

# Equality Rights in Family Law: Spousal and Child Support



Women's Legal  
Education and  
Action Fund

Fonds d'action et  
d'éducation juridiques  
pour les femmes



## What is LEAF?

The Women's Legal Education and Action Fund (LEAF) is a federally registered charity, founded in 1985 to advance the equality of women in Canada through litigation, law reform and public education. LEAF participates in court cases dealing with the equality provisions of the *Charter*. LEAF's work ensures that women and historically disadvantaged groups have their rights protected, respected and advanced through the law.

### LEAF works to:

- ensure the rights of women and girls in Canada, as guaranteed in the Canadian *Charter of Rights and Freedoms*, are upheld in our courts, human rights commissions and government agencies; and
- reveal how factors such as race, class, Aboriginal status, sexual orientation, ability, and religion compound discrimination against women.

Since its inception in 1985, LEAF has been involved in over 150 cases and has helped establish landmark victories for women on a wide range of issues from violence against women, workplace inequities, socio-economic rights, reproductive freedom and more. For more information on LEAF or the cases mentioned in this booklet, please visit [www.leaf.ca](http://www.leaf.ca).

## Equality Rights in Family Law: Spousal and Child Support

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<b>INTRODUCTION.....</b>	<b>2</b>
EQUALITY RIGHTS: AN INTRODUCTION.....	3
SHARING THE COST OF MARRIAGE AND DIVORCE – <i>MOGE v. MOGE</i> .....	5
ENFORCING SUPPORT PAYMENTS – <i>DICKIE v. DICKIE</i> .....	7
CHANGES IN INCOME: RETROACTIVE CHILD SUPPORT – <i>D.B.S. v. S.R.G.</i> .....	9
OTHER ADVANCES TO EQUALITY IN FAMILY LAW: EXAMPLES FROM LEAF’S LEGAL WORK.....	11
<i>Social Assistance</i> .....	11
Social Assistance and the “Spouse in the House” Rule - <i>Falkiner v. Ontario</i> .....	11
Legal Aid in Child Wardship Cases – <i>J.G v. Minister of Health and Community Services of New Brunswick</i> .....	11
<i>Benefits</i> .....	12
Spousal Support after Retirement - <i>Albrecht v. Albrecht</i> .....	12
<i>Child Support</i> .....	12
Income Tax on Child Support - <i>Thibaudeau v. Canada</i> .....	12
<i>Custody and Relocation</i> .....	12
Ability to Relocate in Split Custody Cases – <i>Gordon v. Goertz</i> .....	12
<i>Same-sex Families</i> .....	13
The Definition of “Spouse” – <i>M. v. H.</i> ....	13
<i>Names</i> .....	13
Betrand, Suzanne and the Yukon Change of Name Act, 1985.....	13
Children’s names – Vital Statistics Act Challenges.....	13
<b>CONCLUSION.....</b>	<b>13</b>
Spousal Support and Child Support: Definitions.....	14
Resources.....	15
Legal Resources.....	15
Online Resources.....	15
References .....	16
Cases Cited.....	17





## Introduction

The *Canadian Charter of Rights and Freedoms* guarantees equality rights in Canada. Organizations, such as LEAF, work to ensure the equality rights in the *Charter* are meaningful for all Canadians.

This booklet provides an overview of some of the changes to spousal and child support laws since the *Charter*. As a result of the *Charter's* equality rights, courts now consider and recognize the varying needs of men and women after a divorce or separation. This booklet addresses three important changes to family law:

- Equal sharing of the economic consequences of marriage
- Enforcing court orders for support
- Retroactive child support payments

These three areas reflect significant developments in family law that positively impact many women across Canada. This booklet examines specific cases where equality rights led to greater fairness for women in spousal and child support matters. LEAF intervened in many of the cases discussed below. As an intervenor, LEAF made arguments regarding the equality rights issues raised in each case. In the third case, LEAF's application to intervene was rejected by the court. For more information on LEAF's work, please visit [www.leaf.ca](http://www.leaf.ca).

