

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

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

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

AND IN THE MATTER OF the *Canadian Charter of Rights and Freedoms*, s.24,
Constitutional Act, 1982, R.S.C. 1985, Appendix II, No. 44, as amended

B E T W E E N

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

Applicants

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED
BY THE MINISTRY OF COMMUNITY AND SOCIAL SERVICES
and THE ATTORNEY GENERAL OF ONTARIO**

Respondents

**FACTUM OF THE INTERVENER,
WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)**

**Martha Jackman
Faculty of Law, University of Ottawa
Box 450, Station A
Ottawa, Ontario
K1N 6N5**

**Carissima Mathen
Women's Legal Education and Action Fund
415 Yonge Street, Suite 1800
Toronto, Ontario
M5B 2E7**

**TEL: (613) 562-5823
FAX: (613) 562-5124**

**TEL: (416) 595-7170 ext. 229
FAX: (416) 595-7191**

**Solicitors for the Intervener,
Women's Legal Education and Action Fund (LEAF)**

**TO: THE REGISTERAR OF THIS
HONOURABLE COURT**

AND TO: SCOTT & AYLEN
Barristers and Solicitors
Box 194, 34th Floor
Royal Trust Tower
Toronto-Dominion Centre
Toronto, Ontario
M5K 1H6

Raj Anand
M. Katharine Stephenson
TEL: (416) 368-2400
FAX: (416) 363-7246

Solicitors for the Applicants

AND TO: The Ministry of the Attorney General
Constitutional Law Branch
7th Floor
720 Bay Street
Toronto, Ontario M5K 2K1

Janet E. Minor
TEL: (416) 326-4137
FAX: (416) 326-4015

Lori Sterling
TEL: (416) 326-4453
FAX: (416) 326-4015

Solicitors for the Respondents

AND TO: GOWLING STRATHY & HENDERSON
Barristers and Solicitors
Suite 4900
Commerce Court West
Toronto, Ontario
M5L 1J3

Stephen T. Goudge
Martin J. Doane
Nina T. K. Moritsugu
TEL: (416) 862-4323
FAX: (416) 862-7661

Solicitors for the Canadian Civil Liberties Association

AND TO: WILSON CHK TEN
Barristers
47 Colborne Street
Suite 401
Toronto, Ontario
M5E 1P8

Jeffery Wilson
(416) 360-5952

I - NATURE OF THE PROCEEDINGS

1. By order of Justice Southey, dated May 15, 1996, the Women's Legal Education and Action Fund (LEAF) was granted intervener status in the present case, to challenge the constitutional validity of Ontario Regulation 409/95 and Ontario Regulation 410/95.
2. LEAF is a national, federally incorporated, non-profit organization. LEAF's mandate is to promote the equality rights of Canadian women through litigation, research, public education and other law reform efforts.

II - THE FACTS

3. LEAF accepts the facts set out in the Applicants' factum. LEAF wishes, however, to underscore certain facts relating to the economic circumstances of women and single mothers as well as the legislative history of the Regulations under challenge in order to ensure a complete understanding of the constitutional issues raised in the present case.

A. **The economic circumstances of women and single mothers**

4. Women in Canada remain economically disadvantaged relative to men. In absolute terms, more women than men live in poverty. And of those who are poor, single mothers and their families are among the very poorest.

Statistics Canada, Women in Canada: A Statistical Report, 3rd ed. (Ottawa: Statistics Canada, 1995) at 84-85.

Status of Women Canada, Setting the Stage for the Next Century: The Federal Plan for Gender Equality (Ottawa: Status of Women Canada, 1995) at 19-21.

National Council of Welfare, Women and Poverty Revisited (Ottawa: Supply and Services Canada, 1990) at 57-88.

5. Their economic circumstances make it more likely that women will need to rely on income support and other welfare-related programs and services at some point in their lives.

National Association of Women and the Law, The Federal Social Security Reform: Taking Gender into Account (Ottawa: National Association of Women and the Law, 1994) at 11.

6. In Ontario, 54 percent of all welfare recipients are women. However, almost all recipients in the single parent category are women. Single mothers currently represent 95 percent of single parent recipients under the Family Benefits Act ("FBA") and 90 percent of single parent recipients under the General Welfare Assistance Act ("GWAA").

Affidavit of Nancy Vander Plaats, para. 20, Exhibit "E"
Application Record, vol. 1, Tab 10, pp. 234-35.

7. The high rate of poverty among single mothers and their children and the lack of government action to alleviate this situation was the subject of specific comment by the United Nations Committee on Economic, Social and Cultural Rights in its 1993 review of Canada's compliance with the International Covenant on Economic, Social and Cultural Rights.

United Nations Economic and Social Council, "Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)", Geneva, 10 June 1993, E/C. 12/1993/5, (1993) 20 Canadian Human Rights Reporter C\5 at C\7.

8. A number of factors explain the gendered dimension of poverty in Canada and the economic disadvantage of single mothers in particular.

9. Historically, women's social and economic role was seen to relate primarily to domestic work and child care. Within family units today, women are still defined as secondary earners who must limit their workforce participation in order to care for their children.

Moge v. Moge, [1992] 3 S.C.R. 813 at 861.

Statistics Canada, Women in Canada, supra at 65-66, 69-70.

Status of Women, The Federal Plan for Gender Equality, supra at 19.

