

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Appellants
(Respondents in Appeal)

- and -

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

Respondents
(Appellants)

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

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PART I: OVERVIEW

1. The Women's Legal Education and Action Fund ("LEAF") is a national, non-profit organization whose mandate is to promote the equality rights of Canadian women through litigation, research, public education and other law reform efforts. By order of Chief Justice McMurtry, dated 15 November 2000, LEAF was granted leave to intervene in this appeal.

2. At issue is whether Regulation 366 under the *Family Benefits Act* as amended by O.Reg. 409/95, and Regulation 537 under the *General Welfare Assistance Act*, as amended by O.Reg. 410/95 ("the Regulations"), which define "spouse" to determine eligibility for social assistance violate s. 15 and s. 7 of the *Canadian Charter of Rights and Freedoms*.

3. The Regulations impose a legal presumption that if a welfare applicant or recipient lives in the same dwelling as a person of the opposite sex, the two are "spouses". The recipient or applicant must produce evidence to rebut this presumption. Even where the individuals do not consider themselves "spouses", have no legal obligation to support each other, and have no meaningful financial interdependence, they are deemed "spouses" if the social and familial aspects of their relationship amount to cohabitation and they meet the minimal threshold of having "a mutual agreement or arrangement regarding their financial affairs". Of all welfare recipients, only single parents – of whom 95% are women – are categorically denied assistance in their own right when they are deemed to be living with a "spouse". Further, of all recipients who do not live with a putative "spouse", only single parent recipients are denied benefits unless there is "no reasonable prospect of reconciliation" with a "spouse".

4. LEAF takes the position that (a) the Regulations violate equality rights under s. 15(1) of the *Charter* by discriminating on the enumerated ground of sex; (b) the Regulations violate equality rights under s. 15(1) of the *Charter* by discriminating on the analogous ground of being a single mother on social assistance; (c) the Regulations violate women's rights to liberty and security of the person under s. 7 of the *Charter* by depriving poor women of economic support for basic survival, violating their privacy, and placing women at increased risk of domestic violence; and (d) these violations are not demonstrably justifiable under s. 1 of the *Charter*.

PART II: STATEMENT OF FACTS

5. LEAF adopts the facts as set out in the Respondents' factum. LEAF also highlights the following facts which relate to the social, economic, legal and historical context in which the Regulations operate and which appropriately situate the constitutional inquiry. Before reviewing the socio-economic context, LEAF outlines the relevant legislative history. Excerpts of the relevant statutes and regulations are reproduced at Schedule B of the factum.

A. Legislative History

6. Since its introduction, social assistance for single mothers in need has been premised on the idealized family with clearly demarcated gender roles which assume a male breadwinner and a female dependent caring for children. The state has stepped in to provide support only where the male "breadwinner" is absent or unable to fulfil his role, and where the female "dependent" is deemed by community standards to be morally "deserving" of assistance.

Janet Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family and the Undeserving Other" in Restructuring Caring Labour: Discourse, State Practice and Everyday Life (2000) at 38-39

Margaret Little and Ian Morrison, "The Pecker Detectors are Back': Regulation of the Family Form in Ontario Welfare Policy" (1999), 34:2 *Journal of Canadian Studies* 110 at 112-113

Margaret Leighton, "Handmaids' Tales: Family Benefits Assistance and the Single-Mother-Led Family" (1987), 45 *University of Toronto Faculty of Law Review* 324 at 327

7. Mothers' allowance, introduced in 1920, was available only to women whose husbands had died or were permanently disabled, who were responsible for the care of young children, and who were considered "fit and proper person[s] to receive an allowance." To determine if women were "fit and proper", state workers scrutinized women's conduct in relation to various moral issues, including cleanliness, sobriety, governance of children, and, especially, chastity. Any implication of sexual "misbehaviour" could disentitle a recipient.

Little and Morrison, "Regulation of Family Form", *supra* at 113-114

Leighton, "Handmaids' Tales", *supra* at 328-331

8. Although the range of “morally deserving” mothers gradually grew to include mothers who were deserted wives (1921), foster mothers (1921), divorced women (1955), and unwed mothers (1957), the law expressly continued to make eligibility conditional upon these women being “fit and proper” or “suitable person[s] to receive an allowance”. By the 1950s, “suitability” was determined largely in relation to financial honesty and a woman’s sexual conduct.

Little and Morrison, “Regulation of Family Form”, *supra* at 114

9. In 1966, Ontario consolidated its benefits programs in a single statute. Although the “suitable person” clause was dropped, to be eligible for benefits, the law still required that a single mother be living as a “single person”. By law, then, women continued to face intense and invasive state scrutiny of their relations, sexual and otherwise, with men. This scrutiny involved surveillance of homes to identify if a man visited, unannounced visits by caseworkers, searches through bedrooms, closets and bathrooms for evidence of a male presence, and questioning of landlords, neighbours and co-workers: “If there was a man in the house, the law presumed that it was his responsibility - not the state’s - to provide for the woman and children”.

Mosher, “Managing Disentitlement”, *supra* at 38

Affidavit of Margaret Little, Respondents’ Record, Tab 15 at 626, 632-633

10. Although the law was amended in 1982 to include benefits for single fathers, male recipients then made up less than 1% of the single parent welfare caseload. In 1995, men remained at less than 6% of the single parent welfare caseload.

Leighton, “Handmaids’ Tales”, *supra* at 334

Affidavit of Nancy Vander Plaats, Respondents’ Record, Tab 10, Exhibit E at 234-235

11. In 1987, in settling a *Charter* challenge launched by LEAF, the government amended the regulations to define “spouse” in relation to whether the individuals had, by statute, court order or domestic contract, a legal obligation to support each other. Thus, in line with support obligations under the *Family Law Act*, persons of the opposite sex were deemed “spouses” only after they had lived together continuously for at least three years. To protect women’s privacy,

the 1987 regulations also stated that “sexual factors” would not be investigated or considered in a spousal determination. The government announced that these amendments were made with the express intent to “move away from intrusive investigations into private conduct towards a system which looks at the objective needs of sole support parents”.

