

**FEDERAL COURT OF APPEAL**

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

APPLICANT

AND

**KELLY LESIUK**

RESPONDENT

AND

**WOMEN'S LEGAL EDUCATION AND ACTION FUND**

INTERVENER

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

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## INTRODUCTION

1. At issue in this judicial review is whether ss.6(1) and 7(2) of the *Employment Insurance Act* violate s.15 of the *Charter*. It is the position of the Women's Legal Education and Action Fund ("LEAF") that the legislation, which bases eligibility for employment insurance benefits (EI) on the number of hours worked in a 52-week qualifying period, discriminates against women. The hours-based eligibility criterion disproportionately excludes women from benefits and prefers "male" modeled full-time, full-year paid work over women's paid and unpaid work. The impugned provisions fail to consider the gender-related factors that distinguish the employment patterns of men and women and further entrench the stereotype that women are "secondary" earners and dependents of men. The denial of EI benefits to women, disproportionate to men, has a negative impact upon women's economic well-being and is particularly devastating for those who are already vulnerable because of their status as lone parents, recent immigrants, Aboriginal, visible minorities and women with disabilities. Furthermore, while LEAF does not take issue with the government's stated purposes for enacting the impugned provisions, LEAF submits that the impugned provisions do not achieve these objectives equitably for women and men alike, and thus are not a justifiable, reasonable limit in a free and democratic society.

## PART I - FACTS

2. LEAF adopts the facts set out in the Respondent's Memorandum of Points of Argument. In addition LEAF relies on two types of facts, set out below, to properly contextualize this constitutional inquiry: firstly, the legislative history of unemployment insurance with a focus on the treatment of women, and second, the impact of the impugned provisions on women with a focus on the social and economic context of women workers, particularly those who are economically vulnerable because of their status as part-time workers or their membership in a historically disadvantaged group.

### A. LEGISLATIVE HISTORY

3. A review of the history of unemployment insurance (UI) demonstrates that it was conceptualized as a solution to the high economic cost, both socially and individually, of men's unemployment.<sup>1</sup> Fundamentally, it was based on a "full-time, full year" model of employment in which most men have engaged historically. When a person's employment did not conform to the full-time, full-year model, as was the case for most women, they generally did not qualify for benefits.<sup>2</sup>

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<sup>1</sup> Ruth Roach Pierson, "Gender and the Unemployment Insurance Debates in Canada, 1934-1940" *Labour/Le Travail* 25 (1990) 77 at pp. 77-78. Paul Phillips, "Equality of Opportunity, Reducing Disparities and Essential Services of Reasonable Quality: The Evolution of Unemployment Insurance" (August, 1999), Volume 4, Tab "E," Exhibit "B" of the Affidavit of Paul Phillips, at p. 3186-3187 of the Applicant's Record.

4. The framers of the first unemployment insurance legislation, enacted in 1940, viewed the benefit as accruing to a “household” headed by a male breadwinner with a full-time full-year job, who supported a dependent wife and/or children.<sup>3</sup> Women would thus be shielded from the financial deprivation of unemployment through the provision of benefits to unemployed male breadwinners, rather than as unemployed worker beneficiaries in their own right.<sup>4</sup> To reinforce the notion that only the head of the family was intended to benefit from the regime, a lower base rate was provided for beneficiaries without dependents. It was widely assumed that few women in the labour force had dependents.<sup>5</sup>

5. Because women were viewed primarily as dependent wives, and their earnings were considered secondary to that of the male head of household,<sup>6</sup> it was thought that their employment was undeserving of insurance. This view was buttressed by a belief that women, particularly some mothers, should not be engaged in paid work at all.<sup>7</sup> The ideology that mothers should not work was not applied to women of colour, whose unpaid work as nurturers of their own children is generally not valued.<sup>8</sup>

6. The original UI legislation specifically excluded the types of work in which most women were engaged, or assigned it a lesser value, to prevent “misuse” by those whose interruption in employment the system was not designed to protect. Using facially neutral criteria, many occupations predominated by women were excluded from coverage,<sup>9</sup> as was part-time, seasonal and casual work.<sup>10</sup> The federal government chose a system that linked benefits and premium contributions to employment income, rather than a flat rate, and carried over the disparity between men’s and women’s wages to UI benefits.<sup>11</sup> Furthermore, the benefits period was linked to length of employment and premium contributions, so that the benefits period for casual and intermittent workers, to a great extent married women, was shorter than that of the full-time, full-year worker.<sup>12</sup>

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<sup>2</sup> Leah Vosko, “Irregular Workers, New Involuntary Social Exiles: Women and U.I. Reform,” in Jane Pulkingham and Gordon Ternowetsky, eds., *Remaking Canadian Social Policy: Social Security in the Late 1990s* (Halifax: Fernwood Publishing, 1996) at p. 259. See also Phillips, *supra*, at p. 3169 and 3184 of the Applicant’s Record.

<sup>3</sup> Roach Pierson, *supra*, at pp. 81-83. See also Phillips, *supra* at p. 3186.

<sup>4</sup> Phillips, *supra*, at pp. 3184-3185. See also Roach Pierson, *supra*, at pp. 82-83 and 93.

<sup>5</sup> Roach Pierson, *supra*, at pp. 94-95.

<sup>6</sup> Roach Pierson, *supra*, at p. 95.

<sup>7</sup> Vosko, *supra*, at p.259. See also Ann Porter, “Women and Income Security in the Post-War period: The Case of Unemployment Insurance, 1945-1962,” *Labour/Le Travail* 31 (Spring 1993), 111, Volume 2, Tab “B” of the Applicant’s Record, p.530.

<sup>8</sup> Nitya Iyer, “Some Mothers are Better than Others: A Re-examination of Maternity Benefits” in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997). As Iyer points out, this ideology manifests itself later on by disproportionately denying women of colour access to maternity benefits.

<sup>9</sup> Roach Pierson, *supra*, at p. 99. See also Phillips, *supra*, at p. 3166 of the Applicant’s Record.

<sup>10</sup> Jane Pulkingham, “Remaking the Social Divisions of Welfare: Gender, ‘Dependency’ and UI Reform” (1998) 56 *Studies in Political Economy* 7 at p.11. See also Phillips, *supra*, at p. 3168 of the Applicant’s Record.

<sup>11</sup> Roach Pierson, *supra*, at pp.88-89.

<sup>12</sup> Roach Pierson, *supra*, at p. 97. See also Phillips, *supra*, at p. 3170 and 3186 of the Applicant’s Record.

7. Developments during the post-WWII period, thought necessary to avoid “abuse,” reinforced women’s unequal access to benefits. Women were cut off from UI benefits if they refused employment that was deemed “suitable” in female-dominated, low-wage sectors, even if they previously had been employed in higher wage sectors or in government during the war.<sup>13</sup> With the enactment in 1950 of the “married women’s regulation”, married women were explicitly disqualified from UI benefits for a period of two years following marriage unless they met certain conditions to demonstrate their attachment to the workforce. No similar demonstration of attachment was required of married men. It was presumed that married women who became unemployed after they married had no real intention to return to the workforce.<sup>14</sup>

8. During the period 1977 – 1979 amendments were made that required a longer qualifying period for new entrants, re-entrants and repeat users of the program, and excluded altogether from benefits, people working 20 hours or less per week. These amendments appeared to be motivated by the large number of women, especially married women, who were entering or re-entering the workforce in large numbers at the time.<sup>15</sup>

9. The unemployment insurance system modeled on the male worker, made no provision for interruption of work because of pregnancy and attendant care-giving responsibilities unique to female workers. Because male workers did not become pregnant, there was a fear that the claims of pregnant women who experienced work interruptions were not contemplated by the framers of the legislation, and so were a “misuse” of the system. From 1940 to 1971, pregnant women were excluded from regular benefits by a presumption (not legislated, but applied in practice) that women were “not available for work” six weeks before and six weeks after their expected due date.<sup>16</sup> After giving birth, unemployed women were required to show that they had made childcare arrangements to prove that they were available for work and thus entitled to benefits.<sup>17</sup>

10. When the UI maternity benefit was introduced in 1971, the legislation enshrined the presumption that regular or sickness benefits should not be available in the period surrounding a woman’s due date.<sup>18</sup> Furthermore, to qualify for benefits women had to be in the workforce for at least 10 weeks prior to conception (the “Magic Ten” rule).<sup>19</sup> UI rules that prohibited pregnant women from receiving regular or sickness benefits as well as the “Magic Ten” rule, were revoked in 1984.<sup>20</sup> Nonetheless, the more stringent qualifying period for maternity benefits remains today and continues to be justified by a fear of misuse by women.<sup>21</sup>

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<sup>13</sup> Porter, *supra*, at p. 528 of the Applicant’s Record.

<sup>14</sup> *Ibid*, p. 529 of the Applicant’s Record.

<sup>15</sup> Pulkingham, *supra*, at pp. 18-19.

<sup>16</sup> Porter, *supra*, p. 534 of the Applicant’s Record.

<sup>17</sup> Pal and Morton, “*Bliss v. Attorney General of Canada: From Legal Defeat to Political Victory*” (1986) 24:1 *Osgoode Hall L. J.* 141, at p. 150.

<sup>18</sup> Pal and Morton, *supra*, at p. 151.

<sup>19</sup> Affidavit of Joseph Verbruggen, Volume 9, Tab “10” of the Applicant’s Record, at p. 6771.

<sup>20</sup> Phillips, *supra*, at p. 3193 of the Applicant’s Record.

<sup>21</sup> *Ibid*.

## B. SOCIAL AND ECONOMIC CONTEXT OF WOMEN WORKERS

11. The male model of employment present throughout the history of unemployment insurance currently is manifested through the hours-based eligibility criteria impugned in this judicial review. The hours-based eligibility criteria disproportionately exclude women from unemployment insurance benefits (now termed employment insurance or EI). This exclusion operates to further the economic marginalization of women who work part-time. This is largely due to women's poverty and their concentration in contingent, part-time employment due to gender-related factors.

### (a) Women are More Likely than Men to Work Part-time

12. Women workers are more likely than men to work part-time, as is demonstrated by the following:

- (a) Women are 70% of the part-time labour force;<sup>22</sup>
- (b) About 27% of all women in the paid workforce worked less than 30 hours per week, compared to 10% of men;<sup>23</sup>
- (c) Unemployed women who seek full-time employment have longer unemployment spells than men, and discouraged unemployed women disproportionately settle for low-wage, part-time work.<sup>24</sup>

### (b) Women Work Part-time because of Gender-related Factors

13. The gendered division of unpaid domestic labour results in women performing the lion's share of household and caregiving tasks<sup>25</sup> and constrains the time that they can be available for paid work. Women are more likely to work part-time due to caregiving responsibilities (21% to 2%).<sup>26</sup> Maternity leave and care of children or elderly relatives account for a majority of women's interruptions from paid work (62%).<sup>27</sup> Of women who interrupted a full-time job for pregnancy, child care, or elder-care, less than half return to full-time employment; a significant number re-enter the workforce as part-time workers (25%).<sup>28</sup>

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<sup>22</sup> Statistics Canada, *Full-time and Part-time Employment*, <http://www.statcan.ca/english/Pgdb/People/Labour/labor12.htm>, extracted on April 3, 2002.