10. When spouses separate, mothers overwhelmingly retain custody of their children. For most women, assuming primary child care responsibilities after separation simply continues responsibilities they held prior to separation.

Young v. Young, [1993] 4 S.C.R. 3 at 49-50.

Statistics Canada, Women in Canada, supra at 18, 25.

11. Women's primary responsibility for the care of children has significant negative economic consequences for them. These consequences have been extensively documented and have been recognized by the Supreme Court of Canada in a number of recent decisions.

Moge v. Moge, supra at 853-56, 861-64.

Willick v. Willick, [1994] 3 S.C.R. 670 at 713-16.

E. Carruthers, "Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality" (1995) 11 *Journal of Law & Social Policy* 241 at 250-251.

12. In the case of separated and divorced mothers, the inadequacy and infrequency of support payments is an important factor contributing to their poverty. As the Supreme Court of Canada has pointed out, following marriage and relationship break-down most men continue to have incomes which place them well above the poverty line, while a majority of mothers with custody have incomes below the poverty line even when support is received.

Moge v. Moge, supra at 855.

Willick v. Willick, supra at 715-16.

13. Women's unpaid caregiving labour also creates barriers to their participation in the paid work force. Women's child care responsibilities often limit the number of hours women can work outside the home, which affects their ability to both find work and to advance within their current work situations. Women's child care responsibilities can also cause delayed entry to and extended absences from paid work, as well as the loss of education, training, job experience, promotions and other career opportunities.

Status of Women Canada, Federal Plan for Gender Equality, *supra* at 19.

Moge v. Moge, *supra* at 861-63.

14. For single mothers, their precarious economic circumstances and the lack of affordable child care are additional obstacles to obtaining the education, training and job experience necessary to enter or re-enter the work-force and to compete for paid work in a high unemployment economy.

National Council of Welfare, Women and Poverty Revisited, *supra* at 49-56.

Status of Women Canada, The Federal Plan for Gender Equality, *supra* at 21.

M. Gunderson, L. Muszynski, J. Keck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990) at 18-22.

B. The legislative history of the Regulations

15. The legislative history of Ontario Regulations 409/95 and 410/95 are set out in the Applicants' factum at pages 5-8.

16. Early mothers' allowance legislation in Ontario, like other "poor relief" legislation of the period, was designed to provide for state intervention only in the case of single mothers deemed by community standards to be worthy of assistance. Thus only women who were poor for reasons beyond their individual control (such as widowhood or desertion), who did not have a husband upon whom they could rely for economic support, who were responsible for the care of

young children, and who were considered to be "fit and proper person[s] to receive an allowance" were eligible for assistance.

M. Leighton, "Handmaid's Tales: Family Benefits Assistance and the Single-Mother-Led Family" (1987) 45 University of Toronto Faculty of Law Review 324 at 330-31.

Gunderson, Muszynski & Keck, Women and Labour Market Poverty, supra at 192-93.

17. As soon as a man entered the household, the recipient of mothers' allowance automatically became disentitled to assistance based on two competing assumptions about women's proper social and sexual roles and conduct. First, the "man-in-the-house" was assumed to have stepped into the traditional male role, temporarily taken over by the state, of providing support to the single mother and her children in exchange for her social, domestic and sexual services.

18. Second, if the "man-in-the-house" was not providing economic support, the single mother was also disentitled to assistance on the assumption that, by entering into an extra-marital relationship without the traditional *quid pro quo* of male economic support, she was morally irresponsible, neglectful of her children's interests, and negligent in her role and duties as a single mother.

Leighton, "Family Benefits Assistance and the Single-Mother-Led Family". supra at 327.

19. The language of the applicable regulations has changed to some degree over the years, as set out at pages 6-10 of the Applicants' factum.

20. Notwithstanding its current gender neutral formulation, the underlying statutory objective of the existing Regulations is essentially unchanged from the original Mothers Allowance Act of 1920: the state is to provide assistance only to those mothers who are deemed to be deserving, and only in the last resort.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 250-52.

Leighton, "Family Benefits and the Single-Mother-Led Family", supra at 333.

III - ISSUES AND THE LAW

21. The issues raised in this case are set out in the Applicants' Factum at page 30.
22. LEAF's intervention will be limited to the issue of whether Ontario Regulations 409/95 and 410/95 violate equality rights guarantees set out under section 15 of the Canadian Charter of Rights and Freedoms (the "Charter"), and if so, whether the Regulations can be justified under section 1 of the Charter.

A. Summary of LEAF's position

23. LEAF submits that the regulations at issue violate section 15 of the Charter in two principal regards. First, the regulations discriminate on the prohibited ground of sex. Second, the regulations discriminate against single mothers on social assistance who, by virtue of their historic and continuing disadvantage, warrant protection as an analogous group under section 15 of the Charter.

B. Section 15 of the Charter as a guarantee of substantive equality

24. The right to equality is guaranteed by section 15(1) of the Charter, in the following terms:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and 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.

25. The sex equality guarantees set out in section 15 are reinforced by section 28 of the Charter, which states that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Section 28 was designed to ensure that women's equality was recognized by federal and provincial governments and enforced by the courts as a pre-eminent constitutional value.

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

26. The Supreme Court of Canada has interpreted section 15 of the Charter as a guarantee of substantive rather than merely formal equality. Where the traditional ideal of formal equality requires only that likes be treated alike, a substantive conception of equality focuses on the interplay between the law or policy under challenge and the actual circumstances of the individual or group whose rights are in question.

