

**ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

**DALE BROOMER,
on his own behalf and as litigation guardian for
KYLA BROOMER, EMILY BROOMER and TRAVIS BROOMER,
PAULETTE DUKE,
on her own behalf and as litigation guardian for
KEENAN HUGHES, MADISON HUGHES and ETHAN DUKE and
ROBERT BEAUPARLANT**

Applicants

- and -

**ATTORNEY GENERAL OF ONTARIO,
THE DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM,
THE ADMINISTRATOR OF THE NIPISSING SOCIAL
SERVICES ADMINISTRATION BOARD and
THE ADMINISTRATOR OF THE KAWARTHA LAKES/HALIBURTON
SOCIAL SERVICES ALLIANCE**

Respondents

- and -

**CHARTER COMMITTEE ON POVERTY ISSUES, THE CANADIAN
ASSOCIATION OF ELIZABETH FRY SOCIETIES, THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND, THE DISABLED WOMEN'S NETWORK
CANADA, THE INCOME SECURITY ADVOCACY CENTRE, THE STEERING
COMMITTEE ON SOCIAL ASSISTANCE AND THE ONTARIO SOCIAL
SAFETY NETWORK ("INTERVENOR COALITION")**

Intervenor

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

AND BETWEEN:

EUGENE JOHNSON

Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO
DIRECTOR OF ONTARIO WORKS,
ADMINISTRATOR OF DISTRICT OF THUNDER BAY SOCIAL SERVICES
ADMINISTRATION BOARD**

Respondents

- and -

**CHARTER COMMITTEE ON POVERTY ISSUES, THE CANADIAN
ASSOCIATION OF ELIZABETH FRY SOCIETIES, THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND, THE DISABLED WOMEN'S NETWORK
CANADA, THE INCOME SECURITY ADVOCACY CENTRE, THE STEERING
COMMITTEE ON SOCIAL ASSISTANCE AND THE ONTARIO SOCIAL
SAFETY NETWORK ("INTERVENOR COALITION")**

Intervenor

**APPLICATION UNDER Rule 14.05(3)(g), (g.1) and (h)
of the *Rules of Civil Procedure***

FACTUM OF THE INTERVENOR COALITION

**Charter Committee on Poverty Issues, the Canadian Association of Elizabeth Fry
Societies, the Women's Legal Education and Action Fund, the Disabled Women's
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FACTUM OF THE INTERVENOR COALITION

PART I - THE FACTS

1. The Intervenor Coalition adopts the facts as set out in the Applicants' factum.

PART II - OVERVIEW

2. It is indisputable that in order to live with dignity a person requires, at the very least, access to the basic necessities of life. Governmental acts that deny basic necessities constitute a direct assault on human dignity. They are not permissible under the *Canadian Charter of Rights and Freedoms* ("*Charter*"), which is premised upon the protection of dignity and equality for all human beings, particularly those who are already vulnerable and disadvantaged.

3. The Lifetime Ban does the opposite of protecting dignity and equality as required under the *Charter*. It targets persons who are already most disadvantaged in our society, and punishes them by making them more disadvantaged. It takes food and shelter away from people who need assistance to avoid hunger and homelessness; it tolerates the possibility that single mothers will give children into state care so that the children can be fed and clothed; it enables wheelchairs and other assistive devices to be taken away from people with disabilities. These impacts are imposed without concern for the devastation caused to families, children and all persons in need who live in the shadow of the Lifetime Ban. Social assistance recipients are the only people in society that are subject to such degrading and inhumane treatment.

4. The Intervenor Coalition will argue that sections 15, 7 and 12 of the *Charter* are violated by the Lifetime Ban. The Coalition adopts the arguments made by the Applicants in relation to these sections, and makes the further arguments set out below.

PART III - ARGUMENT

A. SECTION 15

5. The purpose of section 15 is to “prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration”.

Law v. Canada (Minister of Employment and Immigration), [1999] 1. S.C.R. 497 (hereinafter "*Law*"), at para. 51

6. While the issues arising under section 15 of the *Charter* cannot be resolved through a fixed rule or formula, the Supreme Court of Canada has developed the following guidelines to assist this Court in its section 15 analysis:

- (1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics , or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- (2) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?
- (3) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15 of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

Law, supra, at para. 39

7. A law may exist that is both discriminatory on its face and in its effects. While it is no longer necessary to distinguish between direct and adverse effects, these categories can be useful in assisting our understanding of discrimination.

British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U., [1999] 3 S.C.R. 3, at paras. 19-26

8. The Applicants' arguments focus on the adverse effects resulting from the Lifetime Ban. The Coalition supports and adopts the Applicants' arguments. The Coalition also believes the Lifetime Ban constitutes direct discrimination in two ways: (1) it stigmatizes all social assistance recipients by subjecting them to a penalty which applies to no other groups in society; and (2) it imposes material deprivation on a sub-group of recipients, those who are in need of assistance and have been previously convicted of an offence. In both cases, the discrimination at issue can be categorized as direct discrimination based on receipt of social assistance, and more particularly, based on "those in need who require social assistance".

Rodriguez v. B.C., [1993] 3 S.C.R. 519 (hereinafter "*Rodriguez*")

(1) THE LIFETIME BAN DRAWS A FORMAL DISTINCTION BETWEEN THE APPLICANTS AND OTHERS ON THE BASIS OF THEIR RELIANCE ON SOCIAL ASSISTANCE

9. A formal distinction may exist within the law itself, or by the very existence of the law in relation to the world around it. Where the law applies to only one particular group and to no one else, it can be said that a distinction has been drawn between the group to whom the law applies and all others not affected by the law. In this case, the Lifetime Ban applies to all persons in need who require social assistance and to no one else. As such, the law draws a facial distinction between persons in need who require social assistance and all other persons.

(2) THE APPLICANTS ARE SUBJECT TO DIFFERENTIAL TREATMENT BASED ON ONE OR MORE ENUMERATED OR ANALOGOUS GROUNDS

10. As a result of the Lifetime Ban, the Applicants are subject to differential treatment because they are in need and require social assistance. Receipt of social assistance has been recognized by the Ontario Court of Appeal as an analogous ground of discrimination in *Falkiner*. In that case, the ground "receipt of social assistance" included protection for those that had been denied assistance for unconstitutional reasons.

11. Once an analogous ground of discrimination has been recognized, it stands as a constant marker of suspect decision-making or potential discrimination. It is notable that this ground often occurs in conjunction with other grounds of discrimination such as disability, sex and family status, as is demonstrated in this case.

Falkiner v. Ontario (Ministry of Community & Social Services), 59 O.R. (3d) 481 (C.A.), at paras. 84-93

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at para. 8

(3) THE DIFFERENTIAL TREATMENT IS DISCRIMINATORY

12. One of the most compelling factors supporting a finding that differential treatment is discriminatory is the existence of pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by members of the affected group. A legislative provision will be found to be discriminatory when it relies upon and perpetuates inaccurate understandings of the merits, capabilities and worth of a particular group, resulting in further stigmatization of the group.

