

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

BETWEEN: HER MAJESTY THE QUEEN
Appellant
(Respondent)

AND: SUZANNE THIBAUDEAU
Respondent
(Appellant)

AND: SUPPORT AND CUSTODY ORDERS FOR
PRIORITY ENFORCEMENT ("SCOPE")
Intervenor
(Intervenor)

AND: CHARTER COMMITTEE ON POVERTY ISSUES,
FEDERATED ANTI-POVERTY GROUPS OF B.C.,
NATIONAL ACTION COMMITTEE ON THE STATUS
OF WOMEN, and WOMEN'S LEGAL EDUCATION
AND ACTION FUND ("THE COALITION")
Intervenor

AND: ATTORNEY GENERAL OF QUEBEC
Intervenor

FACTUM OF THE COALITION

Counsel for the Coalition

Katherine Hardie
B.C. PUBLIC INTEREST
ADVOCACY CENTRE
#815 - 815 West Hastings Street
Vancouver, B.C. V6C 1B4
(604) 687-3063
(604) 682-7896 (fax)

Ottawa Agent for the Coalition

Philippa Lawson
PUBLIC INTEREST
ADVOCACY CENTRE
#1204 - 1 Nicholas Street
Ottawa, Ontario K1N 7B7
(613) 562-4002
(613) 562-0007 (fax)

TO:

THE REGISTRAR OF THE SUPREME
COURT OF CANADA
Supreme Court of Canada Building
Wellington Street
Ottawa, Ontario K1A 0J1

AND TO:

JOHN C. TAIT, Q.C.
Deputy Attorney General of Canada
Department of Justice Canada
239 Wellington Street
Ottawa, Ontario K1A 0H8

Jean-Marc Aubry, Q.C.
(613) 957-4663
(613) 952-6006 (fax)

Solicitors for the Appellant

AND TO:

BERNIER, BEAUDRY
Barristers & Solicitors
3340, rue de la Pérade, Bureau 300
Sainte-Foy, Quebec G1X 2L7

Michel C. Bernier
Richard Bourgault
Pierre Rioux
Bryan O'Gallagher

(418) 652-1700
(418) 652-1844 (fax)

Solicitors for the Respondent

STIKEMAN, ELLIOTT
Barristers & Solicitors
#914 - 50 O'Connor Street
Ottawa, Ontario K1P 6L2

Martine Band

(613) 234-4555
(613) 230-8877 (fax)

Ottawa Agent for the Respondent

AND TO:

LAW OFFICE OF MARY EBERTS
Suite 3512, Aetna Tower
Toronto-Dominion Centre
Toronto, Ontario M5K 1N2

Counsel:

Mary Eberts
Law Office of Mary Eberts
(416) 865-7307
(416) 865-7380 (fax)

Steve Tenai
Tory Tory DesLauriers & Binnington
(416) 865-7645
(416) 865-7380 (fax)

Solicitors for SCOPE

AND TO:

Attorney General of Quebec
Department of Justice
1200, route de l'Eglise
Ste-Foy, Québec G1V 4M1

Monique Rousseau
(418) 643-5140

Solicitors for the
Attorney General of Quebec

JACK E. PANTALONE
Barrister & Solicitor
#707 - 141 Laurier Avenue West
Ottawa, Ontario K1P 5J3

(613) 594-8780
(613) 238-1323 (fax)

Ottawa Agent for SCOPE

MARY EBERTS

920-3030

NOËL, BERTHLAUME
Barristers & Solicitors
111 Champlain
Hull, Quebec J8X 3R1

Sylvie Roussel
(819) 771-7393
(819) 771-5397 (fax)

Ottawa Agent for the
Attorney General of Quebec

INDEX

PART I:	STATEMENT OF FACTS	1
PART II:	POINTS IN ISSUE	2
PART III:	ARGUMENT	3
A.	Summary of the Coalition’s Position	3
B.	The Equality Guarantees in section 15 of the <i>Charter</i>	4
1.	The Purpose of section 15 of the <i>Charter</i>	4
2.	<i>Charter</i> Values and International Law	5
3.	The Analysis under section 15 of the <i>Charter</i>	6
C.	Application of section 15 of the <i>Charter</i> to the case at Bar	9
1.	Introduction	9
2.	The Larger Social and Economic Context	9
3.	The Groups Affected by section 56(1)(b) of the <i>Income Tax Act</i>	12
i)	Impact on the Basis of Sex	13
ii)	Intersection of Sex, Family Status and Poverty	15
4.	Section 56(1)(b) of the <i>Income Tax Act</i> Discriminates on the Grounds of Sex and Family Status	16
PART IV:	ORDER REQUESTED	20

PART I
STATEMENT OF FACTS

1. Section 56(1)(b) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, required the Respondent to include in her 1989 taxable income the child support payments made that year by her ex-husband.