Please note that this booklet is intended for information and general reference only and does not provide legal advice. This booklet addresses some specific aspects of family law and does not provide a comprehensive overview of this subject. If you have a legal matter for which you need legal advice, contact a lawyer or legal clinic in your region. For more information, please refer to the resources listed at the back of this booklet.



# Equality Rights: An Introduction

The *Canadian Charter of Rights and Freedoms* includes two equality rights clauses. Section 28 guarantees that the rights and freedoms in the *Charter* apply to men and women equally.

Section 15(1) of the *Charter* grants all Canadians equality before and under the law, as well as equal protection and benefit of the law.

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

Before the *Charter* was introduced, the *Canadian Bill of Rights* stated that women and men were equal “before the law”, but not “under the law”. This meant that laws that treated men and women differently were not found to be contrary to the *Bill of Rights*. Laws were often justified because they treated all women in the same unfair manner. Some laws that gave obvious advantages to men were not considered discriminatory as a result of this notion of equality “before the law”.

Many women were affected by the inequality that resulted from unfair laws. The following pre-*Charter* case provides an excellent example:

Jeannette Corbière Lavell and Yvonne Bédard challenged a law under which an Aboriginal woman lost Indian Status if she married a non-Aboriginal man. The law did not apply to Aboriginal men, who could marry outside of the community and retain their Aboriginal status. The Supreme Court of Canada decided that this law did not discriminate against women because it applied to all Aboriginal women equally. Many Aboriginal women lost their status as a result of the law, until it was finally repealed twelve years later.

The term “under the law” was added to s. 15 of the *Charter* to ensure that equality is guaranteed both within groups and between individuals and groups. In order to remove barriers and accommodate differences, courts must consider the context of the particular experience of discrimination and the effect that a law has on an



*The parent-child relationship engages not only moral obligations, but legal ones as well.*

D.B.S. v. S.R.G.

individual or a group. As a result, laws must be applied equally. Laws cannot not perpetuate or promote pre-existing disadvantage and laws must ensure the equal dignity and worth of all people in Canada. In short, equality “under the law” ensures equality in the outcomes, and equality “before the law” ensures fairness in the application of laws.

The approach to equality prior to the *Charter* led to many instances of discrimination for women involved in family law matters. Rules that put women at a disadvantage were not considered discriminatory. As well, it was not until 1992 that the Supreme Court of Canada finally recognized the critical impact of gender roles both during and after marriage.

During marriage, spouses often have different roles and responsibilities in their families. These differences create economic consequences after the marriage ends. As a result of numerous factors, women generally face greater financial hardship after a divorce than men. The following facts illustrate some of the issues facing women in Canada:

- 70% of part-time workers in Canada are women<sup>1</sup>. Many women cannot work full-time because of household chores and caring for children.
- Canadian women make less money than men. In 1997, women working full-time earned \$14, 602 less per year than the average man<sup>2</sup>. For many women, it is difficult to support a family on a single income.
- 90% of lone parent families were headed by lone mothers in 2004<sup>3</sup>.
- In 2002, 35% of all female lone-parent families lived in poverty<sup>4</sup>.
- Families headed by singles mothers are more likely to have lower incomes. In 2003, 43% of all children in low income families were living with a lone female parent<sup>5</sup>.
- In 2005, 92% of Canadians paying child support were fathers; mothers had sole custody over 78% of the time<sup>6</sup>.

The above statistics show many of the economic hardships faced by women in Canada. Women are more likely to take on the responsibility for child care and to earn less money as a result. Laws that do not account for the difficulty many women experience after the end of marriage can lead to discrimination. It is therefore essential that the courts recognize the different needs and interests of women and men.



