

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

B E T W E E N:

**SANDRA FALKINER, DEBORAH SEARS,
CYNTHIA JOHNSTON-PEPPING AND CLAUDE MARIE CADIEUX**

Appellants
(Respondents in Appeal)

- and -

**DIRECTOR, INCOME MAINTENANCE BRANCH,
MINISTRY OF COMMUNITY AND SOCIAL SERVICES
AND ATTORNEY GENERAL OF ONTARIO**

Respondents
(Appellants)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor before the Board

FACTUM OF THE RESPONDING PARTIES

WEIR & FOULDS
Exchange Tower
Suite 1600, Box 480
130 King Street West
Toronto ON M5X 1J5

Raj Anand
LSUC# 19763L
M. Kate Stephenson
LSUC# 38035C

(416) 365-1110 (phone)
(416) 365-1876 (fax)

Solicitors for the Responding

Parties

TO: ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
8th Floor, 720 Bay Street
Toronto ON M5G2K1

JANET E. MINOR
(416) 326-4137 (phone)
(416) 326-4015 (fax)

SARAH KRACIER
(416) 326-2518 (phone)
(416) 326-4015 (fax)

Solicitors for the Appellants

AND TO: THE CANADIAN CIVIL LIBERTIES ASSOCIATION
403 - 229 Yonge Street
Toronto ON M5B 1N9
c/o GOWLING STRATHY & HENDERSON
4900 Commerce Court West
P.O. Box 438, Station Commerce Court
Toronto ON M5L 1J3

MARTAIN DOANE
(416) 862-4323 (phone)
(416) 862-7661 (fax)

Solicitors for the Intervenor, the
Canadian Civil Liberties Association

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SCHEDULE "A"

TAB A

SCHEDULE "B" TAB B

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PART I -- OVERVIEW OF ISSUES IN THE APPEAL

1. This appeal involves 1995 social assistance regulations which define spouse in such a way that social assistance beneficiaries living with persons of the opposite sex are forced to depend on their opposite sex co-resident for financial support even when the co-resident has no legal obligation to support them, has not made any voluntary undertaking to support them, and may not be able to support them. The great majority of persons affected by the regulation are women, particularly sole-support mothers, and their children.

2. In this appeal the Attorney General challenges the decision of the Social Assistance Review Board ("SARB" or "The Board") which found that the impugned "spouse in the house" regulations violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and are not saved by section 1.

3. The criticisms evident in SARB's decision have been consistently applied to rules similar to the one in issue here. Specifically,

- (a) In 1968 the United States Supreme Court struck down a similar spouse in the house rule from Alabama and expressly rejected the argument, asserted by the Appellant in this case, that the rule was "only fair" because it treated in a like manner married and unmarried single mothers. Like SARB, the court found that this was inequitable because the unmarried male co-resident had no legal obligation to support the children for whose benefit the assistance was provided.
- (b) In 1985 a legal challenge was brought against a similar spouse in the house rule in Ontario on the basis of the *Charter* sections 7 and 15. The rule was revoked by the government before the matter was heard, with express comments by the government of the day that the rule was intrusive and arbitrary.
- (c) In 1994 a similar spouse in the house rule was struck down by the Nova Scotia Supreme Court on the grounds that it violated sections 7 and 15 of the *Charter* and was not saved by section 1.
- (d) In 1996 the very rule at issue in this case was challenged in this Honourable Court on the same grounds which were before SARB in this case. Although the majority of the court dismissed the application for procedural reasons and did not consider the merits of the application, Rosenberg J. disagreed with his colleagues on the procedural issue and therefore considered the merits. He found that the rule violated section 15 of the *Charter* and was not saved by section 1. The rule at issue, as described by Rosenberg J., amounted to the creation by the government of a non-existent family based on false stereotypes and myths.

- (e) In 1997 a statutory "dum casta" clause in Nova Scotia with effects substantially similar to the spouse in the house rule was struck down by Chief Justice Glube on the basis that it violated sections 7 and 15 of the *Charter* and was not saved by section 1.

King v. Smith, 392 U.S. 309 (1968)

R. v. Rehberg (1994), 127 N.S.R. (2d) 331 (N.S.S.C.)

Falkiner v. Ontario (Ministry of Community and Social Services) (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.)

Fancy v. Shephard (1997), 51 C.R.R. (2d) 45 (N.S.S.C.)

4. Between 1987 and 1995 opposite-sex co-residents were not deemed to be spouses until they had lived together for three years, at which time the *Family Law Act* imposed upon them a mutual obligation to support. The current government had no report or study which criticized this regime or recommended change, and conducted no public consultation on the appropriate definition of spouse before changing it. There was no evidence that the old rule allowed a social assistance recipient to collect benefits while at the same time being supported by a co-resident. Then, as now, existing regulations prevented such abuse by requiring every social assistance recipient to declare and pursue all available support, and requiring that rental costs be shared equally between co-residents.

5. The only evidence provided by the Attorney General of the rationale for the change was a bureaucrat's affidavit created for this litigation. As the Appellant states in its factum, the alleged rationale was to foster equity by treating common law and married couples alike. SARB recognized that this goal was misperceived since married couples, unlike common law couples who have not resided together for three years, have legal support obligations. SARB found that it was in fact inequitable to treat the two groups alike when their situations are so different.

6. The disproportionate impact of the spouse in the house rule on sole support parents on social assistance, largely single mothers, and its chilling effect on the formation of relationships were the bases of the section 7 and 15 violations found by SARB. A section 15 violation on the basis of sex would also have been found, but for the existence of a contrary decision believed by SARB to be binding. In this appeal the Respondents will argue that the contrary decision is not binding and that a finding of sex discrimination is in fact appropriate.

PART II -- RESPONDENTS' POSITION ON THE FACTS

A. THE HISTORY OF THE SPOUSE IN THE HOUSE RULE IN ONTARIO

7. Until 1986, *Family Benefits* ("FB") and *General Welfare* ("GW") regulations defined a relationship as spousal if a man and woman lived together "as husband and wife". In 1985 this definition and its operation were challenged as violations of sections 7 and 15 of the *Charter*. The then Attorney General conceded the intrusiveness and arbitrariness of the rule and promised to amend the definition of "spouse". The *Charter* challenges were settled on this basis and never heard.

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, para. 33, Exhibit G, pages 238-239

Cross-examination of Nancy Vander Plaats, Respondent's Record, Vol. 3, Tab 2, Exhibit A, page 4

8. After an interim period of one year, and after extensive study, internal policy development and consultation, a new definition of spouse closely approximating the family law definition was enacted in 1987. The new definition provided that a person was the "spouse" of an applicant or recipient if the person was of the opposite sex and:

- (a) the two declared themselves to be spouses;
- (b) the person had a support obligation to the applicant or recipient or any of her dependent children pursuant to a domestic contract;
- (c) the person had a support obligation to the applicant or recipient or any of her dependent children under the *Family Law Act*; or
- (d) the two had lived together for three years and the "economic, social and familial aspects of the relationship" amounted to cohabitation.

Undertakings of Kevin Costante, Appellants' Record, Vol. 6, Tab 23, Exhibit I, pages 1624-1647

9. The 1987 regulations also provided that sexual factors were not to be investigated or considered in determining whether persons were spouses.

10. The regulations impugned in this appeal were enacted in 1995. They left in place the first three parts of the 1987 definition, but abolished the three year rule. Now two people of the opposite sex are deemed to be spouses if they reside in the same dwelling place, unless the applicant or recipient can "provide evidence to satisfy the Director to the contrary". The definition that must be disproved is the new clause (d) which includes in the definition of 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; and

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

B. THE RESPONDENTS

11. The Respondents in this case are four out of thousands of people affected by the October 1995 change in definition. In October 1995, each Respondent was receiving a *Family Benefits* allowance as a sole support mother with dependent children. Each was terminated from benefits as a result of the impugned definition. The salient facts with respect to each Respondent's situation prior to the regulation change are set out at pp. 4-9 of SARB's decision on the *Charter* issues.

SARB *Charter* decision, *Charter Record of Proceedings* (hereinafter *Charter* decision) at 4-9

12. There are certain facts common to all the Respondents, as found by the Board. Each had been living with her co-resident for less than one year at the time of the regulation change. Each had entered into this arrangement on the basis of the "three year rule". In each case the co-resident was not the father of the Respondent's children and had no legal support obligation to the Respondent or her children. In each case, the Respondent's actual entitlement was reduced to take into account income received or deemed to be received from the co-resident. In each case, the Respondent did not consider herself to be in a "spousal" relationship as she understood that term.

Charter decision at 5

13. None of the co-residents in this case were able to support the Respondents and their children financially at any relevant time. All of the Respondents wished to be financially independent.

Charter decision at 5-9

14. Each Respondent entered into her living arrangement in the hope that it would eventually develop into marriage or a permanent relationship of mutual support. All of the Respondents shared expenses with their co-residents to some extent, as they were permitted and encouraged to do by the rules in effect at the time. However, each Respondent had suffered serious abuse in the past, either from former spouses or within their families. Part of the anxiety resulting from this abuse was a reluctance to give up financial independence in an intimate relationship without some confidence in the security of that relationship. The Board found as a fact that none of the Respondents was actually dependent on her co-residents, nor did they intend to become legally obligated to each other at this early stage in their relationship.

Charter decision at 4-9, 24

15. The Respondents' positions on their own wishes and intentions have been clear throughout these proceedings. For example:

- (a) Ms. Falkiner shared expenses with her co-resident but maintained separate finances. She did not expect that he would or could support her. She did not consider the relationship spousal at first although it was her intention to work toward this. She testified that her independence was very important to her.

"Reid and I were so new to each other. Certainly, I did not have the, the faith or belief at that point that this was going to be a spousal relationship. I've maintained my independence for a very long time, and to become a spouse to me personally means that I become dependent--somewhat dependent on someone, and I had no intention of that sort of replacement being made on me"

Her financial stability was also extremely important because she had a disabled child and was a foster mother to troubled teenage girls. She also testified that if she had not received interim assistance to allow her to pursue her challenge at SARB, she would have had to ask her co-resident to move out because her child's well-being came first.

Cross-examination of Sandra Falkiner, (Transcript P-1031-22) Record of Proceedings (Sandra Falkiner), pages 126, 160, 187

- (b) Ms. Cadieux, who suffered from severe abuse in a previous relationship, stated that she did not "want to make that kind of mistake again. People aren't

appliances, they don't come with guarantees so I really want to be sure before I make that commitment". She insisted that she did not think of herself as a spouse and vehemently objected to "there being zero tolerance in effect for people on welfare with regard to common-law residency, but everyone else in Ontario has three years".

Cross examination of Claude Cadieux, Respondent's Record, Vol. 3, Tab 3, pages 32, 45, 48

- (c) Ms. Sears also insisted that she needed time and had to be cautious about her relationship with her co-resident because of his history of substance abuse and bad experiences from previous relationships. She was willing to agree that her co-resident was her "boyfriend" but also stated that she clearly saw this as less than the permanent commitment involved in being part of a "couple". She stated "I have a need to keep my finances separate from Paul's. As Paul is only just recovering... I am concerned that if he slips and has access to my money, the children will go without food, clothing and shelter. Having been through this once in my life with Ray, I do not intend on going through it again... I need my financial independence to protect me and my children"

Affidavit of Deborah Ann Sears, Appellants' Record, Vol. 1, Tab 8, paras. 36, 37, 61, pages 141,143

Examination of Deborah Ann Sears, (Transcript P-1221-25) Record of Proceedings (Deborah Sears), page 12

16. After termination, each Respondent appealed to the Social Assistance Review Board and was found to fall within the amended definition. They have not appealed these findings and this is not an issue in this appeal. The Appellants' claim (para.75), that the Respondents agree that they are "spouses", is incorrect. The Respondents have been clear throughout these proceedings that they do not consider their relationships "spousal" outside the context of the impugned regulations. The Appellants' lack of respect for the Respondents' own beliefs and standards in this regard is emblematic of the lack of respect for the dignity and self-worth of recipients which underlies the 1995 regulation change.

C. THE SOCIAL ASSISTANCE "BENEFIT UNIT"

- (1) How the social assistance system treats people residing in the same place

17. Where one person in a household receives social assistance, the presence of other people in that household is always taken into account in some way by the social assistance system. How this happens depends on whether or not the other person is considered part of the "benefit unit".

18. Where people are included in the benefit unit, the *FB* and *GW* programs treat all income and assets of any member of the benefit unit as income and assets of the whole benefit unit. It is categorically presumed that members of a benefit unit are functionally one economic unit.

Regulation 366 (*Family Benefits*), ss. 3, 13(1);

Regulation 537 (*General Welfare Assistance*), ss. 4(1), 15(1)

19. With the exception of the impugned definition in this case, people are only included in the benefit unit where there is actual dependence (e.g., minor children) and/or a legal obligation between the members of the benefit unit.

20. Where an adult who is not part of the benefit unit resides in the same household as a social assistance recipient, that person's presence is taken into account in determining entitlement under the *FBA* or *GWA* in a variety of ways.

- (a) If the two adults share responsibility for shelter (eg., rent on an apartment), both adults are deemed to pay equal shares of the shelter costs and assistance is calculated accordingly (even if one adult has children and therefore uses more space): Regulation 366, s. 41(1); Regulation 537, s. 31(1).
- (b) If the co-resident is a roomer or boarder, a fixed percentage of his rent is included as income to the recipient (subject to a minimum deemed income charge): Regulation 366 ss. 13(2) 14, 15; Regulation 537, ss. 15(2) 13, 14. A social assistance caseworker can demand that the recipient ask for more rent if the caseworker thinks the boarder is not paying enough: Regulation 366 s. 8; Regulation 537 s. 4(3).
- (c) Any contributions (by the co-resident or anyone else) to any member of the benefit unit may be included in the recipient's income under the

regulations: Regulation 366, s. 13(1); Regulation 537 s. 15(1). This includes not only cash contributions but in-kind contributions. For example, a recipient who is allowed to use a friend's car on a regular basis will have her allowance reduced by the deemed value of the "use": SARB T-06-03-15.

- (d) Any economic contribution from the co-resident greater than the recipient's entitlement automatically renders her ineligible: Regulation 366, s.5(b). Again, this is not restricted to cash. For example, a sole support parent recipient whose roommate gave her money to buy a car to transport her children was disentitled under this rule: SARB K-09-27-21.

21. Mr. Costante states in his affidavit that "a parent with two children who lived in a common-law relationship could have received a maximum total allowance of \$40,140 for the first three years, no matter what the income, assets and other means available to the social assistance recipient from the common law spouse". This claim is repeated by the Appellants in their factum (para.58). It is not true. This figure assumed that the recipient would have had no deductions made from her allowance to account for the presence of the co-resident, whereas the presence of a co-resident is always reflected in allowance calculations, for the reasons given above, as indeed it was for the Respondents in this case.

Affidavit of Kevin Costante, Respondent's Record, Vol.1, Tab 1, para. 53, page 15

Cross examination of Kevin Costante, Appellant's Record, Vol.5, Tab 23, page 1370, Qs. 423-435

(2) The social assistance benefit unit cannot be explained on the basis of "functional" characteristics

22. The Appellants claim (para. 10) that the rationale for using the "family" as the benefit unit is that families demonstrate economic interdependence, there are economies of scale in families, and other responsibilities can be shared in families. As noted by SARB, the Appellants appear to equate "family unit" with "spousal unit" but do not clearly state this. In any event, these purported characteristics cannot account for the actual benefit unit used in social assistance regulations.

Charter decision at 60

23. For example, the fact that people demonstrate these characteristics does not mean

that they are included in the benefit unit. Two siblings who live together, or an aunt and nephew, or a grandfather and granddaughter, or a same sex couple are not included in a single benefit unit regardless of any degree of shared finances and familial responsibilities.

