Court File No. M26092

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Appellants
(Respondents in proposed Appeal)

- and -

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

Respondents
(Appellants in proposed Appeal)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

RESPONDENTS' FACTUM
ON LEAVE TO APPEAL MOTION

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PART I -- NATURE OF THE MOTION

1. The Attorney General of Ontario seeks leave to appeal a decision of the Divisional Court, in an appeal from the Social Assistance Review Board, confirming that the definition of "spouse" used in social assistance legislation in Ontario is unconstitutional because it violates section 15(1) of the Charter of Rights and Freedoms, and cannot be saved under section 1.

2. The Respondents submit that leave to appeal should not be granted. This Honourable Court has stated that as a general rule it will not interfere with decisions of the Divisional Court exercising its appellate jurisdiction. There is no reason to depart from this general rule in the present case.

PART II -- OVERVIEW

3. This case involves 1995 social assistance regulations which define "spouse" in such a way that social assistance recipients 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 (i) has no legal obligation to support them, (ii) has not made any voluntary undertaking to support them, and (iii) is not able to support them. The vast majority of persons affected by the regulation are women, particularly sole-support mothers, and their children.

4. The constitutionality of the impugned regulations has now been considered by three tribunals. In each decision, for substantially the same reasons, the regulations were found to violate section 15(1) of the Charter.

5. Specifically, in each case it was found that the impugned definition violates the equality rights of sole support parents on social assistance, most of whom are women, because it forces them to be financially dependent on opposite-sex co-residents who have no legal obligation to support them. Sole support parents who are not on social assistance do not suffer this burden. In each case the Attorney General's rationale of fairness between married and co-habiting couples was rejected.

6. Similar provisions have been struck down by courts in other jurisdictions, for substantially similar reasons.

7. In light of this consistent record, the Respondents submit that there is not sufficient valid controversy today as to the validity of the "spouse in the house" rule to justify consideration by this Honourable Court.

8. In the court below, the Respondents argued that SARB correctly held that the regulations also violate section 7 of the Charter. The Divisional Court found it unnecessary to address section 7 because it struck down the regulations on the basis of section 15(1). The Respondents submit that if, contrary to their position, leave to appeal is granted, their submissions under section 7 should also be considered by the panel hearing the appeal.

PART III - THE FACTS

I. THE IMPUGNED PROVISIONS

A. History

9. 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 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.

Reasons for Decision, Attorney General's Motion Record, Tab 3, **[hereinafter "Reasons"]**, para. 5

10. A new definition of spouse closely approximating the family law definition was enacted in 1987, following extensive study and consultation. 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

11. Clause (d) of the definition was changed in 1995, abolishing the three year rule, and including as a spouse (emphasis added):

(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.

12. Under this provision, 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", i.e. evidence to show that they are not providing financial support to one another, and that they do not have a "mutual agreement regarding their financial affairs". The regulations provide that sexual factors are not to be taken into account, so that applicants are not entitled to provide evidence rebutting the presumption of a sexual relationship (eg. evidence of being gay or lesbian).

Regulation 366, s. 1

B. Interpretation

13. The Appellants' witnesses acknowledged that clause (d)(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

14. The policy guidelines for caseworkers state 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 requirements for spousal status.

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

15. In a separate ruling in this case, the Social Assistance Review Board (**"SARB"**) interpreted the definition as requiring that two persons exhibit economic interdependence which is "more than trivial", but that "not all non-trivial financial interdependence amounts to actual financial support for a single parent and children". It stated that the economic test sets "such a low standard that parties' desires to remain financially independent were irrelevant and in some cases social and familial factors would be determinative." It has also found that the definition captures relationships which would not ordinarily be considered "spousal". This ruling was not appealed by the Attorney General.

SARB decision on non Charter Issues, p. 9, Motion Record, Tab 5, p. 176

C. Rationale

16. The Attorney General purports that the purpose of the rule is to identify recipients who have support available from a co-resident. In reality, all available funds are already taken into account, quite apart from the spouse rule, in calculating benefit entitlement. All contributions, to any member of the benefit unit, in cash or in kind, are included in income, thereby reducing benefits. All recipients must make "reasonable efforts" to realize any available financial resources, and benefits may be reduced or eliminated if the Director believes that all avenues are not being pursued. Shelter costs are presumed to be shared equally between co-residents, even if they are not.

Regulation 366, ss. 5, 8, 13-15, 41

17. The historical foundation of the impugned definition is the assumption, based on the dominant model of marriage and sexual morality, that a woman with an intimate partner must depend on that partner for financial support. The restriction of the definition to opposite-sex couples suggests that this remains its underlying rationale, as does the fact that actual support is not necessary in order for a co-resident to be deemed a spouse. The Deputy Minister stated in his affidavit that "[i]t 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 found that 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".

Reasons, para. 131

SARB decision on Charter Issues **[hereinafter "SARB"]**, p. 59

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

II. THE RESPONDENTS

18. The four Respondents are sole support mothers. Each was terminated from social assistance in 1995, following the implementation of the impugned regulations.

