

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

**Applicants
(Respondents in Appeal)**

- and -

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

**Respondents
(Appellants in Appeal)**

- and -

**CANADIAN CIVIL LIBERTIES ASSOCIATION and
WOMEN'S LEGAL EDUCATION AND ACTION FUND**

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PART I – OVERVIEW

1. This appeal 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) cannot support them. The vast majority of persons affected by the regulation are women, particularly sole-support mothers, and their children.

2. This appeal is from a decision of the Divisional Court in which two members of that court (i) found that the impugned definition of spouse violated the equality rights of women and sole support mothers on social assistance and (ii) rejected the Attorney General's rationale of equality between married and cohabiting couples. The matter was an appeal from the Social Assistance Review Board (SARB), which had reached the same conclusions.

3. In earlier proceedings, Justice Rosenberg of the Superior Court of Ontario had found a violation of equality rights for the essentially the same reasons, disagreeing with the two other members of a Divisional Court panel who had determined that the matter should be considered by SARB in the first instance. Similar legislative provisions have been struck down by courts in other jurisdictions, for reasons substantially similar to those of Rosenberg J., SARB and the Divisional Court in this case.

4. In this appeal, the Attorney General's primary attack is on factual findings made by SARB and affirmed by the Divisional Court. The Attorney General's argument relies on these factual assertions, which are directly contrary to the findings of SARB and the Divisional Court:

- . that the definition captures only couples who are "sociologically" spouses;
- . that the economic component of the definition captures only financial arrangements which resemble the financial arrangements of married couples;

- . that the definition has no "chilling effect" on the formation of close relationships by social assistance recipients;
- . that the definition does not have a disproportionate effect on women and single mothers.

5. The Respondents will argue that this Honourable Court should exercise its usual caution with respect to overturning factual determinations, and that in any event the record amply supports the findings of the tribunals below. The Attorney General's legal arguments should fail, therefore, since they are based on erroneous factual premises. In addition, his arguments should fail because they seriously disregard several key aspects of the jurisprudence of the Supreme Court of Canada on section 15 of the *Charter*. The Respondents also assert that the impugned definition violates section 7 of the *Charter*.

PART II - THE FACTS

1.0 The Respondents

6. The four Respondents are sole support mothers. Each was terminated from social assistance in 1995 following new social assistance regulations under which it was determined that her male co-resident was her "spouse". None of the co-residents had the means or the obligation to support the Respondents or their children.

Decision of the majority of the Divisional Court, Appeal Book, Tab 3 (hereinafter, "Reasons"), at paras. 19-26

Affidavit of Cynthia Pauline Johnston, Appellants' Record, Vol. 1, Tab 7, para. 22, p. 118

Affidavit of Deborah Ann Sears, Appellants' Record, Vol. 1, Tab 8, paras. 51, 61

7. Each of the Respondents had moved in with her co-resident with the expectation that she could maintain financial independence for a three year period, during which time she would be able to consider whether the relationship would become permanent. Each Respondent had consciously chosen not to enter the sort of committed relationship in which she and her co-resident would rely

on each other for financial support. In each case financial independence and a trial period were crucial to the Respondent because she had experienced serious abuse in the past, from a family member or former spouse.

Reasons, at paras. 19-26

SARB *Charter decision*, Charter Record of Proceedings, (hereinafter "*Charter decision*"), at pp. 5-10, 24

Affidavit of Sandra Elizabeth Falkiner, Appellants' Record, Vol. 1, Tab 5, para. 30, p. 49

Affidavit of Claude Marie Cadieux, Appellants' Record, Vol. 1, Tab 6, at paras. 32, 41, pp. 89, 92

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

Cross-examination of Sandra Falkiner Record of Proceedings (Sandra Falkiner), pp. 126, 160, 187

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

Examination of Deborah Ann Sears, Record of Proceedings (Deborah Sears), at p. 12

8. In paragraph 87 of his factum the Attorney General suggests that the Divisional Court misapprehended the degree of economic interdependence present between the Respondents and their co-residents. The differences suggested are illusory. The Court's review of the facts is abbreviated, but it is an accurate summary in all material respects.

9. Specifically, the factual record is clear that the Respondents and their co-residents shared some household expenses (which is inevitable when two people live together) but that they intentionally maintained financial independence as much as possible. Any pooling of resources, and any payment of bills beyond "fair share" was not because of any commitment to support each other, but because otherwise they risked being evicted or having essential services cut off. Deborah Sears said, "I need my financial independence to protect me and my children". Cynthia Johnson that the she juggled the bills and paid them with whatever money there was between herself and her co-resident. She said, "I couldn't take the risk of having something cut off because I didn't have, you know, the money... I was going to make sure the kids were fed and warm and sheltered".