Law Society of British Columbia v. Andrews, [1989] 1 S.C.R. 143.

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

Symes v. Canada, [1993] 4 S.C.R. 695 at 754-755.

Black & Smith, "The Equality Rights", supra at 14-7 - 14-8.

27. As Justice McLachlin explains in her recent decision for a plurality of the Court in Miron v. Trudel, whether or not a legislative distinction is discriminatory within the meaning of section 15 "can be ascertained only by examining the effect or impact of the distinction in the social and economic context of the legislation and the lives of individuals it touches."

Miron v. Trudel, [1995] 2 S.C.R. 418 at 488.

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

28. Section 15, and with it section 28, highlight a constitutional concern for the equality of women in general. However, laws and policies are also reviewable under section 15 for their

disparate impact on women who are members of other disadvantaged minorities. As Justice Iacobucci argues with respect to the provisions of the Income Tax Act at issue in Symes v. Canada:

... if I were convinced that s. 63 has an adverse effect upon some women ... I would not be concerned if the effect was not felt by all women. That an adverse effect felt by a subgroup of women can still constitute sex-based discrimination appears clear to me from a consideration of past decisions ...

Symes v. Canada, *supra* at 769.

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

C. The constitutionality of the Regulations under section 15

29. LEAF submits that the Regulations are unconstitutional because they draw a distinction based on sex and on the characteristic of being a single mother on assistance, and because that distinction is discriminatory within the meaning of section 15.

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

Egan v. Canada, *supra* at 514, 517, 519.

Miron v. Trudel, *supra* at 424, 425.

1. The Regulations create a distinction

30. The Regulations at issue define a "spouse" for the purposes of the FBA and GWAA, as a person of the opposite sex residing with an applicant or recipient of assistance, if the two have a "mutual agreement regarding their financial affairs", or if financial support is being provided by one to the other and if the "social and familial aspects" of their relationship "amount to cohabitation".

R.R.O. 1990, O. Reg. 366 (Family Benefits Regulation), s. 1(3), as amended by O. Reg. 409/95.

R.R.O. 1009, O. Reg. 537 (General Welfare Regulation), s. 1(3), as amended by O. Reg. 410/95.

31. By adopting this definition, the Regulations create a distinction between "spouses" under the Regulations and other members of society defined as "spouses" under provincial law. The Regulations create this distinction in four ways.

32. First, only applicants and recipients of social assistance are defined as the "spouse" of a person of the opposite sex as soon as that person begins to reside with them, even in the absence of actual economic interdependence and in situations where the applicant or recipient would be considered a "single" person for all other social and legal purposes.

33. For example, under the provincial Family Law Act, for the purpose of determining support obligations and entitlements, "spouse" is defined as including legally married persons and unmarried men and women who have cohabited continuously for a period of not less than three years or who are in a relationship of some permanence if they are the natural or adoptive parents of a child. "Spouse" is defined in a similar way under the Succession Law Reform Act.

Family Law Act, R.S.O. 1990, c. F-3, ss. 29, 30, 31.

Succession Law Reform Act, R.S.O. 1990, c. S-26, ss. 1, 57.

34. Second, only applicants and recipients of social assistance bear the burden of rebutting a regulatory presumption that a person of the opposite sex is their "spouse" as soon as that person begins to reside with them, irrespective of whether any legal support obligations exist, or of whether any financial support is in fact being provided by that person.

35. Third, only applicants and recipients of social assistance in the single parent category are entirely precluded from receiving assistance unless they are living apart from their "spouse" "by

reason of separation with no reasonable prospect of reconciliation." No other applicants or recipients of assistance are subject to this additional requirement of demonstrating that there is no reasonable prospect of reconciliation with their former spouse in order to be entitled to benefits.

36. And fourth, only social assistance recipients in the sole support parent category are disentitled from receiving assistance altogether once they are characterized as a "spouse". For example, under Regulation 773 of the Ministry of Colleges and Universities Act, the Minister is directed to consider the "income of the spouse of [an] applicant" when determining eligibility for and the amount of any bursary. The mere fact that an applicant has been or is living with a spouse does not automatically disentitle that person from receiving a bursary.

R.R.O. 1990, Reg. 773, s. 5(e).

37. Similarly, while social assistance recipients other than in the single parent category have their benefit levels re-assessed taking into account the resources and income of a "spouse", they are not categorically disentitled from receiving benefits.

2. The distinction created by the Regulations is based on the prohibited ground of sex

38. As Chief Justice Lamer explains in his decision in Rodriguez v. British Columbia (A.G.), section 15 of the Charter protects disadvantaged groups against both direct and indirect discrimination:

[T]o promote the objective of a more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

Rodriguez v. British Columbia, supra at 549.

Andrews v. Law Society of British Columbia, supra at 173.

Symes v. Canada, supra at 755.

39. Indirect or "adverse effects" discrimination is found where a facially neutral provision has a disproportionately adverse impact on an already disadvantaged group. For example, in its 1989 decision in Janzen v. Platy Enterprises Ltd., the Supreme Court of Canada reviewed facially neutral employment policies relating to sexual harassment. The Court found that although male employees are also susceptible to sexual harassment, women are most often affected by this practice. As a consequence, the Court concluded that failure to prevent sexual harassment in the work-place amounted to indirect discrimination on the basis of sex.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252.