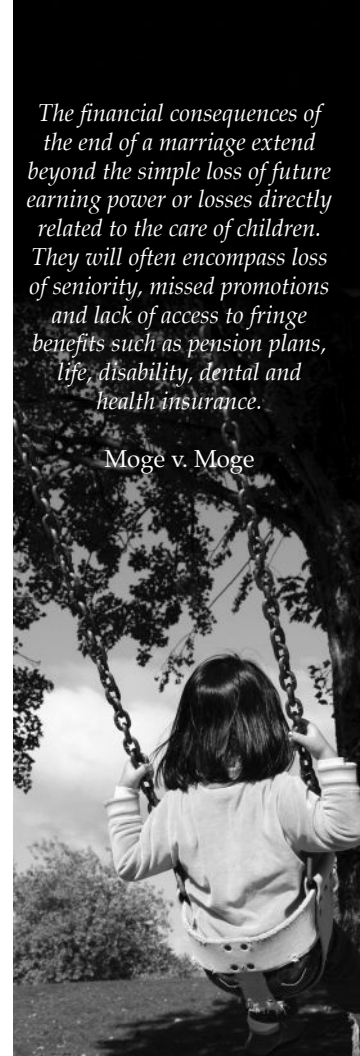
## Sharing the Cost of Marriage and Divorce – *Moge v. Moge*

In the case of *Moge v. Moge* the Supreme Court of Canada fundamentally changed its approach to issues following the breakdown of marriage. Specifically, the Court recognized the economic consequences and hardships that some women experience after divorce.

While married, Mrs. Moge looked after the couple's three children and took care of the household chores during the day, while her husband worked full-time as a welder. At night, Mrs. Moge cleaned homes part-time to supplement her husband's income. After their divorce, Mrs. Moge worked for a number of years at a hotel, receiving some child and spousal support from her ex-husband. However, Mrs. Moge was eventually laid-off and could only find unsteady, part-time work. Despite her financial need, Mrs. Moge stopped receiving support payments. The lower court decided that she was no longer entitled to the support payments because the marriage had ended many years before. The lower court reasoned that Mrs. Moge had been given enough time to become self-sufficient, even though she faced difficulty in finding full-time work. The court chose to focus on the importance of giving Mr. Moge a "clean-break", ignoring the economic disadvantage Mrs. Moge experienced as a result of the marriage. Mrs. Moge lost full-time work opportunities in order care for her family. Mrs. Moge challenged the ruling and appealed to the Supreme Court of Canada, which acknowledged that the lost opportunities that result from marriage cause lasting economic hardship for women.

*The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance.*

*Moge v. Moge*



*The doctrine of equitable sharing of the economic consequences of marriage... seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse.*

Moge v. Moge

Under the federal *Divorce Act*, when deciding on spousal support orders, judges must consider four factors :

1. Any financial advantage or disadvantage for either spouse that results from the marriage or divorce
2. Ensure that costs of child care are fairly divided between spouses
3. Relieve any financial hardship that results from the divorce
4. Where possible, promote financial independence and self-sufficiency

Until 1992, courts mainly focused on the financial independence of ex-spouses more than the other three factors. Spousal support was considered a temporary tool to help ex-spouses become “self-sufficient”. In the *Moge v. Moge* decision, the Supreme Court of Canada recognized that women face particular and lasting financial hardship after divorce. This case led to a more balanced consideration of the four factors and an acknowledgment of the basic differences in the needs and experiences between men and women. Spousal support is no longer considered a temporary solution for support-receiving spouses.

In this case, the Court acknowledged that divorced women are more likely to face financial barriers, such as a limited ability to work because of responsibilities in the home<sup>7</sup>. With an increased focus on fairness, courts will often look at the standard of living during the marriage and the spouse’s financial need in determining the amount of support<sup>8</sup>. One important goal of spousal support is to compensate lost opportunities and financial hardship. Since women are more likely than men to be financially disadvantaged after a divorce, this case led to greater fairness for women seeking support.





## Enforcing Support Payments – *Dickie v. Dickie*

When a court orders one spouse to pay child and/or spousal support, he or she has a legal obligation to make those payments. When the spouse refuses to pay, it is often difficult for the receiving spouse to enforce the support order. The federal government does not directly enforce support orders. Instead, provinces and territories do this through publicly funded “maintenance enforcement programs”. These programs enable the provincial governments to take money from one spouse and send it to the other. However if the support-paying spouse leaves Canada, the receiving spouse’s province/territory must have an agreement with the other country in order to get the support payment. If there is no arrangement between the country and the Canadian province/territory, it is extremely difficult to access the support payments.