Law, supra, at paras. 63 and 64

(a) Persons In Need Who Require Social Assistance Are Members Of Groups That Are Generally Recognized As Being Historically Disadvantaged

13. The Lifetime Ban applies to all persons in need who require social assistance. This group consists, disproportionately (relative to the population as a whole), of persons from groups that are recognized to suffer disadvantage in our society. They are persons with mental or physical disabilities. They are single mothers with dependant children. They are Aboriginal and racialized people. They are persons who have not completed high school or are newcomers to Canada. They rely on social assistance because their disadvantaged circumstances make it difficult or impossible to work.

Affidavit of Debbie Moretta, at paras. 8, 9, 11 and 12-14

Affidavit of Bruce Porter, at para. 38

14. Social assistance assists these groups in meeting their basic needs and in addition, provides programs directed toward alleviating their disadvantage. Poor people with low educational levels rely on social assistance to provide them with educational supports, and assistance towards employment so they have a fighting chance in a competitive work force. People with disabilities rely upon social assistance to enable them to live independently, to pursue employment and contribute to society through the provision of specialized aids and devices such as wheelchairs and crutches, or the medication to manage a debilitating condition. Single mothers rely on social assistance to enable them to carry out their obligations as parents, to ensure they and their children are fed, clothed and housed. In many instances social assistance is what stands between a single mother and an abusive situation or apprehension of her children.

Affidavit of Bruce Porter, at paras. 50, 51

Affidavit of Margaret Little, at paras. 11-30 and 32-37

Affidavit of Harry Beatty, at paras. 21, 25, 26, 29-31, 33, 34, 37-52 and Exhibit "B"

(b) People In Need Who Require Social Assistance Are Subject To Prejudice And Stereotyping

15. Stigmatizing treatment of people who are poor and dependent on social assistance has been a prevalent theme throughout the ages. As far back as Elizabethan times poor people received relief only if they were willing to humiliate themselves by wearing a “P” on their clothing. Later, they were required to subject themselves to the deplorable conditions of “poor houses”. Similar humiliation persists today in less overt ways, for example through the intrusive scrutiny of social assistance recipients’ lives, the welfare snitch line, and forcing people to live on unrealistically low rates of assistance.

Affidavit of Ernie Lightman, at para. 9

United Nations Human Rights Committee, *Concluding Observations on Canada*, CCPR/C/79/Add. 105 (1999) (7 April 1999), at para. 16

16. The source of these policies is an underlying stereotype that people who need to rely on social assistance are morally inferior; that they are responsible for their own poverty, they are lazy, irresponsible, promiscuous (women in particular), greedy and dishonest. The stereotype of moral inferiority informs the way social assistance recipients are treated by others in society, for example when they are looking for housing or seeking employment. Combined with their lack of financial means, this stigma leads inevitably to social exclusion.

Affidavit of Bruce Porter, at paras. 28-52

Affidavit of Margaret Little, at paras. 9-15

17. This stereotyping is perpetuated by governments that rely on the notion of moral inferiority to minimize the need to spend on social welfare. Stereotypes dehumanize social assistance recipients and make it acceptable to treat them harshly. Social assistance recipients are blamed for their own misfortunes and society is thereby absolved of its responsibility to care for people in need. No recognition is given to the structural forces that cause poverty, such as the economic conditions leading to unemployment, or systemic discrimination, including lack of accommodation, that excludes various groups from the workforce.

Affidavit of Bruce Porter, at para. 18

Reuben Hassen, "The Cruel War: Social Security Abuse in Canada" (1981) 3 *Canadian Taxation* 114, at p. 131

18. The prejudice experienced by people on social assistance is reflected in the criminal justice system where studies have demonstrated that those of lower socio-economic status, particularly those who are unemployed, tend to be sentenced more harshly than the general population for similar offences in otherwise similar circumstances.

Affidavit of Bruce Porter, at para. 62

19. This trend is evident when one examines the crime of fraud which is treated more harshly when it occurs in the context of social assistance compared to other contexts. Social assistance fraud is more likely to be prosecuted criminally than employment insurance fraud or income tax fraud and in the event of conviction, to result in a penalty of incarceration. Whereas fines for income tax are set in accordance with ability to pay in order to prevent a deprivation of basic necessities, the Lifetime Ban for welfare fraud is imposed without regard for the deprivation that it causes.

Lorne Sossin, "Welfare State Crime in Canada Revisited: The Politics of Tax Evasion in the 1980s and 1990s" (1999) 3 *Tax Forum* 1, at pp. 1-2, 12 and 13

Dianne L. Martin, "Passing the Buck: Prosecution of Welfare Fraud: Preservation of Stereotypes" (1992) 12 *Windsor Y.B. Access Just* 52, at pp. 68-72

Greenaway, "Crime and Class: Unequal Before the Law", in J. Harp and J.R. Hofley, ed., *Structured Inequality in Canada* (Scarborough: Prentice Hall, 1980) 247, at p. 257

R. Hasson, "Tax Evasion and Social Security Abuse - Some Tentative Observations" (1980) 2 *Canadian Taxation* 98, at p. 106

Affidavit of Bruce Porter, at paras. 65-70

20. Systemic inequalities experienced by people in need who require social assistance may also influence the way in which the recipients respond to fraud charges. Many fraud convictions are the result of guilty pleas which Margaret Little attributes to the fear of

imprisonment that exists among single mothers who will plead guilty in order to avoid incarceration and the risk of losing custody of their children.

Affidavit of Margaret Little, at paras. 20 and 28

Dianne L. Martin, "Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes" (1992) 12 *Windsor Y.B. Access Just* 52, at pp. 59-60 and 63-65

(c) The Circumstances of People in Need Who Require Social Assistance Are Ignored By the Lifetime Ban

21. The Lifetime Ban prevents any consideration of the reality of the lives of those who require social assistance, particularly the disadvantage that results from the law and policies themselves.

22. Social assistance benefits are insufficient to allow recipients and their dependants to meet basic needs for food, clothing and shelter. OW benefits provide an income of \$520.00 per month for single recipients, an amount which has remained the same for eight years, notwithstanding escalating and inflexible costs of housing and basic needs.

Affidavit of Harry Beatty, at para 40

Affidavit of Susan Cox, at para 17

Nicholas Vozoris, Barbara Davis, Valerie Tarasuk, "The Affordability of a Nutritious Diet for Households on Welfare in Toronto" (Jan-Feb. 2002) *Canadian Journal of Public Health* 36

Affidavit of Margaret Little, at para. 25 and 26

Affidavit of Bruce Porter, at para. 47

23. Rather than dealing with the inadequacy of the rates, this government chose to reduce welfare rates by 21.6% in 1995, thereby exacerbating the desperate life circumstances facing recipients.