24. Conversely, the fact that people do not demonstrate these characteristics does not exclude them from the benefit unit. People who *do* have support obligations are spouses regardless of the nature of their relationship (clause (b) of the impugned regulation). They are included in the benefit unit if they "reside in the same dwelling place" even if they live completely separate and apart under one roof. Indeed, the Ministry changed *FB* and *GW* regulations in 1995 to overrule decisions by SARB and this Court which permitted an examination of the real nature of such a relationship.

Ontario (Director, Income Maintenance Branch) v. Nicolitsis (1995), 126 D.L.R. (4th) 733 (Ont. Div. Ct.)

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, Exhibit 15, page 4

(3) The purpose of the 1995 amendments is not "equity" but enforced conformity with the stereotype of conjugal relationships

25. The real purpose of the spouse in the house rule has always been to force poor women, particularly single mothers, to conform to the dominant model of marriage and sexual morality. Social assistance to poor mothers has historically been subject to the condition that women should primarily depend on men to support them; thus, assistance has only been provided to a poor mother where there has been no possibility that a man might step in to support her. It is assumed from the moment that a man and woman form an intimate relationship that he has accepted financial responsibility for her and her children and his resources are available to them. In more recent years this has become restricted in law (although often not in practice) to intimate relationships in the context of sharing a residence, but the underlying theme remains the same.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 15, page 625

26. In Ontario, sharing a residence and having an intimate relationship without marriage imposes no consequences in family law until the passage of three years, whereas in social assistance programs it results in an attribution of spousal status instantly. This clearly works to the advantage of men and to the disadvantage of women and children, who generally need more support than can be obtained by labour market activity.

Mary Jane Mossman & Morag McLean, "Family Law and Social Assistance Programs" Rethinking Equality", in Evans & Wekerle eds., *Women and the Canadian Welfare State* (Toronto: University of Toronto Press, 1997) at 117

27. The "double standard" with respect to the treatment of intimate relationships in family law and social assistance law was succinctly summarized by Justice Kelly of the Nova Scotia Supreme Court in *R. v. Rehberg*:

The man-in-the-house rule reflects a paradigm where a male residing with a recipient single mother was assumed to be responsible for the care of her and her family. This assumption, based on a patriarchal model of a family, is now significantly out of touch with a current model of the family as perceived in most family and divorce legislation and legal authority. These may be summarized for the purposes of this matter as follows: that adults are considered responsible for their own needs, and if unable to provide for those needs, the obligation shifts to the state unless, by virtue of spousal arrangements, a spousal support obligation arises; the obligation to provide for the needs of a child is to be shared, to the extent of their ability, by its father and mother, and thereafter, to the extent required, by the state.

R. v. Rehberg, supra at 351

Falkiner v. Ontario, supra per Rosenberg J. at 151-2

28. This attitude clearly informed the 1995 change, as seen in Mr. Costante's statement that, "It is often difficult to know whether one intends to support in the absence of a necessity to do so. This necessity does not arise as long as there is social assistance available." Or, as stated by SARB, the purpose of the definition is to "[throw] the sole support parent out into the water and [wait] to see if she will sink, or if the co-resident will throw out a financial lifeline".

Charter decision at 59

Affidavit of Kevin Constante, Respondent's Record, Vol. I, Tab 1, para. 66, page 18

D. THE CLAUSE (D) DEFINITION

(1) SARB's conclusions with respect to the reach of clause (d)

29. SARB rejected the claim that there has been "general acceptance by the judiciary, academics and witnesses" of the factors relevant to a determination of spousal status. The Board concluded that even on its most favourable possible interpretation, clause (d) effectively reduced the determination of spousal status to an investigation of inherently ambiguous "social and familial" factors, noting that there is no single template for a spousal relationship. There were no definite "markers" or "bright line" to show when a relationship changed from friends and roommates to "spouses". The economic test set such a low standard that parties' desires to remain financially independent were irrelevant and in some cases social and familial factors would be determinative. The Board found that the definition captured relationships which would not ordinarily be considered "spousal". Although the Board found that a finding of spousal status required a finding of economic dependence which is not trivial, it stated that "not all non-trivial financial interdependence amounts to actual financial support for a single parent and children". *Charter* decision at 26, 51, 60

(2) There is no sociological evidence supporting the clause (d) definition

30. The sociological evidence in this case provides no support for the clause (d) definition of spouse. The studies referred to by the Appellants are based on surveys of couples who declared themselves to be common law couples. In these studies, once the parties characterized their relationships, researchers then looked to see if there were any typical characteristics of the relationships. None of the studies looked at external characteristics and tried to use these to predict whether the "couples" would agree to assume full financial responsibility for each other in the absence of any legal obligation to each other or to the other person's children.

Affidavit of Susannah Wilson, Respondent's Record, Vol. 2, Tab 2, Exhibits H-K

Cross-examination of Susannah Wilson, Appellants' Record, Vol. 8, page 2698, Q. 278

31. The Appellants put their case for using a "functional" definition of spouse no higher than the tautological assertion that "common law" couples are "more likely" to resemble married couples than to resemble "two single persons" living together (paras.21, 22). The Appellants' own witness Wilson agreed that "defining nonmarital cohabitation has been problematic for researchers in the area and no definition or set of criteria has emerged which satisfies all the needs of the various researchers' endeavours."

Cross examination of Susannah Wilson, Appellants' Record, Vol. 8., Tab 24, Q.49

32. The actual comparison the Appellants seem to be inviting is between the nature of some unmarried relationships and a particular model of marital relationships which involves substantial interactions in all the categories described by the Appellants. This model is a stereotype of marriage, not a description of it. It is clear from the Appellants' own evidence that there is no single "functional" characteristic common to all marriages. Some married couples share all financial resources and operate as a single economic unit; some do not. On the Appellants' own evidence, fewer unmarried co-residents fit this stereotype, although some do.

Affidavit of Susannah Wilson, Respondent's Record, Vol. 2, Tab 2, para. 18, page 6

33. This stereotype of marriage often masks real inequalities within marriage, the burden of which are typically borne by women. Mothers, in particular, tend to have less labour market income than men. Men often do not make equal contributions to households in accordance with their incomes. The poverty of single mothers after separation or divorce often represents an unmasking of income inequalities inside the marriage.

Affidavit of Brigitte Kitchen, Appellants' Record, Vol. 2, Tab 11, paras. 20 - 24, page 283

Cross examination of Susannah Wilson, Appellants' Record, Vol. 8, Tab 24, Exhibit A, page 2780

Cross examination of Susannah Wilson, Appellants' Record Vol. 8, Tab 24, Exhibit B, page 2788

Volger and Pahl, "Money, power and inequality within marriage" (1994) 42:2 The Sociological Review 263

(3) There is no judicial support for the clause (d) definition

34. Prior to 1987, Ontario courts in several decisions interpreted the social assistance definition of spouse as defined in the phrase "living together as husband and wife". In the leading case on this point, *Re Warwick*, the Ontario Court of Appeal held that spousal status under this definition involved a consideration of four distinct factors: sexual or conjugal, economic support, social and familial relations. This test was further explained by this Court in various decisions.

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

35. *Re Warwick* was considered in subsequent decisions of this Honourable Court, the leading case being *Willis v. Ministry of Community & Social Services*. The Court held that "as the [Family Benefits Act] is concerned with need, the understanding that support will be provided by the cohabitant is an essential but not the only element". The Appellants claim that clause (d) identifies "marriage-like" relationships, but offer no explanation why the new test departs so radically from the judicially enunciated standard.

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

(4) The definition and supporting policy directives support SARB's conclusions.

(a) The financial component of the test does not establish an accurate marker of "spousal" relationships.

36. As SARB found, the financial component of the spousal test is not restricted to cases where support is forthcoming or where there is any evidence of an intention or desire to support.

Charter decision at 51

37. Under paragraph (i) of clause (d), a sole support parent can be found to be in a spousal relationship if the co-resident provides support to her. SARB agreed that this support had to be "more than trivial" but did not provide guidance as to what this would mean.

38. Under paragraph (ii) of clause (d), a sole support parent can be found to be in a spousal relationship even though the co-resident provides no support at all to her or her children. The Appellants offer no rationale for this paragraph, which clearly contradicts the purpose of the legislation as described in the *Willis* case.

39. The paragraph (iii) test is met if the parties have "a mutual agreement regarding their financial affairs". The meaning of this phrase is opaque to say the least. SARB has split on its interpretation. The majority in this case held that it requires financial interdependence which is "more than trivial". Nevertheless, even the majority concluded that people could be found to be spouses in situations where they did not intend to become financially interdependent and were not committed to mutual support.

Charter decision at 25

40. The Appellants claim that paragraph (iii) means "financial interdependence that is more than trivial", although the Ministry only took this position after this litigation commenced. The 1995 policy guidelines for caseworkers do not refer to interdependence that is "more than trivial". They direct caseworkers that such conduct as "joint use or benefit of assets such as a car, entertainment equipment, telephone(s), appliances, furniture", or contributions towards cable TV, could satisfy the test. The Appellants offer no explanation as to why paragraph (iii) was not drafted to reflect their supposed intention, why this was not included in the 1995 policy directions, or why the definition has not been amended to clarify this intent. Even when the legislation was converted to a new Act, the *Ontario Works Act*, the wording of this section remained unchanged.

Affidavit of Kevin Costante, Respondent's Record, Vol.1, Tab 2, Exhibit 28, page 3

41. The Appellants' witnesses acknowledged that paragraph (iii) could capture arrangements regarding living expenses 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.

Cross examination of Kevin Costante, Appellants' Record, Vol.5, Tab 23, page 1325, Qs. 195-229

Cross examination of Susannah Wilson, Appellants' Record, Vol. 8, Tab 24, page 2661, Qs. 115-139

Cross examination of Dianne Matzelle, (Transcript P-1031-22), Record of Proceedings (Sandra Falkiner), pages 90-93

(b) The definition is rooted in assumptions about sexual behaviour which cannot be rebutted under the regulations

42. The existence of intimate relations is usually an important characteristic distinguishing "spousal" relationships from non-spousal relationships and is usually considered in deciding whether a relationship is conjugal. Clause (d) does not exclude sexual intimacy from the model of spousal relationships underlying the definition. In effect, it creates an irrebuttable presumption of intimacy whenever two people of the opposite sex live together.

43. Because of subsection 1(2) of the regulation, a recipient cannot show that her relationship with her co-resident is *not* sexually intimate. SARB will not even consider evidence

of the co-resident's sexual orientation in determining the nature of the relationship, even though the definition of "spouse" assumes a heterosexual model of "marriage" (albeit without its range of reciprocal obligations and responsibilities): If subsection 1(2) was meant to protect recipients from state intrusion into sexual privacy, it is not clear why recipients cannot choose to waive this protection.

SARB S-02-07-37

44. Moreover, it is questionable whether subsection 1(2) affords any meaningful privacy protection now. The weakness of the protection is demonstrated in this case by the fact that the Appellants felt free to cross-examine the Respondents as to whether they slept in the same bedrooms as their co-residents. There is also evidence from other cases of welfare workers ignoring this protection.

Cross examination of Sandra Falkiner, (Transcript P-1031-22), Record of Proceedings, (Sandra Falkiner), page 193

Cross examination of Deborah Sears, (Transcript P-1221-25), Record of Proceedings (Deborah Sears), page 47

SARB Q-10-14-18

(5) The application of the definition in practice is arbitrary and subjective

45. The spousal test is administered on the basis of a "cohabitation questionnaire". The Appellants claim that this questionnaire and related policy guidelines add certainty or consistency to the test (paras. 38 to 42). In fact, the questionnaire imposes no more than a spurious veneer of objectivity on a process which can never have any degree of precision.

46. The questionnaire consists of more than eighty questions which delve into virtually every aspect of the person's life. The Respondents agree with the Appellants that the questionnaire addresses factors "relevant" to spousal status, because the questionnaire addresses everything imaginable except specific sexual behaviour. What the questionnaire and guidelines do not do is provide any guidance as to what should be done with this information. There are no right or wrong answers, there is no indication of relative importance of different answers and no "template" of behaviour against which the answers can be tested (Is the fact that a man do not do the dishes more or less indicative of whether he is like a "husband"?).

Affidavit of Kevin Costante, Respondent's Record, Vol.1, Tab 1, Exhibit 31

47. There is no evidence that meaningful instruction was given to workers on determining spousal status outside the questionnaire and accompanying policies. The witness Costante claims that there was an "extensive training program" on this regulation. The evidence indicates that caseworkers were given a one day training program in the "Eligibility and Entitlement Initiatives" in October and November 1995. Of this one day, the spousal regulations were only a part, as numerous other regulation changes had been made at the same time. Where the training schedules provided by the Appellaants are broken down, as in the

case of Metro Toronto, it appears that the "extensive training" consisted of a two hour session. This "extensive training" consisted of telling caseworkers that the factors asked about in the Cohabitation Questionnaire were indicators of a spousal relationship, and detailed instructions on the process for terminating clients.

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, Exhibits 19, 20, 23

48. The case of the Respondent Deborah Sears illustrates the problems with the Questionnaire. Ms. Sears' caseworker, Ms. Cumming, testified that this was her first "spousal" case. She received little training (two hours to cover all the social assistance changes which had occurred in the last two years); she made no attempts to gather additional information about ambiguous issues in the Questionnaire; she herself was troubled by some of the questions in the Questionnaire. Nevertheless, she proceeded to make a recommendation, and apparently was actively discouraged from looking further into the case.

Evidence of Lynett Cumming, (Transcript P-1221-25) Record of Proceedings (Deborah Sears) pages 46-48; 54-55

49. The Appellants argue (para.42) that caseworkers for three of the four Respondents indicated that they had "no difficulty" in applying the definition. This does not show that the definition can be applied objectively or that it captures only "marriage-like" relationships. It shows only that workers had no difficulty concluding that people were spouses under the definition and terminating their benefits.

50. The definition is often applied by caseworkers to encompass relationships which do not constitute "cohabitation" as ordinarily understood. People who share accommodation for financial reasons or simple friendship are found to be spouses merely because they enjoy some degree of companionship with their co-resident. This is consistent with experience before 1987.

Affidavit of Donald McKinney, Appellants' Record, Vol. 4, Tab 18, paras. 1-11, page 1171

Affidavit of Gary Gibson, Appellants' Record, Vol. 4, Tab 19, paras. 13-27, page 1179

Affidavit of Bonnie Nye, Appellants' Record, Vol. 4, Tab 20, paras. 13-21, page 1217

Affidavit of Myrna Houston, Appellants' Record, Vol. 2, Tab 12, paras. 3-15, page 534

SARB Q-08-15-10; Q-01-09-33

51. Even if a recipient's relationship is found not to be spousal, she is marked for suspicion within the system. Ministry policy requires that the relationship be re-examined at least once a year and there is nothing to prevent even more frequent review.

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, Exhibit 15, page 11

(6) The appeals system does not compensate for the fundamental flaws in the

definition

52. As illustrated by the Respondents in this appeal, a person can be refused assistance on the grounds that she is living with a "spouse" under clause (d) in circumstances where she admits to having a co-resident but denies that the relationship is spousal. She can also be refused assistance even though she denies that anyone lives with her. If so, she would have a right under the *FBA* to appeal to SARB. However, even assuming that the Board is more consistent than front-line workers in its decisions, this resolves none of the fundamental problems with the definition.

