

Submission

to the

STANDING COMMITTEE ON THE
ADMINISTRATION OF JUSTICE

by

WOMEN FOR JUSTICE

concerning

BILL 7

and the

FAMILY BENEFITS ACT - CONSTITUTIONALITY
OF THE "MAN IN THE HOUSE" RULE

February, 1986

Bill 7

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Family Benefits Act - Constitutionality of the
"Man In The House Rule"

Summary of the Issue

The regulations under the Family Benefits Act R.S.O. 1980 c.151, (FBA) provide that sole support parents, sole support women aged 60 to 64 and wives aged 60 and over of institutionalized Old Age Security recipients are only eligible for family benefits if they are "living as a single person", or more specifically, if they are not living with another as "husband and wife". (Regulation 318, Sections 1(1)(c) and 5(b), as amended, Family Benefits Act). These regulations have resulted in a significant number of sole support women, and in particular sole support mothers, being refused or disentitled to family benefits because of an alleged "man in the house". A number of these women have later been charged with an over-payment under the FBA and in addition, charged and convicted of "welfare fraud" under the Criminal Code. By virtue of the regulations social assistance may be denied or removed and criminal penalties imposed regardless of whether the "man in the house" was actually supporting the sole support woman or her children, or whether he had a legal obligation to do so.

It is the submission of Women for Justice that Sections 5(b) and 1(1)(c) of Regulation 318 are in violation of Sections 7, 15 and 28 of the Charter of Rights and Freedoms and cannot be reasonably justified under section 1 of the Charter. However, even if sections 5(b) and 1(1)(c) of

Regulation 318 are repealed, the mischief will not have been cured. It will still be assumed that the income of a "man in the house" is available to a sole support woman by virtue of sections 13(1)(b) and 1(1)(d) of Regulation 318. It is the submission of Women for Justice that for the same reasons these provisions are also in violation of sections 7, 15 and 28 of the Charter and cannot be reasonably justified under section 1. It is to be noted that the General Welfare Assistance Act R.S.O. 1980, c. 188 contains many similar provisions and again, the same reasoning would apply with respect to their constitutionality.

The Family Benefits Act

The Family Benefits Act is designed to provide long term financial assistance to certain Ontario residents who are in financial need, as defined by that Act and the regulations thereunder. The Family Benefits Act must be distinguished from the General Welfare Assistance Act, which is designed to provide short-term assistance for persons in transition between jobs or other sources of income. Categories of persons eligible for family benefits include:

- a) persons "permanently unemployable", "blind" or "disabled";
- b) persons over age 65 who are not eligible for Old Age Security;
- c) foster parents with foster children;
- d) persons in certain training programs.
- e) sole support women aged 60 to 64;

- f) wives age 60 and over of institutionalized Old Age Security recipients;
- g) sole support parents.

There are many conditions of eligibility that must be met by applicants and recipients of family benefits. However, the eligibility requirement that an applicant or a recipient live as a "single person" only applies to sole support parents, wives aged 60 and over of institutionalized Old Age Security recipients, and sole support women aged 60 to 64.

In this brief, we will refer predominantly to the constitutionality of the family benefits regulations as they affect sole support parents, and sole support mothers in particular, but the arguments in many instances apply equally to women in other categories of eligibility to which the "man in the house" rule applies.

Section 15 of the Charter

It is the submission of Women for Justice that Sections 5(b) and 1(1)(c) of Regulation 318 are in violation of Section 15 of the Charter of Rights and Freedoms on the following grounds:

1) Disparate Negative Impact on Women

The regulations have a disparate negative impact on women.

In 1984, 602 men and 59,792 women were in receipt of family benefits as sole support parents in the Province of Ontario. Women form 99% of the recipients of family benefits as sole support parents; and accordingly

provisions requiring sole support parents to live as a "single person" as a condition of eligibility almost exclusively affect women.

It is important to note that until 1982 sole support fathers were not entitled to family benefits. The absence of a right to long-term financial assistance for sole support fathers can be explained by the Legislature's historical recognition of the fact of women's child bearing and their normative assumption of child rearing responsibilities, and the fact that over one half of single parent families headed by women live below the poverty line. Statistics show that the social and economic factors identifying and explaining the poverty of sole support mothers have not changed significantly over the years, and it can be fairly safely assumed that until they do, the eligibility requirement that sole support parents live as a "single person" will continue to almost exclusively affect women. Further, it can be said that it is precisely the historically unequal position of women that puts them in the unique position of being in need of social assistance as sole support parents.

What is the impact of the "man in the house" rule on sole support mothers? The application of the regulatory provisions by social assistance administrators, the Social Assistance Review Board (SARB) and the courts, and the negative impact this has had on sole support mothers in need is more particularly described in a submission of

Women for Justice to the Ontario Human Rights Commission in 1984. That submission is attached as Schedule A. In summary, it can be said that the substance of the regulations and the manner in which they have been administered have affected the rights of sole support women with children to equal protection and equal benefit of the law in the following ways:

- a) invasion of the right to privacy;
- b) effect on lifestyle by preventing sole support mothers from fully enjoying relationships which are the norm in Canadian society today;
- c) economic and emotional insecurity based on the persistent threat that assistance designed to be of last resort, ie. family benefits, will be removed.