<sup>23</sup> Statistics Canada, "Women in Canada: Work Chapter Updates" (August 2001) at p.6

<sup>24</sup> Phillips, *supra*, at p. 3218 of the Applicant's Record.

<sup>25</sup> See Pupo, "Always Working, Never Done: The Expansion of the Double Work Day" in Pupo, Duffy, Glenday, eds., *Good Jobs, Bad Jobs, No Jobs: The Transformation of Work in the 21<sup>st</sup> Century* (Toronto: Harcourt Brace & Company, 1997), Volume 2, Tab "C" of the Applicant's Record, p. 545-546.

<sup>26</sup> Statistics Canada, "Women in Canada: Work Chapter Updates," *supra*, at p.7.

<sup>27</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at p. 2889 of the Applicant's Record.

<sup>28</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at p. 2863 of the Applicant's Record.

14. Women's time constraints are further exacerbated by a lack of government services for child and elder care.<sup>29</sup> The privatization of government services in education and health care has shifted even more responsibility onto women. Notably, women are increasingly required to care for sick relatives who are sent home from hospital earlier, and for pre-schoolers because children are entering school at an older age. As well, with the growth in size of children's classes and a reduction in the number of paid classroom assistants, there are greater pressures for mothers to "help out."<sup>30</sup>

15. Women who work part-time because of caregiving responsibilities are further constrained in their ability to accept work when offered, if their work is "casual" or "irregular". The unpredictable schedule of much part-time work forces women to make informal caregiving arrangements at the last minute and to rely upon the kindness of relatives or friends (usually other women).<sup>31</sup>

16. In addition to women's caregiving responsibilities, which constrain the amount of time they have to devote to paid employment, part-time employment increasingly is the only type of employment offered to women as employers respond to the demands of the "global economy."<sup>32</sup> Since 1976, there has been an eight-fold increase in involuntary part-time work for women 25-44 years old.<sup>33</sup> A study of involuntary part-time workers from 1993-1996 showed that women consistently made up approximately 70% of the involuntary part-time population.<sup>34</sup>

**(c) Women were Less Likely than Men to Receive UI and are Currently Even Less Likely to Receive EI Benefits**

17. The implementation of the impugned provisions have had a disparate impact on unemployed workers by gender. The percentage of unemployed women who actually receive benefits compared to the population of unemployed women is consistently lower than the equivalent percentage of men. This beneficiary to unemployed ("B/U") ratio indicates how many of the unemployed actually receive benefits and is an indicator of how well the income replacement scheme has met its objectives. From 1989 to 1998, the B/U ratio for unemployed men and women who received benefits declined from 83% to 42%. A significant portion of the decline occurred after the implementation of the impugned provisions, with women being affected more than men. Between 1996 and 1998

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<sup>29</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at pp. 2903-2904. See also Jensen, *supra*, at p. 103 and Pupo and Duffy, "Canadian Part-Time Work in the Late 1990s: On the Cusp of Change" at Volume 2, Tab "A" of the Applicant's Record, p. 518-519.

<sup>30</sup> Pupo, "Always Working, Never Done: The Expansion of the Double Work Day," *supra*, p. 552 of the Applicant's Record. See also Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at p. 2887 and at p. 2908 of the Applicant's Record.

<sup>31</sup> Evidence of K. Lesiuk, Applicant's Record, Volume 1, Tab "4," of the Applicant's Record, pp.21-23.

<sup>32</sup> Jane Jensen, "Part-Time Employment and Women: A Range of Strategies" in Bakker, *Rethinking Restructuring: Gender and Change in Canada*, (Toronto: University of Toronto Press, 1997), at pp. 93-95. See also Phillips, *supra*, at p. 3204 of the Applicant's Record, and Pupo and Duffy, at p. 2852 of the Applicant's Record.

<sup>33</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at p. 2872 of the Applicant's Record.

<sup>34</sup> Statistics Canada, "Longitudinal Aspect of Involuntary Part-Time Employment" (April 2000) at p. 10. "Involuntary" was defined as workers working less than 30 hours a week who could not find full-time employment.

the B/U for women changed from 46.06% to 37.93% (an 8.1% decline) compared to 49.77 to 45.96% for men (a 3.8% decline).<sup>35</sup>

18. Concurrent with the change from UI to EI, the government adopted a new indicator to measure benefits coverage: comparing the number of “actually eligible” unemployed workers to “potentially eligible” workers. “Potentially eligible” unemployed workers are those that are not excluded because they had no work in the last 12 months, were self-employed, quit to go to school or voluntarily quit their last job. “Actually eligible” unemployed workers are those who had enough paid work to qualify for EI. Unlike the B/U ratio, this measure does not provide any indication of the percentage of unemployed workers who are actually in receipt of benefits.

19. Like the B/U, this new ratio, adopted after the implementation of the hours-based eligibility criteria, indicates a disparate impact by gender and part-time status among unemployed workers. These ratios show that in 1999, only 42% of unemployed women were actually eligible for benefits, as compared 57% of unemployed men. Similarly, only 27% of unemployed part-time workers were actually eligible for benefits as compared to 77% for full-time workers.<sup>36</sup> Both coverage ratios support the view that unemployed women are significantly less served than men by the EI program.

20. Between 1995-96 and 1997-1998, one year preceding and one year subsequent to the implementation of the impugned provisions, EI benefits claims by women declined 20% versus a 16% decline for men.<sup>37</sup> The government attributed the steeper decline in claims by women compared to men in part to women’s overrepresentation as entrants and re-entrants who faced 910 hours eligibility, and to the fact that women tend to work fewer paid hours than men.<sup>38</sup>

21. Women over 25, particularly mothers, are more susceptible to economic losses as a result of the impugned provisions that imposed a more stringent eligibility for women re-entrants.<sup>39</sup> A “short-run” impact study commissioned by HRDC, based on 1996/97 data showed that women experienced a reduction of about 2.2 weeks of

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<sup>35</sup> Affidavit of Paul Phillips, Volume 4, Tab “E” of the Applicant’s Record at paras. 12 & 13 and Phillips, *supra*, at pp. 3205-3207.

<sup>36</sup> These percentages are derived from figures reported by Statistics Canada, *The Daily*, “1999 Employment Insurance Coverage: Data from the 1999 Employment Insurance Coverage Survey,” Volume 10, Tab “A” of the Applicant’s Record at p. 7754. In 1999, 53% of unemployed women were potentially eligible for EI. Of those, 80% were actually eligible (80% of 53% is 42%). 65% of unemployed men were potentially eligible for EI. Of those 88% were actually eligible (88% of 65% is 57%). 52% of part-time workers were potentially eligible for EI. Of those only 52% of those were actually eligible (52% of 52% is 27%). 88% of full-time workers were potentially eligible for EI. Of those, 88% were actually eligible (88% of 88% is 77%).

<sup>37</sup> Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, at p. 2917 of the Applicant’s Record.

<sup>38</sup> HRDC, 1998 Monitoring and Assessment Report, Volume 8, Tab “9” of the Applicant’s Record, p. 6279.

<sup>39</sup> Phillips, *supra*, pp. 3215-3217 of the Applicant’s Record.

entitlement compared to men.<sup>40</sup> While both male and female part-timers (aged 24-65) gained from expanded EI coverage, the benefit gain was much greater for men than for women (\$89 to \$11).<sup>41</sup>

22. The government has countered that the above-noted decline in eligibility for female claimants is offset by an increase in the number of workers who can now receive benefits because all hours of employment are now “insured”: all hours of employment count towards eligibility, whereas previously a worker had to have at least 15 hours of employment with one employer to qualify. Contrary to the government’s assertion, the impugned provisions have contributed to an unusual phenomenon: more women than men are new premium contributors who will not qualify for benefits or a refund of their premiums. In 1996, the government’s estimates indicated that of all workers paying premiums for the first time, 8.6% were men who were not eligible for a refund or for benefits. Another 9.4% of these workers were women who were not eligible for a refund or for benefits. A further 3.8% of these workers would be women who are eligible for benefits and 2.2% would be men eligible for benefits.<sup>42</sup>

23. Of the small number of “newly insured” women who are eligible to receive benefits, there are practical reasons why they are unlikely to receive them. Women comprise approximately 70% of part-time workers and 50% of an estimated 653,000 multiple job holders. In theory, female multiple job holders may benefit from pooling their hours of work, because all hours count towards their eligibility threshold (so-called “first hour coverage”). However, if a multiple job holder is unemployed in one job only, she is permitted to keep only 25% of her EI benefits before her earnings are clawed back on a dollar for dollar basis. Effectively, women who are multiple job holders would have to become unemployed from all jobs simultaneously in order to receive benefits comparable to workers with hours from only one employer. Thus, “first hour coverage” does not provide greater access to regular EI benefits to women who are multiple job holders, only potential access to “special benefits” i.e. sickness, maternity or parental benefits where they depart all jobs simultaneously.<sup>43</sup> Given the remoteness of the possibility that these workers would actually be able to receive benefits, their EI contributions are effectively another tax on their earnings.

24. The government’s contention also ignores the fact that many women who were eligible for benefits under UI will not receive them under EI. It was estimated that 16% of those who had sufficient weeks to be eligible for UI would not be eligible for EI with equivalent hours of work.<sup>44</sup> Women are less likely than men to meet the required

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<sup>40</sup> Sweetman, “The Impact of EI on Those Working Less Than 15 Hours Per Week: Final Report” (March 2000), Volume 10, Tab “12” of the Applicant’s Record, pp. 7666, 7701.

<sup>41</sup> Peter Kuhn, *The Net Fiscal Incidence of the Employment Insurance Act on Full - versus Part-time Workers*, (March 2000), Volume 10, Tab “3” of the Applicant’s Record, pp. 7742-7745, Table 1.

<sup>42</sup> Phillips, *supra*, at pp. 3210-3211 of the Applicant’s Record. 70% of part-timers are women, so the number of women eligible for benefits should far exceed the number of eligible men. Most workers who are new premium contributors would be entitled to a refund (76%).

<sup>43</sup> Affidavit of Paul Phillips, *supra*, para. 14 and Phillips, *supra*, at pp. 3210-3213 of the Applicant’s Record.