53. If the definition is unconstitutional on its face and in its application by caseworkers, the fact that an appeals tribunal may apply it more consistently than caseworkers is constitutionally irrelevant. This is discussed in detail in the Respondents' submissions on section 1. The following facts are relevant to this issue:

- (a) The consequences of denial of subsistence benefits to a person in need and her children are immediate and often devastating. If no other resources are available, the recipient will be unable to pay rent and utilities or buy food. An appeal will not be resolved for several months after the termination at the very earliest. An appellant may apply for interim assistance pending appeal but there is no right to this assistance, there is no right to a hearing in such an application and in fact half of all such requests are refused. In 1994-95, 52 percent of interim requests were refused.
- (b) The definition involves complicated questions of fact and law. The success rate on appeal of people who are legally represented has always been significantly higher than the success rate of people who are not. However, only about a quarter of appellants who appear before the Board are represented and legal aid services in social assistance matters are not consistently available across the province.
- (c) The existence of the appeals system patently cannot ameliorate the "chilling effect" of the definition insofar as fear of possible consequences causes applicants and recipients to avoid contact with men in the first place, as discussed further below.
- (d) Finally, the existence of an appeals system is irrelevant unless people know that it exists. Many recipients are not even aware of and are not informed of the right to appeal.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 45, page 635

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 53-69, page 168

Cross-examination of Nancy Vander Plaats, Respondent's Record, Vol. 3, Tab 2, page 92, Q. 431

Affidavit of Ian Morrison, Supplementary Appellants' Record, Tab 1, paras. 10-15, page 4

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 45, page 635

Affidavit of Cheryl Bailey, Appellants' Record, Vol. 4, Tab 22, para. 13, page 1281

SARB 1994-1995, Annual Report of (Ontario, Queen's Printer)

Affidavit of Melissa Flinders, Appellants' Record, Vol. 4, Tab 21, para. 29, page 1272

Affidavit of Bonnie Nye, Appellants' Record, Vol. 4, Tab 20, para. 42, page 1228

54. Although the right to appeal has been retained under the *Ontario Works Act*, none of the above problems have changed. In fact, access to interim assistance and to the appeals

system have been significantly restricted under the *OWA*.

Ian Morrison, "Ontario Works: A Preliminary Assessment" (1998) 13 *Journal of Law and Social Policy* 1 at 36-41.

E. THE DIRECT CONSEQUENCES OF THE SPOUSE IN THE HOUSE RULE

55. The spouse in the house rule has many adverse consequences for applicants and recipients. Some of these are direct consequences which flow from the social assistance regulations. Some are effects which flow from the choices which these consequences force upon applicants and recipients. Some are effects which flow from the way in which the rule is administered.

(1) The spouse in the house rule forces women into dependency on men who have no obligations to support them or their children.

56. If a relationship is considered "spousal", the consequences are as follows:

(a) The recipient may wish to separate from the "spouse" to remain eligible as a sole support parent, although in practice this may be undesirable or even impossible.

- (b) If the recipient chooses to remain with the "spouse", her family's financial situation becomes dependent on his ongoing good will:
 - (i) If the "family" is still in need, they may apply for welfare, but welfare will only be granted if he is eligible therefor and cooperates in the application.
 - (ii) If he cannot or will not apply for welfare, the recipient and her children become entirely dependent on him.

(a) **The "choice" of separating from the spouse**

57. If the recipient separates from the "spouse" in order to remain eligible, she loses whatever advantages she sees as accruing to herself and her children as a result of the relationship, including possible emotional support, companionship or simply help in paying the rent, as in the case of the witness Myrna Houston.

Affidavit of Myrna Houston, Appellants' Record, Vol. 2, Tab 12

58. Separation may not in fact be an option. In the real world, separation may be difficult or impossible in the short term, even if the "spouse" is not providing support and/or cannot or will not apply for welfare:

- (a) The recipient may not be able to compel the "spouse" to leave because the premises may belong to or be rented by him. He may be violent or abusive and refuse to leave.
- (b) She may not be able to leave herself. The inadequacies of social assistance shelter allowances combined with endemic discrimination against sole support parent families in the private rental market mean that low income sole support parents face extraordinary difficulties in obtaining decent affordable shelter.

59. A recipient who does separate may be refused benefits anyway. One of the changes to social assistance regulations in 1995 provided that a sole support parent (and only sole support parents) could be denied benefits if a caseworker decided that there was a "reasonable prospect of reconciliation". The Appellants argue that this provision does not apply to the "vast majority of sole support parents" and that it does not apply to sole support parents under the *FBA*. The Appellants offer no evidence or argument to support this assertion and it is simply untrue.

60. Sole support parents in theory can be eligible for Family Benefits under several different provisions of the *FBA*, Regulation 366 and Regulation 537, only one of which is

subject to the reconciliation rule. The Appellants claim that the reconciliation rule does not apply to sole support parents eligible under the *FBA* itself because it is found in s.2(7) of Regulation 366 and in Regulation 537 s.7(8). This argument has been advanced solely for the purposes of this case and does not represent the government's actual intention or practice.

- (a) Even on the Ministry's own interpretation, there is no basis for the argument that the "vast majority" of sole support parents were not subject to this regulation. At least a quarter of all sole support parents at the time this rule was enacted received *GWA* and were subject to it. It is not known what percentage of *FB* recipients were eligible under what categories because the Ministry has deliberately chosen not to keep this information.
- (b) Any such limitation on the application of the rule obviously depended on caseworkers knowing about it. Caseworkers were never told any such thing. Nor could a caseworker have made this distinction for herself because the Ministry's computer system does not record the subdivisions of eligibility on which the Appellants' interpretation relies.
- (c) The Appellants' assertion that there is "no evidence" as to how the reconciliation rule is applied is due in part to the fact that the Ministry deliberately chose not to collect and record information about it. There is direct evidence that the rule was used to threaten some of people affected by the definition change.
- (d) There is direct evidence in this case that caseworkers have told recipients that the "reconciliation rule" applies to people who separate in order to avoid the consequences of the new spousal definition.

Cross-examination of Nancy Vander Plaats, Respondent's Record Vol. 3, Tab 2, pages 71, 107, Qs. 331, 494

Cross-examination of Margaret Little, Respondent's Record, Vol. 3, Tab 1, page 151, Q. 665

Cross-examination of Kevin Costante, Appellants' Record, Vol. 6, Tab 23, page 1375, Qs. 451-481

Affidavit of Melissa Flinders, Appellants' Record, Vol.4, Tab 21, para.25, page 1272

Undertakings of Kevin Costante, Appellants' Record, Vol. 6, Tab E, page 1486

- (b) **The "choice" of applying for welfare as a couple**

61. A sole support mother cannot receive welfare as part of a "couple" unless the "spouse" both cooperates and is himself eligible to receive welfare.

- (a) They must jointly sign an application for assistance, provide copious documentary evidence with respect to income, assets and financial resources (which may go back as far as three years before the application for assistance) and sign a sweeping "consent to disclose" information form. If the "spouse" will not or cannot cooperate in this application or sign the consent form, the "family" is ineligible for assistance regardless of need: Regulation 537, ss. 9(1), (3), Form 1, Form 3.
- (b) In determining whether they qualify for assistance, all of the "spouse's" income and assets are deemed available to the entire benefit unit for its support (supra, para.18).
- (c) Eligibility and entitlement depends on the behaviour of the "spouse". Entitlement would be affected if the "spouse" quit a job or was fired, failed to do a job search to the satisfaction of a welfare worker, decided to pursue post-secondary education, or attempted self-employment on any terms other than those approved by a welfare worker: Regulation 537, s.1(9), s. 4, s. 4.1, s. 4.2, s. 4.3, s.7.
- (d) The "spouse" might cause the benefit unit to receive an overpayment through conduct over which the woman has no control or of which she may have no knowledge. As a result of amendments to social assistance legislation passed since this case started, even if the couple separates before they become spouses for family law support purposes, she will be held liable for any such overpayment: *Ontario Works Act*, ss. 19(3), 21 (4); *Ontario Disability Support Plan Act*, ss. 14(3), 16(4).

62. If she does apply and qualify for welfare as a couple, a single mother will receive less for herself and children. As SARB noted, the recipient also loses the benefit of special rules for sole support parents, including more favourable asset rules, the ability to attend post-secondary education without requiring approval, and exemption from rules restricting recipients' abilities to be self-employed while remaining eligible for assistance. A sole support parent under the *GWA* and *FBA* was also exempt from a mandatory obligation to seek and maintain any employment for which she might be physically capable and would not be penalized for quitting or being fired from employment, unlike a single employable person or one adult in a two-adult benefit unit.

Charter decision at 25

63. A single mother who applies for assistance as part of a couple loses the right to receive a cheque in her own name for herself and her children. Moreover, the usual practice of the welfare system is that when a "couple" applies for welfare, the cheque is issued to the man as the "head of household", even though this is no longer a legal requirement under the regulations.

Affidavit of Margaret Little, Appellants' Record, Vol.3, Tab 15, Exhibit B

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol.1, Tab 10, para. 68, page 172

64. The Ministry has a policy that the man will not be treated as the "head of household" if there is a history of family violence or abuse of funds, but this policy can only be applied if the caseworker is aware of the policy and of the particular situation. This puts an oppressive burden on a woman in the very circumstances where she may be least able to take the initiative. If the woman doesn't know about the policy or is too frightened or intimidated to reveal the abuse, the policy will do nothing for her. Moreover, because both "spouses" must sign an application for assistance, a woman *cannot* compel welfare authorities to issue welfare to her as head of household if her "spouse" does not cooperate.

65. The realities of the process are illustrated by the appellant Deborah Sears. Patently, given her "spouse's" history of substance abuse, she should have been the beneficiary of this policy. Yet, when she and Paul Townsend applied for welfare, in financial desperation, he was treated as the "head of household" even though she was solely responsible for her dependent children and he had only recently started recovery.

Testimony of Rebecca Fritz, (Transcript P-1221-25) (Vol.1) Record of Proceeding (Deborah Ann Sears), page 59

66. Contrary to what the Appellants appear to be arguing (paras. 64, 65), it is irrelevant whether this systemically discriminatory practice is intentional at the policy or the individual level. The only relevant facts are the existence of the practice and the fact that the Ministry refuses to take any steps that would be likely to affect it.

Legislative Assembly of Ontario, Standing Committee on the Ombudsman, *Hansard* (Weds. 4 December, 1996) B-53 to B-63

(c) The "choice" of remaining off assistance

67. The Appellants argue (para.59) that because many of those terminated in 1995 remained off assistance, the "spousal definition is accurately capturing those couples where financial resources are being shared to support both members of the couple". Even if this claim were true, it would be constitutionally irrelevant for the reasons given below. However, no such inference can be drawn from the evidence in

any event.

68. The Ministry has no idea what actually has happened to these people. It has apparently made no effort to find out. It does not know which people are still in relationships, what the conditions of those relationships are, who is working, who has left the jurisdiction, who has reapplied elsewhere, who is homeless, who is in a shelter or any other possibilities. One must conclude from the fact that the Ministry has done no follow-up studies that it either has no interest in the fate of those affected, or it had reason to be concerned that the results of such an investigation would have been unfavourable to it.

Cross-examination of Kevin Costante, Appellants' Record, Vol. 5, Tab 23, pages 1423 - 1426, Qs. 688-702

69. The evidence to which the Appellants refers relates only to recipients who had already lived together for some period up to three years before October 1995. Even if some of those who remained off assistance did so in supportive relationships, it might equally be concluded that the three year rule was successful in allowing these supportive relationships to develop, as it was intended to do. It is not a legitimate inference that the current application of the definition has any such effect.

(2) The spouse in the house rule creates a climate of fear and suspicion for recipients.

70. The impact of the spouse in the house rule is not just felt by recipients who do in fact live with someone of the opposite sex but is a presence in the life of all single recipients.

71. The state actively and vigorously scrutinizes recipients' living situations upon any suspicion that a person of the opposite sex may be present. Investigations may be triggered by reports from neighbours, landlords or anyone else. Sole support parents are especially vulnerable to reports from malicious ex-partners seeking to cause trouble for them. Where an investigation is triggered, caseworkers are directed to collect "all" available evidence by talking with neighbours, landlords, schools and anyone else who might be thought to have information. Such investigations will often reveal the recipient's identity as a social assistance recipient, although many recipients are very concerned to keep this information secret from the public and even their families because of the stigma attached to welfare receipt, and the public stereotyping and hostility towards recipients.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, paras. 35, 38, 39, 46, 47, 58, pages 632, 633, 635, 639

Affidavit of Bonnie Nye, Appellants' Record, Vol. 4, Tab 20, paras. 29, 35 pages 1223, 1225

Cross-examination of Kevin Costante, Appellants' Record, Vol. 5, Tab 23, page 1315, Q 142 (Exhibit "B")

Affidavit of Myrna Houston, Appellants' Record, Vol. 2, Tab 12, para. 15, page 539

72. Historically, caseworkers have 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 Little, Appellants' Record, Vol. 3, Tab 15, para. 34, page 632

73. In theory a recipient can have an intimate relationship with a man as long as she does not "reside in the same dwelling place". However, the Ministry has no policy on how much contact is permissible. Recipients can never know when the degree of contact or the number of visits may "cross the line". Frequent sightings of a visitor (who may be a "boyfriend", a friend or a male relative) may trigger a coresidency investigation.

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, page 25, para. 96

R. v. Rehberg, supra at 353

74. The very facts commonly taken as incriminating evidence against a recipient often reflect the survival strategies by which women cope with poverty. 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 landlords' income requirements. Similarly, the requirements of a landlord may force people to pretend that they are a couple by presenting themselves together to the landlord or by joining bank accounts. This frequently leads to investigations and often to terminations of assistance which may not be reversed on appeal for months. Although this Court has in the past warned that a single mother's means of subsistence should not be jeopardized based on mere "suspicion", this continues to happen on a regular basis. Many SARB decisions indicate terminations based on little or no evidence of actual coresidence, often on the basis of anonymous denunciations.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 44, page 634

Cross examination of Bruce Porter, Respondent's Record, Vol. 4, Tab 4, page 38, Q. 135

Re Pitts and Director of Income Maintenance (1985), 51 O.R.(2d) 302 (Div.Ct.)

SARB S-04-02-27; SARB Q-11--05-54; SARB Q-04-31-40; SARB N-04-26-12; SARB Q-08-06-13;
SARB S-01-18-19

75. Women are often threatened with fraud charges to coerce "admissions" of "spousal" arrangements. Eligibility review officers have admitted in proceedings before SARB

that they have been cutting people off without any evidence at all of the presence of a spouse on the grounds that "sometimes when people are told there is proof of an allegation, they will admit it". Actual criminal charges are traumatic in themselves, and particularly so when the result is incarceration, as it often was the case under the former "spouse in the house" regime. Publicity engenders increased public hostility, regardless of the outcome of the case. Women charged with social assistance fraud have stated that they entered guilty pleas just to avoid the trauma of a trial.

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 1, paras. 48 to 51, pages 166-167

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, paras. 49 to 51, pages 636-637

Affidavit of Cheryl Bailey, Appellants' Record, Vol. 4, Tab 22, para. 6, page 1279

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

Erlee Carruthers, "Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality" (1995) 11 Journal of Law and Social Policy 241

SARB M-12-25-25

76. Contrary to the Appellants' claims, today even more than in 1987, there are serious reasons to be concerned about the oppressive aspects of the administration of the spouse in the house rule. Since 1995 the Ontario government has engaged in a highly publicized "anti-fraud" campaign, which has further weakened privacy protections for social assistance recipients. The government's province-wide "Welfare Hotline" encourages members of the public to make anonymous denunciations of welfare recipients. The government has given eligibility review officers sweeping and unprecedented powers of investigation, including warrantless search and seizure and the power to compel third parties to provide information on demand.

Ian Morrison, "Ontario Works: A Preliminary Assessment", *supra*

Regulation 134/98 (*Ontario Works*), s. 65

(3) The spouse in the house rule severely constrains poor women's freedom to form relationships of any kind with men.

77. Because of clause (d), a sole support parent who wishes to live with a man in any kind of relationship risks or forfeits her economic independence. The Appellants' suggestion that the rule has no effect on applicants' and recipients' freedom in this regard defies common sense.