Mosher, “Managing Disentitlement”, *supra* at 39

Vander Plaats Affidavit, Respondents’ Record, Tab 10, Exhibit G at 238

12. The impugned Regulations, introduced in 1995, replaced the “three year” cohabitation rule with a presumption that as soon as a single woman resides with a man, that man is her spouse and is providing her and her children with economic support; and with a requirement that a single mother living apart from a “spouse” is entitled to support only where there is “no reasonable prospect of reconciliation” with an absent “spouse”. The 1995 Regulations were introduced at the same time that the government initiated a 1-800 hotline and encouraged people, under a promise of anonymity, to report suspected welfare fraud.

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

Little Affidavit, Respondents’ Record, Tab 15 at 633, para 38; and Exhibit F at 931-932

13. The *FBA* Regulations and regulations under statutes that replaced the *GWAA* were amended in 2000 to extend the definition of “spouse” to individuals residing with a person of the same sex. However, LEAF submits that this extension in no way departs from the underlying premise that personal intimacy implies economic dependence. The 2000 amendments are not at issue in this appeal. In any event, LEAF submits that they merely impose patriarchal structures on same sex relationships and mask the prejudicial impacts and stereotypes about women that are reinforced by the Regulations.

B. Social and Economic Context in which the Regulations Operate

1. Women are Economically More Vulnerable than Men

14. Women remain economically disadvantaged relative to men. In Canada more women

than men live in poverty. In 1993, 56% of all people below Statistics Canada's Low Income Cut Off ("LICO") were women, and 20% of all women in Canada lived below this poverty line.

Statistics Canada, Women in Canada: A Statistical Report (1995) at 84-85

15. Not only are women at greater risk of poverty, but when they are poor, they also experience greater depths of poverty than men. Of all family configurations, single mothers and their children experience both the greatest risk and greatest depth of poverty. Two-thirds of Ontario's single mothers and their children live in poverty. In 1980-1996, on average, single mother-led families in Canada lived about \$10,000 below Statistics Canada's LICO.

National Council of Welfare, Poverty Profile 1996 (1998) at 53

Affidavit of Brigitte Kitchen, Respondents' Record, Tab 11 at 282-283

2. Who are Welfare Recipients in Ontario?

16. In Ontario, 54% of all welfare recipients are women. Single parents make up 30% of all those on social assistance, but almost all single parents on assistance – some 95% – are women. Of all women on welfare, 51% are single mothers.

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 158, Exhibit E at 234-235

17. Some 50% of women on welfare have experienced domestic violence involving physical and/or sexual abuse and are on welfare after leaving violent relationships. All four claimants in this case had left abusive relationships. For these women, having an income independent of any control or ownership by a man secures for them the financial and psychological integrity that is essential if they are to heal from past abuse and to re-build their own and their children's lives free of violence.

Little Affidavit, Respondents' Record, Tab 15 at 638; Cross-examination of Margaret Little, Appellant's Record, Vol. 3, Tab 1 at 120-123, 187-189, Q524-537, Q837-841

Affidavit of Usha Gici George, Respondents' Record, Tab 13 at 543-546

Affidavit of Robert Fulton, Respondents' Record, Tab 17 at 943

3. Social and Economic Disadvantage of Single Mothers

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

19. Systemically, women earn lower incomes than men and women are also often required to limit their paid workforce participation to care for children.

Moge v. Moge, [1992] 3 S.C.R. 813 at 861-862

20. Over 80% of single parent families in Canada are headed by women. Most single parents are women because, overwhelmingly, single women care for children born where the mother was never married or in a common law relationship, and, overwhelmingly, women retain custody of children upon separation and divorce. For most women, assuming primary responsibility for childcare when a relationship ends simply entails continuing the duties they fulfilled during the relationship.

Kitchen Affidavit, Respondents' Record, Tab 11 at 280

Moge v. Moge, *supra* at 863

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

21. When a relationship ends, single mothers experience a sharp drop in income, while men usually retain or improve their former standard of living. Statistics Canada figures reveal that in the year following divorce, on average, the income-relative-to-needs of women with children drops by over 40%, while that of men rises 18%. After divorce or separation, most men have incomes that place them well above the poverty line, while most mothers with custody have incomes below the poverty line even when support payments are received. Most single mothers are single and poor following divorce or separation.

Frances Wooley, "Intra-Family Inequality: Implications for the Design of Income Support" (Ottawa: Canadian Advisory Council on the Status of Women, 1994) at 4-5

Moge v. Moge, *supra* at 855

Willick v. Willick, [1994] 3 S.C.R. 670 at 715-716

Kitchen Affidavit, Respondents' Record, Tab 11 at 281

22. The profile of single mothers is very different from single fathers. Single fathers tend to be older, to care for older children, and to have more established careers and higher incomes. Single fathers also remarry or establish new relationships more quickly than single mothers.

Kitchen Affidavit, Respondents' Record, Tab 11 at 280

23. Women, and in particular single mothers, face specifically gendered barriers to escaping poverty. Women's education, training and employment are more frequently interrupted in order to have and care for children. This has a continuing adverse effect on their ability to enter or re-enter the paid labour force. Lack of available and/or affordable childcare limits the number of hours women can work outside the home, which affects women's ability to find, keep and advance in paid employment. In addition, taking time off work to care for sick children and family members puts single mothers at increased risk of losing their jobs. Finally, when they find work, women's incomes are lower and more precarious because women are concentrated in jobs that are lower paid and less stable than men's jobs.

Kitchen Affidavit, Respondents' Record, Tab 11 at 283-287

M. Gunderson, L. Muszynski, J. Keck, Women and Labour Market Poverty (Ottawa: Canadian Advisory Council of the Status of Women, 1990) at 18-19

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 156-157

4. Stigma that Relates to Receipt of Social Assistance

24. Numerous negative stereotypes and social prejudices persist against individuals on welfare. These include the notions that welfare recipients are not genuinely in need, make fraudulent claims, waste their money, and are able to work but are too lazy and unmotivated to do so. In addition, very specific stereotypes and prejudices stigmatize women and single mothers on welfare. These include the notions that "welfare mothers" are immoral and promiscuous, have lots of children in order to boost the size of their welfare cheque and abuse the system by staying on welfare when they are not in need.

