Court File No. A-137-01

FEDERAL COURT OF APPEAL

BETWEEN:

JOANNE MILLER
Applicant

-and-

ATTORNEY GENERAL OF CANADA
Respondent

-and-

WOMEN'S LEGAL EDUCATION ACTION FUND
Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER WOMEN'S LEGAL EDUCATION ACTION FUND

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Part I: Facts

1. The Women's Legal Education Action Fund ("LEAF") accepts the facts as set out in the appellant's Memorandum of Fact and Law.

Part II: Points in Issue

2. LEAF has permission to intervene in this appeal and to make submissions on the question of whether s. 11(6) of the *Unemployment Insurance Act*[1] ("the Act") is contrary to s. 15(1) of the Charter, insofar as s. 11(6) results in the reduction or loss of regular unemployment insurance benefits ("UI benefits") by a woman who, having received maternity or parental benefits, loses her job.

Part III: Submissions

A. Introduction

3. LEAF's position may be stated succinctly as this: because s. 11 (6) of the Act requires that any maternity and parental benefits already received should be deducted from regular UI benefits, the section, in purpose and effect, uses employed women's unique childbearing capacity and their socially sanctioned role as primary caregivers to deprive them of benefits otherwise available to employed people under the Act. The Act purports to offer special UI benefits to support employed mothers in childbirth and childrearing, but the impugned section undermines this support by using the very provision of those special UI benefits as a justification for denying mothers regular UI benefits. What the government has given with one hand it has taken back with the other. This denial of regular UI benefits discriminates against employed mothers on the basis of pregnancy and parenthood, contrary to the equality guarantees of s. 15 of the *Canadian Charter of Rights and Freedoms* ("the Charter") and cannot be saved by the operation of s. 1.

4. LEAF respectfully submits that, in determining that the impugned section does not violate s. 15 of the Charter, the Umpire erred for the following reasons:

a. The Umpire failed to focus his inquiry on the effect of s. 11(6), and instead

incorrectly limited his analysis to whether or not the special benefits that the claimant received pursuant to other provisions of s. 11 were "ameliorative" within the meaning of s. 15(2) of the Charter.

b. The Umpire's analysis compared the claimant to the wrong group for purposes of the equality analysis required under s. 15(1).

In making these erroneous analytical choices, the Umpire failed to correctly apply the principles of substantive equality that underpin the Charter and that have been affirmed by the Supreme Court of Canada.[2]

B. Overview of LEAF's Position

5. The proper approach to the instant case is to begin with an examination of s. 11(6) of the Act, and not the Act as a whole, because it is s. 11(6) that is under attack. Section 11(6) caps the total number of weeks of regular UI benefits payable to a claimant by requiring that any special UI benefits that the claimant has previously received be deducted from the total regular UI benefits to which the claimant is otherwise entitled. While LEAF does not dispute the characterization of UI programs *generally* as ameliorative, s. 11(6) itself is *not* ameliorative in nature.

6. The purpose of regular UI benefits is to provide income support during a period of involuntary job loss. In contrast, the purpose of special UI benefits is to provide income support during a period of job loss attributable to other life events, including maternity and parental leaves as well as disability. These types of job losses are not the basis for receipt of the regular UI benefits provisions of the Act. The purposes of regular and special UI benefits are totally distinct and unrelated. But in any case, the existence and nature of these two types of benefits is not in issue in this application. Contrary to the Umpire's analysis below, the question of whether or not regular and special UI benefits may be considered "ameliorative" in the broadest sense, and that special UI benefits may also be considered "ameliorative" in the sense used in s. 15 (2) of the Charter, is not engaged here.

7. The effect of s. 11(6) on the claimant, and all other women in the situation of the

claimant, is two-fold. First, the section curtails their access to regular UI benefits for the reason that they have utilized their ability to access maternity benefits, which are uniquely accessed by women. In this respect, the impact of s.11(6) is felt only by women, and it disadvantages them in relation to all others who have involuntarily lost their employment. Second, the section curtails their access to regular UI benefits for the reason that they have utilized their ability to access parental benefits, which are accessed by parents, and much more often by women than men. In this respect, women feel the impact of s. 11(6) directly as parents, and disproportionately as women, and are thereby disadvantaged in relation to most others who have involuntarily lost their employment.

8. The distinctions drawn through the operation of s. 11(6) in the instant case are based on the enumerated ground of sex and on the analogous ground of family/parental status. These distinctions, and the resulting differential treatment of women in the position of the claimant, are discriminatory within the meaning of s. 15(1) because they impose a burden and withhold a benefit on the basis of characteristics protected under s. 15(1). This has the effect of perpetuating the historic disadvantage of women in their roles as workers and parents.

9. This violation of s. 15(1) cannot be justified by a resort to considerations of the ameliorative nature of the special benefits involved. The operation of s. 11(6) of the Act undermines the very ameliorative nature claimed for them by forcing women to utilize maternity and parental benefits for the purpose of a job search, rather than the childbirth and parenting responsibilities those benefits were intended to support.