78. The definition makes it impossible for a poor single mother to attempt trial cohabitation with a man who has no legal or biological connection to her or her children in any normal way. Should she and her co-resident share resources to any extent, she will not be able to discharge the burden of showing she is not a spouse and will lose

any entitlement to assistance in her own right. Should they attempt to live together but remain financially independent, the vagueness of the definition means that they must in reality live in constant apprehension that their interactions will be taken as evidence of spousal status. As the Board found, a sole support parent with an opposite sex roommate would have to "be constantly on guard and constantly fearful that a conversation with her co-resident about personal problems or a friendly interaction between the co-resident and her children could result in the loss of her family's means of subsistence". As stated by Ms. Falkiner in her testimony, "It can be very stressful on, on two people living together when you're trying to say, 'Well, okay, is this yours,' and, 'Is this yours,' and 'Do you buy me those', or, 'Do I buy you these?' That's extremely stressful".

Examination of of Sandra Falkiner, (Transcript, P-1031-22) Record of Proceedings (Sandra Falkiner),
page 187

Charter decision at 26,60

79. The clearest evidence on this point is the evidence of the four Respondents in this case, none of whom would have commenced their co-residency relationships had it not been for the fact that they could do so without losing financial independence.

Charter decision at 5

80. Further, the definition means that if a recipient attempts to live with a male roommate purely for economic or companionable reasons, she places her already precarious financial situation in immediate jeopardy and this continues as long as the co-residency. She will be immediately presumed to be living with a "spouse" and face the burden of disproving this presumption in the face of the vague and subjective nature of the test. She must be willing to face the intrusiveness of the cohabitation questionnaire, and must undergo the same examination on an annual basis for as long as she lives with the "spouse". She may be told by her caseworker that if they live together for an "extended period" they will be considered spouses. SARB
S-04-02-27

81. The chilling effect that the spouse in the house rule has on poor women's freedom of action has been widely noted. It was one of the main conclusions of Professor Little's research. Justice Kelly in *Rehberg* reached the same conclusion with respect to the spouse in the house rule in Nova Scotia. The Social Assistance Review Committee, which recommended the changes which resulted in the 1987 definition, commented that the spouse in the house rule was contrary to values of strengthening family relations because it "reinforced sole-support parents' dependency status and greatly affected their ability to form new relationships"

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15

R. v. Rehberg, supra at 352 - 353

Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 1998) at 20

(4) The effects of the spouse in the house rule are particularly severe for women who are or have been victims of violence and abuse.

82. A very high proportion of women who receive social assistance have been victims of sexual or physical abuse in the past or are abused while on assistance. Each of the Respondents in this case has been the victim of severe abuse.

83. Studies in the U.S. of single mothers receiving social assistance through the AFDC (Aid To Families With Dependent Children) suggest that over 50 percent of these women have experienced serious abuse; some surveys suggest an even higher proportion. One major study found that one of every five recipients had been abused by a former or current boyfriend or husband within the last twelve months, and two of every three had been victims of violence at some point in their lives. This study noted that these findings were comparable to other studies. All the available evidence indicates that women on social assistance in Ontario have a similar profile in respect of family violence. Young single mothers are especially likely to have been severely abused physically or sexually as children and during pregnancy and afterwards.

Allard, Albelda, Colten, Cosenza, *In Harm's Way? Domestic Violence, AFDC Receipt and Welfare Reform in Massachusetts* (Boston: U. Mass, February 1997) at 3

Affidavit of Usha Gici George; Appellants' Record, Vol. 2, Tab 13, paras. 6, 9-21, page 542-546

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 55, page 638

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 3, Tab 10, para.43, pages 164-165

Affidavit of Robert Fulton; Appellants' Record, Vol. 4, Tab 17, paras. 4-6. pages 953-954

84. There are many significant barriers to women leaving abusive relationships. Poverty and a lack of affordable housing keep many women trapped in abusive relationships and this situation has been significantly worsened by this government's cuts to social assistance and to other social services that could support abused women.

United Way of Greater Toronto, *Freedom from Violence: Helping Abused Women and Their Children* (November, 1998)

85. The spouse in the house rule 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 other sources of social and familial

support may be even more limited and whose options are therefore even more constrained.

Affidavit of Usha Gici George, Appellants' Record, Vol. 2, Tab 13, paras. 26-32, page 547

86. For women who have been abused in the past, the process of developing trust is a long one which often involves (as it did for the Respondents in this case) 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, Appellants' Record, Vol. 2, Tab 13, para. 13, page 544

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, para. 56, page 169

Affidavit of Robert Fulton, Appellants' Record, Vol. 2, Tab 17, para. 6, page 944

Cross-examination of Robert Fulton, Respondent's Record, Vol. 4, Tab 6, pages 39-42, Qs. 143-150

87. 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.

Affidavit of Bruce Porter, Appellants' Record, Vol. 3, Tab 14, para. 23, page 588

Cross-examination of Bruce Porter, Respondent's Record, Vol. 4, Tab 4, pages 30-31, Qs. 111-113

Cross-examination of Margaret Little, Respondent's Record, Vol. 3, Tab 1, page 188, Q. 837

88. The spouse in the house rule 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. Women are often charged with fraud or assessed overpayments for living with a man even though he was abusive and controlling and she was not free to leave.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, paras. 57 - 58, page 638

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 43, 52, pages 164, 167

R. v. LaLonde (1995), 22 O.R. (3d) 275 (Gen.Div.)

SARB P-05-18-26 ; SARB M-01-13-54; SARB M-04-22-12R; SARB M-11-11-25

F. CHARACTERISTICS OF THE PEOPLE AFFECTED BY THE SPOUSE IN THE

HOUSE RULE

(1) The rule overwhelmingly affects women and particularly single mothers.

89. Between October 1, 1995 and April 2, 1996, more than 10,000 *FB* and *GWA* recipients were made ineligible as "single" persons because of the new definition. Of the total number of people affected by the rule during this period, 89 percent were 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, Respondent's Record, Vol. 1, Tab 1, paras. 85, 86, page 23

90. By far the largest group of people affected in terms of categorical eligibility were sole support parents, who were 79 percent of all those affected. The vast majority (96 percent) of these sole support parents were women.

Cross-examination of Kevin Costante, Appellants' Record, Tab 23, Exhibit Q, page 119, Q.s 594-595

91. The Appellants have never produced clear statistics reflecting the gender impact of the rule changes so that the proportion of women affected by social assistance category could be compared to the proportion that women made up of each such category. During argument at SARB, counsel for the Appellant introduced unsworn documents containing statistics about the impact of the changes which were not included in Mr. Costante's evidence. This evidence was not produced under oath and was not explained by any expert witness. To the extent it can be interpreted, it confirms that women were disproportionately affected in virtually all categories of receipt. This can be demonstrated by comparing the proportion of women affected in each category to the total percentage of women in each category as of the last date at which the Ministry has made this information available.

Eligibility Category	Caseload	Women as % of caseload	Women as % of persons affected by spouse rule
sole support parent	151,257 (FB)	94.9	95.8 (combined caseload)
	49,953 (GW)	91.4	
GW employable	165,023	30.4	56.1
FB Disabled/PUE	122,359	49.6	68.0
GW ill health	24,403	43.5	74.5
GW student	29,410	45.9	77.0

Affidavit of Nancy Vander Platts, Appellants' Record, Vol. 1, Tab 10, Exhibit E

Charter decision, Exhibit 3 at 391

(2) Single mothers are a severely disadvantaged group in Canadian society

92. Single parent families headed by women have the highest poverty rate of all family types in Canada. Canada's poverty rate for single mothers is higher than most other countries in the industrialized world. The risk of poverty is greatest for young single mothers, who are most likely to have young children at home. 91 percent of single mothers under age 25 live in poverty. The poverty rate for single mothers of all ages with one child under seven is 70.6 percent; for single mothers of all ages with two children under seven, it is 80.7 percent. The depth of poverty (the amount by which they fall below the poverty line) is much greater for single mothers than for other poor families.

Affidavit of Brigitte Kitchen, Appellants' Record, Vol. 2, Tab 11, paras. 4-33, pages 279-287

National Council of Welfare, *Poverty Profile 1996* (Ottawa: Minister of Public Works and Government Services Canada, 1998) at 33-42, 52-55

93. 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 childcare responsibilities. Affordable childcare is very scarce and employers are often not responsive to childcare issues.

Affidavit of Brigitte Kitchen, Appellants' Record, Vol. 2, Tab 11, paras. 26 - 28, page 285

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 30, page 630

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 20, 27, page 158

94. Because most single mothers, especially those with young children, either cannot find employment or cannot make enough from employment to support their families, a very high percentage must turn to social assistance. In Ontario in 1995, about two thirds of all single mothers were on social assistance at any given moment. Nationally, the figure appears to have been around 40 to 50 percent. According to the National Council of Welfare, the most respected authority in this area, in 1997 single parents made up 27 percent of all welfare cases in Canada, although single parent led families were only 6 percent of all families under age 65. The vast majority of single parent led families on welfare were headed by women.

National Council of Welfare, *Profiles of Welfare: Myths and Realities* (Minister of Public Works and Government Services Canada, Spring 1998)

95. The consequences of single motherhood and its impact on economic well-being

follow women throughout their lives. Prolonged poverty is reflected in such things as lack of physical amenities, less opportunity to contribute to public or private savings and pension schemes for income in later life, and so on. As stated by Professor Kitchen, "the consequences of single motherhood remain evident throughout the life cycle. Disadvantages suffered through a period of single motherhood are likely to leave traces throughout the mother's life".

Affidavit of Brigitte Kitchen, Appellants' Record, Vol. 2, Tab 11, para. 11, page 281

96. Being a single mother means a sharply increased likelihood of poor mental and physical health. Single mothers are significantly more likely to have serious mental health problems and to use mental health services than mothers in two parent families. The link between lone-parenthood, poverty and depression is well-documented, as is the association between social isolation and increased risk of morbidity and mortality.

Lipman, Offord & Boyle, "Single Mothers in Ontario: Sociodemographic, physical and mental health characteristics" (March 1997) *Canadian Medical Association Journal* 639.

Tarasuk, Beaton, Geduld and Hilditch, *Nutritional Vulnerability and Food Insecurity among Women in Families Using Food Banks* (Department of Nutritional Sciences, Faculty of Medicine, University of Toronto, 1998), at 16

97. In particular, single mothers on social assistance show dramatically more signs of mental health problems than the general Canadian population. In the largest scale Ontario study of social assistance recipients (concluded in 1995 before the 21.6 percent cut in the welfare rate), it was found that 36 percent of lone parents on social assistance reported being depressed or very unhappy, compared to 4 percent of the general population.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 19, page 626

98. Children are most likely to be poor when they live in households headed by a female lone parent. The effects of child poverty are well documented. Children raised in poverty have higher rates of physical and mental health problems; higher risk of death from disease and accident; higher incidence of poor performance in school; greater likelihood of dropping out of school. These effects follow these children through their lives. In addition to the stresses of poverty in their own lives, poor single mothers bear the strain of watching the disadvantages faced by their children if they spend prolonged periods on social assistance.

Affidavit of Brigitte Kitchen, Appellants' Record, Vol. 2, Tab 11, para. 19, page 283

(3) Single motherhood and social assistance receipt

(a) Social assistance programs and recipients are unpopular and stigmatized

99. The social assistance system is often called the "bottom of the social safety net" because it is the social program of last resort for those without income or other financial resources.

100. Social assistance or "welfare" is an unpopular, stigmatized and stigmatizing program. Social assistance recipients are subject to widespread negative stereotyping, and these include many stereotypes particularly directed at "welfare mothers", such as the stereotype that single mothers on welfare are particularly promiscuous, immoral or unfit. These stereotypes appear extremely persistent over time regardless of the strength of the evidence to disprove them.

Transitions, supra at 29-35

Andrew Armitage, *Social Welfare In Canada Revisited*, 3rd ed., (Oxford University Press, 1996) at 42-43, at 46-47

Martha Jackman, "Constitutional Contact with the Disparities in the World", (1994) 2 *Review of Constitutional Studies* 76

National Council of Welfare, *Profiles of Welfare: Myths and Realities, supra*

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 23, Exhibit C, page 717

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 24, 25, 29, 30, pages 158-160

Affidavit of Bruce Porter, Appellants' Record, Vol. 3, Tab 14, paras. 11 - 15, 28 - 31, pages 584-586, 590-592

Undertakings of Kevin Costante, Appellants' Record, Vol. 7, Tab 23, Exhibit AA, page 2584

101. Governments have no political incentive to be concerned with the well-being of the very poor and those most likely to be in need of social assistance. The revival of the spouse in the house rule in 1995 offers a concrete illustration of government action which capitalizes on stereotyping and hostility toward social assistance recipients, and indeed reinforces and perpetuates stereotypes of Ontario's most vulnerable residents.

Martha Jackman, "Constitutional Contact with the Disparities in the World", *supra*

(b) Social assistance recipients live in severe poverty on incomes which do not provide enough for adequate shelter and food

102. Social assistance allowances are far below all generally accepted measurements of poverty used by the social policy community in Canada and are falling even further. Social assistance recipients are poor by any standard.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, paras. 20-21, page 587

National Council of Welfare, *Welfare Incomes 1996* (Ottawa: Minister of Public Works and

Government Services Canada, Winter 1997-98)

103. In October 1995, at the same time that the definition of spouse was changed, social assistance rates for all categories of recipients except disability benefits were reduced 21.6 percent, thus placing even greater financial pressures on social assistance recipients. To make ends meet, people on social assistance must use all possible cost-saving measures, such as relying on food banks and sharing the costs of accommodation. Careful planning of all expenses is a necessity since social assistance recipients live close to the edge and are unable to save for contingencies. At the same time as it implemented the spouse in the house rule, the Ontario government in fact recommended that recipients share accommodation as a means of coping with the massive rate cuts.

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 7, 9, 66, pages 153-154, 172

Affidavit of Linda E. Law, Appellants' Record, Vol. 4, Tab 16, para. 14, Exhibit B, pages 939-941

Cross-examination of Susannah Wilson, Appellants' Record, Vol. 8, Tab 24, pages 2666, Qs. 143-147

104. Social assistance recipients and particularly sole support parents face severe and growing barriers in obtaining decent and affordable shelter.

- (a) Most social assistance recipients obtain shelter in the private rental market. Social assistance shelter allowances are grossly inadequate to cover the costs of suitable shelter especially in the City of Toronto. As of May 1996, 66 percent of welfare households in Toronto paid more than their maximum shelter allowance for shelter, up from 33 percent in 1995. Fifteen percent paid more than half their basic needs allowance to cover rent, up from 4.6 percent in 1995.
- (b) The rate of residential tenancy evictions has risen sharply in recent years. Most of these evictions are for non-payment of rent, resulting both from short-term financial emergencies and the worsening income situation of low income tenants.
- (c) The number of conventional low-cost apartment units in Toronto is decreasing and there is no significant new construction of rental housing. The pool of affordable apartments will probably decline further because the Ontario government has chosen to decontrol rent for vacant apartments (about 20 percent of apartments become vacant in a given

year) at the same time that it has cancelled all social housing construction.

- (d) In the competition for available rental housing, discrimination against social assistance recipients and particularly against single mothers is endemic, involving both direct discrimination and constructive discrimination in the form of "minimum income" requirements, which exclude all social assistance recipients in areas such as Toronto and environs.

Metropolitan Toronto (Commissioner of Community Services), *Impacts of General Welfare Assistance Rate Reductions* (May 27, 1996) Report to Human Services Committee

Lapointe Consulting Inc., *A Place To Rent: A 3-Part Examination of Ontario's Rental Market* (1996), Part II--Affordability of Renting, at 2

Breaking the Cycle of Homelessness, Interim Report of the Mayor's Homelessness Task Force (Toronto: July 1998)

Affidavit of Bruce Porter, Appellants' Record, Vol. 3, Tab 14, paras. 16-21, page 586

Dawn Kearney et al. v. Bramalea Limited et al. (Ontario Human Rights Board of Inquiry, December 22, 1998)

105. Social assistance recipients often go hungry. A recent study at the University of Toronto Faculty of Medicine examined the nutritional situation of a sample of women food bank users in Toronto. 65 percent of the sample were sole support parents and eighty-four percent of the families received social assistance. 70 percent had experienced moderate or severe hunger in the past 12 months and 57 percent had experienced moderate or severe hunger in the past 30 days. This food deprivation occurred in spite of charitable interventions from food banks. The study found, consistent with other research, that many poor women deprive themselves of food to feed their children.