<sup>44</sup> Pulkingham, *supra*, at p. 25.



eligibility criteria as they do not work enough weeks per year or enough hours per week or a combination of both.<sup>45</sup> One expert witness in the instant case provided a graphic picture of the effect of the change in eligibility from weeks to hours. Formerly, a part-time worker could qualify with 15 hours per week for 20 weeks. With the new rules, she must work 15 hours per week for 46.67 weeks to reach 700 threshold, more than doubling the “attachment” measure. On the other hand, a worker who worked intensely for 45 hours per week would have worked 900 hours in 20 weeks under the former 20 weeks threshold. Currently, this worker need only work 15.56 weeks to qualify i.e. less duration than formerly.<sup>46</sup> Workers positioned for “intense” periods of work are mostly men.<sup>47</sup>

25. Women are also less likely than men to receive EI benefits as the impugned 700-hour criterion for maternity and parental benefits has effectively resurrected the “Magic 10 Rule” of 1971 that required women to be employed prior to conception to be eligible for maternity benefits. For a woman who regularly works part-time 15 hours per week, she must be employed for eight (8) weeks before conception to fulfill the 700 hours requirement. Prior to implementation of the impugned provisions, a woman could enter the workforce in her fourth month of pregnancy and qualify for maternity and parental benefits.<sup>48</sup>

**(d) Women are Economically Disadvantaged Relative to Men**

26. Women, on average, fare less well than men economically and women’s disproportionate exclusion from employment insurance benefits exacerbates this existing disadvantage:

- (a) In 1997, average pre-tax incomes were \$19,800 for all women and \$32,100 for men. In 1999, women employed other than full-year, full-time (including part-time) earned an average of \$12,074, compared to \$15,481 for men in similar atypical work.<sup>49</sup>
- (b) Women make up a disproportionate share of the population with low incomes (in accordance with Statistics Canada’s Low Income Cut Off). In 1997, women accounted for 54% of the population with low incomes; 19% of all women experience low incomes compared to 16% of all men.<sup>50</sup>
- (c) Women who are poor experience a greater depth of poverty than men at every stage of their life cycle.<sup>51</sup>

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<sup>45</sup> Phillips, *supra*, at p. 3213 of the Applicant’s Record, note 43. In 1994, women who worked full and part-time averaged 37.4 insurable weeks of employment. In 1997, male and female part-time workers averaged 16.5 hours per week. According to an expert witness in the instant case, even if one assumed that women who work part-time worked the same number of insurable weeks in a year as women as a whole, they would accumulate on average 617 insurable hours of employment per year, or 83 hours less than the minimum “700 hours” required for regions with the lowest unemployment.

<sup>46</sup> Richard Shillington, “The Impact of the Transition from Unemployment Insurance to Employment Insurance” (August 30, 1999), Volume 4, Tab “C,” Exhibit “B” to the Affidavit of Richard Shillington, pp. 3064.

<sup>47</sup> Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, at pp. 2921-2922 of the Applicant’s Record.

<sup>48</sup> Phillips, *supra*, at p. 3194 of the Applicant’s Record.

<sup>49</sup> Statistics Canada, Average Earnings by Sex and Work Pattern, <http://www.statcan.ca/english/Pgdb/People/Labour/labor01c.htm>, extracted April 3, 2002.

<sup>50</sup> Statistics Canada, *Women in Canada 2000: A Gender-Based Statistical Report* (2000) at pp. 135-137.

(e) **Part-time Workers are Already Poor Relative to Other Workers**

27. "Working poor" men and women are increasingly involved in part-time rather than full-time work. The percentage of working poor engaged in part-time work rose from 59.7 % to 70.4% over the period 1971-1986. Throughout this 15 year period, the percentage of poor females who worked part-time was consistently 75% , outstripping the figure for working poor men.<sup>52</sup> Part-time jobs pay on average 66% of full-time jobs, with half of part-time workers earning around \$7.46 per hour in 1997.<sup>53</sup>

28. Studies have found that for those seeking full-time employment, participation in part-time work actually lengthens the period of unemployment.<sup>54</sup> Often, part-time work during women's prime working years is associated with job instability and labour market discontinuity. Apart from instability, part-time work is often short-term, poorly remunerated,<sup>55</sup> situated in the low-wage service sector of the economy and dominated by low-skill, low-prestige occupations.<sup>56</sup> Thus, part-time work results in lower wages, seniority, benefits and pension,<sup>57</sup> which significantly contributes to women's poverty upon interruption of employment.<sup>58</sup>

29. For the working poor who cannot meet the 700 hours eligibility criteria, it appears that welfare (not savings) is the alternative for income support. Welfare take-up rises by about the same amount that UI take-up falls, suggesting that where unemployment benefits are not available, welfare is the alternative.<sup>59</sup> This direct relationship between EI support and welfare has been demonstrated by a HRDC study that concluded: "Welfare is the income security program of last resort. Individuals and families in need, and who are ineligible for benefits under other programs, may turn to welfare for financial assistance."<sup>60</sup>

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<sup>51</sup> Monica Townsend, *Report Card on Women and Poverty* (Ottawa: Canadian Centre for Policy Alternatives, 2000) at pp. 2-3, citing Statistics Canada.

<sup>52</sup> Gunderson, Morley, and Leon Muszynski with Jennifer Keck, *Women and Labour Market Poverty*, Ottawa: Canadian Advisory Council on the Status of Women, 1990 at page 66.

<sup>53</sup> Kuhn, *supra*, p. 7716.

<sup>54</sup> Phillips, *supra*, at p. 3217 of the Applicant's Record.

<sup>55</sup> Kuhn, *supra* at, p. 7716.

<sup>56</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at pp. 2866-2867 of the Applicant's Record.

<sup>57</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at p. 2868 and 2901 of the Applicant's Record. See also Pupo and Duffy, "Canadian Part-Time Work in the Late 1990s," *supra*, p. 514 of the Applicant's Record.

<sup>58</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at pp. 2872-2873 of the Applicant's Record. Other factors include marital breakdown, death of a spouse, and/or retirement.

<sup>59</sup> Phillips, *supra*, at p. 3227 of the Applicant's Record.

<sup>60</sup> Garry F. Barrett, Denise J. Doiron et. al., *The Interaction of Unemployment Insurance and Social Assistance*, Volume 7, Tab "O" of the Applicant's Record, p. 5332.

(f) **Vulnerability to Poverty also Linked to Being a Lone Parent, a Visible Minority, a Recent Immigrant, an Aboriginal Person and a Woman with a Disability**

30. Ineligibility for EI benefits heightens the vulnerability to poverty of those groups in society that are already disadvantaged.

31. Lone female parents are more likely than lone male parents to work part-time (19 % to 4%)<sup>61</sup> and are the poorest of all women in Canada. In 1997, 56% of all families headed by lone-parent mothers had incomes which fell below the Low Income Cut-off (LICO), far in excess of the percentages for either non-elderly two-parent families with children or male lone-parent families.<sup>62</sup> Female lone parents experience the greatest depth of poverty of all family types.<sup>63</sup>

32. Also among the poorest groups are recent immigrants, whose incidence of poverty is at least twice that of Canadian-born men and women.<sup>64</sup> Recent immigrants are associated with marginal labour market positions, including part-time work, and they are more likely than others to require benefits in a form of supplementary income support.<sup>65</sup> Recent studies by Statistics Canada confirm that female immigrants who came to Canada in the 1990s had higher unemployment rates than their male counterparts and Canadian-born workers of either gender. In 1998, recent immigrant women were unemployed 1.4 times longer than other women.<sup>66</sup> Among recent immigrants, women were employed fewer weeks than men and fewer than Canadian-born resident women.<sup>67</sup> One may reasonably infer that compared to Canadian-born women and men, recent immigrant women face more interruptions in employment and longer periods of unemployment, have less savings to rely on, and thus are more vulnerable to poverty with the imposition of stricter EI eligibility criteria.

33. Aboriginal women also experience persistent economic disadvantage. Although they are less likely than their non-Aboriginal counterparts to be part of the paid workforce, roughly 30% of employed Aboriginal women worked part-time (same as for non-Aboriginal women). They are twice as likely to experience unemployment compared to non-Aboriginal women (21% to 10%) and are twice as likely as non-Aboriginal women to have incomes below the LICO.<sup>68</sup> Furthermore, among Aboriginal lone female parents, 73% lived below the LICO compared to 45 % of non-Aboriginal female lone parents.<sup>69</sup>

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<sup>61</sup> Devereaux, Mary Sue and Colin Lindsay, "Female lone parents in the labour market" (Spring 1993) 5:1 *Perspectives on Labour and Income* 9 at pp. 12-14.

<sup>62</sup> Statistics Canada, *Women in Canada 2000*, *supra* at p. 139.

<sup>63</sup> National Council of Welfare, *Poverty Profile 1998*, Table 5.1.

<sup>64</sup> Smith, Ekua and Andrew Jackson *Does a Rising Tide Lift All Boats? Labour market Experiences and Incomes of Recent Immigrants, 1995-1998* (Ottawa: Canadian Council on Social Development, 2002) at p.12.

<sup>65</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at pp. 2916-2917.

<sup>66</sup> Smith and Jackson, *supra*, at p. 8.

<sup>67</sup> Smith and Jackson, *supra*, pp. 8-9.

<sup>68</sup> *Ibid*, p. 267.

34. Visible minority women are less likely than other Canadian women, excepting Aboriginal women, to be in the paid workforce. Roughly 28% of employed visible minority women worked part-time, slightly less than non-visible minority women.<sup>70</sup> Unemployment rates for visible minority women in 1996 stood at 15% compared to 9% of non-visible minority women.<sup>71</sup> Visible minority women, like Aboriginal women, are twice as likely as other women to have low incomes. In 1995, 37% of visible minority women had incomes below the LICO compared to 19% of other women.<sup>72</sup>

35. Women with disabilities face economic disadvantage in a number of respects: they have lower rates of participation in the labour force, higher rates of unemployment, lower employment earnings, less access to the more generous income support programs and higher poverty rate overall than their male counterparts.<sup>73</sup>

## **PART II - POINTS IN ISSUE**

36. LEAF intends to address three issues in this judicial review:

- (a) Did the learned Umpire err in law in concluding that the impugned provisions violated s.15(1) of the *Charter*?
- (b) What is the impact of s.36 of the *Constitution Act, 1982* upon the government's decision to enact the impugned provisions?
- (c) If the impugned provisions violate the *Charter*, are they saved by s.1 of the *Charter*?

37. It is LEAF's position that these issues should be answered in the following manner: (a) the impugned provisions violate s.15(1) because they discriminate on the basis of sex; (b) the federal government has failed to meet its obligation to provide "essential services of reasonable quality to all Canadians" under s.36(1)(c) of the *Constitution Act, 1982* in enacting the impugned provisions, and (c) the impugned provisions are not demonstrably justified in a free and democratic society.

## **PART III - SUBMISSIONS**

### **A. EQUALITY GUARANTEES IN SECTION 15(1) OF THE CHARTER**

#### **(a) General Overview**

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<sup>69</sup> *Ibid*, p. 268.

<sup>70</sup> *Ibid*, p. 245 and 227.

<sup>71</sup> *Ibid*, p. 244.