10. Although beyond the scope of the submissions authorized by this Court's order, LEAF would also state for the record that this violation of s. 15 cannot be saved by s. 1 of the Charter. There is no substantial and pressing objective claimed for the operation of s. 11(6). The Attorney General argues that the limitation on the combined total of benefit weeks is a control inherent to the design of the UI scheme to ensure that benefits are delivered to targeted populations. Indeed, if that is the objective, it is not achieved through s. 11 (6), since employed mothers must either sacrifice the time allotted under the scheme to childbirth and childrearing to job search, or vice versa. Thus, there is no

rational connection between the cap imposed by s. 11(6) and this claimed objective. The effect of s. 11(6) is such that it can completely nullify one or the other of the objectives of the legislation. None of the conditions of the test in *R.* v. *Oakes* to establish a demonstrably justifiable limit can be met.[3]

C. Principles to be applied under s. 15 (1)

11. LEAF adopts the arguments of the appellant with respect to the application of s. 15 (1) of the Charter in the instant case. There are three steps in determining whether there has been a violation under s.15. These include determining: (1) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (2) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (3) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee, namely by:

> imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.[4]

i. Differential Treatment through Denial of a Benefit

12. According to the Supreme Court of Canada in its decisions in *Andrews* v. *Law Society of British Columbia*[5] and *Law* v. *Canada (Minister of Employment and Immigration)*[6], the first step in an equality analysis entails the identification of one or more relevant comparator groups. It is the claimant's perspective that determines the choice of the correct comparator group for these purposes.[7] Locating the relevant comparator group requires an examination of the subject matter of the legislation and its effects, as well as a full appreciation of context.

13. The operation of s. 11(6) results in differential treatment in that a woman who has lost her job is denied regular UI benefits, or receives a reduced amount of regular UI benefits, solely because she has previously been in receipt of special benefits for

maternity and parental leave under the Act. This differential treatment is the purpose of this provision, which purpose is realized in its effect.

14. Consequently, the analysis of differential treatment must take place through a comparison of the claimant, *as a person who has involuntarily lost employment,* with all others who have involuntarily lost employment. It is neither sufficient nor appropriate to compare the claimant to others who have lost employment after having received special UI benefits, because those others are similarly disadvantaged by the operation of s. 11(6). Picking as a comparator someone else in the same disadvantaged situation will not usually assist in determining the nature and effect of the distinction. As McIntyre J. stated for the majority in the Supreme Court of Canada decision in *Andrews*:

> ... mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application.[8]

ii. Enumerated and/or analogous grounds are the basis for the denial

15. The denial or reduction of regular UI benefits due to the prior receipt of maternity benefits is based on the sex-based characteristic of pregnancy. The Supreme Court of Canada has confirmed that pregnancy discrimination is discrimination on the basis of sex[9] This first denial therefore is based upon the sex of the recipient.

16. The denial or reduction of regular UI benefits due to the prior receipt of parental benefits is based on the characteristic of being a parent, which characteristic is recognized at law as "family status". The Supreme Court of Canada has consistently recognized the primary importance of family and family relationships as deserving of respect and the protection of the Charter and human rights legislation. As that Court noted in *Moge* v. *Moge*[10], the family is an institution that "serves vital personal interests, and may be linked to building a 'comprehensive sense of personhood'".[11] Given the primacy of family and the immutable status of being a family member, it is submitted that it is an analogous ground having regard to the test as articulated by the Supreme

Court of Canada.[12] This second denial then is based upon the parental or "family" status of the recipient.

17. Furthermore, in the context of parental benefits and the effect of s. 11 (6), the burden of the denial falls disproportionately on women who, both historically and in contemporary society, are more likely to be the parent who remains at home with a child. This second denial has a disproportionate impact on women on the basis of their sex, an enumerated ground under s.15, and as such constitutes sex discrimination as well as family status discrimination.

iii. Discriminatory Effect

18. Section 11(6) creates a distinction between the claimant and others on the basis of one or more enumerated and/or analogous grounds -- in this case, sex, pregnancy and parenthood. In doing so, the section in its application fails to take into account the claimant's already disadvantaged position within Canadian society, resulting in substantively differential treatment between the claimant and others and a demeaning of her dignity.

19. Further, the section has the substantive effect of perpetuating the historical disadvantage women experience when they are both mothers and workers by depriving them of income support that is available to workers who are not mothers. The section has the additional effect of promoting the view that women are less worthy of recognition or value as human beings and members of Canadian society, because the section treats employed women as less committed and less deserving workers, as a result of their childbearing and childrearing roles.

20. This form of discrimination was recognized by the Supreme Court of Canada, and condemned as a barrier to equality, in its 1989 decision in *Brooks* v. *Canada Safeway Ltd.*[13], where, commenting on and overturning the earlier *Bliss* v. *Attorney General of Canada*[14] decision, the Court stated:

> Over ten years have elapsed since the decision in Bliss. During that time there have been profound changes in women's labour force participation.