Tarasuk et al, *Nutritional Vulnerability and Food Insecurity among Women in Families Using Food Banks*, (Toronto: University of Toronto Faculty of Medicine, 1998)

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 22, page 628

(c) Social assistance receipt is humiliating and stigmatizing

106. Recipients of social assistance are heavily 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. As noted above, many recipients try to hide the fact that they are on social assistance from strangers, family members and even their own children.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, paras. 23, 47 - 48, pages 628-635

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 24, 25, 29, 30, pages 158, 160

Affidavit of Bruce Porter, Appellants' Record, Vol. 3, Tab 14, paras. 11 - 38, page 584

107. The stresses of subsistence living and isolation combined with the prejudices experienced by persons in receipt of social assistance are severe. The isolation created by the "spouse in the house" rule will only compound this.

Tarasuk et al, *Nutritional Vulnerability and Food Insecurity among Women in Families Using Food Banks*, *supra* at 16-17

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 19, page 626

PART III: ISSUES AND LAW

A. ISSUES

108. The question in this appeal is whether SARB was correct in finding that the impugned definition of spouse violates sections 7 and 15 of the *Charter*, and is not saved by section 1. The standard of review is correctness.

(1) Section 15 -- Overview of Respondents' Position

109. SARB held that section 15 was violated because the spouse definition imposes on sole support parent social assistance recipients a burden which is not imposed on sole support parents who are not on social assistance. SARB would have found sex discrimination as well, but believed that it was bound by a contrary decision of the Federal Court of Appeal. Similarly, SARB found itself bound by a Divisional Court decision to the effect that section 15 discrimination cannot be based on the grounds of 'receipt of social assistance' or 'poverty'.

110. The Respondents submit that section 15 is violated not only because of the reasons articulated by SARB, but also because of the burdens which the rule disproportionately imposes on the groups of women and sole support parents, and the

differential treatment of social assistance recipients relative to other persons. The Respondents will argue that SARB was not bound by the Federal Court of Appeal and was correct in finding that the facts of the case amounted to sex discrimination. On the question of receipt of social assistance as an analogous ground, the Respondents will argue that the earlier decision of the Divisional Court is distinguishable and/or incorrect. SARB suggested that the facts of the case would support a finding of discrimination on the basis of poverty, if that ground were permitted. The Respondents support this view and will argue that the same is true for the ground of receipt of social assistance.

(2) Section 7 -- Overview of Respondents' Position

111. SARB held that section 7 was violated because of the effect of the spouse definition on individual liberty and security of the person. Specifically, SARB found that the spouse in the house rule deterred sole support parents from entering relationships with persons of the opposite sex, and caused them serious psychological distress. These deprivations of liberty and security of the person were not in accordance with the principles of fundamental justice because the spouse definition was overly broad in relation to any legitimate purpose.

112. The Respondents on this appeal submit that SARB was correct on the issue of section 7 not only for the reasons it articulated, but also because of other reasons advanced before it by the Respondents. Specifically, the Respondents submit that section 7 is also violated because the rule exposes social assistance recipients to criminal charges on ambiguous and unjustifiable grounds, and because the administration of the rule violates recipients' privacy interests.

(3) Section 1 -- Overview of Respondents' Position

113. SARB rejected the alleged equity objective of the rule asserted by the Appellants because the effect of the rule is in fact inequity between married and unmarried opposite-sex co-residents. That is, a married person forced to be dependent on her opposite-sex co-resident has the benefit of a legal support obligation, while an unmarried person does not have the same benefit. SARB accepted as pressing and substantial the alternative objective put forward by the Appellants, being to ensure that social assistance is "last resort funding available only where private or other governmental resources are not available". However, the Board held that the rule could not be justified since it was not rationally connected to this objective and did not meet the minimum impairment test.

114. The Respondents agree with SARB's rejection of the alleged equity objective of the spouse in the house rule, but disagree with its acceptance of the alternative "last resort" objective as pressing and substantial. The Respondents agree with SARB that the Appellants failed to provide any reasons which justify the rights violations present in this case.

B. EQUALITY RIGHTS UNDER SECTION 15 OF THE *CHARTER OF RIGHTS*

(1) The purpose and nature of the equality guarantee

115. The application of section 15 to the issues in this case must be grounded in the underlying purpose of the equality guarantees of the *Charter*. Since the inception of the *Charter* it has been clearly accepted that section 15 is a substantive and not just a formal guarantee of equality.

It is clear that the purpose of s.15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

Andrews v Law Society of British Columbia [1989] 1 SCR 143 at 171

116. As part of the substantive guarantee of equality, governments have a positive duty to ensure that legislative distinctions do not have an adverse impact on disadvantaged groups. In *Rodriguez v. British Columbia*, the Chief Justice stated that, "to promote the objective of a more equal society, section 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons". The same positive obligations of government toward disadvantaged groups were confirmed by the Supreme Court in *Vriend* and *Eldridge*.

Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 at 549

Vriend v. Alberta (1998), 156 D.L.R. (4th) 385 at 422 (S.C.C.)

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at 676-682

117. The *Charter* is especially concerned with gender equality. The prohibition of discrimination on grounds of sex in section 15 is reinforced by section 28 of the *Charter*. Section 28 was designed to ensure that women's equality was recognized and enforced as a pre-eminent constitutional value.

W. Black & L. Smith, "The Equality Rights" in E. Mendes & G.A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms*, 3rd ed., (Toronto: Carswell, 1996) 14-1 at 14-70

(2) The section fifteen test

118. The two main components of the section 15 test, consistently applied by the Supreme Court of Canada, are the following:

(a) Does the impugned law draw, between the claimant and others, a

distinction which is based on a personal characteristic and which creates an inequality? The distinction may be evident on the face of the law or in its effects. Inequality is present if the distinction denies the claimant equality under or before the law, equal protection of the law, or equal benefit of the law.

(b) Is the distinction discriminatory? This will be the case if two factors are present:

(i) The distinction was made on the basis of personal characteristics protected by section 15(1), either because the relevant personal characteristics are enumerated in section 15, or because they are analogous to grounds enumerated; and,

(ii) The distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed on others, or of withholding or limiting access to benefits or advantages which are available to others. The existence of a burden must be analyzed from the perspective of the person affected by the distinction.

Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 at 389-91

Eldridge v. British Columbia, *supra* at 669-670

Andrews v. Law Society of British Columbia, *supra* at 174-175

Vriend v. Alberta, *supra* at 417

Egan v. Canada, [1995] 2 S.C.R. 513 at 584

119. Discrimination occurs in particular where the burdens created by the impugned rule exacerbate the disadvantage which already characterizes the applicable enumerated or analogous group.

Rodriguez v. British Columbia, *supra* at 549

Vriend v. Alberta, *supra* at 423 and 427

Egan v. Canada, *supra* at 553

Haig v. Canada (1993), 105 D.L.R. (4th) 577 at 610 (S.C.C.)

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1333

Miron v. Trudel, [1995] 2 S.C.R. 418 at 494-495

Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241 at 272

120. In this case the Appellants argue (para.89) that the section 15 test includes either of two additional elements: (1) the distinction must be based on the stereotypical application of presumed characteristics, *or* (2) the distinction must be based on personal characteristics that are irrelevant to the goals and functional values of the legislation, provided that these are not themselves discriminatory. While both of these requirements are clearly met in the present case, it is submitted that neither of them is a necessary component of the section 15 test.

121. Specifically, the Supreme Court of Canada has expressly stated that discrimination does not require the application of stereotypical group or personal characteristics. On the contrary, in some cases discrimination exists because true characteristics are not taken into account.

Vriend v. Alberta, *supra* at 418

Eaton v. Brant County Board of Education, *supra* at 272-273

122. The requirement of irrelevance has been espoused by a minority of the Supreme Court of Canada only. There are many section 15 *Charter* cases in which it has not been applied by the Supreme Court, and it has been expressly rejected by this Honourable Court and the Court of Appeal for Ontario. It is submitted that the injection of a relevance component in the section 15(1) analysis blurs the distinction between section 15 and section 1, and is properly left to consideration under the latter section.

M. v. H. (1996), 31 O.R.(3d) 417 at 438-439 (C.A.)

Mohamed v. Metropolitan Toronto (Social Services) (1996), 133 D.L.R. (4th) 108 at 118 (Ont. Div. Ct.)

(3) The test for analogous grounds

123. In determining whether a particular personal characteristic is analogous to those enumerated in section 15, a broad, generous and purposive approach must be adopted. The purpose of section 15 is to prevent or remedy discrimination against groups suffering social, political and legal disadvantage in our society.

R. v. Turpin, *supra* at 1332-1333

Haig v. Canada, *supra* at 610

Miron v. Trudel, *supra* at 484-496

124. 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.

A.G. (Canada) v. Mossop, [1993] 1 S.C.R. 554 per L'Heureux-Dubé J. (dissenting) at 645-646

N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 *Queen's Law Journal* 179

125. Several factors have been identified as providing evidence that a group should be protected under section 15. One 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 the fact that the distinction is 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 section 15(1). Additional assistance may be obtained by comparing the ground at issue with the enumerated grounds, or by the 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-- is not true. That is, contrary to the Appellant's submissions, there is no *requirement* that the analogous grounds be characterized as immutable or as "discrete and insular minorities".

Miron v. Trudel, *supra* at 493-497

Andrews v. Law Society of Upper Canada, *supra* at 152

Dale Gibson, "Analogous grounds of discrimination under the Canadian *Charter*: Too much ado about next to nothing" (1991) 29 *Alberta Law Review* 772

Nicole Laviolette, "The Immutable Refugees: Sexual orientation in *Canada (A.G.) v. Ward* (1997) 55 *University of Toronto Faculty of Law Review* 1

C. THE SPOUSE IN THE HOUSE RULE VIOLATES SECTION 15 OF THE CHARTER

(1) Adverse effect discrimination: women and sole support parents

126. The spouse in the house rule creates a distinction by imposing on persons subject to it burdens which are not similarly imposed on other people in society. These burdens include:

- (a) the chilling effect on the ability to form personal relationships with persons

of the opposite sex;

- (b) increased difficulty in obtaining safe, affordable accommodation due to the severe financial and personal risks involved in attempting share with a person of the opposite sex;
- (c) the intrusive and degrading invasion of privacy occasioned by the inquiry into spousal status;
- (d) forced financial dependence on another person;
- (e) reduced social assistance benefits or complete loss of the means of subsistence;
- (f) insult to dignity due to rejection by the state of individuals' own view of fundamentally personal relationships and choices;
- (g) interference in the development of healthy relationships, between parent and co-resident, and co-resident and child.

R. v. Rehberg (1994), 127 N.S.R. (2d) 331 at 344-345, 350-352 (N.S.S.C.)

Falkiner v. Ontario (Ministry of Community and Social Services) (1996), 140 D.L.R. (4th) 115, per Rosenberg J. (dissenting in part) at 165-170 (Ont. Div. Ct.)

Fancy v. Shephard (1997), 51 C.R.R. (2d) 45 at 53-55, 58-61 (N.S.S.C.)

Miron v. Trudel, supra at 497

Egan v. Canada, supra at 594

R. v. Big M Drug Mart (1985), 18 D.L.R. (4th) 321 at 354 (S.C.C.)

127. The groups adversely affected by the rule are disproportionately made up of persons who share certain personal characteristics. Specifically, of the persons affected, 89 percent are women and 79 percent are sole support parents. Of the sole support parents affected, 96 percent are women. It is submitted that the definition of spouse therefore creates, in its effects, distinctions on the basis of sex and sole support parenthood.

128. It is submitted that this disproportionate impact of the rule on women and sole support parents is discriminatory because they are, respectively, enumerated and analogous groups, and because the rule burdens them in a way which perpetuates their existing disadvantage. These factors are discussed further, below.

129. The recognition of disproportionate impact or adverse effect discrimination

is longstanding. In employment cases, for example, height and weight requirements have been held to be discriminatory because persons failing those tests tend to be from certain disadvantaged groups. In the case of *Symes*, the Supreme Court held that tax rules would be discriminatory against women if it was shown that women were more likely than men to be burdened by them. In *Janzen* it was found that sexual harassment is sex discrimination because most victims of such harassment are women. As in all of these cases, the spouse in the house rule is discriminatory because the persons burdened by it tend overwhelmingly to be women and sole support parents.

Ellen Zweibel, "*Thibaudeau v. R.*: Constitutional Challenge to the Taxation of Child Support Payments" (1994) 4 National Journal of Constitutional Law 305

Dianne Pothier, "M'aider, Mayday: Section 15 of the *Charter* in Distress" (1996) 6 National Journal of Constitutional Law 294

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1288-1289

Symes v. Canada (1993), 110 D.L.R. (4th) 470 at 562 (S.C.C.)

Chapdelaine v. Air Canada (1988), 9 C.H.R.R. D/4449 at D/4454-4455 (Can. Human Rights Trib.)

(a) Sex discrimination

130. SARB appeared to recognize the existence of sex discrimination but did not so find because it erroneously believed that it was bound by the decision of the majority of the Federal Court of Appeal in *Thibaudeau*. This application of *stare decisis* was patently incorrect, since decisions of the Federal Court of Appeal are not binding on matters within the jurisdiction of provincial courts and tribunals. Furthermore, the comments relied upon by SARB were not adopted by the Supreme Court in its consideration of the *Thibaudeau* case, and it is submitted that the comments are incorrect. The suggestion is that sex discrimination cannot exist where even one man is burdened by a rule in the same manner as a woman. This proposition has been consistently rejected by the Supreme Court of Canada.

Janzen v. Platy Enterprises supra at 1288-1289

Symes v. Canada, supra at 562

Rodriguez v. British Columbia, supra at 556-557

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. at 1219

131. In addition to the adverse effects analysis described above, a variety of additional factors support a finding of sex discrimination in this case.

132. First, the spouse in the house rule is clearly grounded in the stereotypical assumption that when a woman forms an intimate relationship with a man, he must assume responsibility for her and her children. The rule entrenches this myth, and through it women's subjugation to men.

133. Second, the burdens imposed by the rule perpetuate the disadvantage already experienced by women as a result of systemic sex discrimination, namely, the economic dependence of women on men.

134. Third, the overwhelming presence of women among those affected by the rule is symptomatic of the fact that it is women, more than men, who tend to be poor. As found by the Supreme Court in *Moge v. Moge*, this is because women bear a disproportionate burden of unremunerated family responsibilities and most of the costs of marital breakdown.

Moge v. Moge (1992), 99 D.L.R. (4th) 456 at 482-484 (S.C.C.)

(b) Discrimination against sole support parents

135. As described above, it is submitted that the spouse in the house rule creates a distinction on the basis of sole support parenthood because the majority of persons affected by the rule are sole support parents. The burdens they bear by virtue of the rule include all of those discussed above, as well as additional burdens applicable only to the category of sole support parent social assistance recipients (as opposed to recipients in the categories of disabled or single employable). Specifically,

- (a) Only sole support parents lose categorical eligibility (i.e. eligibility as an individual) under the *FBA* and *GWA* when residing with a spouse;
- (b) Sole support parents face a significantly greater loss of household income than most other recipients if they reapply for general welfare assistance as a "couple";
- (c) Sole support parents lose the benefit of other entitlements under social assistance rules which apply only to this class, intended to reflect the needs of the sole-support parent family;
- (d) Only sole support parents are subject to the "no reasonable prospect of reconciliation" rule under *GW* and *FB* regulations.

136. There is ample factual and legal basis for the proposition that sole support parents are an analogous group. As to the facts, approximately 80 percent of sole support parents are women, and 95 percent of sole support parents on social assistance are women. They are disadvantaged for that reason alone.