2. Women as a group are economically disadvantaged relative to men. Women earn incomes far below that of men, and experience higher rates of poverty. Most women are economically disadvantaged upon divorce and separation.

10

Case on Appeal, Vol. 3, 442 at 443-448

Case on Appeal, Vol. 3, 513 at 542-543

Case on Appeal, Vol. 3, 566 at 581-582

Case on Appeal, Vol. 4, 682 at 685

Case on Appeal, Vol. 5, 937 at 955, and 966

Case on Appeal, Vol. 6, 1037 at 1039, and 1058-1062

Case on Appeal, Vol. 6, 1076 at 1076-1080

3. Ninety-eight per cent of those parents who receive child support are women. A large majority of these women are single parents who, as a group, are particularly vulnerable to poverty.

20

Case on Appeal, Vol. 6, 1033 at 1035-6

Case on Appeal, Vol. 7, 1273 at 1275

Case on Appeal, Vol. 9, 1495 at 1506

Supplementary Case on Appeal, Vol. 2, 179 at 185

PART II
POINTS IN ISSUE

4. Does s. 56(1)(b) of the *Income Tax Act*, S.C. 1970-71-72, c. 63, violate s. 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter")?

5. If so, is s. 56(1)(b) justified under s. 1 of the *Charter*?

PART III
ARGUMENT

A. Summary of the Coalition's Position

6. The Coalition submits that the Court of Appeal erred in employing a formalistic approach that restricted the equality analysis to s. 56(1)(b)'s impact on separated custodial parents on the ground of family status. Section 56(1)(b) also has a discriminatory impact on women that constitutes a violation of the sex equality guarantee in s. 15 of the *Charter*.

10

7. The Coalition submits that the interpretive approach developed by this Court demands an equality analysis on the basis of the intersection of grounds of discrimination. Section 56(1)(b) discriminates against separated custodial parents and, in particular, against single mothers, especially those living in poverty. Section 56(1)(b) violates s. 15 of the *Charter* on the grounds of sex and family status together.

8. The Coalition agrees with the Court of Appeal's conclusion that the s. 15 violation cannot be justified pursuant to s. 1 of the *Charter*. The Coalition makes no additional submissions on this issue.

20

B. The Equality Guarantees in section 15 of the *Charter*

1. The Purpose of s. 15 of the *Charter*

9. This Court has identified equality as one of the fundamental values of our society, against which the objects of all legislation must be measured. This Court has also stated that "the s. 15(1) guarantee is the broadest of all guarantees [in the *Charter*]. It applies to and supports all other rights guaranteed by the *Charter*."

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, per McIntyre J. at 185

10

10. In its developing jurisprudence, this Court has acknowledged the importance of promoting the equality of disadvantaged groups. As Madam Justice Wilson stated, "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society." Similarly, Lamer C.J. recognized that the purpose of s. 15 is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."

Andrews, supra, per Wilson J. at 154

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

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

20

11. In employing a purposive approach, this Court has recognized women's experiences of social and economic disadvantage. This Court has also ruled that s. 15 applies to claims of inequality in social and economic legislation.

Brooks v. Canada Safeway, [1989] 1 S.C.R. 1219, per Dickson C.J. at 1242-1244

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, per Dickson C.J. at 1290

Symes v. Canada, [1993] 4 S.C.R. 695, per Iacobucci J. at 756 and 753

12. This purposive approach to equality has enabled Canadian courts and human rights tribunals to recognize and remedy the various manifestations of discrimination that arise from complex and changing social relations and, therefore, to promote "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."

Andrews, supra, per McIntyre J. at 171

2. Charter Values and International Law

10 13. In interpreting the content of *Charter* rights, attention should be paid to the values which underlie the *Charter* and to Canada's international human rights obligations. This Court has determined that s. 15 embodies "a broad range of values" including "respect for the inherent dignity of the human person" and "commitment to social justice and equality."