Affidavit of Bruce Porter, at para. 47

24. In recognition of the inadequate rates, one of the primary recommendations coming out of the Inquest into the death of Kimberly Ann Rogers (who died eight months pregnant while serving a conditional sentence for welfare fraud, and had been under a welfare suspension) was that allowances for housing and basic needs should be based on actual costs of nutritional food baskets and average rents in communities, and should be adjusted annually to ensure adequacy.

Recommendation #4, Kimberly Ann Rogers Inquest

25. Given the level of social assistance benefits, recipients face enormous challenges in paying the rent and feeding themselves and their children. Recipients are compelled by circumstances to make decisions that impair their dignity. These include giving their children into care, risking eviction and therefore homelessness, doing without dental care, using food banks and going hungry. Steps that would be taken by others facing similar circumstances such as borrowing money; selling a car, carpets or a fridge; getting a roommate to reduce housing costs; or accepting goods or money from friends or family, are unavailable to social assistance recipients because any proceeds would be deducted from benefits, dollar for dollar.

Ontario Disability Support Program Support Policy Directive 5.1 (January 2003)
(hereinafter "**ODSP Policy Directives**"), at pp. 2-3

R. v. Wakil, [2001] O.J. No 3924 (Gen. Div.), at para. 2

Affidavit of Bruce Porter, at para. 58

26. The Applicants themselves exemplify the kind of life circumstances, which in relation to any other offence, would be considered important mitigating factors. For example, Dale Broomer, who is legally blind and disabled, was charged and convicted with failing to declare a WCB benefit of \$82.72 per month, an amount less than the Ministry documented rent shortfall of \$100.00 experienced by 34% of OW recipients. Eugene Johnson received funds for his children who were temporarily in the care of the Children's Aid Society, but used the funds to pay for necessities and maintain his residence in order to ensure the return of his children.

Affidavit of Dale Broomer, at paras. 3 and 14

Affidavit of Eugene Johnson, at para. 37

27. Paulette Duke is a 22 year old single mother with three very young children, including a child born in March of 2002. She has a disabling knee condition, and one of her children is asthmatic. The father of her two oldest children left in February 2000, leaving her to support herself and the children. They moved in with her father when she could not find affordable accommodation. She pled guilty to having submitted a false rental receipt to social assistance, and was required to pay restitution of \$1,022.00, an amount equivalent to the maximum rental allowance for two months. At the time she was receiving an allowance of \$532.00 per month for her basic needs, to support herself and her two children. This amount was entirely inadequate for her to provide food, diapers, formula, extra prescription costs, clothing, and transportation for herself and the children. In order to try and make up the shortfall in her assistance cheque, she visited the local food bank as often as permitted, got used clothing for the children and received a monthly \$40.00 food voucher from her local church. Paulette Duke describes the task of feeding her children on her allowance, as "impossible".

Affidavit of Paulette Duke, at paras. 5-11 and 16-23

28. The desperate circumstances surrounding the plight of one of the Applicants, Mr. Johnson, was recognized by Justice Wright in his application for interim relief in this application.

The unfortunate fact is that when he was sentenced to the fraud charge, the applicant was granted a suspended sentence, conditional upon him repaying \$175/month to the welfare authorities. This was to be repaid by a man who, at best, was entitled to only \$520/month assistance and whose rent alone was \$400/month. From a realistic point of view it appears that we are back in the condition of England of the 1840's. In the short term it appears that jail will once again provide the service which Scrooge contemplated when he asked those soliciting funds for the poor "What, are there no jails?"

Johnson v. Ontario (A.G.), [2003] O.J. No. 3085 (S.C.), at para. 15

29. Overlaying the reality of the lives of people in need who require social assistance, is a social assistance system filled with vague, complex and voluminous rules and policies, the effect of which is to expose recipients to the ongoing risk of being in violation. The regulations are almost incomprehensible and courts have acknowledged this reality. Justice Campbell called one General Welfare Assistance regulation “a Kafkaesque regulation so complex and ambiguous that it becomes a lawyer’s nightmare...”

Kerr v Metropolitan Toronto (Dept. Of Social Services) (1991), 4 O.R. (3d) 430 (Div. Ct.), at p. 446

30. While the previous regulations may have been complex and incomprehensible, the new OW is even worse. The Workfare Watch Project, in a report on the new system found that “...more complex eligibility requirements mean that eligible applicants are failing to access services or are inappropriately removed from them.” Similar findings have been made concerning *ODSPA*.

Dan Herd and Andrew Mitchell, *Discouraged, Diverted and Disentitled: Ontario Works New Service Delivery Model*, (Toronto: Workfare Watch Project, 2002), at p. 58

John Fraser, Cynthia Wilkey and JoAnne Frenschkowski, *Denial by Design . . . The Ontario Disability Support Program*, (Toronto: Income Security Advocacy Centre, 2003), at p. 11

31. For those who rely on social assistance the uncertainty of what behavior is permissible and what is not, coupled with inappropriate ineligibility determinations creates a significant risk of exposing people to unfounded fraud charges. The Applicant, Eugene Johnson is a case in point. Mr. Johnson entered a guilty plea to one count of "fraud" arising because he did not have his children in his care for six months and continued to collect assistance for them, and one other count for two short periods after the Lifetime Ban was enacted. He is currently trying to appeal his conviction on the basis that his plea was uninformed. In fact, regulations and administrative policies permit continued eligibility up to six months under certain circumstances where children are transferred to institutions. The Social Benefits Tribunal has taken a very

reasonable approach to interpreting the policy by extending the period in keeping with the “best interests of the child” and the principle of family unity and stability.

SBT decisions 9905-02862; 0107-05839; 0110-8509; 9903-01847

Ontario Works Policy Directive 21 (Sept. 2001);

ODSPA Policy Directive 0401-01

O. Reg 134/98, s. 2(3)

O. Reg 222/98, s. 2(3)

(d) Government Reinforces The Stereotype Of The “Welfare Cheat” By Distorting the Magnitude Of The Fraud

32. In public statements advertising and promoting its “get tough” policy on welfare fraud, the government reinforces the stereotype of the “welfare cheat” by choosing to highlight only the most egregious examples without in any way recognizing the disadvantaged circumstances of many of those that have been convicted, including the Applicants in this case and Kimberly Rogers. Many of the examples given by Debbie Moretta on behalf of the government are not relevant to the issues in this application because those individuals would not be impacted by the Lifetime Ban because they are not in need.

Affidavit of Debbie Moretta, at para. 26

33. The government furthers the stereotype of the “welfare cheat” by relying on the Welfare Fraud Control Report 2001-2002 which claims that in that fiscal year, investigations uncovered 17,734 cases and \$58.2 million in social assistance that people were not entitled to receive, leaving the clear impression that fraud was rampant. On closer examination it is clear that of the 17,734 cases, only 430 of them involved convictions for fraud. There is no evidence that the remaining 17,304 cases had anything to do with fraud. While fraud entails criminal intent, ineligibility issues and overpayments involve no wrongdoing on the part of the recipient.