40. More recently, in Rodriguez v. British Columbia (A.G.), Chief Justice Lamer found that since persons with physical disabilities who are unable to end their lives unassisted are disproportionately affected by the Criminal Code prohibition against assisted suicide, the prohibition amounts to indirect discrimination on the basis of physical disability.

Rodriguez v. British Columbia (A.G.), *supra* at 555-557.

41. Like the laws and policies struck down by the Court in Janzen v. Platy Enterprises Ltd. and in Rodriguez v. British Columbia (A.G.), the Regulations in the present case are framed in facially neutral terms. However, women receiving assistance in the single parent category represent the vast majority of those at risk of having their benefits terminated. The vast majority of those whose benefits have been terminated pursuant to the revised definition of "spouse" are also women.

Affidavit of Kevin Constante, para. 86
Respondents' Application Record, vol. 1, Tab 1, p.21.

42. In addition to their numeric over-representation within the group affected, women are also disproportionately harmed by the Regulations. As discussed at length below, the Regulations have significant gender-specific impacts, such as maintaining a high degree of state

scrutiny and control over women's personal lives and decision-making and reinforcing the stereotype that women's intimate relationships with men invariably involve economic dependence.

43. In view of the fact that the vast majority of those affected by the Regulations are women, and in light of the disproportionately gender-related nature of the harms which the Regulations cause, LEAF submits that the Regulations create a distinction on the basis of sex.

44. The conclusion that the Regulations draw a distinction based on sex is not altered by the fact that not all those affected by the Regulations are women. For example, in Rodriguez v. British Columbia (A.G.), Chief Justice Lamer finds that, although not all persons with disabilities are unable to end their lives unassisted, the prohibition on unassisted suicide nevertheless constitutes indirect discrimination based on physical disability.

Rodriguez v. British Columbia, *supra* at 556.

Janzen v. Platy Enterprises Ltd., *supra* at 1279.

Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 at 1247.

45. Nor, as Justice Iacobucci recognized in Symes v. Canada, does the fact that not all women are adversely affected alter the fact that the Regulations draw a distinction based on sex.

Symes v. Canada, *supra* at 769.

3. The Regulations draw a distinction based on the characteristic of being a single mother on social assistance

46. LEAF's submits that, apart from discriminating indirectly on the basis of sex, the Regulations also draw a distinction which discriminates indirectly against single mothers on social assistance. As indicated above, single mothers constitute 90 percent of those receiving GWAA assistance and 95 percent of those receiving FBA assistance in the single parent

category. Single mothers on assistance are therefore disproportionately represented among those to whom the Regulations apply.

47. In addition to the disparate impact of the Regulations on single mothers in strictly numeric terms, the Regulations also have harmful consequences which are particular to this group. For example, as argued at greater length below, the Regulations increase the vulnerability of single mothers attempting to leave abusive relationships, and they reinforce the idea that special and more punitive measures must be taken to prevent single mothers from committing welfare fraud.

48. The disproportionate numeric and substantive impact of the Regulations leads to the conclusion that the Regulations draw a distinction on the non-enumerated characteristic of being a single mother on assistance.

4. Single mothers on social assistance are an analogous group to those enumerated under section 15

49. LEAF submits that single mothers on social assistance are an analogous group to those expressly enumerated under section 15. Single mothers on assistance share many of the socio-economic, political and legal characteristics of disadvantage identified by the Supreme Court of Canada of Canada in its equality rights analysis.

Andrews v. Law Society of British Columbia, supra at 152.

R. v. Turpin, supra at 1333.

Egan v. Canada, supra at 599.

50. In addition, single mothers on social assistance often experience multiple layers of discrimination on the basis of grounds which are enumerated in section 15(1) and with grounds analogous to them, including poverty, race, disability and age.

L. Corbeil, The Impact of Poverty on Fairness in Judicial Processes (Ottawa: National Anti-Poverty Organization, 1992) at 1/13.

Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence - Achieving Equality (Ottawa: Ministry of Supply and Services Canada, 1993) at 63-65.
Iyer, "Equality Rights and the Shaping of Social Identity", supra.

Affidavit of Usha Cici George, para. 26-32
Application Record, vol. 2, Tab 13, pp. 7-9.

51. The profound economic disadvantage of single mothers and their children was described at the outset of the factum. Not only is the highest rate of family poverty found among single mother families, they also experience the greatest depths of poverty, with average incomes \$8,535 below Statistics Canada's low income cut-off lines in 1994.

National Council of Welfare, Poverty Profile 1994 (Ottawa: Supply and Services Canada, 1996) at 32, 52.

52. In social terms, for single mothers on social assistance as for other welfare recipients, reliance on this source of income generally means inadequate diet, substandard housing, lower levels of education, and reduced health.

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 76 at 83-89.

53. For single mothers on social assistance, negative stereotypes and social stigma are a constant fact of life: in the popular media, in their dealings with landlords, with financial institutions, with school officials, with neighbours and strangers, with social welfare agencies, with other government officials, and with the legal system.

Affidavit of J. Bruce Porter, para. 18-20 Exhibits "B" & "D"
Application Record, vol. 3, Tab 14, p. 7.

Jackman, "Constitutional Contact with the Disparities in the World", supra at 89-95.

Leighton, "Family Benefits Assistance and the Single-Mother-Led Family", supra at 327.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 251.

Corbeil, The Impact of Poverty on Fairness in Judicial Processes, supra at 4/13 - 5/13.