> With the benefit of a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence....I am prepared to say that Bliss was wrongly decided, or in any event , that Bliss would not be decided now as it was decided then. *Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant...it is unfair to impose all of the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women*."[15] [emphasis added]

21. The fact that the impugned law is framed in neutral terms does not insulate it from a s.15 Charter challenge. If the law has an adverse, discriminatory impact on individuals and groups based on enumerated or analogous ground(s), then s.15 is violated. As is stated in *Law:*

> While it is well established that it is open to a s.15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s.15(1) claim: Andrews [citation omitted]. What is required is that the claimant establish that *either* the purpose *or* the effect of the legislation infringes on s.15(1), such that the onus may be satisfied by showing only a discriminatory effect. [16] [emphasis in original]

22. Furthermore, it does not matter whether all of those adversely affected come from a vulnerable group, or whether all members of a vulnerable group are adversely affected. This was confirmed by the Supreme Court of Canada in *Janzen* v. *Platy Enterprises Ltd.*.[17] What matters in the question of adverse effect discrimination is whether the discriminatory impact is felt by greater numbers of the vulnerable group and/or whether they experience it in a qualitatively different way than others affected.[18]

23. Thus, an argument that men may experience direct discrimination and/or differential treatment through the operation of s. 11(6) when they access parental benefits is not an answer to the fact that women are discriminated against by the operation of this

section. It may well be that men too, *as parents,* are discriminated against by this section and that such discrimination is also contrary to the Charter guarantees under s. 15, but that is not an answer to the discrimination experienced by women as parents. Similarly, an argument that not all women will experience this form of discrimination is not an answer to the fact that women, as employed mothers, will disproportionately experience the differential treatment and discriminatory impact of the operation of s. 11(6). This is, first, because they are women and only women give birth, and second, because they are the primary childcare providers in most Canadian families.

24. Also crucial is that claims under s. 15(1) must be examined within the broader social, political, historical, and legal context within which the impugned law operates and the claims arise:

> At the third stage, the appropriate focus is on how, in the context of the legislation and Canadian society, the particular differential treatment *impacts* upon the people affected by it. This requires examining whether the legislation conflicts with the purposes of s.15: to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian society. Determining whether legislation violates these purposes 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. It must be examined how "a person legitimately feels when confronted with a particular law".[19]

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.[20]

25. *Law* points to the existence of pre-existing disadvantage as one of the most important contextual factors to consider in determining whether the differential treatment imposed by the legislation constitutes discrimination. In most cases, disadvantageous differential treatment imposed on groups who are already vulnerable will be found to be discriminatory. It follows, therefore, that the government must be alive to the vulnerability of groups to ensure that the legislative provisions adopted will not have a greater impact on already disadvantaged classes of persons.[21] The situation and history

in Canadian society of those who are treated differently by the impugned legislation is therefore essential to an analysis of discrimination under s. 15 of the Charter.

a. Women as Mothers/ Women as Workers

26. Women who are both mothers and workers consistently experience economic disadvantage when compared to women who are workers but not mothers, and even more so when compared to their male counterparts in the labour force (male workers generally, and fathers who work). The magnitude of this disadvantage has been calculated to be as high as a 57 percent reduction in expected lifetime earnings in jurisdictions such as the United States, the United Kingdom and Germany. Similar statistics do not exist in Canada, but available data do suggest that women with children continue to earn significantly less than women without family ties.[22]

27. Employed women have historically faced barriers to their full participation in the Canadian workforce, either through directly exclusionary legislation and behaviour, or through more subtle barriers such as inflexible work hours and the increasing reliance of employers on overtime and shift work. Unexamined assumptions on the part of employers about if and when employed women will choose to have children also continue to exist as a usually unarticulated but present barrier to their full participation in the workforce.

28. Discriminatory attitudes to pregnant women and women with children still prevail in our society and the labour market. For example, women may not be regarded as "reliable workers" or may be seen as lacking in commitment to their jobs, because they are perceived as wives with husbands, and as such are not the primary earners in the family. Such discriminatory attitudes heighten women's vulnerability in the labour market and reduce the ability of women with children to compete for employment. Limited access to affordable and accessible childcare also curtails women's ability to participate in the workforce. These factors not only increase women's vulnerability to job loss but also present hurdles to finding appropriate re-employment following childbirth and maternity/parental leave.[23] The operation of s. 11(6) is thus even more deleterious at a time when women are at their most vulnerable.

29. These factors are apparent in the statistics on women's economic position relative to men's. Women, on average, fare less well than men economically and women's disproportionate exclusion from employment insurance benefits exacerbates this existing disadvantage:

- In 1997, average pre-tax incomes were $19,800 for all women and $32,100 for men. In 1999, women employed other than full-year, full-time (including part-time) earned an average of $12,074, compared to $15,481 for men in similar atypical work.[24]
- Women make up a disproportionate share of the population with low incomes (in accordance with Statistics Canada's Low Income Cut Off). In 1997, women accounted for 54% of the population with low incomes; 19% of all women experience low incomes compared to 16% of all men.[25]
- Women who are poor experience a greater depth of poverty than men at every stage of their life cycle.[26]

Therefore the operation of s. 11 (6) increases the disadvantage of employed women at a time when they are at their most vulnerable.