19. Each of the Respondents had been living with her co-resident for less than one year at the time of the regulation change, and she shared expenses with their co-resident to some extent. Each hoped that her relationship with the co-resident would eventually develop into marriage or a permanent relationship of mutual support, but until that occurred she wished to be financially independent.

Reasons, paras. 19-26

20. In each case:

(a) The Respondent had entered into the co-residency with the expectation that she would have three years before being forced to depend on her co-resident for financial assistance;

(b) The Respondent's actual entitlement was already being reduced to take into account in the presence of a co-resident;

(c) The Respondent did not consider herself to be in a "spousal" relationship;

(d) The co-resident had no legal support obligation to the Respondent or her children; and

(e) The co-resident was not able to support the Respondent and her children financially at any relevant time.

Reasons, paras. 19-26
SARB, pp. 4-9,24

21. Each Respondent had suffered serious abuse in the past, either from a former spouse or within her family, and for that reason was reluctant to give up financial independence in an intimate relationship. The Respondent Falkiner was particularly vulnerable financially because one of her children was severely asthmatic. Ms. Sears had serious concerns about financial independence because her co-resident had a history of substance abuse.

Reasons, paras. 19-26

III. EFFECTS OF THE IMPUGNED REGULATIONS

A. Effect on recipients found to be living with a spouse

22. A social assistance recipient found to be a spouse under the impugned regulations is forced to move away from the co-resident, depend on her co-resident for financial assistance, or remain off assistance altogether. All of these options result in profound instability and hardship.

Reasons, para. 68

a. Separation

23. If the recipient and the "spouse" separate, the recipient loses the emotional support and companionship of her co-resident, as well as his contribution to household expenses.

24. In some cases, separation will not be possible. The recipient cannot compel her co-resident to leave against his will. The premises may belong to or be rented by him. He may be violent or abusive and refuse to leave. She may not be able to leave because of the inadequacies of social assistance shelter allowances, combined with endemic discrimination against sole support parent families in the private rental market.

25. A sole support parent who does separate may be refused benefits anyway, if a caseworker decides that there is a "reasonable prospect of reconciliation".

SARB, pp. 45-46

b. Remaining together

26. If the recipient and co-resident wish to remain living together, she must rely on his goodwill in providing financial support to her and her children. If the "family" is still in need, they may receive welfare only if the co-resident is eligible for welfare and he co-operates with the application. Both are circumstances over which the recipient has no control. The co-resident must provide information about all of his assets, going back three years. All of his assets are deemed available to the "spouse". Benefits will be denied if he quits a job or is fired, or if he wishes to go to school or be self-employed.

Regulation 537, ss. 9(1),(3), Forms 1 and 3

27. If the "couple" receives welfare as a "family", the single mother receives reduced benefits and loses the entitlements of a sole support parent, such as the right to attend post-secondary education. Importantly, she loses the right to receive a cheque in her own name for herself and her children. The usual practice is that when a "couple" applies for welfare, the cheque is issued to the man as the "head of household".

Reasons, paras. 47-49

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

c. Remaining off assistance

28. There are many people who have remained off assistance after being cut off pursuant to the spouse rule. The Attorney General has claimed that the spousal definition has therefore succeeded

in capturing couples where financial resources are being shared.

29. This is an obvious fallacy. In reality, the Attorney General has no information about what actually has happened to these people. The Ministry has made no effort to find out. It does not know if former recipients are still in relationships, the conditions of those relationships, who is working, who has left the jurisdiction, who has reapplied elsewhere, who is homeless, who is in a shelter, or any other possibilities.

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

B. Effect on all social assistance recipients

a. Demeaning intrusion into private life

30. All recipients are subject to vigorous scrutiny in the implementation of the spouse definition. Their living situations are investigated through a nine-page questionnaire which asks questions such as whether the recipient and co-resident exchange gifts at Christmas, and whether the co-resident watches the same television. Investigations may be triggered by reports from neighbours, landlords or anyone else. Caseworkers have conducted surveillance and bathroom visits in an attempt to 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.

Affidavit of Margaret Little, Appellants' Record, Vol. 3, Tab 15, para. 34, page 632

31. 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, and subject her to stereotyping and hostility from the public and even her family.

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

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

32. 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.

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

b. Threat of fraud charges

33. 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 cancelled benefits without any evidence of the presence of a spouse because "sometimes when people are told there is proof of an allegation, they will admit it". Actual criminal charges are traumatic in themselves, particularly when the result is incarceration. Publicity engenders increased public hostility, and women charged with social assistance fraud have stated that they entered guilty pleas just to avoid the trauma of a trial. Charges are laid even where there is a history of spousal abuse.

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

SARB M-12-25-25

R. v. Lalonde (1995), 22 O.R. (3d) 375 (Gen. Div.)

34. Current social assistance legislation provides that persons convicted of welfare fraud are banned from social assistance for life.

Regulation 134/98 ss. 33-36
Regulation 222/98 ss. 23-25

c. Chilling effect

35. Because of clause (d), a sole support parent who wishes to live with a man in any kind of relationship risks her economic independence. It is effectively impossible, therefore, for a poor single mother to attempt a normal trial cohabitation with a man who has no legal or biological connection to her or her children.