<sup>72</sup> *Ibid*, p. 246.

<sup>73</sup> Clarence Lochhead and Katherine Scott, *The Dynamics of Women's Poverty in Canada*, Canadian Council on Social Development, March 2000, at p. 16, citing Gail Fawcett, *Living with Disability in Canada: An Economic Portrait*, Hull: Office of Disability Issues, HRDC (1996).

38. There are three steps in determining whether there has been a violation under s.15: determining: (a) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (b) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (c) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee, namely:

“imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.”<sup>74</sup>

39. Each step of the *Law* analysis is made with reference to the overarching goal of the s.15(1):

In general terms, the purpose of s.15(1) 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.<sup>75</sup>

40. Whether s.15 is violated must be assessed subjectively and objectively from the claimant’s perspective, here, a woman who has been denied EI benefits on the basis that she did not have enough hours to meet the eligibility criteria. In assessing the claim objectively, the court must take into account all of the individual’s or group’s traits, history and circumstances<sup>76</sup> in determining whether there is a “rational foundation” for the claimant’s subjective belief.<sup>77</sup>

#### **(b) Aspects of the s.15(1) Analysis Addressed in this Judicial Review**

41. The federal government’s submissions raise certain issues about the application of the *Law* test to the facts of the instant case. LEAF will address the proof required for adverse-effects discrimination to be made out, the importance of looking not only at numbers but also at the qualitative impact of the impugned legislation on already-vulnerable groups in determining whether it discriminates, whether the “ameliorative purpose” of legislation insulates it from review under s.15(1) of the *Charter*, and whether a claimant’s “choice” has any relevance in a s.15(1) analysis. Lastly, while not addressed by the federal government’s arguments, the scope of the government’s positive obligations to ameliorate the circumstances of vulnerable groups under s.15(1) is of special significance in this judicial review and will be addressed by LEAF.

#### **(i) Adverse-Effects Discrimination**

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<sup>74</sup> *Law* [1999] 1 S.C.R. 497 at pp. 548-549.

<sup>75</sup> *Law, supra*, at p. 549.

<sup>76</sup> *Law, supra*, at pp.532-533.

<sup>77</sup> *Lavoie v. Canada* 2002 SCC 23 at paragraph 46.

42. It is now settled that even if a law is framed in neutral terms, this does not insulate it from a s.15 *Charter* challenge. If it has an adverse, discriminatory, impact on individuals and groups based on enumerated or analogous ground(s), then s.15 is violated. As is stated in *Law, supra*, at paragraph 80:

While it is well established that it is open to a s.15(1) claimant to establish discriminatory legislative purpose, proof of legislative intent is not required in order to found a s.15(1) claim: *Andrews, supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes on s.15(1), such that the onus may be satisfied by showing only a discriminatory effect. [Emphasis in the original]<sup>78</sup>

43. In determining whether adverse effects discrimination exists, it matters not whether all of those adversely affected come from a vulnerable group, or whether all members of a vulnerable group are adversely affected. This was confirmed in *Janzen, supra*. There, the Supreme Court found the mere fact that some men are sexually harassed does not negate a finding that sexual harassment constitutes sex discrimination, given that women are at greater risk to experience harassment and more frequently experience it. Further, sexual harassment towards women had a different import than that directed at men, in that it was used to “underscore women’s difference from, and by implication, inferiority with respect to the dominant male group” and to “remind women of their inferior ascribed status.”<sup>79</sup>

44. Furthermore, not all women need experience sexual harassment for it to constitute sex discrimination. Rather, “It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of the individual.”<sup>80</sup>

45. Thus, what matters in the question of adverse effect discrimination is that the discriminatory impact is felt by greater numbers of the vulnerable group and/or that they experience it in a qualitatively different way than others affected.<sup>81</sup>

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<sup>78</sup> See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (“Meorin”)* [1999] 3 S.C.R. 3 at paragraph 48; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 at paragraphs 60-65; *Janzen v. Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 at p. 1279; *Rodriguez v. British Columbia* [1993] 3 S.C.R. 513 at p. 555 (per Lamer C.J.C., dissenting but not on this point); *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219 at pp. 1233-1235

<sup>79</sup> At p. 1284, footnotes omitted, ellipses added. See also *Weatherall v. Canada* [1993] 2 S.C.R. 872 at p. 877, where the court notes that cross-gender frisk searches upon women are “different and more threatening” than those performed on men.

<sup>80</sup> At pp. 1288-1289.

<sup>81</sup> In *Meorin, supra*, the Court upheld the finding that the aerobic standard applied to firefighters discriminated on the basis of sex, as “most” women are adversely affected by the standard (at paragraph 69). In *Rodriguez, supra*, at p. 556 Lamer C.J.C. found that the Criminal Code provisions prohibiting assisted suicide indirectly discriminated against disabled persons, notwithstanding that not all, or even a majority, of physically disabled persons are unable to end their lives unassisted. A similar finding was made in *Brooks, supra*, namely that a provision that discriminates against pregnant women is discriminatory on the basis of sex, regardless of the fact that not all women are pregnant at the same time (at p. 1247). Iacobucci J. comments in *Symes v. Canada* [1993] 4 S.C.R. 695 at pp. 769-770, that if it could be show that s.63 of the *Income Tax Act*, which did not allow the full costs of child care to be deducted as business expenses, had an adverse effect upon a particular group of women (i.e. single mothers) it

(ii) **Importance of Context in Determining Whether Discrimination Exists**

46. For a fulsome s.15 argument, claims must be examined within the broader social, political, historical, and legal context within which the impugned law operates and the claims arise:

At the third stage, the appropriate focus is on how, in the context of the legislation and Canadian society, the particular differential treatment impacts upon the people affected by it. This requires examining whether the legislation conflicts with the purposes of s.15: to recognize all individuals and groups as equally deserving, worthy, and valuable, to remedy stereotyping, disadvantage and prejudice, and to ensure that all are treated as equally important members of Canadian society. Determining whether legislation violates these purposes requires examining the legislation in the context in which it applies, with attention to the interests it affects, and the situation and history in Canadian society of those who are treated differently by it. It must be examined how “a person legitimately feels when confronted with a particular law”: *Law, supra*, at para. 53.

...

The analysis of discriminatory impact must be conducted with a careful eye to the context of who is affected by the legislation and how it affects them.<sup>82</sup>

47. *Law* points to the existence of pre-existing disadvantage as one of the most important contextual factors to consider in determining whether the differential treatment imposed by the legislation constitutes discrimination. In most cases, differential treatment imposed on groups who are already vulnerable because of their unfair circumstances or treatment by society will be discriminatory.<sup>83</sup> It follows, therefore, that the government must be alive to the vulnerability of groups to ensure that the legislative provisions adopted will not have a greater impact on already disadvantaged classes of persons.<sup>84</sup>

48. Other contextual factors to be considered by the court include:

- (a) The relationship between the ground upon which the claim is based and the nature of the differential treatment, that is whether the differential treatment corresponds with need, capacity, or circumstances of the affected group.<sup>85</sup> Section 15(1) may be violated where a law fails to take into account the real needs, capacities and circumstances of a vulnerable group;<sup>86</sup>
- (b) Ameliorative purpose of the legislation, discussed below;

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would be discriminatory on the basis of sex, notwithstanding the effect was not felt by all women, and notwithstanding that it would be felt by some individual men. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46 at pp. 99-100, L'Heureux-Dubé finds that the failure to provide counsel to a parent in child protection proceedings raised issues of gender equality because “women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings.”

<sup>82</sup> *Corbière v. Canada* [1999] 2 S.C.R. 203 at pp. 254-255. See also *Law, supra*, at para. 59, and *R. v. Turpin* [1989] 1 S.C.R. 1296 at pp. 1331-1332.

<sup>83</sup> *Law, supra*, at para. 63.

<sup>84</sup> *Rodriguez, supra*, at p. 549 per Lamer C.J.C. (dissenting but not on this point). See also *Eldridge v. British Columbia (Attorney General), supra*, at pp. 676-682.

<sup>85</sup> *Law, supra*, at para. 69.

<sup>86</sup> *Winko v. British Columbia (Forensic Psychiatric Institute)* [1999] 2 S.C.R. 625 at paragraph 84, and *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 72.

- (c) The nature of the interest affected by the legislation, that is, the more “severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*”.<sup>87</sup>

**(iii) Ameliorative Purpose**

49. That the impugned provisions have an ameliorative purpose does not preclude an analysis under s.15; nor does it mean that lesser scrutiny ought to be applied in the s.15 analysis.<sup>88</sup> While *Law* states that a court may consider the ameliorative purpose or effects of impugned legislation or other state action *upon a more disadvantaged person or group in society* than the excluded group:

“Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination.” See *Vriend, supra*, at paras. 94-104, *per Cory J.*<sup>89</sup>

**(iv) “Choice” and Discrimination**

50. In *Lavoie v. Canada, supra*, McLachlin C.J.C. and L’Heureux-Dubé J. make it clear that discrimination is not negated by an assertion that it was based on a “choice” made by the claimant:

[T]he fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s. 15(1). The Court in *Andrews* was not deterred by such considerations. On the contrary, La Forest J. specifically noted that acquiring Canadian citizenship could in some cases entail the "significant hardship" of losing an existing citizenship. He left no doubt that this hardship was a cost to be considered in favour of the individual affected by the discrimination: *Andrews, supra*, at p. 201.<sup>90</sup>

**(v) Governments’ Positive Obligations Under S.15(1)**

51. It is submitted that s.15(1) of the *Charter* imposes a positive obligation on the government to further the equality of vulnerable groups through the provision of social benefits, *in addition to* the obligation not to further entrench their inequality. The wording of the *Charter* implies the existence of a positive obligation by through the inclusion of s.15(2) which speaks of government actions to ameliorate discrimination. The Supreme Court has spoken of s.15(2) as being “confirmatory” of s.15(1)<sup>91</sup>, and based on its wording, “the Court has interpreted s. 15(1)

<sup>87</sup> *Law, supra*, at para. 74, citing L’Heureux-Dubé J. in *Egan v. Canada* [1995] 2 S.C.R. 513, at paras. 63-64.

<sup>88</sup> *Lovelace v. Ontario* [2000] 1 S.C.R. 950 at para. 61.

<sup>89</sup> *Law, supra*, at para. 72. See also *M. v. H.* [1999] 2 S.C.R. 3 at paragraph 71.

<sup>90</sup> At para. 5. McLachlin C.J.C. and L’Heureux-Dubé were in dissent, but were supported on the issue of the significance of “choice” in the s.15 analysis by the majority decision written by Bastarache J.