30. It is wrong to say that women "choose" childbirth and childcare in modern Canadian society and that it is their "choices" which result in their deprivation of regular UI benefits in the claimant's circumstances. Only women can bear children. Further, women disproportionately bear the burdens and responsibilities of childrearing, both historically and in contemporary society. The gendered division of unpaid domestic labour results in women performing the lion's share of household and caregiving tasks.[27] Maternity leave and care of children or elderly relatives accounts for a majority of women's interruptions from paid work (62%).[28]

31. Despite the social, political and economic gains made by women in the late twentieth century, mothers continue to be the parent most likely to assume a greater share of the responsibility for childrearing, and she remains the parent most likely to forego paid employment and to access the parental benefits provisions of the Act in order to

carry out these responsibilities. In 1998, women represented 98.4 percent of recipients of maternity/ parental benefits under the UI scheme. Information from the 1996 Census survey of unpaid household activity indicates that fathers' participation in childcare work continues at a very low rate beyond the child's first year.[29] Therefore, s. 11 (6), which uses parenthood as a criterion for exclusion from UI benefits, will have a disproportionate and deleterious effect upon women workers.

32. Another contextual factor which may be taken into consideration by the court in a s. 15 analysis is the relationship between the ground upon which the claim is based and the nature of the differential treatment; that is, whether the differential treatment corresponds with need, capacity, or circumstances of the affected group. Section 15(1) may be violated where a law fails to take into account the real needs, capacities and circumstances of a vulnerable group. The nature of the interest affected by the legislation should also be considered, and the more "severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*".[30]

33. All of these factors are indicators of discrimination in the present case. The most obvious effect of the impugned legislation on mothers who are employed is that they do not receive the same level of income support at a time of job loss as others who have not taken on the responsibility of childbearing and childrearing. Women are expected to bear the further financial burden of being deprived of full regular UI benefits upon job loss. This unequal distribution of burdens and responsibilities occurs along gender lines, and exacerbates the economic and social disadvantages already experienced by women. Further, it bears no relationship to the real needs, capacities and circumstances of mothers who work.

b. The Unemployment Insurance Regime is Designed for Men

34. The history of the regime in question is another important aspect of the relevant social and legal context that assists in identifying the discriminatory effect of s. 11(6). In this case it is important to recognize that the unemployment insurance regime itself was modelled and designed for the traditional male worker, who does not experience

interruptions in his attachment to the labour force created by childbearing and childcare responsibilities. Reliance upon this model has resulted in an unemployment insurance regime, including the impugned provision, that only partially accommodates women, and then only as exceptions to the basic system. Employed women are not "exceptions" in the workforce, they are an integral part of it. The result of such adjustments to the system is a set of rules pertaining to special and regular benefits, including s 11 (6), that penalizes those who access the special benefits. This result is discriminatory.

35. The impact of these gender-specific effects is to reinforce stereotypical and mistaken views on childbearing and child care which would render these responsibilities not a matter of public concern, but a private, natural "labour of love" for women. Such stereotypes presume that the financial and social costs of these activities should be borne by women.

36. Being modeled as it was on the male worker, the unemployment insurance system originally made no provision for interruption of work because of pregnancy and attendant care-giving responsibilities unique to female workers. There was a perception that the claims of pregnant women who experienced work interruptions were a "misuse" of the system. From 1940 to 1971, pregnant women were excluded from regular benefits by a presumption (not legislated, but applied in practice) that women were "not available for work" six weeks before and six weeks after their expected due date. After giving birth, unemployed women were required to show that they had made childcare arrangements to prove that they were available for work and thus entitled to benefits.[31]

37. When the UI maternity benefit was introduced in 1971, the legislation enshrined the presumption that regular or sickness benefits should not be available in the period surrounding a woman's due date. Furthermore, to qualify for benefits women had to be in the workforce for at least 10 weeks prior to conception (the " Magic Ten" rule). UI rules that prohibited pregnant women from receiving regular or sickness benefits as well as the "Magic Ten" rule, were revoked in 1984. Nonetheless, many women continue to be excluded from receipt of maternity benefits altogether (for example, the self employed) and the more stringent qualifying period for maternity benefits remains today

and continues to be justified by a fear of misuse by women.[32]

38. The impugned s. 11(6) operates so that a woman who has lost her job is denied regular UI benefits, or receives a reduced number of weeks of regular UI benefits, solely because she has previously been in receipt of maternity and/or parental benefits under the Act. By instituting this provision the federal government has curtailed women's access to the full benefit of regular UI benefits and ignored the multiple purposes for which the UI legislation was enacted. In so doing, it has perpetuated the failure of the system to recognize employed mothers as full participants in the workforce. The impugned legislation fails to ensure that women do not disproportionately bear the financial and social burdens of childrearing.

c. "Ameliorative purpose" and Charter Scrutiny

39. The Umpire below, basing his analysis on that used in *Sollbach* v. *Canada*[33], incorrectly focussed his Charter inquiry on the ameliorative nature of special UI benefits rather than examining the nature of the specific provision at issue. That the underlying benefits administered by UI system have an ameliorative purpose, or even that s. 11(6) might somehow be characterized as having an ameliorative purpose (a proposition with which LEAF specifically disagrees) does not preclude an analysis under s.15; nor does it mean that lesser scrutiny ought to be applied in the s.15 analysis.[34]

40. Further, while an inquiry into the nature of the discrimination alleged may include consideration of the ameliorative nature of the benefits, it is not the focus of the inquiry. In fact, the Supreme Court clearly stated that this factor "will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action *is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination.*" [35] [emphasis added]

41. In order to validly consider the ameliorative nature of special benefits, employed women in the claimant's position must be considered to be "more advantaged in a

relative sense" than others who receive UI regular benefits (as the proper comparator group). Tet it is impossible, having regard to the specific effect of s. 11(6) (which deprives such women of regular benefits) and the general history and current situation of relative disadvantage in the workforce, to conclude that employed women who are also mothers are "more advantaged" in a relative sense than members of the appropriate comparator group.