Examination of Cynthia Pauline Johnston, Record of Proceedings (Cynthia Pauline Johnston), pp. 39, 40, 42, 43

Examination of Deborah Ann Sears, Record of Proceedings (Deborah Ann Sears), p. 107

Affidavit of Sandra Falkiner, Appellants' Record, Vol. 1, Tab 5, para. 22, p. 44

Affidavit of Marie Cadieux, Appellants' Record, Vol. 1, Tab 6, para. 31, p. 89

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

Charter decision, pp. 5-10, 24

10. With respect to the fact that Deborah Sears had a joint bank account with her co-resident, cited by the Attorney General, SARB found that she did not use the account and had opened it with him only because he was exiting an addiction recovery program and was unable to get an account in his own name.

Charter decision, at p. 8

Affidavit of Deborah Ann Sears, Appellants' Record, Vol. 1, Tab 8, para. 39, p. 141

Examination of Deborah Ann Sears, Record Of Proceedings (Deborah Ann Sears), lines 11-16, p. 55

2.0 The Social Assistance Regime

11. There is no need to apply the "spouse" definition to ensure that all of a social assistance recipient's income, actual or deemed, is taken into account. A variety of regulations of general application to all recipients require them to give a full accounting of income and support received from all sources, whether in cash or in kind. This is a pre-condition of obtaining assistance. Failure to disclose or to make reasonable efforts to pursue all available resources may result in termination of benefits. An allowance is only provided if the person is "in need" after taking into account all amounts received from private sources.

Ontario Regulation 366 (*Family Benefits Act*), (hereinafter "Regulation 366"), ss. 3, 5(b), 8, 13(1),

13(2), 14, 15, 41(1)

SARB, T-06-03-15

SARB, K-09-27-21

12. Where a recipient is living with another adult, that person's presence is taken into account in determining entitlement in a variety of ways.

- (a) Where two adults reside together, one of whom is a social assistance recipient, the other adult will be **deemed** (regardless of the actual situation) to be paying half of the rent, and the allowance of the social assistance recipient will be reduced accordingly (even if one adult has children and therefore uses more space): Regulation 366, s.

41(1).

- (b) If the social assistance recipient can prove that the co-resident is not sharing but rather 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. 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.
- (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). 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)(ii). 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.

13. Where the other adult living with an applicant or recipient is considered to be a "spouse", it is presumed that she and her "spouse" share all of their resources within the "family" unit, and that the "spouses" will provide for one another if either is in need. Individual members of the "couple" are not entitled to receive social assistance in their own right. Rather, the "couple" is eligible for assistance on the basis of their combined resources. It is deemed that each "spouse" has access to all of the income and assets of the other "spouse". This is the only situation in the social assistance regime where persons who are not actually dependent on (children), or legally obligated to one another, are put together in a benefit unit.

Reasons, at para. 113
Regulation 366, s. 13(1)(b)

14. A "couple" or "family" (if there are dependent children) is not eligible for any assistance if one of the adults is a student, is self-employed, or does not meet social assistance requirements, such

as the obligation of complete financial disclosure. In these cases, both members of the "couple" are deemed ineligible for assistance, even if they are "in need" based on their individual financial resources.

Regulation 366, ss. 7(1), 8(1), 17(1)

3.0 The Impugned Definition

15. Up to 1985, the definition of spouse required a determination of whether opposite-sex co-residents were living "as husband and wife". In 1986, in the wake of a legal challenge, the government acknowledged that this definition involved an unwarranted intrusive investigation of social assistance recipients' private lives. An interim definition was in place during 1986, while extensive study of the issue was undertaken.

Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, paras. 31-35, pp. 160-162

16. A new definition was enacted in 1987. It provided that persons were not deemed to be spouses unless they had legal support obligations, or until they had lived together for three years. This definition was consistent with the family law regime in which the obligation of financial support arises after three years of cohabitation.

Undertakings of Kevin Costante, Appellants' Record, Vol. 6, Tab 23, Exhibit I, pp. 1624-1647
Affidavit of Nancy Vander Plaats, Appellants' Record, Vol. 1, Tab 10, at paras. 31-35, pp. 160-162

17. The 1987 definition was replaced in 1995 by provisions which were struck down in the present case. They defined a spouse as, *inter alia*:

- (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.

Regulation 366, s. 1(1)(d)

18. Persons living together are deemed to be spouses under this regulation unless they provide evidence to the contrary.

Regulation 366, s. 1(3)

19. The introduction of the spouse definition was part of an “anti-fraud” package which was publicized as being intended to “ensure the system is protected for people with genuine needs”. The package included creation of a “Welfare fraud hotline” (encouraging anonymous calls from the public about possible welfare fraud) and creation of a centralized “fraud prevention team”.

Undertakings of Kevin Costante, Appellants' Record, Vol. VI, Tab 23, Exhibit O
Mosher, "*Managing the Disentitlement of Women: Glorified Markets, the Idealised Family and the Undeserving Other*" in *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford, 2000), p. 43

4.0 Use of "Functional" Criteria

20. The Attorney General's entire appeal is premised on the assertion that the regulation captures only co-residency relationships which are functionally similar to marriage. This premise is contrary to the findings of SARB and the Divisional Court, and not supported by the Attorney General's own evidence.

21. Contrary to the Attorney General's assertion, the definition does not rely on the functional criteria identified in prior jurisprudence and in sociological literature.