54. Single mothers on assistance, like other social assistance recipients, are also politically vulnerable to having their interests overlooked. Financial barriers, sexism, and negative stereotypes make it virtually impossible for single mothers on assistance to be considered for, run, or be elected to political office at any level of government. In addition, this group does not have the organization or resources which are necessary to influence the legislative or regulatory process.

Jackman, "Constitutional Contact with the Disparities in the World", supra at 95-100.

Canadian Panel on Violence Against Women, Changing the Landscape, supra at 65.

55. The political marginalization and exclusion of single mothers and other welfare recipients is reflected in recent government rhetoric in Ontario, with its emphasis on "combating welfare fraud" and on the need generally to tighten welfare eligibility in order to force welfare recipients back to work and to save Ontario taxpayers' money.

Ontario, Ministry of Community and Social Services, "News Release: Government Combats Fraud and Tightens Welfare Rules" (23 August 1995).

K. Toughill, "Welfare Not Set Up to Feed Kids: Harris" Toronto Star (28 September 1995) A1.

I. Morrison & G. Pearce, "Under the Axe: Social Assistance in Ontario in 1995" (1995) 11 Journal of Law & Social Policy 1 at 4-6.

56. Because of the discrimination which women and men on welfare face individually and as a group, receipt of social assistance has been recognized as a prohibited ground of discrimination under the Québec and Ontario human rights codes. The analogous grounds of "social origin" and

"source of income" are also protected under the Newfoundland, Nova Scotia and Manitoba codes.

Jackman, "Constitutional Contact with the Disparities in the World", supra at 103, 111-12.

57. Taken together, these socio-economic, legal and political indices of disadvantage have led a number of courts to recognize welfare recipients, single mothers, and single mothers on social assistance in particular, as analogous groups under section 15 of the Charter.

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

Schachter v. Canada (Employment and Immigration Commission) [1992] 2 S.C.R. 679 at 701-702.

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

58. As Justice Kelly held in R. v. Rehberg:

... the regulations ... provide that a special group, "single parents otherwise eligible for family benefits", can be determined ineligible to receive these benefits if they contravene the man-in-the-house rule, however it is applied. Moreover, this "group" is overwhelmingly female single mothers who are, with their children, a group in society "most likely to experience poverty in the extreme". I find in these circumstances, as was found in Sparks, that poverty is likely a personal characteristic of this group, and in this instance poverty is analogous to the listed grounds in s. 15. As well, or course, the group encompasses a listed ground, "sex", as it is most likely that members of this group are female.

R. v. Rehberg (J.), (1993) 127 N.S.R. (2d) 331 at 351-352.

5. The Regulations are discriminatory

59. The distinctions drawn by the Regulations, based on sex and on the characteristic of being a single mother on assistance, are clearly discriminatory within the meaning of section 15.

In the words of Justice McIntyre, they have "the effect of imposing burdens, obligations or disadvantages" on women and single mothers on assistance "not imposed on others", and they withhold or limit "access to opportunities, benefits and advantages available to other members of society."

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

60. LEAF submits that the Regulations reflect and reinforce a number of stereotypes and assumptions which are harmful to single mothers on social assistance and to women generally. These stereotypes include the notion that a single mother who develops relationships and a sphere of interest beyond her children is selfish and irresponsible; the idea that women's intimate relationships invariably have an economic sub-text and that any involvement with a man necessarily implies some form of economic dependence; and the idea that single mothers are inherently prone to commit welfare fraud and must therefore be subject to extra scrutiny.

Leighton, "Family Benefits Assistance and the Single-Mother-Led-Family", supra at 327.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 248-50.

R. v. Rehberg, supra at 343-45.

61. The Regulations also perpetuate and reinforce the historic prejudice that reliance on public assistance is a social evil and the increasingly pervasive idea that social welfare programs and recipients represent an unwarranted and illegitimate burden on the public fisc. In doing so, the Regulations promote the view that it is acceptable to harass and otherwise penalize single mothers on assistance in order to reduce their numbers and thereby reduce public welfare expenditures. As one commentator puts it:

The "welfare cheater" does not present a genderless face to the public. The problems of abuse and overuse perceived to exist in the system are increasingly being blamed on the large number of women who can't seem to find a man or, in his stead, a job.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 241.

National Association of Women and the Law, The Federal Social Security Reform, supra at 9.

Toughill, "Welfare Not Set Up to Feed Kids: Harris", supra.

62. In addition to the harmful stereotypes which they reflect and perpetuate, the Regulations also have a number of concrete effects which seriously compromise the equality and security of women, and of single mothers on assistance in particular.

63. For a single mother on assistance, deciding to cohabit with a man means the loss of independent support as a single parent. This disentanglement occurs automatically, regardless of whether any financial assistance is in fact available, desired, or forthcoming from the man, and irrespective of she and her children's continuing need for assistance.

64. If the man with whom a single mother is considering cohabiting is himself eligible for welfare assistance, she can apply with him for GWAA benefits as a part of a reconstituted family unit. By immediately and automatically imposing this election, however, the Regulations compel the single mother to give up support in her own right, forcing her into a new "family" and effectively rendering her economically dependent on the man as well as on the state.

Affidavit of Nancy Vander Plaats, para. 67-68
Application Record, vol. 1, Tab 10, p. 172.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 251.

F. Woolley, "Research Note, Intra-Family Inequality: Implications for the Design of Income Support" (Ottawa: Canadian Advisory Council on the Status of Women, November 1994).