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 158-160

Erlee Carruthers, "Prosecuting Women for Welfare Fraud in Ontario" (1995), 11 *Journal of Law & Social Policy* 214 at 250-252

Affidavit of Bruce Porter, Respondents' Record, Tab 14 at 589-594

Little Affidavit, Respondents' Record, Tab 15 at 628

CHRA Review Panel, Promoting Equality: A New Vision (2000) at 109-110

25. The reality is that less than 3% of single mothers on welfare are under the age of 20. Most single mothers on welfare are in their mid- to late-20s and 30s. On average, single mothers on welfare have slightly fewer children than mothers not on welfare. And most single mothers use welfare only once and for a relatively short period of time. Half of single mother recipients use welfare following divorce or separation and rely on it for less than two years. As an overall average, single mother recipients exit the welfare system within 3½ years to 4 years.

National Council of Welfare, Profiles of Welfare: Myths and Realities (1998) at 1-3

Kitchen Affidavit, Respondents' Record, Tab 11, Exhibit C at 426

Porter Affidavit, Respondents' Record, Tab 14 at 590-591

Little Affidavit, Respondents' Record, Tab 15, Exhibit e at 862-865

26. Despite many studies exposing the fallacy of these stereotypes, they persist. Moreover, stereotypes about welfare fraud are becoming increasingly prevalent in response to the government crackdown on welfare fraud of which the Regulations are a part. There remains a presumption that in certain circumstances women receiving welfare are "cheating" and "that personal intimacy implies illegitimate financial intimacy".

Mosher, "Managing Disentitlement", *supra* at 43

Shelley Gavigan, "Legal Forms, Family Forms, Gendered Norms: What is a Spouse?", (1999) 14:1 *Canadian Journal of Law and Society* 127 at 144-145 and footnote 84

5. Who was Affected by the Impugned Regulations?

27. The impugned regulations came into effect on 1 October 1995. By April 1996, 10,013

welfare recipients had been declared ineligible due directly to the new definition of "spouse". Of those declared ineligible for benefits, 89% were women; 79% were sole support parents; and of the sole support parents rendered ineligible, 96% were single mothers.

Cross-Examination of Kevin Costante, Appellant's Record, Vol 1, Tab 23, Ex. Q, at 119

PART III: LEAF'S POSITION ON THE ISSUES

28. LEAF's intervention relates only to the constitutionality of the impugned Regulations. LEAF submits that (a) the Regulations violate the right to equality under s. 15(1) by discriminating against women on the basis of sex; (b) the Regulations violate s. 15(1) by discriminating on the analogous ground of being a single mother on social assistance; (c) the Regulations violate women's rights to liberty and security of the person under s. 7; and (d) that these violations are not demonstrably justifiable under s. 1 of the *Charter*.

PART IV: THE LAW

A. Government's Obligations to Disadvantaged Groups

29. Under s. 15(1) of the *Charter*, government has an obligation to ensure that the laws it makes "tak[e] into account their possible impact on already disadvantaged classes of persons". In addition, s. 15(1) "require[s] that the government not be the source of further inequality".

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at 549, per Lamer C.J.C. (dissenting but not with respect to this comment)

Thibaudeau v. Canada, [1995] 2 S.C.R. 627 at 655, per L'Heureux-Dubé J. (dissenting but not with respect to this comment)

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at 677-678

30. LEAF submits that the present Regulations violate s. 15(1) because they fail to take into account the real needs and circumstances of an already disadvantaged group and exacerbate the depth of disadvantage and inequality that poor women and poor single mothers experience.

B. The Regulations Violate Section 15's Equality Guarantees

31. While *Law v. Canada* is the most recent comprehensive analysis of s. 15, LEAF has deep concerns with the case, including the unduly individualistic analysis of human dignity *Law* adopts and the fact that *Law* incorporates into the s. 15(1) analysis some factors relating to the purpose of the impugned law that properly belong in a s. 1 analysis. LEAF does not rely on either of those two aspects of *Law* in making its arguments in this case.

32. To establish a s. 15(1) violation, it is necessary to show that: (a) the law, in purpose or effect, creates a distinction which denies one of the equality rights; (b) the distinction is based on an enumerated or analogous ground; and (c) the distinction is substantively discriminatory.

Law v. Canada, [1999] 1 S.C.R. 497 at 548

33. Each step of the s. 15 analysis is made with reference to s. 15's purposes which are "... to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

Law v. Canada, supra at 549

34. Whether s. 15 is violated must be assessed subjectively and objectively from the claimants' perspective – here, women and single mothers on welfare: "All of that individual's or that group's traits, history and circumstances must be considered in evaluating whether a reasonable person in circumstances similar to those of the claimant would find that the [regulation] which imposes different treatment has the effect of demeaning his or her dignity."

Law v. Canada, supra at 532-533

35. Most importantly, the Supreme Court of Canada has repeatedly emphasized that s. 15 claims must be examined in the broader social, political, historical and legal context within which the impugned law operates and within which the claims arise:

"Determining whether legislation violates these purposes [of s. 15] requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differently by it. ...

"... The analysis of discriminatory impact must be conducted with a careful eye to the context of *who* is affected by the legislation and *how* it affects them."

Corbière v. Canada, [1999] 2 S.C.R. 203 at para. 63-64, per L'Heureux-Dubé J. (dissenting but with respect to this comment)[emphasis in the original]

Law v. Canada, supra at 531-541

R. v. Turpin, [1989] 1 S.C.R. 1296 at 1331-1332

36. The present s. 15 analysis must give due consideration to the context outlined earlier in this factum: (a) women's and single mother's pre-existing social and economic disadvantage; (b) the historical treatment of women on social assistance; (c) the damaging and persistent stereotypes and prejudices that are directed towards social assistance recipients in general and towards women and single mothers on social assistance in particular; (d) the fact that a large percentage of women on social assistance have left violent domestic relationships; and (e) the fact that, overwhelmingly, those affected by the Regulations are women. To this context, one must also add due consideration of the nature of the interest at stake – the right of those in extreme poverty to receive assistance to secure the basic necessities of life.

