats to "standard of living" are different from threats to basic subsistence where, as in the present case, persons are deprived of the means to support even basic physical integrity. It is submitted, therefore, that this Honourable Court should recognize that the effective removal of subsistence requirements is a violation of life and security of the person which must accord with the principles of fundamental justice.

*Reference Re Lands Protection Act* (1987), 197 A.P.R. 249 (P.E.I.S.C.), at p. 262.

*Schaff v. The Queen*, *supra*, at p. 165.

*Brown v. British Columbia (Ministry of Health)*, *supra*, at p. 467.

*Fernandes v. Director of Social Services*, *supra*, at p. 166.

**(b) Principles of Fundamental Justice**

170. The principles of fundamental justice include both procedural and substantive rights. A court is required to determine not only whether the procedure implemented under impugned legislation is unfair, but also whether the substance of the regulation is unfair.

*Reference Re s.94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 36 (S.C.C.), per Lamer J. at p. 557.

171. The principles of fundamental justice are those upon which there is consensus that they are fundamental or vital to our societal notion of justice. Reference may be made to all components of the legal system, including judicial processes, the common law, legislative law and international comparisons.

*Reference Re s.94(2) of the Motor Vehicle Act*, *supra*.

*Rodriguez v. British Columbia (Attorney General)*, *supra*, pp. 590-591.

172. The principles of fundamental justice are to be determined in relation to the interests protected by section 7 and should be interpreted broadly so as not to stultify the purposes of *Charter* protection.

*Reference Re s. 94(2) of the Motor Vehicle Act, supra*, per Lamer J. at p. 501.

173. It is submitted that the spouse in the house regulations violate the principles of fundamental justice in the following ways.

174. First, the principles of fundamental justice are not satisfied where governmental action is arbitrary or does little to advance its purported purpose. The impugned regulations arbitrarily force sole support mothers and their children into a situation of dependency on a man who has no legal obligation to support them. This forces women to conform to a stereotype that has no basis in society.

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

*Rodriguez v. British Columbia (Attorney General), supra*, per Sopinka J. at p. 594.

*Reference re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, per Lamer C.J.C. at p. 1155.

*R. v. Morgentaler, supra*, per Wilson J. at p. 175.

175. The spouse in the house regulations were enacted to save money by reducing the funds provided to sole support parents. Their effect in fact contradicts the purpose of social assistance legislation, which is to provide assistance to persons in need.

176. Second, the principles of fundamental justice are violated where regulations are vague and overly broad, and are open to be applied in many cases in arbitrary and capricious ways that are likely to lead to inconsistent and unfair results. This is of particular concern in the present case given the history of the application of the spouse in the house rules prior to 1987.

*R. v. Heywood*, [1994] 3 S.C.R. 761, per Cory J. at pp. 791-3.

177. The evidence discloses that the regulations capture friendly arrangements of shared accommodation which would not be treated as spousal for any other purpose or according to any ordinary understanding of spousal status. Further, the regulations also encompass arrangements not to share expenses.

178. Moreover, the "no reasonable prospect of reconciliation" rule is also overly broad and open to arbitrary interpretation, capturing separations caused by the regulations themselves and capitalizing on the ambivalence experienced by many separating couples.

179. Third, it is submitted that the principles of fundamental justice prohibit discriminatory treatment under the law. This principle is violated by the spouse in the house regulations, since the deprivations of liberty and security of the person occasioned by the regulations will overwhelmingly be felt by poor single mothers (and their children).

180. Fourth, it is submitted the protection of privacy interests, violated in the present case as described above, is a principle of fundamental justice violated by the investigatory practices carried out pursuant to this regulation.

181. Fifth, it is submitted that fundamental justice requires that individuals receive consistent treatment under the law. In the present case, the regulations are inconsistent with the larger body of public policy, legislation and jurisprudence in which it operates. Persons are deemed to be spouses in contexts not treated as spousal under any other legal or ordinary meaning and are required to take on financial obligations toward one another in circumstances where family law specifically exempts them from such obligations.

*Lewis v. Martin*, 397 U.S. 552 (1970) 561.

182. Sixth, it is submitted that the principles of fundamental justice include a basic concept of "fair dealing", including the right not to be unfairly burdened by promises detrimentally relied upon. The new regulations unfairly burden persons who entered into living arrangements in reliance on the assurance that they would be allowed a period of cohabitation before their eligibility for sole support parent benefits would be affected. It is clear that each of the applicants

made a profoundly important decision for herself and her children in reliance on the law as it stood prior to October 1995.