In many non-family law cases where a payment of money is ordered by the court, a person who refuses to pay can be found “in contempt of court”. A judge can punish someone for contempt of court with jail terms and fines.

In *Dickie v. Dickie* an ex-husband refused to pay support to his family, despite many court orders. The court repeatedly acknowledged that Dr. Dickie owed his family money, but Mrs. Dickie had no legal way to make her ex-husband pay the support he owed.

The Dickies lived together for fifteen years and had three children. Dr. Dickie was a plastic surgeon and Mrs. Dickie was a registered nurse who gave up full-time work when her first child was born. While they were married, she worked part-time in her husband’s office. The couple separated and Dr. Dickie was ordered to make spousal and child support payments, which he did for a number of years.



*Dr. Dickie’s refusal to pay the court-ordered support has had disastrous consequences for his children and for his former wife.*

Dickie v. Dickie,  
Ontario Court of Appeal

*"Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives."*

New Brunswick  
(Minister of Health and  
Community Services)  
v. G. (J.)

In 2002, Dr. Dickie moved to the Bahamas without telling Mrs. Dickie or the court. Despite several court orders he stopped making support payments before he left, disobeying several court orders. In fact, Dr. Dickie owed over \$150 000 in unpaid spousal and child support. Not only did Dr. Dickie disobey the court and flee the country, he did not appeal any orders or try to change the monthly amounts. Mrs. Dickie did not make enough money to support her family on her own and she was forced to go into debt in order to make ends meet.

Mrs. Dickie took the case to the Supreme Court of Canada, which decided that should the support-paying spouse disobey court orders he or she can be found in contempt of court and should not be allowed to take further steps in the case. In making the contempt remedy available, the Supreme Court recognized the need for serious legal consequences for people who do not obey court orders for support.



## Changes in Income: Retroactive Child Support – *D.B.S. v. S.R.G.*

Retroactive support payments refer to payments that were ordered at an earlier time but have not been made. Until 2006 in *D.B.S. v. S.R.G.*<sup>9</sup>, retroactive child support payments were only available in exceptional circumstances, for example: situations of great financial need; if a parent paying support was hiding income; or if the payments were frequently late. Until 2006, the law was unclear on when retroactive child support should be ordered.

D.B.S. and S.R.G. separated after a 10-year common law relationship. The couple shared custody of their children and neither paid or received any support from the other. At the time of separation, both parents had similar incomes and shared the costs of raising their children. However, when the father had a large income increase seven years after the separation, the mother went to court to ask for retroactive and continued child support payments.

The mother took the case to the Supreme Court of Canada, who confirmed a court's power to order retroactive support payments. The Court stated that the paying parent should increase the amount of child support when his/her income increases significantly. By law, children are entitled to benefit from a significant increase in a parent's income. The Court then outlined the guidelines for retroactive child support:

### *When retroactive payments should be awarded*

- The court stated that retroactive payments should no longer be considered rare or exceptional
- The support must be appropriate in the specific circumstances and it must provide a clear benefit to the child or children. For example, if the parent were to increase support and the child's quality of life would remain the same, the amount of support would like stay the same

*Parents have an obligation to support their children in a manner commensurate with their income, and this obligation and the children's concomitant right to support exist independently of any statute or court order.*

D.B.S. v. S.R.G.





*"...parents are to be trusted with the responsibility of caring for their children, but courts are not to be discouraged from defending the rights of children when they have the opportunity to do so"*

D.B.S. v. S.R.G.