42. Therefore, any consideration of the ameliorative nature of special benefits is inappropriate in the context of this case. Instead, it can be seen that the operation of s. 11(6) creates underinclusive legislation in the sense discussed in *Law*. Employed women who are also mothers are members of a historically disadvantaged group and they are excluded from receiving regular UI benefits available to others who have involuntarily lost their jobs.

43. As Justice Iaccobucci stated in *Lovelace* v. *Ontario*, an analysis that contends that s. 15(2) is a "defence" to a s. 15(1) violation because 15(2) protects state action that goes beyond the substantive equality requirement in 15(1):

> ... means adopting a limited understanding of what is meant by substantive equality and, more importantly, an approach that would regressively narrow the scope of s. 15(1)'s application.[36]

44. It is therefore erroneous to conclude, as the Umpire did below, that based upon the ameliorative purpose of the benefits provided "[a]ll who are entitled to special benefits are disadvantaged *but are partially compensated by the EI benefits available only to them.*" [emphasis added][37]

45. In the alternative, if an inquiry into the ameliorative nature of these benefits is warranted, regard must be had not just to the ameliorative nature of the benefits but to what factors, conditions or situations the benefits were intended to "ameliorate".

46. Section 11(6) treats maternity/parental benefits as though they are the same, and serve the same purpose, as regular UI benefits. This fundamental mischaracterization of the purpose of the different types of benefits is at the root of the discriminatory effect of

the impugned section. In light of the distinct nature and purpose of the two types of benefits, it is not a defence to assert that all claimants will receive the same total amount of benefits.

47. Regular UI benefits are intended to provide a person with economic security while they are looking for work after loss of employment. Special benefits, on the other hand, are intended to give economic support in other socially sanctioned circumstances, for example, maternity and parental leave. They are *not* designed to be used to support a job search and in fact, proof of availability for employment is specifically not a requirement for their receipt. They are designed to support childbirth and childrearing. Regular benefits and special benefits serve different purposes.[38]

48. To insist as the Respondent and the Umpire below do, that women are not disadvantaged in respect of regular UI benefits because they have had the advantage of maternity and parental benefits, is to ignore the clear fact that men will either never or will very infrequently use these benefits. The result of the cap is that women (and virtually only women) will be required to use their maternity and parental leave to support a search for work. The clear, but patently unreasonable result of the Umpire's decision, is that women will have to perform the impossible feat of doing this "retroactively"[39], having only learned of their job loss after having used the maternity and parental benefits available to them.

49. Far from being "partially compensated" for the loss of regular UI benefits, women are virtually totally deprived of regular UI benefits and they cannot be compensated for this loss through the prior receipt of special benefits because those benefits exist for another purpose and were paid to her at another time in her working history.

50. Not only does the Umpire's interpretation deprive employed mothers of regular UI benefits, it actively undermines the purpose of the maternity and parental benefits – to afford time off work for these valuable social and personal activities without economic hardship. It also deprives them of support at a crucial time when they are searching for a job.

51. The ameliorative purpose of special benefits should not be used to justify discrimination against those who use them when they require the support of regular UI benefits. The claimant fit squarely and distinctly within each ameliorative purpose and had a separate and unrelated need for each type of benefit. This conflation of the two different types of benefits denies economic security to employed mothers and their families.

52. Whether or not the same situation could be said to pertain to those claimants who access the category of special benefits for disability is irrelevant to the constitutional questions in this case. However, LEAF would state that the impact of s. 11(6) on persons with disabilities may also raise issues under s. 15 of the Charter. The fact that those with disabilities and employed mothers are similarly detrimentally impacted by the operation of the section does not answer the fundamental question of whether the section violates the equality guarantees of s. 15, despite the learned Umpire's consideration of these matters in the decision below. The point of analysis under s. 15(1) is not to compare the disadvantaged with each other but to consider their position relative to those who are not so disadvantaged.

d. Poverty

53. One of the gender specific negative effects of the impugned legislation arises out of the fact that women experience a greater risk of poverty than men, and when poor, experience a greater depth of poverty. Lone female parents with their dependent children are at even greater risk of living in poverty, and experience a greater depth of poverty than any other family configuration. These facts, combined with the hurdles which women with children face in the labour market, the concentration of women in low paid and precarious employment and their vulnerability to discriminatory treatment, mean that women are more severely affected than men by the operation of s. 11(6).[40]

54. Because the impugned provision disproportionately denies women eligibility to UI benefits, it has the effect of denying the benefit of a comprehensive social insurance scheme to a group in society that is already economically disadvantaged. It is submitted that this violates women's human dignity and denies their recognition as equally

deserving, worthy, and valuable members of Canadian society. The fact that the basis for the differential treatment (use of special benefits associated with child bearing and childrearing) is intimately connected to women's economic vulnerability intensifies the discrimination: their vulnerability is the basis for the differential treatment.

55. Because the pre-existing economic vulnerability of female lone parents, Aboriginal women, visible minority women, recent female immigrants, and disabled women is particularly intense, the fact that these women are among those who are disproportionately denied eligibility for UI benefits heightens the discrimination.