Welfare Fraud Control Report, Affidavit of Debbie Moretta, at para. 70, Exhibit “EE”

John Stapleton, "Report on Social Assistance Programs in Ontario", Exhibit 3 to the Cross-Examination of Bruce Porter

Affidavit of Bruce Porter, at paras. 28 and 77

34. The government also relies on a 1987 KPMG Peat Marwick report to argue conviction rates are an unreliable indicator of the true incidence of fraud. Professor Diane Martin explains that the authors of the KPMG Report rely exclusively on secondary sources to arrive at their estimate that 2.59% to 3.66% of total payments are lost due to fraud. In particular they rely upon a study from Alberta which:

...includes as fraud both cases which were dismissed or never prosecuted as evidence was weak or lacking but "abuse was suspected"; and self-reporting by welfare officials as to incidence of "administrative error" and "unintentional client error". These sources are every bit as unsatisfactory as conviction rates. The categorizations are subjective, and it is quite possible the category of fraud or "suspected abuse" become inflated as officials unconsciously make decisions which tend to reduce the reported rate of their own errors.

Dianne L. Martin, "Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes" (1992) 12 *Windsor Y.B. Access Just* 52, at p. 83

35. The government's continued reliance on the discredited 1987 KPMG Report only serves to highlight the fact that it has no reliable studies or data to support its theory that fraud is rampant.

36. Interestingly enough, the Auditor General Report in 2002 identified major deficiencies in the administrative practices of the department, arising from technological problems; inadequate client screening; computer errors; poor file keeping; lack of internal control procedures and significant administrative errors leading to both under and over payments to recipients. While a picture emerges of a department in disarray, there was no suggestion of rampant dishonesty among recipients.

Affidavit of Bruce Porter, at para. 78

(4) THE LIFETIME BAN CONTRAVENES SECTION 15

37. Underlying the Lifetime Ban is the discriminatory notion that people in need who require social assistance are morally inferior and undeserving. This notion operates to dehumanize social assistance recipients to the point that their personhood, needs and capacities are deemed to be irrelevant. The reason why the “fraud” was committed, the person’s life circumstances, their understanding of the rules and regulations and the effect of the Lifetime Ban, including the effect on their children, spouses and community, are all disregarded.

38. The dehumanization of people in need who require social assistance enables governments to treat them more harshly. The Lifetime Ban presumes that social assistance recipients need a deterrent unthinkably harsh in comparison to anything imposed on members of other groups. This is a form of direct discrimination as it targets all social assistance recipients with the spectre of being “welfare cheats”. The message sent by the Ban serves to deflect the public’s attention away from the systemic factors underlying the social condition of recipients and the flaws of the social assistance system, while exposing them to more discriminatory treatment and public hostility.

39. The Lifetime Ban also directly discriminates by deliberately removing benefits specifically required to ameliorate the disadvantage of persons in need. The Lifetime Ban treats those convicted of welfare fraud in a more harsh manner than those convicted of other types of fraud. Those convicted of welfare fraud face higher rates of prosecution and incarceration and receive the additional penalty of being denied the basic necessities of life forever. The Lifetime Ban treats social assistance recipients convicted of welfare fraud as a special class of offender, because they are deemed to be more dishonest, more incorrigible, and more morally reprehensible, than other members of society who commit similar frauds.

C. SECTION 7

(1) THE SCOPE OF SECTION 7 RIGHTS

40. Section 7 protects interests fundamentally related to human life, liberty, personal security, physical and psychological integrity and autonomy because they are “intrinsicly concerned with the well-being of the living person ... based upon respect for the intrinsic value of human life and on the inherent dignity of every human being.” Section 7 “expresses some of the basic values of the *Charter*.” It is central to the definition of both substantive and procedural *Charter* guarantees and its full impact “will remain difficult to foresee and assess for a long while yet.”

Rodriguez, supra, at p. 585

Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 (hereinafter “*Blencoe*”), at para. 188

41. International human rights norms are crucial to the interpretation of section 7 of the *Charter*. Its wording mirrors Article 3 of the *Universal Declaration of Rights and Freedoms*. As affirmed by Justice L’Heureux Dubé in *Baker*, the *Charter* is the “primary vehicle” through which international human rights are given domestic effect in Canada. In *Ewanchuk* she stated that s. 7, along with s.15, are particularly important in this regard.

R. v. Ewanchuk, [1999] 1 S.C.R. 330, at para. 73

Baker v. Canada, [1999] 2 S.C.R. 817, at para. 70

42. Interpretation in accordance with relevant international human rights norms means recognizing that the obligations emanating from section 7 are not merely negative obligations, but also involve obligations on states to take positive measures to protect life, liberty and security of the person. U.N. monitoring bodies have sharply criticized Canadian governments for taking positions in litigation which exclude from the scope of section 7 fundamental rights under international law such as the right to an adequate standard of living,

including adequate food, clothing and housing, and to take necessary measures to ensure the equal enjoyment of these rights by women and persons with disabilities.

International Covenant on Economic, Social and Cultural Rights, (19 December 1966) Can. T.S. 1976 No. 46, Article 11

Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities* (Eleventh session, 1994), U.N. Doc E/C.12/1994/13 (1994)

United Nations Committee on Economic, Social and Cultural Rights, Government of Canada, *Responses to the Supplementary Questions to Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998), Question 53

United Nations Human Rights Committee, *Concluding Observations on Canada*, CCPR/C/79/Add. 105 (1999) (7 April 1999), at para. 12

C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97, at p. 99

43. Positive obligations on governments have been recognized by the Supreme Court of Canada specifically in the section 7 context. Justice Lamer observed in *Schachter* that section 7 has both positive and negative components, and he subsequently found in *J(G)*, for the majority, that "section 7 imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing."

New Brunswick (Minister of Health and Community Services) v. G.(J), [1999] 3 S.C.R. 46 (hereinafter "*G. (J)*"), at para. 107

Schachter v. Canada, [1992] 2 S.C.R. 679, at para. 91

44. In *Masse v. Ontario*, the majority found that section 7 does not impose a positive obligation to provide basic necessities for persons in need and that the *Charter* doesn't apply to what was described as legislative inaction. This determination was based largely on U.S. jurisprudence, and was inconsistent with Canada's international human rights obligations. Reliance on the U.S. caselaw was misplaced because, as Dickson J. expressly noted in *Irwin Toy*, there is a "striking difference" between the wording of section 7 and the U.S. Bill of Rights. The latter protects life, liberty and property, and does not mention security of the person at all. In *Irwin Toy* Dickson J. expressly referred to international covenants in recognizing that in

assessing the scope of section 7, corporate-commercial property rights, which are excluded, must be distinguished from “such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.”