Reasons, paras. 32-45, 71

36. If a recipient attempts to live with a male roommate but remain financially independent, she places her already precarious financial situation in immediate jeopardy. She will be immediately presumed to be living with a "spouse" and face the burden of disproving this presumption under a vague subjective nature of the test.

37. As SARB 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".

Reasons, para. 70, 111

SARB, pp. 26, 60

d. Effects on women who have experienced abuse

38. Women seeking to leave abusive relationships, already limited by poverty and the lack of affordable housing, are further impeded by the spouse in the house rule because their destination may involve co-residence. The problem is particularly severe for immigrant women, who have fewer sources of social and familial support.

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

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

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

IV. CHARACTERISTICS OF THE PEOPLE AFFECTED BY THE SPOUSE IN THE HOUSE RULE

39. Of the total number of people affected by the rule, 89 percent were women. This includes persons in all categories of social assistance eligibility including single employable, persons with disabilities and sole support parents.

Reasons, para. 82

40. 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.

Reasons, para. 74

41. Women and sole support mothers are both affected by the spouse rule in greater proportion than the social assistance caseload as a whole. A chart setting out the statistics in this regard is set out in Appendix "A" to this factum.

42. Single parent families headed by women have the highest poverty rate of all family types in Canada. Ninety-one 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.

Reasons, para. 75

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

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

43. Single mothers have a sharply increased likelihood of poor mental and physical health. Single mothers on social assistance show dramatically more signs of mental health problems than the general Canadian population. There is a well-documented link between lone-parenthood, poverty and depression, as well as 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.

44. Children raised in poverty have higher rates of physical and mental heath problems; higher risk of death from disease and accident; higher incidence of poor performance in school; greater likelihood of dropping out of school. Such effects follow these children throughout their lives.

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

45. Social assistance is an unpopular, stigmatized and stigmatizing program. Many social assistance recipients report feelings of shame due to stereotypes which label them as personally inadequate and lazy. Hostile attitudes toward social assistance recipients have increased in recent years. Stereotypes of promiscuity and unfitness are particularly directed at "welfare mothers".

Reasons, paras. 86-87

V. EVIDENCE JUSTIFYING THE REGULATIONS

46. The government has produced no report or study which analyzed or criticized the three year regime. There was no evidence that under that regime recipients were collecting social assistance benefits while at the same time being supported by a co-resident. There was no report that a new rule would result in substantial savings. There was no consultation on the issue. The only "evidence" of the rationale for the change was the affidavit of a civil servant, created in this litigation.

VI. PREVIOUS JUDICIAL CONSIDERATION OF THE IMPUGNED REGULATIONS AND SIMILAR PROVISIONS

47. The impugned regulations were challenged by way of judicial review almost immediately after their promulgation, in 1995. A majority of the Divisional Court at that time found that the judicial review was premature since SARB had not reviewed the Respondents' spousal status. Mr. Justice Rosenberg dissented on this point and consequently considered the constitutional issues. The constitutional issues were then considered by SARB, and on appeal, by the Divisional Court again.

48. The findings of Justice Rosenberg, SARB and a majority of the court below are consistent on all key aspects of the constitutional analysis.

(a) ***Interpretation of the provisions:*** Justice Rosenberg, SARB and a majority of the Divisional Court all found that the regulations deem to be "spouses" persons who are not in a marriage-like relationship.

Falkiner v. Ontario (Ministry of Community and Social Services) (1996), 140 D.L.R. (4th) 115 (Div. Ct.) per Rosenberg J. **[hereinafter "Rosenberg J."]**, p. 173; SARB p.26; Reasons, paras. 70, 132

(b) ***Chilling effect:*** Justice Rosenberg, SARB and a majority of the Divisional Court all found that the regulations have a chilling effect on the ability of social assistance recipients to form new relationships.

Rosenberg J., p. 149; *SARB*, p 26; *Reasons*, paras 45, 67

(c) ***Discrimination against women:*** Justice Rosenberg and a majority of the Divisional Court all found that the regulations discriminate on the basis of sex, because of their disproportionate effect on women. SARB would have reached the same conclusion but for the fact that it erroneously considered itself bound by an apparently contrary decision of the Federal Court of Appeal.

Rosenberg J., paras. 114, 118; *SARB*, p 23; *Reasons*, paras. 83-85

(d) ***Discrimination against sole support mothers on social assistance:*** Justice Rosenberg, SARB and a majority of the Divisional Court all found that the regulations discriminate against sole support mothers on social assistance. They all recognized the historical disadvantage and marginalization of sole support mothers, particularly those on social assistance, and found that

sole support mothers on social assistance constitute an analogous group under section 15 of the Charter.

Rosenberg J., paras. 113-4, 118; *SARB*, pp. 28-30; *Reasons*, paras. 79, 91-108

(e) ***Discrimination cannot be justified:*** Justice Rosenberg, SARB and a majority of the Divisional Court all rejected the Attorney General's argument that the regulation was justifiable because it treated common-law couples the same as married ones. They all found that the regulations were unrelated to this asserted objective because the purported common law "spouse" has no obligation to support the social assistance recipient, and because the regulations result in termination of benefits whether or not support is actually provided.