137. All of the evidence concerning the economic, social and personal circumstances of sole support mothers show that this group is further and substantially disadvantaged on any understanding of that concept:

- (a) Sole support parent-led families are one of the poorest groups in Canadian society.
- (b) Sole support mothers' economic and social disadvantages derive from deeply rooted historical disadvantages based on gender inequalities;
- (c) Sole support mother-led families make up the large majority of all sole support families. Approximately 60 percent of all mother-led families live in poverty. The poverty rates are much higher for younger mothers with younger children;
- (d) Sole support mothers who seek social assistance are disproportionately past or current victims of familial or domestic violence;
- (e) Sole support mothers suffer disproportionate health problems, especially psychological problems such as depression. This is compounded by the effects of poverty, which itself is very harmful to mental and physical health.

138. Because of the extremely high risk of poverty, sole support mothers are very likely to have to apply for social assistance at some point to support themselves and their children. This is especially so for young sole support mothers and mothers of young children. When forced to apply for social assistance they are further burdened by the stigma, hostility and harmful stereotyping which goes along with this status.

139. Women may cease to be sole support mothers by remarriage or because at some point their children grow up and become independent of them. However, status as a sole support mother typically lasts for several years. It cannot be readily or immediately altered and it cannot be altered by unilateral action--obviously, single mothers cannot remarry or develop a long term relationship without the consent and cooperation of another person. The adverse consequences of single motherhood tend to follow women throughout their lives. Women pay the economic costs of single motherhood long after their children no longer live with them.

140. A further indicator of the status of sole support parenthood as an analogous group is the fact that family or marital status is a protected ground in most human rights laws in Canada.

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s.3(1)

Fair Practices Act, R.S.N.W.T. 1988, c. F-2, ss. 3(1), 4(1), 5(1)

Yukon Territory Human Rights Act, R.S.Y. 1986, c. 11, s.6(k)

British Columbia Human Rights Code, R.S.B.C. 1996, c.210, ss. 7(1), 8(1), 9, 10(1), 11, 13(1), 14

Individual Rights Protection Act, R.S.A. 1980, c. I-2, ss. 7(1), 8(1)
The Human Rights Code, C.C.S.M. c. H175, s. 9(2)(i)
Ontario Human Rights Code, R.S.O. 1990 c. H.19, ss. 1, 2(1), 2(2), 3, 5(1), 5(2)
Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s.10
New Brunswick Human Rights Code, R.S.N.B. 1973, c. H-11, ss. 3(1), 4(1), 5(1), 6(1), 7(1)
Human Rights Act, R.S.N.S. 1989, c. 214, ss. 5(1)(r),(s)
Human Rights Act, R.S.P.E.I. 1988 c. H-12, s.1(1)(d)
Newfoundland Human Rights Code, R.S.N. 1990, c. H-14, ss. 691), 8, 9(1)

141. Several courts, including two judges sitting in this Honourable Court, have recognized that sole support mothers are a disadvantaged group in Canadian society for the purposes of section 15 analyses.

Falkiner v. Ontario, *supra* per Rosenberg J (dissenting in part) at 163-172

R. v. Rehberg, *supra* at 349-351

Masse et al. v. Ontario (Minister of Community and Social Services) (1996), 134 D.L.R. (4th) 20 at 85 (Ont. Div. Ct.)

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

Federated Anti-Poverty Groups v. Attorney General (British Columbia) (1991), 70 B.C.L.R.(2d) 325 at 344

142. None of the authorities or propositions cited by the Appellants in paragraph 101 of their factum are relevant to this issue:

- (a) *R. v Rehberg*: It is submitted that *Rehberg* is on all fours with the present case and was correctly decided. The Appellants argue that *Rehberg* is distinguishable because the Nova Scotia spousal definition required only evidence of co-residence. However, spouse was defined in the relevant regulations in relation to persons "living together as husband and wife". The Appellants refer to a separate provision under which coresidence created a presumption of spousal status. The Appellants assume that this section created an irrebutable presumption. However, Justice Kelly did not understand the section to have this effect and proceeded on the basis that relevant question was whether the people in question were cohabiting, i.e., living together as husband and wife. Therefore Kelly J.'s analysis is directly applicable.
- (b) *Rhyno v. Nova Scotia (Minister of Community Services)*: This case did not hold that sole support parents are not an analogous group for section 15(1) purposes; rather, it held that there was no legislative distinction drawn in the circumstances of that case. It is submitted that *Rhyno* was

wrongly decided in any event. The *Rhyno* decision was apparently not itself appealed, but it was specifically overruled by the Nova Scotia Court of Appeal in *Carrigan v. Nova Scotia (Department of Community Services)*.

- (c) *Reference re Family Service Act*: This case held that "separated parents subject to support orders filed in New Brunswick courts" were not an analogous group. This finding has no application to the instant case. The New Brunswick Court of Appeal (incorrectly referred to as N.S.C.A. in the Appellants' factum) specifically pointed out that most of those affected were *men* and noted, following *Moge v. Moge*, that it is women and not men who are usually disadvantaged by separation and divorce.
- (d) *T.(D.) v. Childrens Aid Society*: The Nova Scotia Supreme Court in this case found that unmarried non-custodial fathers who displayed no interest in their children were not an analogous group for the purposes of section 15(1). The Court reached the obvious conclusion that it was unmarried mothers, not fathers, who were a historically disadvantaged group.
- (e) *Masse v. Ontario*: The majority decisions in *Masse* did not address directly or indirectly the specific issue of whether sole support parents were an analogous group.

Carrigan v. Nova Scotia (Department of Community Services) (1997), 28 C.H.R.R. D/281at D/283

(2) Direct discrimination -- social assistance recipients

143. The spouse in the house rule also creates a distinction on the basis of social assistance receipt because on its face it creates a distinction between persons with opposite-sex co-residents who are in need of social assistance and all other persons with opposite sex co-residents. Persons affected by the spouse in the house rule are subject to burdens which are not similarly imposed on other members of society. It is submitted that receipt of social assistance is an analogous ground, and that the rule is therefore discriminatory because unlike persons in receipt of social assistance, persons not in receipt of social assistance are entitled to the benefit of a three year rule and a legal support obligation before being forced to financially depend on an opposite-sex co-resident.

144. Again, a finding of discrimination depends on a finding that receipt of social assistance is a ground analogous to those enumerated in section 15. It is

submitted that this requirement is satisfied by virtue of the undeniable social, political and economic disadvantages suffered by this group:

- (a) Social assistance recipients are 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, and people with limited education and literacy;
- (b) There is widespread prejudice and hostility towards social assistance recipients, both historically and currently. This is commonly based on distorted or simply erroneous stereotypical views about the characteristics of social assistance recipients;
- (c) There is widespread discrimination against social assistance recipients, especially in respect of housing;
- (d) Social assistance recipients have little political power and governments have little interest in protecting their interests or motivation to do so. Governments, on the other hand, have substantial political interest in appearing "tough" on welfare.

145. Social assistance recipients are the subject of protective legislation in Ontario and elsewhere. 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.

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")

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)

Miron v. Trudel, *supra* at 496

146. As for the jurisprudence, the question of whether "social assistance

receipt" is an analogous ground has not been addressed by the Ontario Court of Appeal or by the Supreme Court of Canada. However, it has been recognized by courts in several jurisdictions as an analogous ground, alone or in combination with other characteristics.

R. v. Rehberg, supra at 349-352

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

Dartmouth/Halifax County Regional Housing Authority v. Sparks, supra at 232-235

Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General), supra

147. SARB regarded itself as bound by the consideration of this issue by this Court in *Masse v Ontario*, where it was held that the Ontario government did not violate the *Charter* by reducing welfare benefits 21.6 percent. One argument in that case was that by targetting social assistance recipients for such severe cuts, the government had discriminated against them in violation of section 15. Three separate judgments were rendered on this issue:

- (a) O'Driscoll J. held that the rate reductions did not constitute government action within the meaning of section 32. Nevertheless, he went on to opine that social assistance recipients did not constitute a group analogous to those included in section 15(1) of the *Charter*. It is submitted that Justice O'Driscoll's opinion on this issue is *obiter* in light of his finding that there was no government action as required by the *Charter*.
- (b) O'Brien J. reached the same conclusion but on different grounds. For reasons not explained in the decision, he directed his comments (as did Justice O'Driscoll) to the demographic profile of food bank users. He referred to affidavit evidence filed by the Director of the Daily Bread Food Bank to the effect that *food bank users* covered a wide range of skills and occupations. He then concluded that "*On this factual basis* [emphasis added] I am not persuaded that the applicants or those they represent are members of a protected group or one analogous thereto".
- (c) Corbett J. agreed that an overall reduction in levels of social assistance benefits did not violate section 15 per se in terms of creating a differential effect between social assistance recipients and others. However, she carefully pointed out that this was a contextualized decision for the purposes of that case and expressly stated that, "In another context, social assistance recipients may well constitute an analogous group".

148. Supreme Court of Canada jurisprudence is consistent with Corbett J.'s

comment that a group may be analogous for the purpose of one case but not another. It is submitted that on this ground this Honourable Court is entitled to draw its own conclusions regardless of *Masse*.

Miron v. Trudel, supra at 439 and 487

149. In the alternative, it is submitted that the majority in *Masse* erred in their consideration of the test for analogous grounds, in three respects.

150. First, the majority decision is apparently based on the assumption that "heterogeneous" groups cannot be analogous under the *Charter*. This is patently incorrect. All groups protected by section 15 are "heterogeneous" in some respect. Women, persons with disabilities, and persons of any specific race in Canada all display a "wide array of job-skills and occupations" and other varied characteristics, but this is obviously irrelevant to the reasons why section 15 prohibits discrimination against these groups.

151. Second, to the extent that the majority in *Masse* based its finding on the fact that social assistance is not necessarily an immutable or permanent condition, it is submitted that this is again patently incorrect. As stated by McLachlin J. in *Miron*, "while discriminatory group markers often involve immutable characteristics, they do not necessarily do so". For example, there is nothing immutable about other protected grounds, such as citizenship, religion, age or even disability. In any event, there is little choice over social assistance at the time that people need it. People can only qualify for social assistance upon proof of near or total destitution. "Welfare recipient" is not a freely chosen status: the "choice" is often between applying for social assistance and such options as sleeping in a park, entering a shelter or returning to an abusive living situation. It would violate the basic values of section 15 to suggest that widespread discrimination, stereotyping and hostility of the kind that has been exhaustively catalogued in relation to social assistance receipt are irrelevant to a section 15 analysis simply because some people are eventually able to leave assistance.

Miron v. Trudel, supra at 497

152. Third, it is submitted that the majority in *Masse* ignored the most important issue under section 15, which is whether the group in question is subject to stereotyping and hostility based on presumed characteristics. The evidence on this issue with respect to social assistance recipients is overwhelming and uncontradicted.

153. For all of the above reasons, it is submitted that SARB was correct in finding that the spouse in the house rule violates section 15(1) of the *Charter*.

D. THE SPOUSE IN THE HOUSE RULE VIOLATES SECTION SEVEN OF THE CHARTER

- (1) **The spouse in the house rule deprives social assistance recipients of "life, liberty and security of the person".**

(a) The proper interpretation of the section seven guarantee

154. 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." They are essential aspects of a democratic society and, as such, they must be animated by the values embodied in the common law and in the *Charter*.

R. v. O'Connor (1995), 130 D.L.R.(4th) 235 at 288 (S.C.C.)

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 51-52

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

155. In particular, it has been said 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 s. 7 this means that threats to life, liberty and security of the person must be particularly scrutinized when they impinge on the interests of disadvantaged groups, in this case low income single mothers.

Andrews v. Law Society of Upper Canada, *supra* at 185

156. To date, the interpretation of section 7 and the perspective brought to section 7 jurisprudence have occurred primarily in the criminal context. As a result, the interpretation of the core values protected by the words "life, liberty and security of the person" have not been thoroughly considered beyond this context. However, it is clear that section 7 interests are not solely restricted to criminal law matters. As stated by LaForest J. in the *B. (R.) v. C.A.S. of Metropolitan Toronto* case,

[L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 368

Fancy v. Shephard, *supra* at 53-54

(b) The spouse in the house rule affects liberty and security of the person.

(i) Freedom to form relationships free from coercive state interference

157. It is submitted that "liberty" and "security of the person" include the right of all

persons to form relationships which they judge to meet the psychological and emotional needs of themselves and their children. The decision to enter into such a relationship is one of fundamental importance which all persons should be allowed to make free from government constraint. In *Miron v. Trudel*, Madame Justice McLachlin described "the individual's freedom to live life with the mate of one's choice in the fashion of one's choice" as "a matter of defining importance to individuals".

Miron v. Trudel, supra at 497

B. (R.) v. Children's Aid Society of Metropolitan Toronto, supra at 369-370

R. v. Morgentaler, supra at 165-171

Fancy v. Shephard, supra at 52-54

158. Protection and reinforcement of these rights are particularly important for single mothers who have been victims of violence and abuse from men in the past, as is the case with all of the Respondents in this case. As they testified, the experience of abuse makes the decision to attempt to form a new intimate relationship even more fraught with risk than it is for people who have not had this experience.

(ii) Freedom from state imposed stress and anxiety

159. It is submitted that section 7 also protects the right to be free from serious state-imposed stress and anxiety. Contrary to the Appellants' suggestion (para. 121), the Respondents do not claim that there is a free standing constitutional right to be free of any "stress, worry or anxiety". Rather, it is submitted that anxieties are encompassed by section 7 when they are directly connected to personal freedom and dignity.

160. Social assistance recipients are constantly exposed to serious stress and anxiety as a result of the spouse in the house rule, including the fear or actual loss of the basic means of subsistence and the fear of criminal investigation and charges. The imposition of stress and anxiety by the threat of criminal sanction in the enforcement of a regulatory procedure is itself a deprivation of security of the person. In *R. v. Morgentaler*, a majority of the Court held that psychological stress caused by the administration of abortion legislation with its threat of criminal sanction was antithetical to security of the person. It is submitted that the same comment is applicable to the present case.

R. v. Morgentaler, supra at 54-56

161. The protections of section 7 extend beyond the trial process itself to the entire process of criminal investigation and the laying of charges. In *Mills v. The Queen*, Lamer J. stated that being under charge for a criminal offence impairs the right to security of the person, through "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a number of factors, including possible disruption of family and social life and work, legal costs, uncertainty as to the outcome and sanction". Again, it is submitted that this

comment aptly describes the burden of the spouse in the house rule.

Mills v. The Queen, [1986] 1 S.C.R. 863 at 919-920

162. The spouse in the house rule also imposes stress and anxiety because of the enforced choice between freedom to explore a possible relationship, or even to choose an opposite sex roommate, and the threatened loss of subsistence. In *Fancy v. Shephard*, which involved a statutory "dum casta" clause, Chief Justice Glube of Nova Scotia held that a similar choice violated section 7. She rejected the argument of the Attorney General in that case that the essence of the claim was economic:

On its face, s.6(3) [the impugned section] is economic, but the effect is to force those who are in receipt of spousal support to refrain from marrying or cohabiting. The decision to marry or cohabit is a fundamental right and by forcing a person to choose to not marry or cohabit because she will lose her maintenance, denies her the right to freely choose who she will live with. Psychological anxiety is generated violating the security of the person. Many activities have an economic component to them. In this case the violated right to security is the right to enter into a conjugal relationship without fear of losing support. Although there is an economic component that is secondary, I find this section violates the person's personal right to security.

Fancy v Shephard, *supra* at 55

163. The spouse in the house rule also imposes stress and anxiety because of the intrusions into the private lives and concerns of recipients which are an inherent part of the application of the rule. The right to liberty and security of the person in section 7 includes

... 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 293

164. The section 7 protection of privacy is not restricted to the criminal context but operates in the civil law area as well.

R. v. O'Connor, *supra* at 287-291

Canadian AIDS Society v. Ontario (1995), 25 O.R.(3d) 388 at 394-396 (Gen.Div.)