<sup>91</sup> *Lovelace, supra*, at para. 108.



not only to prevent discrimination but also to play a role in promoting the amelioration of the conditions of disadvantaged persons.”<sup>92</sup> LaForest J. in *Eldridge v. British Columbia (Attorney General)*<sup>93</sup> indicates that with respect to circumstances where the government has already decided to provide a benefit, s.15(1) may require the state to take positive action to extend the scope of a benefit to previously excluded classes of persons.<sup>94</sup>

52. It is submitted that Canada’s international human rights obligations also support this interpretation of s.15(1).<sup>95</sup> In *Slaight Communications Inc. v. Davidson*<sup>96</sup>, Dickson C.J.C. stated that international conventions are a “relevant and persuasive source” for the interpretation of the *Charter*’s provisions. The Court also confirmed its earlier recognition in *Reference re Public Service Relations Act (Alta.)*<sup>97</sup> that, “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.” More recently, in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>98</sup> the Supreme Court has reiterated that international human rights law “is also a critical influence on the interpretation of the scope of the rights included in the *Charter*.” In *R. v. Ewanchuk*,<sup>99</sup> Madam Justice L’Heureux Dubé, for the majority, pointed out the importance of international human rights instruments for the interpretation of s.15 of the *Charter* in particular.

## **B. APPLICATION OF SECTION 15(1) OF THE CHARTER TO THE CASE AT BAR**

### **(a) The Impugned Provisions Make a Distinction**

53. The impugned provisions, on their face, make a distinction on the basis of hours of employment. Those unemployed workers who are otherwise eligible, and are able to meet the hours-based requirements (420-700 hours of employment in a 52-week qualifying period) are entitled to receive benefits, while those who do not are denied benefits.

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<sup>92</sup> *Lovelace, supra*, at para. 93. At paragraph 103 Iacobucci J. critiques an analysis that contends that s.15(2) is a “defence” to a s.15(1) violation because s.15(2) protects state action which goes beyond the substantive equality requirement in s.15(1). He states that such an analysis “means adopting a limited understanding of what is meant by substantive equality and, more importantly, an approach that would regressively narrow the scope of s. 15(1)’s application.”

<sup>93</sup> [1997] 3 S.C.R. 624.

<sup>94</sup> At para. 73. See also *Dunmore v. Ontario (A.G.)* 2001 SCC 94.

<sup>95</sup> See Martha Jackman, “From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through *Charter of Rights Review*” (1999) 14 *Journal of Law and Social Policy* 69 at 86, and Bruce Porter, “Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights” (2000) 15 *Journal of Law and Social Policy* 117 at p. 149: “International human rights law does not only require that maternity and parental benefits or security of tenure be provided to disadvantaged or excluded groups in order to remedy discriminatory under-inclusion. It requires, more fundamentally, that adequate programmes and benefits be provided and that appropriate legislation be adopted to provide necessary protection and support for mothers, parents, and children, for example...”

<sup>96</sup> [1989] 1 S.C.R. 1038 at p. 1056.

<sup>97</sup> [1987] 1 S.C.R. 313 at p.p. 349-350.

<sup>98</sup> [1999] 2 S.C.R. 817 at para. 70.

<sup>99</sup> [1999] 1 S.C.R. 330 at para. 73.

(b) **The Distinction is Based Upon the Enumerated Ground of Sex**

54. It is submitted that the *effect* of the legislation is to make a distinction on the basis of sex. Women's claims to benefits disproportionately declined after the hours-based eligibility criteria were instituted. The government implicitly admitted that the disparity was due to the fact that more women than men were unable to meet hours-based eligibility requirements and that a disproportionate number of women were entrants/re-entrants.<sup>100</sup> The ratio of women beneficiaries to women unemployed (B/U) declined disproportionately as compared to men after the change to hours-based eligibility criteria. Percentages comparing actually eligible workers to potentially eligible workers show that the number of unemployed women qualifying for benefits remain very low, and disproportionately low as compared to men.<sup>101</sup> More women than men are newly paying premiums and are not eligible to receive benefits.<sup>102</sup>

55. As well, the impugned provisions have the following gender-specific impacts:

- (a) because women experience a greater risk of poverty and greater depth of poverty than men, the consequences of being disqualified from benefits are more serious for them. The consequences are particularly harsh for women who are among the "poorest of the poor," in particular female lone parents, visible minority women, Aboriginal women, women who are recent immigrants and women with disabilities;
- (b) the impugned provisions further entrench the historical stereotypes within the employment insurance scheme that women are uncommitted workers,<sup>103</sup> they do not need the benefits because they are economically dependent upon men, and that their claims represent a "misuse" of the unemployment insurance system;
- (c) because women have limited access to full-time, secure, employment possibilities, limited access to government-funded caregiving, and because they have primary responsibility for caregiving and domestic labour, they experience the denial of eligibility based on hours of employment in a qualitatively different and more prejudicial way; and
- (d) the impugned provisions perpetuate women's economic dependency upon their partners or social assistance<sup>104</sup> by disentiing women from income replacement during times of unemployment.

56. The government's attempt to rely upon certain factual assertions to support their argument that there has been no differential treatment<sup>105</sup> has been surpassed by 20 years of jurisprudence on s.15(1). Differential treatment

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<sup>100</sup> See paragraph 20 of this Memorandum of Fact and Law, above.

<sup>101</sup> See paragraphs 17, 18 and 19 of this Memorandum of Fact and Law, above.

<sup>102</sup> See paragraphs 22 and 23 of this Memorandum of Fact and Law, above.

<sup>103</sup> See Pulkingham, *supra*, at p. 32, citing the language of government documents: "In the name of 'fairness,' these rules are intended to penalize [part-timers] for their purported lack of 'work effort,' 'individual initiative,' and insufficient 'attachment to the workforce.'

<sup>104</sup> Phillips, *supra*, at pp. 3224-3227 of the Applicant's Record.

<sup>105</sup> Applicant's Memorandum of Points of Argument, pp. 7984-7988.

is not negated by the fact that individual men suffer from the same adverse effects in smaller numbers.<sup>106</sup> It is also not negated by the fact that most employed women (with or without children) would qualify for benefits because they work full-time, as the focus in the instant case is on those who are *denied* benefits. Unemployed women disproportionately fail to qualify for benefits and experience negative, gender-specific impacts of failing to qualify. If it were a requirement that adverse-effects discrimination precisely target all members of a protected group, and only those members, *Charter* protection against discrimination would have little value.<sup>107</sup>

57. Further, the fact that not all of those who are ineligible for EI benefits are ineligible for the same reasons does not negate differential impact. As LEAF submits above, the reasons why women have more difficulty in meeting the hours-based eligibility criteria are related to gender in significant ways, which results in women experiencing the denial of eligibility differently than men. The government's assertion that "the nature of the effect" of denial of eligibility for men and women is the same, even if women are denied eligibility in greater numbers,<sup>108</sup> ignores not only the impact of the disproportionate numbers themselves,<sup>109</sup> but also the aforementioned gender-specific, prejudicial impacts upon women who fail to qualify. This statement points to a formalistic approach to equality which overlooks the specific historical, legal, economic and social context in which women are situated

(c) **The Distinction is Discriminatory**

(i) **Obligation to Refrain from Enacting Legislation Which Further Entrenches Inequality**

58. Because the impugned provisions disproportionately deny women eligibility to EI benefits, they have the effect of denying the benefit of a comprehensive social insurance scheme to a group in society that is already economically disadvantaged. It is submitted that this is violative of women's human dignity and denies their recognition as equally deserving, worthy, and valuable members of Canadian society. The fact that the basis for the differential treatment (lack of hours of employment) is intimately connected to women's economic vulnerability intensifies the discrimination: their vulnerability is the basis for the differential treatment.

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

60. Furthermore, by disproportionately denying benefits to women, and to particularly vulnerable women within that group, the government is forcing them increasingly to rely upon the inadequate level of benefits provided

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<sup>106</sup> *Janzen, supra, Symes, supra.*

<sup>107</sup> *Janzen, supra*, pp. 1288-89.

<sup>108</sup> Applicant's Memorandum of Points of Argument, p. 7986 of the Applicant's Record.

by social assistance.<sup>110</sup> Not only will women suffer increased poverty as a result, but they will also experience further intrusions upon their dignity and freedom through their contact with the social assistance system.<sup>111</sup> EI was specifically designed to act as income replacement for workers in times of temporary unemployment, without their needing to resort to social assistance.<sup>112</sup> Thus, forcing women in disproportionate numbers to rely upon social assistance clearly has the effect of promoting the view that women are less deserving of “concern, respect and consideration.”

61. As noted in *Law*, the withholding of a benefit in a manner which reflects the stereotypical application of presumed group or personal characteristics is the ultimate signifier of discrimination. It is submitted that the impugned provisions perpetuate and entrench the aforementioned stereotypes regarding women and employment and women and the unemployment system by continuing to disproportionately disentitle workers who depart from the male model of employment, namely women, from EI benefits.<sup>113</sup>

62. Given the full legislative context, including women’s economic vulnerability, their improper and stereotypical characterization as “dependents” of men, and the fact that economic dependency creates additional opportunities for women to be abused in their relationships with abusive partners (or may cause them to remain in such relationships),<sup>114</sup> it is submitted that women’s forced economic dependency due to their disqualification from EI benefits is experienced in a uniquely negative and gender-specific manner<sup>115</sup> and therefore violates women’s human dignity.

63. There is a fundamental lack of correspondence between the number of hours a worker works in a year and their need for EI benefits. A worker who works less than the designated number of hours per year does not simply

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<sup>109</sup> In *Brooks, supra*, at p. 1234 and *Janzen, supra*, at 1279, the Supreme Court cites with approval the statement that barriers affecting certain groups in a disproportionately negative way is a signal that the practices that lead to this adverse impact may be discriminatory.

<sup>110</sup> Statistics Canada, “Report on the Main Results of Employment Insurance Coverage Survey, 1998” (1999), which indicates at p. 14 that where unemployed workers who were ineligible for EI had to rely on social assistance as their main source of income, it met all or most of their regular household expenses in only half the cases (52.8%).

<sup>111</sup> Errlee Carruthers, “Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality,” (1995) 11 *Journal of Law and Social Policy* 241, J.E. Mosher, “Managing the Disentitlement of Women: Glorified Markets, the Idealized Family, and the Undeserving Other” in S.M. Neysmith, ed., *Restructuring Caring Labour: Discourse, State Practice and Everyday Life* (Toronto: Oxford University Press, 2000). See also *Falkiner v. Ontario (Ministry of Community and Social Services)* (1996) 140 D.L.R. (4<sup>th</sup>) 115 (Ont. Gen. Div.), per Rosenberg J., *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2000) 188 D.L.R. (4<sup>th</sup>) 52 (Ont. Sup. Ct.).

<sup>112</sup> Phillips, *supra*, at p. 3153 of the Applicant’s Record.

<sup>113</sup> See Pupo and Duffy, *supra*, at p. 2918 of the Applicant’s Record, speaking of the 1996 changes to eligibility: “Intrinsically woven through this harsh reality is the message that women’s part-time income is insignificant both to the family’s standard of living as well as to women’s own sense of personal satisfaction and accomplishment,” and also at p. 2929: “Implicit in [the revised employment insurance policy] is the strength of the ideology of women’s income as secondary.”