Andrews, supra, per McIntyre J. at 171 and La Forest J. at 197

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

Reference re Public Services Relations Act (Alta), [1987] 1 S.C.R. 313, per Dickson C.J. at 349

20 14. In *Slaight Communications*, this Court recognized that Canada's international human rights obligations are both "relevant and persuasive source(s)" for the interpretation of the *Charter's* provisions. The Court also confirmed its earlier recognition in *Reference re Public Service Relations Act (Alta)* that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038, per Dickson C.J. at 1056

Reference re Public Service Relations Act (Alta), *supra*, at 349-350

15. The interpretive principle adopted by this Court is consistent with the international law principle that domestic law must be interpreted in a manner consistent with a state's international obligations.

J. Claydon, "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms" (1987), 2 *Connecticut Journal of International Law* 349 at 353

P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987), 9 *Human Rights Quarterly* 156 at 171

10

16. In *Slaight Communications*, this Court considered Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*. The *Covenant* is also relevant to the present Appeal. Article 11 of the *Covenant* recognizes the right to an adequate standard of living including food, clothing and housing. Article 10 requires the "widest possible care and assistance be accorded to the family while it is responsible for the care and education of dependent children".

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, Doc. A/6316 U.N. (1966), s. 6

20

3. The Analysis under s. 15 of the *Charter*

17. This Court has made it clear that the s. 15 analysis "should not become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation." Rather, the s. 15 analysis should proceed within the broader context of the entire social, political and legal fabric of our society.

Turpin, supra, at 1331-1332

Andrews, supra, per Wilson J. at 152

30

18. The Coalition therefore submits that under the s. 15 analysis, the Court must consider the following questions:

- 1) Which group or groups are affected by the impugned provision?
- 2) Does the impugned law discriminate on the basis of group-characteristics recognized as enumerated or analogous grounds of discrimination?

19. With respect to the first question, it is not sufficient to simply reiterate the language of the impugned provision. Rather, there must be an assessment of the impact of the law on disadvantaged groups in order to identify group characteristics which may constitute grounds of discrimination within the meaning of s. 15. In conducting this inquiry, there must be an appreciation that the affected group is likely to be diverse in that not all members of the group will share all group characteristics. This approach to identifying affected groups incorporates the concept of adverse effect discrimination in the s. 15 analysis as this Court has directed.

Brooks, supra, at 1239, 1247

Janzen, supra, at 1289-1290

Symes, supra, per Iacobucci J. at 769

20. Similarly, there must be an appreciation of the complexity of the group, in particular, that some members of the group will be identified by multiple characteristics. This recognition is of particular relevance to the second question. The Coalition submits that when considering the second question, the Court must consider not only whether there is discrimination on each of the grounds claimed, but also whether the discrimination arises out of the intersection of group characteristics. This inquiry recognizes that discrimination does not occur in discrete categories. Various forms of discrimination are inter-related, mutually reinforcing, and can operate together.

K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum* (1989): 139

30 N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 *C.J.W.L.* 25 at 40-51

N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993), 19 *Queen's Law Journal* 179 at 191-194

L. Philipps and M. Young, "Sex, Tax, and the Charter: A Review of *Thibaudeau v. The Queen*" (1995), 2 *Review of Constitutional Studies* (forthcoming) at 31-38

21. A disjunctive approach to grounds of discrimination fragments the experience of equality seekers and distorts the nature of their equality claims. As an Ontario Board of Inquiry explained:

10 An example might occur should a woman of colour claim that she has been discriminated against by a refusal to hire her. How should she frame her claim?

Both "race" and "sex" are prohibited grounds of discrimination. Under a disjunctive approach, the claim would be analyzed as being either race discrimination or sex discrimination. This would not only fragment her experience and existence; it may also defeat her claim. If the employer could show that it hires men of colour, it might resist the claim of race discrimination; if it could show that it hires white women, it might resist the claim of gender discrimination.

