2016 C.A. No. 454879

Nova Scotia Court of Appeal

Between:

Brenton Sparks

Appellant

and

Assistance Appeal Board (Nova Scotia)

Respondent

and

Department of Community Services (Nova Scotia)

Respondent

Rosemary Sparks, Rosemary Sparks as Guardian *Ad Litem* for Jeannine MacDonald, Tiauna Sparks and Angelica Sparks, and Women's Legal Education and Action Fund Inc. (LEAF)

Intervenors

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PART 1: CONCISE OVERVIEW OF THE APPEAL

1. The Intervenors adopt the statement of facts as contained in the Appellant's factum. This appeal raises an important issue concerning the proper interpretation and application of social assistance legislation and the effects of this interpretation on women, spouses and children in the context of a system of last resort for those living in poverty.

2. As a result of the Department of Community Service's decision to suspend income assistance payments to Brenton Sparks for his failure to abide by the requirements under *Employment Support and Income Assistance Act* and regulations, Rosemary Sparks and her children were deprived of access to the basic necessities of life. She and her children were sanctioned with the loss of their social assistance through no fault of their own, but as a direct result of their relationship with Brenton Sparks.

3. A statutory interpretation that sanctions the punishment of women, as caregivers, and children is contrary to the purpose of the legislation, the *Charter* values of equality, human dignity and avoiding cruel and unusual punishment, as well as Canada's international obligations to protect children's rights and interests.

PART 2: CONCISE STATEMENT OF FACTS

4. The facts establish that at all times relevant to this appeal, Brenton Sparks lived with his spouse, Rosemary Sparks, and their three dependent children, Jeannine MacDonald

(born August 24, 2002), Tiauna Sparks (born July 24, 2006), and Angelica Sparks (born July 20, 2007), in East Preston, Nova Scotia.[1]

5. Despite the reality that all the members of the Sparks family were persons in need of social assistance, the Department of Community Services (the "Department") terminated their social assistance for a period of six weeks over Christmas in 2015 based on Mr. Sparks' failure to comply with the employability assessment process and in particular to attend a meeting with his employment counsellor.[2]

6. As a result, when the Department terminated Mr. Sparks' social assistance and disqualified him for a period of six weeks, they imposed the same penalty upon Rosemary Sparks and their three children. The Nova Scotia Assistance Appeal Board (the "Board") dismissed Mr. Sparks' appeal of the Department's decision to terminate social assistance, for himself and his family members, and upheld the Department's decision.[3]

7. Mr. Sparks' application for judicial review to quash the decision of the Board was also dismissed. The Supreme Court accepted the interpretation and application of the legislation by the Department of Community Services and approved by the Board in terminating social assistance to Mr. Sparks and his family.[4]

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[1] Appeal Book (hereinafter AB), Decision, 5, at para 4.
[2] AB, Decision, at 5.
[3] AB, Decision, 7, at para 15; see also AB, Notice of Ineligibility, at 63.
[4] *Sparks v Assistance Appeal Board et al* [2016] NSSC 201.

8. Rosemary Sparks and her children were not represented before the Board or the court below on Mr. Sparks' application for judicial review. By Order of this Honourable Court dated March 16, 2017, Ms. Sparks was added as an intervenor to this appeal, on her own behalf, and as litigation guardian on behalf of her three children.

9. The same Order also granted intervenor status in this appeal to the Women's Legal Education and Action Fund Inc. ("LEAF")

Legislative facts

10. The *Employment Support and Income Assistance Act* ("ESIA") provides for a program of social assistance in Nova Scotia for those who have no other means of meeting their needs. It provides for 'basic needs' in the form of a 'personal allowance' for each adult member of a household in the amount of $275 per month, as well as a 'shelter allowance,' based on the number of family members residing together as a household, ranging from a maximum of $300-$620 per month.

11. The social assistance program also provides selective assistance for 'special needs' on a discretionary basis, depending upon Departmental approval of individual requests for assistance for needs such as telephone, transportation, childcare, medical and other items.

PART 3: LIST OF ISSUES

The Appellant's Notice of Appeal states that:

> 1. The Learned Trial Judge erred in holding that the Respondent, Assistance Appeal Board, had reasonably interpreted and applied the provisions of the *Employment Support and Income Assistance Act* ("ESIA") and ESIA Regulations (in particular, s. 20(l)(b) of the Regulations) as requiring that not only Mr. Sparks but

> also his wife and children would be ineligible for social assistance upon it being established that he, personally, had refused to participate in "employment services."[5]

PART 4: STANDARD OF REVIEW FOR EACH ISSUE

12. The standard of review with respect to the particular issue under appeal whether Rosemary Sparks and her children should have been disqualified from receiving assistance along with Mr. Sparks, must be assessed in light of the complete absence of reasons in the Board's decision concerning the scope of the Department's decision to disqualify Mr. Sparks.

13. In interpreting the provisions of s. 20 of the *ESIA Regulations*, the Board failed to provide a sufficient basis to allow the Court to assess the reasonableness of its decision or outcome in this case. In particular, the Board decision contains no reasons that would have enabled the Court to assess its path of reasoning or "whether the result, factually and legally, occupies the range of possible outcomes."[6]

In the absence of reasons from the Board, the Learned Trial Judge, LeBlanc J, effectively applied a 'correctness' standard of review to the issue of whether s. 20 of the *ESIA Regulations* could be interpreted to allow the termination of social assistance not simply to

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[5] AB, Notice of Appeal, 1-3.