Rosenberg J., para. 118; *SARB*, pp. 55-62; *Reasons*, paras. 142-143

49. Other jurisdictions have struck down comparable provisions for similar reasons:

(a) The spouse in the house rule in Alabama was struck down by the United States Supreme Court in 1968. As in this case, the government argued that the rule was "only fair" because it treated married and unmarried single mothers in a like manner. The court found that the rule was inequitable because the male co-resident had no legal obligation to support the children for whose benefit the assistance was provided.

(b) The spouse in the house rule in Nova Scotia was struck down by the Nova Scotia Supreme Court in 1994. The court found that sole support mothers were discriminated against, contrary to section 15(1) of the Charter, and that the rule erred by focussing on the fact of living together rather than on actual support provided.

(c) A statutory "dum casta" clause in Nova Scotia, with effects substantially similar to the spouse in the house rule, was struck down in 1997 by Chief Justice Glube of the Nova Scotia Supreme Court. She found that it violated sections 7 and 15 of the Charter and was not saved by section 1 because it did not take account of the actual financial circumstances of the women affected.

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

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

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

VII. OTHER FINDINGS OF THE DIVISIONAL COURT

50. All of the Attorney General's major arguments were rejected by the Divisional Court majority.

51. With respect to the Attorney General's assertion that the regulations avoid marginalizing common-law couples by treating them the same as married couples, the Divisional Court stated:

> With respect, that is a wrong characterization of the situation at bar. When the interests of the individuals are considered, rather than the interests of the alleged couple, against the background of the evidence before the Board, it is seen that the interests of the single mother in such an alleged couple are thoroughly marginalized, ignored and devalued. The evidence shows that frequently the effect is that she and her children are forced to be economically tied to a man, or that she must give up having live-in relationships or even merely sharing accommodation with men. Such a state requirement is inimical to the human dignity of the single mother and is demanded only of persons receiving income assistance.
>
> *Reasons,* para. 67

52. The Divisional Court rejected the Attorney General's proposition that the regulation provides an appropriate "functional" definition of a "marriage like" relationship. The court focused on the actual effect of the definition:

> ... There is all the difference in the world between a person, with her own money, sharing accommodation in the hope that an inchoate relationship may flourish, versus a person whose financial support is largely in the hands of her co-habitant who has no legal obligations towards her and her children. As a functional definition of a marriage-like relationship, the Regulation is deeply flawed because it assumes equivalency between a co-habitant who has support obligations to the applicant or recipient and one who does not.
>
> .... [There is] another serious flaw in the definition as a functional one: it does not distinguish between those financial arrangements that resemble marriage (the objective as stated by counsel to us), and those that do not, including arrangements such as 50:50 which would normally be thought to signal financial independence.
>
> *Reasons*, paras. 69-70

53. The Divisional Court rejected the Attorney General's proposition that if a sole support mother is still in need after being deemed a "spouse", she can simply apply for welfare as part of a "couple":

> ... While this seems like a fair approach, the reality of the system is that people are forced off social assistance because of their relationships. Respondent J. and her co-resident applied for benefits as a family unit, but were refused because J.'s co-resident was self-employed and therefore ineligible. The effect of the cancellation of J.'s "sole support parent" benefits, then, was to force her into a position of choosing between her relationship with her co-resident and her need for social assistance. Respondent S. was also forced to apply for social assistance as a family unit with her co-resident... In making the co-resident the head of the household, the welfare office essentially placed S. and her children's economic well being in the hands of a former substance abuser.

Reasons, para. 71

54. Contrary to the Attorney General's argument that there was no statistical evidence supporting the disproportionate impact of the regulation, the Divisional Court stated that the statistical evidence was "clear", that women and sole support mothers are disproportionately affected by the regulations:

> ... the impugned definition in practice particularly affects poor sole support mothers as is shown by the evidence discussed above. There is extensive evidence in this case that the negative effects of the "spouse in the house" rule are disproportionately felt by sole support mothers and their children, already one of the most deeply disadvantaged groups in Canadian society. The Regulation before us not only "fails to take into account" this disadvantage but is likely to perpetuate and further entrench it.

Reasons, paras. 74, 79

55. The historical disadvantage suffered by sole support mothers was readily apparent to the Divisional Court:

> ... The Respondents argued that there is evidence of historical disadvantage for sole support parents on social assistance. The evidence supports the Respondents' submission. Single mothers have always been economically disadvantaged, as they make up one of the most economically disadvantaged groups in Canada; some 60% of all mother-led families live in poverty. Ornstein, "A Profile of Social Assistance Recipients in Ontario", provides evidence that social assistance recipients have difficulty becoming self-sufficient, in part because of limited education and lack of employability. It is also true that social assistance recipients often face the resentment and anger of others in society, who see the recipients as freeloading and lazy. This stigma leads to social exclusion and isolation (Respondent Record, Vol. III, tab 15). There is thus significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers.