20 *Leshner v. The Queen* (1992), 16 C.H.R.R. D/184, per Dawson at D/213-314 [emphasis in original]

C. Application of s. 15 of the *Charter* to the Case at Bar

1. Introduction

22. On its face, s. 56(1)(b) draws a distinction between separated custodial parents and parents who have not separated. Persons raising children in two parent families are each liable for tax on that portion of their incomes used to provide for their children, and transfers of income between persons within such families are not subject to tax. Following separation, s. 56(1)(b) imposes an additional tax liability on custodial parents by requiring that child support payments made by the non-custodial parent be included in the custodial parent's taxable income.

Case on Appeal, Vol. 3, 442 at 452

Case on Appeal, Vol. 3, 513 at 540

23. Section 56(1)(b) draws a further distinction on its face between separated custodial and non-custodial parents. By virtue of s. 60(b) of the *Income Tax Act*, non-custodial parents are not liable for tax on that portion of their incomes used to provide for their children through the payment of child support. Section 56(1)(b) therefore transfers liability from the non-custodial parent to the custodial parent.

20

2. The Larger Social and Economic Context

24. Underlying much social and economic policy in Canadian society is the assumption that child-rearing work is the responsibility of women. Although not all women perform child-rearing work, and some men do, child-rearing has been seen traditionally as a female role within a two parent heterosexual family. Women are stereotyped as secondary earners. Such discriminatory notions about women's status

30

in society reinforce the social and economic devaluation of child-rearing work and are used to justify the lack of social resources available to those with primary responsibility for child rearing.

M. Gunderson, L. Muszynski, and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 13

M. Eichler, "Lone-parent Families: An Instable Category in Search of Stable Policies", in J. Hudson and B. Galaway, eds., *Single Parent Families: Perspectives on Research and Policy* (Toronto: Thompson Educational Publishing, Inc., 1993) 139 at 144-152

10 E. Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda" (1993), 6 C.J.W.L. 371, at 389-390

S. A. McDaniel, "Single Parenthood: Policy Apartheid in Canada" in Hudson and Galaway, *supra*, 203 at 205-206

Philipps and Young, *supra*, at 45-49

25. While the costs of child-rearing are high, those with responsibility for child care work also experience a restricted ability to earn an adequate living. The lack of social resources, including adequate child care programs, creates a further obstacle to market earnings. The inadequacy of social resources for those performing child care work is most acutely felt by single parents who experience a dramatic increase in the direct and indirect costs and income earning limitations linked to responsibility for child rearing.

20

Case on Appeal, Vol. 4, 586 at 599

Zweibel, *supra*, at 392-394

Statistics Canada, *Lone-parent Families in Canada* (Ottawa: Minister of Industry, Science and Technology, 1992) at 21-26 and 35-38

Gunderson et al., *supra*, at 18-19 and 28-29

26. Women disproportionately experience the disadvantages resulting from the stereotyping of child-rearing as gendered work and from the reality that it is unpaid work. Despite significant increases in labour force participation, and a greater diversity of domestic relationships, women continue to be primarily responsible for the unpaid work of home-making and child care. Child-rearing responsibilities are strongly

30

associated with the economic disadvantage of women relative to men. The lack of adequate social resources often forces women to make sacrifices affecting their paid work opportunities which men do not have to make.

Case on Appeal, Vol. 3, 442 at 444

National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Minister of Supply and Services, 1990) at 20-23

Gunderson et al., *supra*, at 9, 13-17, and 24-27

27. As this Court has recognized, women experience an unfair disadvantage as a result of bearing the disproportionate share of the social costs of both child-bearing and child-rearing. This disadvantage is exacerbated upon separation or divorce because women generally continue to be responsible for the care of children. Many women experience a severe decline in their standard of living following separation.

Brooks, supra, at 1238

Moge v. Moge, [1992] 3 S.C.R. 813, per L'Heureux-Dubé J. at 849-850, 854-856, 861-863, and 867-868

20 *Symes, supra*, per Iacobucci J. at 762-763

Gunderson et al., *supra*, at 20

28. Single mother-led families experience the highest incidence of family poverty in Canada. In 1992, 58.4 per cent of single mother-led families lived in poverty. In addition to experiencing the material restrictions of poverty such as substandard housing, inadequate diet, and reduced health, the stresses and stigma associated with poverty are magnified for low-income women caring for children. Discriminatory views about

single mothers living in poverty include the belief that single mothers are long-term welfare recipients who have too many children.