[6] Regulations pursuant to the *Employment Support and Income Assistance Act* S.N.S. 2000, c. 27; O.I.C. 2001-138 (March 23, 2001, effective August 1, 2001), N.S. Reg. 25/2001 as amended to O.I.C. 2017-50 (March 7, 2017), N.S. Reg. 30/2017, hereinafter "*ESIA Regulations.*"; See *N.L.N.U. v. Newfoundland & Labrador (Treasury Board* [2011] 3 S.C.R. 708 (SCC), paras 11, 14-17, per Abella J. for the Court. See also *Jivalian v Nova Scotia* [2013] NSCA 2, para 15.

the "applicant or recipient," as provided for in the wording of that provision, but also to the Applicant or recipient's family members. [7]

14. In deciding this issue on Appeal, this Honourable Court stands in the shoes of LeBlanc J and must apply a correctness standard to his decision.

15. Constitutional considerations, in particular the requirement that courts interpret legislation harmoniously with constitutional norms and *Charter* values, also support a less deferential standard of review to the decision of the Board to interpret and apply the *ESIA Regulations* in a manner that deprived Ms. Sparks and her children of assistance.

PART 5: ARGUMENT

16. The provision at issue in this appeal is s. 20(1)(b) of the *ESIA Regulations*, which reads as follows:

> **Refusal to accept employment**
> 20 (1) An applicant or recipient is not eligible to receive or to continue to receive assistance where the applicant or recipient, or the spouse of the applicant or recipient unreasonably refuses
>
> (a) to accept employment, where suitable employment is available;
>
> (b) to participate in employment services that are part of an employment plan; or
>
> (c) to engage in an approved educational program that is part of an employment plan, where an appropriate approved educational program is available.[8]

[7] AB, Decision, p 19-23, paras 60-78.
[8] *ESIA Regulations, supra,* Note 6.

17. On its face s. 20 of the *ESIA Regulations* renders an “applicant or recipient” of social assistance “not eligible” to receive social assistance if:

- they “unreasonably refuse”
- their dependent spouse “unreasonably refuses”
- to participate in employment services that are part of an employment plan

18. Mr. Sparks was a recipient of social assistance at the time the Department decided he had unreasonably refused to participate.[9]

19. An applicant is defined in the *ESIA Regulation*s as someone who applies for assistance, as distinguished from a recipient, such as Mr. Sparks, “who is receiving assistance” at the time of the refusal.[10]

20. Under s. 20(1), in determining whether the refusal merits a loss of eligibility for social assistance, the Department must assess whether or not the refusal was “reasonable.” Once the refusal is found to be unreasonable, there is no further exercise of discretion, and the applicant or recipient becomes “not eligible.”

21. Discretion, and the ‘reasonableness’ standard under s. 20 does not apply to: (i) the mandatory nature of the termination of eligibility, nor (ii) the scope (i.e., who is rendered ineligible) nor (iii) the time frame for the period of ineligibility.

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[9] AB, Decision, 5, at para 4.
[10] *ESIA Regulations*, ss. 2 (c), (z).

22. In terms of the length of time of any period of ineligibility under s. 20, in the case of the Sparks family, the Department restricted the period of ineligibility to six weeks as provided for in their Policy Manual, although there is no legislative language to limit the period of ineligibility.

23. Justice LeBlanc summarised the outcome of the Board's decision as follows:

> The Board found that Mr. Sparks did not complete the requisite 90-day Assisted Job Search Program, and "[i]t's quite apparent the appellant had no desire to participate in the services to help him attach to the workforce as per Regulation 17 and 18." Therefore, the Board concluded, **he and his spouse and dependents** became ineligible, pursuant to s. 20(l)(b) of the *Regulations*, to continue to receive assistance.[11]

25. In concluding that the correct interpretation of s. 20 supported the termination of social assistance to Ms. Sparks and the couple's three children, LeBlanc J found that a recipient receives assistance "on behalf of family members" and that it would be "difficult or impossible" to separate the entitlements of each of the family members:

> In conclusion, in each family, there is typically only one recipient. That person receives assistance for the benefit of the household. The amount of assistance paid to the recipient is based on many factors, including whether the recipient has a spouse and children. It cannot be said that separate amounts are paid for each individual. In addition to supporting the conclusion that a recipient receives assistance on behalf of family members, this also makes it difficult or impossible to determine what portion of the payments is attributable to each person. Mr. Sparks provides no suggestion as to how this ought to be calculated. To suggest that the assistance payments for his spouse and children should have continued is both a misinterpretation and an oversimplification of the assistance scheme set out in the Act and Regulations.[12]

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[11] AB, Decision, 7, at para 15, emphasis added, see also AB, Notice of Ineligibility, p 63.
[12] AB, Decision, 22-23, at para 78.

26. In LeBlanc J's interpretation, exposing Mr. Sparks to the risk of losing not only his own assistance, but that of his family, was found to be consistent with the purpose of the legislation. He concluded:

> A recipient who fails to demonstrate this commitment [to becoming employable or employed], within the legislation's parameters, risks losing their entitlement to assistance. It would not be inconsistent with this object or scheme to find **just themselves, but also for their family.**[13]

27. While Ms. Sparks and her children did not violate s. 20 or any other term or condition of their receipt of assistance, the Court nevertheless concluded that they could be punished, through termination of the social assistance benefits paid on their behalf, as a result of Mr. Sparks' actions.