Reasons, para. 86

56. The Divisional Court also found it evident that the status of being a sole support mother is immutable for all relevant purposes:

> ... Examined, as it must be, from the perspective of the equity claimant, the status of being a social assistance recipient cannot be changed except over an extended period of time. At the point when the claimant experiences the impugned discrimination, she continues in financial need and cannot change her status except by foregoing state assistance, surely an unacceptable personal cost. The possibility of changing her status at some later time is irrelevant to her experience, and therefore irrelevant to the section 15 analysis. Her status is, therefore `immutable' as that concept has developed in the authorities cited supra. All the other indicia of analogous grounds are also apparent when viewed from the perspective of the claimant: prejudice, stereotyping, social and political disadvantage are all found in the evidence before the Board and in its findings.

Reasons, para. 110

57. The Divisional Court found that the effects of the Regulation are directly related to the values protected by section 15(1) of the Charter, namely the protection of human dignity:

> ... The evidence shows that the legislation exacts a price from those women for their relationships which it does not exact from other women in society with similar relationships: their financial independence.
>
> The price so exacted is payable in human dignity. This legislation aims directly at the heart of the identity and personhood of the sole support mother on social assistance: she must surrender the right to determine for herself whether she is to be a "spouse", whether she is to retain her economic independence or surrender it involuntarily to another person who has no obligation to provide assistance to her or to her children. This is manifestly an invasion of one of the fundamental attributes of personal identity and autonomy.
>
> ... The regulations reinforce... pre-existing disadvantage and vulnerability. Persons on social assistance are often stigmatized and feel themselves unworthy. The serious invasion of their privacy and the unwarranted assumption of their dependency upon a man occasioned by the Regulation can only reinforce this unfortunate aspect of their lives.
>
> *Reasons*, 107-108, 124

58. The Divisional Court rejected all of the objectives of the regulation put forward by the Attorney General:

> The evidence suggests some possible objectives of the state. The first is to capture any actual support being given to the recipient by the co-habitant. But other regulations of general application to all recipients already require a full accounting of income and support as a basic pre-condition to receiving state assistance. The second is to treat common-law couples as married couples are treated, the objective as put to us by counsel for the Appellants. This is all very well, but as noted earlier, the whole issue before us is the creation of artificial couples where no "couple" actually exists. Finally, the state could have in mind the stereotypical view that a man having an intimate relationship with a woman ought to support her and they ought to form a family unit, whatever their own intentions may be. This would be simply an attempt to impose a certain standard of conduct and morality on people without accomplishing any legitimate state purpose....
>
> It is difficult to accept the objectives as put forward by counsel for the Appellant government. Take first the concept of considering the private resources available to common law couples on the same basis as married couples: the resources available to the "family unit"....[T]he impugned legislation does not just treat common-law couples the same as married couples, but it catches a large number of relationships which do not resemble marriage, where there is no "couple" and no "family unit" involved. Mr. Costante admitted that the Regulation can make roommates of the opposite sex, who share nothing but accommodations, "spouses" for the purposes of social assistance. All of this makes nonsense of the claim that the pressing concern on the part of the government is to ensure equality between common-law and married couples....

> The proper allocation of its funds is an important government objective and the identification of social assistance recipients who have private resources available to them is an obvious aspect of good management. But the public purse cannot be protected constitutionally by overriding the rights of the poorest and weakest in our midst....
>
> Where there is neither an actual contribution to the recipient's needs, nor a legal obligation to make such a contribution, the causes of fair allocation and equal treatment are not advanced by a legislative fiction that resources are available from the co-habitant....
>
> ... [T]he overall legislative objective of providing assistance where it is needed is impaired, not advanced, by the exclusion of persons in need upon specious grounds such as a fictitious spousal or marriage-like relationship. Such a fiction also does nothing to advance the cause of equality between married couples and true common law couples.
>
> *Reasons*, paras. 113, 132, 134, 142-3

59. The Divisional Court found that it was not necessary to rule on the Respondents' submission that the true objective of the legislation is to enforce a particular code of morality, however the court nevertheless stated that "when legislation fails to accomplish the purported objective, some scepticism is justified about whether the purported objective is the true objective." The Court stated, further, that the regulation "appears to owe a good deal to the view of some in society that a woman on social assistance should refrain from intimacy with a man."

Reasons, paras. 137, 139

60. Finally, the Divisional Court strongly disagreed with the Attorney General's submission that the regulations are only a minimal impairment of the Respondents' Charter rights, stating that "it is hard to think of a more intrusive scheme than to force two persons sharing accommodation into an unwanted economic relationship, often placing the female member in a position of dependency upon the male who owes her no obligation based on law or on mutual agreement."

Reasons, para. 144

PART IV – THE LAW

I. CRITERIA FOR GRANTING LEAVE

61. This Honourable Court has stated,

(a) that decisions of the Divisional Court in its appellate capacity "are intended to be final";
(b) that "review of [such] decisions by the Court of Appeal are to be the exceptions to the general rule";

(c) that "the possibility that there may be error in the judgment or order [of the Divisional

Court] will not generally be a ground in itself for granting leave".