National Council of Welfare, *supra*, at 58

National Council of Welfare, *Poverty Profile 1992* (Ottawa: Minister of Supply and Services, 1994) at 14

National Council of Welfare, *In the Best Interests of the Child* (Ottawa, 1979) at 4-8

Social Assistance Review Committee, *Transitions* (Toronto, 1988) at 29-32

Gunderson et al., *supra*, at 21

- 10 29. The Coalition submits that the devaluation of women and of work done by women and the assumption that child-rearing is performed by women in the heterosexual two parent family have resulted in the social and economic penalization of those persons with primary responsibility for child-rearing and, in particular, of single mothers.

3. The Groups Affected by s. 56(1)(b) of the *Income Tax Act*

- 20 30. On its face, s. 56(1)(b) affects persons with custody of a child following separation. The affected group can therefore be distinguished on the basis of family status alone. When the impact of the law is assessed in the larger social and economic context, however, it becomes clear that the vast majority of the affected group are women. Moreover, many members of this group are poor single mothers. Thus, the characteristics of the affected group include sex and poverty in addition to family status.

i) Impact on the Basis of Sex

31. The Court of Appeal found that s. 56(1)(b) creates a distinction based on the applicant's status as a separated custodial parent, and that the relevant ground of discrimination is "family status." It held that s. 56(1)(b) does not discriminate on the basis of sex because the impugned provision:

- a) does not directly delineate women or men as a targeted group;
- b) affects some men although the vast majority of those affected are women;
and
- 10 c) on its face, appears to affect individual women and individual men in the same way.

32. Under the Court of Appeal's approach, the s. 15 analysis is reduced to a question of direct discrimination because the only violation of equality guarantees recognized is that related to the group characteristic delineated by the impugned law. Such an approach ignores the contextual and purposive analysis developed by this Court in *Andrews* and *Turpin* which demands a consideration of broader social and historical inequities within which the legislation operates, and which may be reinforced by the legislation.

20 *Andrews, supra*, per Wilson J. at 152

Turpin, supra, at 1331-1332

33. The result of the Court of Appeal's approach is reminiscent of *Bliss*. In that case, the impugned provision expressly differentiated on the basis of pregnancy and not sex. The Court described Stella Bliss as a pregnant person rather than as a woman, and found that there was no sex discrimination. Similarly, by assigning those women affected by s. 56(1)(b) to the class "separated custodial parents", the Court of Appeal applied a rigid categorical approach to the interpretation of equality guarantees that is at odds with the contemporary jurisprudence of this Court.

30 *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183

34. In *Brooks*, this Court held that pregnancy discrimination constitutes discrimination on the basis of sex. In reaching this conclusion, this Court assessed and recognized the social and economic disadvantage associated with procreation experienced by women, and the Court stated that removal of such a disadvantage is a key purpose of anti-discrimination legislation.

Brooks, supra, at 1238

35. The impact of s. 56(1)(b) must be assessed in light of the larger context of women's inequality. This assessment should not be precluded by the fact that some men are also affected by the impugned provision. As this Court has recognized, sexual harassment is appropriately characterized as sex discrimination even though some victims of sexual harassment are men. Sexual harassment is a gendered abuse of power when considered in the context of a society in which women as a group are particularly vulnerable to harassment because of their ascribed inferior status. Similarly, the gendered role of custodial parents requires that a sex equality analysis be undertaken.

Janzen, supra, at 1289-1290

36. The Federal Court of Appeal's conclusion that the impugned provision could not discriminate on the basis of sex because on its face it affects individual women and men in the same way is the result of a formalistic approach to equality analysis which has been rejected by this Court. The Court of Appeal's approach denies recognition of the social forces which place women, almost exclusively, in the position of needing and receiving child support. The disproportionate impact of s. 56(1)(b) on women is a clear signal that the provision may reinforce the disadvantage experienced by women on the basis of sex.

Action Travail des Femmes v. Canadian National Railway, [1987] 1 S.C.R. 1114 at 1139

Brooks, supra, at 1234

Janzen, supra, at 1279

Symes, supra, per Iacobucci J. at 762

ii) Intersection of Sex, Family Status and Poverty

37. A consideration of the larger social and economic context within which child-rearing work is performed reveals that s. 56(1)(b) imposes a tax liability on those performing the traditionally female role of primary care giver for children after separation of the two parent family. Section 56(1)(b) therefore affects the group concerned on the basis of a socially gendered role related to sex and family status.