Law v. Canada, supra at 534-541

37. LEAF submits that the comparative analysis proposed by the Appellant is unduly narrow, and is conducted within the four corners of the legislation without reference to the broader context. Further, the Appellant's comparison between "common law couples" and married couples begs the very question which is at issue: by deeming individuals to be spouses when they owe each other no legal obligations of support, and thus reinforcing prejudicial stereotypes about sex and economic dependence, do the Regulations discriminate contrary to the *Charter*?

38. LEAF's comparative analysis is supported by the Supreme Court of Canada which has

ruled that, where the law defines an individual as a spouse, the constitutionality of the law's impact must be analyzed with reference to the treatment of that individual. This focus on the individual, combined with a full contextual analysis, properly reveals that the legal definition of spouse can have a differential impact upon different individuals who may be deemed a spouse, and reveals the real and qualitatively distinct impact these Regulations have on women.

M. v. H., [1999] 2 S.C.R. 3 at para. 61

1. The Regulations Create Differential Treatment

39. The 1995 Regulations define a "spouse" as a person of the opposite sex who resides with a welfare applicant/recipient if the two have a "mutual agreement regarding their financial affairs" and the "social and familial aspects" of their relationship "amount to cohabitation".

40. The Regulations treat women and single parents on social assistance differently from all others who may be deemed "spouses" under provincial law. This occurs in five ways:

- (a) Only applicants and recipients of social assistance are defined as a "spouse" as soon as a person of the opposite sex begins to reside with them, even in the absence of any legal obligation to support one another: see para. (d)(iii) of the definition of "spouse" in each Regulation.

In particular, this contrasts sharply with the *Family Law Act* which, for the purposes of determining support obligations, defines a "spouse" to include only individuals who are legally married, and unmarried individuals who have cohabited continuously for not less than three years, or who are in a relationship of some permanence and are the natural or adoptive parents of a child.

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

- (b) Only applicants and recipients of social assistance must by law rebut a presumption that a person of the opposite sex is their "spouse" as soon as that person begins to reside with them: see s. 1(3) of each Regulation.
- (c) Of all welfare recipients, only single parents are categorically denied assistance in their own right once they are deemed to be or have a "spouse". All other welfare recipients have their benefit level re-assessed in light of the resources and income of a "spouse", but if their overall income is found to be below established levels of need, a partial top up allowance is paid out: see s. 2(7)(b)

of Regulation 366; s. 7(8) of Regulation 537.

- (d) Of all welfare recipients, only single parents are categorically denied assistance unless they are living apart from their "spouse" "by reason of separation with no reasonable prospect of reconciliation": see s. 2(7)(b) of Regulation 366; s. 7(8) of Regulation 537.
- (e) As a result of this regime, women and single parents on social assistance are subject to heightened and invasive state scrutiny of their personal relationships.

41. This differential treatment denies women and single mothers on social assistance equal benefit and protection of the law by disqualifying them from receiving social assistance.

2. The Distinction is Based on Prohibited Grounds

42. LEAF submits that the above differences are based on two prohibited grounds: the enumerated ground of sex and the analogous ground of being a single mother on welfare.

43. Section 15 of the *Charter* protects disadvantaged groups against both direct and indirect discrimination. Even where a law is framed in neutral terms – does not draw explicit distinctions on the basis of prohibited grounds – it can create distinctions based on prohibited grounds if its operation disproportionately affects individuals or groups identified by those grounds.

Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1284-1291, esp. at 1290-1291 [sexual harassment is indirect discrimination on the basis of sex]

Rodriguez v. British Columbia, *supra* at 555-557, per Lamer C.J.C. [laws against assisted suicide indirectly discriminate on the basis of physical disability]

Eldridge v. British Columbia, *supra* at 670-675 [funding for health care apply to all but indirectly discriminate on the basis of disability]

44. To find discrimination in the operation of a facially neutral law, it is not necessary that only members of the claimant group be affected by the law, and it is not necessary that all members of the claimant group be equally affected by the law.

Rodriguez v. British Columbia, *supra* at 556-557

Janzen v. Platy, supra at 1288-1290

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

Symes v. Canada, [1993] 4 S.C.R. 695 at 769

45. Contrary to the Appellant's submissions, the fact that the Regulations apply to women and men, to single mothers and single fathers, does not preclude a finding of discrimination against either women or single mothers. The Appellant's analysis denies the substantive effect of the Regulations in the real world. Their analysis also fails to comply with the Supreme Court of Canada's express direction that even where a law is "applicable to everyone", to identify discrimination, it is of "crucial importance" to consider the law's effect from the claimant's perspective: who is affected? and are they affected in a manner related to a prohibited ground?

Corbière v. Canada, supra at para. 63-64, per L'Heureux-Dubé J.

Rodriguez v. British Columbia, supra at 548-549, 555

Janzen v. Platy, supra at 1284-1285, 1288-1290

a. Distinctions in Relation to Sex

46. The Regulations distinguish on the basis of sex because 89% of the individuals they affect are women. In addition, the Regulations have significant gender-specific impacts:

- (a) because women and single mothers live in deeper poverty than men, the consequences of terminating their benefits are more devastating;
- (b) women also experience the Regulations' burdens in a qualitatively different way because
 - (i) they perpetuate a long history of state scrutiny of women's personal lives;
 - (ii) they reinforce the prejudicial stereotype that women's intimate relationships with men invariably involve economic dependence or exchange; and
 - (iii) the fact that women are at greater risk of domestic violence means that they experience the loss of income independent of

male control in a qualitatively different and more prejudicial way.

b. Distinctions in Relation to Single Mothers on Assistance

47. The Regulations also discriminate against single mothers on social assistance:

- (a) In numerical terms, single mothers are disproportionately affected by the Regulations. Single mothers make up almost 95% of single parents receiving welfare and make up almost 76% of all individuals disqualified from receiving benefits due to the 1995 spousal definition.
- (b) Single mothers are also disproportionately disadvantaged in relation to the degree and the qualitative experience of the law's burden. In addition to the qualitative difference that all women on welfare experience (outlined above), single mothers on welfare experience the burden in qualitatively distinct ways because
 - (i) the Regulations reinforce prejudicial stereotypes that relate specifically to single mothers on welfare and their propensity to "cheat" the welfare system;
 - (ii) the loss of income independent of male control places single mothers at serious prejudice because only they, and not their putative spouse, have a legal obligation to provide their children with the necessities of life; and
 - (iii) the Regulations impose added burdens which apply only to single parents (categorical denial of benefits in their own right; the "no reconciliation" rule which puts women escaping domestic violence at greater risk).

c. "Single Mothers on Social Assistance" are an Analogous Ground

48. Being a "single mother on social assistance" is analogous to the prohibited grounds of distinction which are enumerated in s. 15(1).