28. Justice LeBlanc fails to provide the reasons for his conclusion that it would be "difficult or impossible" to maintain eligibility for Rosemary Sparks and her three daughters, while removing the social assistance payable on behalf of Mr. Sparks. As noted, all ESIA budget calculations are statutorily based upon individual entitlements, in the case of the personal allowance, and upon the number of individuals in each household, in the case of the shelter allowance. Similarly, any approval of special needs allowances are individually based. Reducing the budget by the social assistance payable on behalf of Mr. Sparks, in particular the personal allowance and any special needs attributable to him is neither "difficult or impossible."[14]

Section 20 is capable of more than one meaning

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[13] AB, Decision, 22, at para 75, emphasis added.

[14] Because there are four members of the family excluding Mr. Sparks, the shelter allowance component of the budget would be unaffected by the removal of Mr. Sparks' eligibility.

29. The starting point for any consideration of the proper meaning of s. 20 of the *ESIA Regulations* is the wording of the legislation itself. As argued below, s. 20 is capable of more than one interpretation. The provision is not clear on its face; virtually all versions require words to be added to the text to comprehend and assess its meaning.

30. Specifically, with respect to eligibility, the wording of s. 20 does not state that dependent spouses and their children lose their eligibility upon the 'unreasonable refusal' of a recipient. In order to find that Ms. Sparks and her children were disentitled to assistance under s. 20, LeBlanc J effectively added the words "and the applicant or recipient's dependent family members" after the words "applicant or recipient."

31. This is an area of ambiguity requiring the application of principles of statutory construction to the interpretation of s. 20.

32. In particular, LeBlanc J accepted the interpretation employed by the Department and endorsed by the Board, that 'recipient' should be interpreted to include the recipient's spouse and children in rendering the entire family unit ineligible, as a result of an unreasonable refusal. However, there are two further possible interpretations.

33. The first alternative interpretation is that the loss of eligibility is limited to the recipient's own eligibility. It would require adding the words 'to receive their own entitlement to assistance' after the words "not eligible" in the text.

34. However, under s. 20(1), where the dependent spouse is responsible for the unreasonable refusal, this interpretation would result in the 'refusing spouse' maintaining their eligibility, while the 'blameless' recipient loses theirs. The literal interpretation leads to an unreasonable result.

35. As will be argued below, a second alternative interpretation accords most closely with the purpose of the provision, the legislation overall, as well as principles of statutory interpretation, including *Charter* values. This interpretation is that the loss of eligibility affects the entitlement soley of the person who is responsible for the unreasonable refusal to participate. The recipient becomes 'not eligible' to receive social assistance on behalf of the party who has unreasonably refused to participate in employment services.

36. In the present case, this more purposive and *Charter* consistent interpretation of s. 20 of the *ESIA Regulation* would mean that Mr. Sparks would be the only member of the Sparks family disentitled to assistance because of his unreasonable refusal.

Principles of statutory interpretation

37. The modern rule of statutory interpretation as endorsed by the Supreme Court of Canada is as follows:

> In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[15]

[15] *Bell Expressvu Ltd. Partnership v Rex* [2002] SCC 42, at para 26.

Purpose of the legislative provision

38. The purpose of Nova Scotia's social assistance legislation, including the *ESIA Regulations* is two-fold: (i) to provide for assistance for persons in need, and (ii) to "facilitate their movement toward independence and self-sufficiency" and these two goals are interrelated:

> The purpose of this Act is to provide for the assistance of persons in need and, in particular, to facilitate their movement toward independence and self-sufficiency. [16]

39. In order to properly interpret legislative purpose, the Supreme Court of Canada has found that the legislation at issue must be placed within its historical and social context.

40. Nova Scotia's social assistance regime is a program of last resort. Only those with no alternative means are entitled to assistance under the legislation. Justice LeBlanc erred in law, and ignored this social context when he found that "self-sufficiency" was the paramount objective of s. 20:

> The legislation aims to help recipients meet their basic needs, but it also aims to help them move towards economic self-sufficiency. As a means of achieving this goal, the legislation requires assistance recipients to demonstrate a commitment to becoming employable and employed. A recipient who fails to demonstrate this commitment, within the legislation's parameters, risks losing their entitlement to assistance. **It would not be inconsistent with this object or scheme to find that the recipient risks losing their entitlement to assistance for not just themselves, but also for their family.**[17]

41. An interpretation of s. 20 that forces the recipient family members back into the precarious situation of being without any means of assistance, runs counter to the

[16] *Employment Support and Income Assistance Act, supra*, Note 8, s 3.
[17] AB, Decision, para 75, emphasis added.

objectives of the legislation of providing assistance to persons in need and facilitating their movement to independence.

Social context for women and children living in poverty

42. Such an interpretation also ignores the gendered dimensions of the social context of the *ESIA Regulations* and the particular impact of the Board's interpretive approach on women and children who depend on the ESIA regime for assistance.