56. Furthermore, by disproportionately denying benefits to women, and to particularly vulnerable women within that group, the government is forcing women increasingly to rely upon the inadequate level of benefits provided by social assistance. Not only will women suffer increased poverty as a result, but they will also experience further intrusions upon their dignity and freedom through their contact with the social assistance system. Maternity and parental benefits were specifically designed to act as income replacement for workers in times of temporary unemployment, without the need to resort to social assistance. Thus, forcing women in disproportionate numbers to rely upon social assistance clearly has the effect of promoting the view that women are less deserving of "concern, respect and consideration."[41]

e. Perpetuation of Stereotypes and Myths

57. As noted in *Law,* the withholding of a benefit in a manner which reflects the stereotypical application of presumed group or personal characteristics is the ultimate signifier of discrimination.[42] It is submitted that s. 11(6) perpetuates and entrenches the aforementioned stereotypes regarding women, employment and the unemployment system by continuing to disproportionately disentitle workers who depart from the male model of employment, namely women, from UI benefits.

58. Given the full legislative context, including women's economic vulnerability, their improper and stereotypical characterization as "dependants" of men, and the fact that economic dependency creates additional opportunities for women to be abused in

their relationships (or may cause them to remain in such relationships), it is submitted that women's forced economic dependency due to their disqualification from regular UI benefits is experienced in a uniquely negative and gender-specific manner and therefore violates women's human dignity.[43]

59. There is a fundamental lack of correspondence between the provision of special benefits for childbearing/childrearing and the subsequent denial of access to regular UI benefits, which s. 11(6) creates. There is no evidence that the need for income replacement during employment interruption is any less for women, or for employed mothers in particular. In fact, given traditional barriers to employment for women, particularly those from disadvantaged groups, and their disproportionate risk of poverty and their depth of poverty, it may be that UI benefits are needed even more desperately by women than by men. Women in poverty do not have the savings that other, better-off workers may rely upon during spells of unemployment. As such, the government has discriminated against them by failing to take their real needs, capacities and circumstances into account in developing unemployment insurance legislation.

60. Through the mechanism of s. 11(6), the legislators have actually used women's unique capacities as the bearers of children, and their social roles as primary caregivers as a justification for denying them full regular UI benefits. Not only does this use of women's unique status fail to justify the discrimination, as the Supreme Court states in *Lavoie,* it adds to the violation of women's human dignity.[44]

61. A similar argument in defence of government action was made in *Eldridge*. There, the B.C. provincial government attempted to argue that the disadvantage suffered by deaf people in being unable to communicate effectively with their health care providers was because of their social disadvantage and not the provincial health and hospital insurance legislation. LaForest J. dismissed this argument noting that, "[t]he social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government."[45] In the instant case, women's social and economic disadvantage, borne because of childbearing and caregiving responsibilities and external labour market conditions, is directly related to their

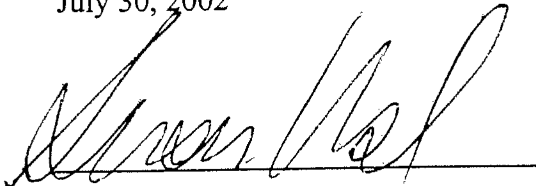
disqualification from benefits.

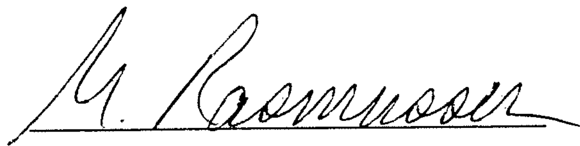
Part IV: Order Sought

62. LEAF supports and adopts the applicant's remedy as requested, and would state in summary that for all of the above noted reasons, substantive equality for women who are employed mothers demands that they should not be deprived of full access to regular UI/EI benefits on the basis that they have already received maternity and parental benefits.

All of which is respectfully submitted.

July 30, 2002





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Solicitors for the Intervener Women's Legal Education Action Fund

Part V: Authorities

Cases

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

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Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch) 188 D.L.R. (4th) 52 (Ont. Sup. Ct.)

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Sandra Fredman, *Women and the Law* (Oxford, UK: Oxford University Press, 1997)

Lorna A. Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto:Sumach Press, 2001)

Nitya Iyer, "Some Mothers are Better Than Others: A Re-examination of Maternity Benefits"in *Challenging the Public/PrivateDivide: Feminism, Law and Public Policy,* ed. Susan B. Boyd (Toronto: University of Toronto Press, 1997)

Statistics Canada, "Average Earnings by Sex and Work Pattern"

Statistics Canada, *Women in Canada 2000: A Gender Based Statistical Report* (Ottawa: 2000) at 135-137.