49. Marital status has already been accepted as an analogous ground under s. 15(1). Thus, as it is a matter of marital status, the condition of being a single mother is also analogous.

50. Single mothers on social assistance also share many of the historical, social, political and economic characteristics of disadvantage which the Supreme Court of Canada has relied upon to identify analogous grounds.

Miron v. Trudel, *supra* at 495-496

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 546

51. The historical treatment of single mothers on welfare and their profound economic disadvantage has already been noted above. In addition, single mothers on welfare often experience multiple layers of discrimination based on grounds enumerated in s. 15(1), including sex, race, disability and age, and grounds analogous to them, such as poverty.

Little Affidavit, Respondents' Record, Tab 15, Exhibit C at 747-753, 824-826

Fulton Affidavit, Respondents' Record, Tab 17, Exhibit B at 967-968

Martha Jackman, "Constitutional Contact with Disparities in the World" (1994), 2:1 *Review of Constitutional Studies* 76 at 81-83

Canadian Panel on Violence Against Women, Changing the Landscape (1993) at 64

52. The persistent negative stereotypes and social stigma directed at single mothers on social assistance have also been noted. As a result, these women are politically vulnerable to having their interests overlooked. Their political marginalization is reinforced by government programs that emphasize the need to "combat welfare fraud", to tighten welfare eligibility to force welfare recipients back to work, and to save Ontario taxpayers' money.

MCSS, News Release (23 August 1995)

Mosher, "Managing Disentitlement", *supra* at 43-47, esp. at 47

53. All but three provincial and territorial human rights codes, for some purposes, prohibit discrimination on the basis of a ground related to receiving welfare. In these provinces, discrimination is prohibited on the basis of "receipt of public assistance" (Ontario, Saskatchewan, and Nova Scotia); "source of income" (Alberta, Manitoba, Prince Edward Island and the Yukon); "social condition" (Québec) and "social origin" (Newfoundland). The relevant

statutory excerpts are reproduced at Schedule B to the factum.

54. Further, the 2000 review of the *Canadian Human Rights Act*, chaired by former Supreme Court Justice Gerard La Forest, recommended that "social condition", as it relates to social and economic disadvantage, be added as a prohibited ground of discrimination in the *Canadian Human Rights Act*.

Promoting Equality: A New Vision, *supra* at 106-113

55. This constellation of socio-economic, legal and political indices of disadvantage has led a number of courts to recognize that the purposes of s. 15(1) are engaged in protecting welfare recipients, single mothers, and single mothers on social assistance from discrimination. In particular, the Nova Scotia Supreme Court recognized single mothers on social assistance as an analogous group in ruling that province's spouse-in-the-house regulation unconstitutional.

R. v. Rehberg (1993), 127 N.S.R. (2d) 331 (N.S.S.C.) at 351-352 [single mothers on social assistance]

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

Schachter v. Canada (Employment and Immigration Commission), [1992] 2 S.C.R. 697 at 701-702 [single mothers]

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

3. The Distinction is Discriminatory

56. Apart from their disproportionate numerical impact on women, the 1995 Regulations perpetuate damaging stereotypes and impose qualitatively distinct burdens on women.

57. Although either men or women may be disqualified from benefits under the Regulations, this does not preclude a finding that the impact is discriminatory in relation to women and single mothers. The Supreme Court of Canada has expressly recognized that men and women will experience identical treatment in qualitatively different ways because of the broader social and

political context and this qualitative difference can establish discrimination under s. 15(1).

Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872 at 877-878

see also: *Janzen v. Platy*, *supra* at a1284-1285, 1288-1290

58. Taking into account the full context in which the Regulations operate, LEAF submits that a law that deems a woman to be a "spouse" against her will and that forces a woman into economic dependence upon a man who has no legal obligation to support her, is experienced in a qualitatively different and gender-specific way that discriminates contrary to s. 15(1).

a. The Regulations Reinforce Prejudicial Stereotypes

59. First, the Regulations are discriminatory because they reflect and entrench a number of stereotypes and prejudices about women. In particular, they reinforce the stereotype that women's intimate relationships with men invariably involve an economic exchange and that any involvement with a man necessarily implies economic dependence or exchange.

60. The Regulations reinforce additional stereotypes that specifically prejudice single mothers on assistance: that single mothers are inherently prone to commit welfare fraud and so must be subject to extra scrutiny; that reliance on social assistance is a social evil; and that social welfare recipients represent an unwarranted and illegitimate burden on the public fisc. As one commentator writes:

"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, 248-250

Leighton, "Handmaids' Tales", *supra* at 327

R. v. Rehberg, *supra* at 351-352

61. In particular, the differential treatment between single mothers and other categories of

welfare recipients reinforces the view that the law is less concerned with the actual needs of single mothers living in poverty, than with their potential unification with a male “breadwinner”.

Leighton, “Handmaids’ Tales”, *supra* at 336

b. The Regulations Have Concrete Discriminatory Effects

62. The Regulations also have a number of concrete effects with qualitatively gender-specific impacts which seriously compromise the equality of women and single mothers on social assistance.

63. First, enforcement of the Regulations perpetuates a degrading and intrusive scrutiny of women’s lives and relationships, continuing the state’s long history of monitoring poor women’s relations with men as a condition of receiving social assistance. This scrutiny is particularly demeaning in view of the reverse onus which, by law, requires women to provide evidence that their male co-resident is not their spouse; and in view of the fact that even if a male co-resident is found not to be a “spouse”, the status of their relationship will be reviewed annually.