43. In *Moge*, the term "feminisation of poverty" served as a touchstone in deciding how the spousal support criteria in the *Divorce Act* should be construed. Justice L'Heureux-Dubé ruled that the objective of "self-sufficiency" in that legislation had to be interpreted within a social context in which women and children were disproportionately economically disadvantaged:

> That Parliament could not have meant to institutionalize the ethos of deemed self-sufficiency is also apparent from an examination of the social context in which support orders are made. In Canada, the feminization of poverty is an entrenched social phenomenon. Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24 per cent. The results were such that by 1986, 16 per cent of all women in this country were considered poor.[18]

44. In her subsequent decision in *Willick,* Justice L'Heureux-Dubé ruled that the legislature must be deemed to be aware of the historical and social context in which it operates, and that the interpretation of legislative purpose requires sensitivity to the social realities of those affected. This includes the power to take judicial notice of reliable social research and socio-economic data.[19]

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[18] *Moge v Moge* [1992] 3 S.C.R. 813 at para 56.
[19] *Willick v Willick* [1994] 3 S.C.R. 670 at para 50, 53.

45. Courts have taken judicial notice of the feminisation of poverty in interpreting legislation addressing family law, as well as bankruptcy provisions.[20]

46. In *Willick,* Justice L'Heureux-Dubé took note of the disproportionate impact of poverty on women and children in construing legislation affecting their right to child support payments:

> By the remarks above, I do not mean to say that a judge's power to take notice of social authority relevant to legal interpretation should be untrammelled. I share my colleague's concern that this power be exercised prudently by judges and that, where feasible, the parties should be accorded the opportunity to comment if the matter is susceptible to dispute. I do not feel that such cautions should preclude me in the present case, however, from taking note of two general facts which are, in my opinion, totally beyond dispute -- the significant level of poverty amongst children in single parent families and the failure of courts to contemplate hidden costs in their calculation of child support awards. Drawing upon these factors should not be taken to imply that the context itself determines this Court's decision as to the law. Rather, contemplation of these factors ensures that this Court's decisions will address and interpret the law placed within its social context. This approach was most recently endorsed in Marzetti v. Marzetti, 1994 CanLII 50 (SCC), [1994] 2 S.C.R. 765, by Iacobucci J., speaking for this Court, who considered social reality to be relevant to his interpretation of a provision of the Bankruptcy Act (at p. 801):
>
>> Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé J. in Moge v. Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, "there is no doubt that divorce and its economic effects" (p. 854) are playing a role in the "feminization of poverty" (p. 853). A statutory interpretation which might help defeat this role is to be preferred over one which does not. [Emphasis added.]
>
> I most heartily agree.[21]

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[20] *Ross v Ross* [2014] ONSC 1828 at para 38; *Van Ryk v Van Ryk* [2017] ABQB 49 at para 79; *Dumont, Re* [2013] ABQB 692 citing *Bowerbank-Buckley, Re* [2007] [2007] OJ 5722 Ont Sup Ct (bankruptcy legislation must be interpreted so as to avoid the feminization of poverty.]

[21] *Willick, supra* Note 19, per L'Heureux-Dubé, at para 21

47. The *ESIA* is the primary legislation by which the Nova Scotia government provides for the alleviation of poverty through the provision of social assistance to persons in need and thus fulfills its international commitment to social and economic rights. Particularly given this context, the disadvantage and disproportionate impact of poverty on women and children continue to form the relevant social context for the interpretation of the statute.[22]

48. The reasoning of the Court in *Moge,* which rejected "economic self-sufficiency" as the sole or even the predominant objective of the legislation, given the disproportionate impact of poverty on women and children, has strong resonance in this case. [23]

49. Poverty rates for racialized families are three times higher than non-racialized families, with 19.8 percent of racialized families living in poverty compared to 6.4 percent of non-racialized families. [24]

50. In a recent report on Canada's compliance with its international human rights obligations, the United Nations Human Rights Committee noted that persistent income

[22] *Moge, supra,* Note 18, at 56.

[23] See *Moge, ibid.* In a social context in which women in Canada remain economically disadvantaged relative to men, women's average incomes remain about two-thirds of men's. Statistics Canada, *Average total income of women and men, 1976 – 2008,* Catalogue No 89-503-X Table 202-0407, Chart 1, (13 May 2013), online: http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388/c-g/c-g001-eng.htm

[24] Indigenous women and racialized women experience much greater rates of poverty; 37% of First Nations women (off reserve) and 28% of racialized women. Vivian O'Donnell & Susan Wallace, *Women in Canada: A Gender Based Statistical Report First Nations, Métis and Inuit Women*, Statistic Canada, Catalogue No 89-503-X (July 2011), online: <http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11442-eng.pdf> See also Tina Chu and Hélène Maheux, *Women in Canada: A Gender Based Statistical Report Visible Minority Women*, Statistics Canada, Catalogue No 89-503-X (July 2011), online: http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11527-eng.pdf. Block, Sheila and Grace-Edward Galabuzi *Canada's Colour Coded Labour Market: The Gap for Racialized Workers*. (Toronto: Wellesley Institute, 2011)

inequalities between men and women are particularly pronounced in Nova Scotia, and disproportionately affect "low income women, minority and Indigenous women."[25]

51. In addition to gender and race, the impact of women's relationships with their children is associated with significant economic disadvantage. "The effects of women's caregiving responsibilities are key to the continued disadvantage that women face in employment, housing, and society at large."[26]

52. Women continue to be the primary caregivers of children and other family members in Canadian society:

> Women continue to provide the bulk of caregiving in our society, whether it is for children, aging parents or relatives, or family members with disabilities. Women both devote more time to caregiving activities, and are more likely to have the primary responsibility for the care of family members. Over 70% of informal caregiving is provided by women.[27]

53. As a result of the failure to accommodate these differences, caregivers, who are predominantly women, experience adverse effects.[28]

54. Those disadvantages faced by women as caregivers of children are heightened when they intersect with other grounds of discrimination such as race or sexual orientation.[29]

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[25] Human Rights Committee, *Concluding Observations*, CCPR/CO/Can/6, August 15, 2015.