Masse v. Ontario (Ministry of Community & Social Services), [1996] O.J. No. 363 (Div. Ct.), at para. 347

Irwin Toy v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 1003

45. The idea that the *Charter* cannot impose positive obligations has also been rejected in Supreme Court cases subsequent to *Masse*. In *Vriend*, the Supreme Court rejected any application of the “problematic distinction” between legislative action and inaction and found that the *Charter* can be engaged by governments’ failure to act so as to protect rights. More recently, in *Gosselin*, the Supreme Court considered whether section 7 imposes positive obligations in relation to the provision of adequate social assistance. Justices Arbour and L’Heureux-Dubé found, in dissent, that section 7 imposes a positive obligation on governments to provide an adequate level of social assistance to those in need. The other six justices found that such a finding was not warranted on the evidence in that case, but acknowledged that it might be warranted in a future case. Justice Bastarache was alone in finding that section 7 would not apply unless the deprivation of life, liberty and security of the person were triggered by state action, but even he recognized that positive obligations are certainly a component of section 7 rights when government action through the justice system is at issue, as in the present case.

Vriend v. Alberta, [1998] 1 S.C.R. 493, at paras. 53 and 60-61

Gosselin v. Quebec (Attorney General), 2002 SCC 84, at paras. 218 and 323

46. Section 7 rights should also be interpreted through an equality rights lens in order “to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.” Section 36(1)(c) of the Constitution Act, 1982 reinforces the constitutional principle of equality and social inclusion, affirming the commitment of federal/provincial/territorial governments to “providing essential public services of

reasonable quality to all Canadians” and recognizing that “shared-cost programs in the health and welfare fields ... considered essential [should be] available to all Canadians.”

G. (J.), supra, at para. 115

Schachter, supra, at pp. 702 and 721

Government of Canada, *Federalism and Decentralization: Where Do We Stand?* (Ottawa: Government of Canada, 1981), at p. 28

Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 36

(2) APPLICATION OF SECTION 7 TO THE LIFETIME BAN

47. The Lifetime Ban violates all three rights in s.7 by denying those in need access to a basic public service that is intricately linked to life, liberty and security of the person.

48. The right to life, in international law and in other jurisdictions, has been interpreted to require governments to adopt positive measures to protect health and well-being and provide for basic necessities. Canada has accepted this interpretation. Any failure or refusal to provide those subject to incarceration or criminal sanction with necessities is, *a fortiori*, a violation of the right to life.

International Covenant on Civil and Political Rights, (19 December 1966) 9.9.9 U.N.T.S. 171, Can. T.S. 1976 No.47; *Supplementary Report of Canada in Response to Questions Posed by the United Nations Human Rights Committee*, CCPR/C/1/Add.62 (March, 1983), at p. 23

U.N. Human Rights Committee, *Lantsova v. The Russian Federation*, Communication No. 763, CCPR/C/74/D/763/1997 15 April 2002; *Francis Korallie Mullin v. Union Territory of Delhi and Others* (Supreme Court of India) (Writ Petition No. 3042, 1980)

49. The right to liberty protects personal rights that are inherent to the individual and consistent with the essential values of our society, such as respect for the dignity of the human person. Parents’ interest in raising and caring and maintaining custody of children is protected under the right to liberty. The Lifetime Ban directly engages the liberty interest by denying access to an essential public service that is central to social citizenship and individual dignity,

autonomy and mobility, particularly for people with disabilities. It also directly impacts the parental interest in raising and caring for children by denying to the household the assistance required for basic needs.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315,
at para. 85

Blencoe, supra, at paras. 45-46

50. The Lifetime Ban similarly infringes the right to security of the person for the reasons outlined in the Applicants' factum.

(3) FUNDAMENTAL JUSTICE

51. An infringement of a s. 7 right will offend "principles of fundamental justice" if it violates "basic tenets of our legal system." They include principles recognized both in domestic law and under international conventions. As Justice LaForest explains in *Godbout v. Longueuil*:

... if deprivations of the rights to life, liberty and security of the person are to survive *Charter* scrutiny, they must be "fundamentally just" not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve, as measured against basic tenets of both our judicial system and our legal system more generally.

Godbout v. Longueil (City), [1997] 3 S.C.R. 844, at para. 74

52. The right to adequate food, clothing and housing is a fundamental right under international human rights law. The Lifetime Ban violates international human rights norms which, as the Supreme Court has recognized, constitute fundamental tenets of our domestic legal system.

United States of America v. Burns, [2001] 1 S.C.R. 283, at paras. 79- 81

53. The Lifetime Ban is inherently discriminatory. It targets the most vulnerable members of society, inflicts a harsher penalty in relation to welfare related offences than other

offences, perpetuates stereotype and stigma and affects only those offenders who find themselves in need subsequent to their conviction. It is inconsistent with the explicit constitutional obligation of governments to provide essential public services of reasonable quality to **all** Canadians.

Rodriguez, supra, at pp. 619-624

R. v. Sharpe, [2001] 1 S.C.R. 45, at para. 133

54. The Lifetime Ban is also contrary to fundamental justice because it is arbitrary, providing no opportunity to consider the particular circumstances of the offence. The requirement to consider specific circumstances is recognized in extensive sentencing principles and jurisprudence under the *Criminal Code*. It is even applied to speeding and parking offences, for which different levels of fines are levied for offences of differing gravity. Mandatory penalties are permitted but only where there is no “reasonable hypothetical” person who could be subject to the penalty in circumstances where it is not warranted.

Rodriguez, supra, at paras. 79 and 147

Criminal Code, R.S.C. 1985, c. C-46, s. 718

Highway Traffic Act, R.S.O. 1990 c. H-8, ss. 128 and 130

R. v. Smith, [1987] 1 S.C.R. 1045 (hereinafter "*Smith*")

55. The Lifetime Ban represents an unprecedented assault on legal norms that have “animated legislative and judicial practice” as a fundamental tenet of the legal system in a wide array of policy areas in Canada. It has been a fundamental tenet of the administration of justice, for example in debtor-creditor law, bankruptcy, family law and criminal law that no one should be deprived of basic necessities.

Affidavit of Bruce Porter, at para.87

56. The Lifetime Ban is also fundamentally unjust because it has been imposed without any public input. The recommendations of numerous municipalities and of the jury in the inquest into the death of Kimberly Rogers have been ignored. There is no evidence of any

public consultation, and since the Ban was enacted by regulation there was not even any legislative debate.

Affidavit of Ernie Lightman, Exhibits "D" to "R"

Recommendations of Kimberly Ann Rogers Inquest

M. Jackman, "The Right to Participate in Health Care and Health Resource Allocation Decisions under Section 7 of the Canadian Charter" (1995-96) 4

Health L. Rev. No. 2, 3-11, at paras. 28, 29 and 32

57. Further, it is a fundamental tenet of the justice system that a punishment should end when there is evidence of remorse and rehabilitation. Parole is granted to offenders based on their behaviour in prison, and pardons may be granted to relieve persons of criminal convictions where the circumstances warrant. The Lifetime Ban provides no room for such relief. It sends the message that social assistance recipients, unlike others, are so inherently dishonest that they can never be rehabilitated, and they do not deserve a second chance.