Regulation 366, as am., s. 1(3); Regulation 537, as am., s. 1(3)

Vander Plaats Affidavit, Respondents’ Record, Tab 10, Exhibit H at 253

64. For women and single mothers on social assistance, deciding to reside with a man means the automatic loss of independent support in her own right, regardless of whether any financial support is in fact available, desired or forthcoming from the man, and irrespective of whether the woman and her children have an actual and continuing need for assistance. LEAF stresses that unlike married spouses or common-law spouses under the *Family Law Act*, a deemed “spouse” under the Regulations may owe the woman no legal obligation of support.

65. The possibility that a woman or single mother with a deemed “spouse” may apply for general welfare benefits as part of a “couple” does not mitigate the prejudicial effect of the definition of “spouse”. On the contrary, it compounds the experience of discrimination.

66. A woman can only apply for general welfare benefits if the male "spouse" consents and both are eligible. The "couple's" eligibility is then based on total household income, even if the man in fact contributes no economic support to the woman and her children. Where a "couple" qualifies for benefits, only one welfare cheque is issued and; by general practice, it is issued to the male "head of the household". Accordingly, even if a woman is able to convince a male "spouse" to apply for general welfare benefits with her, she receives no money in her own name. The financial security of the mother and her children is placed entirely at the largesse of a man who has no legal obligation to support either her or her children.

Regulation 537, s. 4 (eligibility); s. 9(1), (3), Forms 1 and 3 (application for benefits)

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 164, 172

67. In abusive relationships, men often exert control over women and prevent them from leaving the relationship by restricting their access to money. By requiring single mothers and women on social assistance to rely on their male co-resident for support, the Regulations replicate the precise form of economic insecurity that is particularly threatening to women who have experienced abuse.

George Affidavit, Respondents' Record, Tab 13 at 544-546, Exhibit C at 579

68. If the male "spouse" is ineligible for assistance as an individual or as part of a reconstituted family unit, the Regulations again force the woman or single mother into the idealized and traditional female role of depending on a man for support.

69. The requirement that single parents be separated with "no prospect of reconciliation" before they can receive benefits may force women to take conclusive steps to end relationships which are beneficial to them and their children; may foreclose reconciliation efforts within relationships that otherwise may have been salvaged; may affect women's ability to maintain healthy parenting relationships with the fathers of their children; and may make women feel coerced to return to an ex-spouse.

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 168-171, also at 173

George Affidavit, Respondents' Record, Tab 13 at 546-547

70. Finally, the Regulations, in their specific and cumulative effects, force women to make choices about how to manage new and existing personal relationships in a way that responds to the exigencies of the social assistance regime rather than their own and their children's own needs and priorities.

see: Ontario, Report of the Social Assistance Review Committee: Transitions (1988) at 20

71. The requirement that a single mother demonstrate she has "no reasonable prospect of reconciliation" with a spouse imposes added burdens on single mothers who have left abusive relationships. Any steps towards separation beyond those which are absolutely necessary (i.e. divorce proceedings rather than separation) place victims of domestic violence at greater and even life-threatening risk of retaliation from their spouse.

Vander Plaats Affidavit, Respondents' Record, Tab 10 at 164-165, 167-168, 171

George Affidavit, Respondents' Record, Tab 13 at 546-549

Carruthers, "Prosecuting Women for Welfare Fraud", *supra* at 254-256

72. The fact that individual applicants and recipients must complete a "Determination of Spousal Status" questionnaire does not relieve against a finding of discrimination. The Supreme Court of Canada has expressly ruled that "individual testing, without more, does not negate discrimination. The individual must be tested against a realistic standard". Moreover, the mere fact that an individual's situation is considered "will not necessarily defeat a s. 15(1) claim as the focus of the inquiry must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity."

B.C. v. B.C.G.S.E.U., [1999] 3 S.C.R. 3 at 44; also at 38, 40-44

M. v. H., *supra* at para. 70

Law v. Canada, *supra* at 538

Winko v. B.C. (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625 at para. 90

73. LEAF submits that the “individual testing” that occurs in enforcing the Regulations is highly flawed and violates human dignity contrary to the *Charter* for the following reasons:

- (a) The “testing” is unrealistic and violates personal autonomy. Individuals can be deemed “spouses” when they do not consider themselves spouses, in the absence of a legal obligation of support and in the absence of actual meaningful economic interdependence. Trivial factors such as whether the individuals share a phone line or share the use of a television are considered to determine if they are “spouses”. Government directives state that even if the individuals split all costs 50/50, this “does not in and of itself mean financial independence.”
- (b) Second, the criteria that may identify a “spouse” are exceedingly vague. The government’s directions expressly state that “there is no correct number of questions that must be answered in a certain way” to establish a spousal relationship.
- (c) Third, where women must rebut a legal presumption that they have a spouse, this vague “individual testing” never allows them to know the case they must meet.

Vander Plaats Affidavit, Respondents’ Record, Tab 10 at 165-166, Exhibit H at 249, 259, 260

74. LEAF submits that where the criteria for being a “spouse” are so nebulous, where the caseworker’s discretion to declare a spouse is so broad, and where a reverse onus is in effect, discriminatory stereotypes and prejudices will operate to fill the gaps. Such a flawed “test” fails to mitigate the multiple and prejudicial impacts upon human dignity detailed above.

C. The Regulations Violate Section 7 of the *Charter*

75. A s. 7 violation is established where, first, there is a breach of one of the s. 7 interests – life, liberty or security of the person; and second, the law responsible for the breach violates the principles of fundamental justice. LEAF submits that the Regulations violate the rights to liberty and security of the person contrary to the principles of fundamental justice.

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at 1140

Blencoe v. British Columbia (Human Rights Commission) (2000), 190 D.L.R. (4th) 513 (S.C.C.) at 536-537; 2000 S.C.C. 44 at para. 47-48

1. Security of the Person

76. Under “security of the person”, s. 7 protects an individual from physical interference by the state and also protects an individual from “serious state-imposed psychological stress” resulting from “state interference with an individual interest of fundamental importance”.