[26] Ontario Human Rights Commission. *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (November, 2006) at 8.

[27] Ontario Human Rights Commission. *The Cost of Caring, ibid,* at 8.

[28] It is arguable that, irrespective of the ground of family status, the failure to recognize and accommodate caregiving responsibilities, because it is related to long-standing gender roles and assumptions, has an adverse impact on women and in some cases men, and may in appropriate circumstances be considered discrimination on the basis of sex. See Statistics Canada, *Portrait of Caregivers*; 2012; http://www.statcan.gc.ca/pub/89-652-x/89-652-x2013001-eng.pdf. See also Ontario Human Rights Commission, *The Cost of Caring*, *ibid* at 9.

55. The disadvantages embedded in childcare responsibilities and family relationships have a disproportionate effect on racialised communities, including members of the Sparks family in this case.[30]

56. The social context amply demonstrates the disadvantage and precarious position faced by women and children; disadvantage that is magnified by their family status and racialised identities.

Charter values

57. The Supreme Court of Canada has repeatedly affirmed that courts must interpret legislation harmoniously with constitutional norms and *Charter* values.[31]

58. Where a legislative provision, such as s. 20 of the *ESIA Regulations*, is subject to more than one possible meaning, it must be interpreted in a manner consistent with *Charter* values. In *Mabior,* the Supreme Court identified those values as including: "equality, autonomy, liberty, privacy and human dignity."[32]

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[29] The disadvantages experienced by women who are caregivers are further compounded when these women are caring for family members with disabilities, or if they are also racialized, trangendered, lesbian or bisexual, parenting on their own, or have disabilities themselves. Ontario Human Rights Commission, *The Cost of Caring, ibid* at 10.

[30] Due to disproportionate levels of poverty among racialized communities, stereotypes, discrimination and systemic barriers based on family status have a disproportionate impact on these communities. (Ontario Human Rights Commission, *The Cost of Caring, ibid* at 15.

[31] *R v Sharpe* 2001 SCC 2, [2001] 1 S.C.R. 45, at para 33; *R v Mabior* [2012] SCC 47, at para 45; *R v Clarke* [2014] SCC 28, at paras 13-15.

[32] *Mabior*, *ibid.,* at para. 22.

59. In the present case, clear uncertainty exists as to the intended scope of the term 'recipient' of the *ESIA Regulations* and, as outlined above, several alternative interpretations are possible. This case can thus be distinguished from the outcome in *R v Clarke* where the Court found that there was no ambiguity in the wording of the *Criminal Code* provision under review.[33]

The *Charter* values of equality and human dignity

60. The Supreme Court of Canada has further affirmed that equality is a fundamentally important *Charter* value and interpretive lens that applies to and supports all other rights guaranteed by the *Charter*.[34]

61. The equality rights protections of s. 15 of the *Charter* are intended to increase the substantive equality of those groups previously excluded from power and full participation in society, including women, children, and racialised communities.[35]

62. In depriving persons in need like Ms. Sparks and her children of any means of meeting their basic necessities, including food or housing, the interpretation of s. 20 of the *ESIA Regulations* advanced by the Respondent and adopted by the Court below, promotes

[33] *R v Clarke, supra,* Note 31.

[34] *J.G. v New Brunswick (Minister of Health and Community Services)*, [1999] 3 S.C.R. 46, at paras 112-115, per L'Heureux-Dubé, Gonthier and McLachlin JJ citing McIntyre J in *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 185. See also Kerri A. Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-2011) 42 *Ottawa L Rev* 411 at para 56, citing Peter Hogg "Equality as a Charter Value of Constitutional Interpretation" (2003) 20 *SCLR* (2d) 113 at 117.

[35] *Andrews, ibid* at 174; *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219 at 1238; and *R v Turpin*, [1989] 1 SCR 1296 at 1329.

the view that they are less capable, or less worthy of recognition or value as "human beings equally deserving of concern, respect and consideration."[36]

63. The Supreme Court of Canada has recognized, that "the feminization of poverty is an entrenched social phenomenon."[37] The termination of social assistance benefits will have serious negative consequences for any recipient. However, as outlined below, deprivation of social assistance has distinct and disproportionately adverse impacts on women and on children. By ignoring this reality, the interpretation of s. 20 adopted by the court below fails to reflect or respect *Charter* equality rights values.

64. The court plays a vital role in ensuring that state conduct is consistent with the equality rights guarantee. 'State conduct' (in this case the interpretation of the *ESIA* legislation) that 'widens the gap' between women and children and the rest of society has discriminatory effects:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.[38]

Family status and discrimination

65. Family status is essentially about relationships. Since relationships, roles and responsibilities, especially when they extend to caregiving, have historically been divided

[36] *Andrews, ibid*, per McIntyre J, at 171.

[37] *Moge v Moge, supra* Note 18, at para 56.