D. SECTION 12

58. Section 12 of the *Charter* provides that all people have the right "not to be subjected to any cruel and unusual treatment or punishment." Like sections 7 and 15, it is concerned with preserving basic human dignity. It confirms that human dignity must be respected even when a person has behaved in a manner warranting punishment by the state.

(1) THE LIFETIME BAN IS PUNISHMENT

59. Section 12 refers to "treatment" and "punishment", both of which are applicable to the Lifetime Ban. It is submitted that the latter term refers to any penalties that are imposed through the legal system, whether civil or criminal, where the purpose of the penalty is (at least in part) to inflict suffering on the offender.

60. It is submitted that the Lifetime Ban is clearly intended as punishment since it withholds a benefit that would otherwise be available, but for the commission of an offence, with

the inevitable result that the offender will experience pain and suffering. The punitive nature of the ban is evident from the degree of suffering that it inflicts, and the fact that it is permanent, so that it cannot be lifted even from an offender who is remorseful, rehabilitated and unlikely to offend again.

(2) THE LIFETIME BAN IS CRUEL AND UNUSUAL

61. The Lifetime Ban clearly meets the criteria for identifying measures that are "cruel and unusual", described by the Supreme Court as follows (emphasis added):

A punishment will be cruel and unusual and violate section 12 of the Charter if it has any one or more of the following characteristics:

1. The punishment is of such character or duration as to **outrage the public conscience** or be **degrading to human dignity**;
2. The punishment **goes beyond what is necessary** for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
3. The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.

Smith, supra, at pp. 1097-1098

62. In considering these criteria it is crucial to be acutely aware of the stereotypes and discriminatory attitudes that inform discussions about welfare fraud. These attitudes must be disentangled from considerations of what the "public conscience" will tolerate, and from notions of what is "necessary" to deter welfare fraud. The examination of these issues will be tainted if they are informed by exaggerated and discriminatory ideas about welfare recipients and the "problem" of welfare fraud.

(a) Outrage to Public Conscience

63. The criterion "outrage to public conscience" is sometimes expressed as a concern about maintaining "standards of decency" in our society. The Intervenor Coalition submits that it is indecent to withhold benefits necessary to survival, as a punishment, knowing that the consequences of this treatment may include starvation, homelessness, illness and impaired child development.

64. In considering what is decent, or not, the Intervenor Coalition submits that it is appropriate to look to the standards that are expressed in various legal sources, including international instruments, the law of other jurisdictions, and other laws of Canada. As noted above, with respect to fundamental justice, these reveal a universal norm that punishment must not include the deprivation of basic necessities such as food, shelter or health care.

65. The right to be protected from cruel and unusual treatment or punishment is found in many international law documents, including the main human rights instruments such as the *Universal Declaration of Human Rights* (Article 5), and the *International Covenant on Civil and Political Rights* (Article 7). It is also entrenched in a specific treaty, the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, which Canada ratified in 1987.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47

Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 26 June 1987, Annex to GA Res. 39/46

66. Pursuant to these general declarations the United Nations has developed minimum standards for the treatment of persons subject to punishment by the state. It is submitted that these are highly relevant to section 12 of the *Charter*, since they set out those forms of deprivation that are acceptable modes of punishment, and those that are not. In particular, the United Nations Minimum Rules for the Treatment of Prisoners states that all persons must be provided with the necessities of life, including shelter that provides adequate light and warmth;

adequate clothing; food of adequate nutritional value; and supplies necessary to maintain adequate health and hygiene. The Rules specify that these basic necessities are to be provided in a manner that preserves basic human dignity.

Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977)

67. A similar standard has been set by the U.S. Supreme Court under the Eighth Amendment to the U.S. Constitution, which protects against "cruel and unusual punishment". A breach of the Eighth Amendment has been found to occur where authorities are "deliberately indifferent" to the basic needs of inmates, including the need for food, warmth, clothing and health care. The Lifetime Ban easily meets this standard. It is not just deliberate indifference, but deliberate deprivation.

Rhodes v. Chapman, 452 U.S. 337, at p. 347

Estelle v. Gamble, 429 U.S. 97, at pp. 104-106

Wilson v. Seiter, 501 U.S. 294, at pp. 303-304

68. The treatment of fines under Canadian law is also instructive since it indicates the degree to which it is considered proper to punish people by depriving them of the financial means necessary to obtain the necessities of life. Under criminal law, a fine can only be imposed where a court has determined that the offender has the ability to pay it, or to discharge it under a fine-option program. The purpose of taking into account ability to pay is to ensure that the Court does not "crush the accused or his family". The punishment is considered to be sufficient if it causes financial deprivation, but it is too much if it results in an inability to access necessities of life.

R. v. Fera (1976), 32 C.C.C. (2d) 219 (Prov. Ct.), at p. 221

R. v. Pickering, [1997] M.J. No. 114 (Prov. Ct.), at para. 27

Criminal Code, s. 734(2)

69. The Manitoba Court of Appeal has found that it is cruel and unusual punishment to incarcerate a person for failure to pay a fine without considering ability to pay. The court stated that this would amount to a punishment for poverty itself, as in debtors' prisons in Dickens' time:

A poor person strapped for cash when the [parking] ticket is received may well be forced to incur the maximum fine. To pay this higher amount, the offender may have to spend moneys which are more urgently required for family necessities. Although the fine has but a nuisance value for the rich, it may be beyond the means of those without. But the means of the offender are not taken into account.

... The plight of [the appellant], facing a lengthy prison term for debt, would have been understood by both Charles Dickens and his character Little Dorrit whose respective fathers each languished in a debtors' prison, an institution which so outraged the public's sense of decency that it was abolished well over a hundred years ago. Its re-establishment as the threatened home of parking offenders cannot be tolerated under the Charter.

R. v. Joe, [1994] 3 W.W.R. 1 (Man. C.A.), at para. 123

(b) Degrading to Human Dignity

70. The conditions of poverty are degrading to human dignity, regardless of their cause. It is impossible to live a dignified life when one does not have safe living conditions, nutritious food, and the security that is needed in order to participate fully in society.

No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy and active life. Deficiencies in the means of subsistence can be just as fatal, incapacitating or painful as violations of physical security.

Henry Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy (Boston: Princeton University Press, 1996), at pp. 24-25

Oscar Schacter, "Human Dignity as a Normative Concept" (1983) 77 *American Journal of International Law* 848, at p. 852

Grootboom v. South Africa, 2001 (1) S.A. 46 (CC), at para. 23

71. The Lifetime Ban is degrading not just because it perpetuates poverty, but because it does so intentionally. Because it is deliberate, it sends a message about the worth of offenders, that society has so little regard for their human worth that it is willing to force them to beg for charity, or to starve.

72. Furthermore, the Lifetime Ban is degrading because it exploits existing disadvantage and punishes only those who are in need. Its purpose and effect is to use existing disadvantage and need as a punishment.