## **PART VII - THE APPLICANTS' RELIANCE ON THE FORMER REGULATION**

### **A THE APPLICANTS' POSITION**

183. If this Court holds that the October 1995 amendments do not violate the *Charter of Rights and Freedoms* as a matter of general application, it is submitted in the alternative that Ontario Regulation 409/95 is of no force and effect with respect to the individual applicants, because of their reliance on the former definition of spouse in entering into their current relationships.

### **B VIOLATION OF SECTION 7 RIGHTS**

#### **(a) Life, Liberty and Security of the person**

184. It is submitted that the individual applicants in this case have been deprived of interests protected by s. 7 of the *Charter*, for the reasons given in Part IV. In particular:

- (i) The applicants have been deprived of security of the person, in that their basic means of subsistence have been withdrawn.
- (ii) The applicants have been deprived of liberty, in that their choice of living arrangements and freedom to choose the terms of their relationships with their male co-residents has been threatened.
- (iii) The applicants have been deprived of privacy in respect of their own and their children's lives by being subjected to intensive and intrusive investigations to which they would not have been subject but for the passage of Ontario Regulations. 409/95. Furthermore, under the changed definition of spouse, even if any of the applicants are determined not to be living with a "spouse" within the meaning of the new definition, they will be subject to further intrusive investigations at least once a year, and possibly more often at the discretion of the social assistance authorities.

**(b) Principles of fundamental justice**

185. Each of the individual applicants in this case entered into her current living arrangement in reliance on an assertion from the Family Benefits system, that living with a man would not affect her eligibility as a sole support parent for three years. In reliance on these assertions, each of the applicants made a fundamentally important decision pertaining to her life, the decision to live with another person in anticipation of possible commitment to a spousal relationship.

186. The principles of fundamental justice are to be sought in the doctrines, rules and principles which inform our legal system and the legal systems of other democratic nations. However, while principles of fundamental justice may be derived from specific doctrines and rules, the "principle" distilled from such an examination may be broader and more general than the particular rules which exemplify it. A common law rule itself may be too narrow to be reconciled with the basic purpose of the *Charter*.

*R v. Hebert*, [1990] 2 S.C.R. 151, per McLachlin J. at p. 164.

187. Several doctrines illustrate the principle that it is fundamentally unfair to permit a party to act to the detriment of a second party, where the second party has relied upon a promise made by the first party.

188. This principle is reflected in the various doctrines of estoppel, promissory estoppel and waiver, which derive from well-established historical principles of equity. It is rooted in the most basic sense of fairness. As Professor Waddams states with respect to the doctrine of subsequent reliance on promises in the context of contract law,

If A promises that he will give a piece of land to B and B builds a house on it, it would be so obviously unjust to allow A to rescind the promise that no civilized system of justice could tolerate such a result.

Waddams, *The Law of Contracts*, 3d ed. (Toronto: Canada Law Book, 1993), at pp. 125-126 and see: *Robertson v. Minister of Pensions* [1949] 1 K.B. 227.

189. A similar sense of fairness underlies the public law doctrine of legitimate expectation. While it has been held in Canada that the doctrine of legitimate expectation cannot be invoked

to prevent the Executive from introducing legislation for passage by an elected legislature, that reservation has been made expressly subject to the question of "review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected". Furthermore, the instant case does not involve the passage of legislation by a democratically elected legislature.

*Reference Re Canada Assistance Plan* (1991) 83 D.L.R. (4th) 297 (S.C.C.)  
per Sopinka, J. at p. 320.

190. It is submitted that the same fundamental sense of fairness is reflected in the non-*Charter* decision in *Dale v Manitoba*. In that case several disadvantaged students had undertaken post-secondary education in reliance on a government assistance program. None of the students was warned at the beginning of the program, that the assistance program might be changed without warning and without "grandparenting" those in the midst of the program. The court in *Dale* held that the Manitoba government was bound to continue funding to those students on the terms on which they had relied, so long as they remained otherwise eligible for the assistance.

*Dale v. Manitoba* [1995] M.J. No. 389 (Man. Q.B.).

191. It is submitted therefore that by failing to exempt or make any provision for those people who had made fundamentally important decisions in good faith, on the basis of the law as it stood at the time, the implementation of the changed definition of spouse violated the principles of fundamental justice.

## **C VIOLATION OF SECTION 15 RIGHTS**

192. It is further submitted that the applicants' equality rights have been violated by the effects of Ontario Regulations. 409/95.

193. All of the applicants were eligible as sole support mothers at the time that the new definition came into effect. Approximately 10,103 people who were receiving benefits under the former definition of spouse were terminated under the new rule, because a co-resident of the opposite sex was deemed to be a spouse. The respondents' own evidence indicates that the vast majority of those terminated were women, and that virtually all the sole support parents terminated as a result of this change were women.