Monica Townsend, *Report Card on Women and Poverty* (Ottawa: Canadian Centre for Policy Alternatives, 2000)

Norene Pupo, "Always Working, Never Done: The Expansion of the Double Work Day" in Pupo, Duffy, Glenday, eds. *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the 21st Century* (Toronto: Harcourt Brace & Company, 1997)

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Ann Porter, "Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945-1962", *Labour/Le Travail* 31 (Spring 1993)

Leslie Pal and F.L. Morton, "*Bliss* v. *Attorney General of Canada*: From Legal Defeat to Political Victory" (1986) 24:1 *Osgoode Hall L.J.* 141

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Norene Pupo and Ann D. Duffy "Canadian Women and Part-time Work: Issues of Economy, Family and the State with Special Consideration of the Impact of Recent Changes to Employment Insurance" (Research paper)

Endnotes

1. R.S.C. 1985, c. U-1.

2. *Law* v. *Canada (Minister of Employment and Immigration)*,[1999] 1 S.C.R. 497; *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

3. [1986] 1 S.C.R. 103.

4. *Law, supra* note 2 at 548-49.

5. *Andrews*, supra

6. *Supra* note 2.

7. *Ibid.*

8. *Ibid* at 167.

9. *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

10. [1992] 3 S.C.R. 813.

11. *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848; *Miron* v. *Trudel*, [1995] 2 S.C.R. 415 at 497- 499; *Brossard (Town)* v. *Quebec (Commission des Droits de la Personne)*, [1988] 2 S.C.R. 279 at 290-95 and 298-300; *Ontario (Human Rights Commission)* v. *Mr. A* (2000), 50 O.R. (3d) 737 at 745-48 (C.A.)

12. The thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on immutable or personal characteristics, or those that are changeable only at unacceptable cost to personal identity. Personal characteristics that the government has no legitimate interest in expecting individuals to change in order to receive equal treatment under the law are also recognized as analogous grounds. See: *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at 219-20; *Miron, supra* note 11 at 496-97

13. *Supra* note 9.

14. [1974] 1 S.C.R. 183.

15. *Brooks, supra* note 9 at 1243-44.

16. *Law, supra* note 2 at paragraph 80. See also *British Columbia (Public Service Employee Relations Commission)* v. *BCGEU ("Meiorin")*, [1999] 3 S.C.R. 3 at para. 48; *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624 at paras 60-65; *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1279; *Rodriguez* v. *British Columbia (Attorney*

General), [1993] 3 S.C.R. 519 at 555 (per Lamer C.J.C. dissenting, but not on this point); *Brooks*, supra note 9 at 1233-1235.

17. *Janzen, ibid.* There, the Supreme Court found the mere fact that some men are sexually harassed does not negate a finding that sexual harassment constitutes sex discrimination towards women, given that women are at greater risk to experience harassment and more frequently experience it. Further, sexual harassment towards women had a different import than that directed at men, in that it was used to "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to " remind women of their inferior ascribed status". Furthermore, not all women need experience sexual harassment for it to constitute sex discrimination. Rather, "[i]t is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of the individual." *Janzen, ibid* at 1284 and 1288-89. See also: *Weatherall* v. *Canada (Attorney General),* [1993] 2 S.C.R. 872 at 877, where the court notes that cross-gender frisk searches are "different and more threatening" than those performed on men.

18. *Meoirin, supra* note 16 at para. 66. See also *Rodriguez, supra* note 16 at 556; *Brooks*, supra note 9 at 1247; *Symes* v. *Canada*, [1993] 4 S.C.R. 695 at 769-770; *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46 at 99-100.

19. *Law, supra* note 2 at para. 53.

20. *Corbiere, supra* note 12 at 254-55. See also: *Law, supra* note 2 at para. 59 and *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1331-1332.

21. *Law, supra* note 2 at para. 63 and *Rodriguez, supra* note 16 at 549 per Lamer C.J.C. dissenting, but not on this point. See also: *Eldridge, supra* note 16 at 676-682.

22. Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued* (New York: Henry Holt & Co., 2001) at 89-95; Sandra Fredman, *Women and the Law* (Oxford, UK: Oxford University Press, 1997) at 180; Lorna A. Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto:Sumach Press, 2001) at 15.

23. Turnbull, *supra* note 22 at 23 and 52; Nitya Iyer, "Some Mothers are Better Than Others: A Re-examination of Maternity Benefits"in *Challenging the Public/PrivateDivide: Feminism, Law and Public Policy,* ed. Susan B. Boyd (Toronto: University of Toronto Press, 1997)

24. Statistics Canada, "Average Earnings by Sex and Work Pattern", online http://www.statcan.ca/english/Pgdb/People/Labour/labor01c.htm, (last modified: 24 July 2002).

25. Statistics Canada, *Women in Canada 2000: A Gender Based Statistical Report* (Ottawa: 2000) at 135-137.

26. Monica Townsend, *Report Card on Women and Poverty* (Ottawa: Canadian Centre for Policy Alternatives, 2000) at 2-3 citing Statistics Canada.

27. Norene Pupo, "Always Working, Never Done: The Expansion of the Double Work Day" in Pupo, Duffy, Glenday, eds. *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the 21st Century* (Toronto: Harcourt Brace & Company, 1997) at 545-46.

28. Statistics Canada, "Women in Canada: Work Chapter Updates" (Ottawa: August 2001) at 7.

29. Statistics Canada, *Women in Canada, 2000* (Ottawa: Statistics Canada, 89-503-XPE, 2000) at 109, 133; Turnbull, *supra* note 22 at 22.