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

22. One of the sociological indicia -- sexual interaction -- is expressly excluded by the regulation. It may not even be used to rebut the presumption of a spousal relationship, for example, where co-residents do not have the same sexual orientation, or where they are relatives.

Regulation 366, s 1(2)

23. The economic component of true spousal relationships is also effectively ignored by the definition, according to the interpretation of the economic criteria applied by SARB and the Divisional Court in numerous cases. As stated by SARB and reiterated by the Divisional Court, "it is hard to imagine that any two persons sharing accommodation would not have some financial arrangement and so be caught by the definition". The degree of economic interdependence mandated by the regulation is so low that social and familial factors essentially govern. The Attorney General's own witnesses admitted that the economic component could capture fair share and pro rata financial arrangements, whether or not one co-resident was receiving any support from the other.

Reasons, at para. 70

Charter decision, at paras. 26, 51, 60

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

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

Cross-examination of Dianne Matzelle, Record of Proceedings (Sandra Falkiner), pp. 90-93

24. Use of the definition's three criteria to *identify* spouses is not supported by the studies relied upon by the Attorney General. In all of the studies, the couples *self-identified* as being "common law", indicating that they viewed their relationship as having a degree of permanence or commitment. Neither permanence nor commitment is considered in the impugned spouse definition.

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

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

25. Furthermore, the studies demonstrated that self-identified common law relationships exhibit wide variations with respect to each criterion listed in the provision. The Attorney General's own expert witness testified there is no common template for spousal relationships. This suggests that there is no way to tell, from the three criteria alone, whether a relationship is spousal.

Affidavit of Susannah Wilson, Respondent's Record, Vol. 2, Tab 2, paras. 18, 23, pp. 6, 8

26. The majority in the Divisional Court stated that the regulation is "deeply flawed" as a functional definition of a marriage-like relationship because it "assumes equivalency between a co-habitant who has support obligations... and one who has not" and because it "does not distinguish between those financial arrangements that resemble marriage... and those which do not". The majority also recognized the importance of commitment to a finding of spousal status.

The Regulation captures as part of a "couple", individuals who have not formed relationships of such relative permanence as to be comparable to marriage, whether formal or common law. It makes couples, or family units, out of individuals like the Respondents who have made no commitment to each other, with accompanying voluntary assumption of economic interdependence.

Reasons, at para. 69

27. The dissent also appeared to recognize that permanence or a commitment to support one another is important to a spousal determination.

A reasonable period of physically residing together in the same premises is surely required before a finding of cohabitation can be made in the first place. "Staying over" ... is unlikely to be considered "cohabitation".... A year together, however, may be a different story. Or it may not. Four years may, or may not.

Dissenting Reasons of Justice Belleghem (hereinafter "Dissent"), at para. 47

5.0 Administration of the Definition

28. The spousal definition is administered through a list of eighty questions inquiring about all aspects of the interaction between co-residents. Among the questions asked: do you and your co-resident use the same appliances; do you and your co-resident eat together or watch television

together; does your co-resident assist with child-care? These questions can be answered in exactly the same way by a person who considers himself to be a spouse, or by a boarder.

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, Exhibit 31
Cross examination of Margaret Little, Respondent's Record, Vol 3, Tab 1, Qs. 363, 367, 375, 377, 383, pp. 85-89
Cross examination of Marshall Fine, Respondent's Record, Vol. 4, Tab 5, Q. 444, p. 93

29. The Ministry did not produce any documents to show how the questionnaire is supposed to be interpreted by staff. The Attorney General claims that there was an "extensive training program" on the definition and the questionnaire, but the evidence shows a maximum of two hours training, some of which involved detailed instruction on the process for terminating clients' social assistance. The training did not provide instructions or standards on how social assistance workers should weigh the answers to the questionnaire, but stated simply that the questions reflect indicia of spousal status. The Ministry expressly emphasized to workers that persons who share expenses on a "fair share" or "50-50" basis may still be spouses.

Affidavit of Kevin Costante, Respondent's Record, Vol. 1, Tab 1, Exhibits 19, 20, 23, 28
Evidence of Lynett Cumming, Record of Proceedings (Deborah Sears) pp. 46-48; 54-55

30. The evidence shows that the definition often captures relationships which do not constitute "spousal 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.

Paul Thomas and Director of Income Maintenance Branch of the Ministry of Community and Social Services, Court File No. 50493/98, May 2, 2000 (Div. Ct.); On Appeal to the Court of Appeal, File No. M25867 (hereinafter, "Thomas")
Charter decision, at p. 51
Affidavit of Donald McKinney, Appellants' Record, Vol. 4, Tab 18, paras. 1-11, p. 1171
Affidavit of Gary Gibson, Appellants' Record, Vol. 4, Tab 19, paras. 13-27, p. 1179
Affidavit of Bonnie Nye, Appellants' Record, Vol. 4, Tab 20, paras. 13-21, p. 1217
Affidavit of Myrna Houston, Appellants' Record, Vol. 2, Tab 12, paras. 3-15, p. 534
SARB Q-08-15-10; Q-01-09-33

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