<sup>114</sup> Mosher, *supra*, at p. 36-37.

<sup>115</sup> Phillips, *supra*, at p. 3227 of the Applicant’s Record, Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, at p. 2928.

receive less benefits than someone who works more hours. They receive nothing. There is no evidence that the need for income replacement during employment interruption is any less for women, or for part-time workers in particular. In fact, given their disproportionate risk of poverty and their depth of poverty, it may be that EI benefits are needed even more desperately by women than by men. Women in poverty do not have the savings that other, better-off workers may rely upon during spells of unemployment. As such, the government has discriminated against them for failing to take their real needs, capacities and circumstances into account.

64. The government both in this judicial review and in its public policy papers has characterized the number of hours that women work as a matter of “choice.”<sup>116</sup> Not only does this characterization fail to justify the discrimination, as the Supreme Court states in *Lavoie*,<sup>117</sup> but it adds to the violation of women’s human dignity. It implies that women are the authors of their own misfortune when it comes to their disqualification for EI benefits. While this is not only an unfair implication given the external market pressures which channel women into contingent employment situations, including involuntary part-time work, and the social pressures upon women to perform caregiving,<sup>118</sup> it masks the impact of the legislation. The focus centres upon women’s conduct and not the legal consequences prescribed by the legislation, and harkens back to a time when the discriminatory treatment of women in the provision of unemployment insurance benefits was viewed as a consequence of women’s “nature” and not the legislation.<sup>119</sup>

65. A similar argument was made in *Eldridge*,<sup>120</sup> where the B.C. provincial government attempted to argue that the disadvantage suffered by deaf people in being unable to communicate effectively with their health care providers was because of their social disadvantage and not the provincial health and hospital insurance legislation. LaForest J. dismissed this argument noting that, “The social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government.” In the instant case, women’s social and economic disadvantage in terms of not being able to contribute as many hours to work because of caregiving responsibilities and external labour market conditions is directly related to their disqualification from benefits.

(ii) Obligation to Further Women’s Equality

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<sup>116</sup> At p. 7978 and 7987 of the Applicant’s Memorandum of Points of Argument. See also HRDC, “Employment Insurance: Gender Impact Analysis,” (January 24, 1996), Volume 8, Tab “14” of the Applicant’s Record, p. 6533: “While some part-time workers will have to work longer to qualify for benefits, the removal of the weekly minimum will result in all hours of work being insurable.” This implies that those who are denied eligibility have the choice of working more to become eligible. See also the Testimony of A. Nakamura, Volume 1, Tab “4” of the Applicant’s Record, p. 379: “So they [who work less than 700 hours per year] make a choice to care for children, they make a choice to go and do other things and then can afford the choice.”

<sup>117</sup> *Supra*, at para. 5, per L’Heureux-Dubé and McLachlin JJ.

<sup>118</sup> See Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, at pp. 2891-2905 of the Applicant’s Record.

<sup>119</sup> *Bliss v. Attorney General of Canada* [1979] 1 S.C.R. 183, at p. 717.

<sup>120</sup> *Supra*.

66. The scope of the government's positive obligation in this case to further women's equality must be interpreted in light of international human rights conventions that concern income security and women's rights thereto, and which are binding upon Canada. For instance, Article 11 of the *International Covenant on Economic, Social and Cultural Rights*,<sup>121</sup> recognizes the right of everyone to an adequate standard of living including food, clothing and housing, and indicates that state signatories will "take appropriate steps to ensure the realization of this right." Article 10 involves the recognition by Canada and other state signatories that the "widest possible care and assistance be accorded to the family ... while it is responsible for the care and education of dependent children." That these "appropriate steps" and "care and assistance" include providing access to income security is affirmed by Article 9, in which the state signatories recognize, "the right of everyone to social security, including social insurance." Furthermore, regarding the position of new mothers in particular, Article 10 goes on to say, "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits."

67. Article 11 of the *Convention on the Elimination of Discrimination Against Women* mandates that: "States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular...the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work as well as the right to paid leave," and also "to take appropriate measures...to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life..."<sup>122</sup>

68. More recently, Canada affirmed in Article 26 of the *Beijing Declaration and Platform for Action*,<sup>123</sup> that it is "determined to...promote women's economic independence, including employment, and eradicate the persistent and increasing burden of poverty on women by addressing the structural causes of poverty through changes in economic structures, ensuring equal access for all women, including those in rural areas, as vital development agents, to productive resources, opportunities, and public services."

69. The net effect of these international covenants, to which Canada is a signatory, is to impose an obligation upon the federal government to provide women with adequate social benefits during times of unemployment. The federal government's violation of this positive obligation, which has been recognized by an international monitoring body,<sup>124</sup> supports a finding that the government has acted in a discriminatory fashion.

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<sup>121</sup> G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, Doc. A/6316 U.N. (1966), Volume 4, Tab "11" of the Applicant's Record, p. 3356.

<sup>122</sup> G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1981), at p. 3425 of the Applicant's Record.

<sup>123</sup> A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995).

<sup>124</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding*

C. SECTION 36

70. Section 36 of the *Constitution Act, 1982* provides as follows:

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:

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparities in opportunities;
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

71. LEAF submits that the federal and provincial government's commitment in s.36(1)(c) of the *Constitution Act, 1982*, to "provid[e] essential public services of reasonable quality to all Canadians," is a legally enforceable right.<sup>125</sup> At the time the inclusion of s.36 was being debated, the federal government itself spoke of s.36 being "entrenched" in the *Constitution* and "enshrining the obligation of sharing."<sup>126</sup>

72. That s.36(1) creates enforceable rights is borne out by the history of the drafting of the provision. The first version of s.36(1) appeared in Article 46 of the 1971 *Victoria Charter*, which provided that the governments were committed to "the assurance, as nearly as possible, that essential services of reasonable quality are available to all individuals in Canada." Article 47 confirmed that the provision would not affect the distribution of powers between the federal and provincial governments. It also expressly provided that Article 46 "shall not compel" the exercise of federal or provincial legislative powers.<sup>127</sup> By the time of the first reading of the *Constitution Amendment Bill* in 1978, the non-compellability clause had been abandoned. The fact that such a clause was initially considered and then rejected has the effect of making the s.36(1) commitment even stronger.<sup>128</sup>

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*Observations of the Committee on Economic, Social and Cultural Rights* (Canada) 10 December 1998, E/C 12/1/Add.31, Volume 4, Tab "18" of the Applicant's Record, p. 3416.

<sup>125</sup> *Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydra-Electric Board* (1992) 91 D.L.R. (4th) 554, 78 Man. R. (2d) 141 (C.A.), per Scott C.J.M. See also Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (1997) *Dalhousie Law Journal* 306 at p. 355, Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform: (1995) *Can. J. of Women and the Law* 371 at 391-392, Jackman, "From National Standards to Justiciable Rights," *supra* at pp. 79-80. M. Robert, "Challenges and Choices: Implication for Fiscal Federation" in T.J. Courchene, D.W. Conklin & G.C.A. Cook, eds., *Ottawa and the Provinces: the Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) 28.

<sup>126</sup> *House of Commons Debates* (October 6, 1980) Volume 4, Tab "2" of the Applicant's Record, p. 3284.

<sup>127</sup> Nader, *supra*, p. 337.

73. It is important to note that the obligation in s.36(1)(c), to “provide” essential public services, is unqualified. This is different than the wording of s.36(1)(c), s.36(2) and ss. 36(1)(a) and (b). S.36(2) provides only that the governments are committed only to the “principle” of making equalization payments, and s.36(1)(a) and (b) speak of “promoting” or “furthering” which imply progressive realization.<sup>129</sup>

74. By 1940, there was a consensus amongst experts consulted by the federal government, government commissions charged with studying income replacement during employment interruption, as well as the provincial governments and the general public, that a federal unemployment insurance program was an “essential public service.”<sup>130</sup> A federal system was thought to be required to avoid the regional impacts of unemployment and regional disparities in aid to the unemployed, to protect the spending power of individual workers and stabilize the national economy, and to avoid the stigma and negative impact of workforce attachment of unemployed workers being required to go “on the dole.”<sup>131</sup> Nothing has changed since that time to make Employment Insurance any less “essential,”<sup>132</sup> and indeed given the current era of restructuring, which involves increasing unemployment, underemployment, short-term employment, and job insecurity,<sup>133</sup> the unemployment insurance scheme may be even more essential.

75. The essential nature of unemployment insurance has also been recognized internationally, pursuant to the *Universal Declaration of Human Rights*. Article 25(1) provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>134</sup>

76. It is submitted that in light of the program’s historical objectives, government statements regarding the purposes of unemployment insurance, and in particular, what the 1996 changes were purported to accomplish, the following constitute appropriate criteria to judge whether EI is currently of a reasonable quality:

- (a) To provide benefits to the temporarily unemployed,<sup>135</sup>

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<sup>128</sup> *Ibid*, p. 355.

<sup>129</sup> *Ibid*, p. 352 and 357.

<sup>130</sup> Phillips, *supra*, at p. 3165.

<sup>131</sup> Phillips, *supra*, at pp. 3157-3161.

<sup>132</sup> Phillips, *supra*, at p. 3239.

<sup>133</sup> Pat Armstrong, “The Feminization of the Labour Force: Harmonizing Down in a Global Economy” in Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) at pp. 52-53.

<sup>134</sup> GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. The *Universal Declaration of Human Rights* was endorsed by the 48 members of the United Nations General Assembly (including Canada).

<sup>135</sup> Phillips, *supra*, at p. 3165, “A 21<sup>st</sup> Century Employment System for Canada, A Guide to the Employment Insurance Legislation” (December 1995), Volume 8, Tab “18,” p. 6695-6696, Racette, “Milestones in the History of Unemployment Insurance and Employment Insurance Legislation in Canada and Review of its Primary Goals and Parameters,” Volume 8 of the Applicant’s Record at Tab “17,” p. 6664 and 6684.