Re Sault Dock Co Ltd and City of Sault Ste. Marie (1973), 2 O.R. 478 (C.A.) at pp. 479-480.

62. The Attorney General has stated that leave should be granted because the case involves questions of mixed fact and law involving the interpretation and constitutionality of a regulation. It is submitted that the question is not whether such issues are raised, but whether there is *sufficient valid controversy* that the issues warrant consideration by the Court of Appeal. There are many cases involving interpretation or constitutionality of a regulation which have not been granted leave to appeal, including where the court below was divided.

Masse v. Ontario (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.); leave to appeal refused (1996), 40 Admin L.R. (2d) 87n (Ont. C.A.) (21 percent cut in welfare rates amounting to over $1 billion)

Pembroke Civic Hospital v. Ontario (Health Sciences Restriction, Commission (1997) 36 O.R. (3d) 41 (Div. Ct.); leave to appeal refused [1997] O.J. No. 3603 (C.A.) (government authority to close down public hospital)

Van Schyndel v. Harrell and City of Oshawa (1991), 6. O.R. (3d) 35 (Div. Ct.); leave to appeal refused January 20, 1992, per Lacourciere, Krever and McKinlay JJ.A.(interpretation of the *Municipal Conflict of Interest Act*)

63. Against the backdrop of three consistent constitutional decisions in this case, it is submitted that the Attorney General's submissions raise no more than a slight possibility of error. Much of the Attorney General's argument is with the reasons of the Divisional Court, which are not appealable. In considering leave, this Honourable Court should be primarily concerned with the correctness of the outcome, not the reasons.

Sopinka, The Conduct of An Appeal,(Toronto: Butterworths, 1993) at pp. 3-4

64. The Attorney General has also stated that leave should be granted because the case involves a matter of public importance. In reality, the question is very narrow: whether one part of a four-part definition of "spouse" violates section 15 of the Charter. The Divisional Court decision intrudes very minimally on the government's ability to regulate social assistance eligibility. There is no affidavit evidence, and no study or government report, suggesting that the matter is important, and the evidence in this proceeding is that the financial impact is minimal.

II. THE DIVISIONAL COURT DID NOT ERR

A. Criteria for spousal status

65. The Attorney General suggests that the Divisional Court rejected a "functional definition" of spouse. It did not. It only rejected one part of the definition set out in the regulation, and in particular the fact that it captured persons who would not be considered "spouses" as that term is

normally understood.

66. The cases relied upon by the Attorney General in no way suggest that a "functional definition" of spouse is necessarily constitutional, or that such a definition is necessary in order to ensure constitutionality. In *Warwick* it was found that economic factors are relevant to a determination of spousal status. This is consistent with the present case, since the Divisional Court rejected the definition precisely because it rendered economic factors virtually meaningless. *M. v. H.*, *Miron v. Trudel* and *Canada (A.G.) v. Mossop* all involved couples who wished to be equated to married couples and relied on certain functional characteristics to make their case. This does not mean that any "functional definition" is adequate, and, when applied, will be constitutional.

Re Warwick and Minister of Community and Social Services (1978), 21 O.R. (2d) 528
M. v. H., [1999] 2 S.C.R.3
Miron v. Trudel [1995] 2 S.C.R. 418
Canada (A.G.) v. Mossop, [1993] 1 S.C.R. 554

B. Court's reliance on three-year rule in *Family Law Act*

67. The Attorney General argues that the effect of the Divisional Court reasons is to require the definition of spouse in social assistance legislation to "mirror" the definition in family law legislation, and asserts that this is not the norm among other provinces. The existence of any such norm is irrelevant. The constitutionality of legislation in other provinces cannot be presumed. Powerful considerations of access to justice prevent welfare recipients from mounting challenges such as this one; in the only provinces in which these cases have gone forward, the spouse in the house rules have been invalidated.

68. In any event, the decision of the Divisional Court contains no requirement that the definitions of spouse in social assistance law and family law be identical. The Divisional Court referred to the family law definition of spouse in considering the burden created by the impugned regulations. It found that it was discriminatory to allow a three year period of relationship development for co-habiting couples who are not on social assistance, while providing no period whatsoever for co-habiting couples on social assistance. The court did not rule on what time period would be sufficient to remove the discrimination.

69. Furthermore, this was not the only burden which informed the Divisional Court's finding of discrimination. As in the case of *Rehberg*, it is enough that the negative effects of the rule are felt disproportionately by women and single mothers. These effects include: the chilling effect on the ability to form personal relationships with persons of the opposite sex; increased difficulty in obtaining safe, affordable accommodation; the intrusive and degrading invasion of privacy occasioned by the inquiry into spousal status; forced financial dependence on a person who has no legal obligation to support; reduced social assistance benefits or complete loss of the means of subsistence; insult to dignity due to rejection by the state of individuals' own view of fundamentally personal relationships and choices; and interference in the development of healthy relationships, between parent and

co-resident, and between co-resident and child.