*When are retroactive payments not appropriate?*

- A retroactive payment might not be awarded if the recipient spouse delayed in seeking an increase. Since parents receiving support have the right to request proof of the paying-parent's income once a year, including a tax return and pay stub, this information is available to support-seeking parent
- The courts may not award a retroactive payment if it would cause financial hardship for the paying parent

*What is the significance of "blameworthy conduct"?*

- "Blameworthy conduct" exists when a parent puts his/her own interests ahead of the child's right to an appropriate amount of support
- "Blameworthy conduct" on the part of the paying parent will be considered by the court as a reason to allow a retroactive payment
- Examples include hiding income and intimidating the recipient parent into not seeking support

Retroactive payments are limited to a period of three-years before the court case, unless there was "blameworthy conduct".

In *D.B.S v. S.R.G.*, the mother was not awarded retroactive child support because both parents had a similar salary before the father's increase in income. The court determined that support was not required for that time period. However, as the father's income had increased significantly, the court ordered him to start making regular child support payments.

## Other Advances to Equality in Family Law: Examples from LEAF'S Legal Work

The following list provides some examples of LEAF cases in the family law area. These cases reveal some of the advances for equality rights in family law. For more information on these and other LEAF cases please visit: [www.leaf.ca](http://www.leaf.ca).

### Social Assistance

#### *Social Assistance and the "Spouse in the House" Rule – Falkiner v. Ontario*

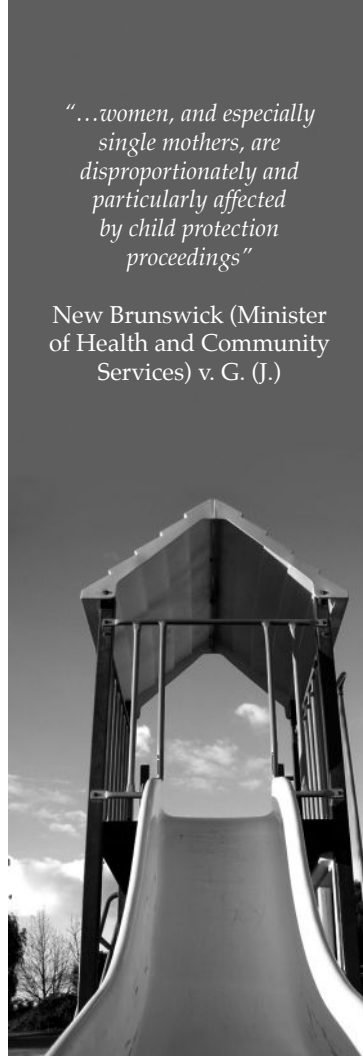
Under Ontario's welfare system, two people living together for more than three months were presumed to be spouses and have access to each other's income. Many relationships that were not "spousal" – such as roommates – were captured by this definition. Approximately 90% of people cut-off from social assistance by this rule were women. In 2004, the Ontario Court of Appeal found that the rule led to discrimination. While the rule appeared neutral, the Court held it had a negative greater impact on women and on single mothers. As a result the Ontario government changed the rule.

#### *Legal Aid in Child Wardship Cases – J.G v. Minister of Health and Community Services of New Brunswick*

In 1999, the Supreme Court of Canada ruled that New Brunswick's failure to provide legal aid to poor parents, facing state applications to remove their children, violated their right to security of the person under section 7 of the *Charter*. LEAF intervened in this case to also argue a violation of section 15 of the *Charter*; but the Supreme Court did not find it necessary to decide that issue. Most legal aid challenges occur in the context of criminal trials, where the vast majority of applicants are men. This case was a significant victory for women in Canada, because the Court recognized that women, especially single mothers, are disproportionately affected by lack of legal representation in other kinds of state proceedings and that effect can result in a violation of their *Charter* rights.

*"...women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings"*

New Brunswick (Minister of Health and Community Services) v. G. (J.)





## Benefits

### *Spousal Support after Retirement - Albrecht v. Albrecht*

After a 35-year marriage ended in divorce, Mrs. Albrecht lost her rights to a division of Canada Pension Plan credits. LEAF intervened at the Ontario Divisional Court and helped win a ruling that a woman is entitled to share a couple's Canada Pension Plan credits when there is a separation or divorce. This case was an important step in addressing the circumstances of older women and to reduce their vulnerability to poverty.