65. If the man with whom she is considering cohabiting is ineligible for assistance as an individual, or as part of a reconstituted family unit, the Regulations force the single mother into the traditional female role of depending on a man instead of on the state.

Affidavit of Sandra Elizabeth Falkiner, para. 31
Application Record, vol. 1, Tab 5, p. 50.

66. In many cases, the Regulations will have the effect of dissuading single mothers on assistance from entering into any kind of stable or longer-term relationships with men, in order to reduce the risk of having their and their children's benefits cut-off. By imposing this burden on single mothers and by limiting their choices in this way, the Regulations clearly replicate the sexist effects of the province's original mothers' allowance regime.

Affidavit of Margaret Hillyard Little, para. 59
Application Record, vol. 3, Tab 15, p. 639.

Carruthers, "Prosecuting Women for Welfare Fraud", supra at 253.

R. v. Rehberg, supra at 344.

67. Even where women decide against entering into any kind of relationship or cohabitation which might fall within the terms of the Regulations, the Regulations continue to have significant adverse impacts on them.

68. As was the case with previous variants of the man-in-the-house rule, enforcement of the Regulations will invariably lead to degrading and intrusive scrutiny of women's lives and relationships, as well as a constant threat of harassment and increased financial and psychological insecurity for recipients and their children. This is particularly true in view of the onus which the Regulations place on single mothers to demonstrate that they are not involved in a "spousal" relationship if they wish to remain eligible for benefits.

Morrison & Pearce, "Social Assistance in Ontario in 1995", supra at 7.

R. v. Rehberg, supra at 344.

69. Perverse and harmful effects on women and their children are also caused by the requirement that single parents be separated with "no reasonable prospect of reconciliation" in

order to be eligible for assistance. This requirement may force women to take conclusive steps to end relationships which were beneficial to them and to their children, in order to maintain their eligibility for assistance as single parents.

70. This condition may also foreclose reconciliation efforts within relationships which might otherwise have been salvageable. And, it may affect women's ability to maintain healthy parenting relationships with the father of their children or to actively support father/children relationships, for fear of this being taken as evidence of a reasonable prospect of reconciliation.

Affidavit of Nancy Vander Plaats, para. 54-56, 66
Application Record, vol. 1, Tab 10, pp. 168-72.

R. v. Rehberg, *supra* at 344.

Leighton, "Family Benefits Assistance and the Single-Mother-Led Family", *supra* at 347.

71. The "no reasonable prospect of reconciliation" requirement is even more objectionable in terms of its potential impact on women who are victims of spousal violence. Concern for their and their children's economic security are significant factors keeping women in abusive relationships. For women trying to escape abusive relationships, or thinking of doing so, the added burden of demonstrating that there is no prospect of reconciliation with a former spouse before they are eligible for assistance is highly prejudicial and even life-threatening.

Affidavit of Nancy Vander Plaats, para. 63-64
Application Record, vol. 1, Tab 10, p.171

Affidavit of Usha Cici George, para. 32
Application Record, vol. 2, Tab 13, p. 549.

Carruthers, "Prosecuting Women for Welfare Fraud", *supra* at 254-56.

72. Evidence suggests that women in abusive relationships are at greatest risk when they attempt to leave. Any steps towards separation beyond those which are absolutely necessary (for example, divorce proceedings as opposed to separation) place victims of domestic violence in

greater danger. The "no reasonable prospect of reconciliation" requirement will make it harder for women who are victims of abuse to leave violent relationships, and will also place those who do take steps to leave at greater risk of retaliation by abusive spouses.

Affidavit of Usha Cici George, para. 22-25
Application Record, vol. 2, Tab 13, pp. 546-54.

Canadian Panel on Violence Against Women, Changing the Landscape, *supra* at 63.

National Association of Women and the Law, The Federal Social Security Reform, *supra* at 13.

73. As suggested earlier, the treatment which the Regulations accord single mothers on assistance is at profound odds with how other "spouses" and beneficiaries of provincial government spending are treated. Under no other provincial legislation are persons characterized as spouses, with the economic consequences of that status, from the moment they begin to cohabit; under no other provincial legislation is there a presumption of spousal relationship and financial interdependence in the absence of some evidence beyond the mere assumption of cohabitation; and under no other government program are beneficiaries subject to such a high level of scrutiny and control as a condition of receiving assistance.

74. The Regulations, in their specific and cumulative effects, severely compromise women's ability to make independent decisions about their lives. The Regulations force women to make choices about how to manage new and existing personal relationships in a way which responds to the exigencies of the social assistance regime, rather than their and their children's own needs and priorities. The Regulations scrutinize, control, and penalize single mothers for choices which are accepted, even encouraged, in other members of society.

75. The Regulations structure single mothers' access to, and continuing eligibility for, assistance in a manner which does not respond to their individual circumstances and capacities, and which reflects and reinforces prejudicial stereotypes about women and single mothers,

including about their dependence on men, their sexual morality, and their value as productive members of society.

76. In their intent and their effects the Regulations promote and perpetuate the view that women and single mothers on assistance are "less capable, or less worthy of recognition or value as human being[s] or as member[s] of Canadian society, equally deserving of concern, respect and consideration."

Andrews v. Law Society of British Columbia, *supra* at 171.

Egan v. Canada, *supra* at 543.

77. LEAF submits that, for all of these reasons, the Regulations are discriminatory within the meaning of section 15 of the Charter and should be struck down pursuant to section 52(1) of the Constitution Act, 1982.