R. v. Rehberg, supra

C. Alleged failure to consider alternate statutory interpretation

70. The Attorney General states that the Divisional Court should have interpreted the regulations so as to render them constitutional, as Belleghem J. did in dissent. The Attorney General did not appeal SARB's ruling on interpretation of the regulations.

71. The principle relied upon by the Attorney General is that where there are competing *but reasonable* interpretations of a statute, the court should reject any interpretation which would render the statute unconstitutional. The court is not entitled to re-write or augment the plain words of a statute in order to create a constitutional interpretation. It is submitted that this is what Belleghem J. did in his dissent. He added criteria which do not exist in the plain words of the regulation. A panel of the Divisional Court has found that even SARB's "more than trivial" interpretation is an inappropriate embellishment of the regulations.

Thomas v. Ontario (Ministry of Community and Social Services), May 2, 2000, per Matlow, Jennings & Lederman JJ.

72. The Attorney General is asking this court to virtually re-write the regulations. Yet the government has made no effort in the last five years to clarify its meaning through a simple amendment to the regulation. To the contrary, the Attorney General adopted the very same spouse definition under new social assistance legislation, in 1998, even after SARB had found that there must be "economic inderdependence which is more than trivial"in 1997.

D. Standard of review of findings of legislative and constitutional fact

73. The Attorney General argues that the Divisional Court gave inappropriate deference to SARB's findings of legislative fact. In fact, the Divisional Court extensively reviewed the record of legislative fact and concluded that the evidence clearly supported SARB's findings.

74. The passages which the Attorney General relies upon from *R.J.R. MacDonald* state that the appeal court is *entitled* to differ from the lower tribunal on matters of legislative fact. They do not state that the appeal court is required to conduct the same extensive evaluation as the tribunal below, or that some deference to the lower tribunal is not appropriate.

R.J.R. - MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199

75. In paragraph 51 of his factum the Attorney General states that the Divisional Court

made findings about the economic circumstances of the Respondents which are not supported by the evidence. There are no such errors identified anywhere in the Attorney General's factum.

E. Section 15 of the Charter

a. Differential treatment

76. The Attorney General argues that the Divisional Court erred in its consideration of the distinction created by the regulations. He states that the proper distinction is between persons who meet the requirements of the definition, and those who do not.

77. The Attorney General refers to the distinction which appears on the face of the impugned provision. This distinction is not necessarily -- or even normally -- the one which is relevant for Charter purposes. Rather, the appropriate distinction is often one which is apparent from the effect of the regulations. In this case, the regulations result in sole support mothers on social assistance being treated differently from other sole support mothers, since the latter are entitled to reside with a person of the opposite sex without facing any financial assumptions or penalties.

Eldridge v. British Columbia (1997), 218 N.R. 161 (S.C.C.)

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

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at pp. 57-8, 88

Corbiere v. Canada, [1997] 2 S.C.R. 203

78. The Attorney General disputes the fact that women and sole support parents are disproportionately affected by the regulations in numerical terms. Three fact finding tribunals have now found to the contrary. The statistics speak for themselves.

79. The Attorney General states that according to the Divisional Court, there would be "adverse effect discrimination whenever a law applies to a pool of persons made up of a majority of women". This is not true. In addition to a finding of differential treatment of or effect upon an enumerated or analogous group, a breach of section15 requires that the law, in purpose or effect, perpetuates existing disadvantages or stereotype, thus promoting the view that the affected class is less capable or less worthy of recognition or value as human beings or as members of Canadian society.

Law, supra
Lovelace v. Ontario 2000 SCC 37

b. Analogous grounds

80. The Attorney General complains that the discussion of analogous grounds refers variously to sole support parents, sole support parents on social assistance, and sole support mothers.

This arises from the court's discussion of various cases, which have each proceeded on varied grounds. Any of these grounds is applicable to the present case.

81. The Supreme Court of Canada has never required that a personal characteristic be immutable to qualify for section 15 protection, although "[t]he fact that a characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous group". The Divisional Court expressly found that the characteristic of sole support motherhood is sufficiently immutable for section 15 purposes, namely, that it was at least temporarily not alterable by "conscious action". This is entirely consistent with recent Supreme Court jurisprudence, which holds that the real question is whether the government has a legitimate interest in "expecting us to change in order to receive equal treatment", and whether recognition of the ground as analogous would further the protection of human dignity.

Miron v. Trudel, supra, at para. 148

Vriend v. Alberta, [1998] 1 S.C.R. 493, at para. 90

Corbiere, supra, at para. 20.

Law, supra, at para. 93

82. The Attorney General states that sole support mothers cannot be analogous because membership in the group is fluid. This is true of many other Charter protected groups as well, such as persons with disabilities and non-Canadian citizens.

83. The Attorney General relies on the decision of *Masse* as binding on the analogous grounds issue in the present case. That case pre-dates key Supreme Court jurisprudence on this issue. It was decided by the Divisional Court and is not binding on this Court. In any event, the majority in that case did not deal with the group of sole support parents on social assistance. The one judge who addressed this issue, Corbett J., found the group to be analogous.