30. *Law, supra* note 2 at paras. 69, 74, citing L'Heuruex-Dube J. in *Egan v. Canada*, [1995] 2 S.C.R. 513 at paras. 63-64; *Winko* v. *British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 84; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at para. 72; *M* v. *H,* [1999] 2 S.C.R. 3 at para. 70.

31. Ann Porter, "Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945-1962", *Labour/Le Travail* 31 (Spring 1993) at 534 ; Leslie Pal and F.L. Morton, "*Bliss* v. *Attorney General of Canada*: From Legal Defeat to Political Victory" (1986) 24:1 *Osgoode Hall L.J.* 141 at p. 151.

32. Pal and Morton, *supra* at 151; Paul Phillips, *Equality of Opportunity, Reducing Disparities and Essential Services of Reasonable Quality: The Evolution of (Un)Employment Insurance,* (unpublished paper, August 1999) at 36-53.

33. [1999] F.C.J. No. 1912 (C.A.).

34. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 61.

35. See *Law, supra* note 2 at para. 72. See also: *Vriend supra* note 30 at paras. 94-104, *per* Cory. J. 89.

36. *Lovelace, supra* note 34 at para. 103.

37. *Applicant's Record,* Affidavit of Clem Nabigon sworn April 2, 2001, Ex. "I" Decision of the Hon. David G. Riche, at p. 168

38. The debate in the House of Commons when maternity benefits were first provided for in the unemployment insurance legislation following the recommendations contained in a Status of Women study makes it clear that the purpose of those benefits was to support employed mothers while they were necessarily absent from the work force due to childbirth. In his speech in support of his motion for second reading of the legislation,

the Hon. Bryce Mackasey, Minister of Labour, said:"We propose to provide unemployment insurance benefits to those people in the work force who are temporarily without earnings as a result of maternity. This is quite consistent with progress in an advanced industrial society. It is not revolutionary, because many countries around the world have already incorporated this feature into their plans. This is a way by which we can provide some security for the person who must retire from the work force in order to have a child." April 19, 1971, Hansard, 5039.Gordon Fairweather MP speaking in relation to a motion calling on the government to appoint a minister responsible for the status of women and for immediate implementation of the programs called for by a Status of Women study, including maternity benefits for employed mothers, said: "The maternity benefits mentioned in the motion under consideration deserve my whole support. It is loathsome to see unemployment insurance investigators discourage mothers-to-be telling them they are not entitled to benefits owing to their condition. This is degrading the most beautiful function of mankind, which has enabled all of us to be here and is responsible for our existence. This deficiency should have long been corrected." March 9, 1971, Commons Debates, 4095. The HRDC website provides a history of the legislation from its first enactment in 1941. It describes the maternity benefits provided for in 1971 as follows: "Up to 15 weeks of maternity benefits were available for women with 20 or more insurable weeks who met the magic 10 rule and left the labour force to give birth and care for their newborn infants. These benefits had to be drawn in a 15-week period starting eight weeks before the week in which birth was expected and ending six weeks after birth actually occurred. They also had to be the first 15 weeks of benefits in the claimant''s initial benefit period."Online, http://www.hrdc-drhc.gc.ca/insur/histui/ui_hist/chap09/9sub5_e.html. Lamer, C.J., writing for the majority of the court, observed in *Schacter* v. *Canada*, [1992] 2 S.C.R. 679 at para. 93:

It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in Tétreault-Gadoury, supra, at p. 41: ... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

39. *Applicant's Record,* Affidavit of Clem Nabigon sworn April 2, 2001, Ex. "I" Decision of the Hon. David G. Riche, at p. 170.

40. Marika Morris, *"Women and Poverty- a Fact Sheet"* (CRIAW: March 2002) http://www.criaw-icref.ca/Poverty_fact_sheet.htm;

41. Statistics Canada, "Report on the Main Results of Employment Insurance Coverage Survey, 1998" (Ottawa: 1999) which indicates on page 14 that where unemployed workers who were ineligible for EI had to rely upon social assistance for their main source of income, it met all or most of their regular household expenses in only half the cases (52.8%); Errlee Carruthers, "Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality" (1995) 11 *Journal of Law and Social Policy* 111, J.E. Mosher, "Managing the Disentitlement of Women: Glorified Markets, the Idealized Family and

the Undeserving Other" in S.M. Neysmith, ed. *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford University Press, 2000). See also: *Falkiner* v. *Ontario (Ministry of Community and Social Services)* (1996), 140 D.L.R. (4th) 115 (Ont. Gen. Div.), per Rosenberg, J., *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* 188 D.L.R. (4th) 52 (Ont. Sup. Ct.); Phillips, *supra* 72-77.

42. *Law, supra* at

43. Mosher, *ibid* at 36-37; Phillips, *ibid* at 36-40; Norene Pupo and Ann D. Duffy "Canadian Women and Part-time Work: Issues of Economy, Family and the State with Special Consideration of the Impact of Recent Changes to Employment Insurance" (Research Paper) at 24-52.

44. *Lavoie* v. *Canada*, [2002] S.C.C. 23 at para. 5 per L'Heureux-Dube and McLachlin JJ.; *Bliss, supra* note 14 at 717.

45. *Eldridge, supra* note 16 at para. 76.

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Applicant Respondent Intervener

(Short title of proceeding)

Court file no. A-137-01

FEDERAL COURT OF APPEAL
Proceeding commenced at Toronto

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