D. The Regulations are not protected under section 15(2) of the Charter

78. LEAF rejects any suggestion that the Regulations are protected under section 15(2) of the Charter. LEAF submits that section 15(2) of the Charter is designed to prevent those who are in a position of advantage in society from attacking programs designed to benefit those who are disadvantaged.

Black & Smith, "The Equality Rights", *supra* at 14-27 - 14-29.

79. The idea that a government program with an ameliorative objective is immunized from section 15(1) review by section 15(2) was rejected by Justice Weiler in Re Ontario Human Rights Commission et al. and the Queen in Right of Ontario et al.. The Supreme Court of Canada has also clearly held that government action does not escape section 15(1) review because it confers a benefit and is designed to ameliorate the circumstances of a particular group.

As Justice Cory held in Egan v. Canada: "once the decision has been made to confer a benefit, it cannot be applied in a discriminatory manner."

Re Ontario Human Rights Commission et al. and the Queen in Right of Ontario et al. (1994), 19 O.R. (3d) 387 at 405.

Egan v. Canada, *supra* at 596.

80. LEAF submits that the question in the present case is not whether the Charter compels governments to act affirmatively to remedy social and economic disadvantage. Rather the issue is whether laws or policies may discriminate in their application to particular groups, and more specifically whether the Regulations may discriminate against women and single mothers on assistance.

E. The Regulations are not justified under section 1 of the Charter

81. The Supreme Court of Canada has emphasized that otherwise unconstitutional provisions in social welfare legislation should not be treated differently or subjected to a lesser level of scrutiny under section 1 of the Charter simply because they may have implications for government spending. As Chief Justice Lamer declares in his judgment for the majority of the Court in Schachter v. Canada: "[t]his Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under section 1."

Schachter v. Canada (Minister of Employment and Immigration), *supra* at 709.

82. Justice Lamer's statement echoes earlier remarks by Justice Wilson in Singh v. Canada that Charter guarantees would be illusory if section 1 could be used by governments to justify rights violations on the basis of financial cost or administrative convenience.

Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177 at 218-19.

83. LEAF submits that the primary objective of the Regulations under challenge is to reduce the total number of single mothers eligible for welfare assistance in the province. LEAF submits that the emphasis which the government has placed on cost savings in relation to this and other recent welfare reforms makes it clear that this is the primary objective of the Regulations.

Ministry of Community and Social Services, "News Release: Government Combats Fraud and Tightens Welfare Rules", supra.

W. Walker, "Government must make hard choices, 'Tories say'" Toronto Star (28 September 1995) A1, A32.

Falkiner et al. v. The Attorney General of Ontario (January 11, 1995) Ontario Divisional Court 810/95 at 11 (decision of Steele J. on motion for interim injunction).

84. LEAF submits that this objective and the deficit reduction policy which underlies it are a product of, and indeed compound, the social and economic marginalization and political exclusion of welfare recipients in general, and of single mothers on assistance in particular.

National Association of Women and the Law, The Federal Social Security Reform, supra, at 11.

Morrison & Pearce, supra, at 4-6.

85. LEAF maintains that this objective is discriminatory in its intent and its effects, and that it is therefore incompatible with the values and principles which the Supreme Court has held to be essential to a free and democratic society, including "respect for the inherent dignity of the human person, commitment to social justice and equality ... and faith in social and political institutions which enhance the participation of individuals and groups in society."

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

86. LEAF maintains that the objective of reducing the number of single mothers on social assistance in the province is not "of sufficient importance to warrant overriding a constitutionally

protected right". On that basis, LEAF submits that the Regulations fail the first criterion set out by the Supreme Court of Canada in R. v. Oakes.

R. v. Oakes, *supra* at 138.

87. LEAF submits that the Regulations also fail the second "proportionality test" set out in the Oakes case. LEAF submits that the Regulations are "arbitrary" and "unfair" in the way in which they define spousal relationships under social assistance legislation relative to other statutory contexts. The Regulations are also based on "irrational considerations" including prejudicial stereotypes about women and single mothers on assistance, their honesty and their worth as productive members of society.

R. v. Oakes, *supra* at 139.

88. LEAF submits that measures such as the present Regulations, which are designed to reduce welfare-related costs without regard to individual circumstances, are not "rationally connected to the objective" either of providing assistance to those in need or of reducing government expenditures. Such measures are not only irrational and inequitable in terms of their impact on those who require assistance, they are irrational and economically inefficient also.

89. It is widely recognized that social security measures make a direct contribution to present economic prosperity and growth. Investment in social welfare today mitigates the inevitable costs of poverty for governments and for society in the future, including the long-term costs of poverty-related illness, illiteracy, under-education, unemployment, and for women in particular, the devastating social and economic costs of poverty-related violence.

National Association of Women and the Law, The Federal Social Security Reform, *supra* at 12-13.

Canadian Panel on Violence Against Women, Changing the Landscape, *supra* at 63.

Canadian Council on Social Development, "News Release: National Social Policy group sends message to Premier of Ontario" (2 October 1995).

90. LEAF submits that, even if the Regulations are not simply intended to reduce provincial welfare rolls and expenditures without regard to individual circumstances but rather are designed to ensure that assistance is provided only to those in need, the means adopted by the Regulations to achieve this objective do not impair the equality rights of women and of single mothers on assistance "as little as possible".