10 38. The Coalition submits that s. 56(1)(b) implicates the group characteristics of sex and family status in a second way. The large majority of those affected by s. 56(1)(b) are single mothers. Thus, s. 56(1)(b) has a numerically disproportionate impact on single mothers on the basis of sex and family status. Furthermore, the Coalition submits that the imposition of an additional tax liability on single mothers who are poor exacerbates their social and economic disadvantage on the basis of their sex, family status and poverty.

20 39. Other courts have addressed the inequities facing low income single parents and have recognized the role of enumerated grounds such as race and sex while also recognizing analogous grounds such as poverty, social condition and family status. Recognizing family status as an analogous ground under s. 15 should not mean, as it did for the Court below, that a court cannot also recognize as a sex equality issue the inequities experienced by custodial parents that flow from an undervaluing of child-rearing work.

Dartmouth/Halifax County Regional Housing v. Sparks (1993), 101 D.L.R. (4th) 224 (N.S.S.C. App. Div.)

R. v. Rehberg (1994), 111 D.L.R. (4th) 336 (N.S.S.C.)

Federated Anti-Poverty Groups of B.C. v. B.C.(A.G.) (1992), 70 B.C.L.R. (2d) 325 (B.C.S.C.)

40. Similarly, the Coalition submits that recognizing the prevalence of poverty among women, and in particular among single mothers, ought to reinforce sex equality claims. It would be ironic if the courts were to adopt an approach to the grounds of discrimination that resulted in a failure to recognize the impact of poverty on the situation of single mothers. As an academic commentator recently wrote, commenting on the Court of Appeal's decision:

In short, the courts must be careful to ensure that the most vulnerable members of Canadian society – those who are subject to multiple forms of discrimination including on the basis of poverty, are not disentitled to remedial action because of the complex and intersecting nature of their claims.

M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994), 2 *Review of Constitutional Studies* 77 at 110

4. Section 56(1)(b) of the *Income Tax Act* Discriminates on the Grounds of Sex and Family Status

41. The Coalition submits that s. 56(1)(b) discriminates on the ground of sex. Because of socially assigned roles, those affected by s. 56(1)(b) are most often women. Section 56(1)(b) therefore imposes an additional obligation that falls disproportionately on a group in society that already shoulders a disproportionate share of the child rearing costs, and that already experiences high rates of poverty. Section 56(1)(b) furthers women's inequality by increasing the costs of child rearing. Section 56(1)(b) operates to reinforce women's existing social and economic disadvantage.

42. The Coalition submits that a more comprehensive recognition of the impact of s. 56(1)(b) must take into account the intersection of sex and family status as well as the conditions of poverty and economic disadvantage experienced by the group defined by this intersection. Further, the Court must recognize the compounding effect that poverty and economic disadvantage has in disadvantaging this group.

43. An examination of the social reality of single parents and single mothers in particular, as referred to in paragraphs 24 to 29 above, reveals "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice". The Coalition therefore submits that family status should be recognized as an analogous ground of discrimination under s. 15 of the *Charter* in order to give effect to the *Charter's* equality guarantees in the present case.

Turpin, supra, per Wilson at 1333

10 44. A number of courts have held that poverty is an analogous ground of discrimination under s. 15. The Coalition supports this view. However, the issue of whether poverty is an analogous ground has not been placed before this Court in this case. In this case, the Coalition submits that vulnerability to poverty is a condition integrally linked to the social and historical experience of women and single mothers in society. Stereotyping and discrimination faced by single mothers is also integrally related to stereotyping and discrimination on the basis of poverty. Poverty, therefore, is a condition of the group that is directly pertinent to the impact of s. 56(1)(b) and, as such, must be considered a key element of the context to be considered.

20 45. The Coalition submits that section 56(1)(b) creates a burden that results in discrimination on the grounds of sex and family status through the imposition of an additional tax liability on persons fulfilling the role of child-rearing outside of the two parent family. In two parent families, each parent is liable only for the tax cost on that portion of his or her income used to support the couple's children. By contrast, under s. 60(b), non-custodial parents have the benefit of no tax liability for that portion of their income used for child support payments.