73. A similar punishment would not be permitted if it was directed toward a traditionally recognized vulnerable group, such as a religious minority, or women. The Lifetime Ban is comparable, for example, to punishing members of a religious minority by taking away their ability to practice their religion, or punishing women by denying them access to pregnancy leave or benefits. Government protection of the rights of these groups is necessary to preserve human dignity, just as social assistance is necessary to preserve the dignity of those who are most in need in our society. Measures necessary to preserve the dignity of disadvantaged groups cannot be taken away as a selective means of punishment.

Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68, at para. 47

(c) Goes Beyond What is Necessary

74. This section 12 criterion is concerned with whether the punishment is “grossly disproportionate” to the offence in question. It involves a consideration of the nature of the offence, the circumstances leading to the offence, and the personal characteristics of the offender. It does **not** involve a consideration of the government's purpose in imposing the treatment in question, but rather, the appropriateness of the penalty in the circumstances of a particular case.

In assessing whether a sentence is grossly disproportionate, the court must first consider the **gravity of the offence**, the **personal characteristics of the offender** and the **particular circumstances** of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. **The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry.**

Smith, supra, at p. 1073 (emphasis added)

75. Under this heading it is important to ensure that the balancing exercise is not impacted by discriminatory notions about welfare fraud and welfare recipients. It is also necessary to take into account the individual circumstances of the offender in question, including, it is submitted, characteristics of existing disadvantage.

76. The question in this case is whether the suffering caused by the Lifetime Ban, and the permanency of this suffering, could ever be justified in relation to the offence of welfare fraud. It is submitted that it could not.

R. v. Goltz, [1991] 3 S.C.R. 485, at pp. 530-531

R. v. Pickering, supra, at paras. 52-59

77. In all cases the deprivation caused by the Ban will be devastating and degrading, since it will be felt when offenders are so poor that they need social assistance. The Lifetime Ban will apply to everyone found to have committed an offence and who is subsequently in need of assistance, regardless of individual circumstances, and regardless of the amount of money involved. All of those affected will be poor (otherwise they would be ineligible for assistance), and the group will inevitably include single mothers, persons with disabilities and other vulnerable persons. In many cases the offence itself may have been linked with the desperate disadvantage suffered by social assistance recipients, or other circumstances of need, none of which are taken into consideration when the Lifetime Ban is applied.

E. SECTION 1

78. In addition to the points made by the Applicants and the Canadian Civil Liberties Association with respect to section one, the Intervenor Coalition emphasizes the following.

79. The Lifetime Ban has a discriminatory purpose, that being, targeting social assistance recipients for differential treatment so as to perpetuate stereotype and prejudice against the group. Its purpose is to deny access to basic public services necessary to life, liberty and security of the person. These are constitutionally impermissible purposes which “simply cannot be construed as pressing or substantial.”

Egan v. Canada, [1995] 2 S.C.R. 513, at para. 210

80. No deference should be accorded the legislature’s role in balancing competing interests in relation to the Ban. It was enacted by regulation, and as noted above, no public consultation or debate has been held. Where concerns have been raised they have been ignored.

M. v. H, [1999] 2 S.C.R. 3, at para. 315

R. v. Mills, [1999] 3 S.C.R. 668, at paras. 59 and 125

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at paras. 69 and 98

81. Finally, the Supreme Court has expressly stated that where a provision deprives a group of constitutional rights as a form of punishment, no judicial deference ought to apply. The characterization of the federal government’s position in *Sauvé* applies to the present case:

When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing.

Sauvé, supra, at para. 52

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 16, 2003

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Law v. Canada* (Minister of Employment and Immigration), [1999] 1. S.C.R. 497
2. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3
3. *Rodriguez v. B.C.*, [1993] 3 S.C.R. 519
4. *Falkiner v. Ontario (Ministry of Community & Social Services)*, 59 O.R. (3d) 481 (C.A.)
5. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
6. *R. v. Wakil*, [2001] O.J. No 3924 (Gen. Div.)
7. *Johnson v. Ontario (A.G.)*, [2003] O.J. No. 3085 (S.C.)
8. *Kerr v Metropolitan Toronto (Dept. Of Social Services)* (1991), 4 O.R. (3d) 430 (Div. Ct.)
9. SBT decision 9905-02862
10. SBT decision 0107-05839
11. SBT decision 0110-8509
12. SBT decision 9903-01847
13. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307
14. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330
15. *Baker v. Canada*, [1999] 2 S.C.R. 817
16. *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46
17. *Masse v. Ontario (Ministry of Community & Social Services)*, [1996] O.J. No. 363 (Div. Ct.)
18. *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927
19. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
20. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84

21. *Schachter v. Canada*, [1992] 2 S.C.R. 679
22. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
23. *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844
24. *United States of America v. Burns*, [2001] 1 S.C.R. 283
25. *R. v. Sharpe*, [2001] 1 S.C.R. 45
26. *R. v. Smith*, [1987] 1 S.C.R. 1045
27. *Rhodes v. Chapman*, 452 U.S. 337
28. *Estelle v. Gamble*, 429 U.S. 97
29. *Wilson v. Seiter*, 501 U.S. 294
30. *R. v. Fera* (1976), 32 C.C.C. (2d) 219 (Prov. Ct.)
31. *R. v. Pickering*, [1997] M.J. No. 114 (Prov. Ct.)
32. *R. v. Joe*, [1994] 3 W.W.R. 1 (Man. C.A.)
33. *Grootboom v. South Africa*, 2001 (1) S.A. 46 (CC)
34. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68
35. *R. v. Goltz*, [1991] 3 S.C.R. 485
36. *Egan v. Canada*, [1995] 2 S.C.R. 513
37. *M. v. H.*, [1999] 2 S.C.R. 3
38. *R. v. Mills*, [1999] 3 S.C.R. 668
39. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199

SCHEDULE "B"
LIST OF STATUTES, REGULATIONS AND BY-LAWS

1. O. REG. 134/98, s. 2(3)

Interpretation

2. (1) For the purposes of the Act . . .

(3) For the purposes of the Act and the regulations, a child is a dependent child, in relation to an applicant or recipient, if,

(a) the applicant or recipient or the spouse or same-sex partner included in the applicant's or recipient's benefit unit is the child's parent;

(b) the child resides in the same dwelling place as the applicant or recipient;

(c) the applicant or recipient or the spouse or same-sex partner included in the benefit unit,

(i) receives the Canada Child Tax Benefit under section 122.6 of the Income Tax Act (Canada) on behalf of the child or a determination has been made under that Act that he or she is eligible to receive the Canada Child Tax Benefit, or

(ii) is the parent with primary care and control of the child, if subclause (i) does not apply;

(d) in the case of a child of school age if clause (e) does not apply, the child,

(i) is attending school or a program approved by the administrator and, if 16 years of age or older, is making satisfactory progress with his or her studies or program,

(ii) is unable to attend school because of a physical or mental disability, or

(iii) is unable to attend school for reasons outside his or her control and the administrator is satisfied that he or she will be attending school or a program approved by the administrator at the next earliest opportunity; and

(c) in the case of a child who is 16 years of age or older and who has one or more dependent children, the child, if required by the administrator, is participating in a program of activities approved by the administrator that will assist the child with the following:

1. The successful completion of a high school diploma.
2. The development of employment-related skills.
3. The further development of the child's parenting skills.