[38] As noted by Abella J, writing for the majority with respect to s. 15 in *Quebec (Attorney General) v A.*, [2013] SCC 5, at para 332.

along gender lines, family status is closely related to the ground of sex discrimination.[39] Similarly, courts in Canada have interpreted s. 15 to prohibit discrimination based on marital status as an analogous ground.[40]

66. The Nova Scotia *Human Rights Act* specifically prohibits discrimination based on family status, defining "family status" as being in a parent-child relationship.[41] At a minimum, the *Charter* values of equality can be interpreted to provide protection based on grounds such as family status contained in the provincial human rights statute.

67. We submit that the equality rights guarantee in the *Charter* encompasses family status and that family status discrimination and sex/gender discrimination are inextricably linked. Further, as noted by Chief Justice Dickson for the Court:

> That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious.[42]

68. Women's primary responsibility for the care of children has significant economic consequences for them, as recognised by the Supreme Court of Canada.[43] Family status

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[39] Ontario Human Rights Commission, *The intersection of family status with other grounds of discrimination* (February 2, 2016) http://www.ohrc.on.ca/en/human-rights-and-family-ontario/intersection-family-status-other-code-grounds

[40] *Miron v Trudel* [1995] 2 SCR 418, para 91, *Falkiner v. Ontario (Minister of Community and Social Services),* (2002) 212 DLR (4th) 633.

[41] *Human Rights Act* RSNS 1989, c 214, s 3(h), 5(1)(r); see also *International Association of Fire Fighters, Local 268 v. Adekayode,* [2016] NSCA 6, para 45.

[42] *Brooks v. Canada Safeway Ltd supra,* Note 35, at para 40.

[43] *Moge v Moge*, *supra,* Note 18 at 853-856, 861-864; *Willick v Willick*, *supra,* Note 19 at 713-716.

discrimination has a disproportionate impact on women because caregivers are disproportionately women, and spend more time in caregiving activities.[44]

69. The Supreme Court has also recognized that women earn lower incomes than men and often must limit their paid workforce participation to care for children. Their access to education, training and employment is more frequently interrupted in order to have and care for children. The responsibility of accessing affordable child care falls upon women, and may limit their ability to work outside the home, which affects their ability to find, keep and advance in paid employment.[45]

70. Because women are at greater risk of poverty and experience greater depths of poverty, particularly if they have dependent children, it follows that they are more likely than men to rely on income support at some point in their lives. Therefore, when a system of last resort, such as Nova Scotia's social assistance regime, allows women and children who are already at risk to be removed from its protection, the consequences for them are particularly grave.

Avoiding discriminatory effects through proper interpretation of section 20

71. The court below has approved an application of s. 20(1) of the *ESIA Regulations* by the Respondent that terminates assistance not simply to the "applicant or recipient", but

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[44] *Symes v R* [1993] 4 S.C.R. 695 at para 204, perL'Heureux-Dubé, J in dissent; see also Statistics Canada, *Portrait of Caregivers, supra* Note 28, p 10.

[45] *Moge, supra,* Note18, at para 71-74, judgment ofL'Heureux-Dubé, J for the majority; see also *Symes, ibid* at 141-143; "the issue of child care negatively affects women in employment terms."

also to the family members of the applicant or recipient, including their spouse and children, given their familial relationship of economic interdependence.

72. In so doing, the Respondent has deprived both spouses and dependent children, such as Rosemary Sparks and the three Sparks children, of their eligibility for social assistance through no fault of their own. This interpretation of s. 20 offends *Charter* values, since it treats women and their dependents as less worthy of respect and dignity as persons in their own right, on the basis of their family relationship with a man who has been determined to be ineligible.

73. The discriminatory effects are systemic, since in every case involving a couple with children a spouse and children suffer by being cut off from social assistance, as a result of government action directed at deterring the 'wrongdoer.' This loss of the social safety net, as a benefit program of last resort, when imposed on women, and women with children, by virtue of their association with men, compounds pre-existing disadvantage. When imposed on their children, this also compounds the disadvantage women face as primary caregivers of children.

Argument on behalf of Rosemary Sparks, and Rosemary Sparks as litigation guardian on behalf of her children

74. An interpretation of s. 20 that disentitles children 'in need' to social assistance, or in other words the basic means of survival, has a discriminatory impact based on their age and family status. In addition, the punitive impact of this interpretation of s. 20 on children is inconsistent with the purpose of the legislation to assist persons in need, *Charter* values

of equality and freedom from cruel and unusual punishment, as well as Canada's international obligations.

Effects of section 20 on the Sparks children's rights

75. The Supreme Court has noted that courts play an important role in ensuring that the law accommodates children's needs and concerns and recognises the 'symbiosis' between children's needs and the family unit:

> However, to further the best interests of the child, a recognition of the close relationship between the needs of the child and the needs of the remaining family unit of which he or she is a part is essential. As Abella J.A. held in M. (B.P.) v. M. (B.L.D.E.) (1992), 97 D.L.R. (4th) 437, for the majority, at p. 459:
>
> > [The best interests of the child] by no means excludes the parental perspective. The needs of children and their parents are obviously inextricable, particularly between children and the parent on whom they depend for their day-to-day care, where only one parent has this primary responsibility. The structure of an environment that fits the child's interests would undoubtedly be reinforced if the economic and emotional needs, especially of custodial parents, were factored in, given the symbiosis of their sense of well-being.[46]

76. In addition to recognising the child as part of a family unit, it is important that children be protected from age-based discrimination, or treatment that fails to recognise their entitlement to be treated as persons. The interpretation of the law adopted by the Court below permits government to treat children as 'pawns,' rather than individuals deserving of dignity and respect, in order to deter their parental 'wrongdoer.' This interpretation is in conflict with the *Charter* values of human dignity and equality.