30 46. Section 56(1)(b) operates to reduce the already limited societal support for single parents. However, s. 56(1)(b) treats the non-custodial parent's child support payments as income in the hands of the custodial parent as though it were a payment for child-rearing work, rather than a contribution toward the support of the non-custodial parent's

children. Section 56(1)(b) reflects and reinforces the stereotypical notion that those fulfilling the traditionally "female" role of child-rearing provide these services for the benefit of those in the traditionally "male" role of provider.

10 47. Moreover, the discriminatory impact falls disproportionately on single mothers on the basis of sex and family status. For those single mothers who are poor, s. 56(1)(b) increases the obstacles to improving the well-being of their families. Because s. 56(1)(b) increases taxable income, it increases the effective rate of tax on income earned in the market. For those single mothers attempting to make a transition from income
 10 assistance to market income, the higher tax rate on market income makes the transition even more difficult.

48. For the single mother living in poverty who makes a transition to employment, s. 56(1)(b) deepens her poverty. The tax depletes already inadequate resources needed to provide for her children's well-being. By compromising the ability of single mothers to provide for their children, the additional tax liability increases the risks associated with poverty such as poor health, and exacerbates the stresses and stigma associated with the poverty of single mothers.

20 49. The approach of the Court below overlooks the essence of a disproportionate impact claim which is to challenge a rule or practice that reinforces a group's pre-existing disadvantage. If left unrecognized and unremedied, the discriminatory effect of the rule or practice "fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces," rather than the result of social and historical inequities reinforced by the rule or practice.

Action Travail, supra, at 1139

See also Philipps and Young, *supra*, at 13-31

50. In reviewing Canada's level of compliance with its international human rights obligations, the United Nations Committee on Economic, Social and Cultural Rights expressed particular concern that over half of single mothers in Canada live in poverty. The Committee encouraged Canadian courts to interpret the *Charter* and human rights legislation so as to provide appropriate remedies for violations of social and economic rights.

UN ESC, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights on a Report Submitted by Canada*, Geneva, 20 June 1993, E/C. 12/1993/5, (1994), 20 C.H.R.R. (forthcoming)

10

See also Jackman, *supra*, at 118-121

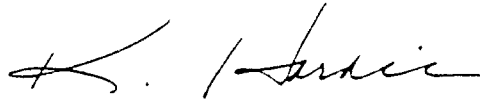
51. The Coalition submits that s. 15 of the *Charter* should be interpreted in the present case in a manner that is consistent with Canada's obligations under international law. A finding that tax provisions which exacerbate the economic disadvantage of single mothers contravene s. 15 of the *Charter* on the basis of sex and family status is, in the Coalition's view, the only conclusion that is consistent with such an interpretation and with a purposive and substantive approach to equality rights.

PART IV
ORDER REQUESTED

52. The Coalition requests that the Appeal be dismissed on the basis that s. 56(1)(b) of the *Income Tax Act* violates s. 15 of the *Charter* on the grounds of sex and family status, and that s. 56(1)(b) is not justified pursuant to s. 1 of the *Charter*.

10

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Katherine Hardie
Counsel for the Coalition

TABLE OF AUTHORITIES

A. CASE LAW

<i>Action Travail des Femmes v. Canadian National Railway</i> , [1987] 1 S.C.R. 1114	14,18
<i>Andrews v. Law Society of B.C.</i> , [1989] 1 S.C.R. 143	4, 5, 6, 13
<i>Bliss v. Attorney General of Canada</i> , [1979] 1 S.C.R. 183	13
<i>Brooks v. Canada Safeway</i> , [1989] 1 S.C.R. 1219	4, 7, 11, 14
<i>Dartmouth/Halifax County Regional Housing v. Sparks</i> (1993), 101 D.L.R. (4th) 224 (N.S.S.C. App. Div.)	15
<i>Federated Anti-Poverty Groups of B.C. v. B.C.(A.G.)</i> (1992), 70 B.C.L.R. (2d) 325 (B.C.S.C.)	15
<i>Janzen v. Platy Enterprises Ltd.</i> , [1989] 1 S.C.R. 1252	4, 7, 14
<i>Leshner v. The Queen</i> (1992), 16 C.H.R.R. D/184	8
<i>Moge v. Moge</i> , [1992] 3 S.C.R. 813	11
<i>Reference re Public Services Relations Act (Alta)</i> , [1987] 1 S.C.R. 313	5
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	5
<i>R. v. Rehberg</i> (1994), 111 D.L.R. (4th) 336 (N.S.S.C.)	15
<i>R. v. Swain</i> , [1991] 1 S.C.R. 933	4
<i>R. v. Turpin</i> , [1989] 1 S.C.R. 1296	4, 6, 13, 17
<i>Slaight Communications v. Davidson</i> , [1989] 1 S.C.R. 1038	5
<i>Symes v. Canada</i> , [1993] 4 S.C.R. 695	4, 7, 11, 14