- (b) To provide a minimally adequate level of income support during unemployment;<sup>136</sup>
- (c) To act as an economic stabilizer during times of high unemployment;<sup>137</sup> and
- (d) To distribute benefits in an equitable manner, and in particular, to treat men and women equally.<sup>138</sup>

77. LEAF submits that this Court should declare the federal government has not met its commitment under s.36(1)(c), as EI, an essential service, is not "of reasonable quality":

- (a) Providing benefits to the unemployed. A number of factors listed above in LEAF's submissions on s.15 demonstrate that despite the government's promises that EI would increase the benefit eligibility of unemployed workers<sup>139</sup>, this has turned out not to be the case. The B/U ratio drastically declined for all workers in the 1990's and continued to decline even further after the 1996 changes to eligibility, so that fewer than 50% of unemployed workers are now eligible for benefits. Fewer unemployed women receive benefits than unemployed men, and the decline in the ratio after the 1996 changes was even steeper for women.
- (b) Minimally adequate level of income. In addition to restricted eligibility, changes to the income replacement rates have meant that now benefits equal only 55% of earnings, without any increase for workers with dependents. The benefit rate is even lower for repeat users of EI, and higher income earners. During the 1990's, the duration of benefits was shrunk for all workers (currently 55 weeks), and became even shorter for repeat users, new entrants and maternity and sickness claimants.<sup>140</sup> While the family income supplement was meant to "shore up" some of the decline in benefits for low-income families, it is granted on a "family-income testing basis." This assumes that women have equal access to the economic resources of their partners, which is questionable,<sup>141</sup> and also means that because women generally have lower incomes than men they are less likely to receive the benefit. In 1995/96-1997/98, men's family supplement benefits actually went up by over 50% while women's declined by 21%. In 1997/98-1998/99, both men and women saw an increase, but the increase in the family supplement benefits paid to men has significantly outstripped the increase in family supplement benefits paid to women.<sup>142</sup>
- (c) Macroeconomic stabilizer. There has been a decline in the stabilizing influence of EI due to program changes which have decreased benefits and increased premiums since the 1970's. To act as a stabilizer there must be injections of income during times of high unemployment, and greater contributions during low unemployment. The government has reduced the level of benefits relative to income, and has phased out its contribution to the fund, meaning that increases in

<sup>136</sup> Phillips, *supra*, at pp. 3165, 3167, 3169, and 3240, Nakamura, "New directions for UI, social welfare and vocational education and training," (November 1995), Volume 10, Tab "C" of the Applicant's Record, p. 7766.

<sup>137</sup> Phillips, *supra*, at p. 3240 of the Applicant's Record, Racette, *supra*, at p. 6664, Nakamura, *supra*, p. 7767.

<sup>138</sup> Status of Women, Canada, "Setting the Stage for the Next Century: The Federal Plan for Gender Equality" at Volume 8 Tab "12," of the Applicant's Record, p. 6428, "Response of the Government of Canada to the Communication of Beverly Smith to the United Nations Commission on the Status of Women," Volume 8 of the Applicant's Record, Tab "13" p. 6518, Human Rights Program, Citizen's Participation Directorate, "Canada's Third Report on *The International Covenant on Economic, Social and Cultural Rights*, Volume 4, Tab "17" of the Applicant's Record, p. 3413, Shillington, "The Impact of the Transition from Unemployment Insurance to Employment Insurance," *supra*, p.3030.

<sup>139</sup> House of Commons Debates (March 26, 1996), George Proud (Parliamentary Secretary to the Minister of Labour), Volume 2, Tab "3" of the Applicant's Record, p. 640-641, House of Commons Debates (May 10, 1996), Robert D. Nault (Parliamentary Secretary to the Minister of Human Resources Development), Volume 2, Tab "3," p. 778.

<sup>140</sup> Phillips, *supra*, at p. 3238.

<sup>141</sup> Pulkingham, *supra*, at p. 29, note 87

<sup>142</sup> HRDC, 1999 Monitoring and Assessment Report, Volume 10, Tab "D," p. 7869.

expenditures (benefits paid out) are followed with increases in contribution rates. As a result the program may actually be operating as a *destabilizer*.<sup>143</sup>

- (d) Equity. Rather than being responsive to the new realities of the workplace, including more contingent employment, as the government has claimed,<sup>144</sup> the hours-based system of eligibility has actually further penalized those who are already economically vulnerable. The negative impact of these changes has been felt more acutely by women, as they disproportionately engage in part-time employment. The consequences have been particularly harsh upon vulnerable subgroups of female part-timers, lone parents, namely women who are recent immigrants, Aboriginal women, visible minority women and disabled women.

#### D. SECTION 1

78. At the s.1 stage, it is for the government to demonstrate that, on a balance of probabilities, subsections 6(1) and 7(1) of the *Employment Insurance Act* are a “reasonable limit” on equality that can be “demonstrably justified in a free and democratic society”. The role of s.1 of the *Charter* was first fully examined by the Supreme Court of Canada in *R. v. Oakes*,<sup>145</sup> and the steps in the analysis were later summarized in *R. v. Edwards Books and Art Ltd.*<sup>146</sup> as follows:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a “pressing and substantial concern”. Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

79. LEAF submits that the section 1 analysis should be conducted with a focus both on the impugned sections of the statute (ss.6(1) and ss.7(1)) and the objective of the legislation as a whole.<sup>147</sup>
80. Legislatures and courts have independent obligations to ensure that laws conform with *Charter* principles. While the government is allowed some leeway in deciding how to distribute finite resources, judicial deference must not extend so far as for the court to abdicate its role in determining if the government acted unconstitutionally.

“To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the

<sup>143</sup> Phillips, *supra*, at pp. 3231-3235 of the Applicant’s Record.

<sup>144</sup> Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, p. 2924 of the Applicant’s Record, “A 21<sup>st</sup> Century Employment System for Canada,” *supra* at p. 6699.

<sup>145</sup> [1986] 1 S.C.R. 103 at pp. 136-139.

<sup>146</sup> [1986] 2 S.C.R. 713 at p.768, per Dickson C.J.

<sup>147</sup> *M. v. H.*, *supra*, at para. 82, and *Vriend*, *supra*.

constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.”<sup>148</sup>

**(a) Sufficiently Important Objective of the Impugned Provisions**

81. The federal government’s stated purposes for instituting the minimum entrance requirements (MER or “hours” threshold) contained in Bill C-12 (1996) includes the following:

- (a) to eliminate any fiscal incentive for employers to create part-time jobs with less than 15 hours per week;
- (b) to ensure that recipients of benefits have a minimum degree of attachment to the workforce and reduce the overall level of dependency on EI benefits;
- (c) to limit “cross-subsidization” of claimants who work for short periods, and do not contribute enough premiums to cover their claims, by long-serving employees; and
- (d) to provide a basis for a fiscally-viable plan in which benefits are proportional to contributions.<sup>149</sup>

82. Furthermore, HRDC commented on the design and objectives of the new system in a submission to the House of Commons, January 24, 1996:<sup>150</sup>

The new Employment Insurance (EI) system has been designed to remove disincentives and barriers to paid employment, reduce ongoing reliance on the system, increase fairness of the system while at the same time reinvest in employment benefits to help Canadians find and keep jobs and protect those in need. The modernized system is a major step in the government’s Jobs and Growth Strategy. *It has been designed to take into consideration the economic and social experiences of women and men, to recognize the changing nature of the labour force, to supplement the benefits of low-income families with children, and to provide support to enable women and men, especially those with family responsibilities, to participate in the paid labour force.* [emphasis added]

83. While the Applicant in the instant case does not cite “savings” as an objective associated with the impugned provisions, government sources were frank in acknowledging that the EI Act was intended to reduce the cost of the unemployment insurance program by a minimum of 10%.<sup>151</sup>

84. LEAF concedes that elimination of incentives for employers to create part-time jobs of fewer than 15 hours per week and the maintenance of a viable EI plan, identified by the Appellant as (a) and (d) above, are important objectives. LEAF does not concede that ensuring a minimum degree of workforce attachment or limiting cross-subsidization between workers are important objectives. Furthermore, LEAF disputes that these objectives are attainable, given the government’s reliance on a discriminatory threshold to determine benefits eligibility. The means used to achieve the stated objectives of increasing the “fairness of the system” have had the opposite effect.

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<sup>148</sup> *RJR- MacDonald v. Canada*, [1995] 3 S.C.R. 199 at 332. See also *Eldridge v. British Columbia (Attorney General)*, *supra*, at para. 86, *M. v. H.*, *supra*, at para. 80.

<sup>149</sup> Applicant’s Memorandum of Points of Argument, Submissions, Part B (section I analysis) and Facts, Part A  
<sup>150</sup> Pupo and Duffy, “Canadian Women and Part-Time Work,” *supra*, p. 2924 of the Applicant’s Record.

<sup>151</sup> Racette, “Milestones in the history of Unemployment and Employment Insurance Legislation in Canada,” *supra*, p. 6683 of the Applicant’s Record. See also Paul Martin, Minister of Finance, Budget Speech of February 27, 1995, Volume 5, Tab “3” of the Applicant’s Record, p.4190.

85. The government intended to achieve savings and succeeded in this pursuit so that the EI fund is currently in a surplus position. In this context LEAF underscores that the Supreme Court of Canada has clearly and repeatedly recognized that “budgetary considerations cannot be used to justify a violation under s. 1.”<sup>152</sup> The guarantees of the *Charter* would be illusory if they could be overridden simply in pursuit of administrative and budgetary convenience. The perceived lack of financial resources to fund income support for unemployed workers cannot be used as a basis for rendering the equality *Charter* guarantee meaningless:

“[I]n a period of economic restraint, competition over scarce resources will almost always be a factor in the government’s distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. Accordingly, to treat such a price... as a justification for denying the constitutional rights of the [claimants] would completely vitiate the purpose of entrenching rights and freedoms.”<sup>153</sup>

86. LEAF submits that the government’s savings objective compounds the social and economic marginalization of women who experience an interruption in their employment. The objective of the impugned provisions is discriminatory in effect and cannot be constitutionally sanctioned as sufficiently pressing and substantial when the objective is achieved literally at the expense of the most vulnerable workers in society. Achieving savings in this manner conflicts sharply with the values and principles that the Supreme Court of Canada has ruled are essential to a free and democratic society, including “respect for the inherent dignity of the human person, commitment to social justice and equality ... and faith in social and political institutions which enhance the participation of individuals in society.”<sup>154</sup>

**(b) Proportionality**

87. To satisfy the proportionality test, the government must demonstrate that the eligibility criteria are rationally connected to its goals; that they minimally impair the *Charter* rights of unemployed women who have experienced discrimination (denial of benefits) with the change to the criteria; and, that there is a balance between the salutary and deleterious effects of the *Charter* infringement.<sup>155</sup>

**(i) Rational Connection**

88. LEAF submits that even if ensuring a minimum degree of workforce attachment is an important objective, which LEAF argues is not the case, there is no rational connection between this and the minimum entrance requirement (MER), given the pattern of women’s participation in paid and unpaid work.

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<sup>152</sup> *Adler v. Ontario* [1996] 3 S.C.R. 609 at p. 675, per L’Heureux-Dubé (dissenting, but not on this point).

<sup>153</sup> *McKinney v. Guelph University*, [1990] 3 S.C.R. 229 at p. 403.

<sup>154</sup> *R. v. Oakes*, *supra* at p. 145.

<sup>155</sup> *Oakes*, *supra*, pp. 138 –139.