Masse, supra

c. Discrimination

84. The Attorney General rejects the contention that the spouse definition is demeaning to women and sole support mothers. This is contrary to the direct evidence of the Respondents, the experts, and the findings of Rosenberg J., SARB and the Divisional Court majority.

85. The Supreme Court of Canada has recently made clear that it is the perspective of the Charter claimant that matters. The question is not whether the government admits that it has devalued the Respondents, but whether the regulation causes the Respondents to experience the regulations as demeaning them and perpetuating stereotypes by which they are already burdened.

Law, supra

d. Section 1 of the Charter

86. The court below found on the evidence that the objective of equality between married and unmarried couples was not pressing and substantial. Moreover, "the impugned legislation does not really deal with that issue. Instead it sweeps up individuals who are not part of a couple at all."

87. The Attorney General relies on the case of *Miron v. Trudel* for the proposition that equal treatment of married and common law couples is constitutionally mandated and therefore a pressing objective. That case dealt with persons who considered themselves to be spouses and were excluded from the benefits associated with that status. This does not mean that persons who do not consider themselves to be spouses are constitutionally required to be treated as such. The Supreme Court of Canada has insisted that substantive rather than formal discrimination is the essence of a section 15; it has accepted that "substantive inequality [may not be effected] through formally identical treatment."

Weatherall v. Canada (Attorney General) [1993] 2 S.C.R. 872
Law, supra, at paras. 25, 36, 82

88. The Attorney General complains that the Divisional Court failed to recognize "allocation of public resources to persons most in need" as a pressing objective. Whether or not this is true, the Divisional Court's more important conclusion was that the regulation was not rationally connected to this objective because it *does not take into account actual need.* It denies social assistance benefits to a person whose co-resident has no means or intention of providing support.

PART V – ORDER REQUESTED

89. The Respondents therefore submit that the motion for leave to appeal should be dismissed.

90. In the alternative, if leave is granted, the Respondents propose that the following questions should be answered by the Court:

(a) Does the definition of "spouse" in s. 1(1)(d) of the Regulation violate sections 7 and 15 of the Charter, as found by SARB?
(b) If the definition of "spouse" violates the Charter, is it justified under section 1 of the Charter?

91. The Respondents concur with the Attorney General's request (not stated in his factum but otherwise communicated to the Respondents) that the appeal be expedited if leave is granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF AUGUST 2000

Raj Anand

M. Kate Stephenson

Chantal Tie

APPENDIX "A"

EFFECTS OF SPOUSE RULE ON CHARTER PROTECTED GROUPS

GROUP	group as % of total caseload	group as % of singles caseload	group as % of persons "affected" by spouse rule	group as % of persons terminated by spouse rule	group as % of persons terminated, returning as single	group as % of persons terminated, return as couple	group as % of persons terminated and remaining off assistance
women	54.2	60.2	70.5	88.9	84.2	80.6	92.1
single mothers	27.7	33.1	59.5	76.01	67.7	65.3	80.3

SOURCES: *Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, para. 33, Exhibit E, pp. 234-235*

SARB Decision on Charter issues, Exhibit 3 at 391

SCHEDULE "A"

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

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

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

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

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

Sault Dock Co Ltd and City of Sault Ste. Marie (1973), 2 O.R. 478 (C.A.)

Masse v. Ontario (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.); leave to appeal refused (1996), 40 Admin L.R. (2d) 87n (Ont. C.A.)

Pembroke Civic Hospital v. Ontario (Health Services Restricturing, Commission) (1997) 36 O.R. (3d) 41 (Div. Ct.); leave to appeal refused [1997] O.J. No. 3603 (C.A.)

Van Schyndel v. Harrell and City of Oshawa (1991), 6. O.R. (3d) 35 (Div. Ct.); leave to appeal refused January 20, 1992, per Lacourciere, Krever and McKinlay JJ.A.

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

M. v. H., [1999] 2 S.C.R.3

Miron v. Trudel [1995] 2 S.C.R. 418

Canada (A.G.) v. Mossop, [1993] 1S.C.R. 554

Thomas v. Ontario (Ministry of Community and Social Services), May 2, 2000, per Matlow, Jennings and Lederman JJ.

R.J.R. - MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199

Eldridge v. British Columbia (1997), 218 N.R. 161 (S.C.C.)

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

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Corbiere v. Canada, [1997] 2 S.C.R. 203

Lovelace v. Ontario 2000 SCC 37

Vriend v. Alberta, [1998] 1 S.C.R. 493

Weatherall v. Canada (Attorney General) [1993] 2 S.C.R. 872

SARB M-12-25-25

SARB P-05-18-26

SARB M-01-13-54

SARB M-04-22-12R

SARB M-11-11-25

SCHEDULE "B"

Regulation 366, ss. 5, 8, 13-15, 41

Regulation 537 ss. 9 (1), (3)

Regulation 134/98 ss.33-36

Regulation 222/98 ss. 23-25

SCHEDULE "C"

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

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

Sopinka, The Conduct of An Appeal, (Toronto: Butterworths, 1993)