194. It is therefore submitted that insofar as the regulations redefine "spouse" to apply to persons who had not been considered spouses prior to the promulgation of the regulations, they discriminate against women, and particularly against sole support mother.


**PART VIII - NATURE OF RELIEF REQUESTED**


195. The Applicants therefor request:


- (i) An order declaring that Regulation 366 of R.R.O. 1990, subsections 1(1)(d), 1(3) and 2(7)(b) as amended by *Ontario Regulations 409/95* and Regulation 537 of R.R.O. 1990, subsections 1(1)(d), 1(3) and 7(8) as amended by *Ontario Regulation 410/95* are *ultra vires* the *Family Benefits Act* and the *General Welfare Assistance Act*;
- (ii) An order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* declaring that these same regulations are contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;
- (iii) In the alternative, an order declaring that these regulations are of no force and effect with respect to the applications;
- (iv) Their costs of this application; and
- (v) Such further and other relief as counsel may advise and this Honourable Court may permit.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** this 29th day of May, 1996.

  
Raj Anand

  
Chantal Tie

  
M. Kate Stephenson

Of Counsel for the Applicants

PART IX

LIST OF AUTHORITIES

A. CASES

1. *Re Pitts and Director, Family Benefits Branch* (1985), 51 O.R.(2d) 302 (Div.Ct.).
2. *Kerr v. Metropolitan Toronto* (1995), 22 O.R. (2d) 588; rev'd without reference to this point.
3. *Dennhardt v. Ontario (Ministry of Community and Social Services)*(1987), 45 D.L.R. (4th) 149 at 153 (Ont.Div.Ct.) per Austin J. quoting from Wilson J. in *Re Abrahs and A.G. Canada* (1983), 142 D.L.R. (3d) 1 at 7-8
4. *Our House Ottawa Inc. v. Ottawa-Carleton (Regional Municipality)* (1992), 92 D.L.R. (4th) 337, at 348 (Ont.Div.Ct.).
5. *Hills v. Canada*, [1988] 1 S.C.R. 513, per L'Heureux Dube at 558.
6. *Canada (Attorney General) v. Mossop* (1993), 149 N.R. 1 (SCC) per Lamer J. at 27.
7. *Schachter v. Canada* (1989), 93 D.L.R. (4th) 1, per Lamer C.J.C. at 15
8. *Re Gach and Director of Welfare (Brandon)* (1973), 35 D.L.R. (3D) 152 (Man.C.A.)
9. *Re De Lima and Minister of Community and Social Services* (1973) 35 D.L.R. (3d) 481 (Ont.Div.Ct.)
10. *Canada (Attorney General) v. Silk* (1983), 145 D.L.R. (3d) 221
11. *Canada (Attorney General) v. Paulsen et al.* (1973), 38 D.L.R. (3d) 225 at 232.
12. *Re Metropolitan Toronto Police Association and Inflation Restraint Board* (1984), 9 D.L.R. (4th) 634 (Ont.Div.Ct.)
13. *Trans Canada Pipelines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.)
14. *Re Warwick and Minister of Community and Social Services* (1978), 21 O.R. (2d) 528 (C.A.)
15. *Willis v. Ministry of Community and Social Services* (1983), 40 O.R. (2d) 287 (Div.Ct.)

16. *Re Szmuiłowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204 (Div.Ct.) at pp. 219-220.
17. *Trans-Canada Pipe Lines Ltd. v. Provincial Treasurer of Saskatchewan* (1968), 67 D.L.R. (2d) 694 at p. 703.
18. *Forget v. Quebec* (1988), 52 D.L.R. (4th) 432 (S.C.C.) at p. 443.
19. *R. v. Swain*, [1991] 1 S.C.R. 933, per Lamer C.J.C. at p. 992.
20. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, (19890, D.L.R. (4th) 1 (S.C.C.) per McIntyre J. at pp. 18, 22-24 D.L.R.
21. *Symes v. Canada*, (1993), 110 D.L.R. (4th) 470 (S.C.C.), per Iacobucci J. at pp. 552-553, 556.
22. *Egan v. Canada*, [1995], 2 S.C.R. 513, per Cory J. at pp. 584-586.
23. *Rodriguez v. British Columbia (Attorney General)*, [1996] 3 S.C.R. 519, per Lamer, C.J.C., at p. 556-557.
24. *Brooks, Allen and Dixon et al. v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; 94 N.R. 373; 58 Man.R. (2d) 161; 59 D.L.R. (4th) 321, at p. 1247 S.C.R.
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Applicants

and

**THE ATTORNEY GENERAL OF ONTARIO et al.**  
Respondents

Court File No. 810/95

**ONTARIO COURT (GENERAL DIVISION)  
DIVISIONAL COURT**

Proceeding Commenced at

Toronto

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