89. Women's participation in part-time work is strongly linked with their role as parents and caregivers. As much of their time is consumed by caregiving responsibilities, women are less able than men to put in long hours in the paid workforce. LEAF submits that women's inability to accumulate long hours in short periods of time is not an objective measure of women's commitment to participate in the paid workforce.

90. The government's expert at trial testified that a worker who works even two hours per week, year after year, demonstrates a commitment to work that qualifies as "workforce attachment."<sup>156</sup> Nonetheless, the current eligibility criteria implicitly treat as a nullity, the workforce attachment of any part-time worker who fails to meet the threshold, regardless of the number of weeks or years that this worker participates in the workforce. On their face, the impugned provisions completely disregard part-time workers' length of service as a measure of workforce attachment. The singular reliance on hours worked does not adequately measure the enduring nature of part-time workers' involvement in the labour market. The hours-based MER is not rationally connected to nor does it achieve the stated goal of ensuring that "recipients of benefits have a *minimum* degree of attachment to the workforce" but instead screens for intense or full-time attachment.

91. LEAF submits that the stated objective of increasing the "fairness of the system" is not rationally connected to the "neutral" impugned provisions as the latter does not define workforce attachment in a manner that reflects the distinct labour market experience of women. Women are over-represented among workers who are rendered ineligible under the EI hours based threshold, even those who work up to thirteen (13) hours per week year-round. The fairness objective is elusive as the current hours-based threshold favours workers who are able to work overtime and longer shift hours to qualify to receive benefits after a short period of employment. Workers positioned for "intense" periods of work are mostly men.<sup>157</sup> LEAF submits that the hours based threshold simultaneously favours males and disadvantaged females and thus undermines the government's stated goals of "increasing fairness in the system".

92. LEAF further submits that even if limiting cross-subsidization was an important objective, which LEAF denies, cross-subsidization of workers who work for short intense periods by long-serving workers is enhanced, not reduced by the impugned provisions. Those who work 13 hours or less weekly (largely female) are "taxed" with premium contributions and are ineligible for benefits while workers who are capable of working intensely for short periods (seasonal workers, largely male) qualify more readily than they did before the hours-based threshold was introduced.<sup>158</sup> All the evidence from non-government experts suggests that for many of those working less than 15 hours their new EI contribution, if not refunded with their income tax, is very unlikely to lead to any benefits.<sup>159</sup>

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<sup>156</sup> Testimony of Alice Nakamura, *supra*, at pp.376-377.

<sup>157</sup> Pupo and Duffy, "Canadian Women and Part-Time Work," *supra*, at pp. 2921-2922 of the Applicant's Record.

<sup>158</sup> *Infra*, footnote 46

<sup>159</sup> Shillington, *The Impact of the Transition from Unemployment Insurance to Employment Insurance*, *supra*, p. 3041.

(ii) Minimal Impairment

93. The implementation of the MER impairs the rights of women in two respects: women may be disqualified entirely from receiving EI as an income supplement and forced to depend on partners, savings or welfare; and, women are subjected to an effective payroll tax as they are required to pay EI premiums with no realistic chance of being eligible for benefits.

94. The impugned provisions result in a complete denial of benefits to large numbers of women who work part-time. The complete exclusion from EI benefits of women who contribute to the EI plan, even those who may have worked 52 weeks year-round but had insufficient hours, leaves them without income support when they are unemployed. As excluded women are likely employed part-time, they also likely face a rapid descent into poverty in the absence of EI benefits, given the established links between part-time work and poverty. The complete denial of income security during unemployment is a significant impairment of the economic and dignity rights of women who work part-time and who are likely to be close to or below the low-income cut-off measure of poverty even while employed. This impairment is particularly significant for women who are members of other historically disadvantaged groups.

(iii) Deleterious and salutary effects

95. The government has argued that the drop in eligible female claimants since the introduction of the hours-based threshold in 1996 should be evaluated alongside gains in coverage for women based on "first hour" premium contributions. Government studies in 1996 projected that many part-time workers would commence premium payments with very little chance of becoming eligible for benefits within 52 weeks and would also not qualify for a refund of their premiums. Part-time workers with 13 hours/week or less of paid work need 54 or more weeks to obtain 700 hours and are thus excluded from receiving benefits. In effect, every hour worked counts for taxation but not for eligibility thus imposing a burden on marginally employed women without any countervailing benefit.

96. LEAF does not dispute that some part-time women have newly become eligible for coverage based on "first hour" premium contributions. These newly covered workers are likely multiple job-holders, who in practice, must simultaneously lose all their employment to obtain EI benefits. The disenfranchisement of part-time workers, primarily women, who once qualified with as little as 300 hours accumulated over 20 weeks of employment and who now fail to meet the hours-based threshold for their region, is not offset by the relatively small number of multiple job holders who may newly qualify for EI benefits. On the whole, women have fallen even further behind men as eligible claimants under the new hours-based system.

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97. Moreover, the effect of the impugned provisions is contrary to the scheme of the Act as a whole. The EI program serves less than 42 % of the unemployed population and an even lesser percentage of unemployed women. As these coverage figures decreased further on implementation of the impugned provisions, the effect of the impugned provisions is deleterious, particularly for female part-time workers. The impugned provisions have contributed to the “savings” accumulating as a surplus in the EI fund, concurrent with a sharper decline in the number of women compared to men who are denied any benefits whatsoever.

98. Accumulation of “savings” (not merely pursuit of self-sufficiency of the EI fund) through the implementation of the impugned provisions has essentially undermined the *raison d’être* of the EI program as a whole to provide income support to unemployed workers. These savings have been achieved in a discriminatory manner by burdening more women than men with “taxation” without eligibility and imposing an eligibility threshold that is more readily achieved by men than women.

99. Finally, as part-time workers represent 30% of the labour force and many are economically vulnerable women, LEAF submits that the impugned provisions *unjustifiably* exacerbate their condition contrary to *Charter* principles and are thus unconstitutional.

#### **Part IV – REMEDY SOUGHT**

100. LEAF does not concede that a threshold is required for access to EI benefits as the benefits level and duration of payment are linked directly to a worker’s employment history. If there is no workforce attachment whatsoever, there is no benefit to be claimed. If workforce attachment is limited in terms of weeks or hours worked, this would reflect in the duration and level of benefits. The government has not attempted to demonstrate that a threshold is necessary for a viable EI plan. The government has merely proceeded on the assumption that some workers who contribute premiums must be excluded from receipt of benefits.

101. In the alternative, LEAF submits that a considerably lowered “hours” threshold or a threshold that combined hours and weeks worked would substantially lessen or eliminate the impairment to women’s right to benefit from the EI program. There is evidence on the record that the government was warned of the potential deleterious effect of the 700 hours threshold on women and part-time workers. Furthermore, the government was urged to adopt a measure of workforce attachment in *weeks* worked, not just hours worked, to recognize constraints that preclude women from increasing hours of paid work while concurrently fulfilling care-giving obligations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10<sup>th</sup> DAY OF APRIL 2002.

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Kerri Froc

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Yola Grant



## Part V – List of Authorities

### Statutes

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3. *Constitution Act, 1982*, s.36

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**APPENDIX "A"**



# Constitution Acts 1867 to 1982



Department of Justice Ministère de la Justice  
Canada Canada

*Français*

## *The Constitution Act, 1982*

### Part

#### **I Canadian Charter of Rights and Freedoms**

Guarantee of Rights and Freedoms

Fundamental Freedoms

Democratic Rights

Mobility Rights

Legal Rights

Equality Rights

Official Languages of Canada

Minority Language Educational Rights

Enforcement

General

Application of Charter

Citation

#### **II Rights of the Aboriginal Peoples of Canada**

#### **III Equalization and Regional Disparities**

#### **IV Constitutional Conference**

#### **IV.I Constitutional Conferences**

#### **V Procedure for Amending Constitution of Canada**

#### **VI Amendment to the Constitution Act, 1867**

#### **VII General**

conference

Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. <sup>(95)</sup>

### PART III EQUALIZATION AND REGIONAL DISPARITIES

Commitment to  
promote 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

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

Commitment  
respecting  
public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. <sup>(96)</sup>

### PART IV CONSTITUTIONAL CONFERENCE

37. <sup>(97)</sup>



# Lois constitutionnelles de 1867 à 1982



Ministère de la Justice Department of Justice  
Canada Canada

English

## Loi constitutionnelle de 1982

### Partie

#### **I Charte canadienne des droits et libertés**

Garantie des droits et libertés

Libertés fondamentales

Droits démocratiques

Liberté de circulation et d'établissement

Garanties juridiques

Droits à l'égalité

Langues officielles du Canada

Droits à l'instruction dans la langue de la minorité

Recours

Dispositions générales

Application de la charte

Titre

#### **II Droits des peuples autochtones du Canada**

#### **III Péréquation et inégalités régionales**

#### **IV Conférence constitutionnelle**

#### **IV.I Conférence constitutionnelle**

#### **V Procédure de modification de la Constitution du Canada**

#### **VI Modification de la Loi constitutionnelle de 1867**

#### **VII Dispositions générales**



## PARTIE II DROITS DES PEUPLES AUTOCHTONES DU CANADA

- Confirmation des droits existants des peuples autochtones** 35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
- Définition de « peuples autochtones du Canada »** (2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.
- Accords sur des revendications territoriales** (3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
- Égalité de garantie des droits pour les deux sexes** (4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes. <sup>(94)</sup>
- Engagement relatif à la participation à une conférence constitutionnelle** 35.1 Les gouvernements fédéral et provinciaux sont liés par l'engagement de principe selon lequel le premier ministre du Canada, avant toute modification de la catégorie 24 de l'article 91 de la « *Loi constitutionnelle de 1867* », de l'article 25 de la présente loi ou de la présente partie :
- a) convoquera une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même et comportant à son ordre du jour la question du projet de modification;
  - b) invitera les représentants des peuples autochtones du Canada à participer aux travaux relatifs à cette question. <sup>(95)</sup>

## PARTIE III PÉRÉQUATION ET INÉGALITÉS RÉGIONALES

- Engagements relatifs à l'égalité des chances** 36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à
- a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

- b) favoriser le développement économique pour réduire l'inégalité des chances;
- c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif  
aux services  
publics

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables. <sup>(96)</sup>

#### PARTIE IV CONFÉRENCE CONSTITUTIONNELLE

[Abrogé]            37.            Abrogé. <sup>(97)</sup>

#### PARTIE IV.I CONFÉRENCES CONSTITUTIONNELLES

[Abrogé]            37.1            Abrogé. <sup>(98)</sup>

#### PARTIE V PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA <sup>(99)</sup>

Procédure normale  
de modification    38.

(1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée à la fois :

- a) par des résolutions du Sénat et de la Chambre des communes;
- b) par des résolutions des assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de toutes les provinces.

Majorité simple

(2) Une modification faite conformément au paragraphe (1) mais dérogoratoire à la compétence législative, aux droits de propriété ou à tous autres droits ou privilèges d'une législature