Blencoe v. B.C., *supra* at 540-541, para. 55-57

New Brunswick (Minister of Health) v. G.(J.), [1999] 3 S.C.R. 46 at 76-78

77. Psychological incursions will violate the right to security of the person where “the state interferes in profoundly intimate and personal choices of an individual”; interferes with interests that are “basic to individual autonomy” or “basic to individual dignity”; or interferes with an individual’s “ability to make essential life choices”.

Blencoe v. B.C., *supra* at pp. 540-541, 550-552, para. 55-57, 81-86

78. The combination of stigmatization, loss of privacy, and disruption of family or social life may cause serious psychological stress so as to engage an individual’s security of person. Whether state action causes serious psychological stress must be assessed objectively.

G.(J.), *supra* at 77-78

79. LEAF submits that the impugned Regulations violate security of the person because:
- (a) they subject women on social assistance to highly invasive investigations into the minutiae of all aspects (save sexual) of her personal relationships;
 - (b) they subject women on social assistance to public humiliation and stigmatization by making it a condition of her receiving assistance that the state be permitted to question her landlord, neighbours, friends, co-workers and others about her personal relationships and in so doing reveal to these persons that the woman receives welfare, a fact that subjects the woman to added stigma and prejudice;
 - (c) they are unduly vague and so subject women to ongoing stress and uncertainty because a woman never knows which interactions between herself and her co-resident, or between her family and her co-resident, may “tip the balance” such that the Director could find that she lives with a “spouse”;

- (d) they subject women and single mothers escaping domestic violence to the risk of further abuse and harassment by ex-partners by (i) terminating support in the face of actual need, leaving women without the financial wherewithal to reside apart from a violent partner; and (ii) by requiring them to prove that there is “no reasonable prospect of reconciliation” with a “spouse”;
- (e) their enforcement can force a woman to choose to between continuing an emotionally supportive relationship with a co-resident and losing benefits for the necessities of life.

Decision of SARB, Appeal Book, Tab 4 at 145

Little Affidavit, Respondents' Record, Tab 15 at 635-636

Vander Plats Affidavit, Respondents' Record, Tab 10 at 164-165

George Affidavit, Respondents' Record, Tab 13 at 544-546

Re Pitts (1985), 51 O.R. (2d) 302 (Div. Ct.) at 314

Irwin Toy v. Québec (Attorney General), [1989] 1 S.C.R. 927 at 1003-1004

2. Liberty

80. LEAF submits that the Regulations also violate women’s right to liberty under s.7. The Supreme Court of Canada has ruled that “the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual’s fundamental being.” The liberty interest also encompasses a “reasonable expectation of privacy”. Thus, the right to liberty is violated when the state interferes with an individual’s right to make inherently personal and private choices. Within this sphere of inherently personal choices – including an individual’s right to choose with whom they will associate and where they will live – the state cannot interfere to “impose any one conception of the good life”.

Blencoe v. B.C., *supra* at pp. 537-540, para. 49-54

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 166

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

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at 893

81. LEAF submits that the Regulations violate women's right to liberty because

- (a) the investigations into women's personal relationships that are triggered by the Regulations violate women's reasonable expectation of privacy. While it might be reasonable for the government to make inquiries into actual financial support provided by one co-resident to another, and into the existence of actual legal obligations of support, the government's inquiry into all facets of a woman's or single mother's relationship with a male co-resident is an unreasonable invasion of privacy.

Falkiner v. Ontario (Ministry of Community and Social Services) (1996), 140 D.L.R. (4th) 115 (Ont. Div. Ct.) at 172, per Rosenberg J.

- (b) by deeming a male co-resident to be a "spouse", the Regulations violate women's and single mother's autonomy to structure their personal relationships. The Regulations force these women into a particular family form which the state considers beneficial, namely a "traditional" nuclear family with a male breadwinner and a female dependent raising children. In addition, they assume and reinforce women's financial dependence on men where there is or may be personal intimacy. In this way the Regulations fail to respect the inherently personal and private choices women may make in shaping their social and sexual lives and they limit women's freedom to shape relationships with men who do not owe them or their children a legal obligation of support.

3. Principles of Fundamental Justice

82. LEAF submits that the above violations of liberty and security of the person are not in accordance with the principles of fundamental justice. First, a deprivation of an individual's s. 7 rights cannot be in accordance with fundamental justice when effected through a law that is arbitrary or unfair, or has the effect of infringing another *Charter* right, here s. 15 of the *Charter*.

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

Morgentaler, *supra*, at 175

R. v. Mills, [1999] 3 S.C.R. 668 at 714

83. While the state has an interest in ensuring that welfare is paid to those in need, there is no evidence that those whose benefits were terminated due to the impugned definition of spouse were not in need and had access to other sources of funds. By focusing on matters extraneous to whether actual financial benefits and legal obligations of support flow to women

and single mothers from their male co-residents, the Regulations are arbitrary and unfair. Rather than using criteria that are relevant to determine actual need, the Regulations rely upon gender-related stereotypes to determine entitlement to benefits, and so violate s. 15.

84. Second, LEAF submits that the definition of "spouse" is overly vague and is therefore unable to set a limit that is consistent with the principles of fundamental justice. The criteria by which a "spouse" is identified are too vague to give a woman subject to the Regulations due notice of when her actions may lead the Director to find a spousal relationship and are too vague to enable her to fairly meet the reverse onus of disproving the existence of a "spouse".

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 626-627, 635, 638, 639

85. Third, LEAF submits that the violations of s. 7 do not fairly balance the interest of the state and the individual. In effecting this balance, LEAF stresses that international human rights instruments should be considered in giving substance to s. 7's concept of "fundamental justice". The Supreme Court of Canada has confirmed 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."

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 70

Ref. re: Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 348-350

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 503, 512

86. Canada is a signatory to a number of international human rights instruments that recognize the right of every person and their family to have an adequate standard of living, including adequate food, clothing and shelter. Given the international recognition of such rights, LEAF submits that where a person in real economic need is denied social assistance to support such fundamental rights and that denial is made in violation of a s. 7 interest, it cannot be in accordance with the principles of fundamental justice.