(c) The spouse in the house rule deprives recipients of these rights

165. The Appellants appear to be arguing in part that even if these interests are protected by section 7, the effects of the spouse in the house rule do not amount to deprivations of these interests because recipients are not physically prevented from residing with a person of the opposite sex. It is submitted that this argument misconceives the nature of the protection afforded by the *Charter*. As stated by the late Chief Justice Dickson:

One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.

R v Big M Drug Mart (1985), 18 DLR(4th) 321 at 354 (S.C.C.)

166. SARB correctly found that the nature of the test and the consequences of being found to be living with a "spouse" would have a serious chilling effect on the ability to attempt to form a new relationship on a single mother's own terms. There was ample support for this proposition in the evidence, as cited above. Furthermore, as stated by Kelly J. in *Rehberg*, it is a common sense inference.

R v Rehberg, supra at 344

Fancy v. Shephard, supra at 55

167. Even if the spousal definition was clear and completely predictable in its application, it would have a chilling effect on the liberty interests at stake in this case. On any possible interpretation of the definition, it means that a sole support mother is not free to cohabit with a man on a trial basis, even for a month, without sacrificing her financial independence. As SARB found, the chilling effect is in addition exacerbated because of ambiguity in the rule and its application in that a recipient can never know for certain when a relationship might be found to be spousal.

168. The Appellants argue that the former definition had an equal "chilling effect" after three years' cohabitation. This argument ignores the benefits associated with the three year waiting period. First, as emphasized by SARB and by Rosenberg J. in Divisional Court, at the end of three years a legal support obligation arises. Second, after three years the nature of the relationship will presumably be established and there would be significant evidence available as to whether or not the relationship was truly conjugal. Notably, SARB itself has expressed concern about terminating people before

a pattern of relevant behaviour can be determined. Furthermore, the test applied under the old rule at the end of the three year period was not the test currently set out by clause (d), but one which was more closely related to the traditional common law test of spousal status.

SARB Q-09-09-22

SARB H-04-18-09

SARB L-01-27-36

SARB J-07-25-16

(2) The deprivations are not in accordance with the principles of fundamental justice.

(a) Interpretation of the second branch of section seven

169. 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. 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, legislation and international comparisons.

Reference Re s.94(2) of the Motor Vehicle Act (1985), 24 D.L.R. (4th) 536 at 547-550 (S.C.C.)

Rodriguez v. British Columbia, supra at 590-592

170. The principles of fundamental justice include both procedural and substantive fairness. The test for substantive review of deprivations of protected interests in the civil context has been posed as a "balancing of the interests of the individual and the state".

Reference Re s.94(2) of the Motor Vehicle Act, supra at 557

Canadian Aids Society v. Ontario, supra at 397

171. In determining whether the requirements of fundamental justice have been met in this case, it is submitted that it is the practical operation of the social assistance system that matters, not merely the law on its face.

R. v. Morgentaler, supra at 62 ff

(b) The impugned definition is overbroad

172. The principles of fundamental justice are violated where regulations are 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.

R. v. Heywood (1994), 120 D.L.R.(4th) 348 at 382-385 (S.C.C.)

173. It is submitted that SARB correctly concluded that the spousal definition is overbroad. It not only captures relationships which would be considered "spousal" in the usual sense of a conjugal relationship based on substantial economic, social, familial and sexual factors, but clearly also captures relationships which would not meet such a test. Moreover, it deems such relationships to exist from the moment co-residence between two people of the opposite sex commences.

(c) The impugned definition results in arbitrary and subjective applications

174. SARB did not uphold the Respondents' argument that the spouse in the house rule was arbitrary and inconsistent in its application and violates the principles of fundamental justice in this respect. It is submitted that SARB's reasoning in this regard was internally inconsistent. Specifically, SARB earlier held that neither the words of the definition nor the policies and questionnaire give any real guidance as to how the supposed factors comprising the spousal test should be applied. It noted that the factors examined in the questionnaire are not spelled out and are not weighted. These are surely concerns about arbitrariness and subjectivity.

175. Furthermore, the factors relied upon by SARB in dismissing the arbitrariness claim in no way overcome the risk of subjectivity.

- (a) The fact that caseworkers *may* choose to consult with a supervisor about the definition does not in any way ensure consistency either within one office or within the province;
- (b) The fact that a caseworker may claim that he or she has no difficulty applying the definition does not provide any assurance that their decisions are consistent or objective;
- (c) The existence of an appeal mechanism *may* provide eventual redress for arbitrariness or subjectivity, but does not address the inherent subjectivity of the rule itself.

(d) The deprivation of protected interests is substantively unjust

176. SARB did not address the Respondents' argument that the rule violates the principles of fundamental justice because it is substantively unfair. There are four aspects to this submission:

177. First, it is submitted that the principles of fundamental justice are not satisfied where governmental action does little to advance its purported purpose. In this case the spouse in the house rule actually negates its purported purpose, since it

creates inequity rather than fostering equity. It arbitrarily forces sole support mothers and their children into a situation of dependency on men who have no legal obligation to support them, forcing women to conform to a stereotype which is oppressive. As for the objective of saving money, the rule had the meagre objective in 1994/95 of saving less than 1 percent of the social assistance budget. Moreover, there is no probative evidence which confirms that persons deprived of social assistance under the rule obtain any alternate means of subsistence, private or public.

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

Rodriguez v. British Columbia, *supra* at 594

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

R. v. Morgentaler, *supra* at 174-177

178. Second, it is submitted that the principles of fundamental justice are not met when the impugned law is discriminatory. This principle is violated by the spouse in the house regulations, since, as discussed above, the deprivations of liberty and security of the person occasioned by the regulations will overwhelmingly be felt by poor single mothers and their children.

179. Third, it is submitted that the protection of privacy interests is a principle of fundamental justice violated by the investigatory practices carried out pursuant to this regulation.

180. Fourth, it is submitted that fundamental justice requires that individuals receive consistent treatment under the law as a whole. In the present case, the regulations are inconsistent with the larger body of public policy, legislation and jurisprudence within which they operate. 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)

E. THE VIOLATIONS OF SECTION FIFTEEN RIGHTS ARE NOT SAVED BY SECTION ONE OF THE CHARTER

(1) The Section One Test

181. The Respondents agree that the basic test for the application of section 1 is as set out in paragraph 131 of the Appellants' factum.

182. It is submitted that this Court should take a rigorous approach to the state's burden of proof. There must be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. No matter how important the goal may seem, if the state has not demonstrated that the means by which it seeks to achieve it are reasonable and proportionate to the infringement of rights, then the law must fail.

[T]he infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.

RJR MacDonald Inc. and Imperial Tobacco Ltd. v. Canada, [1995] 3 S.C.R. 199 at 328

183. Where, as here, a regulation rather than a statutory provision breaches the *Charter*, the standard of review should be especially strict. The standard of justification in section 1 is that of a "free and democratic society". As these words imply, the democratic process is fundamental to law making in Canada. None of the reasons which might justify deference to public passage of an act of a Legislature applies to the promulgation of a regulation by Executive fiat without consultation, public debate or any of the safeguards of the legislative system.

184. Discrimination in welfare programs should be scrutinized with particular care. Unlike universal and non-stigmatizing social programs which affect most of society, such as medicare or old age pensions, or social insurance programs based on contributory principles, social assistance programs are primarily used by the marginalized, the vulnerable and the unpopular. Virtually all specific eligibility and entitlement rules in social assistance programs are established by regulation and avoid the democratic process. Governments have no political incentive to be concerned with the well-being of the poor; in fact it is usually to governments' political advantage to perpetuate stereotypes and hostility towards the poor rather than to resist such impulses.

Martha Jackman, "Constitutional Contact with the Disparities in the World", *supra*

Ian Morrison, "The Ontario Works Act: A Preliminary Assessment", *supra*

185. The Appellants' argument (para. 130) that special deference should be shown to discrimination in social assistance programs is not supported by the authorities cited by them:

- (a) *Egan v. Canada* did not involve a social assistance program but a universal old age pension scheme. The only judge to argue for sweeping deference to legislative decisions in social programs was Sopinka J. His proposition was not adopted by any of the Justices who rendered decisions on section 1 in that case. Moreover, the issue in *Egan* was the speed with which governments should move to remedy newly acknowledged forms of discrimination and a unanimous Supreme Court in *Vriend* rejected Sopinka J's "incrementalist" approach. In the present case the government has acted to remove a remedial provision and reinstate an oppressive and discriminatory practice.
- (b) *Irwin Toy* did not involve a social program at all. The decision in *Irwin Toy* suggests that deference should be shown to governmental choices which involve drawing lines for legislative purposes where the legislature is mediating between legitimate competing claims including constitutional rights. There are no opposing *Charter* claims in this case.
- (c) *Pyke v. Ontario*: The comments of the Divisional Court on section 1 in *Pyke* are *obiter* and not binding on this Court. Furthermore, in *Pyke* there were other government programs intended to benefit 16 and 17 year olds in the same manner as social assistance legislation. The same is not true in this case.

Vriend v. Alberta, supra at 434

(2) There is no pressing and substantial need for the spouse in the house rule.

186. The issue is not whether there is a pressing and substantial objective underlying the legislation within which the constitutional violation occurs, but whether the infringing provision itself has a pressing and substantial objective. The onus is on the Appellants to prove this objective.

Vriend v. Alberta, supra at 431

Rosenberg v. Canada (Attorney General) (1998), 108 O.A.C. 339 at 345 (C.A.)

187. The Appellants argue that the objectives of the regulation change were:

- (a) to achieve "equity" between married couples and couples in common law relationships; and
- (b) to assess the need for social assistance appropriately by considering private resources available from the family unit.

(a) **The evidence as to the government's objectives**

188. It is submitted that in order to demonstrate a pressing and substantial need for change sufficient to justify a violation of constitutional rights, some evidence of problems with the existing regulation must be provided. In the present case there is no legislative record to explain the change, which was made without any study, background evidence or consultation. The only evidence here is the assertion of one senior bureaucrat, Mr. Costante, prepared in response to this litigation. It is submitted that his statements should be scrutinized with care. It is submitted that the only evidence of actual motive that can reasonably be inferred from the documents put forward by Mr. Costante is that the change was made to save money. It is well established that cost savings alone cannot provide sufficient justification of a constitutional violation under this part of the section 1 test.

Re Singh, supra at 469

Schacter v. Canada, [1992] 2 S.C.R. 679 at 709

Egan v. Canada, supra at 618

189. In the alternative, even if evidence of a pressing need for change is not required, there must be some evidence to support the rationale for the change. The only direct evidence here indicates that the change was based on stereotypical assumptions. Mr. Costante based his assertions about the definition on "common knowledge" about the "tendencies" of couples. The evidence is clear that these assumptions are not necessarily true of either of married or unmarried "couples".

190. Moreover, Mr. Costante also argued that "It is often difficult to know whether one intends to support in the absence of a necessity to do so. This necessity does not arise as

long as there is social assistance available." SARB interpreted this to mean that the intent of the changes was to "[throw] the sole support parent out into the water and [wait] to see if she will sink, or if the coresident will throw out a financial lifeline". This objective is repugnant to the goals of social assistance legislation and section 1 values.

(b) The "equity" objective cannot justify an infringement of constitutional rights.

191. Both Rosenberg J. and SARB rejected the Appellants' argument with respect to the purported equity rationale. They held that the impugned definition in fact results in inequity since married couples, unlike people deemed to be couples by clause (d), have a voluntarily undertaken legal obligation to support one another. Both Rosenberg J. and SARB found that the three year rule was more equitable than clause (d). Rosenberg J. found that there was no urgency to the equity objective because the regulations already capture support actually received by a recipient and because married and "common law" couples are not in fact the same.

Charter Decision at 56-7

Falkiner v. Ontario, supra per Rosenberg J. at 172-173

192. The Supreme Court of the United States struck down a version of the spouse in the house rule in 1968 in the case of *King v. Smith*, originating in the state of Alabama. One of the justifications offered by the state of Alabama was identical to the rationale offered by the Appellants here, i.e., that 'there is a public interest in a state not undertaking the payment of these funds to families who because of their living arrangements would be in the same situation as if the parents were married'. This rationale was summarily rejected by the Court:

The difficulty with this argument is that it fails to take account of the circumstance that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their fathers: the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not.

King v. Smith, supra

193. The Appellants assert but never fully explain their claim of "equity". At various points they appear to be arguing that (1) there is some kind of free-standing abstract constitutional obligation to treat unmarried and married "couples" the same for all purposes; (2) that "married" couples are treated inequitably by social assistance rules; and/or (3) that it is fair to treat unmarried co-residents as a single benefit unit when they display characteristics similar to people who are included in social assistance benefit units. None of these claims bears up under close examination.

(i) There is no constitutional equity principle engaged here

194. The Appellants appear (para. 136) to be making the novel assertion that the *Charter* demands that so-called "common law" (heterosexual) couples be treated the same as married couples. Their reliance for this proposition on *Miron v. Trudel* is misconceived. In that case, self-declared unmarried couples argued that they were entitled to the same benefits under law as married couples. The Supreme Court found that there were no distinctions between the groups which would justify the denial of benefits. In this case there is no benefit to married couples which unmarried couples are denied and there are highly relevant differences between them, namely, self-identification as spouses and a voluntary assumption of support obligations. It is submitted that there is no case which holds that equity requires that burdens freely chosen by members of one group be imposed upon members of another group, notwithstanding some similar characteristics.

195. It is further submitted that the Appellants' equity argument is not logically sustainable, for the following reasons:

- (a) It appears that the government only embraces this supposed imperative where it permits them to act in a discriminatory manner toward poor women. It apparently feels no such compulsion to achieve equality between married and same-sex couples, despite clear judicial authority that distinctions of this kind are discriminatory.
- (b) The Appellants' argument is internally contradictory. On one hand, the Appellants argue an abstract constitutional imperative to treat all "couples" alike, while simultaneously claiming that the government has no obligation to

show any consistency in deciding when unmarried coresidents should be defined as spouses for different legislative purposes.

- (c) The result of the rule is to create even more inequalities. A person is deemed to be a "spouse" under clause (d) before he becomes a spouse for other purposes. Thus, for example, a man who is deemed to be a "spouse" under clause (d) and therefore assumed to be responsible for support of a family to whom he has no legal obligation connection is not a "spouse" for the purposes of income tax deductions, most benefit packages, etc.

(ii) Married couples are not treated inequitably

196. By definition, "married couples" and "unmarried couples" cannot be directly compared. Marriage is a legal status, not a description of a "functional" state. By their elision of legal status and functional description, the Appellants avoid ever stating which functional characteristics are in fact relevant and appropriate for defining a "marriage-like" relationship for purposes of social assistance. While the Appellants argue that the definition treats unmarried "couples" like married couples, they themselves acknowledge that some married couples are not financially interdependent (para.150) and therefore according to their own interpretation of the definition do not have a "spousal" relationship.

197. There is no actual inequity (differential burden) revealed in the evidence. Not treating unmarried co-residents as spouses has no effect on married couples. It neither advantages nor prejudices any interests they have in the social assistance system. Conversely, treating unmarried co-residents as spouses neither advantages nor prejudices married recipients.

198. Ultimately, the Appellants' "equity" claim is simply an attempt to validate the precise discrimination that lies at the heart of the *Charter* violations in this case, the assumption that if a man and woman live together the man must support her. This is the opposite of equity.

(iii) The argument from available resources is not an equity argument

199. The third possible interpretation of the Appellants' equity argument is simply another formulation of the "truly needy" objective and is addressed below.

(c) **The "truly needy" objective**

200. It is submitted that the second purported objective of the definition change also cannot be supported as "pressing and substantial" within the meaning of the section 1 test. SARB in its section 1 reasoning accepted the Appellants' claim with respect to this goal. However, it is submitted that SARB erred here in confusing the legitimacy of the overall goal of the social assistance system with the objectives of the specific provisions which violate the *Charter*, contrary to the dicta in *Vriend* and *Rosenberg*.