Over time, society as a whole and the courts in particular have gained a more sophisticated understanding of discrimination. Unreasonable differential treatment of persons on the basis of a prohibited ground, for example, sex, age or race, has long been considered discrimination. More recently, the courts in the United States and the courts in Canada under human rights legislation have recognized that similar treatment can have disparate impacts, disadvantaging one group more than another.

It is submitted that in order to establish discrimination under Section 15 of the Charter it is not

necessary to establish that individuals in a comparable class, that is men, are treated differently under Regulation 318; it is the operation of the law in itself that constitutes discrimination on the basis of sex. Therefore, although sections 5(d) and 1(1)(c) of Regulation 318 appear gender neutral on their face, the regulations function to disproportionately affect women to their disadvantage and are as such, discriminatory.

2) History of the Regulations

The history of the Family Benefits Act and regulations thereunder show that section 5(b) and 1(1)(c) of Regulation 318 are rooted in the perceived morality of sole support mothers. To look at only the more recent history of the Family Benefit Act in regard to the eligibility criteria of sole support mothers, it can be seen that until 1980 separated women with children were only entitled to family benefits if they had been deserted by their husbands. The present regulations, effectively providing that a sole support mother is ~~not~~ entitled to financial assistance from the state if she is having a relationship with a man, relate back to stereotypical notions of chaste deserted women as part of the "deserving poor". Relationships out of marriage, with and without financial obligation, have now been recognized by the Ontario legislature in, for example, the Family Law Reform Act, R.S.O. 1980, c. 152. It is time the Family Benefits Act was brought up to date with community standards.

3) Exclusion based on Stereotypes

Sections 5(b) and 1(1)(c) of Regulation 318 and their application are based on the assumption that by virtue of living with or having a relationship with a man, a woman is or should be economically dependent on him for support for herself and her children. The regulations provide a blanket exclusion from benefits once a sole support mother is found to be living with a man as "husband and wife" regardless of whether he is actually supporting her and her children or whether he has a legal obligation to do so. At the same time social assistance administrators in exercising their discretion are not obliged to find that there is an economic relationship before finding that a sole support mother is living with a man as "husband and wife".

The result is that sole support mothers in financial need are being denied social assistance on the basis of a gender based stereotype that women are or should be economically dependent on men. It was the position of the Royal Commission on Equality in Employment (Chairperson, Judge Rosalie Abella), that discrimination includes practices and attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to opportunities or benefits generally available because of attributed rather than actual characteristics. In the case of the "man in the house" rule, a sole support mother will be denied the right to

privacy, to form relationships and to economic security based on the assumption that she and her children are being supported by a man, without investigation as to whether that assumption is founded. Despite the purpose of the Family Benefits Act, sole support mothers are excluded from benefits based on criteria which are irrelevant to need.

4) Differential Support Obligations and Expectations Applied to Poor Sole Support Mothers

To assume that a sole support mother is or should be supported by a man with whom she is living or having a relationship is to effectively apply different standards of child and spousal support obligations to poor women.

The legislature is implicitly saying to a mother applying for or receiving family benefits that she must look to the man with whom she is living or having a relationship for support for herself and her children. However, for other Ontario residents, the legislature has provided in Bill 1, An Act to Revise the Family Law Reform Act c. 4, 1986, that a woman is only entitled to look to a man for child support if he is the father of the children or has treated them as his own. (Section 1(1) Bill 1) Assuming she is not married to the man in question, according to family law a woman may only look to a man with whom she is living or having a relationship for support for herself if they have cohabited continuously for three years or have had a child together and cohabited for some time. (Section 29, Bill 1).

Different standards of support obligations and expectations are being applied to different classes of persons. Those sole support mothers "in need" within the meaning of the Family Benefits Act are being given a different message by the legislature than other persons "in need" within the meaning of the Family Benefits Act and all other Ontario residents "in need" within the meaning of the Family Law Act. It is submitted that this distinction denies a certain class, predominantly sole support mothers, equal protection and equal benefit of the law with respect to financial assistance, and constitutes a violation of Section 15 of the Charter of Rights and Freedoms. These women are given neither a right (to social assistance) nor a remedy (to child and spousal support).

5) Differential Treatment of Children of Poor Sole Support Mothers

Finally, it is submitted that the impact of sections 5(b) and 1(1)(c) of Regulation 318 is to deny children of sole support mothers in financial need equal protection and equal benefit of the law so as to violate Section 15 of the Charter of Rights and Freedoms.