Universal Declaration of Human Rights (1948), Article 25

International Covenant on Economic, Social and Cultural Rights (1976), Article 11

Convention of the Rights of the Child (1992), Article 27

United Nations Economic and Social Council, "Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)", Geneva, 10 June 1993, E/C.12/1993/5; (1993), 20 C.H.R.R. C/1 at C/7

D. The Violations are Not Demonstrably Justifiable under Section 1

87. To establish that a limit on constitutional rights and freedoms is reasonable and demonstrably justified in a free and democratic society, (a) the legislation's objective must be sufficiently pressing and substantial to warrant overriding a constitutionally protected right; and (b) the means chosen to implement the objective must be proportional to the objective. The means must be "rationally connected" to the objective, they must impair the constitutional right "as little as possible", and there must be a proportionality between the effects of the impugned legislation and the legislation's objective. The onus for justifying a limitation on a *Charter* right rests on the party seeking to uphold that limitation. Each part of the s. 1 test must be satisfied on the basis of cogent and persuasive evidence.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136-139

88. Legislatures and courts have independent obligations to ensure that laws conform with *Charter* principles. Judicial deference to the legislature must not extend too far as the court cannot abdicate its role in determining if government choices fall within the constitution's limits.

"To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded."

RJR-MacDonald v. Canada, [1995] 3 S.C.R. 199 at 332

1. Objective of the Impugned Amendment to the Regulations

89. LEAF rejects the proposed objective that the Regulations were amended in order to

ensure equality for common law and married couples. Justification on this basis wholly ignores the crux of the dispute which is that individuals, who lack the actual support and legal obligations for support that common law and married couples have, are nevertheless deemed to be spouses and treated as such. On the contrary, LEAF submits that the overriding objective of the Regulations is to reduce government spending by reducing the number of women and single mothers on social assistance.

MCSS News Release (23 August 1995)

Falkiner v. Attorney General of Ontario (11 January 1995) (Ont. Div. Ct.), Respondents' Record, Tab 4 at 28 [decision on motion for interim injunction]

90. To meet the s.1 test, the governmental objective must be not merely legitimate, or even merely "pressing and substantial"; it must be sufficiently pressing and substantial to warrant overriding constitutionally protected rights.

R. v. Oakes, supra at 135-136, 138

R. v. Keegstra, [1990] 3 S.C.R. 697 at 735-737, 755-757

Singh v. Canada, [1985] 1 S.C.R. 177 at 218

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 352

91. In this context LEAF underscores that the Supreme Court of Canada has clearly and repeatedly recognized that "budgetary considerations cannot be used to justify a violation under s. 1." The guarantees of the *Charter* would be illusory if they could be overridden simply in pursuit of administrative and budgetary convenience. The lack of institutional resources can never be used as a basis for rendering a *Charter* guarantee meaningless:

"[I]n a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. Accordingly, to treat such price ... as a justification for denying the constitutional rights of the [claimants] would completely vitiate the purpose of entrenching rights and freedoms."

McKinney v. Guelph University, [1990] 3 S.C.R. 229 at 403

Schachter v. Canada, supra at 709

Singh v. Canada, supra at 218-219

R. v. Askov, [1990] 2 S.C.R. 1199 at 1213, 1224-1226, 1237

Adler v. Ontario, [1996] 3 S.C.R. 609 at 675, per L'Heureux-Dubé J. (dissenting but not with respect to this comment)

92. LEAF submits that the government's cost cutting objective and deficit reduction policy which underlie it are the product of and compound the social and economic marginalization and political exclusion of women and single mothers on social assistance. The objective is discriminatory in intent and effect. It cannot be constitutionally sanctioned as sufficiently pressing and substantial when the objective is achieved at the expense of the most disadvantaged in society. Saving money in this way conflicts sharply with the values and principles that the Supreme Court of Canada has ruled are 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, supra at 136

2. The Impingement on *Charter* Rights is not Proportional

93. LEAF submits that the Regulations also fails the s. 1 proportionality test.

94. Rational connection: LEAF submits that the Appellant has failed to demonstrate that to fulfill its objective, it was necessary to impair the constitutional rights at issue in the case. LEAF submits that the Regulations' definition of spouse are "arbitrary" and "unfair", are based on "irrational considerations" including prejudicial stereotypes about women and single mothers on assistance, and are not "rationally connected" to the objective of either the *Family Benefits Act* or *General Welfare Assistance Act* which is to provide assistance to persons in need.

95. Minimal impairment: LEAF also submits that the Appellant has failed to demonstrate that

it has "minimally impaired" the *Charter* rights at issue. Options less violative of *Charter* rights were available: the impugned Regulations in fact repealed regulations that were less prejudicial to these rights. Moreover, "individual testing" using the spousal questionnaire fails to provide minimal impairment because the questionnaire's criteria are exceedingly vague, subject to extremely broad and unstructured discretion, and employed in the context of a reverse onus. Finally, the prejudicial impacts upon the rights of the most disadvantaged, detailed above, cannot be characterized as "minimal": in this case, the most disadvantaged women are subject to extreme prejudice in relation to rights related to basic survival.

96. Disproportionate deleterious effects: Finally, LEAF submits that in light of the nature of the rights at stake and the "severity of the deleterious effects" of the Regulations, they cannot be "justified by the purpose [they are] intended to serve." The Regulations severely compromise the security and equality of one of the most disadvantaged groups in society by denying them an entitlement to minimal social assistance in relation to the necessities of life. The values of a free and democratic society cannot countenance such a deleterious burden on such fundamental needs to justify a reduction in government spending.


R. v. Oakes, supra at 139-140

97. For all these reasons, LEAF submits that the Regulations violate both s. 15 and s.7 of the *Charter*, these violations are not justified under s.1.

PART V: ORDER REQUESTED

98. LEAF supports the order for relief as requested by the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22nd DAY OF DECEMBER 2000.


Fay C. Faraday
Kerri Froc