Vriend v. Alberta, supra at 431

Rosenberg v. Canada, supra at 345

201. Specifically, in the overall design of the social assistance system it is legitimate for the government to consider the resources that an individual has available to meet basic needs. However, this cannot be the function of a deeming provision such as clause (d) because this provision applies irrespective of whether resources are actually available.

202. Where this Court has held an exclusion from social assistance benefits to be justifiable under section 1, it has done so on the grounds that the legislature has ensured a legal right to subsistence support either from private means or from another social program. As stated by the Court in *Pyke v Ontario*, the government is entitled to ensure that a person is need of assistance "**in the sense that the applicant does not have alternative means of support available through other legislative mechanisms**". People deemed to be spouses under clause (d) do not have entitlements to support through other legislative mechanisms.

Pyke v Ontario, supra at 18

Mohamed v. Metropolitan Toronto (Social Services), supra at 123-128

(3) **In the alternative, the clause (d) definition cannot be supported under the proportionality test.**

203. In the alternative, it is submitted that the limits on the appellants' equality rights

cannot be justified because the means chosen are not proportionate to the infringement.

(a) The restriction is not rationally connected to any legitimate legislative goals

204. A restriction on *Charter* rights must be carefully designed to meet the objective. Where the government does not choose a marker that is rationally connected to its stated objective, it cannot justify restrictions under s.1.

Rodriguez v British Columbia, supra at 561

205. Conservation of scarce resources may in a proper case be served by distinctions in a benefits program, but the rational connection test will be used strictly in such cases to ensure that the restrictions do not simply promote the very inequalities the program was designed to alleviate. The mere assertion by government that the removal of the discrimination will result in cost consequences will not satisfy the rational connection requirement.

Ontario Human Rights Commission v. Ontario (1994), 19 O.R. (3d) 387 at 405-407 (C.A.)

(i) The "equity" objective

206. Even if the goal of seeking "equity" between married and unmarried couples is held to be a legitimate state goal, there is no rational connection between this goal and the 1995 amendments. As stated above, no direct comparison can be drawn between married and unmarried "couples" because there is no common ground between a legal status and a specific form of social interaction. To the extent that the Appellants' real argument is that the spousal definition should include relationships which are functionally similar to married couples for purposes relevant to the provision of social assistance, it is submitted that SARB correctly held that this goal was achieved by the 1987 definition and was undone by the 1995 amendments.

(ii) The "truly needy" objective

207. Clause (d) also fails the rational connection test with respect to the Appellants' second justification. The purpose of the *Family Benefits Act* is to provide benefits to those in need. It is in this context that the government's cost-saving measures must be assessed. Provisions that disqualify persons in need or reduce their eligibility for assistance without

reference to support actually available from an alternative source can bear no rational connection to the government's objectives. As stated by SARB, there is no rational connection between providing only for those who are truly needy and cutting off from assistance people who have no other means of support.

Willis, supra

Kerr v Metropolitan Toronto (1991), 4 OR (3d) 430 at 439-440 (Div. Ct.), rev'd on other grounds (1995), 22 O.R.(3d) 588 (C.A.)

Re Dennhardt and Ontario (1987), 45 D.L.R. (4th) 149 at 153 (Div.Ct.)

208. Furthermore, there is no rational connection between the rule and the objective in a broader sense. The Appellants claim that support obligations are not relevant to the determination of eligibility. However, it is only one group of people not subject to support obligations--single persons living with people of the opposite sex, in practice usually single mothers--who are thrown off assistance to see if someone else "throws out a financial lifeline".

(b) The impugned definition does not minimally impair the constitutional rights violated by the spouse in the house rule

209. The new spousal definition is not a "limit" on equality rights, it is a negation of them. The government has not attempted to construct a rule which would balance its interests against the interests of social assistance recipients; and particularly poor single mothers. Rather, it has determined to sacrifice all the interests of those potentially affected by the rules to its goals.

210. Looking at the definition and the political, social and administrative context in which it has been applied since October 1995, it is clear that the new spouse in the house rule was designed and implemented to identify anyone whose living situation might appear "spousal" in the loosest and most expansive possible way and to force these people to forfeit *any* financial independence.

211. There is no evidence that the government even considered any provisions which were less sweeping. Moreover, the government has made no effort to change the wording of the regulation to be consistent with the "non-trivial" component, imported by way of interpretation by some SARB members and relied upon by the government in this case.

212. Both overbreadth and vagueness are important considerations in determining whether a law impairs a right more than is necessary to achieve its legitimate goals. Overbreadth and vagueness are distinct concepts but may overlap substantially in a given case. According to the Supreme Court there are two separate vagueness tests under s.1. The first and more stringent standard applies to determine whether the limit in question is "prescribed by law"; i.e., whether the law is so vague that it is incapable of interpretation. The second test is whether, even if the words of the law can be given some meaning, the law is either overinclusive on its face in relation to the rationale for limiting the constitutional right, or so vague that it will have this effect in practice.

Osborne v. Canada (Treasury Board) (1991), 82 D.L.R.(4th) 321 at 338-344 (S.C.C.)

213. The Respondents accept that clause (d) is not unconstitutionally vague in the first of these senses. However, it is so overinclusive both on its face and in practice that it cannot be held to be a minimal impairment of the equality interests of social assistance recipients.

214. It is submitted that there is no constitutionally permissible basis for the state to treat people as members of a single benefit unit for social assistance purposes unless they have a legal support obligation towards each other or have voluntarily chosen to live as a single integrated family unit. SARB found that clause (d) is far broader than this, even giving the language of the economic test the broadest interpretation it can reasonably bear.

215. The evidence also indicates that from the time of its enactment to the present, the definition has often been applied in an arbitrary and cavalier manner which has resulted in its having an even more overinclusive effect.

- (a) After October 1995, thousands of recipients who had been receiving assistance as "single" persons were cut off because of the presence of an opposite sex co-resident with little or no investigation of their living arrangements;
- (b) Persons continue to be cut off or refused assistance because of the suspected presence of an opposite sex co-resident on the basis of little or no evidence;
- (c) Caseworkers and eligibility review officers continue to use both the clause (d) definition and the "reconciliation" rule to misadvise and threaten applicants and recipients.

216. To the extent that some women may have been forced into financial dependency on men who may be reluctant or resentful about supporting them, this result simply reinforces the discrimination which invalidates the spouse in the house rule. It is an exacerbation of discrimination, not a minimal impairment.

(c) The deleterious effects of the rule outweigh any legitimate state goal.

217. There must be a proportionality between the deleterious effects of the measures responsible for limiting the rights or freedoms and the objective sought to be achieved, and there must be a proportionality between the deleterious and the salutary effects of a measure. It is submitted that no such balance can be attained here. There is no proportionality between the object of these Regulations and the effects of the restrictions imposed. Nor is there a balance between deleterious and positive effects of the measure.

Dagenais v. C.B.C., [1994] 3 S.C.R. 385 at 889

218. The positive effect sought is a reduction in the cost of social assistance. The annual savings expected from the implementation of this change were approximately 0.67 percent of the 1994/1995 annual social assistance budget for Ontario.

Affidavit of Kevin Costante; Respondent's Record Vol. 1, Tab 1, para.94

219. The negative effects of the measure are:

- (a) To reinforce the dependency that has contributed to the disadvantage of this group in the first place and to reinforce an offensive stereotype of social assistance recipients as inherently dishonest;
- (b) To deprive those affected, overwhelmingly poor mothers and their children, of access to social assistance in their own right or at all;
- (c) To submit any recipient who chooses to live with a member of the opposite sex to intrusive questioning and invasions of privacy to determine whether they are to be granted the privilege of choosing the living arrangement most satisfactory to them, and to subject those determined not to be living with a spouse to repeated invasions of privacy;

- (d) To expose applicants and recipients to intrusive invasions of privacy in the investigation of alleged co-resident situations, to expose members of this group in future to fears of anonymous denunciations and further deprivations of privacy including the possibility of criminal charges; and
- (e) To impose a seriously chilling effect on poor people's freedom to choose their living arrangements.

220. It is submitted that the Court must also consider the situation of the children of sole support parents and the impact of the rule upon them. As stated by the Supreme Court in the recent case of *Benner v. Canada*, "the link between parent and child is of a particularly unique and intimate nature". The spouse in the house rule discriminates against the children of sole support parents, who may be forced into relationships with "fathers" who have no obligations to support them, or out of relationships with possibly supportive men, based on their mothers' status. Children of poor sole support mothers obviously share their mothers' poverty; the life-long consequences of poverty for children are both exhaustively documented and horrific.

Benner v. Canada (Secretary of State), supra

(d) There are less intrusive alternatives to the clause (d) definition

221. Finally, there are clearly less intrusive alternatives to the rule available. The social assistance system already takes into account the presence of another adult in any household receiving social assistance in a variety of ways. It is submitted that this is a reasonable and appropriate response to the presence of a person who has not voluntarily undertaken to provide support to the entire benefit unit and who is under no obligation to do so. It achieves the legitimate goal of ensuring a fair share contribution without forcing poor mothers into relations of dependency.

F. THE VIOLATIONS OF SECTION SEVEN RIGHTS ARE NOT SAVED BY SECTION ONE

222. It is submitted that legislation which violates section 7 cannot be saved under section 1 except in extraordinary circumstances such as war or national emergencies, situations patently not present in this case.

Reference Re s.94(2) of the Motor Vehicle Act, supra at 561

R. v. Heywood, supra at 391

223. In the alternative, it is submitted that the violations of section 7 are not demonstrably justifiable for the same reasons that the violations of section 15 are not saved by section 1, as discussed above.

PART IV: ORDER REQUESTED

224. The Respondents submit that this appeal should be dismissed on the grounds that clause (d) of the definition of "spouse" in Regulation 366 violates sections fifteen and seven of the *Charter of Rights* and is not saved by section one, and is therefore of no force or effect, pursuant to section 52(1) of the Constitution Act, 1982.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF
JANUARY 1999**

Raj Anand

M. Kate Stephenson

Chantal Tie

Of Counsel for the Responding

Parties

SCHEDULE "A"

1. *King v. Smith*, 392 U.S. 309 (1968)
2. *R. v. Rehberg* (1994), 127 N.S.R. (2d) 331 (N.S.S.C.)
3. *Fancy v. Shephard* (1997), 51 C.R.R. (2d) 45 (N.S.S.C.)
4. *Ontario (Director, Income Maintenance Branch) v. Nicolitsis* (1995), 126 D.L.R. (4th) 733 (Ont. Div. Ct.)
5. *Re: Warwick and Minister of Community and Social Services* (1978), 21 O.R. (2d) 528 (C.A.)
6. *Willis v. Ministry of Community and Social Services* (1983), 40 O.R. (2d) 287 (Ont. Div. Ct.)
7. *Re Pitts and Director of Income Maintenance* (1985), 51 O.R. (2d) 302 (Div. Ct.)
8. *R. v. LaLonde* (1995), 22 O.R. (3d) 275 (Gen. Div.)
9. *Dawn Kearney et al. v. Bramalea Limited et al.* (Ontario Human Rights Board of Inquiry, December 22, 1998)
10. *Andrews v Law Society of British Columbia* [1989] 1 SCR 143
11. *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519
12. *Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 at 422 (S.C.C.)
13. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
14. *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358
15. *Egan v. Canada*, [1995] 2 S.C.R. 513
16. *Haig v. Canada* (1993), 105 D.L.R. (4th) 577 at 610 (S.C.C.)
17. *R. v. Turpin*, [1989] 1 S.C.R. 1296
18. *Miron v. Trudel*, [1995] 2 S.C.R. 418
19. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241

20. *M. v. H.* (1996), 31 O.R.(3d) 417
21. *Mohamed v. Metropolitan Toronto (Social Services)* (1996), 133 D.L.R. (4th) 108
22. *A.G. (Canada) v. Mossop*, [1993] 1 S.C.R. 554 per L'Heureux-Dubé J. (dissenting)
23. *R. v. Rehberg* (1994), 127 N.S.R. (2d) 331
24. *Falkiner v. Ontario (Ministry of Community and Social Services)* (1996), 140 D.L.R. (4th) 115, per Rosenberg J. (dissenting in part)
25. *Fancy v. Shephard* (1997), 51 C.R.R. (2d) 45
26. *R. v. Big M Drug Mart* (1985), 18 D.L.R.(4th) 321
27. *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252
28. *Symes v. Canada* (1993), 110 D.L.R. (4th) 470 (S.C.C.)
29. *Chapdelaine v. Air Canada* (1988), 9 C.H.R.R. D/4449 at D/4454-4455 (Can. Human Rights Trib.)
30. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R.
31. *Moge v. Moge* (1992), 99 D.L.R. (4th) 456 (S.C.C.)
32. *Masse et al. v. Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.)
33. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
34. *Federated Anti-Poverty Groups v. Attorney General (British Columbia)* (1991), 70 B.C.L.R.(2d) 325
35. *Carrigan v. Nova Scotia (Department of Community Services)* (1997), 28 C.H.R.R. D/281 at D/283
36. *Schaff v. Canada*, [1993] 18 C.R.R. (2d) 143 (T.C.C.)
37. *R. v. O'Connor* (1995), 130 D.L.R.(4th) 235 (S.C.C.)

38. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
39. *Re Singh and Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 422 at 458-459 (S.C.C.)
40. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
41. *Mills v. The Queen*, [1986] 1 S.C.R. 863
42. *R. v. Plant*, [1993] 3 S.C.R. 281
43. *Canadian AIDS Society v. Ontario* (1995), 25 O.R.(3d) (Gen.Div.)
44. *Reference Re s.94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 (S.C.C.)
45. *R. v. Heywood* (1994), 120 D.L.R.(4th) 348 (S.C.C.)
46. *R. v. Jones*, [1986] 2 S.C.R. 284
47. *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123
48. *Lewis v. Martin*, 397 U.S. 552 (1970)
49. *RJR MacDonald Inc. and Imperial Tobacco Ltd. v. Canada*, [1995] 3 S.C.R. 199
50. *Rosenberg v. Canada (Attorney General)* (1998), 108 O.A.C. 339 (C.A.)
51. *Schacter v. Canada*, [1992] 2 S.C.R. 679
52. *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387 (C.A.)
53. *Kerr v Metropolitan Toronto* (1991), 4 OR (3d) 430 (Div. Ct.)
54. *Re Dennhardt and Ontario* (1987), 45 D.L.R. (4th) 149 (Div.Ct.)
55. *Osborne v. Canada (Treasury Board)* (1991), 82 D.L.R.(4th) 321 (S.C.C.)
56. *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 385

SCHEDULE "B"

1. Regulation 366 (*Family Benefits*), ss. 3, 13(1)
2. Regulation 537 (*General Welfare Assistance*), ss. 4(1), 15(1)
3. Regulation 134/98 (*Ontario Works*), s. 65
4. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 1998) at 20
5. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s.3(1)
6. *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2, ss. 3(1), 4(1), 5(1)
7. *Yukon Territory Human Rights Act*, R.S.Y. 1986, c. 11, s.6(k)
8. *British Columbia Human Rights Code*, R.S.B.C. 1996, c.210, ss. 7(1), 8(1), 9, 10(1), 11, 13(1), 14
9. *Individual Rights Protection Act*, R.S.A. 1980, c. I-2, ss. 7(1), 8(1)
10. *The Human Rights Code*, C.C.S.M. c. H175, s. 9(2)(i)
11. *Ontario Human Rights Code*, R.S.O. 1990 c. H.19, ss. 1, 2(1), 2(2), 3, 5(1), 5(2)
12. *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s.10
13. *New Brunswick Human Rights Code*, R.S.N.B. 1973, c. H-11, ss. 3(1), 4(1), 5(1), 6(1), 7(1)
14. *Human Rights Act*, R.S.N.S. 1989, c. 214, ss. 5(1)(r),(s)
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