Charter values; avoiding cruel and unusual punishment

[46] *Young v Young*, [1993] 4 SCR 3 at para 87.

77. In adopting an interpretation of s. 20 of the *ESIA Regulations* that effectively holds the three Sparks children responsible for their father's wrongdoing, the Court has endorsed a collective punishment approach in the withholding of the necessities of life to dependent children.

78. This Honourable Court must seek an interpretation of s. 20 that best incorporates *Charter* values with respect to children's rights and avoidance of cruel and unusual punishment. In a case addressing the denial of health benefits to the children of refugees based on their parents' immigration status, the Federal Court found that a denial of access to basic health services "shocks the conscience and outrages standards of decency." The Court relied upon a decision of the United States Supreme Court with respect to the injustice of punishing children for the wrongdoing of a parent:

> ….in *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164 (U.S. Sup. Ct. 1972), the Court stated that "visiting ... condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the ... child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth *and penalizing the ... child is an ineffectual - as well as unjust - way of deterring the parent*"[47]

79. The Court found that the withdrawal of essential public benefits constituted collective punishment of children for the wrongdoing of their parents, contrary to the values enshrined in the *Charter*:

> Be that as it may, it is surely antithetical to the values of our Canadian society to visit the sins of parents on their innocent children.[48]

[47] *Canadian Doctors for Refugee Care v Canada* [2014] FCTD 651, at paras 664, 691, per MacTavish J, emphasis in original.

[48] *Canadian Doctors, ibid* at para 668.

80. Similarly in these circumstances, the denial of social assistance as a system of last resort to vulnerable children is contrary to the values underlying the *Charter.*

81. Different reasoning lead to a similar result concerning the disqualification of children from social assistance benefits in a claim based on s. 7, 12 and 15 of the *Charter*. In *Broomer,* the court issued an interlocutory injunction to prevent the government of Ontario and its social assistance program from reducing child benefits payments:

> The solution which the Government has then adopted is to deduct the repayments obligations from the amount of social assistance or child benefits which are paid to the defaulting individual's spouse and children. I am unable to see any logical basis or legitimate rationale upon which this action is taken. I must assume that the amounts which are paid to individuals, especially children, are based on what the Government concludes these individuals need to survive. To then reduce the amounts which those individuals receive as a consequence of actions for which they are not responsible is to inflict a punishment or penalty against innocent parties.… In my view, the imposition of a penalty on entirely innocent individuals, especially children, in these circumstances with the consequent irreparable harm to these individuals, encroaches on their fundamental rights and must be restrained.[49]

82. The Court held that the regulation in question was discriminatory because it imposed a burden on social assistance recipients that could not be imposed on others, violating their equality rights. Its conclusion that withdrawal of social assistance from children amounted to an illogical and illegitimate punishment of children underscores the argument here that this form of treatment is contrary to *Charter* values.

Canada's international obligations to children

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[49] *Broomer v Ontario* [2002] OJ 2196, Ont Sup. Ct.

83. The Intervenors adopt the Appellant's submissions with respect to the principles of interpretation and Canada's international human rights obligations.[50]

84. International jurisprudence echoes this principle with respect to the court's role in implementing international human rights obligations:

> If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. [51]

85. Those international obligations include children's right to non-discrimination. The interpretation of s. 20 adopted by the Court below has the effect of depriving all children in need of the basic means of subsistence by virtue of their relationship with their parents. This failure to recognise children as persons in their own right deprives them of dignity and respect and is contrary to the values underlying s. 15 of the *Charter.*[52]

Best interests

86. The concept of "best interests of the child" forms part of Canada's international human rights obligations towards children:

> Best interests of children to be a primary consideration
> Article 3(1)
> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[53]

87. Regardless of whether legislation has a direct or indirect impact on children, courts have an obligation to consider the effects on children's rights and interests, and how to

[50] Appellant's factum, para 74.
[51] Committee on the Rights of the Child, *General Comment 14*, para 6(b) http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf
[52] *Convention on the Rights of the Child* [1989], G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456, at Article 2.1.
[53] *Convention on the Rights of the Child*, *ibid* art. 3, para. 1.

protect best interests. The needs and interests of children must be given significant weight, as they reflect central humanitarian and compassionate values in Canadian society.[54]

88. Best interests include the "physical, mental and emotional needs" of children. An interpretation of s. 20 that results in the deprivation of the basic means of survival in the form of social assistance, undermines best interests and runs counter to Canada's international human rights obligations to children.

Conclusion

89. In a case such as this, the principles of statutory construction require that the legislation under review be interpreted in a manner consistent with the statutory purpose, *Charter* values, and Canada's international human rights obligations. The interpretive exercise should not take place in a vacuum, but with an awareness of proper social and historical context, including the disadvantage faced by women, particularly in their role as caregivers of their children. A statutory provision that is neutral on its face, may yet have discriminatory impacts by disproportionately affecting the interests of a disadvantaged group (children and their caregivers).

90. It is apparent that the decision to hold all members of a family unit responsible for the actions of one of its members has a disproportionate impact on children and their caregivers, in a context in which women experience continued disadvantage socially and economically. With respect to recipients and spouses, we can observe in this particular

[54] Committee on the Rights of the Child, *General Comment 14*, *supra,* Note 49 at para 12; see *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817 at 67 and 70.

case, that the result was to terminate a mother, Rosemary Sparks, by virtue of her association with Brenton Sparks. These effects should not be ignored by this Honourable Court in undertaking its proper role in determining the correct interpretation of this Regulation.