### *Parental Benefits - Schachter v. Canada*

In 1992, an Ontario court ruled that childcare benefits must be extended to all biological parents, allowing fathers benefits for childcare. This was an important ruling for women as it recognized that both parents have a role to play in the care of a new baby. As well, the court stated that maternity benefits must be available to birth mothers exclusively, in recognition of women's particular needs after pregnancy and labour.

## Child Support

### *Income Tax on Child Support - Thibaudeau v. Canada*

In 1995, Suzanne Thibaudeau went to the Supreme Court of Canada to fight a rule in the *Income Tax Act* that required her to pay tax on the child support payments she received, while her ex-spouse could use the payments as a deduction on his income tax. In a split decision, the Supreme Court did not find that the law discriminated against single-parents the vast majority of whom are women. Nonetheless, the case received a lot of public and media attention and in 1999, the federal government changed the law to better balanced the rights of custodial and support-paying parents.

## Custody and Relocation

### *Ability to Relocate in Split Custody Cases – Gordon v. Goertz*

In this case, a mother had custody of her daughter, while the father had visitation rights. The mother wanted to move to Australia for work and wanted to take her daughter with her. The father argued that this would

limit his right to access. LEAF argued that the custodial mother should be able to relocate with their children and not be restricted by a father's right to convenient access. In 1996, the Supreme Court of Canada decided that it was in the best interests of the child to stay with her mother.

## Same-sex Families

*The Definition of "Spouse" – M. v. H.*

In 1999, the Supreme Court of Canada ruled that gays and lesbians must be included in the Ontario definition of "spouse" for the purposes of spousal support. Many provincial governments, and the federal government, responded by providing same-sex couples with legal recognition. In 2005, same-sex couples won the right to marry.

## Names

*Betrand, Suzanne and the Yukon Change of Name Act, 1985*

In the first case ever sponsored by LEAF, an archaic law that denied married women the right to the change their surnames to their birth names was struck down.

*Children's names – Vital Statistics Act Challenges*

In 1986, a law that required children to have their father's surname was struck down, enabling mothers to give their children the maternal surname.

## Conclusion

Family law has seen tremendous development in the years following the *Charter*. Greater fairness in family law is crucial to promoting women's full equality in Canada. The courts, recognizing women face that separation causes greater financial hardship for dependent spouses after divorce and, have made it easier for women to get the support they need. For more information on LEAF's work, please visit [www.leaf.ca](http://www.leaf.ca).

# Spousal Support and Child Support: Definitions

The follow definitions are based on the federal laws surrounding marriage, divorce and child support. Please note that these definitions may be different in provincial statutes. For example, the laws surrounding support for non-married spouses are dealt with at the provincial level.

## *Divorce Act, 1985*

- The federal legislation that covers divorce and separation for married spouses; spousal and child support are found in section 15 of this statute

## *Spousal Support*

- Payments made to a spouse on separation or divorce
- Under the Divorce Act a court must consider the following factors:
  - The circumstances, including the needs and means of each spouse
  - the length of time the couple lived together
  - the *functions* performed by each spouse when they lived together
  - any order, agreement or arrangement relating to support of either spouse, for example a pre-nuptial agreement or domestic contract
- No mandatory guidelines exist, but there are *Spousal Support Advisory Guidelines* which some courts may use a guide to determine the amount and duration of spousal support
- Where partners are unmarried provincial and territorial laws govern support rules and obligations

## *Child of the marriage*

- A minor child of two spouses or former spouses, or a child who is over 18 years old, but is a dependant because of illness, disability or another reason
- Often a child does not need to be the biological child of both spouses, so long as there is a “settled intention” of one parent to treat him/her as a child of the family

## *Child Support*

- Payments made to support a child/children after divorce or separation
- Since 1997, courts must use *Child Support Guidelines* to determine the amount and duration of child support orders
  - The *Guidelines* set out the amount of child support to be paid to the parent with custody, based on the income of the support paying spouse and number of children
  - There are separate charts for each province, in order to account for different provincial taxes
  - There is flexibility in the *Guidelines* for special expenses, if the amount in the *Guidelines* would cause undue hardship for the paying parent or for situations of split or shared custody

## *Retroactive child support*

- A payment can be ordered by a court when a parent has not received sufficient support in the past

# Resources

## Legal Resources

To get a lawyer, contact your province's Law Society's Lawyer Referral Service. For a fee (usually \$10), you will be given the name of a family lawyer and/or ½ hour of legal advice.