B. ARTICLES, BOOKS, AND REPORTS

- Alston, P. and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987), 9 *Human Rights Quarterly* 156 6
- Claydon, J., "The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms" (1987), 2 *Connecticut Journal of International Law* 349 6
- Crenshaw, K., "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum* (1989): 139 7
- Duclos, N. "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 *C.J.W.L.* 25 7
- Eichler, M., "Lone-parent Families: An Instable Category in Search of Stable Policies", in J. Hudson and B. Galaway, eds., *Single Parent Families: Perspectives on Research and Policy* (Toronto: Thompson Educational Publishing, Inc., 1993) 139 10
- Gunderson, M., L. Muszynski, and J. Keck, *Women and Labour Market Poverty* (Ottawa: Canadian Advisory Council on the Status of Women, 1990) 10, 11, 12
- Iyer, N., "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993), 19 *Queen's Law Journal* 179 8
- Jackman, M. "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law" (1994), 2 *Review of Constitutional Studies* 77 16, 19
- McDaniel, S.A., "Single Parenthood: Policy Apartheid in Canada" in J. Hudson and B. Galaway, eds., *Single Parent Families: Perspectives on Research and Policy* (Toronto: Thompson Educational Publishing, Inc., 1993) 203 10
- National Council of Welfare, *In the Best Interests of the Child* (Ottawa, 1979) 12

National Council of Welfare, <i>Poverty Profile 1992</i> (Ottawa: Minister of Supply and Services, 1994)	12
National Council of Welfare, <i>Women and Poverty Revisited</i> (Ottawa: Minister of Supply and Services, 1990)	11, 12
Philipps, L. and M. Young, "Sex, Tax, and the Charter: A Review of <i>Thibaudeau v. The Queen</i> " (1995), 2 <i>Review of Constitutional Studies</i> (forthcoming)	8, 10, 18
Social Assistance Review Committee, <i>Transitions</i> (Toronto, 1988)	12
Statistics Canada, <i>Lone-parent Families in Canada</i> (Ottawa: Minister of Industry, Science and Technology, 1992)	10
UN ESC, Committee on Economic, Social and Cultural Rights, <i>Concluding Observations of the Committee on Economic, Social and Cultural Rights on a Report Submitted by Canada</i> , Geneva, 20 June 1993, E/C. 12/1993/5, (1993), 20 C.H.R.R. (forthcoming)	19
Zweibel, E. "Child Support Policy and Child Support Guidelines: Broadening the Agenda" (1993), 6 C.J.W.L. 371	10

APPENDIX

STATUTES RELIED ON

Canadian Charter of Rights and Freedoms, s. 1, s. 15

Income Tax Act, S.C. 1970-71-72, c. 63, s. 56(1)(b), s. 60(b)

International Covenant on Economic, Social and Cultural Rights,
G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49,
Doc. A/6316 U.N. (1966), s. 6, article 10, article 11

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

INCOME TAX ACT

56. (1) Amounts to be included in income for year. — Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,

(b) **alimony.** — any amount received by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if the recipient was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, the spouse or former spouse required to make the payment at the time the payment was received and throughout the remainder of the year;

60. Other deductions. — There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable:

(b) **alimony payments.** — an amount paid by the taxpayer in the year, pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written agreement, as alimony or other allowance payable on a periodic basis for the maintenance of the recipient thereof, children of the marriage, or both the recipient and children of the marriage, if he was living apart from, and was separated pursuant to a divorce, judicial separation or written separation agreement from, his spouse or former spouse to whom he was required to make the payment at the time the payment was made and throughout the remainder of the year;

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

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

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.