91. An interpretation that terminates the necessities of life to children and recipients or spouses should be avoided, and the interpretation implemented by the Department and adopted by the Court below, rejected on this basis. An interpretation that results in the termination of assistance to the 'recipient' in situations where they are not responsible for the 'unreasonable refusal' pursuant to s. 20(1)(b) is also unreasonable and illogical as it serves no purpose as a deterrent and visits punishment in the absence of responsibility. The sole interpretation that accords with the principles of interpretation in this case is one that results in the termination of social assistance benefits solely to the person responsible for the refusal. In addition to a recipient's own eligibility, their eligibility for benefits under the *ESIA Act* is based upon the entitlements of their 'dependent' children and spouse. In this sense, the words "An applicant or recipient is not eligible to receive or to continue to receive assistance" must be interpreted to mean a loss of eligibility for the portion of their social assistance attributable to the person responsible for the "unreasonable refusal." Such an interpretation achieves the goal of rationality, logic and fairness, in connecting the punishment (ineligibility) with responsibility (for the unreasonable refusal.)

PART 6: ORDER OR RELIEF SOUGHT

92. LEAF submits that this Honourable Court should allow the appeal and takes no position regarding any further order or relief.

93. Rosemary Sparks, on her own behalf, and on behalf of her children, supports the relief sought by the Appellant including declaratory relief and costs.

94. The intervenors jointly seek exemption from any costs awards, and do not seek costs.

DATED at Halifax, Nova Scotia, this 7th day of April, 2017.

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Claire McNeil, Counsel for the Intervenors

APPENDIX A – LIST OF CITATIONS

List of Citations

1. *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143
2. *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817
3. *Bell Expressvu Ltd. Partnership v Rex* [2002] SCC 42
4. *Broomer v Ontario* [2002] OJ 2196, Ont Sup. Ct.
5. *Bowerbank-Buckley, Re* [2007] OJ 5722 Ont Sup Ct
6. *Brooks v. Canada Safeway Ltd,* [1989] 1 S.C.R. 1219
7. *Canadian Doctors for Refugee Care v Canada* [2014] FCTD 651
8. *Dumont, Re* [2013] ABQB 692
9. *Falkiner v Ontario* [2002] 59 O.R. (3d) 481
10. *International Association of Fire Fighters, Local 268 v. Adekayode,*[2016] NSCA 6
11. *J.G. v New Brunswick (Min. of Health and Community Services)*, [1999] 3 S.C.R. 46
12. *Miron v Trudel* [1995] 2 SCR 418
13. *Moge v Moge*, [1992] 3 SCR 813
14. *N.L.N.U. v. Newfoundland & Labrador (Treasury Board* [2011] 3 S.C.R. 708
15. *R v Clarke* [2014] SCC 28
16. *R v Mabior* [2012] SCC 47
17. *R v Sharpe* 2001 SCC 2, [2001] 1 S.C.R. 45
18. *R v Turpin*, [1989] 1 SCR 1296
19. *Quebec v A. Quebec (Attorney General) v A.*, 2013 SCC 5
20. *Ross v Ross* [2014] ONSC 1828
21. *Symes v R* [1993] 4 S.C.R. 695
22. *Van Ryk v Van Ryk* [2017] ABQB 49
23. *Willick v Willick* [1994] 3 SCR 670
24. *Young v Young*, [1993] 4 SCR 3

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27. Froc Kerri A., "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-2011) 42 Ottawa L Rev 411

28. Human Rights Committee, Concluding Observations, CCPR/CO/Can/6, August 15, 2015

29. O'Donnell, Vivian & Susan Wallace, *Women in Canada: A Gender Based Statistical Report First Nations, Métis and Inuit Women*, Statistic Canada, Catalogue No 89-503-X (July 2011) online: http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11442-eng.pdf

30. Ontario Human Rights Commission: *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (November, 2006)

31. Ontario Human Rights Commission: *The intersection of family status with other grounds of discrimination* (February 2, 2016) http://www.ohrc.on.ca/en/human-rights-and-family-ontario/intersection-family-status-other-code-grounds

32. Statistics Canada: *Average total income of women and men, 1976 – 2008,* Catalogue No 89-503-X Table 202-0407, Chart 1, (13 May 2013) online: http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388/c-g/c-g001-eng.htm]

33. Statistics Canada: *Persons in low income after tax - in% 2007 to 2011* Catalogue No 75-202-X, (June 2013), online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil41a-eng.htm?sdi=low%20income>

34. Statistics Canada: *Portrait of Caregivers* (2012) http://www.statcan.gc.ca/pub/89-652-x/89-652-x2013001-eng.pdf

APPENDIX B – STATUTES AND REGULATIONS

Employment Support and Income Assistance Act S.N.S. 2000, c. 27

Regulations pursuant to the Employment Support and Income Assistance Act S.N.S. 2000, c. 27*;* O.I.C. 2001-138 (March 23, 2001, effective August 1, 2001), N.S. Reg. 25/2001 as amended to O.I.C. 2017-50 (March 7, 2017), N.S. Reg. 30/2017

Human Rights Act, RSNS, 1989, c. 214

International Sources

Convention on the Rights of the Child [1989], G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456

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