Over the last several decades there has been a growing focus in legislation governing the welfare of children on what is in the best interests of the child. (for example the Child and Family Services Act, 1984 c. 55, Children's Law Reform Act, R.S.O. 1980 c. 68, Family

Law Reform Act R.S.O. 1980 c. 152) In this context, it is to be remembered that the provision of family benefits to sole support mothers was designed to ensure that the economic and emotional needs of children of families in need were cared for. This legislative intent is evidenced by the provision that, in general, a sole support mother has no obligation to look for work as a condition of eligibility for family benefits based on the recognition that caring for children is a full-time responsibility and that children should be entitled to such care.

Despite the legislature's intention to protect the needs of children in all arenas, some children:

- a) are being denied the benefits of the Family Benefits Act because of the lifestyle of their custodial parent;
- b) are being told to look for their food and shelter to a man who may not be obliged to support them and is not in fact doing so.

These children are not receiving equal protection or benefit of the law. The effect of the regulations is to disadvantage children of sole support parents "in need" within the meaning of the Family Benefits Act relative to all others.

To repeat, it is precisely the historically unequal position of women that puts them and their children in the unique social position of being in need of social assistance as sole support mothers. By virtue of Sections 5(b) and

1(1)(c) of Regulation 318, sole support mothers and their children are being denied equal protection and equal benefit of the law based on stereotypical assumptions regarding women's economic dependence on men. Both on their face and by operation of the regulations, sole support mothers and their children are being discriminated against in violation of section 15 of the Charter of Rights and Freedoms.

Section 1 of the Charter - Are these violations of section 15 reasonably justified?

Women for Justice acknowledges a legitimate government interest in ensuring that social assistance is provided only to those "in need". It is our submission, however, that the means chosen to meet that objective are not a limitation "prescribed by law", nor are the regulations rationally or proportionately related to this government interest.

- 1) Sections 5(b) and 1(1)(c) of Regulation 318 present a test for determining eligibility that is ~~vague~~ and highly discretionary. A limitation on rights referred to in the Charter that cannot be ascertained or understood cannot be considered a limitation "prescribed by law" within the meaning of Section 1 of the Charter.
- 2) Sections 5(b) and 1(1)(b) of Regulation 318 are not rationally related to the goal of preventing persons

not "in need" from obtaining assistance under the Family Benefits Act in that there is no requirement that social assistance administrators determine whether other financial support is being provided or is available before finding a woman ineligible for benefits. Similarly, sections 13(1)(b) and 1(1)(d) of Regulation 318 create an assumption that the income of a man with whom a sole support mother is living or having a relationship is available to her without an examination of whether this is the case, (although at least a determination is made as to whether he has any income).

3) It is submitted that reasonable provision already exists in the regulations under the Family Benefits Act to ensure that persons applying for or in receipt of family benefits are truly "in need".

a) Section 8 of Regulation 318 under the Family Benefits Act provides that an applicant or recipient is obliged to take advantage of all available financial resources as a condition of eligibility for benefits. Accordingly, a sole support mother is already obliged to take advantage of any legal rights she has to child or spousal support.

b) Section 13(2) 23 and 24 of Regulation 318 provides that in assessing need, any gifts or payments received from a third party will be considered. Accordingly, if a sole support

mother is receiving, for example free or reduced room and board, from a friend or relative, this will be taken into account in determining her need and the benefits to which she is entitled under the Family Benefits Act.

- 4) Disabled men and women "in need", whether single parents or not, are not excluded from eligibility if they are living with another as "husband and wife" (However, the income of their co-vivant will be assumed to be available to the applicant or recipient in assessing need by virtue of sections 13(1)(b) and 1(1)(d) of Regulation 318.) In the case of employable persons aged 21 and over receiving welfare assistance and residing with their parents, the income of their parents is not assumed to be available to them. (In other words, there is no section 5(b) or section 13(1)(b) equivalent in the regulations). Accordingly, in similar situations the legislature has satisfied itself that the object of ensuring only those "in need" receive social assistance has been met without applying stereotypical assumptions of economic support. Instead, in the case of employable 21 year olds residing at home the object is met by examining the individual's situation to determine actual economic need.

For section 15 of the Charter of Rights and Freedoms to be given real meaning, the definition of discrimination must take into account the roles women have traditionally assumed and women's historically poor economic position. In attempting to address this unique position by providing financial assistance to sole support mothers in need, to comply with section 15 we must be diligent to ensure that we are placing no greater burdens on these women than we do to other Ontario residents, whether in financial need or not. To the extent that conditions must be imposed to ensure that the government interest of providing social assistance to only those "in need" is met, those conditions must be clear, rationally related to the object of the legislation, and reasonable in imposing no greater burden than is necessary to achieve the stated goal. It is our submission that the "man in the house" rule is discriminatory, highly discretionary and irrational, and accordingly Sections 5(b) and 13(1)(b) of Regulation 318 should be repealed in order to bring this aspect of the regulations in compliance with the Charter of Rights and Freedoms.