If you cannot afford a lawyer, contact your regional legal aid office for information about qualifying for a legal aid certificate. You can also contact community legal clinics in your region. For a public legal education organization in your province, please visit - <http://canada.justice.gc.ca/en/ps/pad/resources/plei.html>.

Some useful resources include:

### **The Canadian Bar Association**

Toll Free: 1-800-267-8860

Email: [info@cba.org](mailto:info@cba.org)

Visit [www.cba.org](http://www.cba.org) for a list of regional branches

### **YWCA**

Phone: (416) 962-8881

Email: [national@ywcacanada.ca](mailto:national@ywcacanada.ca)

Visit: [www.ywcacaanda.ca](http://www.ywcacaanda.ca) for a regional branch

### **Family Mediation Canada/Mediation Familiale Canada**

Phone: 1-877-FMC-2005 / 519-585-3118

Email: [fmc@fmc.ca](mailto:fmc@fmc.ca)

Visit: [www.fmc.ca](http://www.fmc.ca)

## Online Resources

*Advisory Spousal Support Guidelines* - [www.justice.gc.ca/en/dept/pub/spousal/project/spousal\\_support\\_advisory\\_guidelines\\_e.pdf](http://www.justice.gc.ca/en/dept/pub/spousal/project/spousal_support_advisory_guidelines_e.pdf)

*Divorce Act, 1985* - <http://laws.justice.gc.ca/en/D-3.4/index.html>

Family Court Services – by Province - <http://canada.justice.gc.ca/en/ps/pad/resources/fjis/search.asp?type=3>

*Family Law Assistance Services – Department of Justice* - <http://canada.justice.gc.ca/en/ps/flas/index.html>

*Family Service Canada* - [www.familyservicecanada.org](http://www.familyservicecanada.org)

*Federal Child Support Guidelines* - [www.justice.gc.ca/en/ps/sup/grl/ligfed.html](http://www.justice.gc.ca/en/ps/sup/grl/ligfed.html)

Support Enforcement Services – by Province - *Advisory Spousal Support Guidelines* - [www.justice.gc.ca/en/dept/pub/spousal/project/spousal\\_support\\_advisory\\_guidelines\\_e.pdf](http://www.justice.gc.ca/en/dept/pub/spousal/project/spousal_support_advisory_guidelines_e.pdf)

*Women's Legal Education and Action Fund (LEAF)* – [www.leaf.ca](http://www.leaf.ca)

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<sup>2</sup> Marie Drolet, *The Persistent Gap: New Evidence on the Canadian Gender Wage Gap* (Statistics Canada, 2001) online: <http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2001157.pdf>.

<sup>3</sup> René Morissette and Yuri Ostrovsky, *Income Instability of Lone Parents, Singles and Two-parent Families in Canada, 1984 to 2004* (Statistics Canada, 2005) online: <http://www.statcan.ca/english/research/11F0019MIE/11F0019MIE2007297.pdf>.

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<sup>8</sup> Carol Rogerson and Rollie Thomson, *Spousal Support Advisory Guidelines* (Department of Justice, 2005) online: [http://www.justice.gc.ca/en/dept/pub/spousal/project/spousal\\_support\\_advisory\\_guidelines\\_e.pdf](http://www.justice.gc.ca/en/dept/pub/spousal/project/spousal_support_advisory_guidelines_e.pdf).

<sup>9</sup> *D.B.S. v. S.R.G.*, [2005] A.J. No. 2 (C.A.)



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