2. O. REG. 222/98, s. 2(3)

Interpretation

2. (1) For the purposes of the Act . . .

(3) For the purposes of the Act and the regulations, a child is a dependent child, in relation to an applicant or recipient, if,

(a) the applicant or recipient or the spouse or same-sex partner" included in the applicant's or recipient's benefit unit is the child's parent;

(b) the child resides in the same dwelling place as the applicant or recipient;

(c) the applicant or recipient or the spouse or same-sex partner included in the benefit unit,

(i) receives the Canada Child Tax Benefit under section 122.6 of the Income Tax Act (Canada) on behalf of the child or a determination has been made under that Act that he or she is eligible to receive the Canada Child Tax Benefit, or

(ii) is the parent with primary care and control of the child, if subclause (i) does not apply; and

(d) in the case of a child of school age, the child,

(i) is attending school or a program approved by the Director and, if over 16 years of age, is making satisfactory progress with his or her studies or program,

(ii) is unable to attend school because of a physical or mental disability, or

(iii) is unable to attend school for reasons outside his or her control and the Director is satisfied that he or she will be attending school or a program approved by the Director at the next earliest opportunity.

3. **UNIVERSAL DECLARATION OF HUMAN RIGHTS**, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

4. **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

5. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. General comment on its implementation

6. **STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS**, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

Register

11. In all places where prisoners are required to live or work,

(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.

13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate....



Personal hygiene

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.

16. In order that prisoners may maintain a good appearance compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.

Clothing and bedding

17. (1) Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep

him in good health. Such clothing shall in no manner be degrading or humiliating....



Food

20. (1) Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

(2) Drinking water shall be available to every prisoner whenever he needs it....



Medical services

22. (1) At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.

(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.

(3) The services of a qualified dental officer shall be available to every prisoner.

23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate....

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures;

the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed....

7. **CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,...

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

8. CRIMINAL CODE, R.S.C. 1985, c. C-46

734. (1) Subject to subsection (2), a court that convicts a person, other than a corporation, of an offence may fine the offender by making an order under section 734.1...

Offender's ability to pay

(2) Except when the punishment for an offence includes a minimum fine or a fine is imposed in lieu of a forfeiture order, a court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine or discharge it under section 736.

9. *PROVINCIAL OFFENCES ACT, R.S.O. c. P.33*

Relief against minimum fine

59.(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

10. HIGHWAY TRAFFIC ACT, R.S.O. 1990, c. H.8

Rate of Speed - Penalty

128.(14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,

(a) is less than 20 kilometres per hour over the maximum speed limit, to a fine of \$3 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit;

(b) is 20 kilometres per hour or more but less than 35 kilometres per hour over the maximum speed limit, to a fine of \$4.50 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit;

(c) is 35 kilometres per hour or more but less than 50 kilometres per hour over the maximum speed limit, to a fine of \$7 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit; and

(d) is 50 kilometres per hour or more over the maximum speed limit, to a fine of \$9.75 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit.



Careless driving

130. Every person is guilty of the offence of driving carelessly who drives a vehicle or street car on a highway without due care and attention or without reasonable consideration for other persons using the highway and on conviction is liable to a fine of not less than \$200 and not more than \$1,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her licence or permit may be suspended for a period of not more than two years. R.S.O. 1990, c. H.8, s. 130.

11. *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, Part I of the Constitution Act, 1982, B to the Canada Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11, Sections 7, 12, 15(1) and 24(1);

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

• • •

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

• • •

15.(1) 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.

12. CONSTITUTION ACT, 1982

Equal Opportunities

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to . . .

- (c) providing essential public services of reasonable quality to all Canadians.

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**ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N:

**DALE BROOMER,
on his own behalf and as litigation guardian for
KYL A BROOMER, EMILY BROOMER and TRAVIS BROOMER,
PAULETTE DUKE,
on her own behalf and as litigation guardian for
KEENAN HUGHES, MADISON HUGHES and ETHAN DUKE and
ROBERT BEAUPARLANT**

Applicants

- and -

**ATTORNEY GENERAL OF ONTARIO,
THE DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM,
THE ADMINISTRATOR OF THE NIPISSING SOCIAL
SERVICES ADMINISTRATION BOARD and
THE ADMINISTRATOR OF THE KAWARTHA LAKES/HALIBURTON
SOCIAL SERVICES ALLIANCE**

Respondents

- and -

**CHARTER COMMITTEE ON POVERTY ISSUES, THE CANADIAN
ASSOCIATION OF ELIZABETH FRY SOCIETIES, THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND, THE DISABLED WOMEN'S NETWORK
CANADA, THE INCOME SECURITY ADVOCACY CENTRE, THE STEERING
COMMITTEE ON SOCIAL ASSISTANCE AND THE ONTARIO SOCIAL
SAFETY NETWORK ("INTERVENOR COALITION")**

Intervenor

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

AND BETWEEN:

EUGENE JOHNSON

Applicant

-and-

**ATTORNEY GENERAL OF ONTARIO
DIRECTOR OF ONTARIO WORKS,
ADMINISTRATOR OF DISTRICT OF THUNDER BAY SOCIAL SERVICES
ADMINISTRATION BOARD**

Respondents

- and -

**CHARTER COMMITTEE ON POVERTY ISSUES, THE CANADIAN
ASSOCIATION OF ELIZABETH FRY SOCIETIES, THE WOMEN'S LEGAL
EDUCATION AND ACTION FUND, THE DISABLED WOMEN'S NETWORK
CANADA, THE INCOME SECURITY ADVOCACY CENTRE, THE STEERING
COMMITTEE ON SOCIAL ASSISTANCE AND THE ONTARIO SOCIAL
SAFETY NETWORK ("INTERVENOR COALITION")**

Intervenor

**APPLICATION UNDER Rule 14.05(3)(g), (g.1) and (h)
of the *Rules of Civil Procedure***

**INTERVENOR COALITION'S CERTIFICATE
RE ESTIMATE OF TIME**

I, **JENNIFER SCOTT**, counsel for the Intervenor Coalition, estimate that the time required for oral argument on behalf of the Appellant (not including reply) is 1 hour.

An Order under subrule 61.09(2) (original record and exhibits) is not required.

Date: September 16, 2003

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Applicants

- and -

ATTORNEY GENERAL OF ONTARIO, et al.
Respondents

EUGENE JOHNSON
Applicant

- and -

ATTORNEY GENERAL OF ONTARIO, et al.
Respondents

Court File No. 420/03

**ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceedings commenced at Toronto

**INTERVENOR COALITION'S CERTIFICATE
RE ESTIMATE OF TIME**

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FACTUM OF THE INTERVENOR COALITION

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