R. v. Oakes, *supra* at 139.

91. LEAF submits that alternative means causing lesser impairment to the section 15 rights of women and single mothers on assistance are available to achieve the objective of ensuring that only those needing assistance receive it. In particular, LEAF submits that the definition of "spouse" under Ontario Regulations 589/87 and 590/97, which the current Regulations supercede, represents one such alternative.

92. In short, LEAF submits that the objective of Ontario Regulations 409/95 and 410/95 is not "of sufficient importance to warrant overriding a constitutionally protected right" and that "the means chosen are [not] reasonable and demonstrably justified in a free and democratic society". LEAF therefore submits that the Regulations are unconstitutional and should be struck down.

R. v. Oakes, *supra* at 138-40.

IV - NATURE OF RELIEF REQUESTED

93. LEAF supports the order for relief requested by the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 5th day of June, 1996

Martha Jackman

Carissima Mathen

Counsel for the Intervener LEAF

SCHEDULE A

A. CASES

1. Moge v. Moge, [1992] 3 S.C.R. 813
2. Young v. Young, [1993] 4 S.C.R. 3
3. Willick v. Willick, [1994] 3 S.C.R. 670
4. Law Society of British Columbia v. Andrews, [1989] 1 S.C.R. 143
5. R. v. Turpin, [1989] 1 S.C.R. 1296
6. Symes v. Canada, [1993] 4 S.C.R. 695
7. Miron v. Trudel, [1995] 2 S.C.R. 418
8. Rodriguez v. British Columbia (A.G.), [1993] 3 S.C.R. 519
9. Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252
10. Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219
11. R. v. Rehberg (J.), (1993) 127 N.S.R. (2d) 331
12. Dartmouth/Halifax County Regional Housing Authority v. Sparks, (1993) 101 D.L.R. (4th) 224
13. Schachter v. Canada (Employment and Immigration Commission) [1992] 2 S.C.R. 679
14. Federated Anti-Poverty Groups v. British Columbia (A.G.) (1991) 70 B.C.L.R. (2d) 325
15. Re Ontario Human Rights Commission et al. and the Queen in Right of Ontario et al. (1994), 19 O.R. (3d) 387
16. Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177
17. Falkiner et al. v. The Attorney General of Ontario (January 11, 1995) Ontario Divisional Court 810/95 (decision of Steele J. on motion for interim injunction).

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

B. ARTICLES

1. Statistics Canada, Women in Canada: A Statistical Report, 3rd ed. (Ottawa: Statistics Canada, 1995)
2. Status of Women Canada, Setting the Stage for the Next Century: The Federal Plan for Gender Equality (Ottawa: Status of Women Canada, 1995)
3. National Council of Welfare, Women and Poverty Revisited (Ottawa: Supply and Services Canada, 1990)
4. National Association of Women and the Law, The Federal Social Security Reform: Taking Gender into Account (Ottawa: National Association of Women and the Law, 1994)
5. United Nations Economic and Social Council, "Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)", Geneva, 10 June 1993, E/C. 12/1993/5, (1993) 20 Canadian Human Rights Reporter C\5
6. E. Carruthers, "Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality" (1995) 11 Journal of Law & Social Policy 241
7. M. Gunderson, L. Muszynski, J. Keck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council on the Status of Women, 1990)
8. M. Leighton, "Handmaid's Tales: Family Benefits Assistance and the Single-Mother-Led Family" (1987) 45 University of Toronto Faculty of Law Review 324
9. W. Black & L. Smith, "The Equality Rights" in E. Mendes & G.-A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms, 3rd ed. (Toronto: Carswell, 1996) 14-1
10. N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's Law Journal 179.
11. L. Corbeil, The Impact of Poverty on Fairness in Judicial Processes (Ottawa: National Anti-Poverty Organization, 1992) at 1/13.
12. Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence - Achieving Equality (Ottawa: Ministry of Supply and Services Canada, 1993)

13. National Council of Welfare, Poverty Profile 1994 (Ottawa: Supply and Services Canada, 1996)
14. 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 76
15. Ontario, Ministry of Community and Social Services, "News Release: Government Combats Fraud and Tightens Welfare Rules" (23 August 1995).
16. K. Toughill, "Welfare Not Set Up to Feed Kids: Harris" Toronto Star (28 September 1995) A1.
17. I. Morrison & G. Pearce, "Under the Axe: Social Assistance in Ontario in 1995" (1995) 11 Journal of Law & Social Policy 1
18. F. Woolley, "Research Note, Intra-Family Inequality: Implications for the Design of Income Support" (Ottawa: Canadian Advisory Council on the Status of Women, November 1994)
19. W. Walker, "Government must make hard choices, 'Tories say'" Toronto Star (28 September 1995) A1
20. Canadian Council on Social Development, "News Release: National Social Policy group sends message to Premier of Ontario" (2 October 1995).

SCHEDULE B

1. R.R.O. 1990, O. Reg. 366 (Family Benefits Regulation), s. 1(3), as amended by O. Reg. 409/95.
2. R.R.O. 1009, O. Reg. 537 (General Welfare Regulation), s. 1(3), as amended by O. Reg. 410/95.
3. Family Law Act, R.S.O. 1990, c. F-3, ss. 29, 30, 31.
4. Succession Law Reform Act, R.S.O. 1990, c. S-26, ss. 1, 57.
5. R.R.O. 1990, Reg. 773, s. 5(e).